14 The International Centre for Settlement of Investment Disputes

1) Introduction

The International Centre for Settlement of Investment Disputes (the ICSID Centre) was created by the International Convention on the Settlement of Investment Disputes (also known as the Washington Convention). The Centre was briefly mentioned in Chapter 9 of the Manual, which dealt with investor-State disputes and which considered, among other things, the ICSID Convention.

This chapter now looks at the Centre in more detail, and also considers the ICSID Arbitration Rules, Conciliation Rules, Additional Facility Rules and fact-finding procedure, and the ICSID caseload.

Brief mention will be made again of some of the problems arising in investor-State disputes, referred to earlier in Chapter 9.

2) Historical Overview

The Centre states that on a number of occasions in the past, the World Bank as an institution and the President of the Bank in his personal capacity have participated in the mediation or conciliation of investment disputes between governments and private foreign investors. The creation of ICSID in 1966 was thus *"in part intended to relieve the President and the staff of the burden of becoming involved in such disputes. But the Bank's overriding consideration in creating ICSID was the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help to promote increased flows of international investment."*

The Centre goes on to say that ICSID was established

> *"... under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) which came into force on October 14, 1966. ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State which has ratified the Convention. Annual meetings of the Council are held in conjunction with the joint Bank / Fund annual meetings.*
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> *"ICSID is an autonomous international organization. However, it has close links with the World Bank. All of ICSID's members are also members of the Bank. Unless a government makes a contrary designation, its Governor for the Bank sits ex officio on ICSID's Administrative Council. The expenses of the ICSID Secretariat are financed out of the Bank's budget, although the costs of individual proceedings are borne by the parties involved.*
>
> *"Pursuant to the Convention, ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is*

entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards."

Besides providing facilities for conciliation and arbitration under the ICSID Convention, since 1978 the Centre has had a set of Additional Facility Rules authorising the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals that fall outside the scope of the Convention.

"These include conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute, provided it relates to a transaction which has 'features that distinguishes it from an ordinary commercial transaction.' The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry ' to examine and report on facts.'"

The Centre goes on to say that the third activity of ICSID in the field of dispute settlement *"has consisted in the Secretary-General of ICSID accepting to act as the appointing authority of arbitrators for ad hoc (i.e., non-institutional) arbitration proceedings. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), which are specially designed for ad hoc proceedings."*

Provisions on ICSID arbitration are a common feature of investment contracts between governments of member countries and investors from other member countries, and the Centre notes that advance consents by governments to submit investment disputes to ICSID arbitration can be found in about 20 investment laws and in over 900 bilateral investment treaties (BITS). In addition, *"Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties (the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur)."*

Under the ICSID Convention, proceedings need not be held at the Centre's headquarters in Washington, DC, as the parties to an ICSID proceeding are free to agree to conduct their proceeding at any other place. The Convention's provisions *"facilitate advance stipulations for such other venues when the place chosen is the seat of an institution with which the Centre has an arrangement for this purpose. ICSID has to date entered in such arrangements with the Permanent Court of Arbitration at The Hague, the Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur, the Australian Centre for International Commercial Arbitration at Melbourne, the Australian Commercial Disputes Centre at Sydney, the Singapore International Arbitration Centre and the GCC Commercial Arbitration Centre at Bahrain. These arrangements have proved their usefulness in many ICSID cases and have helped to promote cooperation between ICSID and these institutions in several other respects."*

As at January 2006, 155 States had signed the ICSID Convention. The Centre states that the number of cases submitted to it – under the ICSID Convention and under the ICSID Additional Facility Rules – has increased significantly in recent years. The full text of ICSID's statement is available on its website.[60]

3) The ICSID Institution of Arbitration and Conciliation Proceedings

The Institution Rules of ICSID set out the process to be used for the commencement of an ICSID arbitration or conciliation. These Rules relate to the time from the filing of a request for arbitration or conciliation to the time of the dispatch of a notice of registration. Transactions after that stage are regulated in accordance with the Arbitration Rules or the Conciliation Rules, as the case may be (these Rules are considered in sections 4 and 5 of this chapter).

Rule 1 of the Institution Rules provides that any Contracting State or any national of a Contracting State wishing to institute arbitration or conciliation proceedings under the ICSID Convention is to do so by means of a written request to the Secretary-General at the Centre. The request may be made jointly by the parties to the dispute.

Rule 2 sets out the detailed information that is to be included in the request. The request is to:

"(a) designate precisely each party to the dispute and state the address of each;

(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;

(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

(d) indicate with respect to the party that is a national of a Contracting State:

(i) its nationality on the date of consent; and

(ii) if the party is a natural person:

(A) his nationality on the date of the request; and

(B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or

(iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;

(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."

60 www.worldbank.org/icsid/.

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

The request may additionally set out any provisions agreed by the parties concerning the number of arbitrators or conciliators and the method of the appointment, as well as any other provisions agreed by them (Rule 3).

Any documentation submitted with the request is to conform with the requirements of Administrative and Financial Regulation 30. On receiving the request, the Secretary-General is to send an acknowledgement to the requesting party, but is to take no further action until he or she has received payment of the prescribed fee. When the fee has been received, the Secretary-General transmits a copy of the request and the documentation to the other party (Rules 4 and 5).

The request is to be registered unless the Secretary-General finds *"on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre"*. In that event, he or she is to notify the parties that their request has been refused and give the reasons for that refusal (Rule 6).

Rule 7 sets out the detail that is to be entered into the notice of registration of the request, including an invitation to the parties to proceed to the next stage of the process – namely the constitution of a Conciliation or Arbitration Commission. The notice is to:

"(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 provides that the request may be withdrawn by service of written notice on the Secretary-General prior to registration.

4) The ICSID Rules of Procedure for Arbitration Proceedings

Introduction

Before looking at the detail of the ICSID Arbitration Rules, it may be useful to mention that these Rules broadly follow the same pattern as the Arbitration Rules of the Permanent Court of Arbitration (PCA), which were considered in an earlier chapter of the Manual.

Chapter 1 of the ICSID Arbitration Rules deals with the appointment and replacement of arbitrators. Chapter II contains provisions relating to the procedure of the Tribunal and Chapter III contains general procedural provisions dealing with matters such as time limits. Written and oral procedures are set out in Chapter IV, covering matters such as witnesses and experts. Chapter V deals with matters described as 'Particular Procedures', and contains provisions relating to matters such as objections to jurisdiction. Provisions concerning the award are set out in Chapter VI, and Chapter VII deals with the interpretation, revision and annulment of the award.

Chapter 1: Establishment of the Tribunal

Chapter I is comprised of 12 Rules dealing with the establishment of the Tribunal.

On notification of the registration of the request for arbitration, Rule 1 states that the parties are to proceed with all possible dispatch to constitute a Tribunal. The majority of the arbitrators are to be nationals of States other than the State that is party to the dispute and 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."*

Where the parties have not agreed on the number and method of appointment of arbitrators, the procedure to be followed is set out in Rule 2:

> *"(1)...(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."*

The communications provided for in paragraph 1 are to be transmitted to the Secretary-General. If no agreement is reached on the appointment of the Tribunal within 60 days after the registration of the request, either party may inform the Secretary-General that it chooses the formula provided for in Article 37 (2) (b) of the Convention.

Rule 3 goes on to deal with the appointment of arbitrators in accordance with provisions 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."

The communications provided for in that Rule are to be transmitted to the Secretary-General.

Where a Tribunal has not been constituted within 90 days following the dispatch by the Secretary-General of the notice of registration, either party may request the Chairman of the Administrative Council to appoint the arbitrator or arbitrators not yet appointed and to designate one arbitrator to be the President of the Tribunal.

Rule 5 contains provisions relating to the acceptance of appointments by arbitrators.

Rule 6 states that the Tribunal is deemed to be constituted, and the proceedings to have begun, when the Secretary-General notifies the parties that all arbitrators have accepted their appointment. Each arbitrator is to 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.

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

Any arbitrator failing to sign that declaration by the end of the first session of the Tribunal is deemed to have resigned.

Rules 7 to 9 deal with the replacement, incapacity, resignation and disqualification of arbitrators. At any time prior to the constitution of the Tribunal, any party may replace an arbitrator appointed by that party. Where an arbitrator becomes incapacitated or unable to perform his/her duties, the disqualification procedure set out in Rule 9 is applied. An arbitrator may resign by submitting his/her resignation to the other members of the Tribunal and to the Secretary-General. However, where that arbitrator was appointed by one of the parties, the Tribunal is to consider the reasons for the resignation and decide whether it consents to that resignation. The Rule 9 procedure relating to the disqualification of arbitrators requires a party proposing disqualification, pursuant to Article 57 of the Convention, to file a proposal with the Secretary-General stating the reasons on which it is based. The filing of the disqualification proposal is to be made before the proceeding is declared closed. The Secretary-General is then to:

"(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and

(b) notify the other party of the proposal."

The arbitrator whose disqualification is proposed may *"furnish explanations to the Tribunal or the Chairman, as the case may be"*. Unless the proposal relates to a majority of the members of the Tribunal, the other members *"... shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision."* The arbitration is suspended until a decision has been taken on the disqualification proposal.

Rules 10 and 11 deal with vacancies on the Tribunal. The Secretary-General is to notify the parties of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation. The proceeding is suspended until the vacancy is filled, which is to be achieved by the same method by which the appointment was originally made. Rule 12 provides that as soon as a vacancy has been filled, the proceeding is to 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 II: Procedure of the Tribunal

Chapter II, Rules 13 to 18, contains provisions largely dealing with the Tribunal's own procedures.

Rule 14 provides that the Tribunal is to hold its first session within 60 days of its constitution. The Tribunal will determine the dates of subsequent sessions, after consultation with the Secretary-General and the parties. The Tribunal is to meet at the seat of the Centre, or such other place as has been agreed under the provisions of Article 63 of the Convention.

The President of the Tribunal is to conduct the hearings and, unless the parties agree otherwise, the presence of a majority of the members of the Tribunal is required at the sittings. The deliberations of the Tribunal take place in private and remain secret. Only members of the Tribunal may take part in its deliberations: *"No other person shall be admitted unless the Tribunal decides otherwise."* Decisions of the Tribunal are by a majority of votes, and the Tribunal may take any decision by correspondence among its members.

Should the President of the Tribunal be unable to act, his/her functions are to be performed by another member of the Tribunal, acting in the order in which notice of acceptance of appointment was received by the Secretary-General.

The final Rule of Chapter 2 states that each party may be represented or assisted by agents, counsel or advocates *"... whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party"*.

Chapter III: General procedural provisions – pre-hearing conferences, documents, etc

Rules 19 to 28 of Chapter III contain general procedural provisions.

The Tribunal shall make the orders necessary for the conduct of the arbitration proceedings, and as early as possible after the constitution of the Tribunal, the President is to *"... endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:*

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;

(b) the language or languages to be used in the proceeding;

(c) the number and sequence of the pleadings and the time limits within which they are to be filed;

(d) the number of copies desired by each party of instruments filed by the other;

(e) dispensing with the written or the oral procedure;

(f) the manner in which the cost of the proceeding is to be apportioned; and

(g) the manner in which the record of the hearings shall be kept."

In the conduct of the proceeding, the Tribunal is to apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations (Rule 20).

Rule 21 deals with pre-hearing conferences between the Tribunal and the parties aimed at an exchange of information and the *"stipulation of uncontested facts in order to expedite the proceeding"*. In addition, the parties may request a pre-hearing conference *"to consider the issues in dispute with a view to reaching an amicable settlement"*.

Rule 22 provides that the parties may agree on the use of one or two languages. The Tribunal must approve any language that is not one of the official languages of the Centre (namely, English, French and Spanish).

Rules 23 and 24 deal with copies of instruments and supporting documentation. Except as otherwise provided, every request, pleading, application, written observation, supporting documentation (if any) or other instrument is to be filed in the form of a signed original accompanied by a specified number of copies. Supporting documentation should ordinarily be filed together with the instrument to which it relates. 'Accidental errors' in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered (Rule 25).

Time limits are dealt with in Rule 26. They shall be fixed by the Tribunal, which shall assign dates for the completion of the various steps in the proceeding. The Tribunal may extend any time limit. Any steps taken after the expiration of the relevant time limit is to be disregarded *"unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise"*.

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

The final Rule of Chapter 3 deals with the costs of the proceeding.

Chapter IV: Written and oral procedures

Chapter IV contains provisions in Rules 29 to 38 dealing with written and oral procedures. Rule 29 states that, unless the parties agree otherwise, the arbitral proceeding is to comprise two distinct phases: a written procedure followed by an oral procedure.

The written procedure

In addition to the request for arbitration, Rule 31 provides that the written procedure is to consist of the following pleadings, which are to be filed within the 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."

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

The Rules provide succinctly what is to be set out in the pleadings. A memorial is to 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."*

The oral procedure

Rule 32 deals with the oral procedure, which is to consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts. The Tribunal shall decide, with the consent of the parties, what other persons may attend hearings. Members of the Tribunal may put questions to the parties, their agents, counsel and advocates, and may ask them for explanations.

Rules 33 and 34 deal with evidence. Without prejudice to the rules concerning the production of documents, each party is to communicate to the Secretary-General, for onward transmission to the Tribunal and the other party, *"precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed".*

The Tribunal is to be the judge of the admissibility of any evidence and of the probative value of that evidence. If it considers it necessary, the Tribunal may call on the parties to produce documents, witnesses and experts and may visit any place connected with the dispute or may conduct inquiries there. The parties are to cooperate with the Tribunal in these matters, and it is to take formal note of the failure of a party to comply with its obligations.

Rules 35 and 36 deal with witnesses and experts. They are to be examined before the Tribunal by the parties. Such examination is under the control of the President. Members of the Tribunal may also put questions. Before giving evidence, each witness is to make the following declaration:

"I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth."

Each expert is to make the following declaration before making his/her statement:

> *"I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."*

In addition, the Tribunal may admit evidence given by a witness or expert in the form of a written deposition. Further, with the consent of the parties, the Tribunal may arrange for the examination of a witness or an expert *"otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination."*

Article 37 provides that, if the Tribunal considers it necessary, it may visit any place connected with the dispute or may conduct an inquiry at such place. The parties are entitled to participate in any such visit or inquiry.

When the parties have completed their presentation of the case, the Tribunal is to declare the proceeding closed. In exceptional circumstances the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that *"... new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points".*

Chapter V: 'Particular procedures'

Chapter V in Rules 39 to 45 contains provisions for 'Particular Procedures'. These include provisional measures, ancillary claims, jurisdiction, default, settlement and discontinuance.

Provisional measures

The first particular procedure relates to the important matter of provisional measures in Rule 39:

> *"(1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*
>
> *(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).*
>
> *(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.*
>
> *(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations."*

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

Ancillary claims

Rule 40 states that, unless the parties have agreed otherwise, a party may present an *"incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre"*.

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

The Tribunal is to fix a time limit within which the party against which an ancillary claim is presented may file its observations on that claim.

Jurisdiction

Rule 41 relates to the potentially significant matter of objections to jurisdiction. An award made by a tribunal that lacks jurisdiction is subject to annulment.

Any objection that the dispute itself or any ancillary claim is not within the jurisdiction of the Centre, or within the competence of the Tribunal, is to be made as early as possible. The party mounting the challenge *"... shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time"*. Additionally, the Tribunal itself may at any stage of the proceeding consider whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre or within its own competence.

Where a formal objection relating to the dispute is raised, the proceeding on the merits is to be suspended. The President of the Tribunal, after consultation with its other members, is to fix a time limit within which the parties may file observations on the objection. The Tribunal decides whether or not the further procedures relating to the objection are to be oral. As is common in arbitral practice generally, the Tribunal may deal with the objection either as a preliminary question or may join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it is to fix time limits for the further procedures. However, if it decides that the dispute is not within the jurisdiction of the Centre or not within its own competence *"it shall render an award to that effect"*.

Default

Rule 42 provides that if a party, referred to as the 'defaulting party', fails to appear or to present its case, the other party may request the Tribunal to deal with the questions submitted to it and to render an award. The Tribunal is to notify the defaulting party of such a request and, unless it is satisfied that the party in question does not intend to appear or to present its case, is to grant a period of grace on the following basis:

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

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

Without the consent of the other party, the period of grace is not to exceed 60 days. The Tribunal subsequently resumes consideration of the dispute. Any failure on the part of the defaulting party to appear or present its case is not deemed an admission of assertions made by the other party. The Tribunal is then to *"examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations."*

Settlement and discontinuance

Under Rule 43, if the parties agree on a settlement of the dispute or otherwise agree to discontinue the proceeding, the Tribunal (or the Secretary-General in a case where the Tribunal has not yet been constituted) is to take note of the discontinuance of the proceeding. If the parties file with the Secretary-General the full and signed text of their settlement, and if they submit a written request for the Tribunal to embody that settlement in an award, the Tribunal *"may record the settlement in the form of its award"*.

Rule 44 states that if a party requests the discontinuance of the proceeding, the Tribunal (or the Secretary-General, if the Tribunal has not yet been constituted) is to fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made, that party is deemed to have acquiesced in the discontinuance. If an objection is made, the proceeding is to continue. Rule 45 provides that if the parties fail to take any steps in the proceeding during six consecutive months (or such other period as may be agreed), the Tribunal (or the Secretary General) shall in an order *"take note of the discontinuance"*.

Chapter VI: The award

Rules 46 to 49 deal with the award.

Rule 46 provides that the award (including any individual or dissenting opinion) is to be drawn up and signed within 120 days of the closure of the proceeding. The Tribunal has power to extend that period by a further 60 days. Rule 47 states that the award is to be in writing and is to contain the following:

"(a) a precise designation of each party;

(b) a statement that the Tribunal was established under the Convention, and a description *of the method of its constitution;*

(c) the name of each member of the Tribunal, and an identification of the appointing authority of each;

(d) the names of the agents, counsel and advocates of the parties;

(e) the dates and place of the sittings of the Tribunal;

(f) a summary of the proceeding;

(g) a statement of the facts as found by the Tribunal;

(h) the submissions of the parties;

(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and

(j) any decision of the Tribunal regarding the cost of the proceeding."

The award is to be signed by the members of the Tribunal who voted for it, and the date of each signature is to be indicated. Any member of the Tribunal may attach his/her individual opinion to the award, whether dissenting from the majority or not. Any member may attach a statement of dissent.

Rule 48 deals with the rendering of the award. Following signature of the award by all members of the Tribunal, the Secretary-General is to (a) authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.

The award is deemed to have been rendered on the date on which the certified copies were dispatched. The Centre is not to publish the award without the consent of the parties. However, the Centre may *"include in its publications excerpts of the legal rules applied by the Tribunal"*.

Provisions for supplementary decisions and rectification of the award are set out in Rule 49. Within 45 days of the date on which the award was rendered, either party may request (pursuant to Article 49 (2) of the Convention) either a supplementary decision on the award or a rectification of the award. The request is to be addressed in writing to the Secretary-General and is to:

"(a) identify the award to which it relates;

(b) indicate the date of the request;

(c) state in detail:

(i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and

(ii) any error in the award which the requesting party seeks to have rectified; and

(d) be accompanied by a fee for lodging the request."

The Secretary-General is to register the request, notify the parties accordingly, and transmit a copy of that request and any accompanying documentation to the other party and to the Tribunal.

The President of the Tribunal is to consult the members as to whether it is necessary to meet in order to consider the request. The Tribunal is to fix a time for the parties to file observations on the request and determine the procedure to be followed for a consideration of the request.

The Secretary-General must refuse to register any request received more than 45 days after the award was rendered.

Chapter VII: Interpretation, revision and annulment of the award

Chapter VII of the Arbitration Rules contains provisions for the interpretation and revision of an ICSID award, together with the significant provisions relating to an application for the annulment of an award pursuant to Article 52 (1) of the ICSID Convention (and provisions for a stay of enforcement where application has been made for annulment or revision of an award).

Rule 50 provides that an application for the interpretation, revision or annulment of an award is to be made in writing to the Secretary-General and is to:

"(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."*

On receiving the application the Secretary-General is to register it, notify the parties accordingly and transmit to the other party a copy of the application and any documentation. The Secretary-General is to refuse to register applications not made within the time limits specified in the Rules, and is to notify the requesting party accordingly.

The provisions relating to annulment contained in Rule 50 and in Article 52 of the ICSID Convention are in some respects similar to provisions contained in Article V of the New York Convention (relating to the recognition and enforcement of foreign arbitral awards) and to provisions in Articles 34 and 36 of the UNCITRAL Model Law (relating to the setting aside and recognition and enforcement of arbitral awards).

Rules 51 and 52 contain 'further procedures' relating to interpretation and revision and to annulment. 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. The Tribunal is deemed to be reconstituted on the dispatch of the

relevant notices. However, if it cannot be reconstituted, the Secretary-General is to notify the parties and invite them to proceed to constitute a new Tribunal, which is to comprise the same number of arbitrators (and is to be appointed by the same method) as the original Tribunal (Rule 51). In the case of an annulment, the Secretary-General is to request the Chairman of the Administrative Council to appoint an ad hoc Committee in accordance with Article 52 of the ICSID Convention (Rule 52).

Rule 53 states that the provisions of the rules apply *mutatis mutandis* to the procedures relating to interpretation, revision or annulment. The party that has applied for revision or annulment of an award may well require a stay of enforcement pending the outcome of the application, particularly so in the case of an application for annulment. The relevant provisions are contained in Rule 54. On making the application for revision or annulment the party applying may at the same time (or at any time before the final disposition of the application) request a stay of enforcement in relation to all or part of the award. The other party may make a similar application. Priority is to be given to such a request.

Where an application for revision or annulment contains a request for a stay, the Secretary-General is to inform both parties that a provisional stay has been put into effect. As soon as the Tribunal (or Committee) is constituted it shall, on the request of either party, rule within 30 days on whether the provisional stay should be continued. Unless the stay is continued, it is treated as being automatically terminated.

Rule 54 (3) provides that *"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)."*

Requests for a stay are to specify the circumstances that require the stay or its modification or termination. Each party is to have an opportunity of presenting its observations on the stay application. The Secretary-General is to notify the parties of the outcome.

Rule 55 deals with the resubmission of a dispute following annulment. A request is to be made in writing to the Secretary-General and is to:

"(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."

The Secretary-General invites the parties to proceed to the constitution of a new Tribunal. This is to include the same number of arbitrators, appointed by the same method, as the original Tribunal.

Where the original award is only annulled in part, the new Tribunal is not to reconsider the unannulled part. However, it may apply the stay provisions to the annulled portion.

The Rules apply to a resubmitted dispute in the same manner as if such dispute had been submitted under the Institution Rules.

Chapter VIII

Rule 56 states that the text of the Rules is equally authentic in each of the official languages (English, French and Spanish).

5) The ICSID Rules of Procedure for Conciliation

Introduction

The ICSID Conciliation Rules follow a similar pattern to the Arbitration Rules. The bulk of them can therefore simply be outlined.

Chapter I deals with the establishment of the Commission of Conciliators: general obligations; method of constituting the commission; appointment, resignation, disqualification and replacement of Conciliators; and resumption of proceedings. Chapter II sets out provisions mainly concerned with the Commission's own procedure: sessions, sittings, deliberations and decisions of the Commission and incapacity of the President. It also deals with the representation of the parties. Chapter III is concerned with general procedural provisions: procedural orders; preliminary procedural consultation; and languages.

The crucial section of the Rules dealing with the conciliation process is contained in Chapter IV, and this will be considered in more detail. It is important to bear in mind that the result of the conciliation process, unlike the arbitration process, is non-binding.

Chapter IV

The Conciliation Procedures are set out in Chapter IV. Rules 22 and 23 are of particular importance.

Rule 22

Rule 22 is at the heart of the conciliation process, since it sets out the functions of the Commission of Conciliators. Rule 22 (1) provides that, in order to clarify the issues in dispute between the parties, the Commission:

> *"(1) shall hear the parties and shall endeavor to obtain any information that might serve this end. The parties shall be associated with its work as closely as possible.*
>
> *"(2) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make – orally or in writing – recommendations to the parties. It may recommend that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about*

agreement between them, from specific acts that might aggravate the dispute; it shall point out to the parties the arguments in favor of its recommendations. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made.

"(3) The Commission, in order to obtain information that might enable it to discharge its functions, may at any stage of the proceeding:

(a) request from either party oral explanations, documents and other information;

(b) request evidence from other persons; and

(c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries."

Rule 23

Rule 23 (1) makes the important point that the good faith of the parties is a vital requirement of the conciliation process. It states that:

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

Rule 23 (2) requires the parties to comply with any time limits.

Rules 24 to 28

As soon as the Commission is constituted, the Secretary-General is to transmit to each member of the Commission a copy of the request, supporting documentation, the notice of registration and any communications from the parties (Rule 24).

Provisions relating to written statements are contained in Rule 25. The President of the Commission is to invite each party to file a *"written statement of its position"*. The time limit is 30 days. Every written statement or other instrument may be accompanied by supporting documentation, which should ordinarily be filed together with the instrument to which it relates (Rule 26).

Rule 27 makes provisions for hearings. These are to take place in private, and unless the parties agree otherwise, are to remain secret. The Commission is to decide, with the consent of the parties, which other persons – besides the parties and their agents, counsel, advocates, witnesses and experts – may attend the hearings.

The parties may request the Commission to hear witnesses and experts, who shall be examined before the Commission. Such examination is by the parties, but under the control of the President. Questions may also be put by any member of the Commission. If a witness or expert cannot attend the hearing, the Commission (with the agreement of the parties) may make arrangements for the relevant evidence to be given in a written deposition or to be taken by examination at another place (Rule 28).

Chapters V and VI

Chapter V contains the provisions dealing with termination of the proceeding: objections to jurisdiction; closure of the proceeding; preparation of the conciliation Report; provisions relating to the Report; and communication of that Report.

Rule 32 states that the Report is to contain:

"(a) a precise designation of each party;

(b) a statement that the Commission was established under the Convention, and a description of the method of its constitution;

(c) the names of the members of the Commission, and an identification of the appointing authority of each;

(d) the names of the agents, counsel and advocates of the parties;

(e) the dates and place of the sittings of the Commission; and

(f) a summary of the proceeding."

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

Chapter VI contains the Final Provisions.

6) The ICSID Additional Facility Rules and the Fact-finding Provisions

Introduction

The Administrative Council of the Centre adopted Additional Facility Rules that authorise the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of that provision in the ICSID Convention.

Given that proceedings under the Additional Facility Rules are not governed by the Convention, it is important to appreciate that arbitrations conducted under these Rules are not protected from national laws. Therefore recognition and enforcement of awards will be governed by the law of the place of enforcement – the 'self-enforcing' machinery of the ICSID Convention does not apply.

ICSID's Introduction to the Additional Facility Rules explains the extent of the Centre's jurisdiction by analogy with Article 25 (1) of the ICSID Convention. That Article provides that the jurisdiction of the Centre *"shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre".* The Introduction explains that the additional categories of proceedings are:

"(i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a

Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction."

The Introduction states that the Additional Facility Rules *"comprise a principal set of Rules Governing the Additional Facility and their three schedules: Fact-Finding Rules (Schedule A), Conciliation Rules (Schedule B) and Arbitration Rules (Schedule C). On September 29, 2002, the Administrative Council approved amendments of the Additional Facility Rules. These amendments came into effect on January 1, 2003."*

The Additional Facility Rules

Article 1 of the Rules contains definitions. Article 2 states that the Secretariat of the Centre is authorised to administer proceedings between a State and a national of another State that fall within the following categories:

"(a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;

(b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and

(c) fact-finding proceedings."

Article 3 makes clear that, because the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention are applicable to those proceedings or to recommendations, awards or reports.

Article 4 (1) states that any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The rest of Article 4 sets out the conditions to be satisfied for such approval to be granted:

"(2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements ratione personae of that Article shall have been met at the time when proceedings are instituted.

(3) In the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) that the underlying transaction has features which distinguish it from an ordinary commercial transaction.

(4) If in the case of an application based on Article 2(b) the jurisdictional requirements ratione personae of Article 25 of the Convention shall have been met and the Secretary-General is of the opinion that it is likely that a Conciliation Commission or Arbitral Tribunal, as the case may be, will hold that the dispute arises directly out of an investment, he may make his approval of the application conditional upon consent by both parties to submit any dispute in the first instance to the jurisdiction of the Centre."

Proceedings for fact-finding, conciliation and arbitration under the Additional Facility are to be conducted in accordance with the respective Rules set out in Schedules A, B and C. Schedules B and C contain detailed provisions dealing with conciliation and arbitration that are similar to the ICSID Conciliation and Arbitration rules already considered.

The fact-finding provisions

Schedule A contains the fact-finding provisions. There are four Chapters: Chapter I deals with the institution of proceedings; Chapter II with the Committee and its workings; Chapter III with the termination of the proceedings; and Chapter IV includes a requirement of good faith.

Chapter I: Commencement of the process and appointment of the Committee

Article 1 of Chapter I sets out the nature of a 'fact-finding proceeding':

"Any State or national of a State wishing to institute an inquiry under the Additional Facility to examine and report on facts (hereinafter called a 'fact-finding proceeding') shall send a request to that effect in writing to the Secretariat at the seat of the Centre...."

The request may be made jointly by the parties. Article 2 states that the request is to:

"(a) designate precisely each party to the fact-finding proceeding and state the address of each;

(b) set forth the agreement between the parties providing for recourse to the fact-finding proceeding; and

(c) state the circumstances to be examined and reported on."

The request is also to set out any provisions agreed by the parties regarding *"the number of commissioners, their qualifications, appointment, replacement, resignation and disqualification, the extent of the powers of the Committee, the appointment of its President, and the place of its sessions, as well as the procedure to be followed in the fact-finding proceeding (hereinafter called the 'Procedural Arrangement')"*.

Provisions relating to the registration of the request by the Secretary-General are set out in Article 3. The other party may object to the request (Article 4). Such objection is to be made in writing to the Secretary-General and is to indicate which of the following grounds are relied on. Namely, that:

"(a) the other party is under no obligation to have recourse to fact-finding;

(b) the circumstances indicated in the request as the circumstances to be examined and reported on are wholly or partly outside the scope of the agreement between the parties for recourse to fact-finding."

The Secretary-General is to send a copy of the notice of objections to the other party and is to invite the parties *"to meet with him in order to seek to resolve the objections by agreement"*. If no agreement is reached, the parties are to be invited to designate a 'Special Commissioner' to rule on the objections. If the parties do not designate a Special Commissioner within the period allowed (and are not willing to allow the designation to be made by the Chairman of the Administrative Council or some other authority), the Secretary-General is to inform the parties that *"the fact-finding proceeding cannot be held, recording the failure of the parties or one of them to cooperate"*.

If the Special Commissioner is appointed, he or she is to rule on the objections after hearing both parties and decide whether or not the fact-finding proceeding is to continue. If it is to continue, the Special Commissioner is to determine the scope of the proceeding (Article 5).

To the extent that the parties have not agreed the fact-finding procedure to be followed, Article 6 provides that the Procedural Arrangement is to be drawn up by the Chairman, in consultation with the parties. Unless the parties agree otherwise, that Arrangement is to provide for the appointment of three commissioners, and:

"(a) qualifications, appointment, replacement, resignation, and disqualification of the commissioners, filling up of the vacancies and consequential resumption of proceeding; and (b) incapacity of the President of the Committee and procedural matters, including procedural languages, shall, to the extent practicable, be similar to those applicable to conciliators and conciliation proceedings under the Conciliation (Additional Facility) Rules."

Chapter II: Procedure of the Committee

Unless the parties agree otherwise, the Committee is to consist of a sole Commissioner or any uneven number of Commissioners. If it consists of three or more, one is to be appointed President (Article 7). Following their appointment, Article 8 requires each member of the Committee to sign a declaration similar to that required under the Arbitration Rules.

Each investigation, and each examination of a locality, is to be in the presence of agents and counsel of the parties (Article 10). Decisions of the Committee are to be taken by a majority of votes of the members (Article 11). Article 12 provides that the Secretary-General shall make the necessary arrangements for the serving of notices by the Committee. The constitution of that Committee and its procedures are to be governed by the Procedural Arrangement. Any matters not provided for in that Arrangement, or in any of the Rules, are to be determined by the agreement of the parties or, failing that, by the Committee (Article 13).

Chapter III: Termination of the proceedings and the Report of the Committee

After the parties have presented their explanations and evidence, and any witnesses have been heard, the President of the Committee is to declare the fact-finding proceedings closed. The Committee then adjourns to deliberate and to draw up its Report.

If one of the parties has failed to appear, to participate in the proceeding or to cooperate with the Committee, and the Committee determines that as a result it is unable to carry out its task, it is to give notice to the parties, *"close the proceeding and draw up its Report, noting the reference to fact-finding under the Additional Facility and recording the failure of that party to appear, participate or cooperate"* (Article 14).

Article 15 states that the Report of the Committee is to be adopted by a majority of the Commissioners and signed by them. The refusal of a Commissioner to sign shall not invalidate the Report. A Commissioner who dissents may attach to the Report a statement explaining his/her reasons.

Article 15 (4) contains the significant provision that *"The Report shall be limited to findings of fact. The Report shall not contain any recommendations to the parties nor shall it have the character of an award"*. Article 16 contains the equally significant provision that the parties shall be *"entirely free as to the effect to be given to the Report"*.

Chapter IV: Good faith

Article 17 contains what is in effect a 'good faith' requirement that the parties cooperate with the Committee. The parties are to:

> *"undertake to facilitate the work of the Committee and to supply it with all means and facilities necessary to enable it to become fully acquainted with, and to accurately understand, the facts in question. Without prejudice to the generality of the foregoing, the parties in particular undertake to supply the Committee to the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow the Committee to visit the localities in question and to summon and hear witnesses or experts."*

7) The ICSID Centre's Caseload

The increasing use of – and reliance on – bilateral and multilateral investment treaties has led in recent years to a considerable increase in the Centre's caseload. This fact was stressed by the Senior Counsel at ICSID, Mr Ucheroa Onwuamaegbu, when he spoke at the 2004 International Oil and Gas Conference in London (see Box 9). Although cases traditionally brought to the Centre were mostly commenced on the basis of the agreement of the parties in their investment contracts, or on the basis of consents of governments contained in national investment laws, Mr Onwuamaegbu said that in the past decade more cases had been commenced on the authority of the consents provided by governments in various bilateral and multilateral treaties that provide for ICSID arbitration for the resolution of their investment disputes. Indeed, about 80 per cent of the cases then pending at the Centre were commenced on the basis of consents contained in BITs.

Box 9: Comments on ICSID by the Centre's Senior Counsel

Speaking at the 2004 International Oil and Gas Conference at the Guildhall in the City of London, ICSID's Senior Counsel Mr Ucheroa Onwuamaegbu stated that the Centre provided facilities for the arbitration and conciliation under the ICSID Convention of legal disputes arising directly out of an investment between member States and nationals of other member States. By way of example, he said that the Centre had recently registered a request for arbitration by a Dutch company against the Government of Tunisia concerning alleged breaches of rights and obligations under the Tunisian foreign investment law.

He added that in addition to the Convention cases, ICSID also administered cases under the Additional Facility Rules, where one of the parties was not a member country or a national of a member country, or where the dispute did not directly arise out of an investment. Therefore a country like Canada (or its national) could be a party to proceedings at the Centre under those Rules. He pointed out that such proceedings were not covered by the provisions of the Convention and could therefore be subject to the control of national courts.

Of cases pending at ICSID, 14 related to oil and gas and of those all but three involved the Government of Argentina as a respondent. All of the cases involving Argentina concerned complaints of similar measures of the Government, which claimants alleged had breached their rights guaranteed under BITs. This fact raised challenging issues for ICSID in relation to administering multiple cases involving the same respondent and similar legal and factual issues. One approach taken by the Centre, with the cooperation of the parties, had been to appoint the same arbitrators wherever possible to deal with different claims that involved similar issues. Some of the pending cases raised common issues – for example, jurisdictional matters raised when a claimant alleged a breach of a contract and a breach of a treaty in the same dispute.

To date, ICSID had dealt with four conciliation cases, and was taking steps to encourage increased use of the Conciliation Rules.

In concluding, Mr Onwuaemaegbu stressed that an award made by a Tribunal under the ICSID Convention could be enforced in 140 countries as if it were a *"final judgement of a court"* in each of those countries. Such an award was also free from interference by the local courts.

In the year 2004 there were more than 70 pending cases. By early 2006, the number of pending cases exceeded 100. These cases included disputes dealing with the following:

- Debt instruments
- Cobalt and copper mining concessions
- Natural gas transportation

- Hydrocarbon concession and electricity generation project
- Water and sewer services concession agreement
- Concession agreement regarding a port
- Electric power generating station project
- Energy enterprise
- Oil and gas development contract
- Waterway construction project
- Dam construction project
- Diamond mining concessions
- Airport project / construction of an airport terminal
- Electricity generation and distribution enterprise
- Oil refinery
- Cotton processing and trading enterprise
- Sunflower oil joint venture
- Cement production enterprise
- Railway concession agreement
- Dredging project
- Thermal energy station project

States involved in the cases included Argentina, Bolivia, Burundi, Democratic Republic of the Congo, Ecuador, Egypt, Jordan, Kazakhstan, Kenya, Mexico, Pakistan, Peru, Philippines, Romania, Seychelles, Slovak Republic, Trinidad and Tobago, Turkey and the United States of America.

8) Problems Arising in Investor-State Disputes

Some of the difficulties that may arise in investment treaty arbitration were considered in Chapter 9 of the Manual, which dealt with investor-State disputes.

The problems looked at were 'umbrella' / *pacta sunt servanda* clauses, 'fork in the road' provisions, and the difficulties caused by different tribunals arriving at different decisions in cases involving similar facts / similar issues. The decisions *in SGS v Pakistan* and *SGS v the Philippines* were taken as an example of the problems. The chapter also considered possible solutions to those problems that might be provided by listing similar facts / similar issues cases before the same tribunals, or by using mechanisms such as joinder or consolidation.

A more radical proposal, which was being considered by ICSID in 2004, was the setting up of an appellate process – a single optional mechanism for the appeal of awards in investor-State disputes as an alternative to individual appeal mechanisms that could be created under different treaties by member countries.

9) Proposed Changes to the ICSID Rules

The possibility of setting up an appellate process was raised in a 'Discussion Paper on Possible Improvements of the Legal Framework for ICSID Arbitration', released by the Secretariat of the ICSID Centre in October 2004.[61] The Secretariat sought comments on the Discussion Paper from, among others, business groups, civil society groups and arbitration experts and institutions around the world.

In May 2005 ICSID issued a Working Paper that outlined the results of that extensive consultation and set out a number of proposed changes to the Rules. According to the Working Paper, the Discussion Paper had

> *"... suggested some changes to the ICSID Arbitration Rules and the Additional Facility Arbitration Rules. The suggested changes concerned preliminary procedures; publication of awards; access of third parties to the proceedings; and disclosure requirements of arbitrators. The Discussion Paper also suggested that ICSID might strengthen its conciliation services and expand its training activities. A further possibility considered in the Discussion Paper was the establishment by ICSID of a mechanism for the appeal of awards in investment arbitrations. The Discussion Paper explained that this was a possibility that ICSID might pursue as an alternative to the creation of individual appeal mechanisms under different investment treaties of member countries."*

For example, the proposed changes to ICSID Arbitration Rule 39 dealing with preliminary procedures are set out in an Annex to the Working Paper. The Note explaining the reasons for the proposed amendments stated:

> *"As noted in the Secretariat's Discussion Paper of October 22, 2004, under the ICSID Arbitration Rules, provisional measures may only be sought from national courts if provided for in the consent to arbitration of the parties. Even where such measures are urgently needed, the parties must await the review and registration of the request for arbitration, and the constitution of the arbitral tribunal, before filing a request. Thereafter, the tribunal would have to allow the parties enough time to file observations before it could recommend provisional measures.*
>
> *"The suggested changes introduce a procedure for the expedited filing of requests for provisional measures, and of all the observations of the parties on such a request, prior to the constitution of a tribunal. Such a procedure would reduce delay and ensure that the tribunal is able to consider the request once it is constituted, especially where the measures are urgently required."*

However, the Working Paper did not make any proposals in relation to the difficult question of an appellate system. Paragraph 4 of the Working Paper explained why:

> *"The members of the Administrative Council and others who provided comments on the Discussion Paper expressed appreciation for the initiative to review the framework for ICSID arbitration and identify possible improvements. There was general agreement that, if international appellate procedures were to be introduced*

61 Further information on the Discussion Paper can be found on the World Bank website.

for investment treaty arbitrations, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. Most, however, considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper. The Secretariat will continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism."

10) Conclusions

The ICSID system is a supranational system created specifically for the purpose of handling investment disputes. The Centre, through the ICSID Convention and the various sets of ICSID Rules, provides a wide range of investment dispute resolution processes to both States and nationals of States. One of the system's many benefits is the fact that, in relation to arbitration, it provides a self-contained enforcement mechanism.

The increased use of and reliance on bilateral and multilateral investment treaties has resulted in an increase in the volume of the Centre's caseload, a situation that seems likely to continue into the future.

Part IV: International Commercial Dispute Resolution

"Given the prodigious expansion of international commercial arbitration over the past half-century (the increase of trade being its fundamental cause, and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards its primary instrument) modern practitioners may be excused for believing that we are living in an unprecedented golden age of international arbitration. They would be surprised to learn how vast international arbitral jurisprudence was in the 19th Century. In the period between 1814 and 1898, for example, one study enumerated no less than 158 different international tribunals, including the celebrated commissions created in 1853 between Britain and the US; in 1868 between Mexico and the US; and in 1880 between France and the US....

"The list did not include the commissions created under the famous Jay Treaty, UK/US, 8 Stat. 116, which was concluded in 1794 for the purposes, inter alia, of adjudicating claims of British creditors who were unsatisfied by their treatment at the hands of US courts, and vice versa. All of these bodies were created by treaty, some to resolve only one dispute, but others to deal with many cases over a period of years."

Jan Paulsson[62]

62 Jan Paulsson, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law", paper delivered at the 18th Congress of the International Council for Commercial Arbitration in Montreal, June 2006.