> 11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the dispute 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given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.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 large 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."[6]

In sum, the Executive Directors of the World Bank underscored the importance of the balance inherent in the Convention: the basic goal of the ICSID system is to promote much-needed international investment by offering a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary

6 "Report of the Executive Directors", *supra* note 4, at 25.

of nationalistic decisions by local courts and to host States that are (rightly or wrongly) wary of self-interested actions by foreign investors.

The Preamble of the Convention itself underlines this economic goal, and the operational objective of establishing an effective regime for neutral resolution of investment disputes that is attractive to States and investors alike:

> "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:" (emphasis in original).

The Convention then proceeds to its ten chapters and 75 articles, with aspirational language giving way to detailed legal procedures. As explained by Ibrahim Shihata, who served as the Secretary-General of ICSID from 1983 to 2000, the goal of the Convention in creating ICSID was "to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to 'depoliticize' the settlement of investment disputes".[7]

The view from here

How has ICSID measured up against the goals set out in the Preamble and expressed by the Executive Directors in 1965? If this question were posed in the 1970s or 1980s, the answer would have to be qualified. There were few ICSID cases then and scant evidence that ICSID clauses were prevalent in international investment contracts.

The answer today is very different. On average, 27 cases have been registered annually with ICSID in recent years, with a peak of 37 cases in 2007.

This increase is due in large part to the proliferation of BITs and other international agreements with investment protection provisions, which contain dispute resolution provisions offering ICSID arbitration in the event of disputes. At the end of 2008, the total number of BITs worldwide reached a record 2,676, with the total number of other international agreements with investment provisions having reached 273.[8] Similarly, global foreign direct investment flows reached a historic record of US$1.9 trillion in 2007, before falling an estimated 15 percent in 2008 in the face of the global financial crisis.[9] The fact that many, if not most, BITs and international investment agreements include the option of ICSID dispute resolution perhaps confirms the connection between increased

7 I. Shihata, "Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA", *ICSID Review – FILJ* 1 (1986): 4.

8 UNCTAD, "Recent Developments in International Investment Agreements (2008–June 2009)", *IIA Monitor* No. 3 (2009), <www.unctad.org/en/docs/webdiaeia20098_en.pdf>.

9 UNCTAD, "Assessing the Impact of the Current Financial and Economic Crisis on Global FDI Flows", <www.unctad.org/en/docs/diaeia20093_en.pdf>, 2009.

foreign investment and the availability of a neutral dispute resolution process, as envisioned by the drafters of the ICSID Convention some 40 years ago.

The first investment treaty case, *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*,[10] was registered in 1987 (23 non-investment treaty cases had been registered at ICSID prior to *AAPL*). The flow of investment treaty cases has increased remarkably since then. As of January 2010, ICSID had registered 305 cases: 271 ICSID Convention arbitration cases, six ICSID Convention conciliation cases and 28 ICSID Additional Facility arbitration cases. These cases involve State parties from South America (30 percent), Eastern Europe and Central Asia (22 percent), Sub-Saharan Africa (16 percent), the Middle East and North Africa (10 percent), South and East Asia and the Pacific (8 percent), Central America and the Caribbean (7 percent), North America (6 percent) and Western Europe (1 percent).[11] The considerable majority of the ICSID Convention arbitration cases and ICSID Additional Facility arbitration cases (73 percent of all registered ICSID cases) are investment treaty cases, initiated under a BIT or other international investment agreement.[12] When compared to the broader universe of known investment treaty cases, ICSID continues to be the leading international arbitral institution for investment treaty arbitration: the 225 registered ICSID investment treaty cases represent 63 percent of the 357 known investment treaty disputes as of January 2010.[13]

As ICSID remains squarely in the international spotlight for investor-State arbitration, the obvious question is not whether but how the outcome of the many pending investment treaty cases will affect foreign investment (and ICSID itself). A developing jurisprudence is a given: investor-State arbitrations – which typically involve a political element – are less likely to settle than commercial arbitrations, and so a significant proportion of them lead to awards on the merits, available publicly.

10 *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3.

11 ICSID, "The ICSID Caseload – Statistics", 2010-1: 7-8, 11, <icsid.worldbank.org/ICSID/Index.jsp>.

12 *Id.* at 10.

13 UNCTAD, "Latest Developments in Investor-State Dispute Settlement", *IIA Issues Note* No. 1 (2010), <www.unctad.org/en/docs/webdiaeia20103_en.pdf>.

As of January 2010, ICSID investment treaty tribunals had rendered more than 200 publicly available decisions, awards and orders, including: (a) 76 awards on the merits; (b) 60 decisions on jurisdiction; (c) 26 decisions or orders on provisional measures; (d) ten decisions on annulment; (e) 13 decisions on whether or not to stay enforcement of an award; and (f) numerous other decisions and orders on a range of other procedural issues, including arbitrator and counsel challenges, the participation of non-disputing parties, ancillary claims and confidentiality issues. As to the outcomes of these decisions, it is telling that statistical studies by empiricist scholars on decisions and awards rendered by ICSID and other investment treaty tribunals indicate fairly even successes for investors and States.[14] The reasoning of these tribunals has generated a considerable number of treatises, monographs and articles on international investment law by both academics and practitioners. This developing jurisprudence on key jurisdictional and substantive issues is discussed in Chapter 3, and a Selected Bibliography is included in Annex 9.

In this context, it is worth revisiting Professor Lauterpacht's observations (again in the Foreword to the second edition of Professor Schreuer's commentary) about the many achievements of the ICSID Convention that are now taken for granted:

> "At the time the Convention was concluded, some of its most important features represented significant new developments, though in the light of subsequent advances in international law they now appear almost commonplace. For the first time a system was instituted under which non-State entities – corporations or individuals – could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the States parties."[15]

14 *See, e.g.*, S. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration", *North Carolina Law Review* 86 (2007): 1; L. Ahee & R. Walck, "Investment Arbitration Update As Of December 31, 2007", *Transnational Dispute Management* 6, no. 1 (March 2009); L. Ahee & R. Walck, "Investment Arbitration Update As Of December 31, 2008", *Transnational Dispute Management* 6, no. 1 (March 2009); L. Ahee & R. Walck, "ICSID Arbitration in 2009", *Transnational Dispute Management* 7, no. 1 (2010).

ICSID: the institution

ICSID is one of the five international organizations that make up the World Bank Group. It is located at the World Bank headquarters in Washington, DC. The Centre itself does not conduct arbitration proceedings, but administers their initiation and functioning.

ICSID comprises an Administrative Council and a Secretariat. The former is the governing body. It meets in conjunction with the World Bank annual meeting, and is chaired ex officio by the President of the World Bank. It consists of one representative of each Contracting State, usually a finance minister or his or her deputy.

A Secretary-General and a Deputy Secretary-General, who are elected by the Administrative Council, head the Secretariat. Although the Secretary-General had traditionally been the general counsel of the World Bank, the two positions were formally separated in 2008. The Secretariat provides institutional support for arbitration by, among other things, maintaining the list of members of the Panel of Conciliators and Arbitrators, screening and registering arbitration requests, assisting in the constitution of arbitral tribunals and their operations, administering the funds required to cover the costs of the proceedings, adopting rules and regulations for the conduct of arbitrations, and drafting model arbitration clauses for investment agreements.

The Secretariat staff includes experienced and multi-lingual counsel, who are generally available for consultations with parties who may require clarification as to matters of procedure. The Secretary-General appoints one of them as the Secretary for each tribunal. The Secretary maintains the file, serves as the official conduit for the transmission of written submissions and evidence, makes the necessary practical arrangements for hearings, keeps minutes of hearings, ensures

15 Schreuer, *The ICSID Convention*, *supra* note 2, at ix.

that adequate funds to cover the costs of the arbitration are in hand, prepares drafts of procedural orders, and generally assists the arbitrators.

The ICSID staff performs substantial professional work beyond case administration, primarily with respect to publication of information and scholarship. The Centre publishes, among other things: (a) the *ICSID Review – Foreign Investment Law Journal*, a highly regarded journal containing articles, case reports, excerpts of the legal reasoning of unpublished decisions, and book reviews pertinent to investment law and international business transactions (biannually by subscription); (b) *News from ICSID*, a biannual bulletin (being discontinued); (c) *ICSID Basic Documents*, a bound booklet of the Convention and key rules (as amended); (d) the *ICSID Annual Report*; (e) the *ICSID Caseload – Statistics*, a biannual report profiling the ICSID caseload; and (f) a variety of bibliographies and compilations of BITs and investment laws. The majority of these resources are available on the ICSID website, which was substantially redesigned in November 2007 and began including extensive procedural details about ongoing ICSID cases in April 2008. The Centre also organizes conferences, and senior Secretariat attorneys make significant spoken and written contributions in the field of investment law.

As noted, the ICSID Secretariat is housed at the World Bank headquarters in Washington, DC. The World Bank provides the Centre with office space, general facilities such as hearing rooms and conference space, and administrative services. Pursuant to Convention Article 17, the World Bank funds the administrative budget of ICSID.[16] The practical effect is that Contracting States cannot delay proceedings, either in general or in specific cases, by failing to pay separate charges for ICSID membership. Both State and private parties to individual arbitrations pay only modest usage fees, in addition to the expenses of the tribunal constituted to deal with their case.

16 Article 17 of the Convention provides in full: "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." The Bank and ICSID entered into a Memorandum of Administrative Arrangements on 13 February 1967, under which the Bank pays ICSID staff salaries and administrative expenses.

ICSID: the rules and regulations

ICSID has several sets of rules and regulations, designed to serve distinct purposes. All may be found on the ICSID website. The main rules and regulations include:

- The Administrative and Financial Regulations, which govern meetings of the Administrative Council and regulate the Centre's administration of conciliation and arbitration proceedings;
- The Institution Rules (Annex 2), which regulate the initiation of ICSID conciliation and arbitration proceedings;
- The Arbitration Rules (Annex 3), which set out procedures for the conduct of the various phases of arbitration proceedings, including the constitution of the tribunal, the written and oral presentations by the parties of their respective cases, and the preparation of the arbitral award; and
- The Conciliation Rules, which govern the conduct of conciliation proceedings.

In April 2006, following consultations among the ICSID Secretariat, Contracting State representatives, arbitration experts and civil society groups, significant amendments were made to the ICSID Rules and Regulations.[17] The amendments to ICSID Arbitration Rules 6, 32, 37, 39, 41 and 48, which came into effect on 10 April 2006, introduced a preliminary procedure concerning provisional measures, fast track procedures for dismissal of claims "manifestly without legal merit", access of non-disputing parties to proceedings, and increased disclosure requirements for arbitrators.[18] We discuss these amendments, and the other

17 ICSID Secretariat, "Possible Improvements of the Framework for ICSID Arbitration", <icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf>, 22 October 2004; ICSID Secretariat, "Suggested Changes to the ICSID Rules and Regulations", <icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=22_1.pdf>, 12 May 2005.

18 The 2006 amendments to the ICSID Arbitration Rules were also made to the corresponding provisions of the Additional Facility Arbitration Rules, except for the amendment to Rule

> jurisdiction under those treaty provisions, since there is a direct right of action of shareholders. It follows that the Claimant has *jus standi* before this Tribunal under international law, the 1965 Convention and the Argentina–United States Bilateral Investment Treaty."[80]

In *Siemens v. Argentina*, Argentina filed similar jurisdictional objections, including an objection asserting that the applicable BIT in that case, the Germany–Argentina BIT, required a direct relationship between the investor and the investment.[81] Unlike in *CMS*, in *Siemens*, the investor's ownership of shares in a local Argentine company was not direct but effectuated through a corporate affiliate, and the applicable BIT contained no explicit reference to direct or indirect investment. The tribunal nonetheless dismissed Argentina's objection, noting that the BIT did not require "that there be no interposed companies between the investment and the ultimate owner of the company".[82] ICSID tribunals in other cases have similarly held that the ownership of shares, direct or indirect, constitutes an investment under the Convention.[83]

It is imperative for international investors – just as they routinely structure and restructure their investments to take advantage of available tax and other benefits – to consider structuring investments in ways that enable them to benefit

80 *CMS v. Argentina* (Decision of the Tribunal on Objections to Jurisdiction), *supra* note 76, at para. 65.

81 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004).

82 *Id.* at para. 137.

83 *See, e.g., Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003); *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004); *LG&E Energy Corp. and others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (30 April 2004); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005); *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006); *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007).

from BIT protections. As stated by the *Aguas del Tunari v. Bolivia* tribunal, "it is not uncommon practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment".[84] Investors and their counsel should be familiar with the substantive protections and dispute resolution methods offered by the BITs entered into by various host jurisdictions. Specifically, along with other factors, an investor should consider selecting the nationality of its investing company or companies to take advantage of the most favorable regimes from among perhaps many potentially applicable BITs.

What constitutes an "investment"?

For a qualifying investor to rely on the substantive protections and procedural safeguards of a BIT, it must have made an investment protected by the treaty.

Most BITs define the term "investment" in a broad, open-ended way that ensures a high degree of flexibility in application. Definitions, for example from the UK–Russia or US–Argentina BITs, often include general language referring to "every kind of asset"[85] or "every kind of investment in the territory".[86] Treaty definitions often provide specific and non-exhaustive examples, such as:

(a) "movable and immovable property" (UK–Russia BIT); "tangible and intangible property" (US–Argentina BIT);

(b) "shares in, and stock, bonds and debentures of, and any other form of participation in a company or business enterprise" (UK–Russia BIT); "company or shares of stock or other interests in a company or interests in the assets thereof" (US–Argentina BIT);

84 *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005), at para. 330.

85 *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, <www.unctad.org/sections/dite/iia/docs/bits/uk_ussr.pdf>, 3 July 1991, Art. 1(a).

86 *See, e.g.*, Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, <www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf>, 20 October 1994, Art. I(1)(a) (Annex 6).

(c) "claims to money, and claims to performance under contract having a financial value" (UK–Russia BIT); "a claim to money or a claim to performance having economic value and directly related to an investment" (US–Argentina BIT); and

(d) "intellectual property" (US–Argentina BIT); "intellectual property rights, technical processes, know-how and any other benefit or advantage attached to a business" (UK–Russia BIT).

Some BITs explicitly apply only to investments made after the conclusion of the treaty. Most are broader in scope in terms of time. For example, Article 1(a) of the UK–Turkmenistan BIT states that "the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement".[87]

Many BITs explicitly exclude from coverage investments in certain industries or other sectors. For example, the 1992 US Model BIT is drafted to reserve the right of the US to make exceptions to the "national treatment" protection (see below) in sectors such as banking, insurance, ownership of real property, use of land and natural resources, and mining on the public domain. It is also drafted to reserve the right to make exceptions to "most favored nation" treatment (see below) in the following sectors: ownership of real property, mining on the public domain, maritime services and maritime-related services, and primary dealership in US government securities. These exceptions accordingly have been introduced in a number of individual BITs, for example in the US–Kazakhstan BIT.

In some BITs the term "investment" is explicitly linked to specified criteria. For example, the Sweden–Argentina BIT provides that "the term 'investment' shall comprise every kind of asset, invested by an investor of one Contracting Party in the territory of the other Contracting Party, *provided that the investment*

87 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, <www.unctad.org/sections/dite/iia/docs/bits/uk_turkmenistan.pdf>, 9 February 1995, Art. 1(a).

has been made in accordance with the laws and regulations of the other Contracting Party". (emphasis added).[88]

BIT provisions of this kind have been the subject of a number of ICSID decisions and awards, with differing results. In *Gruslin v. Malaysia*, the tribunal held that Malaysia had not consented to ICSID arbitration with the claimant under the criteria set out in the Belgium–Malaysia BIT, which provided for protection of "approved projects" only.[89] The investment in question, an investment by Gruslin in shares listed on the Malaysian stock market, was found not to be of the type that could be considered an "approved project". In *Inceysa v. El Salvador*, which involved a similar approval provision in the El Salvador–Spain BIT, the tribunal held that it lacked jurisdiction on the basis of the need for the investment to be made lawfully in accordance with Spanish law, finding that "Inceysa's investment was made in a manner that was clearly illegal".[90] In *Plama v. Bulgaria*, which concerned a treaty that did not explicitly require conformity of an investment with local law, the tribunal held that such a requirement of legality nevertheless was implicit.[91] Several other ICSID tribunals have evaluated but rejected jurisdictional arguments that investments were not established in accordance with local law.[92]

88 Agreement Between the Government of the Kingdom of Sweden and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, <www.unctad.org/sections/dite/iia/docs/bits/argentina_sweden.pdf>, 28 September 1992, Art. 1(1).

89 *Phillipe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award (27 November 2000), *ICSID Reports* 5 (2002): 483-512. Freshfields was counsel to the respondent.

90 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006); *see also Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007).

91 *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008); *see also Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009).

92 *See, e.g., Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005); *Kardassopoulos v. Georgia* (Decision on Jurisdiction),

In early ICSID decisions and awards in BIT cases, jurisdictional objections challenging the existence of an investment were rare, and tribunals appeared to have little difficulty determining whether or not an investment existed for purposes of Convention Article 25(1). In *Fedax v. Venezuela*, for example, the tribunal held that promissory notes issued by Venezuela and acquired by the claimant from the original holder in the secondary market, through endorsement, constituted an investment under the Netherlands–Venezuela BIT.[93] The tribunal extensively analyzed the notion of investment under BITs and MITs and refused to limit it to the classic forms of direct investment as argued by Venezuela, i.e., "the laying out of money or property in business ventures, so that it may produce a revenue or income".[94]

A shift occurred with the decision on jurisdiction in *Salini v. Morocco* in 2001.[95] Morocco argued that the construction contract in question did not constitute an investment under the Morocco–Italy BIT or under the Convention. The tribunal stated that Article 25(1) criteria "would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute", but that "the awards at hand only very rarely turned on the notion of investment".[96] The tribunal listed the characteristics or features of an investment – since occasionally referred to as the "*Salini* test" – as involving: (a) a contribution; (b) a certain duration; (c) an element of risk; and (d) a contribution to the host State's economic development. The tribunal held that the construction contract in question had these characteristics and hence constituted an investment under both the BIT and Convention Article 25.[97]

In the years following *Salini*, ICSID tribunals have adopted two basic approaches to the notion of investment under Convention Article 25(1) and

supra note 83; *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008).

93 *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997).

94 *Id.* at para. 19.

95 *Salini v. Morocco* (Decision on Jurisdiction), *supra* note 92.

96 *Id.* at para. 52.

97 *Id.*

applicable BITs.[98] The first approach presumes that there is a notion of "investment" under the ICSID Convention, which can be understood and illustrated through a number of characteristics. As explained by ICSID tribunals, this is not a strict test, and these criteria "are but benchmarks or yardsticks to help a tribunal in assessing the existence of an investment",[99] that "must be considered as mere examples".[100]

The second approach, in contrast, considers such criteria as necessary elements that must be satisfied cumulatively. ICSID tribunals following the second approach do not, however, agree on the exact criteria. Some tribunals have adopted three[101] or all four of the characteristics of the *Salini* test.[102] Others have added criteria to

98 *See* E. Gaillard, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice", in *International Investment Law for the 21st Century*, eds. C. Binder et al. (Oxford: Oxford University Press, 2009), 403.

99 *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award (13 March 2009), para. 241. Freshfields is counsel to the respondent.

100 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), para. 165. *See also Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008); *Malaysian Historical Salvors, Sdn, Bhd v. Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009); *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009).

101 *Consortium Groupement L.E.S.I.- DIPENTA v. Popular Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award (10 January 2005); *Bayindir v. Pakistan* (Decision on Jurisdiction), *supra* note 92; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008); *see also* Z. Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009).

102 *Salini v. Morocco* (Decision on Jurisdiction), *supra* note 92; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007); *Kardassopoulos v. Georgia* (Decision on Jurisdiction), *supra* note 83.

transparency – tribunals, at their discretion, may permit third parties and the public to attend hearings, unless either party objects.

Arbitration Rule 35 provides that witnesses and experts, who must preface their testimony with declarations of veracity, "shall be examined before the Tribunal by the parties under the control of its President" and may be questioned by the tribunal itself. In light of the control given to the president in Arbitration Rule 35, counsel cannot expect to conduct extensive direct examination or overly aggressive cross-examination. Although the tribunal has discretion to admit written rather than oral testimony and to arrange for oral examination other than before the tribunal itself (Arbitration Rule 36), this rarely happens.

Given short hearings and the importance of written witness statements and expert reports, the main purpose of presenting fact witnesses and experts at the hearing is to allow cross-examination by the opposing side and, most important, questions from the tribunal. A hearing is not an occasion to repeat the written submissions, but rather an opportunity to gauge – and respond to – the arbitrators' main concerns. Discernment and responsiveness in advocacy are critical.

Evidence, disclosure and discovery

Arbitration Rule 34 gives the tribunal discretion to decide on both the admissibility and probative value of evidence. A tribunal's approach will depend on several factors, not the least of which is the balance of civil and common lawyers on the panel. Formal rules of evidence, such as those developed under national procedural codes, do not apply.

Convention Article 43 provides for voluntary disclosure of evidence, subject to the parties' agreement otherwise. Arbitration Rule 33 provides for the transmission by each party of "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", within time limits fixed by the tribunal. Arbitration Rule 34 authorizes the tribunal to require the production of documents and the presentation of fact witnesses and experts, and to make site visits. As a matter of practice, parties annex copies of the contemporaneous documents on which they rely to their written submissions.

In sum, in ICSID arbitration any discovery of evidence beyond voluntary disclosure is firmly in the control of the tribunal. Parties to ICSID proceedings cannot expect extensive, US-style document discovery. Depositions are unheard of.

If a party fails to cooperate in the evidentiary process, Arbitration Rule 34(3) directs the ICSID tribunal to take "formal note" of such failure and any reasons given by the party. Although the Arbitration Rules do not contain any further explicit sanction, a party's uncooperative conduct, as in any international arbitration, may lead the tribunal to draw adverse inferences from that lack of cooperation and may affect the assessment of damages and allocation of costs. In *AGIP v. Congo*, for example, the government of Congo's failure to comply with a provisional measure ordering it to produce documentation was reflected in the tribunal's assessment of damages.[273] As in any arbitration proceeding, it is unwise for a party to flout the procedural decisions of the tribunal that is proceeding to decide the merits of its case.

Objections to jurisdiction

Article 41 of the ICSID Convention affirms that the tribunal "shall be the judge of its own competence", meaning that the tribunal itself is to decide questions regarding its jurisdiction. Given the rapid rise in the number of bilateral investment treaty arbitrations under the Convention, and their often unfamiliar jurisdictional foundations, respondent States almost routinely object to ICSID jurisdiction under the relevant treaty. Claimant investors should expect to invest substantial time and resources on jurisdictional issues, which may or may not be joined to the merits.

Under Arbitration Rule 41, a party raising jurisdictional objections must do so "as early as possible" in the proceedings, but in any event not later than in its countermemorial, unless the relevant facts were not known until later. Under the 2003 version of Arbitration Rule 41, proceedings on the merits are automatically suspended when a party submits jurisdictional objections, which it may do either

273 *AGIP S.p.A. v. The Government of the People's Republic of the Congo*, ICSID Case No. ARB/77/1, Award (30 November 1979), *ICSID Reports* 1 (1993): 306, 317-318.

separately (if such possibility is envisioned in the procedural order) or as part of its countermemorial. The 2006 amendments to Rule 41 give the tribunal discretion whether or not to suspend the proceedings on the merits. In either case, the tribunal must consider whether to join the jurisdictional objections to the merits or establish a separate jurisdictional phase, including a schedule for pleadings on the jurisdictional objections.

As a practical matter, when ICSID tribunals deal with jurisdictional objections as preliminary questions, this may add a year or more to the duration of an ICSID arbitration. Where the case is bifurcated in this way, if the tribunal finds that it lacks jurisdiction the case comes to an end; the tribunal issues an award dismissing the case for lack of jurisdiction, which is subject to the limited avenues of post-award proceedings available under the Convention (discussed at the end of this chapter and in Chapter 5). If, to the contrary, the tribunal finds that it has jurisdiction, it issues a reasoned decision on jurisdiction (rather than an award) and proceeds to calendar further proceedings on the merits and quantum. Such jurisdictional decisions are not defined as awards under the definition in Convention Article 48(3) and so are not subject to the post-award proceedings available under the Convention. They are, however, an integral part of the award, when issued, and may accordingly be challenged at that stage under the Convention.

Preliminary objections to claims

The 2006 amendments to the Arbitration Rules introduced an important new provision, Arbitration Rule 41(5), allowing a summary determination of whether a claim is "manifestly without legal merit".[274] Such a summary dismissal

274 Rule 41(5) provides as follows: "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."

must be requested by the respondent under Rule 41(5) within 30 days of the constitution of the tribunal. The tribunal, in turn, must make a decision at the first session or promptly thereafter, and must issue a final award dismissing the case if it finds the objection to be well-founded. To ensure procedural fairness with such a short timeline, Rule 41(5) requires that the challenge be as precise as possible and that both parties have the opportunity to present their observations, typically in writing.

As of January 2010, respondents had made applications under Rule 41(5) in three cases: *Trans-Global Petroleum v. Jordan*;[275] *Brandes Investment Partners v. Venezuela*;[276] and *Global Trading Resource Corp. v. Ukraine*. The outcomes differed, but the tribunals in both *Trans-Global* and *Brandes* agreed that the standard for an application under Rule 41(5) is set high and "requires the respondent to establish its objection clearly and obviously, with relative ease and dispatch".

In *Trans-Global*, the tribunal denied Jordan's Rule 41(5) application, but noted that the claimant had withdrawn one of its claims that was manifestly without legal merit.[277] The tribunal in *Brandes* denied Venezuela's Rule 41(5) application, finding that the application raised questions that "necessitate[d] the examination of complex legal and factual issues" and could not be resolved in summary proceedings.[278] The *Global Trading* application remained pending as of September 2010.

Provisional measures

Under Convention Article 47 and Arbitration Rule 39, a party may request at any point during the proceedings "that provisional measures for the preservation

275 *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008), at para. 88.

276 *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules (2 February 2009), para. 63.

277 *Trans-Global Petroleum v. Jordan* (Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules), *supra* note 275, paras. 120, 124.

278 *Brandes v. Venezuela* (Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules), *supra* note 276, at para. 71.

of its rights be *recommended* by the Tribunal". (emphasis added). Despite the apparent limitation in the use of the word "recommend" as compared to the word "order", many ICSID tribunals have determined that provisional measures decisions are binding on the parties.[279] A recommendation for provisional measures, however, does not constitute an award and is not subject to post-award proceedings under the Convention.

The request for provisional measures must describe the rights to be preserved, the measures requested and the circumstances. Although the tribunal may also recommend provisional measures on its own initiative, it cannot proceed before giving each party the opportunity to present observations (Arbitration Rules 39(3) and (4)). Arbitration Rule 39 was amended in 2006 to permit a party to file a request for provisional measures any time after the arbitration is initiated, even before the Tribunal is constituted. The Secretariat may administer the exchange of written submissions on the provisional measure in parallel with the constitution of the tribunal, thus expediting the earliest possible resolution. This is particularly important given the limitations imposed by the ICSID regime on accessing the courts for urgent relief.

ICSID tribunals do not readily recommend provisional measures. As of January 2010, parties had made requests for recommendation of provisional measures in 58 registered ICSID cases, resulting in recommendations in only some 16 cases. These 16 decisions involved provisional measures directing a party: (a) to preserve or produce documents;[280] (b) to discontinue parallel proceedings in local courts, or not to take steps that would exacerbate the dispute;[281] and

279 *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), *ICSID Review–FILJ* 16 (2001): 212; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures (25 September 2001); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007).

280 *See, e.g., AGIP v. Congo* (Award), *supra* note 273; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006).

281 *See, e.g., Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award (6 January 1988), *ICSID Reports* 4 (1997): 54-78; *see also Československá Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4,

(c) to maintain the confidentiality of the proceedings.[282] A list of the requests for provisional measures advanced in ICSID cases, including details about the measures requested and the outcomes, is set out in Table III.E in Annex 10.

As highlighted in Chapter 2, parties arbitrating under the Convention – whether pursuant to an investor-State contract, a BIT or a MIT – may not seek provisional measures from an authority other than the tribunal, i.e., from a national court, unless this is expressly provided for in the agreement or the relevant treaty (Arbitration Rule 39(6)). Investors anticipating the need for urgent interim measures from local courts in connection with particular projects must, in the absence of favorable legislation, negotiate for such rights in their investment contracts.

Default, discontinuance and settlement

The rules envision default and discontinuance, including discontinuance by reason of settlement. Default, not surprisingly, is rare. Discontinuance is common; as of January 2010, 34 percent of ICSID Convention and ICSID Additional Facility arbitrations ended in discontinuance.[283]

Article 45 of the Convention and Arbitration Rule 42 govern default. If a party fails to appear or to present its case at any stage of the proceedings, the tribunal may, at the request of the other party, render an award on the issues before it. Prior to ruling, the tribunal must notify the defaulting party of the other party's request to proceed and, unless satisfied that the defaulting party has no intention

Decision on Objections to Jurisdiction (24 May 1999); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1, Claimant's Request for Provisional Measures (1 July 2003); *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009); *Burlington Resources, Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures (29 June 2009).

282 *See, e.g., World Duty Free Company Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006).

283 "The ICSID Caseload", *supra* note 11, at 13.

(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.

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.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary 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 fulfil the functions with which it is charged under this Convention.

(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;

(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.

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.

or 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;

(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 _____.

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."

(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.

(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.

(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.

request in writing of either party transmitted through the Secretary-General, appoint the arbitrator or arbitrators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate an arbitrator to be President of the Tribunal.

(5) Except as the parties shall otherwise agree, no person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute or as a member of any fact-finding committee relating thereto may be appointed as a member of the Tribunal.

Article 7
Nationality of Arbitrators

(1) 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.

(2) Arbitrators appointed by the Chairman shall not be nationals of the State party to the dispute or of the State whose national is a party to the dispute.

Article 8
Qualifications of Arbitrators

Arbitrators 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.

Article 9
Method of Constituting the Tribunal in the Absence of Agreement Between the Parties

(1) If the parties have not agreed upon the number of arbitrators and the method of their appointment within 60 days after the registration of the request, the Secretary-General shall, upon the request of either party promptly inform the parties that the Tribunal is to be constituted in accordance with the following procedure:

(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; and

(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 paragraph (1) of this Article 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.

Article 10
Appointment of Arbitrators and Designation of President of Tribunal by the Chairman of the Administrative Council

(1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.

(2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.

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

Article 11
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 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.

Article 12
Replacement of Arbitrators prior to Constitution of the Tribunal

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.

Article 13
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 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 award made by the Tribunal.
>
> I shall judge fairly as between the parties and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre.
>
> 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 such a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Article 14
Replacement of Arbitrators after Constitution of the Tribunal

(1) After a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if an arbitrator should die, become incapacitated, resign or be disqualified, the resulting vacancy shall be filled as provided in this Article and Article 17 of these Rules.

(2) 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 Article 15 shall apply.

(3) 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.

Article 15
Disqualification of Arbitrators

(1) A party may propose to a Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by Article 8 of these Rules, or on the ground that he was ineligible for appointment to the Tribunal under Article 7 of these Rules.

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

(3) 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; and

(b) notify the other party of the proposal.

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

(5) The decision on any proposal to disqualify an arbitrator shall be taken by the other members of the Tribunal except that where those members are equally divided, or in the case of a proposal to disqualify a sole arbitrator, or a majority of the arbitrators, the Chairman shall take that decision.

(6) 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.

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

Article 16
Procedure during a Vacancy on the Tribunal

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman 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.

Article 17
Filling Vacancies on the Tribunal

(1) Except as provided in paragraph (2) of this Article, 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 shall:

(a) 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, 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) In filling a vacancy the party or the Chairman, as the case may be, shall observe the provisions of these Rules with respect to the appointment of arbitrators. Article 13(2) of these Rules shall apply *mutatis mutandis* to the newly appointed arbitrator.

Article 18
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

Chapter IV
Place of Arbitration

Article 19
Limitation on Choice of Forum

Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Article 20
Determination of Place of Arbitration

(1) Subject to Article 19 of these Rules the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.

(2) The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. It may also visit any place connected with the dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.

(3) The award shall be made at the place of arbitration.

Chapter V
Working of the Tribunal

Article 21
Sessions of the Tribunal

(1) The Tribunal shall meet for 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 Secretariat, and with the parties as far as possible. If, upon its constitution, the Tribunal has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Tribunal, and with the parties as far as possible.

(2) Subsequent sessions shall be convened by the President within time limits determined by the Tribunal. The dates of such sessions shall be fixed by the President of the Tribunal after consultation with its members and the Secretariat, and with the parties as far as possible.

(3) 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.

Article 22
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.

Article 23
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.

Article 24
Decisions of the Tribunal

(1) Any award or other decision of the Tribunal shall be made by a majority of the votes of all its members. Abstention by any member of the Tribunal shall count as a negative vote.

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

Article 25
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 Secretariat had received the notice of their acceptance of their appointment to the Tribunal.

Article 26
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 Secretariat, which 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 VI
General Procedural Provisions

Article 27
Procedural Orders

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

Article 28
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 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, which is not inconsistent with any

Article 34
Waiver

A party which knows or ought to have known that a provision 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 to have waived the right to object.

Article 35
Filling of Gaps

If any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Chapter VII
Written and Oral Procedures

Article 36
Normal Procedures

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Article 37
Transmission of the Request

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

Article 38
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. However, the parties may instead agree that one of them shall, for the purposes of paragraph (1) of this Article, 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.

Article 39
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.