

PRACTICE NOTES FOR RESPONDENTS IN ICSID ARBITRATION



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1- Purpose of Document

Although States or State entities can initiate international investment arbitration, they are more often the Respondent. States often inquire about practice aspects of responding to an investment claim, especially if they have not participated in a case before. The information in this document addresses questions frequently asked by ICSID member States or investors. It also provides some practical organizational suggestions for responding to a request for arbitration and preparing a case. It does not provide legal advice or policy guidance and is not an exhaustive guide to arbitration.

2- Introduction

ICSID arbitration is offered by States in international investment treaties, investment contracts or investment legislation. Investment treaties are negotiated between States, investment contracts are negotiated between States and foreign investors, and foreign investment legislation is adopted by national legislatures. Usually these instruments give foreign investors the option of arbitration at ICSID if a dispute arises. Arbitration may be conducted under the [ICSID Convention](#) or [Additional Facility](#) and related rules. The full text of these rules can be found on the [ICSID website](#). ICSID can also administer arbitrations under the [UNCITRAL Arbitration Rules](#) or ad hoc arbitrations. Information on how to arrange for ICSID to administer a non-ICSID case can be found [here](#).

3- A Note on Prevention of Disputes

➤ *Conflict Prevention Mechanisms*

Many States consider prevention or avoidance of disputes as part of their overall approach to investor-State dispute settlement. An examination of dispute avoidance and prevention is beyond the intent of this paper, however a few general points are useful.

First, States should consider their domestic laws and international legal obligations when entering into investment instruments to ensure there is no conflict between them.

Second, it is important to ensure that government officials in various portfolios are aware generally of the State's investment obligations. This will allow them to identify potentially non-compliant measures and ensure that government conduct is consistent with investment obligations. There are many ways to develop an awareness of investment obligations within government. These include creating checklists of issues that engage investment liability and training government officials on the overall scope of a country's investment instruments. Training officials with responsibility for programs and policy involving foreign direct investment is particularly effective.

Many international investment agreements apply to sub-national entities such as provinces, states and municipalities. As a result, it can be useful to include such entities in dispute prevention. Additionally, if the conduct of a sub-national entity is raised in a dispute, that entity should be involved in the preparatory steps discussed below.

Some States have established formal dispute prevention and management systems. These include training about the State's investment obligations, reviewing prospective measures for compliance with investment obligations, creating an early warning system to flag and address potential disputes raised by foreign investors or designating a specific department or agency as the coordinating or lead department on investment arbitration.

A related aspect of awareness is for States to monitor recent developments in investment arbitration. This will allow officials to assess the State's compliance with its international commitments, evaluate the nature and scope of potential liability under investment instruments, and take any necessary corrective action. It will also help States determine whether amendments, notes of interpretation, or other formal steps should be taken with respect to treaties in force. The ICSID website offers users a [free notification](#) service showing when a new case is registered, a Tribunal is constituted, or an award or decision is published. There are also a number of [free websites](#) with investment arbitration cases.

Further Reading on Investment Dispute Prevention Mechanisms:

Roberto Echandi, Investor-State Conflict Management: A Preliminary Sketch, 11 *Transnational Dispute Management* (2014).

[UNCTAD, IIA Issues Note, No. 4 \(2013\).](#)

[USAID/APEC Paper on Investor-State Dispute Prevention Strategies \(2013\).](#)

[UNCTAD, Best Practices in Investment for Development: How to Prevent and Manage Investor-State Disputes, Lessons from Peru \(2011\).](#)

[UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration, New York and Geneva, \(2010\).](#) Also available in [French](#) and [Spanish](#).

David Pawlak and José Antonio Rivas, "Managing Investment-Treaty Obligations and Investor-State Disputes: A Guide for Government Officials", in *Latin American Investment Treaty Arbitration: The Controversies and Conflicts*, (Mary H. Mourra ed.) (Kluwer Law International 2008), pp. 163-193.

[Canada, A Guide for Canadian Municipalities.](#) Also available in [French](#).

[Colombia, Fortalecimiento de las Estrategia del Estado para la Prevención y Atención de Controversias Internacionales de Inversión.](#)

[Perú, Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión and Law no. 28933.](#)

[American Chamber of Commerce in Mongolia, Best Practices in International Arbitration.](#)

Presidential Decree No. 303-15 of the Dominican Republic on "La prevención, atención y defensa efectiva de las controversias que puedan originarse en virtud de los acuerdos de la OMC, de los tratados de libre comercio y de los tratados internacionales de inversión."

[South Korea, South Korea Ombudsman.](#)

➤ *Drafting Considerations*

International investment instruments should be carefully drafted. This includes using clear language that conveys what is intended to be offered under the treaty, contract, or legislation. In designing the investment agreement, it is useful to consider conceptually what would happen if there was a breach or default under the instrument, what remedies would be available, and where the remedies could be pursued.

➤ *Considerations Specific to Drafting Investment Treaties*

When an investment dispute arises, tribunals must interpret the meaning of the treaty provisions before applying them to the facts of the case. Tribunals use the [Vienna Convention on the Law of Treaties](#) (1969) to do so. Under the Vienna Convention, interpreters rely on the ordinary meaning of the terms in the treaty, their context, and its object and purpose. As a result, clear treaty drafting using unambiguous language is vital to dispute avoidance.

The Vienna Convention also permits some use of *travaux préparatoires* as a supplementary means of interpretation. It is therefore useful for both parties to the treaty to have a common set of the *travaux préparatoires* created during the negotiation and to ensure these are readily available if disputes arise under the treaty.

If a treaty is drafted in more than one language, it is important to indicate clearly which language version(s) is/are the authentic one(s). If there is more than one authentic version of a treaty, all authentic versions should reflect the intention of the parties and be as close in meaning as possible. The text in each language version should be carefully reviewed to check for proper grammar, consistency throughout the text, careful use of mandatory and discretionary (may/shall) terminology, correct verb tense, correct and complete cross-references to other parts of the treaty, and other such details.

Treaty drafting can be aided by consulting with counsel experienced in investment law and arbitration to ensure the treaty language takes into account best practices and recent cases interpreting investment treaty provisions.

Once concluded, the treaty needs to be implemented in accordance with national and international procedures. This refers both to ratification of the investment treaty and to adoption of domestic implementing legislation if needed. States should ensure that they have taken all measures necessary to comply with the terms of the treaty.

➤ *Developing a Model Investment Treaty*

Some States develop a model investment treaty that is used as a platform for negotiating investment agreements with other States. Having a model treaty is one way to ensure that a State comprehensively addresses how the investment treaty will complement the regulatory powers of the host State and protect foreign investment in the host State. Even if a State does not have a model investment treaty, it is useful to consider how obligations are drafted in model treaties as these may provide insight into possible drafting approaches.

➤ *Admissions Clauses*

Where the treaty has an admissions clause—*i.e.*, requires the admission of foreign investments in accordance with the host State's law—the State should ensure that it has administrative capacity to make decisions about admission of investment and provide a clear process for making such decisions.

➤ *Denial of Benefits Clauses*

Where the treaty has provisions allowing the treaty Parties to deny benefits—*i.e.*, the State Parties to the investment treaty reserve the right to deny the benefits of the treaty to a particular category of investor(s) and/or for particular reasons enumerated in the treaty—States should be aware of the specific steps required to invoke the clause, and any timing constraints on invoking such a clause.

Further Reading on Drafting Investment Treaties and Model Clauses:

[K. Gordon, and J. Pohl \(2015\), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02, OECD Publishing.](#)

[UNCTAD, IIA Issues Note, No. 4 \(2013\).](#)

[Chester Brown and Devashish Krishan \(eds.\), *Commentaries on Selected Model Investment Treaties* \(OUP 2013\).](#)

[Anthony Aust, *Modern Treaty Law and Practice* \(CUP 3rd ed. 2013\).](#)

[J. Pohl, K. Mashigo and A. Nohen \(2012\), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02, OECD Publishing.](#)

[APEC/UNCTAD Model Clauses \(2012\).](#)

[Model Bilateral Investment Treaties: \[Canada 2004\]\(#\); \[France 2006\]\(#\); \[Colombia 2007\]\(#\); \[Germany 2008\]\(#\); \[Austria 2010\]\(#\); \[US 2012\]\(#\); \[South Africa 2012\]\(#\), \[Norway 2015 with its further explanation\]\(#\); and \[India 2015\]\(#\).](#)

[INTA Model Free Trade Agreement \(2011\).](#)

4- Pre-Arbitration Phase

➤ *Notice of the Existence of a Dispute*

The Respondent State may informally receive notice of a dispute, perhaps well before an arbitration is commenced. It is also made aware of a potential arbitration through formal notice requirements in the applicable legal instrument or on receipt of a Request for Arbitration or Notice of Claim.

- **Informal notice:** Usually an investor will try to resolve its dispute informally before bringing an arbitration. For example, the investor may contact host government officials in the host State or consular officials of the host State to discuss a problem that has arisen. A State may receive a letter from a foreign investor informing it that an official action, measures adopted by a State, or omissions on its part adversely affect the investor's rights under an international investment treaty, contract or investment laws. This is a good opportunity for the State to take stock of the situation and determine whether it can resolve the dispute. Internal procedures should be in place to ensure that such information is directed to the appropriate officials who can address the dispute. If the State has a designated agency for investment arbitration, that entity may also be consulted at this stage.

- Formal notification: Some investment instruments require a foreign investor to formally put the host government on notice that it has a claim. The [ICSID Arbitration Rules](#) and [Arbitration \(Additional Facility\) Rules](#) do not have a formal notice of claim requirement, but States are advised of a claim through receipt of the [Request for Arbitration](#). Again, internal procedures should be in place to ensure that any such notice is directed to the appropriate officials who can address the dispute.

➤ *Opportunity to Resolve the Dispute*

Parties are often best able to find mutually agreeable resolutions at the start of a dispute. As a result, States should pro-actively assess the cost-benefit of settlement as soon as they receive notice of a dispute. This could include the following:

- Making a preliminary assessment of potential liability under the claim: this is primarily an assessment of the particular case. However, a State may also consider systemic implications of a settlement;
- Thinking through possible terms of a mutually agreeable resolution: this often includes financial terms, but it may also include non-financial terms. Non-financial terms may be especially relevant to keeping the investor operating in the host State;
- Considering the mechanisms available to discuss early resolution of the dispute: a State may want to explore settlement informally or through formal negotiation, mediation, early neutral evaluation, or otherwise;
- Holding preliminary discussions with the investor: such discussions are useful to learn about the background to the dispute, relevant factual allegations, and legal claims of the investor. This can be done as part of a formal “cooling off” period discussion, or could be done by agreement of the parties without a formal cooling off requirement. Such discussions are usually held on a confidential and “without prejudice” basis, so that parties are not constrained in future proceedings if a resolution is not found;
- If a resolution is reached, it should be documented so that the terms are clear to all parties. This may include an appropriate release of liability;
- A dispute can be resolved at any time before the final award is rendered, and parties may wish to pursue such discussions in parallel with arbitration or at different points in the process. If parties do so, they should carefully coordinate their approaches to settlement and arbitration.

Further Reading on ADR in Investment Arbitration:

Frauke Nitschke, The IBA’s Investor–State Mediation Rules and the ICSID Dispute Settlement Framework, 29 *ICSID Review—Foreign Investment Law Journal* 112-132 (2014).

Susan Franck, Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide, 29 *ICSID Review—Foreign Investment Law Journal* 66-89 (2014).

Silvia Constain, Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape, 29 *ICSID Review—Foreign Investment Law Journal* 25-40 (2013).

Anna Joubin-Bret, Les nouvelles règles IBA de médiation entre investisseurs et Etats : un outil au service du règlement des différends investisseur-Etat, *Les Cahiers de l'Arbitrage* 2013-1 (2013).

[IBA Investor- State Mediation Rules \(2012\)](#).

[IFC Alternative Dispute Resolution Guidelines \(2011\)](#).

Jeswald Salacuse, Is there a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution, 31 *Fordham International Law Journal* 136 (2007).

➤ *Early Preparation for Dispute Settlement*

Early preparation is vital to ensuring the Respondent advances its case as effectively as possible. The earlier this is done, the better. Ideally, such preparation should begin when the State is made aware of a dispute. However, preparation should certainly start when a Request for Arbitration is received. The points below are useful reminders in the preparatory process.

➤ *“Whole of government” Approach*

An international arbitration may involve more than one government entity. This may be because a number of government actors were involved in the events raised by the claim or because different government departments have responsibility for a policy area raised by the claim. Similarly, a number of government departments might have responsibility for the legal defense of the State. A Respondent State will want to ensure that its defense in the arbitration represents the overall position of the State. To do so, a Respondent State should:

- Identify the main participants in the dispute: identify which officials and departments have an interest or role in the claim and should be part of the team involved in preparation of the case. Not all entities will be equally relevant, thus it is important to identify the main entities that should drive the process, and develop a system to keep relevant persons informed about the case. This might include regular update meetings of officials and counsel, identification of “point persons” who can keep their department informed, regular update memos and the like;
- Build a team: the Respondent State should identify the specific person(s) who will be involved in the process, clearly define their roles, and assign them specific responsibilities. This will involve legal counsel and departmental officials;
- Coordination is key: different government entities may have different interests and so it will be important to allow for productive debate among the team representing the Respondent. It is equally important to have a way to make decisions and move forward in a unified and timely manner;
- Have a decision-making process: put in place a *modus operandi* in terms of who makes decisions, and who gives instructions to counsel, and ensure that there are clearly defined reporting lines. Having an approach in place for giving instructions and providing reports will be all the more important when the case starts and there is a procedural calendar with mandatory deadlines. Everyone on the Respondent team should understand the decision-making process and the need to move expeditiously.

➤ *Legal Representation*

Legal representation should be secured as early in the process as possible. States should be aware of different models of legal representation and their respective advantages and disadvantages.

Using in-house counsel can be a cost-effective option, especially if a State has a number of on-going cases. In addition, this develops in-house capacity which can contribute to legal representation in future cases and negotiations of future investment treaties or contracts. On the other hand, developing such specialized expertise takes time and a commitment of resources, and so it is not ideal for every State. If this option is selected, the in-house counsel should have the time available to dedicate to preparation and presentation of the case.

A State may hire outside counsel to represent it in an arbitration. This allows the State to select counsel with expertise in arbitration and international investment law who can provide the necessary support resources. This is likely to be more costly than the in-house counsel option, but may overall be a more effective use of resources if the State does not readily have the in-house team required.

Some States develop a team with a combination of outside and in-house legal counsel. This allows the State to benefit from outside counsel expertise in a pending investment arbitration while building in-house capacity for future cases and negotiations.

In selecting outside counsel the State should:

- Ensure all procurement policies and selection formalities are completed in advance. The objective of this is to ensure that case preparation is not prejudiced by an on-going counsel selection process in the early days of the arbitration;
- Indicate the profile required of counsel. Usually this will include expertise in international investment law, public international law, and international arbitration. It may also include expertise in a particular industry or other qualifications relevant to the case. A further consideration is whether counsel could have a conflict of interest with a potential arbitrator or with another party involved in the case;
- Indicate the level of seniority required and the tasks that can/must be done in-house or by outside counsel. Thought should be given to building a team with counsel at various levels of seniority, depending on the tasks to be done by each. Costs can be contained by having a clear idea of what can be done by less senior counsel and what should be addressed by more senior counsel;
- Have a clear understanding of the roles of counsel, including how they will work with State officials, how they will obtain instructions, provide periodic status reports and the like. Some States designate a single point of contact between the State and its counsel to avoid confusion;
- Have a clear understanding of counsel's fee structure, billing practices, and cost expectations and have a mechanism to receive and review financial invoices on a regular basis;
- Some governments have required counsel selected through a tender process to provide training for government officials so they can benefit from the experience obtained in a particular case.

Regardless of whether inside or outside counsel are selected, the Respondent should ensure that the case team has sufficient support personnel. For example, paralegals, secretaries, clerks and information technology staff are integral members of the case team.

Further Reading on Legal Representation in Investment Arbitration:

Jeremy K. Sharpe, "Representing a Respondent State in Investment Arbitration", in *Litigating International Investment Disputes*, (Chiara Giorgetti ed.) (Martinus Nijhoff Publishers 2014), pp. 41-79.

[Gary Born, Legal Representation in Arbitration, LexisNexis \(2014\).](#)

[IBA Guidelines on Party Representation in International Arbitration \(2013\).](#)

➤ *Deciding Case Strategy*

The State must determine its overall case strategy with its counsel. While many of these decisions are made in early days, a number of them are revisited as the case progresses. Among the things a State should consider as part of its case strategy are the following:

- Consistency and credibility – All positions taken by the Respondent should be considered not just from the limited perspective of the specific case in issue, but also from a broader perspective, in light of positions taken by the State in past or other on-going cases, the tenability of any position taken by the State, and its consistency with the State's policy objectives.
- Risk management – Throughout the case each party must determine the extent to which it wishes to take certain positions or bring certain applications. A party may not wish to pursue every possible application because it believes it will not be worth the cost in terms of time, resources, or outcome, or it may distract from focusing on the bigger picture of the case. These are strategic decisions to be made by the State with its counsel.
- Tribunal Constitution – Constitution of the Tribunal is one of the most important decisions made in a case and is made at an early stage in the arbitration. [see below, the Section on the Constitution of the Tribunal]
- Pre-Conditions to Arbitration – Some investment agreements include pre-conditions to initiating arbitration. These may be mandatory or voluntary, and might affect jurisdiction. For example:
 - Must the investor file a waiver? Some investment agreements require the investor to waive its right to pursue claims in more than one forum at a time and may require a formal waiver to be filed;
 - Are there cooling off periods? Most investment instruments require the investor to wait a certain amount of time after the alleged breach before it can start a case. They may also require the investor and/or the State to initiate consultations or otherwise take steps to attempt to resolve the dispute;
 - Is there a requirement to exhaust local remedies? Some agreements require parties to pursue the dispute in local administrative bodies or courts before commencing arbitration;
 - Do prescription or limitation periods apply? Some investment instruments require the investor to initiate a claim within a certain period of time after the relevant events, failing which the claim is prescribed.
- Merits – What are the State's defenses on the merits? Does the State have any ancillary claims or counter-claims? What are the applicable timeframes?
- State Responsibility – A State acts through its officials and employees. In addition, a State may empower a State agency or a private entity to exercise elements of governmental authority.

Tribunals routinely rely on the International Law Commission's [Articles on Responsibility of States for Internationally Wrongful Acts](#) to determine the extent to which the conduct of an individual officer or agency is attributable to the State. Consider whether this may be at issue in the arbitration.

- Consolidation – Are there related or like cases in parallel proceedings? Can they be consolidated? Parallel proceedings can generate additional costs or inconsistent results which might be avoided by consolidation of similar or related cases.
- Preliminary Objections – Should a preliminary objection that the case is manifestly without legal merit be raised under Arbitration Rule 41(5)? [See below, on Rule 41(5)]
- Jurisdiction and admissibility – Have all requirements been satisfied in relation to consent and jurisdiction?
- Provisional measures – Is there a possibility that the investor will ask the Tribunal for provisional measures to preserve its rights? Will the State require provisional measures?
- Evidence and Document Production – Will the State need to request documents in the Claimant's possession, and is the State ready to produce relevant documents that might be requested by the Claimant or be required to substantiate its defence? [See below, Document Disclosure]
- Damages – Assess the Claimant's case on damages, if necessary with expert assistance.
- Focus Advocacy on the Tribunal – The case is decided by the Tribunal, not counsel or the administering institution. As a result, advocacy should be directed to the Tribunal rather than opposing counsel or the administering institution.

➤ *Media Strategy*

Investor-State arbitration is increasingly a matter of public interest. Thus, a State should determine its media strategy as part of its overall approach to the case. This means that:

- The State should determine the rules governing public access to documents and hearings. This may be found in the treaty, law or contract, the ICSID Rules (see in particular [Arbitration Rule 48](#)), the Mauritius Convention on Transparency, or relevant procedural orders once the case has started or elsewhere. In addition, a State may wish to agree to a greater level of transparency than required by applicable provisions. All members of the State team, including counsel and officials, should know and follow the State's approach to transparency;
- It is useful to designate a single spokesperson for case-related media inquiries to avoid inconsistency. This may include having an internal "question and answer" or "frequently asked questions" document that evolves with the case and is developed by the case team.

Further Reading on Media Strategy:

[Meg Kinnear and Aïssatou Diop, "Use of the Media by Counsel in Investor–State Arbitration", \(ICCA Congress Series No. 13, 2006\) \(November 2012\).](#)

➤ *Budgeting*

The parties to the proceedings are responsible for the cost of proceedings. The main categories of costs are:

- **Representation Costs** – this is by far the largest cost in an arbitration, usually estimated at more than 80% of the overall cost. It includes counsel fees, expert fees and witness costs. Counsel fees are set by a party in consultation with its own counsel. Counsel fees may be set on various bases, including an hourly fee, a contingency fee, a cap on fees and/or a success fee. Parties should ensure that they clearly understand the fee arrangement of their counsel;
- **Arbitrator Fees and Expenses** – the second largest portion of the overall cost is the cost of arbitrators. It is usually estimated at 14-16% of the overall cost. At ICSID, arbitrator fees are capped at 3,000 USD per day;
- **Administrative Fees** – The ICSID administrative fee is 32,000 USD per year, and is usually equally divided between the Claimant and Respondent (16,000 USD each). In addition, ICSID charges the case account for specific case related expenses such as transcripts, interpretation, and the like. There is no charge for ICSID staff or for the use of World Bank hearing rooms and facilities.

ICSID tribunals have discretion to award costs in a case in accordance with [Article 61](#) of the ICSID Convention. The overall cost of a case varies depending on the complexity and the duration of the case.

More generally, a Respondent should address the following aspects of case funding:

- **Source of funding:** the State should secure a source of funding at the start of the case, so it can meet costs as they are incurred;
- **Accessibility of funds:** a lengthy funds approval process can impede case preparation. Requests for funds in the case may not follow the State's budget cycle, and this should be addressed as the case commences;
- **Budget:** State officials should establish a budget for the case based on cost expectations, including counsel, arbitrators and institutional fees. Some contingencies should be built into this budget as unexpected matters may arise during proceedings. The budget should be regularly updated;
- **Contracting:** consider whether any contracts are required (e.g.: legal, expert witness...) and identify the agency with authority to conclude such contracts;
- **Accounting:** a State should keep track of costs throughout the procedure. To assist in this regard, the ICSID Secretariat issues a periodic financial statement to the parties itemizing the fees and costs of the Centre and of arbitrators. Either Party can request detailed invoices for expenses incurred in connection with a case at any time. Once a case is concluded, ICSID ensures all invoices have been paid and does a final reconciliation of the funds in the escrow account. It refunds the parties if funds remain after payment of all accounts;
- **Managing costs:** every step in a case can have an impact on the case budget. Thus, carefully deciding what motions and defenses to pursue can have cost-saving consequences.

Further Reading on Costs:

[ICSID Website on costs.](#)

[ICC Commission Report, "Decisions on Costs in International Arbitration", Offprint from ICC Dispute Resolution Bulletin 2015, issue 2.](#)

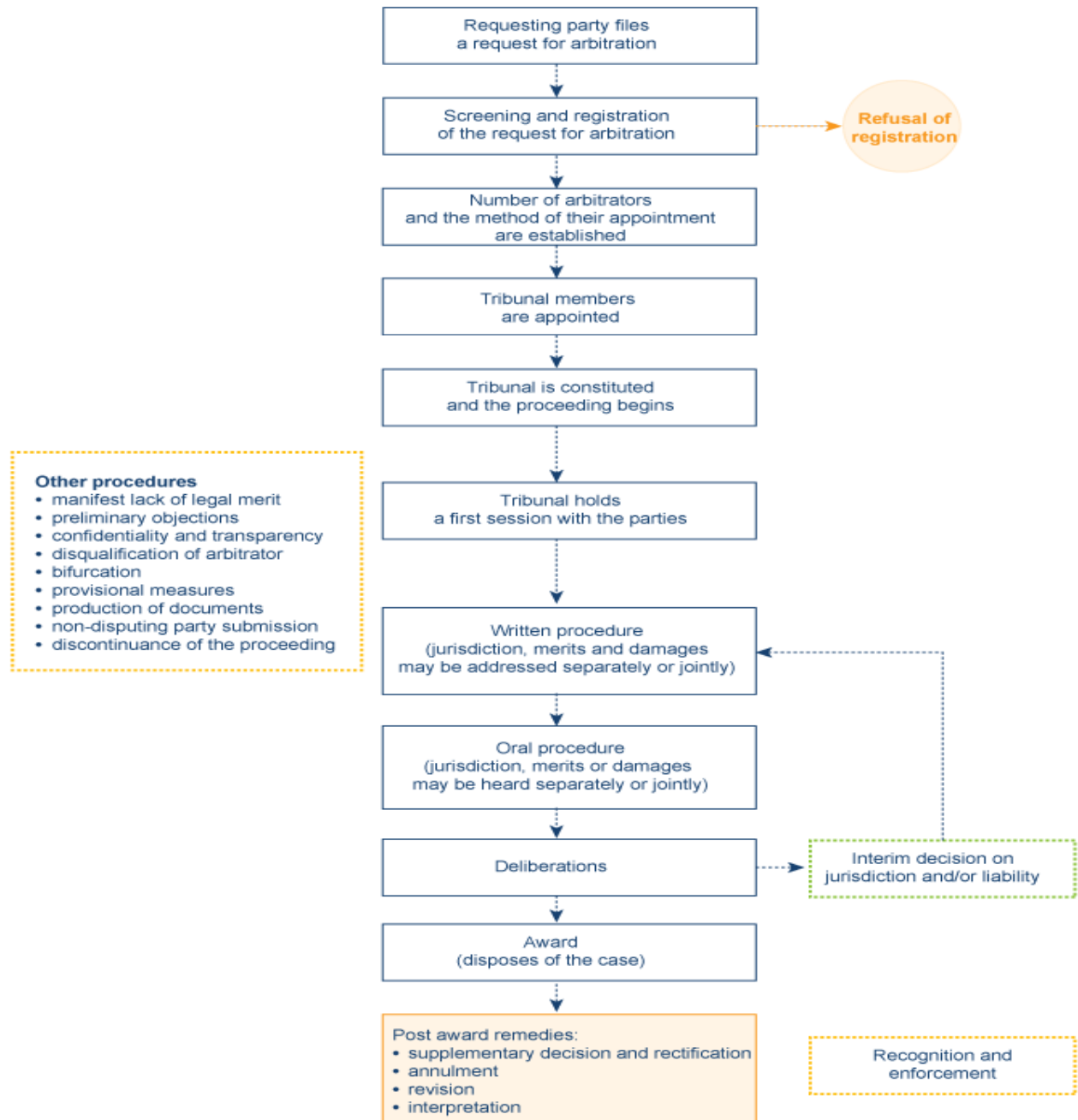
[Matthew Hodgson, Costs in Investment Treaty Arbitration: The Case for Reform, 11 *Transnational Dispute Management* \(2014\).](#)

[Lucy Reed, Allocation of Costs in International Arbitration, *ICSID Review—Foreign Investment Law Journal*, Vol. 26, No. 1, pp. 76-87 \(2011\).](#)

[ICC Commission on Arbitration, "Techniques for Controlling Time and Cost in Arbitration" \(ICC Publication 843, 2007\).](#)

5- Steps in the Process

As an arbitration proceeds, a Party should be aware of the next steps and be ready to address these. Schematically, the steps in an ICSID arbitration are shown below:



6- Request for Arbitration

If the investor or the State pursue arbitration at ICSID, they will commence the proceedings by filing a Request for Arbitration (RFA). The RFA may be filed under the [ICSID Convention](#) or [ICSID Arbitration \(Additional Facility\) Rules](#).

➤ *Upon Receipt of a Request for Arbitration*

The Request for Arbitration identifies the parties, the investment, the nature of the dispute, the applicable legal instruments and the manner in which the parties consented to arbitration. Detailed factual and legal arguments are developed later in the procedure.

In some cases, the requesting party (Claimant) identifies the specific government office to which ICSID should send copies of a RFA. In other cases, the Claimant does not know precisely where to address the request, and may ask ICSID to send the copies to a number of State offices. The State is responsible for directing these to the appropriate national authorities and should do so as quickly as possible. If the State has designated an agency for such cases, the agency should also receive a copy of the Request.

ICSID also sends a copy of the RFA to the Embassy of the Respondent State in Washington, D.C., as an extra precaution to ensure that relevant authorities receive the request. States may wish to advise their Washington embassies where to direct any such notice and to do so immediately upon receipt.

States can avoid potential delay by notifying ICSID of the name and address of the State office in charge of receiving RFAs from ICSID. Alternatively, some States designate an address for service in their treaty or contract. This is equally effective, but requires the State to ensure this address is kept current.

➤ *The Notice of Registration*

Upon receipt of the RFA, ICSID appoints one of its staff counsel to the file and the RFA is reviewed for registration purposes. The case is registered unless it is “manifestly outside” the jurisdiction of the Centre. This decision is made on the basis of the documents filed by the Claimant and the answer to any questions posed by the ICSID Secretariat. The Secretary-General makes the decision on registration expeditiously, on average within 21 days after its receipt. Sometimes a Respondent wishes to file submissions explaining its position on why the RFA should not be registered. Any such letter from the Respondent should be sent very quickly after receipt of the RFA.

If the RFA is not manifestly outside the jurisdiction of the Centre, the Secretary-General issues a [Notice of Registration](#) to both parties, informing them that a dispute has been registered by the Centre and assigning a case number. Registration of the dispute is without prejudice to the Tribunal’s consideration of jurisdiction.

Further reading on Registration of an RFA:

Sergio Puig and Chester Brown, The Secretary-General’s Power to Refuse to Register a Request for Arbitration under the ICSID Convention, 27 *ICSID Review—Foreign Investment Law Journal* 172-191 (2012).

Martina Polasek, The Threshold for Registration of a Request for Arbitration under the ICSID Convention, 5 *Dispute Resolution International* 177 (2011).

7- The Constitution of the Tribunal

The two main aspects of constituting a Tribunal are: the number of arbitrators and the method of their appointment.

The parties can agree on any method of appointment they wish. The treaty, contract or legislation applicable in the case may stipulate the method of constituting the tribunal. The two most commonly used methods in investment arbitration are:

- the Claimant appoints one arbitrator, the Respondent appoints one arbitrator, and the parties agree on the president of the Tribunal; or
- the Claimant appoints one arbitrator, the Respondent appoints one arbitrator, and the two co-arbitrators appoint the president of the Tribunal (possibly in consultation with the parties).

While three-person tribunals are the norm in investment arbitration, time and cost can be reduced by using a sole arbitrator. As a result, the Respondent should consider whether the case could be addressed by one arbitrator rather than three.

The parties' selection of an arbitrator is a significant step in the process, and the Respondent State is well advised to participate in the constitution of the Tribunal. Failure to participate in the constitution of the Tribunal does not stall its formation (Article 37(2)(b) and Article 38 of the ICSID Convention or Article 6 and Article 9 of the Arbitration (Additional Facility) Rules).

If the parties do not agree on a method of constitution and 60 days have passed since the registration of the RFA, either party can invoke the default method provided in Article 37(2)(b) of the ICSID Convention. The default method allows each party to name one arbitrator and to agree on the president. The corresponding provisions are found in Article 9 of the ICSID Arbitration (Additional Facility) Rules.

Once a method of constitution of the Tribunal is identified, the parties proceed to the appointment of arbitrators. If one or more arbitrators remain to be appointed and 90 days have passed since the registration of the RFA, either party may request the Chairman of the Administrative Council of ICSID to appoint any arbitrators remaining to be appointed under Article 38 of the ICSID Convention or in Article 6 (4) of the ICSID Arbitration (Additional Facility) Rules.

Once the Tribunal is constituted, the proceedings are deemed to have begun. Certain mandatory timeframes apply from this point forward. Parties should be prepared to meet the timeframes after constitution, and the case team should have a detailed calendar that allows it to meet the necessary filings and deadlines in the case.

8- Arbitrator Selection

Counsel and parties have various views on the ideal profile for an arbitrator. Counsel usually consider the experience of potential arbitrators and their past awards and academic writing. They may speak with other counsel or parties who have appeared before the potential arbitrator, review their written decisions and writings, or listen to them at a conference.

Among the criteria usually considered, in no particular order, are:

- expertise in international investment law
- expertise in public international law
- experience in arbitration, in particular investment arbitration
- expertise in the subject-matter or specific area of law raised by the case
- conflicts of interest issues
- language capacity
- availability to devote the time required to the arbitral process

In addition to the criteria above, the Tribunal president should have the capacity to run an arbitration efficiently, deliver orders and awards in a timely fashion, and create a collegial and effective working environment for the Tribunal.

Party-appointed Arbitrators and Pre-appointment Interviews

In ICSID arbitration, party-appointed arbitrators are not proponents of the positions of the Party that appointed them. All arbitrators, including the presiding arbitrator, have to sign a declaration of independence and impartiality under Arbitration Rule 6 or Article 13 of the Arbitration (Additional Facility) Rules.

Parties and Counsel should never have *ex parte* discussions about the case with any Tribunal member. Some parties arrange pre-appointment interviews of potential party-nominated arbitrators. Such interviews are mainly to ensure the arbitrator has sufficient time for the case and does not have a conflict of interest. Discussions about the merits of a case must be avoided in pre-appointment interviews.

The Nationality Rule

Article 39 of the ICSID Convention and Arbitration Rule 1(3), or Article 7 of the Arbitration (Additional Facility) Rules, require the majority of arbitrators on a Tribunal to be nationals of States other than the State party to the arbitration or the State whose national is a party to the arbitration. An arbitrator having the same nationality as one of the parties to the dispute may only be appointed by agreement of both parties.

Disqualification of Arbitrators

If a party believes that an arbitrator does not meet the requirements for selection, it can bring an application for disqualification of that arbitrator after the Tribunal is constituted. A [proposal to disqualify](#) must be brought promptly after the grounds for the proposal arise; failure to do so may result in dismissal of the proposal. The usual ground for such an application is an allegation that an arbitrator lacks independence and impartiality.

Further reading on Arbitrator Appointment:

[IBA Rules on Conflict of Interest in International Arbitration \(2013\).](#)

[Karel Daele, The Standard for Disqualifying Arbitrators Finally Settled and Lowered – Case Comment, Saint Gobain v Venezuela and Blue Bank v Venezuela, 29 ICSID Review—Foreign Investment Law Journal, 296-305 \(2014\).](#)

Meg Kinnear and Frauke Nitschke, “Disqualification of Arbitrators under the ICSID Convention and Rules”, in *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Chiara Giorgetti ed.) (Brill Nijhoff, 2015), pp. 34-79.

Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, *Kluwer Law International* (2011).

[Meg Kinnear on "Arbitrator Appointments by ICSID" \(video\).](#)

9- Initial Request for Advance of Funds

Advances of funds are made by the parties and cover the costs of proceedings, including ICSID’s administrative fees and expenses, and the fees and expenses of the arbitrators. A Memorandum on the Fees and Expenses of ICSID Arbitrators is available on the [ICSID Website](#). Representation costs (counsel and witnesses) are paid separately by parties.

Once the case is registered, ICSID establishes an interest-bearing escrow account for that case. Requests for funds in the case are made by the ICSID Secretariat and are governed by the Centre’s Administrative and Financial Regulations. Under Regulation 14(3), the parties make an initial advance payment to the Centre as soon as the Tribunal is constituted. The initial advance is payable before the first session. Therefore, the parties must be prepared to advance funds relatively quickly after registration of the request. Thereafter, the parties make periodic advance payments to the Centre based on estimates of the costs to be incurred in a case. The Centre is not required to provide any service unless sufficient advance payments have been made.

The amount of the request for advances can vary from case to case, and is set in consultation with the Tribunal President based on likely expenses in the upcoming 3-6 months. In general, the initial advance is usually between 100,000 – 200,000 USD per party, and the request is sent immediately after the Tribunal is constituted.

If requested advances are not paid in full within 30 days, the ICSID Secretary-General informs the parties of the default and invites either party to make the required payment. If the payment is still not made within 15 days, the Secretary-General may ask the Tribunal to stay the proceeding which may lead to discontinuance of the case.

10- First Session of the Tribunal

Under Arbitration Rule 13 or Article 21 of the Arbitration (Additional Facility) Rules, the Tribunal must hold its first session within 60 days after its constitution. Although this period may be extended by agreement of the parties, ICSID seeks to schedule the first session as soon as possible within the 60 day period to expedite proceedings.

The first session of the Tribunal is a procedural meeting to decide on the conduct of the arbitration. It can be done in person or by telephone or video-conference in order to save cost and simplify the process. Parties often agree to hold a first session by telephone or video where there are few debated items on the agenda.

In advance of the first session, the ICSID Secretariat circulates a draft agenda listing items to be discussed by the parties. These include applicable arbitration rules, costs of the arbitration, the time for each stage of the process, procedural issues governing the written and oral phase of the proceeding, and the handling of evidence. The Secretariat also provides the parties with a draft procedural order, asking them to indicate the items on which they agree and stating their respective positions on the items on which they disagree.

At the first session the Tribunal President will go through the agenda items, giving the parties an opportunity to confirm their respective positions on each item. The items of disagreement that remain between the parties are decided by the Tribunal after consultation between its members. After the first session, the Tribunal issues a procedural order setting out the parties' agreement and the Tribunal's decisions on the various agenda items.

➤ *Procedural Timetable*

Once the case starts, mandatory timeframes for specific steps are set in the first Procedural Order. The Procedural Order should plan as far forward as practicable to ensure the parties and Tribunal reserve the necessary time and to avoid having to return to the Tribunal to set further dates. Parties usually "plan backward" from mandatory timeframes to ensure they comply with the schedule. Parties should address their expectations for delivery of decisions and awards in this order.

➤ *Place of the Proceeding*

ICSID proceedings can be held in every region of the world.

ICSID has large hearing facilities at the World Bank headquarters in Washington, D.C. and the World Bank Conference Centre in Paris. In addition, ICSID has access to facilities in other World Bank offices or based on arrangements with other arbitral institutions.

The place of the proceeding does not have a bearing on the enforceability of an award issued under the ICSID Convention. This is in contrast to awards issued under the Arbitration (Additional Facility) Rules and the UNCITRAL Rules where the legal seat of the arbitration determines the place and availability of review of decisions and awards.

➤ *Procedural Language*

ICSID has three official languages: English, French, and Spanish. The parties should advise the ICSID Tribunal Secretary concerning the language(s) in which they wish to conduct the first session. In addition, the language(s) of the procedure are usually agreed to by the parties or are decided by the Tribunal at the first session pursuant to Arbitration Rule 22, or Article 30 of the Arbitration (Additional Facility) Rules.

Setting the languages of the proceeding should take practical and budgetary considerations into account. The costs of translating documents or interpreting oral proceedings can add up quickly. Parties may wish to address this by selecting a single procedural language or by agreeing that certain documents do not need to be translated. ICSID is able to obtain interpreters and translators for any language required by the case.

➤ *Confidentiality and Transparency*

Confidentiality and transparency obligations of parties, ICSID and the tribunal are discussed fully [here](#). Applicable transparency provisions should be addressed in the first session and parties must comply with these during the arbitration.

➤ *Tribunal Secretary and Tribunal Assistant*

ICSID assigns a Tribunal Secretary to every case. Every Tribunal Secretary is a legal counsel and they are assisted by paralegals and legal assistants at the Centre. Their job is to assist the parties and the Tribunal in ensuring an effective process. While they cannot give legal advice, ICSID Tribunal Secretaries are often consulted by parties for information about practice. The ICSID Secretary is an employee of the Centre and is not separately remunerated by the parties. If the ICSID Secretary is required to travel for the case, the cost of travel is covered by the escrow account for the file.

In addition to the Tribunal Secretary, in some cases the Tribunal requests an Assistant to the Tribunal. Before an Assistant is appointed, the Tribunal President will inform the parties of the proposed Assistant, confirm the co-arbitrators have no objection to the appointment, provide the parties with the person's *curriculum vitae*, and request the parties consent. The Assistant is required to sign an undertaking regarding confidentiality, impartiality, and conflicts of interest. The rate of remuneration of the Assistant is discussed with the parties, and his/her work is billed directly to the case escrow account. The duties of the Assistant are discussed with the parties when the Assistant is proposed.

Further Reading on ICSID Tribunal Secretaries:

Eloise Obadia and Frauke Nitschke, "Institutional Arbitration and the Role of the Secretariat", in *Litigating International Investment Disputes, A Practitioner's Guide*, (Chiara Giorgetti ed.) (Brill Nijhoff 2014), pp. 80- 144.

11- Early Pleadings and Other Proceedings

➤ *Provisional Measures*

Either party can ask the Tribunal to recommend provisional measures for the preservation of its rights at any stage in the proceedings. Due to their nature as urgent requests, Arbitration Rule 39(2) provides that "[t]he Tribunal shall give priority to the consideration of a request [for provisional measures]." A request for provisional measures may be made even before a tribunal has been constituted, in which case, the Secretary-General sets time limits for the parties to make submissions so the Tribunal may deal with the request upon its constitution. Provisional measures are addressed in Article 46 of the Arbitration (Additional Facility) Rules

➤ *Rule 41(5) Objection for Manifest Lack of Legal Merit*

A Respondent may invoke Arbitration Rule 41(5) or Article 45 (6) of the Arbitration (Additional Facility) Rules to request early dismissal of a claim that is “manifestly without legal merit.” As the wording of the Rule suggests, the standard of proof is high. Such an objection must relate to a legal defect that is manifest or obvious and does not require an in-depth inquiry into the facts of a case.

Rule 41(5) calls for an expedited procedure and the application must be made no later than 30 days after the constitution of the Tribunal and before the first session. Such applications are often dealt with at the first session. Once formulated, the Tribunal must decide the objection expeditiously. As a result, if a Respondent wishes to bring a Rule 41(5) application, it should be prepared to do so early in the proceedings.

Further Reading on Preliminary Matters:

Aissatou Diop, *Objection under Rule 41(5) of the ICSID Arbitration Rules*, 25 *ICSID Review—Foreign Investment Law Journal* 312-336 (2010).

Gabrielle Kaufmann-Kohler & Aurélia Antonietti, “Interim Relief in International Investment Agreements”, in *Arbitration under International Investment Agreements: An Analysis of the Key Procedural, Jurisdictional and Substantive Issues*, (Katia Yannaca-Small ed.) (OUP 2010) pp. 507-550.

➤ *Amicus Curiae Briefs and Participation of Non-parties*

Entities that are not parties to a dispute may ask a Tribunal to permit them to make non-disputing party submissions. The Tribunal will consult the disputing parties before deciding whether to allow the non-disputing parties to participate in the proceeding. If the non-disputing parties are allowed to participate, the Tribunal will usually allow the disputing parties to file observations on the non-disputing party submissions.

It is useful to build time into the first procedural order for participation by non-disputing parties.

Further Reading on Non-Party Participation:

[ICSID Website.](#)

Neale H. Bergman, “Transparency of the Proceedings and Third Party Participation” in *Litigating International Investment Disputes, A Practitioner’s Guide*, (Chiara Giorgetti ed.) (Brill Nijhoff 2014), pp. 375-410.

[OECD \(2005\), “Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures”, OECD Working Papers on International Investment, 2005/01, OECD Publishing.](#)

12- The Written Procedure

➤ *The Evidence*

In assembling its evidence, a State will need to:

- identify the facts required to disprove the Claimant's case or support the Respondent's defence;
- identify the documents or categories of documents that contain such facts; and
- locate the government agencies and officers that have custody of such documents.

Officials assembling documents on behalf of a Respondent State face a particular challenge because documents can be located in various agencies across government. The records may be kept in electronic or hard copy format.

The case file in an investment arbitration can quickly become voluminous. Thus, it is important to determine how the Respondent will retrieve and organize documents for use in arbitration. A record-keeping system should be put in place early using clear labels. This may be a hard-copy repository, but parties usually use some type of electronic document management system for collection and retrieval of records. This is especially helpful if there are numerous documents.

States should be prepared to respond to document production requests from Claimants. States should also remember that requests for information by the Claimant may be processed through other government mechanisms for access to information such as freedom of information legislation. It is important for the State to ensure that it has a copy of all documents produced through relevant legislation or other means available to the public.

➤ *Witnesses and Experts*

Parties should consider whether they can agree on any facts so that they can dispose of the need to prove such facts through witnesses or documents. This can be done at a pre-hearing conference (Arbitration Rules 21 (1); Article 29 (1) of the Arbitration (Additional Facility) Rules) or could be addressed earlier in the arbitration.

The State should identify all potential fact witnesses as early as possible in the process, locate and contact them to ensure that they are available, and confirm their willingness to give testimony. Fact witnesses may submit statements and testify in a language other than the procedural language. If that is the case, their written and/or oral testimony will need to be translated into a/the language of the procedure. Fact witnesses may have expenses such as travel expenses (flight and hotel) if they attend a hearing.

The parties may also use expert witnesses for different aspects of the case, i.e., legal experts, industry experts, or quantum of damages experts. Experts are usually paid witnesses. The State should carefully and strategically choose its experts to maximize their usefulness while minimizing costs. Experts may need some of the documents or declarations by fact witnesses as a basis for their expert opinion. Generally they will work with counsel to prepare their expert reports.

Fact witnesses submit statements concerning relevant matters while experts submit reports – these statements and reports accompany the parties' pleadings. Thus, parties must ensure that their witnesses and experts are aware of and able to meet all submission deadlines in the procedural calendar and be available for hearings.

➤ Pleadings

The parties present their factual claims, legal arguments, and requests for relief in their pleadings.

- The sequence of the parties' pleadings usually start with the Claimant's memorial on the merits (unless the case is bifurcated – see below).
- The State has until the filing of its counter-memorial on the merits to request bifurcation if it wishes to raise objections to jurisdiction under Arbitration Rule 41(1) or Article 45 (2) of the Arbitration (Additional Facility) Rules. Simultaneously, the State may ask the Tribunal to suspend the proceeding on the merits and decide jurisdictional objections in a separate and preliminary phase (called "bifurcation" of merits and jurisdiction). Bifurcation is often addressed at the first procedural session and in the first procedural order.
- A request for bifurcation of the jurisdictional phase of an arbitration, if filed, is addressed separately, *i.e.*, the Tribunal will allow the opposing party to make a submission on the request to bifurcate before deciding to grant or reject it.
 - If the State's request for bifurcation is granted, the proceeding on the merits may be suspended, and the parties file pleadings on jurisdiction, followed by a hearing on jurisdiction.
 - If the Tribunal finds that it has no jurisdiction, it issues an award on jurisdiction, and the case ends.
 - If the Tribunal finds that it has jurisdiction, it issues a decision on jurisdiction, and the case proceeds on a merits phase.
 - If the State's request for bifurcation is rejected, the case proceeds to address the jurisdiction and merits together in a single phase.

Whether in the jurisdiction or the merits phase, the parties usually file two rounds of pleadings consisting of a Memorial and a Counter-Memorial in the first round and a Reply and Rejoinder in the second round. Each pleading is accompanied by supporting materials, often in the form of witness statements, expert reports, factual exhibits, and/or legal authorities.

Further Reading on Written Pleadings:

Barton Legum, The Ten Commandments of Written Advocacy in International Arbitration, 29 *Arbitration International* 1-6 (2013).

➤ Document Disclosure

Each party may ask the Tribunal to require the opposing party to produce documents that it believes are relevant to its case and are in the possession, custody, or control of the other Party. Document disclosure, or production, takes place during the pre-hearing phase of a case. Often it occurs between the first and second set of pleadings, but this can be varied on a case-by-case basis. Both the scope and sequencing of document production is usually addressed in the first procedural order, although it may be addressed in a subsequent procedural order. The Respondent and its counsel should consider the scope and timing of document production as part of their overall case strategy. Among other things, these could affect the human resources needed and the budget for the case.

The applicable rules regarding document disclosure are often agreed to by the parties or ordered by the Tribunal. Reference is frequently made to the [IBA Rules on the Taking of Evidence in International Arbitration](#) (2010) to guide the Tribunal's decision on whether documents should be disclosed and to what extent.

States should take steps as soon as they learn of a dispute to identify and preserve relevant documentary evidence. The State's record-keeping system is especially relevant at the document production stage to keep track of the documents that the State has requested and received, and the documents that have been requested from the State and that it has provided.

A refusal to produce a document may lead to an application to the tribunal to determine whether the document should have been produced. In ICSID proceedings, document production applications are routinely addressed using a Redfern schedule which has the following six columns to be completed by the parties and the Tribunal:

1. the requesting party's numbered requests;
2. the documents or category of documents being requested;
3. the alleged relevance or materiality of the requested documents;
4. the responding party's response or objection to the requests – this frequently involves claiming a privilege such as attorney-client privilege or executive privilege;
5. the requesting party's reply to the objection; and
6. the Tribunal's ruling on whether the document should be produced.

Failure to cooperate with a Tribunal's document production order may lead to an adverse inference being drawn against the non-producing Party and may affect the allocation of costs.

Further Reading on Document Production:

Courtney Lotfi, Documentary Evidence and Document Production in International Arbitration, CILS – Biennial Symposium on International Arbitration and Dispute Resolution, *Transnational Dispute Management* (2014).

Sameer Sattar, Document Production and the 2010 IBA Rules on the Taking of Evidence in International Arbitration: A Commentary, 14 *International Arbitration Law Review* 210-219 (2011).

[IBA Rules on the Taking of Evidence in International Arbitration \(2010\)](#).

13- The Oral Procedure

The ICSID Secretariat makes all logistical arrangements for hearings including reserving a venue and hiring court reporters and interpreters. If the parties have any special requests in this respect, they should bring them to the attention of the ICSID Secretary and the Tribunal at the earliest moment.

➤ *Certificates of Official Travel*

In some cases, representatives of one or both parties must travel to the place of the hearing. If so, they may require visas and may request Certificates of Official Travel from the ICSID Secretariat under Regulation 31 to help secure the visas. These Certificates are official letters addressed to the relevant embassy, certifying that a proceeding will be held under the ICSID Convention, indicating the specific location and dates, and identifying the person seeking to attend. Visas should be requested as early as possible to avoid last-minute problems and potentially a refusal to issue a visa.

➤ *Logistics Letter*

About one month before the hearing, the ICSID Secretariat sends a “logistics letter” to the parties. The purpose of this letter is to provide the parties with information on logistical arrangements that have been made and to request information needed to complete the remaining logistical arrangements.

The information typically provided in the logistics letter includes:

- Hearing dates and venue address—these are known months in advance but the logistics letter serves as a reminder;
- Room assignment—in addition to the room reserved for the hearing, each party will be assigned a private (“break-out”) room to be used only by that party during the hearing;
- Transcription—the ICSID Secretariat arranges court reporting services for the hearing. These services generally include transcripts in real time, individual computers to follow the transcripts (in the agreed procedural languages) and full copies at the end of each day;
- Interpretation—interpretation may be required if there is more than one procedural language or if there are witnesses testifying in a language other than the procedural language. At the request of the parties, the ICSID Secretariat hires interpreters using the World Bank’s global network of interpreters. Interpretation can be simultaneous or consecutive. Consecutive interpretation is unusual as it increases the time required for the hearing;
- Set up date and time—the parties are given access to the hearing room and break-out room a day or two before the hearing, so they can organize their materials and familiarize themselves with the venue;
- Printing and internet access—venues used in ICSID hearings provide printing services and Wi-Fi internet access to all hearing participants;
- Catering—the ICSID Secretariat can provide on-site catering services if requested by the parties;
- List of participants—the letter requests the names of participants, including witnesses and experts, and persons who will participate in the set-up, the email addresses of the persons to whom the transcript should be sent, and any required information not already provided.

➤ *The Pre-Hearing Organizational Meeting*

A pre-hearing organizational meeting is held between the Tribunal (or its President sitting on behalf of the Tribunal) and the parties. This usually takes place two to four weeks before the hearing.

The pre-hearing organizational meeting is usually held by teleconference. The ICSID Secretariat takes care of the logistics of arranging the call. Parties are provided with an agenda approved by the Tribunal

and asked to submit a joint statement indicating the items on which they were able to reach an agreement and stating their respective positions on the items on which they disagreed ahead of the meeting.

A typical agenda will list various organizational, administrative, and logistical items to be discussed, including:

- the start and end times each day;
- the total number of hours required by each party to present its case;
- each party's complete list of participants;
- the sequence of the oral pleadings;
- the fact and expert witnesses each party wishes to call, the order in which it wishes to call them, the time allotted to witness examination, and the sequestration of witnesses;
- requirements for interpretation and court reporters;
- the use of hearing bundles; and
- the submission of post-hearing briefs and submission or statements of costs.

The Tribunal or the parties may add items to the agenda if they wish.

During the meeting, the Tribunal will go through the agenda, acknowledging and confirming the parties' positions where there is common ground. Where the parties differ, the Tribunal will listen to each party's position and try to find common ground between them. If the parties still cannot agree on an item, the Tribunal will take the item under advisement and inform the parties of its decision later. Counsel should be prepared to explain its position on items of disagreement between the parties.

After the pre-hearing organizational meeting, the Tribunal will issue an order or letter to the parties summarizing what was agreed during the meeting and providing its decision on matters not agreed between the parties.

Further Reading on Pre-Hearing Process:

Michael Moser, The 'Pre-hearing Checklist' – A Technique for Enhancing Efficiency in International Arbitral Proceedings, 30 *Journal of International Arbitration* 155-159 (2013).

➤ *Set up Before the Hearing*

Based on information provided by each party in response to the logistics letter, security passes will be prepared for the individuals participating in the set-up to have access to the hearing room and the break-out room. A government issued photo identification such as a passport will be required to pick up a security pass.

Parties typically use the set up time to transport and organize their documents in the hearing and break out rooms so as to be able to easily access them during the hearing. They also use this time to test the technology, for instance, for PowerPoint presentations they wish to make during the hearing.

The court reporters will typically set up on this day, especially in cases where real-time transcription is required and they need to provide monitors to each party and the Tribunal.

➤ *The Hearing*

Based on information provided by each party in response to the logistics letter, security passes are provided to hearing participants (who had not previously picked up their passes for the set up) upon arrival at the place of the hearing and presentation of a photo identification.

An ICSID team, led by the Secretary of the Tribunal, attends the hearing to assist the Tribunal and the parties with any administrative, procedural, or logistical issue that might arise.

The hearing gives each party the opportunity to orally present its case to the Tribunal and examine fact and expert witnesses presented by the opposing party. The order of proceedings is agreed upon at the pre-hearing organizational meeting. It usually provides that each party will present its opening statement, followed by the examination of witnesses then experts, and ending with each party presenting its closing argument.

Depending on the agreement of the parties, a typical hearing day will last from 9 a.m. to 5 or 6 p.m. with morning, lunch and afternoon breaks. The Secretary of the Tribunal keeps track of each party's time in accordance with the method agreed to by the parties, which is usually the chess-clock system whereby time is split equally between the parties.

- Witness examination: before testifying, the Tribunal President will ask the witness to read the declaration promising to provide truthful evidence (Arbitration Rule 35(2)). The manner in which witnesses are to be examined will have been agreed in a Procedural Order or at the pre-hearing organizational meeting. Usually, the examination is limited in direct, and mostly consists of cross examination, with some redirect and re-cross. Generally, not all witnesses who submitted statements are called to testify. Fact witnesses are typically sequestered before giving testimony.
- Expert examination: like fact witnesses, experts also read a declaration from Arbitration Rule 35(3) before giving testimony. The Tribunal may determine that the expert report speaks for itself and move directly to cross-examination, or it may allow the expert to give a presentation to the tribunal before being cross-examined by opposing counsel. Experts from opposite sides usually testify separately, although some tribunals have opposing experts testify at the same time (referred to as "expert conferencing" or "hot-tubbing"). Generally, experts are not sequestered.

The ICSID Secretariat makes the required arrangements if there is public access to hearings, or web-casting. Parties interested in seeing a hearing should look at video of cases on the ICSID website. In addition, ICSID is glad to give parties a tour of facilities in advance of a hearing so they know the facilities available.

14- Post-Hearing Submissions and Procedures

If not decided before, the Tribunal will discuss post-hearing submissions and procedures with the parties at the conclusion of the hearing but before it adjourns. The Tribunal may also ask the parties to address specific questions. Other issues will include:

- whether and how corrections will be made to the transcript and the deadline for submitting them;

- whether there will be post-hearing briefs and if so, how many, page limits, format, and deadlines; and
- whether statements of costs or submissions on costs will be filed, number of rounds, format, page limit, and deadlines.

Counsel should be prepared to express their preferences with respect to these items at the appropriate time.

Post-hearing submissions typically consist of post-hearing briefs and submissions or statements of costs. A Statement of costs is generally a one- or two-page document listing cost items and amounts spent in relation to them. Submissions on costs take the form of briefs making arguments in support of one party's request on costs and against the opposing party's request on costs.

Parties also may ask the tribunal to advise how long they expect to take before the award is rendered. ICSID practice is to ask the Tribunal to send regular updates on its progress to the parties.

➤ *Tear-down after the Hearing*

Typically each party takes away the documents it brought to the hearing but may request the shredding or return by courier of any materials left behind.

15- Closure of the Proceedings

After the parties' presentation of their respective cases is completed, the Tribunal will issue a letter declaring the proceedings closed under ICSID Arbitration Rule 38(1) or Article 44(1) of the Arbitration (Additional Facility) Rules. Once the proceeding is closed, no further evidence may be submitted by either party unless the stringent requirements of Arbitration Rule 38(2) or Article 44(2) of the Arbitration (Additional Facility) Rules are met. No request for disqualification of an arbitrator may be made after closing the proceedings.

16- Tribunal Decisions and the Award

➤ *What's in a Name?*

The ICSID system only has decisions or orders and the award. "Interim decisions" are simply "decisions" and "final award" is just "award." This is in contrast to rulings issued under the UNCITRAL Arbitration Rules.

The issuance of a decision signals the continuation of a proceeding, whereas an award marks the end of a proceeding. For example, where the proceeding is bifurcated between jurisdiction and merits, a decision on jurisdiction means that the Tribunal found that it has jurisdiction and is competent to examine the merits of a case. In contrast, an award on jurisdiction means that the Tribunal found that it does not have jurisdiction over a dispute and cannot look into the merits, and thus the proceeding is concluded.

➤ *Decisions versus Procedural Orders*

There is no formal distinction between rulings in the form of decisions or in the form of procedural orders. As a matter of practice, rulings on points of substance tend to be handed down as decisions, whereas rulings on questions of procedure tend to come as orders.

➤ *The Award*

When the award is ready, the ICSID Secretariat dispatches certified copies to the parties and places the original in the archives of the Centre. The official date of the award is the date of its dispatch to the parties. A party can ask the ICSID Secretariat for additional copies of the award if needed. Under Article 48(5) of the ICSID Convention and Regulation 22(2) or Article 53(3) of the Arbitration (Additional Facility) Rules, the ICSID Secretariat cannot publish the award without the consent of both parties, but must make excerpts of the award public. In practice ICSID asks the parties for permission to publish the award, failing which it prepares and publishes excerpts.

Issues of confidentiality and transparency may arise at the award stage. The State may receive questions and should reply in line with its overall approach to transparency and media strategy. Parties sometimes ask the tribunal to give them early notice (usually several days) that an award on the merits will be issued so they can ensure the necessary staff are available to read the award and consider next steps expeditiously. This also allows the Respondent to ensure it has a spokesperson available should media questions about the award arise.

17- The Post-Award Phase

Representatives of the State and their counsel should read the award as soon as it issues and debrief on its meaning and consequences. Based on this, the State may wish to draw up a plan of action specifying the steps to take to enforce the award, to comply with the award, or to initiate post-award proceedings. The post-award remedies available in an ICSID Convention case are [rectification](#), [interpretation](#), [revision](#) or [annulment](#).

Under Article 53, an ICSID Convention award is binding, and its terms must be complied with by the parties in a dispute. Under Article 54, each ICSID Contracting State has an obligation to recognize ICSID awards as binding and enforce the pecuniary obligations of such awards within its territories as if they were final judgments issued by its courts. Thus, an award might be enforced in the territory of the State party to the dispute or in the territory of another ICSID Contracting State.

A State should bear in mind that the execution of an ICSID Convention award is governed by the laws on the execution of judgments in the State in whose territory an award is sought to be executed under Article 54(3).

If it is an Additional Facility case, the award is binding on all parties pursuant to Article 52(4) of the Arbitration (Additional Facility) Rules. A State party to the dispute can apply for post-awards remedies provided for in Articles 55, 56 and 57 of the Arbitration (Additional Facility) Rules and the laws of the place of arbitration. Article 19 of the Arbitration (Additional Facility) Rules requires that arbitration proceedings must be held only in States that are parties to the [1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#).

Further Reading on Post-Award Proceedings:

Julien Fouret, *Enforcement of Investment Treaty Arbitration: A Global Guide* (Globe Business Publishing 2015).

[ICSID Background Paper on Annulment.](#)

Stanimir Alexandrov, "Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention", in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, (Christina Bine ed.) (OUP 2009) pp. 322-337.

Conclusion

The ICSID Secretariat, and in particular the ICSID Tribunal Secretary assigned to the case, can answer any other questions concerning ICSID practice. Further information about ICSID arbitration and detailed explanations about each step in the process can be found on the [ICSID website](#).

General Reading on ICSID Arbitration:

Chiara Giorgetti, *Litigating International Investment Disputes: A Practitioner's Guide* (Brill Nijhoff 2014).

Jeremy K. Sharpe, "Representing a Respondent State in Investment Arbitration", in *Litigating International Investment Disputes*, (Chiara Giorgetti ed.) (Martinus Nijhoff Publishers 2014), pp. 41-79.

Thomas Webster, *Handbook of Investment Arbitration: Commentary, Precedents and Models for ICSID Arbitration* (Sweet & Maxwell 2012).

Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (2nd ed.) (Kluwer Law International 2011).

Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary* (2nd ed.) (CUP 2009).

Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions: 1974-2002* (OUP 2013).

Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions: 2003-2007* (OUP 2009).