Chapter 4

An Overview of Procedure in an Investment Treaty Arbitration

*Barton Legum**

INTRODUCTION

What is the procedure in this treaty arbitration? What should I expect? Whether the client is a high-ranking official in a Ministry of Justice or General Prosecutor's office, a businessman or a member of a multinational corporation's legal department, these questions are inevitably among the first posed in a case.

There is tremendous variability in the procedure of investment arbitrations. Arbitrations range from cases that take many years to conclude to cases that are heard within a year or two. The experience in one case may not hold for another.

However, there are a number of common elements and fixed variables. An understanding of these elements and variables allows the reader to draw conclusions as to how a specific arbitration will likely play out. This is the understanding that this chapter attempts to convey, with a practical focus on the principal strategic decisions in such a case.

OVERVIEW OF THE OVERVIEW

As is the case with other forms of international arbitration, investment treaty arbitration is a hybrid of civil-law and common-law procedure. Like many civil-law systems,

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investment arbitration places great emphasis on the written submissions that precede the hearing. Each party makes its case in the written submissions, which present all of the evidence it relies upon to establish its case. Similar to civil-law proceedings, the oral hearing in many ways merely supplements these written submissions.

However, as in common-law proceedings, the hearings are often multiday affairs that feature cross-examination of witnesses by counsel and active questioning by the arbitral tribunal. The nature and variety of these hearings resemble more those of common-law proceedings than civil-law ones.

From a practical perspective, the activity in an investment-treaty arbitration can be divided into five, sequential phases: (1) the preparation of the case, (2) the written submissions, (3) the hearing, (4) posthearing activity, and (5) the decision and its aftermath.

PREPARATION OF THE CASE

For present purposes, preparation of the case includes the period from the inception of the dispute to the first procedural session with the arbitral tribunal. It is in many respects the most important phase of the case. During this time, the parties select the counsel to represent them, conduct an initial analysis of the case, select the arbitrators, and decide on the specific procedure for the arbitration. Each of these decisions is critical. Many parties make the mistake of devoting insufficient resources to this period of the case and these decisions. This mistake is difficult to overcome later in the procedure.

The Beginning

The preparation period begins for the claimant when it realizes that there is a serious problem—or potential problem—with a foreign investment and that an investment treaty may either provide a possible solution or assist in a political or negotiated resolution of the issue. In some instances, the investor recognizes the problem years before a dispute emerges and seeks early advice on international investment law. The advice at this stage may help to resolve the dispute before arbitration ever becomes necessary. In other cases, the advice may help to better prepare the case for arbitration. In still other cases, the problem with the foreign investment develops suddenly, and the investor seeks advice only shortly before the arbitration is commenced.

For the respondent State, the preparation period commences—or at any rate *should* commence—when the relevant ministry receives the first communication that identifies a potential dispute under an investment treaty. In some instances, this will occur when a high-ranking official of the government receives a letter from the investor or its counsel. In others, this will occur when a formal notice of intention to submit a claim to arbitration is communicated. In many instances, the preparation period for the State will begin only once the request for arbitration is received.

Because investment-treaty arbitration is a relatively recent development, many States do not have internal procedures for dealing with these cases. It is now perhaps

more the rule than the exception for there to be lack of clarity as to which ministry is responsible for the file, where funding for defense of the case will come from, what procedures must be followed to retain competent counsel, and what budget will pay for any eventual adverse award. Long periods of apparent inactivity on the State side of the case often result while these issues are sorted out internally. The resultant delays can leave the State with a compressed period for preparation. Unless the State retains highly experienced counsel, this compressed preparation time can place the State at a significant disadvantage.

Initial Case Assessment

After counsel is retained by both sides, each party generally conducts a legal and factual assessment of the case. The principal documents relevant to the case are collected and, often, translated. Witnesses are interviewed. A chronology of events is prepared, and the facts are analyzed in terms of the substantive and jurisdictional standards of the investment treaty. If time permits, counsel will often prepare a confidential memorandum setting out initial views on the case and prospects for success for discussion with the client.

For the claimant, this initial case assessment serves as the basis for its strategy in deciding whether to bring the claim at all, framing its claim in the request for arbitration, selecting arbitration rules (if the treaty provides a choice of rules), deciding whom to appoint as the first arbitrator, and negotiating detailed procedures with the respondent. For the respondent, the case assessment serves as the basis for its strategy in appointing the second arbitrator and agreeing on the presiding arbitrator, deciding whether to propose multiple phases for jurisdiction, liability and damages, and determining what detailed procedures to negotiate with the other side and propose to the tribunal. The higher the quality and accuracy of the case assessment, the better-founded these crucial decisions by each party will be.

The Request for Arbitration

The document that commences the arbitration proceedings is referred to as the Request for Arbitration under the ICSID Rules[1] and the Notice of Arbitration under the UNCITRAL Rules.[2] In neither case is this document a definitive and complete statement of the claims asserted: in the ICSID system, that function is reserved for the

1 Convention on the Settlement of Investment Disputes Between States and Nationals of other States art. 36 [hereinafter ICSID Convention]; ICSID Rules of Procedure for Arbitration Proceedings 1 [hereinafter ICSID Rules].

2 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules art. 3 [hereinafter UNCITRAL Rules].

claimant's memorial[3] and in the UNCITRAL system, for the statement of claim.[4] Instead, the request or notice provides certain basic information about the claims, the parties, and the basis for arbitral jurisdiction.[5] Because it is the first document concerning the case that the arbitral tribunal will see, however, many claimants devote time and energy to making this document as persuasive as possible.

UNCITRAL arbitrations begin as soon as the Notice of Arbitration is received by the respondent.[6] ICSID arbitrations, by contrast, commence only when the Secretary-General of ICSID registers the request.[7]

There are a number of substantive and formal requirements for requests for arbitration under the ICSID Rules.[8] Some investment treaties impose additional formal preconditions to arbitration.[9]

Historically, it has taken ICSID between two and six months to register requests for arbitration. The Secretariat has recently introduced internal reforms to reduce that period to between three weeks and two months, with some exceptional cases requiring longer.

Selection of Arbitration Rules

Many investment treaties allow the investor a choice of which arbitration rules will govern the arbitral procedure. The most common choice is between the ICSID Rules and the UNCITRAL Rules,[10] although a minority of treaties alternatively provide a choice of the ICC or SCC Rules.[11] A detailed comparison of these rules is beyond the scope of this chapter, but the principal practical differences will now be summarized.

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3 ICSID Rule 31(1), (3).

4 UNCITRAL Rules art. 18.

5 *See* ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings 2 [hereinafter ICSID Institution Rules]; UNCITRAL Rules art. 3(3).

6 UNCITRAL Rules art. 3(2).

7 ICSID Institution Rule 6(2).

8 *See generally* ICSID Institution Rule 2.

9 *See, e.g.*, NAFTA art. 1121(1) (entitled "Conditions Precedent to Submission of a Claim to Arbitration") ("A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.").

10 *E.g.*, 2004 US Model BIT art. 24(3); Germany and Argentina Bilateral Investment Treaty art. 10(4); Mozambique and Uganda Bilateral Investment Treaty art. 9(2).

11 *E.g.*, Oman and Austria Bilateral Investment Treaty art. 10; Norway and Russia Bilateral Investment Treaty art. 8; Energy Charter Treaty art. 26(4)(c).

Cost. Arbitration under the ICSID Rules is significantly less expensive, in general, than arbitration under the UNCITRAL Rules. ICSID has a set fee schedule that establishes hourly fees for tribunal members at a rate that is one-half to one-third of market rates for top arbitrators.[12] The UNCITRAL Rules allow the arbitrators to set their own fees, and they understandably tend to do so based on market rates.[13]

In addition, the ICSID Secretariat provides a range of services at nominal cost. These include hearing rooms at World Bank buildings with facilities for simultaneous interpretation, case scheduling and docket maintenance, and substantial case management and general secretarial services.[14]

UNCITRAL arbitrations, by contrast, are *ad hoc* in the sense that there is no institution that administers the arbitration.[15] All of the services just mentioned must be organized and paid for by the parties and the arbitrators in UNCITRAL arbitrations, and these costs add to the expense of the proceedings.[16]

Jurisdictional requirements. The ICSID Convention provides jurisdiction only over the class of disputes delimited in Article 25 of that Convention.[17] For an arbitration to proceed, it must satisfy not only the jurisdictional requirements of the investment treaty but also the additional requirements of the ICSID Convention.[18] By contrast, the UNCITRAL Rules impose no additional requirements for jurisdiction, with the result that a tribunal will have jurisdiction over any claim meeting the requirements of the investment treaty. A claimant anticipating a substantial jurisdictional objection may prefer the UNCITRAL Rules to those of ICSID– for merely by selecting the UNCITRAL Rules, the claimant eliminates all jurisdictional objections based on the requirements of Article 25 of the ICSID Convention.

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12 ICSID Administrative and Financial Regulations reg. 14; ICSID Schedule of Fees, *available at* http://icsid.worldbank.org (follow "Cases" then "Schedule of Fees" in left-hand navigation pane).

13 *See* UNCITRAL Rules art. 39, commentary.

14 *See* ICSID "Dispute Settlement Facilities," http://icsid.worldbank.org (follow "About ICSID," then "Dispute Settlement Facilities" in left-hand navigation pane).

15 UNCITRAL Rules preface (stating in part that the rules are "for *ad hoc* arbitration . . . acceptable in countries with different legal, social and economic systems"). A number of institutions routinely administer UNCITRAL arbitrations for a fee, including ICSID, the Permanent Court of Arbitration, and others.

16 *See* UNCITRAL Rules arts. 38, 39.

17 ICSID Convention art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.").

18 *See ibid.*; Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (March 18, 1965) 22–33 (describing the ICSID jurisdictional requirements of consent, nature of the dispute, parties to the dispute, notification by contracting states, arbitration as exclusive remedy, and claims by the investor's state).

Enforcement and review mechanisms. The ICSID Convention has a unique system for review and enforcement of arbitral awards. Under the Convention, a special arbitral tribunal called an "*ad hoc* committee" decides on applications for annulment of an award.[19] An ICSID award is not subject to any review in national courts.[20] Instead, the national courts of Contracting States are obligated to enforce ICSID awards as if they were a judgment of a court of first instance.[21] By contrast, UNCITRAL awards are subject to annulment or set-aside proceedings in the national court of the place of arbitration and to limited review in proceedings to enforce the award elsewhere.[22]

Transparency. The ICSID Rules provide for a public docket describing the cases registered and significant case developments.[23] They also provide for publication of at least excerpts of the reasoning of ICSID awards and set a presumption that *amicus curiae* submissions will be accepted and that hearings will be open to the public.[24] By contrast, the UNCITRAL Rules provide a presumption that hearings will be private and do not address other questions of transparency.[25]

Selection of the Arbitrators

"*Tant vaut l'arbitre, tant vaut l'arbitrage,*" the French international arbitration community aptly observes: "an arbitration is worth no more than the arbitrator." Selection of arbitrators is one of the most important decisions in the case.

In investment treaty arbitration, the claimant names the first arbitrator, the respondent names the second arbitrator, and then either the two parties or the two arbitrators agree on the third and presiding arbitrator.[26] If the tribunal is not constituted within a stated period of time, then the ICSID Secretariat or another designated authority may appoint the remaining arbitrator or arbitrators.[27]

There are a number of different approaches to selection of arbitrators in investment treaty cases. Some practitioners believe that all that matters is appointing seasoned and respected arbitrators. Others take a more nuanced approach, attempting to match the arbitrator appointed to the specific needs of the case. For example, if a party considered that the case depended upon an understanding of the commercial realities of the

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19 ICSID Convention art. 52(3).
20 *Ibid.*, art. 53(1).
21 *Ibid.*, art. 54(1).
22 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, "The New York Convention," arts. III, V, VI (New York, June 10, 1958).
23 ICSID Administrative and Financial Regulations reg. 22.
24 ICSID Rules 32(2), 37(2), 48(4).
25 *See* UNCITRAL Rules art. 25(4). UNCITRAL is at this writing considering whether to adopt provisions for greater transparency in investment treaty arbitrations under a revised set of UNCITRAL rules. *See* UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, Feb. 4–8, 2008) paras. 54–69.
26 *See* ICSID Convention art. 37(2), ICSID Rules 3 & 4; UNCITRAL Rules art. 7.
27 ICSID Convention, art. 38. *See also* UNCITRAL Rules, arts. 6(2), 7(2)–(3).

investment, an arbitrator with a commercial background might be desirable. If instead the party considered the case to depend upon intimate familiarity with how government works, an arbitrator with significant government experience might be helpful. For practitioners taking this approach, an arbitrator appropriate for one case might not be desirable for another case.

The First Session with the Tribunal

The first session with the arbitral tribunal usually takes place six to twelve weeks after the tribunal has been constituted, i.e., after the date when all of the arbitrators confirm their appointment.[28] It is at this session that the procedure for the arbitration is organized.[29] The counsel for the two parties generally attempt to agree on as many aspects of the procedure as possible before the first session, reserving the discussion at that session only for disputed items. It is possible later to change the procedure decided at the first session, but it is not easy.

It is widely said, and it is true, that arbitration is a flexible process. The advantage of this flexibility is that it is possible to design a procedure that is perfect for the specific needs of the case at hand. The difficulty is that if a party does not have a clear idea of what those needs are, the party can wind up agreeing to a procedure at the first session that does not at all suit *its* needs for proving *its* case.[30] A party that has performed a comprehensive and thoughtful case assessment, and is assisted by experienced counsel, will not find itself in such a position.

The principal procedural issues that arise at the first session are 1) language of the proceedings; 2) place of arbitration; 3) confidentiality of information relating to the arbitration; 4) scheduling of written submissions; 5) collection of documentary evidence; and 6) how to organize testimonial evidence, both before and at the

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28 *See* ICSID Rule 13(1) ("The Tribunal shall hold its first session with 60 days after its constitution or such other period as the parties may agree.").

29 ICSID Rule 20.

30 Example: a respondent State plans to defeat an investment treaty claim based on an allegation that the investment was made illegally. The investor proposes a simple procedure, where each side provides the other with the documents it intends to rely on, followed rapidly by a memorial, a counter-memorial and the main hearing. The respondent agrees.

In preparing its counter-memorial, however, the respondent realizes that, under the applicable law, it must show bad faith by the investor to support a finding of illegality. The documents in the respondent's possession suggest that the investor was ill-informed, but they do not show bad faith. The documents that might support such a finding would be in the investor's files —but the agreed procedure does not provide the respondent with access to any documents in those files other than those that the investor will rely on at the hearing.

If the respondent proceeds under the agreed procedure, the result is fairly clear: the respondent has little chance of proving its case. If the agreed procedure had contemplated requests for documents along the lines of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, the situation might be different. But it will be difficult, if not impossible, to add in a document request procedure given the tight timetable the respondent agreed to. The procedure the respondent agreed to, in this example, does not serve its case.

evidentiary hearing.[31] A detailed treatment of each of these issues is beyond the scope of this chapter, and they are discussed in more detail in Chapter 5. Of these, scheduling, document production, and the hearing—items 4, 5, and 6—are the issues that are disputed recurrently and will now be briefly discussed.

Multiple-phase cases. In investment treaty arbitration, the principal issue is often whether the case will be heard in multiple phases. It is possible for a case to be briefed in a single phase, where all issues in the case—jurisdiction, admissibility of the claim, liability, and damages—are determined at once. The advantage of this approach is that it is often the most rapid and cost-effective way to resolve the dispute. However, this observation will not hold true *if* the respondent can successfully assert a challenge to the tribunal's jurisdiction or if a decision on one issue in the case can simplify or eliminate later proceedings.[32]

Jurisdictional issues in investment treaty cases tend to be complex. Clever counsel can often devise a potential objection to jurisdiction. Moreover, the abstraction of consent to arbitration without any preexisting contract with the investor—aptly called "arbitration without privity"[33]—is difficult for officials in ministries of justice to accept. There is often a strong political imperative for respondents to treat claims as frivolous. The combination of these factors explains the fact that objections to jurisdiction are commonplace in investor-state cases.

The objections are rarely successful. A recent, broad-based survey finds the objections to be successful in less than one out of every five cases in which they are advanced.[34] The prevalence and lack of success of jurisdictional objections, combined with the current prevailing practice to hold a separate phase on jurisdiction, means that investment arbitrations are often multiple-phase proceedings.

Multiple-phase proceedings are more costly and take longer to resolve than single-phase proceedings. A study of investment treaty cases resolved in 2007 concluded that most cases were resolved in three to four years or less. However, one-third of the cases took four years or more to resolve.[35] Each of these longer cases, I would venture, was a case heard in multiple phases.

Time and cost aside, there can be attractive intellectual and strategic reasons to opt for separate liability and damages phases. Damages often involve issues distinct from the merits, with relatively little overlap in witnesses, evidence, or argument.

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31 *See* ICSID Rules 20(1); UNCITRAL Notes on Organizing Arbitral Proceedings paras. 2–3, 6–7, 9–10, 13.

32 *See, e.g.*, UNCITRAL Notes on Organizing Arbitral Proceedings para. 76.

33 Jan Paulsson, *Arbitration without Privity*, 12 ICSID Review—F.I.L.J. 232 (1995).

34 Richard E. Walck, *Current Statistics on Investment Treaty Arbitration*, at 7 (May 2, 2007) (finding, in survey of over 200 investment treaty awards, that jurisdictional objections were successful in only 16 percent of the cases where they were advanced).

35 Linda A. Ahee & Richard E. Walck, *Investment Arbitration Update as of December 31, 2007*, at 6 (of 29 cases resolved in 2007, 5 were resolved in under 1 year; 1 was resolved in 1–2 years; 4 were resolved in 2–3 years; 8 were resolved in 3–4 years; 5 were resolved in 4–5 years; and 6 were resolved in more than 5 years) (http://www.gfa-llc.com/images/Investment_Arbitration_Update_12-31-07.pdf) (last visited on 10 September 2009).

Often expert evidence is required to prove damages. Expert evidence is expensive. And many arbitrators and counsel do not find damages to be particularly interesting. Some will readily agree to a separate damages phase in the hope and expectation that the parties will negotiate a settlement if the tribunal rules that the respondent is liable.

Disclosure of evidence. The other scheduling issue that frequently receives heated debate at the first session is disclosure of evidence. When a party believes that evidence important to its case may be found in the files of the other party, it will sometimes press for a period of disclosure of evidence before the first written submission is made.[36] The advantage of this approach is that it allows the written submissions to be made on a fully formed factual record. The disadvantage of this approach is that disclosure of evidence in investment treaty cases is often a messy affair that gives rise to frequent procedural disputes and delays.

In my experience, governments—even ones in developed countries—are not particularly good at record keeping. Clerical staff are not as well paid or trained as in private enterprise. There are often few internal incentives for them to take time away from overwhelming existing duties to access what records there are.

Investors often have little appreciation for how bad the conditions for record keeping and retrieval are in many government agencies. The investor's typical reaction to a paltry production in response to a disclosure request is suspicion and a demand for relief from the tribunal. Intervention by the tribunal requires time. More time still is required for the respondent to respond to the tribunal's order. Delay, cost, and frustration are the typical results of disclosure requests in investment arbitrations. Occasionally, however, disclosure results in critical evidence that would not otherwise be available.

In many cases, there is no disclosure as such but merely the submission by each party of evidence supporting its case. In others, there is disclosure but only in between the regularly scheduled written submissions of the parties.

After the first session, the tribunal enters a procedural order (sometimes in the form of minutes of the session) that sets the procedure for the rest of the case or at least the next phase of the case. The next act, save those cases where there is an initial period of disclosure, is the written submissions.

THE WRITTEN SUBMISSIONS

The written submissions in investment treaty arbitrations generally take the form of four substantial pleadings: the memorial, the counter-memorial, the reply, and the rejoinder.[37] The arbitral rules require only the first two of these pleadings to be submitted.[38] The majority of investment treaty cases, however, deploy all four of the pleadings.

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36 *See* UNCITRAL Notes on Organizing Arbitral Proceedings para. 13.

37 ICSID Rule 31(1).

38 *Ibid.* (". . . and, if the parties so agree or the Tribunal deems it necessary," the reply and the rejoinder will also be required).

counter-memorial to present the entirety of the arguments and the evidence offered by each party in support of its case in chief. The pleadings are often lengthy, ranging on average from 75 to 150 pages in length or more. They are typically accompanied by annexes containing multiple witness statements and documentary evidence, as well as copies of the legal authorities on which the pleading relies.

The reply and the rejoinder are responsive pleadings, limited in content to responding to the points and evidence offered in the immediately preceding pleading. They are accompanied by responsive witness statements, documentary evidence, and legal authorities.

Because of the substantial effort required to prepare these pleadings, it is common for several months to be allocated to each party for preparation of the memorial and counter-memorial and a number of weeks for the reply and rejoinder.

THE HEARING

The hearing is the occasion for the parties to engage the tribunal with respect to the essential issues in the case and for witnesses to be cross-examined in a manner that tests the accuracy of their testimony.[39] Hearings are typically multiple-day affairs. They range from one or two days (typically for jurisdictional hearings in cases where there are no complicated legal or factual issues) to two or, in rare cases, three weeks for highly complex ones. The average hearing is probably three to five days in length.

It is difficult to generalize concerning hearings in investment treaty cases. The hearing on the merits in some cases consists entirely of arguments by counsel for the parties based on evidence introduced into the record during the written submissions. In some cases, however, argument by counsel constitutes only a small part of the hearing, with the great majority consisting of cross-examination of witnesses. Many hearings fall between these two extremes.

The one constant is that witness statements are generally considered to be the direct testimony of the witness, meaning that the witness need not repeat orally his or her written testimony for it to be fully considered by the tribunal.[40] Examination of witnesses at the hearing tends to be concentrated on cross-examination, although increasingly tribunals permit counsel for the witness to conduct a brief direct examination at the hearing to remind the tribunal of the main points of the witness's testimony and put the witness more at ease in the unfamiliar and stressful environment of an international arbitration hearing.

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39 *See* ICSID Rule 32 (stating that "[t]he oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts"); UNCITRAL Rules art. 15(2) (stating that "[i]f either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument").

40 ICSID Rule 36; UNCITRAL Rules art. 25(4), (5).

The tribunal members listen carefully to the arguments and evidence presented at the hearing. They do, however, interrupt counsel to ask questions about the arguments presented and pose questions directly to the witnesses brought before them.[41] These interventions tend to occur less frequently than in typical common-law proceedings and more frequently than in typical civil-law ones. Much, however, depends on the specific character of the arbitrators and, to some extent, counsel in the case in question.

The hearing is a critical part of the case. As a practical matter, this is when the arbitrators will focus the most on the case and begin their deliberations on its outcome. Many arbitrators read the pleadings shortly before the hearing. It is the parties' best opportunity to explain the case that they have made in the pleadings.

Post-hearing Activity

After the hearing, the arbitrators retire to deliberate and prepare the decision or award. The deliberations are secret. In many cases, the parties have nothing to do but wait during the period between the hearing and the decision or award.

Often, however, the tribunal requests additional submissions from the parties in the period between the hearing and the decision. In some cases, this results from an issue raised at the hearing that the parties had not previously addressed in detail. In others, the tribunal's deliberations will identify a discrete point on which clarification is useful for purposes of its decision, and the arbitrators will request production of evidence or a small submission on that question. In still others, tribunal members, believing it to be useful as a general proposition to have the parties' reflected views on the issues presented at the hearing, will request post-hearing submissions as a matter of course. Depending on their length, post-hearing submissions can substantially add to the cost of the proceedings for the parties.

The arbitration rules generally provide the tribunal the authority after the hearing to close the proceedings to further submissions.[42] After a closure order, the parties can make further submissions only with a showing of good cause to do so.

Depending on the complexity of the issues presented and whether there is need for a translation, it can take between three months and a year for a tribunal to issue a decision on jurisdiction. Subject to the same considerations, a decision or award on liability or damages can take between six and eighteen months for a tribunal to prepare. The mean is likely around six months for preparation of a decision on jurisdiction and a year for an award on the merits.

The Decision or Award and Its Aftermath

Decisions and awards in investment treaty cases are substantial documents. They typically describe the parties, the procedure, the facts, and the arguments advanced by the

41 *See* ICSID Rule 32(3).

42 ICSID Rule 38; UNCITRAL Rules art. 29.

parties. They also, of course, set out the tribunal's analysis of the issues presented, the decision, and its operative part.[43] Decisions and awards range in length from 50 to over 150 pages.

Statistical studies on investment treaty arbitration do not indicate a bias in either direction in the numbers of wins and losses by States and investors. However, it has been found that, in those cases that investors win, the damages awarded are on average only about one-third of the amounts claimed by them.[44] Reimbursement to the winning party of the legal costs of the arbitration is awarded in only about one-sixth of the cases.[45]

Awards are final, binding, and not subject to appeal.[46] Awards of monetary relief may be enforced against available assets through national court systems.

After the award is rendered, different strategic questions naturally present themselves to the parties depending on whether the award favors or disfavors them. For the losing party, the main question is whether the award is infirm in a manner subject to correction or annulment. For parties winning affirmative relief, the question is how to enforce the award.[47] Both of these subjects are covered in great depth in later chapters of this book.[48]

For purposes of this overview, it is worth noting that the losing party has essentially two, very restricted options: it can ask the same tribunal to correct the decision on limited grounds, or it can ask a national court or, in the ICSID Convention system, another arbitration tribunal to annul the decision on limited grounds.[49] The applicable standards are demanding in either case, and requests for correction or annulment are rarely successful.[50]

On the subject of enforcement of investment treaty arbitration awards, there is as yet relatively little experience. One respected author concludes that this is so because States have generally observed their obligation to pay the awards against them.[51]

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43 *See generally* ICSID Rule 47; UNCITRAL Rules, art. 32.

44 Richard E. Walck, *supra* n. 34, at 6.

45 *Ibid.*, at 15.

46 ICSID Convention art. 53; UNCITRAL Rules art. 32.

47 In UNCITRAL arbitrations, it is common practice for tribunals to issue their decisions on jurisdiction and liability as interim awards that finally dispose of those issues without putting an end to the proceedings. In the ICSID system, however, there is no provision for interim awards; the only document entitled "award" is the one that puts an end to the proceeding. Because of this feature, in the ICSID system decisions on jurisdiction and liability in favor of the investor are decisions, not awards, and the post-award relief described below is not formally available, at least until the final award is rendered.

48 *See* Chapters 23 and 25 of the present book.

49 *See* ICSID Convention art. 52(1); New York Convention, art. V.

50 *But cf.* Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, *in* 50 YEARS OF THE NEW YORK CONVENTION, INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES No. 14, at 285, 287–88 (Albert Jan van de Berg ed., 2009) (finding that only 6 percent of all non-ICSID investment treaty awards were annulled by national courts even in part, but 40 percent of all ICSID arbitration awards were at least partially annulled by *ad hoc* Committees established under the ICSID system; Dr. Verhoosel questions, however, whether these results are statistically significant given the relatively small sample size).

51 *See* Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 136–37 (R. Doak Bishop ed., Juris Publishing 2009).

CONCLUSION

The procedure in investment treaty arbitrations resembles that of international commercial arbitration in many respects. But the presence of a State as party, the applicability of public international law as the rule of decision, and the inevitable incorporation of some elements of inter-State dispute resolution mechanisms have combined to create a procedure that in a number of respects is distinct. Navigating these procedures requires care and experience. But the first step to doing so is understanding what lies ahead. I hope that this chapter has made a small contribution to that end.

ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS

A GUIDE TO THE KEY ISSUES

Edited by
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