International Centre for Settlement of Investment Disputes (ICSID)

by
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The Author

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<td>Multilateral Investment Guarantee Agency</td>
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<td>NAFTA</td>
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<td>Non-governmental organization</td>
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<td>Organization for Economic Co-operation and Development</td>
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Preface

This monograph is intended to give a solid overview of the International Centre for Settlement of Investment Disputes (ICSID) and the principles of its functioning.

The volume describes ICSID's mandate, its organization and core functions, its arbitration and conciliation mechanisms, jurisdiction, recognition, and enforcement of ICSID awards. Finally, it discusses the main principles of international investment law as well as the future of ICSID.

The author wishes to thank Mark Bravin for his encouragement and support. Also, the monograph greatly benefited from the comments of Stanimir Alexandrov, Borzu Sabahi, and Margrete Stevens. Needless to say, all errors and omissions are mine.

Yaraslau Kryvoi
September 2009
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Part I. Development and Structure

Chapter 1. Introduction

1. International Centre for Settlement of Investment Disputes (ICSID) is a leading international arbitration institution in the field of investor-State dispute settlement. It was established in 1966 as a part of the World Bank pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

2. The Convention sets forth ICSID’s mandate, organization, and core functions. The ICSID Convention is a multilateral treaty formulated by the executive directors of the World Bank. It was opened for signature on 18 March 1965 and entered into force on 14 October 1966. Today, ICSID is an autonomous international institution with more than 140 Member States.

3. The Convention sought to remove major impediments and risks to foreign direct investments in the absence of specialized facilities for investment dispute settlement. The Convention created the Centre as an impartial international forum providing facilities for the resolution of international investment disputes. The Centre facilitates resolution of disputes between foreign investors and States through conciliation or arbitration procedures. It also acts as an appointing authority for investor-State arbitrations under other procedural rules. Recourse to the ICSID facilities is always voluntary and subject to the parties’ consent.

4. The Centre’s large membership base, its rising caseload, and the numerous references to its arbitration facilities in investment treaties and laws is evidence of its increasing significance. ICSID plays a central role in the development of the body of international investment law.
5–9

Chapter 2. Investor-State Disputes

5. Prior to studying the ICSID in detail, it is necessary to look into the economic and legal context that determined the need for establishing the ICSID. The main factors were the rise of cross-border foreign investments and the increasing number of bilateral and multilateral investment treaties setting the legal standards of treatment of foreign investors.

6. Foreign investments dramatically grew in the twentieth century and were the main cause of globalization. There is an almost universal consensus that cross-border investment flows are beneficial for foreign investors and host countries. Cross-border investment flows improve the long-term efficiency of the host country by providing greater competition; transferring capital, technology, and managerial skills; enhancing market access; and expanding the volume of international trade. Foreign investors also benefit from their access to new markets, cheaper natural resources, and an expanded labour force; they also create new jobs and provide new technologies for the host countries.

7. International investment treaties are meant to facilitate foreign investments. According to the United Nations Commission on Trade and Development (UNCTAD), in 2009 existing international agreements included more than 2,400 bilateral investment treaties (BITs), more than 2,600 double taxation treaties, a large number of preferential free trade and investment agreements, as well as numerous regional and multilateral agreements that regulate foreign investments.1 Investment laws and BITs reflect the modern trend of investment regulation liberalization and increasingly protective standards of the treatment of foreign investment.2 On the domestic level, governments across the globe adopt very similar approaches to the legal regulation of the treatment of private foreign investment. The standards include rules of entry, guarantees against expropriation, general standards of treatment, and procedures for the settlement of disputes.

8. The World Bank and other United Nations agencies, such as UNCTAD, work on creation of favourable investment climates in various countries. The World Bank publishes an annual Doing Business Report, which facilitates more favourable business climates; the Multilateral Investment Guarantee Agency (MIGA) is in charge of insuring investment risks. UNCTAD monitors foreign direct investment flows, publishes bilateral investment treaties, and promotes more predictable investment environments.

9. But despite all those efforts by international organizations and national governments, doing business in foreign countries, especially where the rule of law is weak and the political situation is unstable, may be quite risky. The likely risks include expropriation of investor’s property without adequate compensation,
governmental interference short of expropriation, a government’s non-observance of contractual obligations, discrimination, and unfair treatment. Thus, there was a growing need for an impartial dispute resolution body, such as ICSID, specializing in investment disputes.

10. According to the World Bank Guidelines on the Treatment of Foreign Direct Investments, disputes between private foreign investors and the host state are normally settled through negotiations between them or, failing this, through national courts or other mechanisms, including conciliation and binding independent arbitration. The World Bank encourages states to accept investment dispute settlements through arbitration under the ICSID Convention or through the ‘ICSID Additional Facility’ if a state is not a party to the Convention.

11. Figure 1 presents known investment arbitrations as of the end of 2005.

12. A growing number of international investment treaties, which provided ICSID arbitration as a method of resolving disputes, explain the dramatic increase in disputes arbitrated at ICSID. Following the collapse of the Soviet Union in the early 1990s, the Eastern Block countries began liberalizing their economies and encouraging foreign direct investment by means of international investment treaties with ICSID dispute resolution clauses. Successful and highly publicized arbitral awards also contributed to investors’ willingness to put forward their international claims in ICSID.

13. Almost all BITs provide for arbitration to resolve investment disputes. Typically, investors are given a choice between submitting disputes to ICSID or to
an ad hoc tribunal established under the rules of the United Nations Commission on International Trade Law (UNCITRAL). However, disputes may also be brought before other arbitral bodies, such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) in Paris, and the London Court of International Arbitration (see Figure 2).

![Figure 2. Disputes by forum of arbitration, end 2005](image)

Source: UNCTAD


14. Multilateral investment treaties, such as the North American Free Trade Agreement (NAFTA), also have contributed to the increased number of international investment disputes. NAFTA is the most well-known treaty between the United States, Canada, and Mexico. Chapter 11 of the treaty permits investors of these countries to initiate arbitration under the UNCITRAL Rules or ICSID Additional Facility Rules.

15. The number of international investment disputes, that is, disputes between foreign investors and host states, has grown tremendously in the past decade. Although agreements, which provided for the settlement of investments, were in existence for many decades, the first investor-State dispute based on bilateral investment treaties was registered at ICSID in 1987, and as of April 1998, ICSID had considered only fourteen cases. However, the number of investor-state arbitrations has also increased in the past ten years as illustrated in Figure 1. According to the ICSID Annual Report, in 2008 the Centre administered 145 cases – the highest ever yearly number of ICSID cases. As of July 2009, there were 292 pending or concluded cases listed on the ICSID website.


16. Based on the information about registered ICSID cases, their distribution is uneven, with almost half of the cases coming from Latin America. In recent years, there was a notable increase in the number of cases brought against countries in Eastern Europe and Central Asia, which currently constitute the second-largest
Part I, Ch. 2, Investor-State Disputes

regional group with 24% of all pending cases.\(^1\) Other cases involve countries of South and East Asia, the Middle East, North Africa, sub-Saharan Africa, and North America. As far as the economic sectors are concerned, the largest groups of cases involve oil, gas, and mining disputes (21%) and power generation and electricity disputes (14%).\(^2\)

2. Ibid.
Chapter 3. The ICSID Convention

§1. Genesis

17. The World Bank Group was appropriately positioned to serve as a core of the newly created international dispute resolution mechanism. It is one of the largest multilateral financial institutions supplying capital to developing countries. The organization is directly concerned with capital flows from the developed to the developing nations, including private funds made directly available for projects in the developing world.

18. The World Bank Group includes five international institutions; it emerged in 1945 as a result of the international Bretton Woods agreements reached at the United Nations Monetary and Financial Conference in July 1944.1 The World Bank Group currently consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), MIGA, and ICSID. IBRD provides loans and development assistance to middle-income countries in Latin America, Asia, Africa, and Eastern Europe. IDA’s support is focused on the poorest countries, to which it provides interest-free loans and grants. IFC promotes growth in the developing world by financing private-sector investments and providing technical support and advice to governments and businesses. MIGA encourages foreign investment in developing countries by providing guarantees to foreign investors against loss caused by non-commercial risks. And, finally, ICSID – established in 1966 – provides facilities for settling investment disputes between foreign investors and their host countries.


19. ICSID became the realization of the World Bank’s idea to provide institutional facilities and procedures promoting voluntary resolution of investment disputes. In the absence of any international instruments between the foreign investor and the host government, the disputes previously were resolved by national law, usually through the domestic courts. The only other option available to investors was to invoke diplomatic protections of the home state to support the case and to initiate proceedings before an international tribunal. Thus, the investor was unable to proceed with an international claim against a foreign government directly.

20. Moreover, investors often found that their governments refused to proceed with even a meritorious claim, fearing that this would be regarded as an unfriendly act towards the host country.1 It had been a well-established principle of international law at that time that a wrong done to a national of one state, for which another state was intentionally responsible, was actionable not by the injured national, but by his or her state.2 If it was unclear whether the case has merits, the home government was even less likely to proceed against another government. As a result, foreign investors were often deprived of an opportunity to have redress at an impartial tribunal.

Part I, Ch. 3, The ICSID Convention 21–24


2. Ibid.

21. As a specialized investment forum, the ICSID was established by the administrative action of the World Bank without any specialized intergovernmental agreements. However, a number of legal issues required the adoption of a special Convention. These issues included regulation of consent by sovereigns, enforcement of awards, and exhaustion of local remedies.\textsuperscript{1} The most important justification for the need for a special Convention was to empower a private individual to file claims against the state without recourse to diplomatic protection.

1. Ibid.

22. In the late 1960s, the World Bank decided to conduct a detailed study of whether a new dispute resolution mechanism could improve the environment for foreign investments by reducing the likelihood of unresolved conflicts and eliminating the risk of confrontation between the host country and the investor’s state.\textsuperscript{1}


§2. History of Drafting and Adoption

23. Work on the creation of a special investment dispute forum started after a memorandum of the General Counsel of the World Bank was circulated on 28 August 1961. The memorandum was meant to tackle unfavourable investment conditions from the procedural angle by creating a forum of experts who would consider investment disputes voluntarily submitted to arbitration. In the course of drafting, two main proposals were considered. One proposal advanced the creation of a permanent tribunal staffed by arbitrators, elected and appointed for a fixed period, and operating under established rules of procedure. The other proposal suggested offering a panel of names, either submitted by the state parties to the tribunal or designated by some other authority, from which the arbitrators would be selected.\textsuperscript{1} Eventually, the latter approach prevailed.


24. In the process of drafting the Convention, the World Bank followed the approach used in creating the IFC in 1956. The staff prepared drafts and working papers for the consideration of the Executive Directors, a policy-making body representing the World Bank’s member countries. The Convention was to serve the following goals:

(a) a recognition by States of the possibility of direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments;
(b) a recognition by States that agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings;

(c) provision of international machinery for the conduct of arbitration, including the availability of arbitrators, methods for their selection and rules for the conduct of the arbitral proceedings;

(d) provision for conciliation as an alternative for arbitration.¹


25. In 1963, the Executive Directors authorized the President of the World Bank to convene regional meetings of experts to work out various technical questions related to drafting the Convention. On the basis of the Bank’s General Counsel and the expert meetings’ reports, the Executive Directors concluded that a Convention was negotiable. At an Annual Meeting of the Board of Governors the Executive Directors were assigned the task of drafting the Convention dealing with settlement of investment disputes, which would be acceptable to the largest number of participants.¹


26. Sixty-one member countries met in Washington, DC, at the Bank’s headquarters to discuss the Convention and a specially designated Legal Committee was appointed. The Executive Directors used the ‘no-formal-vote-system’, under which they tried to achieve consensus instead of resorting to a formal vote.¹ On 18 March 1965, the Executive Directors of the World Bank approved the text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States for signature and ratification of member governments.² According to Article 67 of the Convention, it is open for signature on behalf of Member States of the World Bank, as well as other state which is a party to the Statute of the International Court of Justice (ICJ).

27. Today, ICSID provides an effective organizational and procedural framework for the settlement of international investment disputes between foreign investors and governments. The Convention established the Centre and provides for procedures of conciliation and arbitration, to which foreign investors and governments submit their disputes on the basis of consent.

§3. The Structure and Major Provisions of the Convention

28. ICSID was established and is administered by an intergovernmental organization and operates under a special international treaty. The organization is an integral part of the World Bank Group in charge of the resolution of international


2. Ibid.
investment disputes. Unlike many other arbitration institutions, the Centre is neither a private nor a state institution.

29. The Convention gives the parties great autonomy, and allows to tailor arbitration proceedings to their particular needs. The parties are free to choose the law governing their dispute, the venue of arbitration, the procedural rules, the language, and other aspects of arbitration. However, the arbitration is autonomous, which is achieved by the elimination of the need to obtain additional approvals from domestic courts to enforce the award and the ability of the Centre to order provisional measures and handle a dispute even when one party decides not to honour the commitments it has taken.

30. The drafters of the Convention tried to create a balanced instrument, serving both the interests of investors and the interests of the host governments. One of the most important provisions of the Convention deals with enforceability of awards in the territories of the Contracting States.1 The awards are binding and not subject to appeal or to any other remedy, other than those explicitly provided for in the Convention. The awards should be treated as though they were final judgments of national courts. This served to eliminate obstacles that often stood in the way of enforcement of foreign arbitral awards.

1. See s. 6 of the Convention.

31. The Convention stresses the voluntary nature of its dispute resolution machinery. The Preamble emphasizes that the mere fact of ratification, acceptance, or approval of the Convention does not create an obligation of a government to submit any particular dispute to conciliation or arbitration. Thus, there is no violation of the principle of sovereignty as both the state and the investor are required to give written consent to arbitration.

32. The most distinctive feature of the Convention is that it firmly establishes the capacity of private entities – either individuals or corporations – to submit a claim against a state without intervention of their respective national governments. This has changed investment disputes from purely political issues into international law issues, which generally facilitates faster and more efficient resolution of disputes. Up to this day, the Convention is regarded as one of the most important treaties to recognize individuals as subjects of international law.1 Once the parties agree to arbitrate and fulfil the requirements of the Convention, the ICSID has jurisdiction. Consent may not be unilaterally withdrawn by either party, which ensures that the parties’ agreement to arbitrate is binding.


33. Most systems of arbitration are subject to domestic laws and control of courts of the place of arbitration, which recognize and enforce awards. Dispute resolution under the Convention is outside the control of national legal systems. The awards are not subject to any remedy other than internal remedies provided by the Convention itself.
The Convention is structured as follows.

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The Convention entered into force on 14 September 1966, after the twentieth ratification instrument was deposited. As of 27 October 2009, there are 156 signatory states to the Convention. Of these, 144 states have also deposited their instruments of ratification, acceptance, or approval of the Convention to become ICSID Contracting States. Other notable membership developments include the signing of the Convention by Canada and the notice of denunciation received from Bolivia in 2007 and Ecuador in 2009. A complete list of Contracting States and other signatories of the Convention is available in Appendix II.

1. See ICSID website.
Chapter 4. Institutional Framework

36. ICSID has a simple organizational structure consisting of the Administrative Council and the Secretariat. The ICSID Administrative Council is composed of one representative from each Contracting State. The president of the World Bank serves as the chair of the Administrative Council without a right to vote.

1. See Arts 4–6 of the Convention.

37. The main role of the Council is to adopt the rules of procedure for arbitration and conciliation. It also adopts administrative and financial regulations of the Centre; oversees the annual budget of revenues and expenditures; and handles some other administrative issues, as provided by Article 6 of the Convention. Decisions are made by a majority of votes, and each member of the Administrative Council usually has one vote.

38. The ICSID Secretariat consists of a Secretary-General and his or her deputies. They are elected by the Administrative Council for six years and are eligible for re-election. The Secretary-General is the official legal representative and the principal officer of the Centre; the Secretary-General is responsible for the administration of the Centre, including the appointment of staff.

1. See Arts 9–11 of the Convention.

39. The Secretary-General also acts as the registrar with the authority to decide at the initial stage whether a claim is manifestly outside the jurisdiction of the Centre in accordance with Article 36(3) of the Convention. The Secretary-General has the power to appoint arbitrators in the absence of agreement between the parties. Currently (as of 2009), Meg Kinnear serves as Secretary-General, and Nassib Ziadé serves as Deputy Secretary-General.

40. The main functions of the Secretariat include providing institutional support for the initiation and conduct of ICSID proceedings; administering the proceedings and finances of each case; and assisting in the constitution of conciliation commissions, arbitral tribunals, and ad hoc committees.

41. The Secretariat is also responsible for publications, which includes maintaining the ICSID website. The *ICSID Review – Foreign Investment Law Journal*, published by ICSID since 1986, is the major publication in the area of investor-state arbitration law. The *ICSID Review* contains materials on international and domestic law pertinent to investment disputes and foreign investment. It also publishes recent ICSID decisions and awards accompanied by introductory notes prepared by the Centre’s staff.

42. The Centre’s publications also include two multivolume loose-leaf publications – *Investment Laws of the World* and *Investment Treaties*. *Investment Laws of the World* contains basic investment legislation from more than 130 countries, as well as contact information for the respective national governmental agencies in
charge of promoting foreign investment. The ICSID collection of investment treaties comprises more than 1,140 treaties concluded after 1961. The Secretariat also publishes a semi-annual newsletter, titled *News from ICSID*. This newsletter covers the amendments to the ICSID Rules and Regulations as well as other institutional developments and events.

43. The ICSID Secretariat is located in Washington, DC, which, under the Convention, is also the default venue for ICSID arbitration and conciliation, according to Article 62 of the Convention. Upon agreement between the parties, conciliation and arbitration proceedings can be held at the seat of the Permanent Court of Arbitration or at any other arbitration institution that has made the necessary arrangements with the Centre. Under Article 63 of the Convention, the parties can hold arbitration proceedings at another venue approved by Arbitration Tribunal or Conciliation Commission upon consultation with the Secretary-General. Most of proceedings are held at the Centre’s seat in Washington, DC, but several have taken place at venues in Europe and Asia.¹ In recent years, a large number of ICSID organizational meetings and first sessions have been held by means of video or telephone conference.²

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Part II. The Conciliation and Arbitration Mechanisms

Chapter 1. Conciliation Mechanism

44. Conciliation is a method of dispute resolution in which a neutral third party facilitates communication in an attempt to help disputing parties settle their dispute. Any Contracting State or a national of a Contracting State can initiate conciliation or arbitration by sending a written request to the Secretary-General, who in turn sends a copy of the request to the other party. The request should contain information concerning the issues in question, the identity of the parties, and the indication of consent to conciliation in accordance with the rules of procedure.¹

1. Article 28(2) of the Convention.

45. Conciliation and arbitration follow the same procedure at institution.¹ The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) adopted by the Administrative Council regulate this procedure.

1. Institution Rules 1–7.

46. The Secretary-General reviews the request and registers it, unless he or she finds it to be manifestly outside the Centre’s jurisdiction. According to Rule 8, the requesting party may, by written notice to the Secretary-General, withdraw the request before it has been registered.

47. The Conciliation Commission’s main goal is to make recommendations to the parties, which would resolve the dispute. The Committee proposes specific terms of settlement, advises about specific acts that would aggravate the dispute, and points out advantages of the solution proposed.¹ The parties are required to cooperate with the Commission in good faith, in particular by furnishing the necessary documents, information, and explanations.² The parties may request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission may also make arrangements for the evidence to be given as a written deposition or taken by examination elsewhere.³

2. Conciliation Rule 23.
48. If the parties have not agreed on the composition of the Conciliation Commission, they follow the procedure provided by Rule 2 of Conciliation Rules. First, the requesting party proposes either a sole conciliator or a specified uneven number of conciliators and specifies the method proposed for their appointment. Second, the other party may either request such proposals or make other proposals regarding the number of conciliators and the method of their appointment. Third, the requesting party either accepts or rejects this proposal. Each of these steps should be made within twenty days.

49. If no agreement between the parties is reached within sixty days, the Secretary-General appoints conciliators in accordance with Article 26(b) of the Convention. The Conciliation Rules provide for procedures in situations of incapacity, resignation, disqualification of conciliators, as well when vacancies arise on the Commission. Decisions of the Conciliation Commission are made by majority vote, and abstentions qualify as a negative vote. It is permitted to make decisions by correspondence, provided that all members of the Commission are consulted and the president of the Commission certifies the decision.

50. On completion of conciliation proceedings, the Conciliation Commission prepares and delivers a report in accordance with Conciliation Rules 30–33. If the parties managed to reach an agreement, the report describes the issues in dispute and records the agreement the parties have reached. If an agreement is unlikely, the final report records this as well. If either party fails to appear or participate in the proceedings, the Conciliation Commission closes the proceedings and reports the party’s failure to appear or participate. The offers made as well as the views and admissions expressed during the process of conciliation cannot be used in any other proceedings, regardless of whether at arbitration or litigation.
Chapter 2. Arbitration Mechanism

§1. Request for Arbitration

51. Unlike conciliation proceedings, which seek to bring parties to agreement, arbitration aims to achieve binding determination of the dispute by the Tribunal.\(^1\) The procedure for initiating arbitration at ICSID is the same as the conciliation procedure.\(^2\) Any Contracting State or a national of such a State directs a request to institute arbitration proceedings to the Secretary-General, who sends a copy to the other party. As with conciliation, the Secretary-General is obligated to register the request, unless the dispute is manifestly outside of the jurisdiction of the Centre.

1. ‘Executive Directors Report’, at 46.

52. The screening power of the Secretary-General is designed to prevent unfounded proceedings without obtaining consent with the sole purpose of intimidation. According to the drafting history, this Secretary-General’s power should apply ‘where there was no slightest doubt that the party was in bad faith or misinformed’.\(^1\) An example would be a claim submitted by a national of a country that is not a party to the Convention.


53. An original and five signed copies of the arbitration request need to be provided in one of the ICSID official languages – English, French, or Spanish.\(^2\) According to Article 36(2) of the Convention, the request for arbitration or conciliation should include information concerning the issues in dispute, the identity of the parties, and their consent to arbitration. Institution Rule 2 requires mentioning the date of consent and the nationality of the investor, demonstrating that he or she is a national of a Contracting State. It has been suggested that a claimant also needs to provide a summary of the merits of the case as well as the main legal arguments.\(^3\)

1. ICSID Institution Rule 4.
2. ICSID Administrative and Financial Regulation 34.

54. Once the request is registered, it cannot be unilaterally withdrawn.\(^1\) According to Arbitration Rule 44, the proceedings may be discontinued only with the other party’s agreement. The parties also jointly may seek to discontinue the proceedings in accordance with Arbitration Rule 43.

1. ICSID Institution Rule 8.

§2. Rules Applicable to Arbitration Procedure

55. Arbitration proceedings ought to be conducted in accordance with Section 3 of the Convention, unless the parties have agreed otherwise.\(^1\) Arbitration procedure

1. ICSID – 35
is regulated exhaustively by the Convention and by the ICSID Arbitration Rules. Likewise, applicable substantive law does not govern matters related to the Tribunal’s jurisdiction under Article 25 of the Convention. It is international law, not national procedural laws, that regulates the procedural aspects of ICSID arbitration. The Tribunal in *CSOB v. Slovak Republic* held the following with regard to consent to arbitration:

The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of ICSID Convention.2

56. However, if the parties do not wish to abide by the ICSID Arbitration Rules, they may select any other procedural rules. In 2007, the Centre agreed to provide administrative services to ten arbitration proceedings conducted under UNCITRAL Arbitration Rules.1 The ICSID Secretary-General also can be requested to act as an authority appointing arbitrators in UNCITRAL proceedings.2

57. According to Arbitration Rule 31, the written part of arbitration consists of the following pleadings:

(a) a memorial by the requesting party;
(b) a countermemorial by the other party;

and, if the parties agree or the Tribunal deems it necessary:

(c) a reply by the requesting party; and
(d) a rejoinder by the other party.1


58. A memorial submitted to the ICSID Tribunal contains a statement of relevant facts, a statement of law, and the submissions. A countermemorial, reply, or rejoinder contains an admission or denial of the facts stated in the most recent previous pleading, any additional facts, observations concerning the statement of law in the most recent previous pleading, a statement of law in answer thereto, and the submissions.1

1. Ibid.

59. At the oral pleading stage, the parties present their positions and the members of the Tribunal may put questions to the parties and ask for explanations.1 It is within the Tribunal’s competence to decide on admissibility of any evidence and
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60. The president of the Tribunal conducts its hearings and presides at its deliberations, and a majority of the Tribunal’s members is required for a quorum. As with conciliation, decisions are taken by a majority of the members of the Tribunal with abstentions counting as a negative vote. Arbitrators are also permitted to make decisions by correspondence, provided that every arbitrator is consulted and the president of the Tribunal certifies the decision itself.

61. The procedure for constituting the Tribunal is described in Arbitration Rules 1–6 and is the same as the procedure for appointing conciliators. Once the Tribunal is formed, it considers whether it has jurisdiction and whether there are any objections to its jurisdiction. The Tribunal may either decide on jurisdiction as a preliminary question or combine it with the decision on the merits of the dispute.

62. According to Article 44 of the Convention, the failure to appear to present a case is not deemed to be an admission of the other party’s assertions. The Tribunal may enter a decision even if the party has not appeared at the proceedings. However, in this case it is necessary to notify the absent party and give it a grace period to present its case. Article 56(1) of the Convention provides that once the Tribunal has been constituted, the arbitrators shall remain the same. Articles 37 to 40 of the Convention regulate procedures for replacement of incapacitated or deceased arbitrators, which are the same as the procedures for appointment of new arbitrators. Special rules regulate the replacement of resigned arbitrators.

63. The burden of demonstrating the impact of the state action in dispute rests fully on the investor. As the Tribunal in Tokios Tokelés pointed out, the principle of *onus probandi actori incumbit* – stipulating that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals. The Tribunal concluded that the claimant failed to satisfy this burden and rejected its claims.

64. The significance of this principle was also emphasized in Asian Agricultural Products, Ltd. v. Republic of Sri Lanka, which found that the investor was not able to prove expropriation:
[a] Party having a burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, less they be discredited for want, or insufficiency, of proof.1


65. Arbitration Rule 42 deals with default proceedings, that is, when a party fails to appear or to present a case at any stage of the proceeding. Failure of the defaulting party to appear or to present its case is not deemed to be an admission of the assertions made by the other party.1 The other party may at any time before the end of the proceedings request the Tribunal to deal with the questions submitted to it and to render an award. The other party is granted a grace period of sixty days to appear upon the Tribunal’s notice. If it fails to appear, the Tribunal may proceed with the case without the defaulting party.

1. Arbitration Rule 42.

66. According to Article 48 of the Convention, the members of the Tribunal who voted for those awards should sign them. The Tribunal needs to secure consent of both parties to the dispute to publish the award. The Tribunal decides all questions by a simple majority of votes. The Convention requires that every question be addressed and supported by the Tribunal’s reasoning. As in other types of arbitration, any member of the Tribunal may render an individual opinion, whether dissenting or concurring. Arbitrators often sign the award on different dates. No matter when the award was actually signed, it is considered to be rendered on the date of dispatch of certified copies to the parties.

§3. ADDITIONAL CLAIMS AND COUNTERCLAIMS

67. Parties to an ICSID dispute may present an incidental claim, an additional claim, or a counterclaim, provided that it arises directly from the subject matter of the dispute and is otherwise within the jurisdiction of the Centre.1 Timing is important for submission of such claims; an incidental claim or an additional claim can be presented no later than in the reply, and a counterclaim no later than in the counter-memorial. However, the Tribunal may allow submission at a later stage in the proceedings.2

1. Arbitration Rule 40.
2. Ibid.

68. The Convention’s drafting history suggests that the reason for inclusion of counterclaims is to eliminate the necessity of starting new procedures.1 As Professor Schreuer pointed out, ‘[t]he basic idea of Article 46 is the consolidation of closely related claims into one set of proceedings’2 and ‘deciding all aspects of a
dispute in one set of proceedings’. Other commentators also observed that ‘[d]espite the inherently asymmetrical character of a BIT, BIT tribunals should be able to hear closely connected investment counter-claims arising under the investment contract’.

3. Ibid.

69. ICSID Tribunals have asserted their jurisdiction over counterclaims in the past. In Alex Genin v. Republic of Estonia, the ICSID Tribunal asserted its jurisdiction over the government’s counterclaims and considered the merits of the counterclaim, in which the government requested that the investor return the proceeds of the allegedly illicit transactions. Similarly, in Benvenuti and Bonfant v. Congo, another ICSID Tribunal invoked its jurisdiction over counterclaims on various counts, including the over invoicing of raw materials and defects in contract execution. The Tribunal concluded that because the counterclaim ‘relate[d] directly to the subject-matter of the dispute’, it should retain its jurisdiction in accordance with Rule 40 of the ICSID Arbitration Rules. Another example is Klöckner v. Cameroon, where the Tribunal asserted its jurisdiction and allowed a counterclaim, which involved a locally incorporated subsidiary.

3. Ibid., para. 4.104.

70. In MINE v. Guinea, Guinea asserted a counterclaim against a foreign investor to recover legal expenses that the government incurred because of the investor’s non-compliance with the Tribunal’s recommendation. Upon consideration of the arguments in the counterclaim, the Tribunal awarded Guinea’s counterclaim.


§4. Provisional Measures

71. According to Article 47 of the Convention, the Tribunal may recommend provisional measures to preserve the rights of either party. The purpose of provisional measures is to ensure that a party did not take any action to frustrate a personal award and as far as possible to preserve the status quo at the time when the provisional measures were asked for.

Arbitration Rule 39 stipulates that the request for provisional measures shall include the rights to be preserved, the measures for which the recommendation is being requested, and the circumstances that require such measures. It is also within the Tribunal’s competence to recommend provisional measures on its own initiative or measures other than those specified in a request.1


Provisional measures are extraordinary measures that meet the requirements of the necessity of preserving the rights of the party and doing so urgently to avoid an irreparable harm.1 The Arbitration Rules also make it clear that the parties can request domestic judicial or other authorities to order provisional measures, prior to or following the institution of the proceedings, to preserve their respective rights and interests.2

1. Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Procedural Order No. 3 of 18 Jan. 2005, para. 8 (internal footnotes omitted); Schreuer Commentary, at 751–757.
2. Ibid.

During the preparation of the Convention, the drafting committee made a deliberate choice in favour of ‘recommending’ provisional measures rather than ‘prescribing’ or ‘indicating’ them. Although concerns were raised that ICSID’s inability to render obligatory provisional measures would undermine the prestige of the Tribunal, the drafters decided that the power to prescribe provisional measures without being able to enforce them would be inadequate. Indeed, ICSID has no enforcement mechanisms of its own and thus can only recommend measures. However, if recommendations are not carried out, the Tribunal will take that fact into account when rendering its award.1


It is sufficient for the Tribunal to establish prima facie jurisdiction to rule on a request for provisional measures, even though the other party may object to the Tribunal’s jurisdiction.1 The Tokios Tokelés Tribunal explained that even if the actions in dispute do not meet the jurisdictional requirements of Article 25 of the Convention, that is, do not arise directly out of an investment, the ‘tribunal may order a provisional measure if the actions of the opposing party relate to the subject-matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters’.2

2. Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Procedural Order No. 3 of 18 Jan. 2005, para. 7 (internal footnotes omitted).
§5. ICSID COSTS AND FEES

76. Arbitrating cases at ICSID is expensive. Expenses include charges paid to the Centre, arbitrators and conciliators, and attorneys. The ICSID Schedule of Fees adopted in 2008 regulates the Centre’s charges.

77. Currently, the lodging fee of USD 25,000 is payable to the Centre by the party requesting the institution for conciliation or arbitration proceedings. This charge is non-refundable. The Centre’s administrative charge has been set at USD 20,000. This charge is levied on a case following the constitution of a conciliation commission, an arbitral tribunal, or an ad hoc committee, and it is charged annually thereafter. The parties must also reimburse the expenses incurred by the Centre’s legal staff attending meetings held away from the seat of the ICSID in Washington, DC, in the amount of USD 1,500 per day of meetings.

2. Ibid., para. 4.
3. Ibid., para. 5.

78. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators, and the ad hoc committee members are entitled to receive, unless agreed on otherwise between them and the parties, a fee of USD 3,000 per day for meetings or other work performed in connection with the proceedings, they are also entitled to subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14.

1. Ibid., para. 3.

79. The Secretary-General determines the costs of proceedings to be paid by the parties in accordance with the regulations of the ICSID Administrative Council. ICSID Tribunals usually make decisions on allocating expenses incurred by the parties. These expenses include the fees and expenses of the Tribunal’s members and the charges for the use of the Centre’s facilities.


80. However, if the parties have agreed on a different allocation of costs in advance, the Tribunal upholds their decision. The parties are required to submit to the Tribunal a statement of costs reasonably incurred or borne in the proceedings. The Secretary-General submits to the Tribunal an account of all amounts paid by each party to the Centre and all costs incurred by the Centre for the proceedings. The decision on costs usually constitutes a part of the award.

81. The drafters contemplated two aspects when deciding on the rules on costs. First, because the proceedings are supposed to be of a friendly nature, each party was to bear its own expenses and the expenses for the use of the Centre’s facilities were to be born equally. Second, the drafters were aware of the need to discourage bringing claims that were frivolous and motivated by bad faith. The latter was one of the most important considerations in allowing Tribunals to award costs against a party that brought such claims, so that it bears not only its own costs but also the expenses of the other party and the costs of the proceedings.

82. ICSID Tribunals tend to act in accordance with this approach. For instance, to discourage frivolous annulment procedures, one ICSID Annulment Committee ruled in a decision rendered against the state of Seychelles that all costs should be borne by the state that had challenged the first award. A number of recent tribunals followed the principle that ‘costs follow the event’, making the losing party bear the costs of the proceeding and reimburse attorneys’ fees and expenses. In *Phoenix v. The Czech Republic*, the Tribunal’s final award provided that the investor pay all costs of the proceedings, including the Czech Republic’s legal fees and expenses (excluding the lodging fee). The Tribunal reasoned that because the claimant’s claim was without any merit, and constituted an abuse of the international investment protection regime, the state would not be penalized by having to pay for its defence.

2. Ibid., at 337, 351.
3. Ibid., at 351, 436.

2. See, e.g., *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 Aug. 2008, paras 307–324 (awarding fees, costs, and the respondent’s attorneys’ fees and expenses where, *inter alia*, the claimant engaged in fraudulent misrepresentation and was held not entitled to protection under the BIT).
Chapter 3. Constitution of Arbitration Tribunal

83. The arbitration tribunal is constituted as soon as possible after the registration of a request by the Secretary-General. The tribunal usually consists of an uneven number of arbitrators, and the parties may choose to appoint a sole arbitrator. If the parties have not reached any special agreement on appointment of arbitrators, the default procedure is governed by Article 37(2)(b) of the Convention. The tribunal in the case consists of three arbitrators, one appointed by each party and the third (the president) appointed by agreement of the parties.

84. If the tribunal is not constituted within ninety days of the registration of the request for arbitration, on request of either party and after consulting both parties, the Secretary-General appoints arbitrators not yet appointed. The Convention specifies that the arbitrators appointed by means of this procedure should not be nationals of the Contracting State party to the dispute. No matter who appoints the arbitrators, the majority of them shall not be the nationals of the government party or the Contracting State whose national is the party to the dispute.1

1. Arbitration Rule 1.

85. Any party may propose to disqualify any of its arbitrators based on the arbitrator’s manifest lack of qualities required by the Convention or on an arbitrator’s ineligibility for appointment in accordance with the Convention.1

1. See Arts 57 and 59 of the Convention.

86. Conflict of interest may also constitute grounds for disqualification as it may infringe on the Convention’s independence. However, the threshold for such disqualification is high. In Amco v. Indonesia, an arbitrator was challenged because he had previously advised the claimant’s companies on tax issues and because the arbitrator’s law firm and the claimant’s counsel shared a joint office and profit sharing arrangements for many years.1 The other arbitrators concluded that this was not enough for disqualification.


87. The Centre maintains the Panel of Conciliators and the Panel of Arbitrators, available on ICSID website. The parties to the dispute are permitted to appoint arbitrators who are not on the list of current members of the ICSID Panels, but the choice of the chair of the Administrative Council is limited to those on the list.

88. Each Contracting State can designate four persons to each Panel, and the chair of the Administrative Council may designate ten persons to each Panel. The persons, who may serve on either Panel, are expected to be of high moral character and sufficient competence in the fields of law, commerce, industry, and finance. The chair of the Administrative Council is charged with ensuring that, in making the designations, due regard be paid to the importance of assuring representation
on the Panels of the principal legal systems of the world and the main forms of economic activity.

89. Although the jurisdiction of the Centre is limited to legal disputes, there is no requirement that the members of the Panels be lawyers. The appointed Panel members serve for six years and can be renewed. As was noted in the course of drafting the Convention, non-lawyers’ knowledge could be necessary to resolve disputes regarding the facts essential to a determination of legal rights and obligations.1


90. The ICSID Secretariat maintains a list of current members of the ICSID Panels of Conciliators and of Arbitrators, which consists of two parts. Part I lists designations by the chair of the Administrative Council; Part II lists designations by Contracting States. The list is regularly updated and is available on the ICSID website. An interesting characteristic of the list is that it contains very few individuals from developing countries, which usually prefer to appoint Western-qualified arbitrators.
Chapter 4. Jurisdiction (Competence)

§1. Overview

91. Unlike many other arbitration institutions, ICSID has a specialized subject-matter jurisdiction. Article 25(1) is the cornerstone of ICSID subject-matter jurisdiction:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

92. As a general rule, ICSID Tribunals are judges of their own competence. However, the Contracting States may notify ICSID about the class or classes of disputes, which it would not submit to the Centre’s jurisdiction. In the absence of such notification, the default rules described as follows apply.

1. Article 41 of the Convention.
2. Article 25(4) of the Convention.

93. The drafters of the Convention observed that the term jurisdiction did not mean compulsory jurisdiction, but rather the ‘outer limits within which use can be made of facilities provided for by the Centre’. In the process of preparation of the Convention, Article II referred to both jurisdiction and competence. The idea was that the Centre itself would not engage in conciliation or arbitration, like the Permanent Court of Arbitration in The Hague, the Netherlands.

2. Ibid., at 320.

94. Not every dispute is covered by the jurisdiction of the Centre, even if there is consent. The Convention is intended to deal with only one specific type of disputes, namely, the investment disputes, and only with those investment disputes that involve Contracting States and nationals of other Contracting States. ICSID tribunals apply a prima facie test to determine whether the merits warrant jurisdiction. This test requires that the facts alleged by the claimant, if established, are capable of forming the basis for a treaty violation. (Schreuer Commentary, at 540–541), two considerations are important. First, to ensure that tribunals are not flooded with claims that have no chance of success, or may be of abusive nature. Second, that tribunals do not go into the merits of cases without sufficient prior debate. (See Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 Apr. 2005, para. 254. Available on ICSID web site).

1. Ibid.

95. The Convention sets up a number of conditions for the jurisdiction of the Centre. First, there should be written consent of both parties to submit their dispute
to the Centre. Consent to arbitration is also referred to as a condition \textit{ratione voluntaris}. Second, the dispute must be a legal dispute arising directly from a foreign investment (jurisdiction \textit{ratione materiae}). Third, one of the parties to the dispute should be a national of a Contracting State and the other party should be a State party to the Convention (jurisdiction \textit{ratione personae}). Finally, there is a condition \textit{ratione temporis}, that is, the ICSID Convention must be applicable at the relevant time.

96. It is important to distinguish between the issues of jurisdiction and admissibility. If the claim cannot be brought to ICSID Tribunals, it is an issue of jurisdiction. But if the issue is that the claim should not be heard at all (or at least not yet), then it is an issue of admissibility. This distinction is important because if the Tribunal goes beyond its jurisdiction, the award is subject to annulment in accordance with the Convention. However, the decision cannot be annulled even if the Tribunal has incorrectly resolved the issue of admissibility.


97. As already noted, the Centre has no compulsory jurisdiction and access to it is strictly based on the consent of the parties. This rule also left intact the principle of customary international law pursuant to which claims cannot be brought before an international tribunal until local remedies have been exhausted. The Convention does not address whether exhausting local remedies was desirable. However, Article 26 states ‘[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention’ (emphasis added). To date, only Israel, Costa Rica, and Guatemala have made declarations requiring the exhaustion of legal remedies in accordance with Article 26. Therefore, unless a special declaration is made, when there is consent to submit a dispute to the Centre, the exhaustion of local remedies shall have been waived. The same position has been reiterated in the report of Executive Directors.

1. The List of Contracting States and Measures Taken by Them for the Purpose of the Convention (April 2008), at 11 (available on the ICSID website).
3. ‘Executive Directors Report’, at 45.

98. Unilateral acceptance of ICSID jurisdiction by a state constitutes an offer, which could be accepted by a foreign investor and become binding on both parties, even if there is no investment agreement with a particular investor. Consent may be expressed in different forms. It may be a clause included in an investment agreement, a bilateral treaty, or a special compromise regarding the already-arisen dispute. There is no need for the consent of both parties to be expressed in one document. Although consent is a necessary prerequisite for the jurisdiction of the Centre, it is not sufficient to bring a dispute within the Centre’s jurisdiction.

2. ‘Executive Directors Report’, at 43.
99. A distinctive feature of the ICSID dispute resolution mechanism is that states are not permitted to give diplomatic protection to their nationals. The only exception (Article 37 of the Convention) is when the other state has failed to abide by and comply with the award rendered by ICSID. However, this provision does not include informal diplomatic exchanges to facilitate settlement of the dispute, which are permissible.

§2. Parallel Proceedings

100. The increasing number of BITs currently available for investors provide them with a choice to pursue claims for damages in a number of fora, that is, either of different arbitration regimes or of arbitration in a national court. The Convention and jurisprudence do not favour parallel proceeding in domestic courts once the parties have consented to ICSID jurisdiction. Article 26 of the Convention provides that because the parties consented to ICSID arbitration, they are precluded from pursuing any other remedy.

101. ICSID Executive Directors pointed out in paragraph 32 of their Report:

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of local remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.1

1. Ibid., at 45.

102. According to Professor Christoph Schreuer, one important purpose of Article 26 is to secure non-interference with the arbitration process to preserve the self-contained nature of the ICSID proceedings. According to him, from the moment consent to arbitration has been given, the parties have lost their right to seek relief in another forum.1

1. Ibid.

103. In the past, ICSID Tribunals upheld the prohibition against parallel proceedings. The ICSID cases discussed later demonstrate that compliance with Article 26 is important for two reasons. First, it ensures that the parties obtain a valid, enforceable award. Second, it allows preserving resources by not having to participate in costly litigation in two fora.

104. The ICSID Tribunal in Tokios Tokelés v. Ukraine summarized the apparent consensus:

ICSID tribunals have repeatedly ruled . . . that the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions and refrain from commencing any further such proceedings in connection with the dispute before the ICSID tribunal.1
105. The *Tokios Tokelés* Tribunal made clear that parallel proceedings might prejudice the rendering or the implementation of the ICSID eventual decision or award or aggravate the existing dispute.\(^1\) Similarly, in *Lanco v. Argentina* the ICSID emphasized the importance of non-interference from any other forum with the ICSID arbitration proceeding, once such proceeding has been instituted.\(^2\)


106. Once the ICSID Tribunal has resolved the dispute, the parties will need to comply with it, regardless of the findings of domestic courts.\(^1\) Although decisions rendered by the domestic courts will not be binding on the relevant Tribunal,\(^2\) they may prejudice the final award and its enforcement. Eventually, the parties will need to comply with the award rendered by ICSID, as required by Article 54 of ICSID. Not only is pursuing parallel proceedings inconsistent with the ICSID rules and case law but also litigation in two *fora* is a costly endeavour as pointed out by the Tribunal in *SGS v. Pakistan*. The Tribunal in that case recommended that domestic arbitration between the same parties be stayed ‘until such time, if any, as this Tribunal has issued an award declining jurisdiction over the present dispute and that award is no longer capable of being interpreted, revised or annulled pursuant to the Convention’.\(^3\)

1. It is a well-settled principle of international law that domestic law cannot serve as justification for non-compliance with international obligations. See *Oppenheim’s International Law* 85 (R. Jennings & A. Watts eds, 1997) (‘[T]he failure of an organ of the state, such as . . . a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations’).
2. In *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Procedural Order No. 2 of 16 Oct. 2002, at 299 available on the ICSID website: www.icsid.worldbank.org (observing that although a Supreme Court judgment of Pakistan is final as a matter of law of Pakistan, ‘as a matter of international law, it does not in any way bind this Tribunal’).
Chapter 5. Personal Jurisdiction

§1. NATIONAL OF ANOTHER CONTRACTING STATE

I. Natural Persons

107. The definition of a ‘national of another Contracting State’ has a broad meaning. It includes both natural and juridical persons, as well as associations, and is not restricted to privately owned companies. A natural person, who is also a national of the state party to the dispute, would not be eligible to be a party in the proceedings under the auspices of the Centre. As the Report of Executive Directors stresses, that ineligibility is absolute and cannot be cured even if the party in question has had the nationality of the other state or if one of the states gave its consent to initiating the proceedings.¹

1. ‘Executive Directors Report’, at 44.

108. A number of ICSID cases involved individual entrepreneurs who sued host states on behalf of their locally incorporated companies. These individuals were nationals of state parties to the Convention.¹


II. Juridical Persons

109. The main purpose of the Convention is to enable foreign investors to resort to an impartial and independent dispute settlement mechanism outside the jurisdiction of a host state. Therefore, as a general rule, nationals of the host state or companies controlled by domestic investors are barred from resorting to ICSID.

110. Like natural persons, juridical persons who have the same nationality as the state party to the dispute may not be a party to ICSID proceedings. However, this requirement is not absolute; if the home state of the investor agreed to treat the judicial person as a national of another Contracting State, this judicial person would be eligible.¹

1. ‘Executive Directors Report’, at 44.

111. Article 25 makes it clear that the Convention allows only the nationals of a Contracting State to submit their disputes to ICSID. Many states require that investors incorporate domestic legal entities for purposes of doing business in that state. Therefore, such entities are not eligible to participate in ICSID proceedings.

112. When the state’s consent is offered in BIT or investment legislation, there is no presumption that local companies incorporated by foreign investors can resort
to ICSID to resolve disputes. However, because of foreign control, the parties may agree to treat locally incorporated companies as the nationals of another Contracting State for the purposes of this Convention. ICSID Tribunals have used a somewhat relaxed test in determining the existence of agreement on a foreign nationality. If there is an agreement with a locally incorporated company controlled by foreign nationals and the host state, it is treated as an implicit consent to arbitrate ICSID disputes.

1. See Art. 25(2) of the Convention.

113. Another important issue is whether ICSID Tribunals need to assert jurisdiction only over the corporate entities directly controlled by foreign investors or also over those controlled by their subsidiaries. It is common for foreign investors to operate through locally incorporated groups of companies, and, therefore, this question is of practical importance. Different tribunals have approached this issue from different perspectives.

114. For instance, in Amco v. Indonesia, a foreign parent company controlled a locally incorporated entity. The ICSID Tribunal acknowledged that there was no explicit agreement to treat a local company as a foreign corporation. But the Tribunal also noted that the government of Indonesia acknowledged in the agreement the status of the locally incorporated but foreign-controlled corporation. The Tribunal ruled that it was enough to constitute an implied agreement for purposes of Article 25 of the Convention and asserted its jurisdiction over the locally incorporated company.


115. Similarly, in Klöckner v. Cameroon an agreement between a locally incorporated company and the government of Cameroon, containing an ICSID clause, was found to be sufficient to regard the local company as a foreign company and assert jurisdiction ratione personae. The literature suggests that equity participation, voting rights, and management must be considered when foreign control is being determined.

2. Schreuer Commentary, Art. 25, para. 573.

116. In Vacuum Salt Products Ltd. v. Ghana, the Tribunal denied jurisdiction, ruling that that the reference in Article 25(2)(b) to “foreign control” necessarily sets an objective Convention limit, beyond which ICSID jurisdiction cannot exist. Despite the existence of an ICSID clause in an agreement between the Ghanaian government and Vacuum Salt containing an ICSID clause, the Tribunal noted that only 20% of the shares belonged to foreign investors whereas 80% belonged to the nationals of Ghana. The Tribunal also took into consideration that there was little
role the foreign investor played in the company’s management and concluded that it had no jurisdiction \textit{ratiune personae}.\footnote{Vacuum Salt Products Ltd. v. Ghana (ICSID Case No. ARB/92/1), Award of 16 Feb. 1994, \textit{ICSID Reports} 4 (1997): 329, 342–343.}

2. Ibid., at 351.

117. In \textit{Amco v. Indonesia}, the ICSID Tribunal asserted jurisdiction over a company directly controlled by foreigners, but refused to go beyond the first level of control.\footnote{Amco v. Indonesia (ICSID Case No. ARB/81/1), Decision on Jurisdiction of 25 Sep. 1983, \textit{ICSID Reports} 1 (1993): 389.} In another case, the ICSID Tribunal focused on the purpose of the Convention in facilitating foreign investments through locally incorporated companies and went beyond the first layer of control.\footnote{SOABI v. Senegal (ICSID Case No. ARB/82/1), Decision on Jurisdiction of 1 Aug. 1984.}

2. SOABI v. Senegal (ICSID Case No. ARB/82/1), Decision on Jurisdiction of 1 Aug. 1984.

118. Scholarly opinions are also divided. Some commentators suggest that ICSID Tribunals need to look into the formal controllers and exclude companies directly or indirectly controlled by the nationals of non-Contracting States or the nationals of the host state.\footnote{Schreuer Commentary, at 318.} Others think that the correct approach is to allow the Tribunals to look for control by nationals of a Contracting State until jurisdiction \textit{ratiune personae} can be established.\footnote{C.F. Amerasinghe, ‘Interpretation of Art. 25(2)(b) of the ICSID Convention’, in \textit{International Arbitration in the 21st Century: Towards ‘Judicialization’ and Uniformity?}, ed. R. Lillich and C. Brower (1994), 223, 240.}

1. Schreuer Commentary, at 318.

119. The ICSID Tribunal in \textit{Tokios Tokelés v. Ukraine} emphasized that if the contracting parties want to impose an ownership or control requirement on the definition of investment, they must do so explicitly.\footnote{Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Decision on Jurisdiction of 29 Apr. 2004, \textit{ICSID Review – FILJ} 20 (2005): 205, para. 36.} Thus, even a company that has 99% ownership of the nationals of the state against which an ICSID claim is brought could be considered a ‘foreign’ investor, as long as it is incorporated in another Contracting State.


§2. Nationals of Non-contracting States (the Additional Facility)

120. In case the ICSID Tribunal has jurisdiction \textit{ratiune personae} only over one party, it is still possible to resort to its dispute resolution machinery. Article 2 of the Convention provides for the Additional Facility, which enables a non-Contracting State or a national of a non-Contracting State to use ICSID resources. Under the rules of the Additional Facility, only one party must fulfil the requirements of \textit{ratiune personae}. Any proceedings conducted under the auspices of the Additional Facility require specific consent of the ICSID Secretary-General, in accordance with Article 4 of the Additional Facility Rules.
121. The Additional Facility is not a separate institution and is physically a part of ICSID. The ICSID Secretariat also serves the Additional Facility. Although the Convention is not applicable to the Additional Facility procedures, many of the principles of its functioning are similar. The most notable difference between the rules of the Convention and the rules of the Additional Facility is that the Convention’s self-contained provisions on recognition and enforcement of awards are not applicable to Additional Facility awards. This is the reason why proceedings under the Additional Facility Rules may be conducted only in the countries that are parties to the New York Convention.1 Otherwise, the award would be more difficult to enforce.

1. Article 19 of the Additional Facility Rules.

122. The Additional Facility has gained importance because of the three NAFTA countries (Canada, Mexico, and the United States), the United States is the only ICSID Contracting Party to consent to submit disputes to ICSID. The other two rely on the Additional Facility.1 Currently, twenty-six disputes – pending and concluded – have been submitted under the Rules of the ICSID Additional Facility.2

2. The most cited cases include Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings of 26 Jun. 2002; Técnicas Medioambientales Técnued, S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, ILM 43 (2004): 133; The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3), Award of 26 Jun. 2003, ILM 42 (2003): 811.

§3. CONTRACTING STATE

123. A state may become a party to the Convention if it approves, accepts, or ratifies the Convention. According to Article 68 of the Convention, the status of a Contracting State is effective thirty days after the deposition of the instrument of ratification. A Contracting State may act as a party as such or it may be represented by a constituent subdivision or agency of a Contracting State designated to the Centre by that state.

124. Initially, the drafters of the Convention did not provide ‘political subdivisions or instrumentalities’ with the capacity to appear at ICSID. However, during consultations, a point was made that in many countries statutory corporations and public companies, in which the government was a stakeholder, concluded investment agreements.1 Eventually, Article 25(1) was formulated to enable these entities to appear at ICSID. Mere ownership by the government in a public company is not enough to qualify under Article 25(1).


125. The term constituent subdivisions includes municipalities and local government bodies, states, provinces, and other semi-autonomous bodies in federated
or unitary states. The drafting history shows that the term agencies includes only governmental agencies, which were legally part of and indistinguishable from the central government. Such agencies act on behalf of the state and although they may sometimes have a separate legal personality, they are entrusted with government functions.


126. The Convention provides for two types of parties on the government’s side. First, a Contracting State itself can be a party in the dispute. Second, any constituent subdivision or agency of a Contracting State designated to the Centre by that state qualifies as a party. As the travaux préparatoires of the Convention show, only governmental agencies entrusted with certain public functions and powers can fall under the ‘constituent subdivision or agency’ category. Commentators also agree that it is neither control nor ownership, but rather the performance of public functions on behalf of the Contracting State, that matters.

1. History of the Convention, at 503.

2. Ibid.

127. In order for a constituent subdivision or an agency to be a party to ICSID proceedings, the state should designate such entity to the Centre in accordance with Article 25(1) of the Convention. In the absence of such designation, ICSID has no personal jurisdiction over the dispute. The requirement of designation of the Contracting State is meant to provide a screening process, so that the government can withhold its consent when there is an ordinary company rather than a constituent subdivision or agency.

1. See Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of St. Kitts and Nevis (ICSID Case No. ARB/95/2), Award of 13 Jan. 1997, ICSID Review – FILJ 13 (1998): 328 (ruling that an autonomous entity within federation cannot be a proper party to an ICSID dispute absent a designation of the state, which signed an agreement containing an ICSID arbitration clause).


128. A constituent subdivision or agency can also give consent to ICSID dispute resolution. However, in this case it is necessary that that the state give approval or notify the Centre that no such approval is required. In Cable Television v. St. Kitts and Nevis, a foreign investor entered into an agreement with an administrative body of the host state. Although this agreement contained an ICSID clause, the Tribunal found that it had no jurisdiction because there had been no designation or approval required by the Convention.

1. Article 25(3) of the Convention.

129. The requirement of designation makes the definition of ‘constituent subdivisions’ and ‘agencies’ less important. If a Contracting State designates such...
an entity to the Centre, there is a strong presumption that this entity, indeed, satisfies the jurisdictional requirements of the Convention. Commentators generally agree that there is no need for a special form of designation and that designation can be made at any time before a request for arbitration or conciliation is made.

1. C.F. Amerasinghe, supra n. 130, at 234.
2. Ibid., at 236.
Chapter 6. Subject-Matter Jurisdiction

§1. LEGAL DISPUTE

130. The condition of parties’ consent is common to almost all international arbitrations.1 However, the Centre cannot extend its jurisdiction over any commercial dispute. Only a legal dispute – not a political controversy or a conflict of interest – can be subject to arbitration by ICSID. Travaux preparatoire of the Convention explains that the requirement of legal character is necessary to distinguish the dispute in question from political, economic, or purely commercial disputes.2 The Convention’s drafting history shows that the concept of legal disputes does not include moral disagreements or dealing with unfairness, poor political judgment, national health, national security, and other non-legal disagreements.3

3. Ibid., at 466.

131. In the course of drafting, the issue of justiciability of political questions has been raised on a number of occasions.1 Although the drafters agreed that these questions fall within ICSID jurisdiction,2 they did not include this in the Convention’s final text. In any event, the disputes are only arbitrable at ICSID if there is consent of the state and if the state would presumably never consent to arbitration of disputes of clearly a non-legal nature.

1. See, e.g., ibid., at 257, 470.
2. Ibid.

132. According to the Report of the Executive Directors, the term legal disputes was used to make a distinction of conflicts of interest, as opposed to conflicts of rights. The Report further clarifies that ‘the dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation’.1 Commentators note that ‘the dispute will only qualify as legal if legal remedies such as restitution or damages are sought and the legal rights are based on . . . treaties or legislation . . . claimed’.2

2. Schreuer Commentary, at 105.

133. The issue of the dispute’s legal nature had rarely been contested in ICSID proceedings. The Tribunal in AES Corp. v. Argentina used the definition of legal dispute given in the opinion of the ICJ in the case concerning East Timor, which explained that a legal dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or interests between parties’.1

134. Not only should the dispute be legal but also it must arise from lawful and good faith activities. ICSID Tribunals ruled that if investment is made in bad faith, it is not possible for the investor to rely on protections afforded by BITs or the ICSID Convention. In *Inceysa v. Salvador*, the Tribunal defined the principle of good faith as 'the absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment'.¹ This principle is related to the principle of *nemo auditur propriam turruitudinem allegans* – nobody can benefit from his own wrong. The Tribunal in *Inceysa* ruled that this principle requires that an investor may not ‘benefit from an investment effectuated by means of one or several illegal acts’.² In addition, the Tribunal recognized that the rights acquired from illegal acts violate the general international public policy principle of ‘respect for the law’.³

1. *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 Aug. 2006, para. 231 (ruling that the tribunal had no jurisdiction over a dispute involving an investment contract obtained in violation of domestic law).

135. In *World Duty Free v. Kenya*, the Tribunal concluded that ‘claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by [ICSID] Arbitral Tribunal’ as a matter of international public policy.⁴ Another ICSID Tribunal ruled that investment made solely to assert a claim under the BIT cannot be afforded protection under ICSID Convention.² If the fact that investment is made in violation of the laws of the host state is manifest, this would allow the Tribunal to deny its jurisdiction.³ If it is not manifest, then the Tribunal may consider it at the merits stage.⁴

4. See *Plama Consortium Limited v. Bulgaria* (ICSID Case No. ARB/03/24); Award of 27 Aug. 2008, paras 138–139 (finding no jurisdiction over a dispute in which the investor failed to provide relevant information concerning the investment and the investor).

§2. Arising Directly out of an Investment

136. Parties to ICSID arbitrations frequently contest the issue of whether the controversy directly arises out of an investment. ‘Arising directly’ refers to the dispute, not to the investment.¹ There is an important distinction between rights and obligations of general application that are normally outside of ICSID jurisdiction and those arising directly out of investment.²

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137. In the course of drafting the Convention, one of the proposed definitions was ‘any contribution of money or other asset of economic value for an indefinite period or, if the period is not defined, for not less than five years’. Another definition was more extensive:

The term ‘investment’ means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (3) financial obligations of a private or public entity other than obligations arising out of short-term banking or credit facilities.

Eventually, the drafters decided not to provide a definition for the term investment. This was done deliberately to enable the parties to exclude certain classes of disputes in advance.

2. Ibid., at 634.
3. ‘Executive Directors Report’, at 44.

138. The Convention drafters assumed that this aspect of ICSID jurisdiction could be more appropriately controlled by the requirement of consent. It had been noted that ‘the requirement that the dispute must have arisen out of an “investment” may be merged into the requirement of consent to jurisdiction’. In other words, it is up to the parties to decide what constitutes investment. If the issue regarding the question of the subject-matter jurisdiction does not arise, then it is deemed that the dispute before the Tribunal concerns an investment.


139. The Executive Directors’ Report clarified this issue:

No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

140. There is no de minimus requirement of the amount of investment that can give rise to ICSID jurisdiction. This issue arose during the preparation of the Convention, and the prevailing view was that because it was up to the parties to consent to ICSID jurisdiction, they could set up a minimum amount if they needed to do so.

141. The most frequently referenced definition of investment is known as the ‘Salini test’, according to which the notion of investment implies that the following criteria are met: (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host state’s development.1


142. In the absence of legally binding definition of what constitutes investment, investment tribunals have considered shares in a company,1 a loan,2 a construction contract,3 a telecommunication license as such in the past.4 ICSID Tribunals analyse all relevant circumstances to determine whether there was an investment within the meaning of the Convention and consider the duration of the project, the risks involved, and the level of business commitment.5

5. See, e.g., Salini v. Morocco, supra n. 164, para. 32.

143. Purely domestic disputes, such as those involving the interpretation of tax regulations, are usually excluded from ICSID jurisdiction. In Amco v. Indonesia the ICSID Tribunal held that it lacked jurisdiction over tax disputes that were not covered by an investment treaty.1 The Tribunal ruled that the claim of tax fraud was beyond its competence and noted that:

it is correct to distinguish between rights and obligations that are applicable to legal or natural persons who are within the reach of a host State’s jurisdiction, as a matter of general law; and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction.2

2. Ibid.

144. However, if there is a specific provision related to taxes in BIT, it may fall under the ICSID jurisdiction. In Bauxite v. Jamaica1 the ICSID Tribunal ruled that it had jurisdiction over the dispute, which involved an investment agreement with a ‘no further tax’ clause, pursuant to which Jamaica undertook not to impose any
additional royalties or taxes that had not been specifically provided for or referred
to in the investment agreement. The Bauxite Tribunal examined the language of the
investment agreement and concluded that it had jurisdiction because the dispute
concerned ‘the alleged rights and obligations stemming from particular provisions
in the agreement between Kaiser and Jamaica’.2

1. Kaiser Bauxite Company v. The Government of Jamaica, Decision on Jurisdiction and
2. Ibid.

§3. JURISDICTION OVER MORAL DAMAGES

145. ICSID Tribunals sometimes face claims for moral damages, damages arising
out of human rights of investors, or damages to the investor’s business reputation.
These damages are usually difficult to verify and quantify with precision. As a
general rule, ICSID Tribunals found that those claims lacked jurisdiction, even in the
cases of serious violations of investors’ rights, unless an investment treaty specifically
protected such rights.

146. In Biloune v. Ghana,1 the Tribunal rejected recovery for moral damages
claimed for denial of justice and violation of human rights resulting from arbitrary
detention and unlawful forceful deportation of an investor. According to the Tribunal,

The Government agreed to arbitrate only disputes ‘in respect of the foreign
investment.’ Thus, other matters – however compelling the claim or wrongful
the alleged act – are outside this Tribunal’s jurisdiction. . . . [W]hile the
acts alleged to violate the international human rights . . . may be relevant in
considering the investment dispute under arbitration, this Tribunal lacks juris-
diction to address, as an independent cause of action, a claim of violation of
human rights.2

1. Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government
2. Ibid., para. 9.

147. However, in Benvenuti and Bofant the ICSID Tribunal awarded moral
damages to an Italian investor1 whose premises and property were occupied by the
military of the People’s Republic of Congo.2 The investor’s personnel were forced
to leave the host country; the investor lost its credit with suppliers and banks and
could not resume business operation in Italy.3

1. S.A.R.L. Benvenuti and Bonfant v. People’s Republic of the Congo (ICSID Case No. ARB/77/2),
2. Ibid., para. 4.56.
3. Ibid., para. 4.95.

148. In Desert Line the ICSID Tribunal found a state liable for physical distress,
maliciously inflicted on the claimant on the basis of a fault-based liability.1 In that
case the government ‘directly and indirectly caused and allowed to be caused theft, harassment by armed groups and tribes, repeated attacks on the physical integrity of the Claimant’s investment, such as the arrest and detention of the Claimant’s personnel – including the son of the claimant’s chairman’.2


149. Reputation damages are usually not awarded by ICSID Tribunals. In *CSG Société Générale*, a foreign investor requested compensation for damages to its reputation resulting from termination of a contract with the host government.1 The ICSID Tribunal concluded that it had no jurisdiction because there was no evidence that the parties to BIT agreed to treat ‘all breaches of each State’s contracts with investors of the other state . . . as breaches of the BIT’.2 In *Letco* the ICSID Tribunal did not award an investor damages for the loss of its commercial reputation because of the lack of adequate proof.3 In *Tokios Tokelès*, the ICSID Tribunal declined any monetary compensation for reputation damages because there was no concrete evidence that any damage had been inflicted.4

3. Award of 31 Mar. 1986, ILM 26 (1987): 647, 675 (‘Because of a lack of adequate proof, the Tribunal does not award [the Claimant] damages for loss of commercial reputation.’)
§1. Choice of Substantive Law

150. Article 42 of the Convention stipulates that the dispute shall be decided in accordance with the governing law selected by the parties. The Convention gives parties certain flexibility as far as their choice of the applicable law. Such law can be determined by the parties’ agreement. According to Article 42(1) of the Convention, Tribunals ‘shall decide a dispute in accordance with such rules of law as may be agreed to by the parties’. It is important to note that Article 42(1) is phrased in terms of ‘rules of law’ rather than ‘systems of law’. Therefore, the parties are not restricted to a certain legal system in its entirety, but may combine rules of different legal origins.

151. The applicable substantive law may be chosen in one of several ways – by direct agreement, by stipulation in legislation or a treaty, or in the course of arbitration proceedings. Article 42(1) of the Convention does not require that the agreement on applicable law be expressed verbally or in writing. However, usually the substantive law is chosen with ‘reasonable certainty’ as dictated by the terms of the parties’ contract or by the circumstances of the case.1 Sometimes the choice of law can be established by the ICSID Tribunal based on the conduct of the parties, for instance, the choice may be based on the reliance by the parties on a particular system of law.2


152. In certain situations, the parties may fail to agree on the applicable law. This may be the result of the parties’ oversight or disagreement, or it may arise because the parties believe that the Tribunal is better qualified to decide the matter. If the parties failed to reach an agreement on the applicable law, the Tribunal applies the law of the Contracting State party to the dispute, which also includes the rules on the conflict of laws. Similarly, if the parties failed to reach a complete agreement on the applicable law, leaving certain aspects of their legal relationship without a clear choice of the applicable law, these aspects are decided in accordance with the residual rule of Article 42(1).

153. The Tribunal is not permitted to conclude that the situation engaged in a case has no answer from the governing system of law because of silence or obscurity.1 The Tribunal is entitled to call on the parties to produce documents or other evidence, visit the scene, and conduct necessary inquiries, unless the parties have agreed otherwise.2

1. Article 42(2) of the Convention.
2. Article 43 of the Convention.
154. Failure to apply applicable substantive law may constitute an excess of powers and lead to annulment of the award under Article 52(1)(b). For instance, the ad hoc committee in Klöckner v. Cameroon decided that the Tribunal manifestly exceeded its powers when the award’s reasoning seemed more like a reference to equity, rather than the agreed-on applicable law of a Contracting State.¹


155. ICSID Tribunals have analysed the following main interpretive arguments in the past and found them consistent with Article 38(d) of the Statute of the ICJ and Articles 32–33 of the Vienna Convention on the Law of Treaties (VCLT): the wording of the provision, the context, the object and purpose, the customary international law, the general principles of law, the analogies and contrario arguments, the agreements between the parties, the case law, the state practice, the preparatory work, the legal doctrine, and the reasonable results.¹


156. A recent empirical study on interpretative arguments used by ICSID Tribunals found that the three arguments most frequently used by ICSID Tribunals are ICSID case law, legal doctrine, and state practice.¹

1. Ibid., at 356.

§2. INTERNATIONAL SUBSTANTIVE LAW

157. According to Article 42 of the Convention, if the parties have not reached an agreement on the rules of the international law, the Tribunal – in addition to the law of a state party to the dispute – applies ‘such rules of international law as may be applicable’. One of the earlier drafts of the Convention provided that, in the absence of agreement, the Tribunal should apply ‘national or international law’. However, this has been changed to avoid the impression that it was necessarily a question of alternatives.¹

1. History of the Convention, at 800.

158. The parties may even exclude domestic law altogether and apply only international law. For instance, NAFTA¹ and the Energy Charter Treaty² provide for international law as a sole source of the applicable law. However, doing so is not recommended because the international law may lack clarity and technical details necessary for the resolution of the dispute.

1. Article 1131 of NAFTA.

159. The International law remains applicable unless the parties have explicitly excluded it. In SPP v. Egypt, the ICSID Tribunal considered the issue of whether

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the choice of national law made international law rules irrelevant. The Tribunal concluded the following:

When municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law.\(^1\) Moreover, it had been argued that characterizing the role of international law as only ‘supplemental and corrective’ does not make practical sense, because tribunals ought to test claims both against applicable domestic law and international law.\(^2\)


160. Two other cases, in which the Tribunals have taken a similar approach, are **MTD v. Chile** and **Azurix v. Argentina**. In the **MTD** case, the Tribunal declared that ‘[t]his being a dispute under the BIT, the parties have agreed that the merits of the dispute will be decided in accordance with international law’.\(^1\)

1. **MTD Equity Sdn Bhd v. Republic of Chile** (ICSID Case No. ARB/01/7), Award of 14 Jul. 2006, (para. 86); see also **Azurix Corp. v. Argentine Republic** (ICSID Case No. ARB/01/12), Award of 14 Jul. 2006, para. 67.

161. The Report of Executive Directors clarifies that the term international law has the same meaning as Article 38(1) of the Statute of the ICJ with allowance being made that Article 38 was designed to apply to interstate disputes. According to Article 38(1) the following constitutes sources of international law:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A brief explanation of each source of international law is in order.

I. International Conventions

162. International treaties are of primary importance in investment disputes. First, the Convention is a treaty itself. Second, most clauses establishing jurisdiction of the Centre as well as the substantive rights and obligations of States toward investors are often found in treaties, such as BITs. International law always includes rules set out in bilateral investment agreements between the states concerned.\(^1\) Not only do the already-ratified treaties constitute international law but
also the unratified treaties as well as the preparatory work, which may not even end up in the conclusion of a treaty, often have an effect of a customary international law.2

1. History of the Convention, at 984.
2. Oppenheim’s International Law, supra n. 108, at 33.

163. Disputes arising out of obligations in international treaties often involve disagreements over the interpretation of particular terms, such as what constitutes investment or fair and equitable treatment. ICSID Tribunals often rely on the VCLT of 1969, which provides guidance on treaty interpretation.

164. Article 31 of the VCLT is considered to be the expression of customary international law.1 According to this article:

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.2

1. Phoenix Action, Ltd v. The Czech Republic (ICSID Case No. ARB/06/5), Award of 15 Apr. 2009, para. 54.
2. Article 32, VCLT.

165. In addition to these basic rules of interpretation, the Vienna Convention allows for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.1

1. Article 33, VCLT.

166. Treaties other than the Convention and BITs are also applied in ICSID arbitrations. In SPP v. Egypt, the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Protection of the World Cultural and Natural Heritage played a key role.1

II. Customary International Law

167. The meaning of custom, or customary international law, has been defined by the ICJ in the Asylum case:

The party which relies on custom . . . must prove that this custom is established in such a manner that it has become binding on the other party . . . that the rule invoked . . . is in accordance with a consent and uniform usage, practiced by the States in question, and that this usage is the expression of a right appertaining to the State and a duty incumbent on the territorial State.


168. In the theory of international law, there are two essential components of custom, namely practice and opinio juris. Oppenheim’s International Law defines custom as ‘a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right’.

1. Oppenheim’s International Law, supra n. 108, at 27.

169. Tribunals generally prefer customary international law at the time of the dispute. For instance, in Tecnicas v. Mexico, the Tribunal applied ‘customary international law not as frozen in time, but in evolution’ to interpret the concept of indirect expropriation.


III. General Principles of Law

170. The general principles of law recognized by civilized nations constitute another source of international law. Their main distinction from international customs is that they do not arise out of international law as such. Instead, they come from domestic law, practice of international organizations, or relations between states and private organizations. These principles touch on the issues of the choice of law, the independence of judiciary, its transparency, among other issues. The most important principle is that of good faith. This principle can be found in any domestic legal system as well as in the United Nations Charter.


171. Other principles include pacta sunt servanda and the exceptio non adimleti contractus, estoppel, full compensation of damages resulting from a failure to fulfil contractual obligations, due process, unjust enrichment, res judicata, and the plaintiff’s bearing of the burden of proof. The principle of compensation in case of nationalization was regarded as a generally recognized principle of international law in ICSID case Bevenuti and Bonfant v. Congo.

IV. ICSID Case Law and Other Secondary Sources

172. The Statute of the ICJ mentions judicial decisions and writings of distinguished scholars as secondary sources for determination of the rules of international law. The writings of Christoph Schreuer, Aron Broches, Antonio Parra, and C.F. Amerasinghe are among the most respected in the field.

1. Article 38 of the Statute of the ICJ.

173. Although the decisions of tribunals and courts, either domestic or international, are not a primary source of international law, they are important for treaty arbitrations. Unlike common law judges, ICSID arbitrators do not create, but only apply, international law. However, ICSID Tribunals tend to rely heavily on the previous international judicial decisions, in particular on those of other ICSID Tribunals. ICSID Tribunals rely on prior ICSID decisions as well as UNCITRAL, Iran-US Claims Tribunal, and other investment tribunal decisions.

1. Emmanuel Gaillard & Yas Banifatemi (eds), The Precedent in International Arbitration (2008).

174. The Tribunal in Enron v. Argentina explained why tribunals resort to this source of law:

The conclusions of the Tribunal follow the same line of reasoning, not because there might be a compulsory precedent, but because the circumstances of the various cases are comparable, and in some circumstances identical.


175. Similarly, the Tribunal in AES Corporation v. Argentina observed that although prior ICSID awards, even those applying similar BIT language, do not constitute binding precedent, this does not mean that no consideration is given to other decisions on jurisdiction or to awards delivered by other tribunals in similar
Part II, Ch. 7, Applicable Substantive Law 176–178

cases. The Tribunal found itself not barred, as a matter of principle, from considering the position taken or the opinion expressed by other tribunals. In ADC v. Hungary, the Tribunal also emphasized that despite their non-binding nature, the ‘cautious reliance on certain principles developed [in case law], as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States’.

2. Ibid.

Arguably, ICSID case law has become one of the most important factors shaping international law for two reasons. First, well-qualified and impartial jurists, who address specific facts by applying international law, render ICSID awards. Second, the reliance on case law facilitates the consistent application of international law and the predictability of results, which is important for development and underscores the increasing role and prestige of international investment law. It is interesting to note that purely domestic judicial decisions also constitute a part of international law in accordance with Article 38 at the ICJ Statute.

§3. Ex Aequo Et Bono

177. The parties may agree that the dispute is decided on the basis of equity, or *ex aequo et bono*. The decision will be based not on certain legal rules but on the considerations deemed right and fair by the court. The ICJ Statute provides a similar provision in Article 38(2).

1. Article 42(3) of the Convention.

178. In Benenuti and Bofant v. Congo, the Tribunal decided the dispute on the basis of *ex aequo et bono*. The Tribunal may decide a dispute *ex aequo et bono* only if there is an explicit agreement by the parties to that effect. It should be noted that this agreement can be reached in the course of arbitration proceedings.

Chapter 8. Principles of International Investment Law

179. ICSID Tribunals play an important role in development of international investment law. The principles commonly included in bilateral investment treaties to protect investors include fair and equitable treatment, non-discrimination, protection from expropriation and unfair and unjustified measures, and the most-favoured nation principle. The next sections demonstrate how these principles are understood in ICSID jurisprudence.

§1. Fair and Equitable Treatment

180. Fair and equitable treatment is one of the most important principles of international investment law.1 The World Bank Guidelines on the Treatment of Foreign Direct Investment require that all states extend fair and equitable treatment to investments established in their territories by nationals of any other state.2 The treatment should be as favourable as that accorded by the state to domestic investors in similar circumstances.3 In addition, fair and equitable treatment includes non-discrimination among foreign investors on the grounds of nationality. The Guidelines further clarify that full protection and security should be accorded to the investor’s rights regarding ownership, control, and substantial benefits derived from the property.4

3. Ibid.

181. More specifically, fair and equitable treatment of foreign investors implies prompt issue of licenses and concessions that may be necessary for the uninterrupted operation of the admitted investment, the authorization of foreign personnel, the free transfer of net revenues realized from the investment, and the guarantees in case of the liquidation of the investment.1 In *Mondev*, the Tribunal explained that a state need not act in bad faith for a violation of the fair and equitable principle to occur.2

1. Ibid., at paras 5–6.

182. ICSID Tribunals looked into various factors to determine whether the treatment of investors was fair and equitable, including any specific representations made to the investor on which he or she reasonably relied, discrimination compared to other investors, transparency of decision making, as well as coercion and harassment by state authorities.1 It has been held by ICSID Tribunals that the de facto difference in treatment of foreign investors as compared to national investors is a violation of the national treatment principle and is sufficient to create a presumption of discrimination.2
Part II, Ch. 8, Principles of International Investment Law 183–186


183. In *Waste Management v. Mexico*, a claimant asserted that the failure in waste management business resulted from the combination of the conduct of local, provincial, and federal authorities with the failure of the Mexican courts and tribunals to provide any relief. The Tribunal elaborated that ‘fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes claimant to sectional or racial prejudice’.

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184. At the same time, the standard of fair and equitable treatment should be viewed in the light of ‘the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders’. This, *inter alia*, includes the right of governments to act in the broader public interest by protecting the environment, granting or withdrawing government subsidies, regulating tariff levels and imposing zoning restrictions.

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185. The unlawfulness of a host state’s measures under its own legislation is neither necessary nor sufficient to constitute a breach actionable under the Convention. The Tribunal in *ADF Group Inc.* has stated with regard to the ‘fair and equitable treatment’ standard contained in Article 1105(1) NAFTA that ‘something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements’.

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186. In *Saluka Investments BV v. Czech Republic*, the claimant alleged that the government acted in violation of the ‘fair and equitable treatment’ standard by illegally granting massive financial assistance to its competitors and thus distorting fair competition. Investment treaties are not meant to penalize each and every breach by the government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host state. The Tribunal in *Saluka* disagreed with the claimant and observed that the standard of fair and equitable treatment and the non-impairment standards are not breached by a mere violation of domestic law.

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§2. ARBITRARY AND DISCRIMINATORY MEASURES

187. The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. Investment tribunals often cite the ICJ decision in the *ELSI* case on the issue of arbitrary measures. Considering the legality of the requisition of a foreign-owned factory in order to prevent its closure and the lay off of a thousand workers, the ICJ observed:

> [a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the Asylum case, when it spoke of 'arbitrary action' 'being substituted for the rule of law'. It is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.


188. In *S.D. Myers* an investor alleged that the government’s measures affecting the operations of waste exporters were applied in an arbitrary and unjustifiable manner that also constituted a disguised restriction on international trade or investment. In that case, waste disposal companies in the United States were not permitted to operate in Canada in the same fashion as Canadian waste disposal companies. It was alleged that the government limited the investor’s ability to carry out its operations on an arbitrary and discriminatory basis in violation of the treaty. The Tribunal concluded that the principle of fair and equitable treatment was violated by Canada’s unjust and arbitrary measures:

> only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

2. The claimant relied on the following NAFTA treaty provision: ‘[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security’.

189. Another ICSID Tribunal concluded that foreign investors can legitimately expect a host state to act consistently, that is, ‘without arbitrarily revoking any
pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities'.


190. In Tokios Tokelés v. Ukraine, the claimant alleged that governmental authorities in the Ukraine were engaged in a campaign of oppression, which violated the Ukraine-Lithuania BIT. The alleged violations merely pertained to a tax investigation, which was seen by the claimant as retaliation for certain political activities in which he was engaged in the past. The Tribunal observed that ‘[w]hat does matter, for the purposes of the Treaty, is whether there was a malicious campaign, and if so whether it can be attributed to the respondent State’. The Tribunal eventually concluded that the claimant failed to meet the burden of proof by showing that his assertions were more likely than not to be true.

1. Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Award of 26 Jul. 2007, para. 4.
2. Ibid.
3. Ibid., paras 124, 136.

§3. Denial of Justice

191. The Organization for Economic Cooperation and Development (OECD) considers denial of justice a part of customary international law:

In the broadest sense, it seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State towards aliens it includes therefore acts or omissions of the authorities of any of the three branches of government, i.e., executive, legislative or judiciary. In the narrowest sense, it is ‘limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgment.’

1. OECD, Fair and Equitable Treatment Standard in International Investment Law (2004), 28 (internal citations omitted).

192. When investors are dissatisfied with the way they are treated by the courts or administrative agencies of a host state, they often claim denial of justice. The Loewen case is the most frequently discussed authority on denial of justice in which the Tribunal defined the criteria for the denial of justice as follows:

In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.

193. As noted in *Azinian v. United Mexican States*, a party can claim the denial of justice if ‘the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way’. The Tribunal held that the possibility of holding a state accountable for judicial decisions does not ‘entitle a claimant to a review of national court decisions as though the international jurisdiction seized this plenary appellate jurisdiction’. As the Tribunal further emphasized, ‘[w]hat must be shown is that the court decision itself constitutes a violation of the treaty’.

3. Ibid.

194. If the investor can effectively address the alleged violations in domestic courts, there is usually no denial of justice. According to *Mondev International Ltd. v. United States of America*, the applicable standard for denial of justice is the presence of a ‘wilful disregard of due process of law, which shocks, or at least surprises, a sense of judicial propriety’.

2. Ibid., para. 127.

195. As one commentator noted, ‘international law attaches state responsibility for juridical action only if it is shown that there was no reasonably available mechanism to correct the challenged action’. States are expected to provide a fair and efficient system of justice, but they cannot guarantee that judicial misconduct will never occur.

2. Ibid.

§4. GUARANTEES IN THE EVENT OF EXPROPRIATION

196. According the World Bank’s Guidelines, a state may not expropriate or otherwise take in whole or in part a foreign private investment on its territory, or undertake the measures that have similar effects. The only exception is when such an action is done in accordance with the applicable legal procedures, in pursuance of good faith for a public purpose, without discrimination on the basis of nationality, and against the payment of appropriate compensation. It is also generally expected that the due process requirement is met.


197. It should be noted that states are not liable for bona fide expropriations. In *Saluka v. The Czech Republic* the Tribunal held that
it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at general welfare.1


198. The MIGA, another World Bank Institution aimed at facilitating foreign investment, provides the following definition of expropriation and similar measures:

any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which the governments normally take for the purpose of regulating economic activity in their territories.1


199. Another definition of expropriation was given by the ICSID Tribunal in S.D. Myers, namely: ‘a taking by a government-type authority of a person’s “property” with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the “taking”’.1 Expropriations can also be indirect. Indirect expropriation can be classified as creeping measures taken for regulatory purposes but resulting in the loss of economic value.2 In Parkings v. Lithuania the Tribunal understood indirect expropriation as ‘the negative effect of government measures on the investor’s property rights which does not involve a transfer of property but a deprivation of the enjoyment of the property’.3


200. An example of direct expropriation would be when ‘governmental authorities take over a mine or a factory, depriving the investor of all meaningful benefits of ownership and control’.1 The ICSID Tribunal in Metalclad defined indirect expropriation as ‘covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’.2

2. Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Award of 30 Aug. 2000, para. 103.
ICSID Tribunals held that when the government issues certain permissions to the investor, but later deprives him or her of this right, its actions might amount to expropriation. In *Vivendi v. Argentina*, the Tribunal found that “there can be no doubt that contractual rights are capable of being expropriated”. In *Middle East Cement Shipping v. Egypt* the Tribunal decided that Egypt’s decree prohibiting the import of cement had an effect tantamount to expropriation. It concluded that the investor was entitled to prompt, adequate, and effective compensation. In *Antoine Goetz and Others v. Republic of Burundi* the Tribunal decided that the withdrawal of the certificate of free zone constituted a measure equivalent to expropriation, defined in Article 4 of the BIT as a ‘measure depriving of or restricting property rights’.

According to the World Bank’s Guidelines, appropriate compensation is based on the fair market value and paid in convertible currency without delay. The Guidelines define what constitutes fair market value in the absence of agreement between the parties:

an amount that a willing buyer would normally pay to willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it had been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.

§5. Most-Favoured Nation

An important component of the non-discrimination principle is the most-favoured nation treatment. International investment agreements typically require that a foreign investor be given the most generous standard of treatment available to an investor from any other foreign country. However, the question of whether procedural rights can be borrowed by foreign investors from other treaties has been a controversial issue.

According to *Maffezini v. Spain*, foreign investors can rely on more liberal dispute resolution provisions. In that case, the Tribunal permitted the investor to rely on a Chile-Spain BIT and ignore the less liberal cooling off requirement of the Argentine-Spain BIT before invoking the jurisdiction of the arbitral tribunal. However, in *Pluma* the ICSID Tribunal rejected expansion of the dispute resolution clause using the most-favoured nation provision and emphasized the need for an
unambiguous agreement between the parties, even when reached by the incorporation of reference. The Tribunal rejected the investor’s attempt to invoke the ICSID jurisdiction by virtue of the more generous provisions of the Bulgaria-Finland BIT.


205. Plama’s Tribunal approach is practical because otherwise all provisions providing for dispute resolution would have become meaningless. The investors’ right to choose any dispute resolution mechanism would seriously undermine the fundamental principle of state sovereignty. Consent is the cornerstone of the ICSID jurisdiction. In East Timor case, the ICJ pointed out the importance of distinguishing between the application of a substantive obligation and conferring a mandatory jurisdiction of international tribunal, emphasizing that jurisdiction in international law depends on consent.1


§6. Umbrella Clauses

206. When the state breaches a contract concluded with foreign investors, the investors may have both contract and treaty claims against the host state. Many investment agreements also provide investors with the right to arbitrate contract disputes with sovereign states. Subject-matter jurisdiction of ICSID Tribunals in this case is much wider when investment treaty provisions guarantee the host state’s observance of obligations or commitments entered into vis-à-vis foreign investors. These provisions are commonly known as umbrella clauses. A typical umbrella clause provides that ‘each party shall observe any obligation it may have entered into with regard to investments’.1


207. There is no uniform interpretation of umbrella clauses in ICSID jurisprudence. Some Tribunals consider these clauses as automatically elevating the host state’s breaches of contract with investors to a treaty violation. Other case rejected this interpretation without explaining the meaning of the umbrella clauses.2 The main rationale in favour of the narrow interpretation of umbrella clauses is the Convention’s concern of opening the floodgates of investment treaty arbitration to every contractual claim.

2. See e.g., SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of Nov. 2003, paras 164–173.
208. ICSID Tribunals often address the question of whether a contract breach gives rise to a treaty breach when there is an umbrella clause or even in the absence of such clause. Contractual rights also qualify as an investment and hence serious violations of these rights may amount to expropriation. It should be noted that failure to perform a contract might amount to a breach of treaty even in the absence of an umbrella clause. For instance, such failure may constitute a violation of the fair and equitable treatment standard because it frustrates the investor’s legitimate expectations.

209. In Axurix v. Argentina the Tribunal held that a contract entered into by a province of Buenos Aires was not covered by the umbrella clause. Similarly, in Impregilo v. Pakistan the Tribunal stated that the umbrella clause would not cover contracts entered into between the foreign investor and a distinct legal entity. However, in Noble Ventures v. Romania the Tribunal held that the conduct of the state entity was attributable to Romania and gave rise to the breach of umbrella clause.\(^1\)


210. The ICSID Tribunal in Tecmed v. Mexico defined legitimate expectations as the requirement to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.\(^1\) However, there is a clear trend in ICSID case law to consider the violations of a contract to amount to a treaty breach only if the violating party acted as a sovereign, and not as an ordinary contracting party.\(^2\)


211. Some BITs grant investors a right to establishment under certain conditions.\(^1\) This raises the issue of whether it is possible to initiate ICSID arbitration prior to the conclusion of investment, concession, or a similar contract to do business in a host state. The ICSID Tribunal in Mihaly v. Sri Lanka addressed this issue concluding that ICSID Tribunals have no jurisdiction until a contract had been concluded.\(^2\)

Chapter 9. Awards

§1. RECOGNITION AND ENFORCEMENT

212. One of the most remarkable features of ICSID arbitration is the mechanism of recognition and enforceability of its awards. Unlike awards of other arbitration tribunals, ICSID awards do not need to be enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

213. Within 120 days after the completion of proceedings, the Tribunal is required to draw up the award taking any individual or dissenting opinion into consideration. However, if the Tribunal is unable to draw up the award within this period, it may extend it by an additional sixty days.1 Either party may request a supplementary decision or rectification of the award in accordance with Article 49(2) of the Convention and Rule 49 of the Arbitration Rules.

1. Arbitration Rule 46.

214. Article 53(1) of the Convention provides for the obligation to comply with an ICSID award:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

215. Article 54(1) of the Convention deals with enforcement and execution mechanisms:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as it were a final judgment of a court in that State.

216. Parties do not have to resort to enforcement mechanisms under Article 54(1), which is binding on the parties under Article 53(1) immediately upon rendering.1 The main purpose of Article 54(1) is to require that each Contracting Party open its courts, in case either party fails to abide by or to comply with the terms of the award.2

1. Schreuer Commentary, at 1087.

217. The Convention drafters intended that the award should have a res judicata effect on the national courts as a matter already determined in arbitration proceedings.3 In the unlikely event that a losing state failed to comply with the award, it would violate the Convention, which allows the state whose national had
failed to obtain satisfaction to take up the case. The Executive Director’s Report noted that a Contracting State may institute proceedings against another Contracting State if there was a failure to comply with the award rendered in the dispute. However, the state is not entitled to commence proceedings against another state if it disagrees with the competence of ICSID in a particular case or disagrees with its substance.

1. History of the Convention, at 519.
2. Ibid., at 344.
4. Ibid.

ICSID Tribunals have held that the requirement to pursue a breach of contract claim in domestic courts does not prevent the use of the investor-State dispute resolution mechanism of ICSID. This is true even when establishing the breach of contract under domestic law is central to the establishment of a breach of the state’s treaty obligations.


Traditionally, ICSID Tribunals grant monetary relief. The parties usually request pecuniary relief rather than specific performance or declaratory awards. However, the drafting history of the Convention shows that although enforcement is meant to be restricted to the award’s pecuniary obligations, the Tribunals can order a party to perform or to refrain from certain acts. In the process of drafting the Convention, Aron Broches explained

an award could well order the performance or non-performance of certain acts, but all that could be enforced would be to the obligation to pay damages if the party did not comply with the order. In the kind of disputes that would come before the Centre payment of damages was all that parties would ultimately expect in the absence of voluntary compliance.

1. History of the Convention, at 991.

The issue of specific performance was addressed in the decision on the jurisdiction in Enron v. Argentina. Argentina argued that the Tribunal had no power to order injunctive relief and hence could not declare taxes unlawful as the claimant requested. The Tribunal disagreed with Argentina and ruled that it was in its power to order specific performance. After referring to several non-ICSID awards, the Tribunal held that ‘in addition to declaratory powers, it had the power to order measures involving performance or injunction of certain acts’. Christoph Schreuer also considers that ‘an award, that is expressed not in monetary terms but in terms of obligation to perform a particular act or to refrain from a certain course of action is equally binding and gives rise to the effect of res judicata’.

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221. The drafting history of the Convention shows that the drafters were against forced execution against the state. The drafters did not consider it necessary to change the principles that apply to Contracting States in enforcement of the final judgments. In other words, forceful execution is governed by domestic civil procedure rules.


§2. Remedies against the Award

222. According to Article 53 of the Convention, the award is binding on the parties and is not subject to any appeal in either a domestic or an international forum. The Convention provides for several ‘internal’ ICSID remedies. These are supplementation and rectification, interpretation, revision, and annulment.

I. Request for Supplementation and Rectification

223. If the award rendered contains any clerical, arithmetical, or similar errors, either party may request to rectify such an award. According to Article 49 of the Convention, the rectification request needs to be made within forty-five days after the award is rendered.

224. In CDSE v. Costa Rica, a claimant requested rectification of the award. The Tribunal gave the other party an opportunity to file written observations of the request and rendered a decision correcting two minor clerical errors and a mistake in the identification of the parties. At the same time, the Tribunal disagreed with the claimant’s request to correct an alleged misstatement of a party’s position on the point of law.


225. The ICSID ad hoc committee in Vivendi v. Argentina noted that the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits. The Tribunal emphasized that ‘Article 49(2) does not permit the “rectification” of substantive findings made by a tribunal or committee or of the weight or credence accorded by the tribunal or committee to the claims, arguments and evidence presented by the parties.’


II. Request for Interpretation

226. In case of disagreement between the parties over the meaning of the award, either party may direct a request for interpretation to the Secretary-General
generally, requests for interpretation are very rare.1


III. Request for Revision

227. Article 51 of the Convention gives either party a right to request revision of the award. The only ground for revision under Article 51 is discovering a fact that is capable of decisively affecting the award. The parties are not allowed to trigger Article 51 if the reason for not discovering this fact is negligence. A request for revision must be submitted within ninety days after the discovery. However, if more than three years have passed since the date of the award, the case may not be revised. Like the request for interpretation under Article 50, the request for revision must be considered by the same Tribunal. If that is not possible, a new tribunal is constituted.

IV. Request for Annulment

228. Unlike in cases of interpretation and revision, the chair of the Tribunal appoints a new Tribunal to deal with annulment. This ad hoc tribunal consists of three new arbitrators. Article 52 provides a number of additional restrictions on those who can serve on the ad hoc tribunal – members should not be of the same nationality as any former member of the Tribunal, shall not be designated by either of those states, or act as conciliators in the same dispute. The ad hoc committee has authority to stay the enforcement of the rendered award pending its decision. If the ad hoc committee concludes that the award is subject to annulment, a new tribunal decides the case de novo.

229. The annulment procedure is unavailable for decisions preliminary to awards, such as the decisions on jurisdiction or on the orders for provisional measures. However, if the decision on the jurisdiction is a part of the award, then it is also subject to annulment. Similarly, annulment is not available in relation to decisions interpreting or revising the awards; whereas decisions on supplementation and correction are subject to annulment because they become integral parts of the award.

230. Annulment is different from appeal. Article 53 clearly provides that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention. The result of a successful annulment procedure is the invalidation of the original decision, but an appeal may result in the modification of the decision. As a general rule, annulment does not modify the award but rather
removes it. The Convention provides a limited number of grounds on which either party may request annulment of the award. The list of grounds as provided by Article 52 of the Convention are as follows:

(a) The Tribunal was not properly constituted.
(b) The Tribunal has manifestly exceeded its powers.
(c) There was corruption on the part of a member of the Tribunal.
(d) There has been a serious departure from a fundamental rule of procedure.
(e) The award has failed to state the reasons on which it is based.

231. Improper constitution of the Tribunal may involve the issues arising out of the arbitrators’ nationalities. According to Article 38 of the Convention, arbitrators may not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute. Article 39 stipulates that the majority of arbitrators should not be nationals of States whose governments or investors are a party to the dispute. The annulments on the ground of nationality are unlikely to arise because the ICSID Secretariat carefully monitors the constitution of tribunals.

232. Another ground – the manifest excess of powers – has been frequently evoked in the past. The excess of powers is the most obvious example of where the tribunal has no jurisdiction. This may happen if jurisdictional requirements established by Article 25 of the Convention have not been met.

233. An example of manifest excess of powers is a failure to apply the proper law. In *Amco v. Indonesia*, the Tribunal ruled that failure to apply the proper substantive law would constitute a manifest excess of powers and a ground for nullity.1 The Tribunal in *Klöckner v. Cameroon* went even further by ruling that the absence of any references to legislative texts, to judgments, or to scholarly opinions amounted to the application of an improper law.2


234. In *MINE v. Guinea* the Tribunal explained that the requirement to state reasons is satisfied if

the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.1

235. Early decision on annulment in *Klöckner v. Cameroon* adhered to the view that if at least one of the grounds for annulment provided by Article 52(1) is present, then the whole award should be annulled. However, the Tribunal in *MINE v. Guinea* has taken a different position. The respondent in that case requested annulment of a part of the award that did not deal with its counterclaims. The Tribunal ruled that the unchallenged part of the award would remain in effect regardless of the effect of the annulment award on the challenged portions of the award. That Tribunal reasoned that ‘annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards’.


236. Corruption of an arbitrator, that is, an arbitrator’s misconduct because of personal gain, may also lead to annulment. Mere bias in the absence of improper financial gain does not amount to corruption. Article 52(2) of the Convention provides for a longer period of 120 days to submit a request for annulment under this ground.
Chapter 1. ICSID in the Global Context

§1. Areas of Concern

237. One of the main purposes of ICSID dispute resolution proceedings is to encourage the development of the rule of law, promote international investment agreements, and create a favourable investment climate in host countries. However, investor-state arbitration poses a challenge for developing countries, which do not have the capacity to handle the increasing number and growing complexity of investment disputes, the potentially high costs of conducting such procedures, and the potential impacts of awards on their budgets and national reputations as investment destinations.1


238. As one non-governmental organization (NGO) observed:

investment treaty arbitration rules are weighted heavily in favour of global corporations and against the mostly poor countries caught up in disputes...93% of the cases [at ICSID] involve low- or middle-income developing countries...[and] ICSID tribunals have ruled in favour of the investor and ordered the government to pay compensation in nearly 70% of cases.1


239. In 2007, Bolivia became the first country to withdraw from ICSID.1 Bolivia’s withdrawal from ICSID came at a time when the Bolivian government was nationalizing key sectors of its economy. In 2007, Ecuador limited the scope of disputes arbitrable under ICSID.2 Ecuador announced that it would not consent to ICSID arbitration in disputes arising out of investments in natural resources, such as oil, gas, and minerals. In July 2009, Ecuador submitted a notice of denunciation from the ICSID Convention, becoming the second Latin American country to do so.3

2. Ecuador’s Notification under Art. 25(4) of the ICSID Convention, 5 Dec. 2007.
ICSID Tribunals often arbitrate very sensitive issues, such as the management of water (Bolivia), indigenous land rights (Guatemala), or protecting the economy during crises (Argentina). Nearly all proceedings are carried out behind closed doors without any meaningful participation or even knowledge of the social groups affected by the ICSID decisions. There is no appeal process for these groups either.


ICSID is also very expensive. According to UNCTAD, the average legal costs incurred by governments range between USD 1 million and USD 2 million, including the lawyers’ fees. Some claims involve sums reaching hundreds of millions of dollars. Although they are not particularly high for large multinational enterprises, these costs may be insurmountable for small and poor countries. Heavy legal costs especially hurt developing nations, which are either forced to hire expensive teams of foreign lawyers or risk losing their cases and paying foreign investors significant amounts diverting finances from other areas.


It is also argued that ICSID, which is a part of the World Bank, is not impartial because it encourages privatization and the privatized companies resort to ICSID dispute resolution mechanism. This may potentially result in a conflict of interest because the Secretary-General can play an important role in ICSID proceedings, particularly in appointing a third arbitrator if the parties have failed to agree on such. It is also argued that investment treaty tribunals are biased in favour of investors because the former depend on claims brought against the latter.


Many developing countries, particularly those in Latin America, view ICSID as a challenge to their sovereignty and a tool of foreign investors rather than an impartial forum. Although statistically investors lose at least as often as government, financial implications are significant even when the state has to defend a meritless claim that does not result in an award favouring the investor.

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244. Developing countries will remain capital-importing countries and it is they primarily who will bear the burden of heavy awards against them. Argentina is the most frequent respondent in ICSID cases, the majority of which arose after major economic crises there. Although foreign investors are able to recover their losses through ICSID, heavy ICSID awards against countries recovering from economic meltdowns may aggravate problems in those countries even more.

245. There is an ongoing debate as to the appropriateness of ICSID rulings on public policy issues and awards of hundreds of millions of dollars against developing countries that often lack transparency and accountability required from the domestic judicial systems of developed nations. It had been alleged that the regulatory disputes considered by international private arbitrators conflict with principles of judicial accountability and independence in democratic societies and compromise the integrity of the legal system by contracting out the judicial function in public law.1 NGOs are pushing for more transparency in ICSID Tribunal’s decision making.2


246. It is also argued that investment treaty tribunals are biased in favour of investors because the former depend on claims brought against the latter.1 Many are concerned that in the absence of any appellate body, there is a risk that the tribunals will not decide like cases in like manner because they are not obliged to do so.2 This also may hurt the predictability and consistency of ICSID awards. Even when the Tribunals listen to the disputes arising from virtually identical treaty provisions, where the same counsel represented the parties and the same witnesses testified, the tribunals may reach mutually inconsistent decisions.3 On the one hand, this hurts the predictability of ICSID decisions, but on the other hand, it means that awards are final and are not subject to review, at least in theory.

1. Van Harten, supra n. 311, at 5.
2. Ibid.

247. Another concern is the lack of diversity with respect to nationality of arbitrators. Although the arbitrators’ pool itself is diverse, the parties and the ICSID secretariat tend to appoint arbitrators from developed countries. The nationals of the United States and the United Kingdom are the top two nations appointed as arbitrators.1

248. Commentators also argue that ICSID annulment procedures are often used to review the merits of cases, something that the Convention does not permit. Annulment procedures were meant to be used as ‘the extraordinary and limited remedy’.1 But instead of ensuring that the awards are final, some ad hoc committees reviewed awards on the merits.2


§2. ICSID REFORM

249. ICSID has implemented a number of reforms aimed at increasing its transparency, including publishing a web-based list of pending and completed cases. Today, the ICSID Secretariat has the authority to publish significant extracts of decisions without the consent of the parties. And there is a proposal to amend Arbitration Rule 48 to give ICSID the power to promptly include in its publications excerpts from the legal reasoning of the Tribunal.1

1. ICSID, Proposed Amendment to Arbitration Rule 48, 2005.

250. In 2008, ICSID undertook a number of reforms to strengthen and modernize its operations, including the creation of several specialized teams within ICSID.1 Three staff teams worked exclusively on case administration, which resulted in a significant reduction in the amount of time necessary to register cases. A special financial team was created to tackle the issues of accounting and financial reporting controls. And a special team was assigned to handle ICSID publications and knowledge management.


251. It is difficult to disagree with the view that international arbitration should involve unbiased, depoliticized adjudication and that the outcomes should be based on law rather than on factors unrelated to the merits of the case.1 Other proposals include the need to facilitate transparency and consistency of ICSID proceedings, which includes the establishment of the appeal body.2 The ICSID appellate body could make ICSID jurisprudence more consistent and predictable, which is very important to investors, governments, and other stakeholders. In theory, an appellate body could substitute its own decision for that of the first tribunal or require that tribunal to rectify its mistakes.


252. Creating an appeal body has a number of advantages, including ensuring consistency, rectification of legal errors, and avoiding possibly serious errors of fact;
the review would be confined to a neutral tribunal rather than the national courts. The disadvantages of an appellate mechanism include departure from the principle of finality, additional delays and costs, additional caseload, and politicisation of the system.1


253. The recently proposed changes put forward by the OECD relate to the improvement of the quality of arbitral awards by establishing an Additional Annulment Facility and an appellate mechanism.1 An OECD study also proposed encouraging consolidation of parallel proceedings to improve problems related to multiple proceedings involving the same subject matter.2

1. Ibid., at 6–9.
2. Ibid., at 14–19.

254. It had also been suggested that providing more particularized guidelines about arbitrator appointments would help alleviate concerns that presiding arbitrators, who are usually from developed countries, would not be biased against developing countries.1 A recent empirical study found no significant correlation between the outcomes of investor-State arbitrations and the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between the two.2 This means that the investment treaty arbitration system, as a whole, seems fair and does not need a radical overhaul of the arbitration process. But the study also found that tribunals with presiding arbitrators from the developing world tend to make smaller awards against developed states.3

2. Ibid., at 487.
3. Ibid., at 488.

255. When any reforms are contemplated, they should not harm foreign investors because otherwise the reforms would undermine investors’ incentives to submit cases to ICSID, who might prefer other arbitration rules.
Appendix I. ICSID Convention

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER I
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Section 1
Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.
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Article 2
The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3
The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2
The Administrative Council

Article 4
(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal’s absence from a meeting or inability to act.
(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be ex officio its representative and its alternate respectively.

Article 5
The President of the Bank shall be ex officio Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6
(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:
(a) adopt the administrative and financial regulations of the Centre;
(b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
(d) approve arrangements with the Bank for the use of the Bank’s administrative facilities and services;
(e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
(f) adopt the annual budget of revenues and expenditures of the Centre;
(g) approve the annual report on the operation of the Centre.
The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.
(2) The Administrative Council may appoint such committees as it considers necessary.
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(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General’s absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.
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Article 11
The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4
The Panels

Article 12
The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13
(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.
(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14
(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce; industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.
(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15
(1) Panel members shall serve for renewable periods of six years.
(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member’s term.
(3) Panel members shall continue in office until their successors have been designated.

Article 16
(1) A person may serve on both Panels.
(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.
(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.
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Section 5
Financing the Centre

Article 17
If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6
Status, Immunities and Privileges

Article 18
The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity:
(a) to contract;
(b) to acquire and dispose of movable and immovable property;
(c) to institute legal proceedings.

Article 19
To enable the Centre to fulfill its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20
The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21
The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat.
(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
(b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of traveling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22
The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.
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Article 23
(1) The archives of the Centre shall be inviolable, wherever they may be.
(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favorable than that accorded to other international organizations.

Article 24
(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.
(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.
(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER II
JURISDICTION OF THE CENTRE
Article 25
(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
(2) “National of another Contracting State” means:
(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26
Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27
(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER III
CONCILIATION

Section 1
Request for Conciliation

Article 28
(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation 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.

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

(3) 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.

Section 2
Constitution of the Conciliation Commission

Article 29
(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.
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(2)
(a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.
(b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30
If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31
(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.
(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3
Conciliation Proceedings

Article 32
(1) The Commission shall be the judge of its own competence.
(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33
Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34
(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.
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(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35
Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

CHAPTER IV
ARBITRATION

Section 1
Request for Arbitration

Article 36
(1) 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.
(2) 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.
(3) 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.

Section 2
Constitution of the Tribunal

Article 37
(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.
(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.
(b) 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 arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.
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Article 38
If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39
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; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40
(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.
(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3
Powers and Functions of the Tribunal

Article 41
(1) The Tribunal shall be the judge of its own competence.
(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42
(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.
(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

Article 43
Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,
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(a) call upon the parties to produce documents or other evidence, and
(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

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.

Article 45
(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party’s assertions.
(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46
Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47
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.

Section 4
The Award

Article 48
(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.

Article 49
(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5
Interpretation, Revision and Annulment of the Award

Article 50
(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51
(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52
(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
   (a) that the Tribunal was not properly constituted;
   (b) that the Tribunal has manifestly exceeded its powers;
   (c) that there was corruption on the part of a member of the Tribunal;
   (d) that there has been a serious departure from a fundamental rule of procedure; or
   (e) that the award has failed to state the reasons on which it is based.
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(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Section 6
Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General...
Appendix I

of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

CHAPTER V

REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

Article 56

(1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy.

Article 57

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.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.
Appendix I

CHAPTER VI
COST OF PROCEEDINGS

Article 59
The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60
(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.
(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61
(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.
(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection 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.

CHAPTER VII
PLACE OF PROCEEDINGS

Article 62
Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63
Conciliation and arbitration proceedings may be held, if the parties so agree,
(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or
(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER VIII
DISPUTES BETWEEN CONTRACTING STATES

Article 64
Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.
Appendix I

CHAPTER IX
AMENDMENT

Article 65
Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66
(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.
(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X
FINAL PROVISIONS

Article 67
This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68
(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.
(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69
Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70
This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.
Appendix I

Article 71
Any Contracting State may denounce this Convention by written notice to the depository of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72
Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73
Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74
The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75
The depositary shall notify all signatory States of the following:
(a) signatures in accordance with Article 67;
(b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
(c) the date on which this Convention enters into force in accordance with Article 68;
(d) exclusions from territorial application pursuant to Article 70;
(e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
(f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfill the functions with which it is charged under this Convention.
Appendix II. List of the ICSID Convention Signatories

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES
LIST OF CONTRACTING STATES AND OTHER SIGNATORIES
OF THE CONVENTION
(as of July 29, 2009)

The 156 States listed below have signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States on the dates indicated. The names of the 144 States that have deposited their instruments of ratification are in bold, and the dates of such deposit and of the attainment of the status of Contracting State by the entry into force of the Convention for each of them are also indicated.

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<td>Mar. 24, 1975</td>
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Appendix III

The Administrative and Financial Regulations of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention. The Regulations of particular interest to parties to proceedings under the Convention are: 14–16, 22–31 and 34(1). They are intended to be complementary both to the Convention and to the Institution, Conciliation and Arbitration Rules adopted pursuant to Article 6(1)(b) and (c) of the Convention.

Administrative and Financial Regulations

Chapter I

Procedures of the Administrative Council

Regulation 1

Date and Place of the Annual Meeting

(1) The Annual Meeting of the Administrative Council shall take place in conjunction with the Annual Meeting of the Board of Governors of the International Bank for Reconstruction and Development (hereinafter referred to as the “Bank”), unless the Council specifies otherwise.

(2) The Secretary-General shall coordinate the arrangements for the Annual Meeting of the Administrative Council with the appropriate officers of the Bank.

Regulation 2

Notice of Meetings

(1) The Secretary-General shall, by any rapid means of communication, give each member notice of the time and place of each meeting of the Administrative Council, which notice shall be dispatched not less than 42 days prior to the date set for such meeting, except that in urgent cases such notice shall be sufficient if dispatched by telegram or cable not less than 10 days prior to the date set for such meeting.

(2) Any meeting of the Administrative Council at which no quorum is present may be adjourned from time to time by a majority of the members present and notice of the adjourned meeting need not be given.

Regulation 3

Agenda for Meetings

(1) Under the direction of the Chairman, the Secretary-General shall prepare a brief agenda for each meeting of the Administrative Council and shall transmit such agenda to each member with the notice of such meeting.

(2) Additional subjects may be placed on the agenda for any meeting of the Administrative Council by any member provided that he shall give notice thereof to the Secretary-General not less than seven days prior to the date set for such meeting. In special circumstances the Chairman, or the Secretary-General after consulting the Chairman, may at any time place additional subjects on the agenda for any meeting of the Council. The Secretary-General shall as promptly as possible give each member notice of the addition of any subject to the agenda for any meeting.
Appendix III

(3) The Administrative Council may at any time authorize any subject to be placed on the agenda for any meeting even though the notice required by this Regulation shall not have been given.

Regulation 4
Presiding Officer

(1) The Chairman shall be the Presiding Officer at meetings of the Administrative Council.

(2) If the Chairman is unable to preside over all or part of a meeting of the Council, one of the members of the Administrative Council shall act as temporary Presiding Officer. This member shall be the Representative, Alternate Representative or temporary Alternate Representative of that Contracting State represented at the meeting that stands highest on a list of Contracting States arranged chronologically according to the date of the deposit of instruments of ratification, acceptance or approval of the Convention, starting with the State following the one that had on the last previous occasion provided a temporary Presiding Officer. A temporary Presiding Officer may cast the vote of the State he represents, or he may assign another member of his delegation to do so.

Regulation 5
Secretary of the Council

(1) The Secretary-General shall serve as Secretary of the Administrative Council.

(2) Except as otherwise specifically directed by the Administrative Council, the Secretary-General, in consultation with the Chairman, shall have charge of all arrangements for the holding of meetings of the Council.

(3) The Secretary-General shall keep a summary record of the proceedings of the Administrative Council, copies of which shall be provided to all members.

(4) The Secretary-General shall present to each Annual Meeting of the Administrative Council, for its approval pursuant to Article 6(1)(g) of the Convention, the annual report on the operation of the Centre.

Regulation 6
Attendance at Meetings

(1) The Secretary-General and the Deputy Secretaries-General may attend all meetings of the Administrative Council.

(2) The Secretary-General, in consultation with the Chairman, may invite observers to attend any meeting of the Administrative Council.

Regulation 7
Voting

(1) Except as otherwise specifically provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. At any meeting the Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but he shall require a formal vote upon the request of any member. Whenever a formal vote is required the written text of the motion shall be distributed to the members.
Appendix III

(2) No member of the Administrative Council may vote by proxy or by any other method than in person, but the representative of a Contracting State may designate a temporary alternate to vote for him at any meeting at which the regular alternate is not present.

(3) Whenever, in the judgment of the Chairman, any action must be taken by the Administrative Council which should not be postponed until the next Annual Meeting of the Council and does not warrant the calling of a special meeting, the Secretary-General shall transmit to each member by any rapid means of communication a motion embodying the proposed action with a request for a vote by the members of the Council. Votes shall be cast during a period ending 21 days after such dispatch, unless a longer period is approved by the Chairman. At the expiration of the established period, the Secretary-General shall record the results and notify all members of the Council. If the replies received do not include those of a majority of the members, the motion shall be considered lost.

(4) Whenever at a meeting of the Administrative Council at which all Contracting States are not represented, the votes necessary to adopt a proposed decision by a majority of two-thirds of the members of the Council are not obtained, the Council with the concurrence of the Chairman may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members shall be solicited in accordance with paragraph (3) of this Regulation. Votes registered at the meeting may be changed by the member before the expiration of the voting period established pursuant to that paragraph.

Chapter II
The Secretariat
Regulation 8
Election of the Secretary-General and His Deputies

In proposing to the Administrative Council one or more candidates for the office of Secretary-General or any Deputy Secretary-General, the Chairman shall at the same time make proposals with respect to:

(a) the length of the term of service;
(b) approval for any of the candidates to hold, if elected, any other employment or to engage in any other occupation;
(c) the conditions of service, taking into account any proposals made pursuant to paragraph (b).

Regulation 9
Acting Secretary-General

(1) If, on the election of a Deputy Secretary-General, there should at any time be more than one Deputy Secretary-General, the Chairman shall immediately after such election propose to the Administrative Council the order in which these Deputies shall act as Secretary-General pursuant to Article 10(3) of the Convention. In the absence of such a decision the order shall be that of seniority in the post of Deputy.
Appendix III

(2) The Secretary-General shall designate the member of the staff of the Centre who shall act for him during his absence or inability to act, if all Deputy Secretaries-General should also be absent or unable to act or if the office of Deputy should be vacant. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chairman shall designate the member of the staff who shall act for the Secretary-General.

Regulation 10
Appointment of Staff Members
The Secretary-General shall appoint the members of the staff of the Centre. Appointments may be made directly or by secondment.

Regulation 11
Conditions of Employment
(1) The conditions of service of the members of the staff of the Centre shall be the same as those of the staff of the Bank.
(2) The Secretary-General shall make arrangements with the Bank, within the framework of the general administrative arrangements approved by the Administrative Council pursuant to Article 6(1)(d) of the Convention, for the participation of members of the Secretariat in the Staff Retirement Plan of the Bank as well as in other facilities and contractual arrangements established for the benefit of the staff of the Bank.

Regulation 12
Authority of the Secretary-General
(1) Deputy Secretaries-General and the members of the staff, whether on direct appointment or on secondment, shall act solely under the direction of the Secretary-General.
(2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. In the case of Deputy Secretaries-General dismissal may only be imposed with the concurrence of the Administrative Council.

Regulation 13
Incompatibility of Functions
The Secretary-General, the Deputy Secretaries-General and the members of the staff may not serve on the Panel of Conciliators or of Arbitrators, or as members of any Commission or Tribunal.

Chapter III
Financial Provisions
Regulation 14
Direct Costs of Individual Proceedings
(1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred,
Appendix III

each member of a Commission, a Tribunal or an ad hoc Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as “Committee”) shall receive:
(a) a fee for each day on which he participates in meetings of the body of which he is a member;
(b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;
(c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a per diem allowance based on the allowance established from time to time for the Executive Directors of the Bank;
(d) travel expenses in connection with meetings of the body of which he is a member based on the norms established from time to time for the Executive Directors of the Bank.

The amounts of the fees referred to in paragraphs (a) and (b) above shall be determined from time to time by the Secretary-General, with the approval of the Chairman. Any request for a higher amount shall be made through the Secretary-General.

(2) All payments, including reimbursement of expenses, to the following shall in all cases be made by the Centre and not by or through either party to the proceeding:
(a) members of Commissions, Tribunals and Committees;
(b) witnesses and experts summoned at the initiative of a Commission, Tribunal or Committee, and not of one of the parties;
(c) members of the Secretariat of the Centre, including persons (such as interpreters, translators, reporters or secretaries) especially engaged by the Centre for a particular proceeding;
(d) the host of any proceeding held away from the seat of the Centre pursuant to Article 63 of the Convention.

(3) In order to enable the Centre to make the payments provided for in paragraph (2), as well as to incur other direct expenses in connection with a proceeding (other than expenses covered by Regulation 15):
(a) the parties shall make advance payments to the Centre as follows:
   (i) initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;
   (ii) if at any time the Secretary-General determines, after consultation with the President of the body in question and as far as possible the parties, that the advances made by the parties will not cover a revised estimate of expenses for the period or any subsequent period, he shall request the parties to make supplementary advance payments.
(b) the Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or expenses of the members of any Commission, Tribunal or Committee, unless sufficient advance payments shall previously have been made;
Appendix III

(c) if the initial advance payments are insufficient to cover estimated future expenses, prior to requesting the parties to make additional advance payments, the Secretary-General shall ascertain the actual expenses incurred and commitments entered into by the Centre with regard to each proceeding and shall appropriately charge or credit the parties;

(d) in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;

(e) in the event that an application for annulment of an award is registered, the above provisions of this Rule shall apply mutatis mutandis, except that the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.

Regulation 15
Special Services to Parties

(1) The Centre shall only perform any special service for a party in connection with a proceeding (for example, the provision of translations or copies) if the party shall in advance have deposited an amount sufficient to cover the charge for such service.

(2) Charges for special services shall normally be based on a schedule of fees to be promulgated from time to time by the Secretary-General and communicated by him to all Contracting States as well as to the parties to all pending proceedings.

Regulation 16
Fee for Lodging Requests

The party or parties (if a request is made jointly) wishing to institute a conciliation or arbitration proceeding, requesting a supplementary decision to, or the
Appendix III
rectification, interpretation, revision or annulment of an arbitral award, or requesting
resubmission of a dispute to a new Tribunal after the annulment of an arbitral
award, shall pay to the Centre a non-refundable fee determined from time to time
by the Secretary-General.

Regulation 17
The Budget
(1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of
the following year.
(2) Before the end of each fiscal year the Secretary-General shall prepare and
submit, for adoption by the Administrative Council at its next Annual Meeting
and in accordance with Article 6(1)(f) of the Convention, a budget for the
following fiscal year. This budget is to indicate the expected expenditures of
the Centre (excepting those to be incurred on a reimbursable basis) and the
expected revenues (excepting reimbursements).
(3) If, during the course of a fiscal year, the Secretary-General determines that
the expected expenditures will exceed those authorized in the budget, or if he
should wish to incur expenditures not previously authorized, he shall, in
consultation with the Chairman, prepare a supplementary budget, which he
shall submit to the Administrative Council for adoption, either at the Annual
Meeting or at any other meeting, or in accordance with Regulation 7(3).
(4) The adoption of a budget constitutes authority for the Secretary-General
to make expenditures and incur obligations for the purposes and within the
limits specified in the budget. Unless otherwise provided by the Administra-
tive Council, the Secretary-General may exceed the amount specified for
any given budget item, provided that the total amount of the budget is not
exceeded.
(5) Pending the adoption of the budget by the Administrative Council, the Secretary-
General may incur expenditures for the purposes and within the limits specified
in the budget he submitted to the Council, up to one quarter of the amount
authorized to be expended in the previous fiscal year but in no event exceed-
ing the amount that the Bank has agreed to make available for the current
fiscal year.

Regulation 18
Assessment of Contributions
(1) Any excess of expected expenditures over expected revenues shall be assessed
on the Contracting States. Each State that is not a member of the Bank shall
be assessed a fraction of the total assessment equal to the fraction of the
budget of the International Court of Justice that it would have to bear if that
budget were divided only among the Contracting States in proportion to the
then current scale of contributions applicable to the budget of the Court; the
balance of the total assessment shall be divided among the Contracting States
that are members of the Bank in proportion to their respective subscription
to the capital stock of the Bank. The assessments shall be calculated by the
Secretary-General immediately after the adoption of the annual budget, on the
Appendix III

basis of the then current membership of the Centre, and shall be promptly communicated to all Contracting States. The assessments shall be payable as soon as they are thus communicated.

(2) On the adoption of a supplementary budget, the Secretary-General shall immediately calculate supplementary assessments, which shall be payable as soon as they are communicated to the Contracting States.

(3) A State which is party to the Convention during any part of a fiscal year shall be assessed for the entire fiscal year. If a State becomes a party to the Convention after the assessments for a given fiscal year have been calculated, its assessment shall be calculated by the application of the same appropriate factor as was applied in calculating the original assessments, and no recalculation of the assessments of the other Contracting States shall be made.

(4) If, after the close of a fiscal year, it is determined that there is a cash surplus, such surplus shall, unless the Administrative Council otherwise decides, be credited to the Contracting States in proportion to the assessed contributions they had paid for that fiscal year. These credits shall be made with respect to the assessments for the fiscal year commencing two years after the end of the fiscal year to which the surplus pertains.

Regulation 19
Audits

The Secretary-General shall have an audit of the accounts of the Centre made once each year and on the basis of this audit submit a financial statement to the Administrative Council for consideration at the Annual Meeting.

Chapter IV
General Functions of the Secretariat

Regulation 20
List of Contracting States

The Secretary-General shall maintain a list, which he shall transmit from time to time to all Contracting States and on request to any State or person, of the Contracting States (including former Contracting States, showing the date on which their notice of denunciation was received by the depositary), indicating for each:

(a) the date on which the Convention entered into force with respect to it;
(b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;
(c) any designation, pursuant to Article 25(1) of the Convention, of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;
(d) any notification, pursuant to Article 25(3) of the Convention, that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;
(e) any notification, pursuant to Article 25(4) of the Convention, of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;
Appendix III

(f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention;

(g) any legislative or other measures taken, pursuant to Article 69 of the Convention, for making its provisions effective in the territories of the State and communicated by the State to the Centre.

Regulation 21
Establishment of Panels

(1) Whenever a Contracting State has the right to make one or more designations to the Panel of Conciliators or of Arbitrators, the Secretary-General shall invite the State to make such designations.

(2) Each designation made by a Contracting State or by the Chairman shall indicate the name, address and nationality of the designee, and include a statement of his qualifications, with particular reference to his competence in the fields of law, commerce, industry and finance.

(3) As soon as the Secretary-General is notified of a designation, he shall inform the designee thereof, indicating to him the designating authority and the terminal date of the period of designation, and requesting confirmation that the designee is willing to serve.

(4) The Secretary-General shall maintain lists, which he shall transmit from time to time to all Contracting States and on request to any State or person, of the members of the Panels of Conciliators and of Arbitrators, indicating for each member:
   (a) his address;
   (b) his nationality;
   (c) the terminal date of the current designation;
   (d) the designating authority;
   (e) his qualifications.

Regulation 22
Publication

(1) The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.

(2) If both parties to a proceeding consent to the publication of:
   (a) reports of Conciliation Commissions;
   (b) arbitral awards; or
   (c) the minutes and other records of proceedings,
the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.
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Chapter V
Functions with Respect to Individual Proceedings

Regulation 23
The Registers

(1) The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.

(2) The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

Regulation 24
Means of Communication

(1) During the pendency of any proceeding the Secretary-General shall be the official channel of written communications among the parties, the Commission, Tribunal or Committee, and the Chairman of the Administrative Council, except that:
(a) the parties may communicate directly with each other unless the communication is one required by the Convention or the Institution, Conciliation or Arbitration Rules (hereinafter referred to as the “Rules”);
(b) the members of any Commission, Tribunal or Committee shall communicate directly with each other.

(2) Instruments and documents shall be introduced into the proceeding by transmitting them to the Secretary-General, who shall retain the original for the files of the Centre and arrange for appropriate distribution of copies. If the instrument or document does not meet the applicable requirements, the Secretary-General:
(a) shall inform the party submitting it of the deficiency, and of any consequent action the Secretary-General is taking;
(b) may, if the deficiency is merely a formal one, accept it subject to subsequent correction;
(c) may, if the deficiency consists merely of an insufficiency in the number of copies or the lack of required translations, provide the necessary copies or translations at the cost of the party concerned.

Regulation 25
Secretary

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from among the Secretariat of the Centre, and shall in any case, while serving in that capacity, be considered as a member of its staff. He shall:
Appendix III

(a) represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary;

(b) be the channel through which the parties may request particular services from the Centre;

(c) keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and

(d) perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General.

Regulation 26
Place of Proceedings

(1) The Secretary-General shall make arrangements for the holding of conciliation and arbitration proceedings at the seat of the Centre or shall, at the request of the parties and as provided in Article 63 of the Convention, make or supervise arrangements if proceedings are held elsewhere.

(2) The Secretary-General shall assist a Commission or Tribunal, at its request, in visiting any place connected with a dispute or in conducting inquiries there.

Regulation 27
Other Assistance

(1) The Secretary-General shall provide such other assistance as may be required in connection with all meetings of Commissions, Tribunals and Committees, in particular in making translations and interpretations from one official language of the Centre into another.

(2) The Secretary-General may also provide, by use of the staff and equipment of the Centre or of persons employed and equipment acquired on a short-time basis, other services required for the conduct of proceedings, such as the duplication and translation of documents, or interpretations from and to a language other than an official language of the Centre.

Regulation 28
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and shall make arrangements for the permanent retention of the original text:

(a) of the request and of all instruments and documents filed or prepared in connection with any proceeding, including the minutes of any hearing;

(b) of any report by a Commission or of any award or decision by a Tribunal or Committee.

(2) Subject to the Rules and to the agreement of the parties to particular proceedings, and upon payment of any charges in accordance with a schedule to be promulgated by the Secretary-General, he shall make available to the parties certified copies of reports and awards (reflecting thereon any supplementary
Appendix III

decision, rectification, interpretation, revision or annulment duly made, and any stay of enforcement while it is in effect), as well as of other instruments, documents and minutes.

Chapter VI
Special Provisions Relating to Proceedings

Regulation 29
Time Limits

(1) All time limits, specified in the Convention or the Rules or fixed by a Commission, Tribunal, Committee or the Secretary-General, shall be computed from the date on which the limit is announced in the presence of the parties or their representatives or on which the Secretary-General dispatches the pertinent notification or instrument (which date shall be marked on it). The day of such announcement or dispatch shall be excluded from the calculation.

(2) A time limit shall be satisfied if a notification or instrument dispatched by a party is delivered at the seat of the Centre, or to the Secretary of the competent Commission, Tribunal or Committee that is meeting away from the seat of the Centre, before the close of business on the indicated date or, if that day is a Saturday, a Sunday, a public holiday observed at the place of delivery or a day on which for any reason regular mail delivery is restricted at the place of delivery, then before the close of business on the next subsequent day on which regular mail service is available.

Regulation 30
Supporting Documentation

(1) Documentation filed in support of any request, pleading, application, written observation or other instrument introduced into a proceeding shall consist of one original and of the number of additional copies specified in paragraph (2). The original shall, unless otherwise agreed by the parties or ordered by the competent Commission, Tribunal or Committee, consist of the complete document or of a duly certified copy or extract, except if the party is unable to obtain such document or certified copy or extract (in which case the reason for such inability must be stated).

(2) The number of additional copies of any document shall be equal to the number of additional copies required of the instrument to which the documentation relates, except that no such copies are required if the document has been published and is readily available. Each additional copy shall be certified by the party presenting it to be a true and complete copy of the original, except that if the document is lengthy and relevant only in part, it is sufficient if it is certified to be a true and complete extract of the relevant parts, which must be precisely specified.

(3) Each original and additional copy of a document which is not in a language approved for the proceeding in question, shall, unless otherwise ordered by the competent Commission, Tribunal or Committee, be accompanied by a certified translation into such a language. However, if the document is lengthy and relevant only in part, it is sufficient if only the relevant parts, which must
Appendix III

be precisely specified, are translated, provided that the competent body may require a fuller or a complete translation.

(4) Whenever an extract of an original document is presented pursuant to paragraph (1) or a partial copy or translation pursuant to paragraph (2) or (3), each such extract, copy and translation shall be accompanied by a statement that the omission of the remainder of the text does not render the portion presented misleading.

Chapter VII
Immunities and Privileges

Regulation 31
Certificates of Official Travel

The Secretary-General may issue certificates to members of Commissions, Tribunals or Committees, to officers and employees of the Secretariat and to the parties, agents, counsel, advocates, witnesses and experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Convention.

Regulation 32
Waiver of Immunities

(1) The Secretary-General may waive the immunity of:
   (a) the Centre;
   (b) members of the staff of the Centre.

(2) The Chairman of the Council may waive the immunity of:
   (a) the Secretary-General or any Deputy Secretary-General;
   (b) members of a Commission, Tribunal or Committee;
   (c) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, if a recommendation for such waiver is made by the Commission, Tribunal or Committee concerned.

(3) The Administrative Council may waive the immunity of:
   (a) the Chairman and members of the Council;
   (b) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned;
   (c) the Centre or any person mentioned in paragraph (1) or (2).

Chapter VIII
Miscellaneous

Regulation 33
Communications with Contracting States

Unless another channel of communications is specified by the State concerned, all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State’s representative on the Administrative Council.
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Regulation 34
Official Languages

(1) The official languages of the Centre shall be English, French and Spanish.
(2) The texts of these Regulations in each official language shall be equally authentic.
Appendix IV. Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules)

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The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention.

The Institution Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 16, 22(1), 23, 24, 30 and 34(1).

The Institution Rules are restricted in scope to the period of time from the filing of a request to the dispatch of the notice of registration. All transactions subsequent to that time are to be regulated in accordance with the Conciliation and the Arbitration Rules.

Institution Rules

Rule 1

The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation or arbitration proceedings under the Convention shall address a request to that effect in writing to the Secretary-General at the seat of the Centre. The request shall indicate whether it relates to a conciliation or an arbitration proceeding. It shall be drawn up in an official language of the Centre, shall be dated, and shall be signed by the requesting party or its duly authorized representative.

(2) The request may be made jointly by the parties to the dispute.

Rule 2

Contents of the Request

(1) The request shall:
(a) designate precisely each party to the dispute and state the address of each;
(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;
(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;
(d) indicate with respect to the party that is a national of a Contracting State:
   (i) its nationality on the date of consent; and
   (ii) if the party is a natural person:
      (A) his nationality on the date of the request; and
      (B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or
   (iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;
Appendix IV

(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.

(2) The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.

(3) “Date of consent” means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

Rule 3

Optional Information in the Request

The request may in addition set forth any provisions agreed by the parties regarding the number of conciliators or arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.

Rule 4

Copies of the Request

(1) The request shall be accompanied by five additional signed copies. The Secretary-General may require such further copies as he may deem necessary.

(2) Any documentation submitted with the request shall conform to the requirements of Administrative and Financial Regulation 30.

Rule 5

Acknowledgement of the Request

(1) On receiving a request the Secretary-General shall:

(a) send an acknowledgement to the requesting party;

(b) take no other action with respect to the request until he has received payment of the prescribed fee.

(2) As soon as he has received the fee for lodging the request, the Secretary-General shall transmit a copy of the request and of the accompanying documentation to the other party.

Rule 6

Registration of the Request

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

(a) register the request in the Conciliation or the Arbitration Register and on the same day notify the parties of the registration; or

(b) if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of his refusal to register the request and of the reasons therefor.

(2) A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.
Appendix IV

Rule 7
Notice of Registration
The notice of registration of a request shall:
(a) record that the request is registered and indicate the date of the registration and of the dispatch of that notice;
(b) notify each party that all communications and notices in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Centre;
(c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the conciliators or arbitrators;
(d) invite the parties to proceed, as soon as possible, to constitute a Conciliation Commission in accordance with Articles 29 to 31 of the Convention, or an Arbitral Tribunal in accordance with Articles 37 to 40;
(e) remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission or Arbitral Tribunal in regard to jurisdiction, competence and the merits; and
(f) be accompanied by a list of the members of the Panel of Conciliators or of Arbitrators of the Centre.

Rule 8
Withdrawal of the Request
The requesting party may, by written notice to the Secretary-General, withdraw the request before it has been registered. The Secretary-General shall promptly notify the other party, unless, pursuant to Rule 5(1)(b), the request had not been transmitted to it.

Rule 9
Final Provisions
(1) The texts of these Rules in each official language of the Centre shall be equally authentic.
(2) These Rules may be cited as the “Institution Rules” of the Centre.
Appendix V. Rules of Procedure for Conciliation Proceedings (Conciliation Rules)

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The Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Conciliation Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 14-16, 22-31 and 34(1).

The Conciliation Rules cover the period of time from the dispatch of the notice of registration of a request for conciliation until a report is drawn up. The transactions previous to that time are to be regulated in accordance with the Institution Rules.

Conciliation Rules

Chapter I

Establishment of the Commission

Rule 1

General Obligations

(1) Upon notification of the registration of the request for conciliation, the parties shall, with all possible dispatch, proceed to constitute a Commission, with due regard to Section 2 of Chapter III of the Convention.

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of conciliators and the method of their appointment.

Rule 2

Method of Constituting the Commission in the Absence of Previous Agreement

(1) If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators 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 conciliator or of a specified uneven number of conciliators 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 conciliators 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.
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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 29(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Commission is to be constituted in accordance with that Article.

Rule 3
Appointment of Conciliators to a Commission Constituted in Accordance with Convention Article 29(2)(b)

(1) If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention:
(a) either party shall, in a communication to the other party:
   (i) name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and
   (ii) invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;
(b) promptly upon receipt of this communication the other party shall, in its reply:
   (i) name a person as the conciliator appointed by it; and
   (ii) concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator 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 conciliator proposed by that party to be the President of the Commission.

(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 4
Appointment of Conciliators by the Chairman of the Administrative Council

(1) If the Commission is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the conciliator or conciliators not yet appointed and to designate a conciliator to be the President of the Commission.
Appendix V

(2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the conciliators shall elect the President of the Commission and they fail to do so.

(3) The Secretary-General shall forthwith send a copy of the request to the other party.

(4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Article 31(1) of the Convention, he shall consult both parties as far as possible.

(5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5

Acceptance of Appointments

(1) The party or parties concerned shall notify the Secretary-General of the appointment of each conciliator and indicate the method of his appointment.

(2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of a conciliator, he shall seek an acceptance from the appointee.

(3) If a conciliator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another conciliator in accordance with the method followed for the previous appointment.

Rule 6

Constitution of the Commission

(1) The Commission shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the conciliators have accepted their appointment.

(2) Before or at the first session of the Commission, each conciliator shall sign a declaration in the following form:

“To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between __ and __.

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Commission.

“I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

“A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto.”

Any conciliator failing to sign such a declaration by the end of the first session of the Commission shall be deemed to have resigned.
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Rule 7
Replacement of Conciliators

At any time before the Commission is constituted, each party may replace any conciliator appointed by it and the parties may by common consent agree to replace any conciliator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8
Incapacity or Resignation of Conciliators

(1) If a conciliator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of conciliators set forth in Rule 9 shall apply.

(2) A conciliator may resign by submitting his resignation to the other members of the Commission and the Secretary-General. If the conciliator was appointed by one of the parties, the Commission shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Commission shall promptly notify the Secretary-General of its decision.

Rule 9
Disqualification of Conciliators

(1) A party proposing the disqualification of a conciliator pursuant to Article 57 of the Convention shall promptly, and in any event before the Commission first recommends terms of settlement of the dispute to the parties or when the proceeding is closed (whichever occurs earlier), file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:
   (a) transmit the proposal to the members of the Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman of the Administrative Council; and
   (b) notify the other party of the proposal.

(3) The conciliator to whom the proposal relates may, without delay, furnish explanations to the Commission or the Chairman, as the case may be.

(4) Unless the proposal relates to a majority of the members of the Commission, the other members shall promptly consider and vote on the proposal in the absence of the conciliator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the conciliator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify a conciliator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

(6) The proceeding shall be suspended until a decision has been taken on the proposal.
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Rule 10
Procedure during a Vacancy on the Commission

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of a conciliator and of the consent, if any, of the Commission to a resignation.

(2) Upon the notification by the Secretary-General of a vacancy on the Commission, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11
Filling Vacancies on the Commission

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of a conciliator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to conciliators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Conciliators:
   (a) to fill a vacancy caused by the resignation, without the consent of the Commission, of a conciliator appointed by a party; or
   (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, mutatis mutandis, 6(2).

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Commission has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed conciliator may, however, require that any hearings be repeated in whole or in part.

Chapter II
Working of the Commission

Rule 13
Sessions of the Commission

(1) The Commission shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Commission after consultation with its members and the Secretary-General. If upon its constitution the Commission has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.
Appendix V

(2) The dates of subsequent sessions shall be determined by the Commission, after consultation with the Secretary-General and with the parties as far as possible.

(3) The Commission shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Commission. Failing such approval, the Commission shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Commission and the parties of the dates and place of the sessions of the Commission in good time.

Rule 14

Sittings of the Commission

(1) The President of the Commission shall conduct its hearings and preside at its deliberations.

(2) Except as the parties otherwise agree, the presence of a majority of the members of the Commission shall be required at its sittings.

(3) The President of the Commission shall fix the date and hour of its sittings.

Rule 15

Deliberations of the Commission

(1) The deliberations of the Commission shall take place in private and remain secret.

(2) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

Rule 16

Decisions of the Commission

(1) Decisions of the Commission shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

(2) Except as otherwise provided by these Rules or decided by the Commission, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Commission.

Rule 17

Incapacity of the President

If at any time the President of the Commission should be unable to act, his functions shall be performed by one of the other members of the Commission, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Commission.
Rule 18
Representation of the Parties
(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Commission and the other party.
(2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter III
General Procedural Provisions
Rule 19
Procedural Orders
The Commission shall make the orders required for the conduct of the proceeding.

Rule 20
Preliminary Procedural Consultation
(1) As early as possible after the constitution of a Commission, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:
(a) the number of members of the Commission required to constitute a quorum at its sittings;
(b) the language or languages to be used in the proceeding;
(c) the evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
(d) the number of copies desired by each party of instruments filed by the other; and
(e) the manner in which the record of the hearings shall be kept.
(2) In the conduct of the proceeding the Commission shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21
Procedural Languages
(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that, if they agree on any language that is not an official language of the Centre, the Commission, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.
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(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Commission so requires, to translation and interpretation. The recommendations and the report of the Commission shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Chapter IV
Conciliation Procedures

Rule 22
Functions of the Commission

(1) In order to clarify the issues in dispute between the parties, the Commission shall hear the parties and shall endeavor to obtain any information that might serve this end. The parties shall be associated with its work as closely as possible.

(2) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make—orally or in writing—recommendations to the parties. It may recommend that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute; it shall point out to the parties the arguments in favor of its recommendations. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made.

(3) The Commission, in order to obtain information that might enable it to discharge its functions, may at any stage of the proceeding:
(a) request from either party oral explanations, documents and other information;
(b) request evidence from other persons; and
(c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.

Rule 23
Cooperation of the Parties

(1) The parties shall cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call. The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake.

(2) The parties shall comply with any time limits agreed with or fixed by the Commission.

Rule 24
Transmission of the Request

As soon as the Commission is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the
supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

**Rule 25**

**Written Statements**

1. Upon the constitution of the Commission, its President shall invite each party to file, within 30 days or such longer time limit as he may fix, a written statement of its position. If, upon its constitution, the Commission has no President, such invitation shall be issued and any such longer time limit shall be fixed by the Secretary-General. At any stage of the proceeding, within such time limits as the Commission shall fix, either party may file such other written statements as it deems useful and relevant.

2. Except as otherwise provided by the Commission after consultation with the parties and the Secretary-General, every written statement or other instrument shall be filed in the form of a signed original accompanied by additional copies whose number shall be two more than the number of members of the Commission.

**Rule 26**

**Supporting Documentation**

1. Every written statement or other instrument filed by a party may be accompanied by supporting documentation, in such form and number of copies as required by Administrative and Financial Regulation 30.

2. Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

**Rule 27**

**Hearings**

1. The hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret.

2. The Commission shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Commission may attend the hearings.

**Rule 28**

**Witnesses and Experts**

1. Each party may, at any stage of the proceeding, request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission shall fix a time limit within which such hearing shall take place.

2. Witnesses and experts shall, as a rule, be examined before the Commission by the parties under the control of its President. Questions may also be put to them by any member of the Commission.

3. If a witness or expert is unable to appear before it, the Commission, in agreement with the parties, may make appropriate arrangements for the evidence
Appendix V

to be given in a written deposition or to be taken by examination elsewhere. The parties may participate in any such examination.

Chapter V
Termination of the Proceeding

Rule 29
Objections to Jurisdiction

(1) Any objection that the dispute is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Commission shall be made as early as possible. A party shall file the objection with the Secretary-General no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time.

(2) The Commission may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission shall obtain the views of the parties on the objection.

(4) The Commission may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Commission overrules the objection or joins it to the merits, it shall resume consideration of the latter without delay.

(5) If the Commission decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall close the proceeding and draw up a report to that effect, in which it shall state its reasons.

Rule 30
Closure of the Proceeding

(1) If the parties reach agreement on the issues in dispute, the Commission shall close the proceeding and draw up its report noting the issues in dispute and recording that the parties have reached agreement. At the request of the parties, the report shall record the detailed terms and conditions of their agreement.

(2) If at any stage of the proceeding it appears to the Commission that there is no likelihood of agreement between the parties, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of the parties to reach agreement.

(3) If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Rule 31
Preparation of the Report

The report of the Commission shall be drawn up and signed within 60 days after the closure of the proceeding.
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Rule 32
The Report

(1) The report shall be in writing and shall contain, in addition to the material specified in paragraph (2) and in Rule 30:
   (a) a precise designation of each party;
   (b) a statement that the Commission was established under the Convention, and a description of the method of its constitution;
   (c) the names of the members of the Commission, 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 Commission; and
   (f) a summary of the proceeding.

(2) The report shall also record any agreement of the parties, pursuant to Article 35 of the Convention, concerning the use in other proceedings of the views expressed or statements or admissions or offers of settlement made in the proceeding before the Commission or of the report or any recommendation made by the Commission.

(3) The report shall be signed by the members of the Commission; the date of each signature shall be indicated. The fact that a member refuses to sign the report shall be recorded therein.

Rule 33
Communication of the Report

(1) Upon signature by the last conciliator to sign, the Secretary-General shall promptly:
   (a) authenticate the original text of the report and deposit it in the archives of the Centre; and
   (b) dispatch a certified copy to each party, indicating the date of dispatch on the original text and on all copies.

(2) The Secretary-General shall, upon request, make available to a party additional certified copies of the report.

(3) The Centre shall not publish the report without the consent of the parties.

Chapter VI
General Provisions

Rule 34
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the “Conciliation Rules” of the Centre.
Appendix VI. Rules of Procedure for Arbitration Proceedings
(Arbitration Rules)

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The Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulations 14-16, 22-31 and 34(1).

The Arbitration Rules cover the period of time from the dispatch of the notice of registration of a request for arbitration until an award is rendered and all challenges possible to it under the Convention have been exhausted. The transactions previous to that time are to be regulated in accordance with the Institution Rules.

Arbitration Rules

Chapter I

Establishment of the Tribunal

Rule 1

General Obligations

(1) Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

(3) The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

(4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.

Rule 2

Method of Constituting the Tribunal in the Absence of Previous Agreement

(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;
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(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 3
Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)

(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 4
Appointment of Arbitrators by the Chairman of
the Administrative Council

(1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.

(2) The provision of paragraph (1) shall apply mutatis mutandis in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.

(3) The Secretary-General shall forthwith send a copy of the request to the other party.

(4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Articles 38 and 40(1) of the Convention, he shall consult both parties as far as possible.

(5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5
Acceptance of Appointments

(1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.

(2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee.

(3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

Rule 6
Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

“To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between ____ and ____.”
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“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

“I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

“Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Rule 7
Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8
Incapacity or Resignation of Arbitrators

(1) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.

(2) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Rule 9
Disqualification of Arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:
(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
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(b) notify the other party of the proposal.

(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.

(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

(6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10
Procedure during a Vacancy on the Tribunal

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.

(2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11
Filling Vacancies on the Tribunal

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:
   (a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or
   (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, mutatis mutandis, 6(2).

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.
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Chapter II

Working of the Tribunal

Rule 13

Sessions of the Tribunal

(1) The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. If upon its constitution the Tribunal has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.

(2) The dates of subsequent sessions shall be determined by the Tribunal, after consultation with the Secretary-General and with the parties as far as possible.

(3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

Rule 14

Sittings of the Tribunal

(1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.

(2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.

(3) The President of the Tribunal shall fix the date and hour of its sittings.

Rule 15

Deliberations of the Tribunal

(1) The deliberations of the Tribunal shall take place in private and remain secret.

(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

Rule 16

Decisions of the Tribunal

(1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

(2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.
Rule 17
Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

Rule 18
Representation of the Parties

(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

(2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

Chapter III
General Procedural Provisions

Rule 19
Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding.

Rule 20
Preliminary Procedural Consultation

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;
(b) the language or languages to be used in the proceeding;
(c) the number and sequence of the pleadings and the time limits within which they are to be filed;
(d) the number of copies desired by each party of instruments filed by the other;
(e) dispensing with the written or the oral procedure;
(f) the manner in which the cost of the proceeding is to be apportioned; and
(g) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21
Pre-Hearing Conference

(1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties...
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may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

(2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Rule 22
Procedural Languages

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e., English, French and Spanish) for this purpose.

(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 23
Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

(a) before the number of members of the Tribunal has been determined: five;
(b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Rule 24
Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 25
Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.
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Rule 26
Time Limits
(1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.

(2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Rule 27
Waiver
A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.

Rule 28
Cost of Proceeding
(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
   (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
   (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

Chapter IV
Written and Oral Procedures
Rule 29
Normal Procedures
Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.
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Rule 30
Transmission of the Request
As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 31
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.
(2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however, the parties may instead agree that one of them shall, for the purposes of paragraph (1), be considered as the requesting 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.

Rule 32
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.

Rule 33
Marshalling of Evidence
Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-
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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.

Rule 34
Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:
(a) call upon the parties to produce documents, witnesses and experts; and
(b) visit any place connected with the dispute or conduct inquiries there.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Rule 35
Examination of Witnesses and Experts

(1) Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.

(2) Each witness shall make the following declaration before giving his evidence:
“I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth.”

(3) Each expert shall make the following declaration before making his statement:
“I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.”

Rule 36
Witnesses and Experts: Special Rules

Notwithstanding Rule 35 the Tribunal may:
(a) admit evidence given by a witness or expert in a written deposition; and
(b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination.
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Rule 37
Visits and Inquiries; Submissions of Non-disputing Parties

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 38
Closure of the Proceeding

(1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.

(2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

Chapter V
Particular Procedures

Rule 39
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).
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(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Rule 40
Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41
Preliminary Objections

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the
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Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

Rule 42

Default

(1) If a party (in this Rule called the “defaulting party”) fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.

(2) The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:

(a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or

(b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

The period of grace shall not, without the consent of the other party, exceed 60 days.

(3) After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party.

(4) The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.
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Rule 43 
Settlement and Discontinuance 
(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding. 
(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

Rule 44 
Discontinuance at Request of a Party 
If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

Rule 45 
Discontinuance for Failure of Parties to Act 
If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

Chapter VI 
The Award 
Rule 46 
Preparation of the Award 
The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.

Rule 47 
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;
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(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.

Rule 48

Rendering of the Award

(1) Upon signature by the last arbitrator to sign, the Secretary-General shall
promptly:
(a) authenticate the original text of the award and deposit it in the archives
   of the Centre, together with any individual opinions and statements of
dissent; and
(b) dispatch a certified copy of the award (including individual opinions and
    statements of dissent) to each party, indicating the date of dispatch on
    the original text and on all copies.

(2) The award shall be deemed to have been rendered on the date on which the
certified copies were dispatched.

(3) The Secretary-General shall, upon request, make available to a party addi-
tional certified copies of the award.

(4) The Centre shall not publish the award without the consent of the parties. The
Centre shall, however, promptly include in its publications excerpts of the
legal reasoning of the Tribunal.

Rule 49

Supplementary Decisions and Rectification

(1) Within 45 days after the date on which the award was rendered, either party
may request, pursuant to Article 49(2) of the Convention, a supplementary
decision on, or the rectification of, the award. Such a request shall be
addressed in writing to the Secretary-General. The request shall:
(a) identify the award to which it relates;
(b) indicate the date of the request;
(c) state in detail:
   (i) any question which, in the opinion of the requesting party, the
       Tribunal omitted to decide in the award; and
   (ii) any error in the award which the requesting party seeks to have
        rectified; and
(d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall
forthwith:
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(a) register the request;
(b) notify the parties of the registration;
(c) transmit to the other party a copy of the request and of any accompanying documentation; and
(d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

(3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

(4) Rules 46–48 shall apply, mutatis mutandis, to any decision of the Tribunal pursuant to this Rule.

(5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.

Chapter VII
Interpretation, Revision and Annulment of the Award

Rule 50

The Application

(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:
(a) identify the award to which it relates;
(b) indicate the date of the application;
(c) state in detail:
   (i) in an application for interpretation, the precise points in dispute;
   (ii) in an application for revision, pursuant to Article 51(1) of the Convention, the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant’s ignorance of that fact was not due to negligence;
   (iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:
      – that the Tribunal was not properly constituted;
      – that the Tribunal has manifestly exceeded its powers;
      – that there was corruption on the part of a member of the Tribunal;
      – that there has been a serious departure from a fundamental rule of procedure;
      – that the award has failed to state the reasons on which it is based;
   (d) be accompanied by the payment of a fee for lodging the application.
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(2) Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:
   (a) register the application;
   (b) notify the parties of the registration; and
   (c) transmit to the other party a copy of the application and of any accompanying documentation.

(3) The Secretary-General shall refuse to register an application for:
   (a) revision, if, in accordance with Article 51(2) of the Convention, it is not made within 90 days after the discovery of the new fact and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction);
   (b) annulment, if, in accordance with Article 52(2) of the Convention, it is not made:
      (i) within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds:
         – the Tribunal was not properly constituted;
         – the Tribunal has manifestly exceeded its powers;
         – there has been a serious departure from a fundamental rule of procedure;
         – the award has failed to state the reasons on which it is based;
      (ii) in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).

(4) If the Secretary-General refuses to register an application for revision, or annulment, he shall forthwith notify the requesting party of his refusal.

Rule 51
Interpretation or Revision:
Further Procedures

(1) Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:
   (a) transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and
   (b) request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.

(2) If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as
soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

**Rule 52**

**Annulment: Further Procedures**

(1) Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an ad hoc Committee in accordance with Article 52(3) of the Convention.

(2) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Before or at the first session of the Committee, each member shall sign a declaration conforming to that set forth in Rule 6(2).

**Rule 53**

**Rules of Procedure**

The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.

**Rule 54**

**Stay of Enforcement of the Award**

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.
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(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

Rule 55
Resubmission of Dispute after an Annulment

(1) If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. Such a request shall be addressed in writing to the Secretary-General and shall:
   (a) identify the award to which it relates;
   (b) indicate the date of the request;
   (c) explain in detail what aspect of the dispute is to be submitted to the Tribunal; and
   (d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
   (a) register it in the Arbitration Register;
   (b) notify both parties of the registration;
   (c) transmit to the other party a copy of the request and of any accompanying documentation; and
   (d) invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

(3) If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in accordance with the procedures set forth in Rule 54, stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

(4) Except as otherwise provided in paragraphs (1)–(3), these Rules shall apply to a proceeding on a resubmitted dispute in the same manner as if such dispute had been submitted pursuant to the Institution Rules.

Chapter VIII
General Provisions

Rule 56
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the “Arbitration Rules” of the Centre.
Appendix VII. Report of the Executive Directors on the Convention

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1. Resolution No. 214, adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964, provides as follows:

“RESOLVED:
(a) The report of the Executive Directors on “Settlement of Investment Disputes,” dated August 6, 1964, is hereby approved.
(b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.
(c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.
(d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate.”

2. The Executive Directors of the Bank, acting pursuant to the foregoing Resolution, have formulated a Convention on the Settlement of Investment Disputes between States and Nationals of Other States and, on March 18, 1965, approved the submission of the text of the Convention, as attached hereto, to member governments of the Bank. This action by the Executive Directors does not, of course, imply that the governments represented by the individual Executive Directors are committed to take action on the Convention.

3. The action by the Executive Directors was preceded by extensive preparatory work, details of which are given in paragraphs 6–8 below. The Executive Directors are satisfied that the Convention in the form attached hereto represents a broad consensus of the views of those governments which accept the principle of establishing by inter-governmental agreement facilities and procedures for the settlement of investment disputes which States and foreign investors wish to submit to conciliation or arbitration. They are also satisfied that the Convention constitutes a suitable framework for such facilities and procedures. Accordingly, the text of the Convention is submitted to member governments for consideration with a view to signature and ratification, acceptance or approval.

4. The Executive Directors invite attention to the provision of Article 68(2) pursuant to which the Convention will enter into force as between the Contracting States 30 days after deposit with the Bank, the depositary of the Convention, of the twentieth instrument of ratification, acceptance or approval.
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5. The attached text of the Convention in the English, French and Spanish languages has been deposited in the archives of the Bank, as depositary, and is open for signature.

II

6. The question of the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between States and foreign investors was first placed before the Board of Governors of the Bank at its Seventeenth Annual Meeting, held in Washington, D.C. in September 1962. At that Meeting the Board of Governors, by Resolution No. 174, adopted on September 18, 1962, requested the Executive Directors to study the question.

7. After a series of informal discussions on the basis of working papers prepared by the staff of the Bank, the Executive Directors decided that the Bank should convene consultative meetings of legal experts designated by member governments to consider the subject in greater detail. The consultative meetings were held on a regional basis in Addis Ababa (December 16–20, 1963), Santiago de Chile (February 3–7, 1964), Geneva (February 17–21, 1964) and Bangkok (April 27–May 1, 1964), with the administrative assistance of the United Nations Economic Commissions and the European Office of the United Nations, and took as the basis for discussion a Preliminary Draft of a Convention on Settlement of Investment Disputes between States and Nationals of Other States prepared by the staff of the Bank in the light of the discussions of the Executive Directors and the views of governments. The meetings were attended by legal experts from 86 countries.

8. In the light of the preparatory work and of the views expressed at the consultative meetings, the Executive Directors reported to the Board of Governors at its Nineteenth Annual Meeting in Tokyo, in September 1964, that it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-governmental agreement. The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task. This Committee met in Washington from November 23 through December 11, 1964, and the Executive Directors gratefully acknowledge the valuable advice they received from the representatives of the 61 member countries who served on the Committee.
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III

9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

10. The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.

11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.

12. The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

13. While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.

14. The provisions of the attached Convention are for the most part self-explanatory. Brief comment on a few principal features may, however, be useful to member governments in their consideration of the Convention.
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IV

The International Centre for Settlement of Investment Disputes

General

15. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is “to provide facilities for conciliation and arbitration of investment disputes * * *” (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

16. As sponsor of the establishment of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).

17. With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank’s headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the Centre for a period of years to be determined after the Centre is established.

18. Simplicity and economy consistent with the efficient discharge of the functions of the Centre characterize its structure. The organs of the Centre are the Administrative Council (Articles 4–8) and the Secretariat (Article 9–11). The Administrative Council will be composed of one representative of each Contracting State, serving without remuneration from the Centre. Each member of the Council casts one vote and matters before the Council are decided by a majority of the votes cast unless a different majority is required by the Convention. The President of the Bank will serve ex officio as the Council’s Chairman but will have no vote. The Secretariat will consist of a Secretary-General, one or more Deputy Secretaries-General and staff. In the interest of flexibility the Convention provides for the possibility of there being more than one Deputy Secretary-General, but the Executive Directors do not now foresee a need for more than one or two full time high officials of the Centre. Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, limits their terms of office to a period not exceeding six years and permits their re-election. The Executive Directors believe that the initial election, which will take place shortly after the Convention will have come into force, should be for a short term so as not to deprive the States which ratify the Convention after its entry into force of
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the possibility of participating in the selection of the high officials of the Centre. Article 10 also limits the extent to which these officials may engage in activities other than their official functions.

Functions of the Administrative Council

19. The principal functions of the Administrative Council are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of the Centre and the adoption of administrative and financial regulations, rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of two-thirds of the members of the Council.

Functions of the Secretary-General

20. The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre (Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is *manifestly* outside the jurisdiction of the Centre (Article 28(3) and 36(3)). The Secretary-General is given this limited power to “screen” requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.

The Panels

21. Article 3 requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators, while Articles 12–16 outline the manner and terms of designation of Panel members. In particular, Article 14(1) seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the Panels but requires (Articles 31(2) and 40(2)) that such appointees possess the qualities stated in Article 14(1). The Chairman, when called upon to appoint a conciliator or arbitrator pursuant to Article 30 or 38, is restricted in his choice to Panel members.
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V
Jurisdiction of the Centre

22. The term “jurisdiction of the Centre” is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25–27).

Consent

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromis regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Nature of the Dispute

26. Article 25(1) requires that the dispute must be a “legal dispute arising directly out of an investment.” The expression “legal dispute” has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

27. No attempt was made to define the term “investment” given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).
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Parties to the Dispute

28. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a “national of another Contracting State.” The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.

29. It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

30. Clause (b) of Article 25(2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

Notifications by Contracting States

31. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

Arbitration as Exclusive Remedy

32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This
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rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

Claims by the Investor’s State

33. When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.

VI
Proceedings under the Convention

Institution of Proceedings

34. Proceedings are instituted by means of a request addressed to the Secretary-General (Articles 28 and 36). After registration of the request the Conciliation Commission or Arbitral Tribunal, as the case may be, will be constituted. Reference is made to paragraph 20 above on the power of the Secretary-General to refuse registration.

Constitution of Conciliation Commissions and Arbitral Tribunals

35. Although the Convention leaves the parties a large measure of freedom as regards the constitution of Commissions and Tribunals, it assures that a lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings (Articles 29–30 and 37–38, respectively).

36. Mention has already been made of the fact that the parties are free to appoint conciliators and arbitrators from outside the Panels (see paragraph 21 above). While the Convention does not restrict the appointment of conciliators with reference to nationality, Article 39 lays down the rule that the majority of the members of an Arbitral Tribunal should not be nationals of the State party to the dispute or of the State whose national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal composed of not more than three members. However, the rule will not apply where each and every arbitrator on the Tribunal has been appointed by agreement of the parties.
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Conciliation Proceedings; Powers and Functions of Arbitral Tribunals

37. In general, the provisions of Articles 32–35 dealing with conciliation proceedings and of Articles 41–49, dealing with the powers and functions of Arbitral Tribunals and awards rendered by such Tribunals, are self-explanatory. The differences between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.

38. Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration (see paragraph 20 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.

39. In keeping with the consensual character of proceedings under the Convention, the parties to conciliation or arbitration proceedings may agree on the rules of procedure which will apply in those proceedings. However, if or to the extent that they have not so agreed the Conciliation Rules and Arbitration Rules adopted by the Administrative Council will apply (Articles 33 and 44).

40. Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term “international law” as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.¹

¹. Article 38(1) of the Statute of the International Court of Justice reads as follows:

“1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”
Appendix VII

Recognition and Enforcement of Arbitral Awards

41. Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).

42. Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.

43. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

VII

Place of Proceedings

44. In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

VIII

Disputes Between Contracting States

45. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application
Appendix VII

of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.

IX

Entry into Force

46. The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States joining before the Convention enters into force and those joining thereafter (Article 67). The Convention is subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures (Article 68). As already stated, the Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.
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