

Introduction to ICSID Process

Meg Kinnear Secretary-General, ICSID

Day 2
Bangkok, Thailand
September 27, 2019







Establishment of ICSID – 1966

- The ICSID Convention is an international treaty
- ICSID is 1 of the 5 WBG institutions and its only "non-financial" arm
- It is the premier facility for investment dispute settlement in the world has administered over 70% of all known disputes



Annex 1 – ICSID in the World Bank Group

Annex 2 – ICSID Statistics Report - 2019

Annex 3 – SEAP Statistics Report - 2019

Structure of ICSID

ADMINISTRATIVE COUNCIL

- One representative of each Member State
- One vote per State
- Chairman is President of the World Bank (no vote)

FUNCTIONS

- Adopt ICSID arbitration and conciliation rules
- Adopt annual budget and approve annual report
- Select SG and DSG(s)
- Designate persons to Panels of Arbitrators and Conciliators

SECRETARIAT

- Secretary-General
- Deputy Secretaries-General
- Staff (70 people)

FUNCTIONS

- Support proceedings
- Training and technical assistance
- Publications





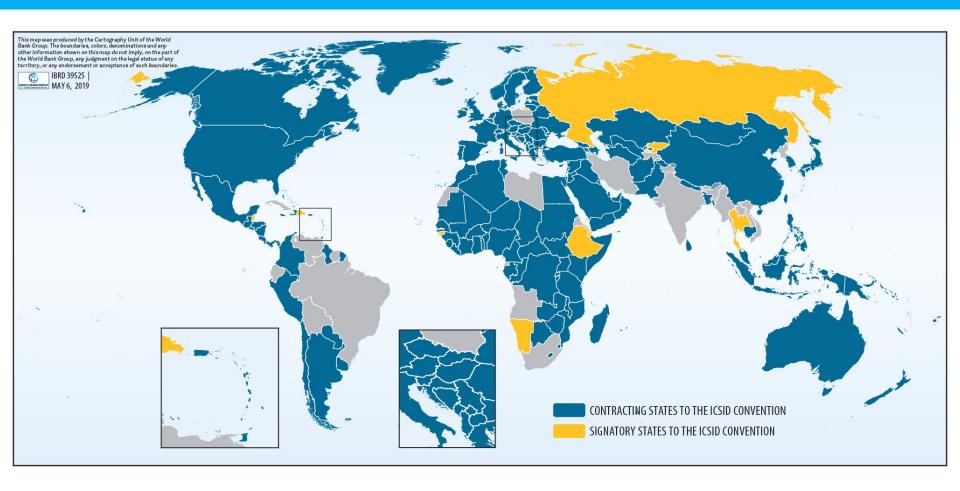
Mandate of ICSID

- ICSID offers independent facilities and procedures to resolve investment disputes between States and foreign investors
- Availability of ICSID contributes to:
 - o attracting and retaining private investment
 - o creating stable investment climates
 - o rules-based international trade and investment
 - o rule of law in Member States





International Membership: 154 States

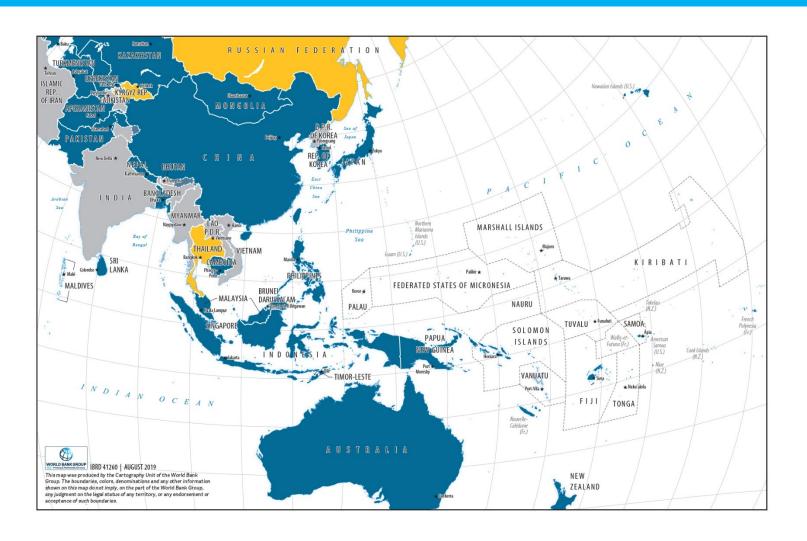


Annex 4 - List of ICSID Signatory and Member States





Membership in SEAP Region







Attributes of Membership

MEMBERSHIP PROCESS

- Joining & membership is at no cost to States
- Simple membership process (signature and ratification of Convention)

IMPACT

- Strong signal of intent to encourage and attract FDI
- Positive factor in MIGA risk assessment and generally re: investment climate

SEAT AT THE TABLE

- Join ICSID Administrative Council
- Participate in amendment of rules
- Name 4 arbitrators and 4 conciliators for ICSID Panels
- Become part of world's leading ISDS facility







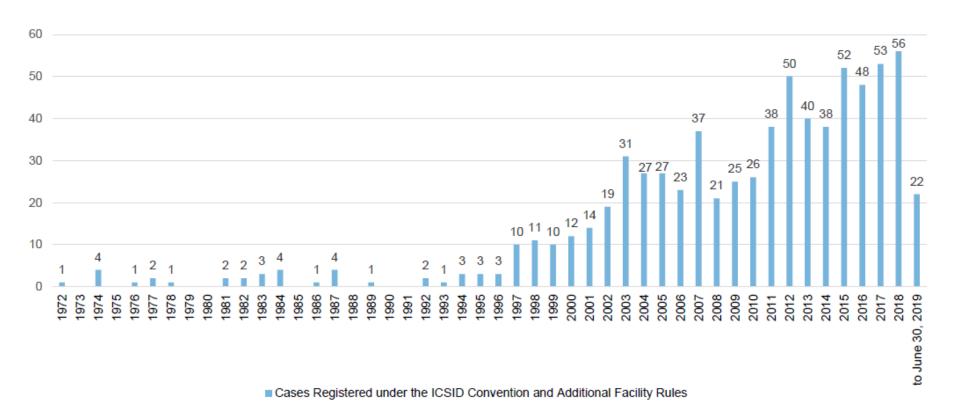
Case Benefits

- 1. Well elaborated and specialized rules
- 2. Expertise of Centre
- 3. Fully delocalized
- 4. Can arbitrate anywhere in the world
- 5. ICSID is only institution that can do UNCITRAL, ICSID and ICSID AF Cases
- 6. Only institution with post-Award remedies
- 7. Unique simplified enforcement mechanism
- 8. Most cost-effective option
- 9. Available as registry for ICSID and non-ICSID cases





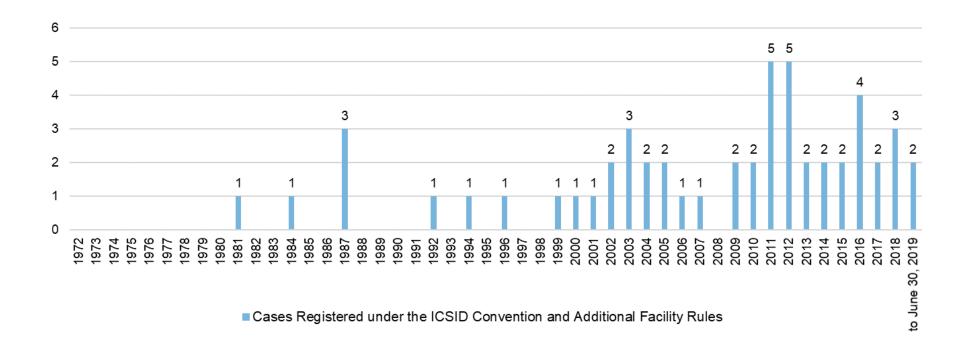
ICSID Caseload - Cases Registered by June 30, 2019







Cases Registered in the SEAP Region – June 30, 2019







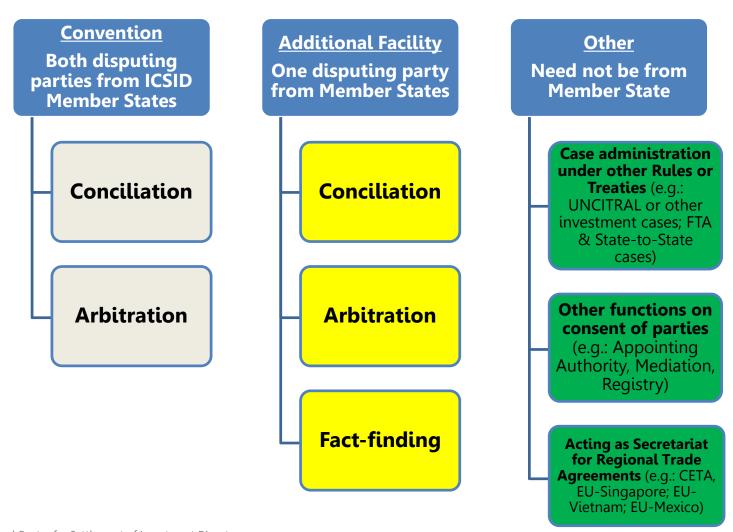
ICSID Cases Involving a SEAP State Party – June 30, 2019

SEAP State	Number of ICSID Cases
Democratic Republic of Timor-Leste	1
Democratic Socialist Republic of Sri Lanka	5
Federal Democratic Republic of Nepal	1
Independent State of Papua New Guinea	3
Islamic Republic of Pakistan	8
Kingdom of Cambodia	1
Lao People's Democratic Republic	2
Malaysia	3
New Zealand	1
People's Republic of Bangladesh	7
People's Republic of China	3
Republic of Indonesia	8
Republic of Korea	3
Republic of Mongolia	1
Republic of the Philippines	5
Socialist Republic of Vietnam	1





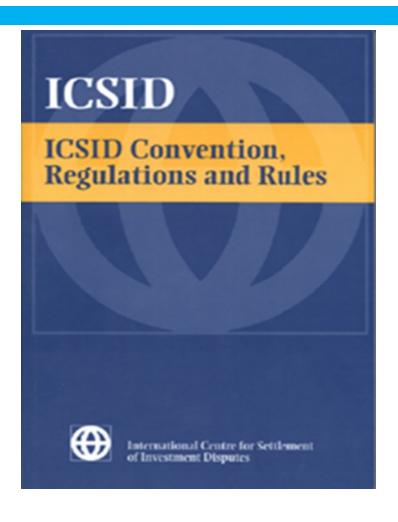
ICSID Administered Proceedings







ICSID Convention & Rules



- **ICSID Convention** the treaty between States (pp. 9-33)
- Administrative & Financial Regulations – costs of cases & role of the Centre (pp. 53-71)
- **Institution Rules** how to initiate a case (pp. 75-79)
- **Arbitration Rules** procedure after case is registered (pp. 101-128)





Part II: ICSID Jurisdiction







Conditions for ICSID Jurisdiction

Article 25(1) of the ICSID Convention

- Legal Dispute
- Arising Directly out of an Investment
- Between a Member State, and
- A National of Another Member State
- Consent in Writing





(1) What is a "Legal Dispute"?

• Concerns the existence or scope of a legal right or obligation

Cannot be a mere conflict of interest or hypothetical

situation







Investment: Objective Criteria

An investment has certain inherent features:

- 1. Contribution (in money or assets) made by investor
- 2. Duration of the activities / performance
- 3. Participation in the risk of the transaction
- 4. Regularity of profits expected
- 5. Contribution to the economic development of the Host State





(2) What is an "Investment"?

Objective ("Double Key Hole")

An economic activity must:

• Satisfy the requirement for an investment established on the basis of "objective" criteria.

and

 Satisfy the definition of investment in the instrument of consent.

Subjective

Compliance with the definition of investment in the instrument of consent = compliance with the requirement for an "investment" in Article 25.

(3) Between A Member State...

- Must have ratified the ICSID Convention
- A subdivision or agency of a Member State may be a party if:
 - It has been designated to ICSID (ICSID Convention Article 25(1)), and
 - The State has approved its consent to arbitration (ICSID Convention Article 25(3))





(4) And a National of Another Member State

Article 25 (2)

Individual Person (25(2)(a))

Juridical Person (25(2)(b))
-e.g.: company, partnership, etc.





A National of Another Member State

Article 25(2)(a) of the ICSID Convention

• An individual:

- must be a national of another Member State at the time of consent and at the date of registration of the Request, and
- o cannot have the same nationality as the host State







A National of Another Member State

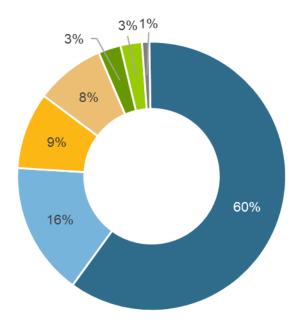
Article 25(2)(b) of the ICSID Convention

- A company must be a national of another Member State at the date of consent
- **Exception**: a company may have the same nationality as the host State if:
 - o it is under foreign control, and
 - o the parties agree to treat it as a foreign national

(5) Consent in Writing

Sources of Consent:

- Contracts
- Investment Laws
- Bilateral or Multilateral Investment Treaties

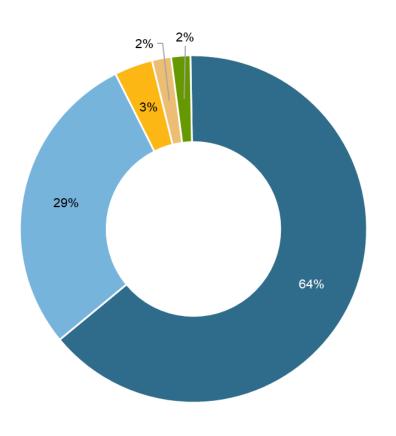


- Bilateral Investment Treaty
- Investment Contract between the Investor and the Host-State
- Energy Charter Treaty
- Investment Law of the Host-State
- North American Free Trade Agreement
- Other Treaties*
- Dominican Republic-United States-Central America Free Trade Agreement





Basis of Consent in SEAP cases – June 30, 2019



- Bilateral Investment Treaty
- Investment Contract between the Investor and the Host-State
- Investment Law of the Host-State
- Energy Charter Treaty
- ASEAN Agreement for the Promotion and Protection of Investments





Treaty become "Consent" to ICSID Arbitration?

• State gives consent by concluding the Treaty ("offer to arbitrate")

4

• The covered investor "accepts" the offer in writing, often by submitting the dispute to ICSID

Consent to arbitration





Scope of Consent

- Parties may limit the scope of consent e.g.:
 - o Requirement to exhaust local remedies, or comply with a cooling off period
 - Types of dispute covered
 - Investors covered
 - Time limitations
- But Parties cannot derogate from the Convention by consent





Philip Morris v. Uruguay (ICSID Case No. ARB/10/7)

 Challenge to "Single Presentation Requirement" and 80% label requirement of Uruguay







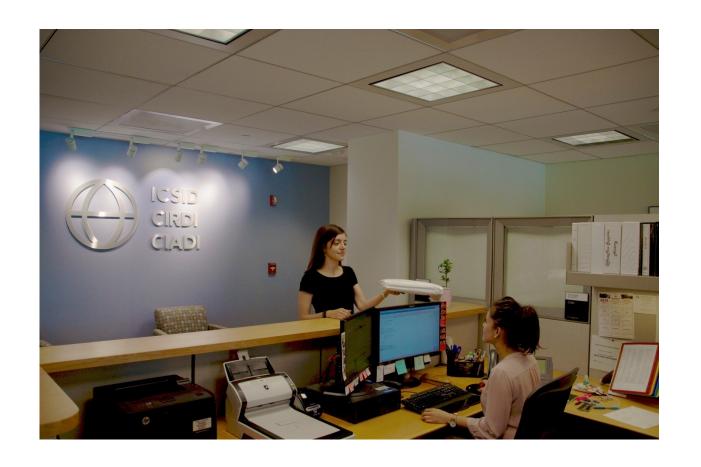
Philip Morris Brands Sàrl, Phillip Morris Products S.A., and Abal Hermanos S.A. v. Uruguay (ICSID Case No. ARB/10/7)

Legal Dispute	The dispute concerned an alleged substantial decrease in sales and deprivation of intellectual property rights due to Uruguay's breach of BIT
Investment	The Claimants' investment included: a local manufacturing facility; shares in Abal; rights to royalty payments; trademarks and goodwill
Member State	Respondent was the Oriental Republic of Uruguay – an ICSID member since 2000
National of Another Member State	Claimants were 2 Swiss tobacco companies and a Uruguayan company under foreign control
Consent	Consent to ICSID arbitration was found in the Switzerland-Uruguay BIT





Part III: Institution of Arbitration Proceedings







Conduct of an ICSID Arbitration





The Request for Arbitration

- The process of filing a request is governed by the Institution Rules
- Filed by the Claimant usually the investor; could be the State (or in some circumstances, a subdivision or agency of a State)
- Claimant pays a non-refundable lodging fee of 25,000 USD
 helps prevent frivolous claims





The Request for Arbitration – IR 1-2

- State whether case is a conciliation or arbitration, language and counsel authorization...
- Address requirements for Art. 25 jurisdiction, jurisdiction under instrument of consent and basic facts
- Served on respondent, who can address absence of jurisdiction





Review of the Request

- ICSID reviews the request in light of the Convention and the instrument of consent
- The request is registered unless it is "manifestly outside the jurisdiction of the Centre" (Article 36(3) ICSID Convention)







Requests Manifestly Outside the Jurisdiction of the Centre

Examples of Refusals to Register

- Investor has the same nationality as host State
- A State agency was not designated to ICSID by the Member State
- Investor is not a national of an ICSID Member State
- The BIT has not entered into force
- Request is filed after expiry of mandatory limitation period





Registration of a Request

- The Secretary-General must issue a notice of registration or refuse to register
- Registration process now takes 16 days on average
- No appeal against the registration decision
- Is without prejudice to subsequent arguments before Tribunal on jurisdiction and merits





Part IV: Constitution of the Tribunal

Relevant Provisions:

- ICSID Convention, Articles 12-16, 37-40, 56-58
- ICSID Arbitration Rules 1 12



Constitution of the Tribunal - Process

Step 1 (HOW)

• Determine the **number** of arbitrators and the **method** of their appointment

Step 2 (WHO)

 Selection and appointment of individual Tribunal members

Step 3 (FINAL STEPS) • Acceptance of appointment by each arbitrator and constitution of the Tribunal





Number of Arbitrators on a Tribunal



• A sole arbitrator or any uneven number of arbitrators if the parties so agree (Art. 37)





Requirements for Appointees

Qualifications:

(Art. 14)

Nationality: (Art. 39, Rule 1(3))

- High moral character
- Recognized competence
- Independent judgment
- Majority shall be nationals of States other than the State party to dispute and the State of investors' nationality
- If the Tribunal consists of 3 members, a national of either State may not be appointed by a disputing party without the agreement of the other

Annex 11 – Selecting an Arbitrator





Method of Appointment of Tribunal

Parties **agree** on a method (Art. 37(2)(a))

Agreement exists at the time of request (see treaty, law or contract)

OR

Subsequent agreement of parties

e.g.: strike & rank list, ballot, selection by Secretary-General

Parties **do not agree** on a method

(Art. 37(2)(b))

Ballot (ICSID proposes 5 or more candidates)

If parties agree on a ballot candidate, the appointment is made by agreement of the parties

If ballot fails, select from ICSID Panel of Arbitrators (Art. 38)





Appointment by Chairman – Convention Article 38

- If no appointment within 90 days, a party can ask Chairman to appoint the missing arbitrator
- Process: ballot of 5 persons sent to parties if no consensus, Chairman appoints
- Chairman must appoint from ICSID Panel of Arbitrators (Panel consists of 4 persons designated by each State and 10 persons by Chairman)

Annex 12 – Panel of Arbitrators (ICSID 10) Annex 13 – Sample Ballot





ICSID Panel of Arbitrators

- Each Member State may designate 4 persons to the Panel
- The Chairman may designate 10 persons to the Panel
- Panel members serve for renewable, 6 year terms
- Most relevant to appointment under Articles 38 and 52 of the ICSID Convention





Acceptance of Appointment & Declaration

- ICSID seeks acceptance from appointees (Arbitration Rule 5(2))
- Declaration of Arbitrator (Arbitration Rule 6):
 - To keep information confidential
 - To judge fairly as between the parties
 - Statement of relationship with parties or other circumstance if needed
 - Continuing obligation to disclose any such relationship or circumstance that arises subsequently

Annex 14 – Declaration – Arb. Rule 6(2)





Constitution of Tribunal

• The Tribunal is constituted when all arbitrators have accepted their appointments.



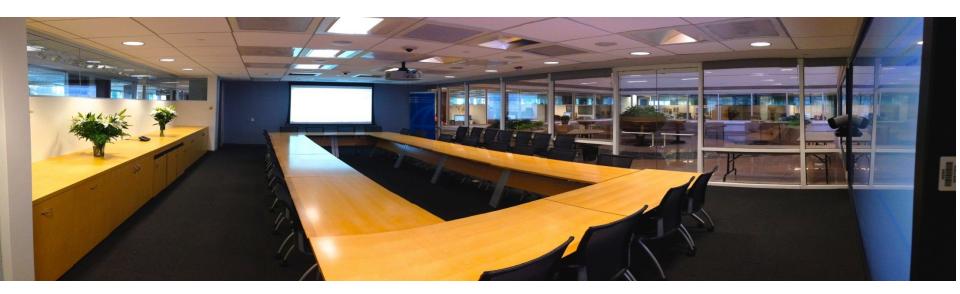




Disqualification of Arbitrators

Relevant Provisions

- ICSID Convention Articles 57-58
- ICSID Arbitration Rules 8-12



Grounds for Disqualification - Article 57

- Manifest lack of the qualities in Article 14(1)
 - High moral character
 - Recognized competence in law, commerce, industry or finance
 - Reliability to exercise independent judgment
- Nationality requirements not met
- Objective test from perspective of reasonable third person
- Burden of proof on applicant

Challenge – Procedure

TRIBUNAL IS CONSTITUTED



PROCEEDING SUSPENDED

PARTIES AND CHALLENGED ARBITRATOR(S) SUBMIT OBSERVATIONS

DECISION TAKEN

- By other Tribunal members in challenge to a minority of the Tribunal
- By Chairman of ICSID Administrative Council if Tribunal members are equally divided, or if challenge is to a sole arbitrator or majority of Tribunal

REJECT PROPOSAL

- Resume proceeding immediately

DISQUALIFY ARBITRATOR(S)

- Vacancy filled by same method as original appointment
- Resume proceeding after new arbitrator(s) accept their appointment





Part V: Commencement of Proceedings

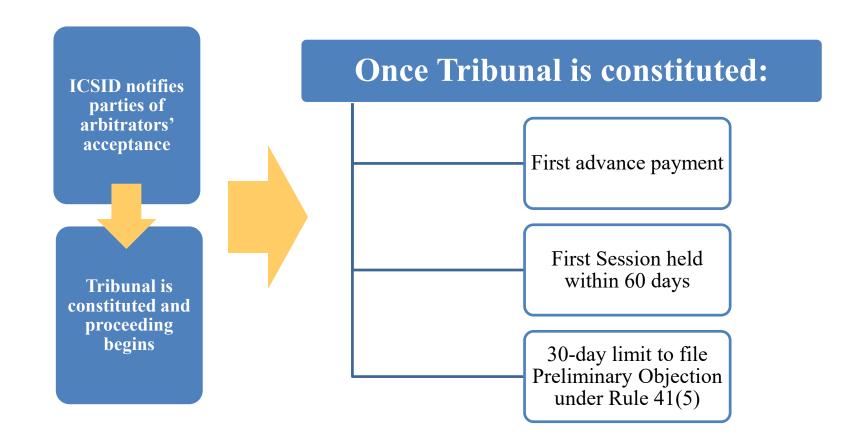
First Session and Procedural Order No. 1







Commencement of Arbitration







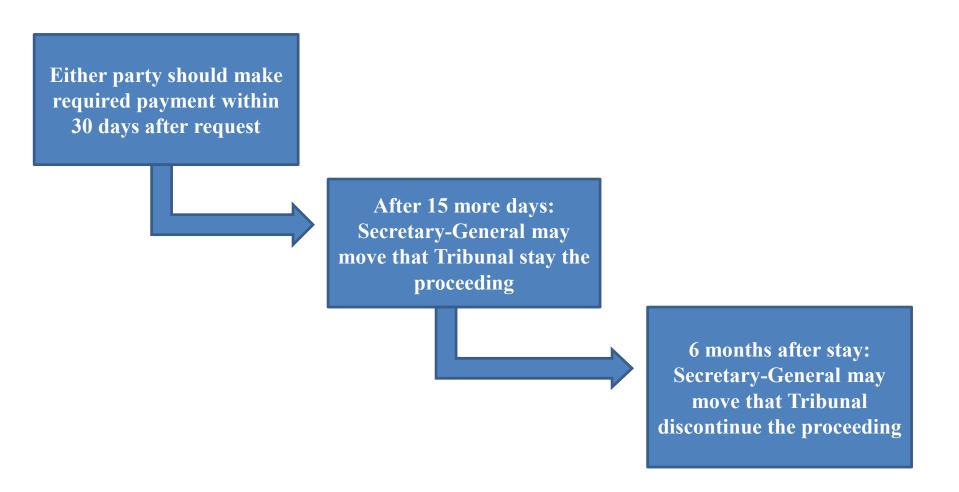
Request for Advances

- Advance payments requested periodically
 - Initial advance payment to be paid before the First Session
- Each party normally pays ½ of each advance (Admin. & Fin. Reg. 14 (3)(d))
- Put in a separate case fund
- Used to pay the arbitrators fees and expenses, ICSID administrative fee, and other disbursements





Non-Payment of Advances Admin. & Fin. Reg. 14 (3)(d)







First Session of the Tribunal – Practical Considerations

To be held within 60 days from Tribunal constitution (unless otherwise agreed)

Date fixed by Tribunal in consultation with the parties and Secretary-General

Held in any venue agreed by parties – (Washington, D.C. as default)

ICSID encourages parties to consider video or teleconference to reduce costs

First Session Considers Procedural Matters

- Parties are provided a draft agenda and draft Procedural Order
 No. 1 for comments ahead of the session
- Main items discussed include:
 - Applicable arbitration rules
 - Procedural language(s)
 - Place of proceedings
 - o Procedural calendar, bifurcation
 - Written and oral pleadings
 - Public access to documents and hearings

Annex 16 – Sample Agenda Annex 17 – Sample PO No.1

Procedural Order No. 1

- Contains the parties' agreements and the Tribunal's decisions
- Point of reference throughout the proceeding
- Can be amended or supplemented







Part VI: Other Procedures







Manifest Lack of Legal Merit

Relevant Provisions

• ICSID Arbitration Rule 41(5)







Manifest Lack of Legal Merit - Rule 41(5)

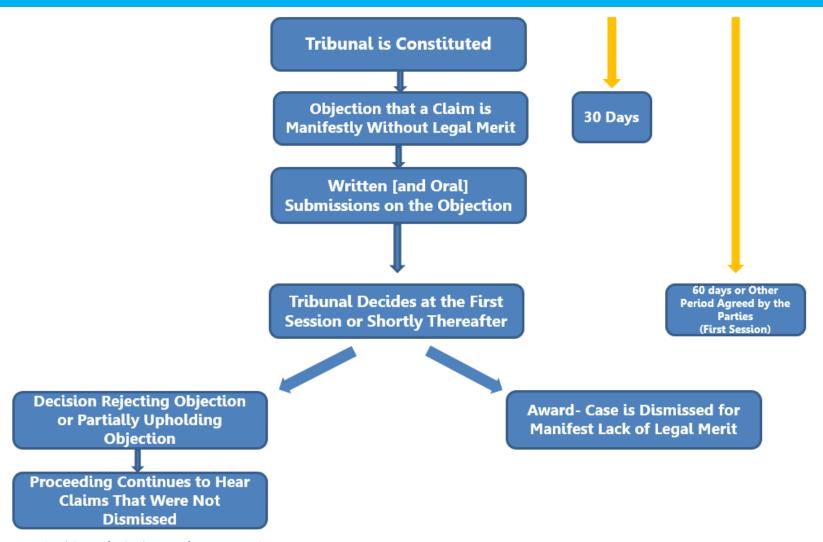
- Allows early dismissal of claims that manifestly lack legal merit
- Applies to absence of jurisdiction and merits
- Not for novel or difficult legal issues
- Standard is high the lack of legal merit must be obvious

Annex 18 – List of Decisions on Rule 41(5)





Procedure – Rule 41(5)







Preliminary Objections

Relevant Provisions

- ICSID Convention Article 41
- ICSID Arbitration Rule 41







Preliminary Objections

- Usually an objection to the jurisdiction of the Tribunal
- Must be made as early as possible, but in any event before filing the Respondent's Counter-Memorial
- Can be made even if the same objection was dismissed under Arbitration Rule 41(5)
- If the Tribunal finds that there is no jurisdiction, it renders an award





Provisional Measures

Relevant Provisions

- ICSID Convention Article 47
- ICSID Arbitration Rule 39







Scope of Provisional Measures

- Measures to preserve the rights of a party
- May be requested by either party at any time
- If granted, Tribunal issues a recommendation in a Procedural Order or Decision
- Recommendations may be altered, withdrawn or expire during the proceeding





Conditions for Granting Provisional Measures

- Prima facie jurisdiction of tribunal
- Urgency (must be decided before award)
- Necessity 'Irreparable harm'
- Rights are in dispute (can be procedural rights)
- Balancing of parties' rights (sovereign rights, claimant's right to pursue claims)





Provisional Measures in practice

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40)

- The Claimant requested provisional measures in two instances
- The Tribunal denied the Claimants' requests and reminded the parties "of their general duty arising from the principle of good faith not to take any action to aggravate the dispute or affect the integrity of the arbitration."

See Annex 19 – Churchill Mining PLC and others v. Indonesia, Procedural Order No. 9 and 14





Production of Documents

Relevant Provisions

• ICSID Arbitration Rule 34







Timing

- The Parties can request documents from each other
 - Tribunal decides on contested requests for documents
- Timing usually decided in Procedural Order No. 1
- The Tribunal may ask the parties to produce documents or other evidence at any stage of the case





How to Request Documents

- The requests include:
 - description of documents or categories of documents requested
 - o relevance and materiality to the case
 - o indication that the requesting party does not possess the documents requested
 - the basis on which to assert that the other party has the documents





Examples of Objections to Production of Documents

- The category of documents sought is too broad
- Document is not relevant to the dispute
- Document is protected by attorney-client privilege
- Document is in possession of third party

Annex 21 – IBA Rules on Taking of Evidence





Written Pleadings

Relevant Provisions

- ICSID Convention Art. 43-44
- Arbitration Rules 29-38







Written Pleadings

- Normally two rounds of pleadings:
 - → Claimant's Memorial
 - → Respondent's Counter-memorial
 - → Claimant's Reply
 - → Respondent's Rejoinder
- Same structure for jurisdiction, merits and quantum phases





Counter-claim – AR 40

- Can present additional claim or counter-claim if it:
 - Arises directly out of the subject matter of the dispute
 - Is within the scope of consent
 - Is within the jurisdiction of ICSID
- Additional claim must be presented by the time of filing the reply
- Counter-claim must be presented by the time of filing the counter-memorial





Memorial

- Statement of the relevant facts
- Statement of the law
- Argument
- All evidence a party plans to rely upon:
 - Exhibits
 - Legal Authorities





Transparency



CASES

RECENTLY REGISTERED

September 8, 2014 BSG Resources Limited v. Republic of Guinea (ICSID Case No. ARB/14/22)

August 18, 2014

Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)

August 15, 2014 Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20)

VICAT v. Republic of Senegal (ICSID Case No. ARB/14/19)

RECENTLY CONSTITUTED

October 16, 2014 Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic (ICSID Case No. ARB/14/16)

October 2, 2014
Anglo American PLC v. Bolivarian Republic of
Venezuela (ICSID Case No. ARB(AF)/14/1)

September 30, 2014

Adem Dogan v. Turkmenistan (ICSID Case No. ARB/09/9)

September 29, 2014 Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5)

RECENTLY PUBLISHED

October 17, 2014 - Mercer International, Inc. v. Canada (ICSID Case No. ARB(AF)/12/3) Procedural Order No. 4 (December 19, 2013)

October 17, 2014 - Mercer International, Inc. v. Canada (ICSID Case No. ARB(AF)/12/3) Procedural Order No. 3 (June 7, 2013)

October 17, 2014 - Mercer International, Inc. v. Canada (ICSID Case No. ARB(AF)/12/3) Procedural Order No. 2 (April 29, 2013)

October 17, 2014 - Mercer International, Inc. v. Canada (ICSID Case No. ARB(AF)/12/3) Procedural Order No. 1 (January 24, 2013)

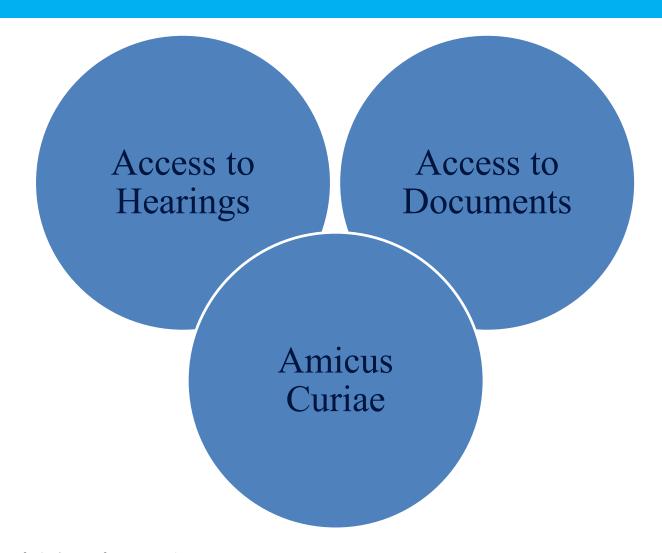
Relevant Provisions

- ICSID Arbitration Rules 6(2), 15, 32(2), 37(2), 48(4)
- Administrative and Financial Regulations
 22-23





Transparency







The Mauritius Convention on Transparency

- United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("the Mauritius Convention") entered into force on October 18, 2017
- State Parties agree to the extension of the UNCITRAL Rules on Transparency to *all investment cases* brought under a treaty concluded *before* April 2014, when the respondent State and the national state of the investor are parties to the Mauritius Convention or when the Respondent State and the claimant agree.
 - 23 States have signed
 - 5 have ratified: Cameroon, Canada, Gambia, Mauritius, and Switzerland





Transparency in Practice

BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea

- Parties agreed to apply the UNCITRAL Rules on Transparency in this ICSID case
- Transparency principle included in <u>PO1</u> and regime set up in <u>PO2</u>
- All case documents and hearings are public (by <u>video link</u>), subject to parties' confidentiality objections
- ICSID is the <u>repository</u>

Annex 23 – BSGR v. Guinea, PO No. 1 and PO No. 2





Non-Disputing Party Submissions

Relevant provisions

• ICSID Arbitration Rules 37(2)







Who Can Be a Non-disputing Party?

- Any person or entity that is not a party to the dispute can include:
 - A natural or juridical person
 - An NGO
 - An REIO
 - A State





Criteria to Allow a Non-disputing Party Submission

ICSID Arbitration Rule 37(2)

- In discretion of Tribunal which considers whether:
 - The submission will assist in determination of a factual or legal issue by bringing a different perspective, particular knowledge or insight
 - The submission addresses a matter within the scope of the dispute
 - The non-disputing party has a significant interest in the proceeding





Procedure

- No timing specified in Arbitration Rules
- Tribunal must consult the parties on whether to allow nondisputing party submissions
- Parties may present their observations on the non-disputing party submission





Rights of a Non-disputing Party

- To file a written submission on a matter within the scope of the dispute
- Submission may not disrupt the proceeding or unduly burden or unfairly prejudice either party
- No access to non-public documents/case records without consent of both parties
- Cannot attend closed hearing without parties consent –
 Arbitration Rule 32(2)





Philip Morris and others v. Uruguay - NDP

Procedural Order Nos. 3 and 4 (2015):

- In 2015 the WHO and the PAHO submitted amicus applications.
- The Tribunal admitted both requests in light of ICSID Arbitration Rule 37(2):
 - They addressed matters within the dispute
 - They brought perspective, knowledge or insights distinct from disputing parties (in this case factual expertise)
 - They had significant interest in the proceeding

Annex 25 – PMI v. Uruguay - Procedural Order No. 3 & 4





Philip Morris and others v. Uruguay - NDP

- In 2015 the Avaaz Foundation and the Inter-American Association of Intellectual Property (ASIPI) submitted petitions to file written submissions as non-disputing parties
- Pursuant to Arbitration Rule 37(2), the Tribunal denied both petitions
 - Both requests were late in the process
 - Both interventions would disrupt the proceeding and potentially unduly burden and unfairly prejudice the Parties
 - With respect to ASIPI, the Tribunal also considered the lack of connection between the petitioner and the disputing parties
 - Respondent alleged "a close relationship between ASIPI and Claimants"

PMI v. Uruguay - Award, ¶¶ 49-55 (8 July 2016)





Part VII: Oral Process

Relevant Provisions:

- ICSID Convention, Articles 62,63
- ICSID Arbitration Rules 32-37



Before the Hearing

- Pre-hearing organizational meeting deals with e.g.:
 - o Daily Schedule, Order of proceedings and allocation of time
 - Procedure for open hearings
 - Sequestration of witnesses and experts
- Checklist of Preparation for Hearing, e.g.
 - Request interpretation
 - Request travel certificate from ICSID in support of visa applications
 - Prepare hearing bundles

Annex 27 – Checklist for Hearing Preparation





Facilities Agreement

- ICSID has agreements with arbitration institutions and dispute-settlement centers around the world.
- From these agreements:
 - o 7 are in the Asia Pacific region (CIETAC; Hong Kong International Arbitration Centre (HKIAC); Asian International Arbitration Centre (formerly KLRCA); Maxwell Chambers; Seoul International Dispute Resolution Center (SIDRC); Shenzhen Court of International Arbitration (SCIA); Singapore International Arbitration Centre (SIAC)).
 - Can use a World Bank office in any State

The Hearing

Opening by moving party

Opening by responding party

Moving party leads its witnesses

Responding party leads its witnesses

Closing by moving party

Closing by responding party



Examination of witnesses and experts:

- Direct
- Cross
- Re-direct







Tribunal's Opening Remarks

Spence International et al. v. Republic of Costa Rica (UNCT/13/2), Hearing on Merits (CAFTA), April 2015







Claimant's Opening

Spence International et al. v. Republic of Costa Rica (UNCT/13/2), Hearing on Merits (CAFTA), April 2015







Cross-Examination of Claimant's Witness

Spence International et al. v. Republic of Costa Rica (UNCT/13/2), Hearing on Merits (CAFTA), April 2015







Respondent's Closing

Spence International et al. v. Republic of Costa Rica (UNCT/13/2), Hearing on Merits (CAFTA), April 2015







Termination of the Proceedings Settlement/Discontinuance







Discontinuance of the Proceeding

Arbitration Rule 43

• On settlement or agreement on discontinuance by the parties

Arbitration Rule 44

• On request of a party if there is no objection by the other party

Arbitration Rule 45

For failure of the parties to act

Regulation 14(3)(d) and (e)

 For failure of the parties to pay advances

The Award

Relevant Provisions

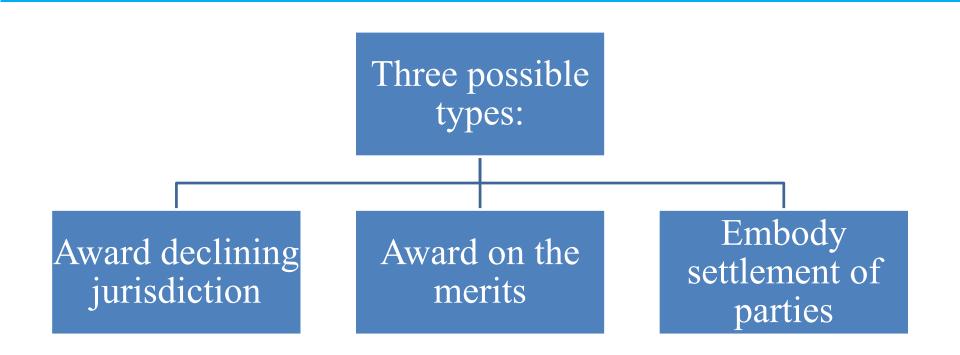
- ICSID Convention Article 48
- ICSID Arbitration Rules 46-48

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES WASHINGTON, D.C. PHILIP MORRIS BRANDS SÀRL, PHILIP MORRIS PRODUCTS S.A. ABAL HERMANOS S.A. (THE CLAIMANTS) ORIENTAL REPUBLIC OF URUGUAY (THE RESPONDENT) (ICSID Case No. ARB/10/7) AWARD Members of the Tribunal Prof. Piero Bernardini, President Mr. Gary Born, Arbitrator Judge James Crawford, Arbitrator Secretary of the Tribunal: Mrs. Mairee Uran-Bidegain Date of dispatch to the parties: July 8, 2016





Awards



No partial award in the ICSID system





Special Features of ICSID Convention Awards

- Awards are final and binding
- Annulment and post-Award remedies available no appeal in local courts
- Member States must recognize monetary awards without further process
- Monetary award enforceable as a final judgment in any Contracting State





Content of the Award

Arbitration Rule 47

- The dates and place of the sittings of the Tribunal
- A summary of the proceeding
- A statement of the facts as found by the Tribunal
- The submissions of the parties
- The decision of the Tribunal on every question submitted to it, with the reasons upon which the decision is based
- Any decision of the Tribunal regarding the costs of the proceeding





Rendering the Award

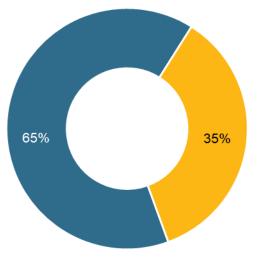
Arbitration Rules 46-48

- In writing
- Signed by the members of the Tribunal who voted for it
- Any member may attach a concurring or dissenting opinion to Award
- Rendered in writing within 120 days after close of the proceeding
 - o Possible 60-day extension
- Secretary-General dispatches certified copy of award with date of dispatch
 - o Post-award remedies run from date of dispatch

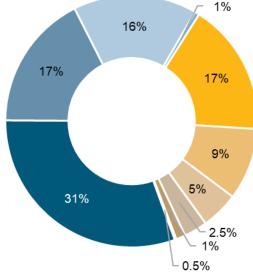




Outcomes in ICSID Cases – June 30, 2019



- Dispute decided by Tribunal (see charts 9a and 9b)
- Dispute settled or proceeding otherwise discontinued (see charts 9a and 9c)

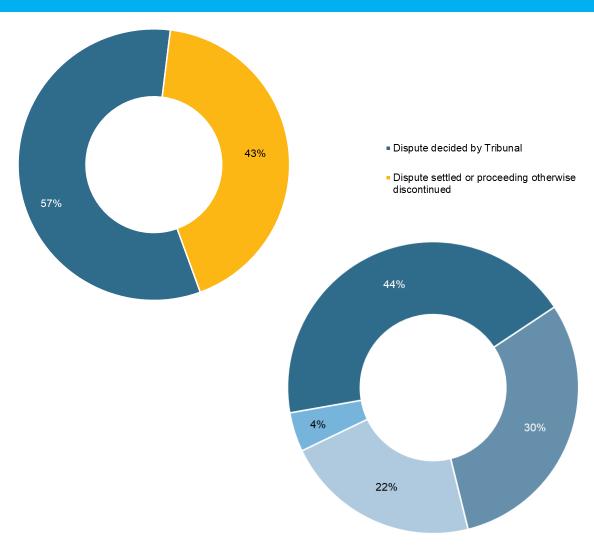


- Award upholding claims in part or in full
- Award dismissing all claims
- Award declining jurisdiction
- Award deciding that the claims are manifestly without legal merit*
- Proceeding discontinued at the request of both parties [1]
- Proceeding discontinued at the request of one party
- Settlement agreement embodied in an award at parties' request
- Proceeding discontinued for lack of payment of the required advances [4]
- Proceeding discontinued for failure of parties to act [5]
- Proceeding discontinued at the Initiative of the Tribunal [6]





Outcomes in SEAP Cases – June 30, 2019



- Award declining jurisdiction
- Award upholding claims in part or in full
- Award dismissing all claims
- Award deciding that the claims are manifestly without legal merit





Part IX: Costs of Arbitration

Relevant Provisions:

- ICSID Convention Article 61
- ICSID Arbitration Rule 28
- Administrative and Financial Regulation 14
- ICSID Schedule of Fees







Costs of Arbitration - 3 Components

Parties' expenses

- Cost of legal representation
- Witnesses
- Experts
- Any other cost relating to the presentation of a party's case

Arbitrators' fees and expenses

- 3,000 USD per day (\$375/hour)
- Plus:
 - Direct expenses
 reasonably incurred,
 travel expenses and
 subsistence
 allowance (when
 traveling)

Centre's administrative charges

- 42,000 USD/yearly
 usually shared by parties
 (21,000 USD each)
- Includes:
 - Hearing facilities

 at the World Bank,
 services of the

 Tribunal Secretary

 and case team, and
 financial
 administration

80-85% 14-18% 1-2%





Part XI: Post-Award Remedies

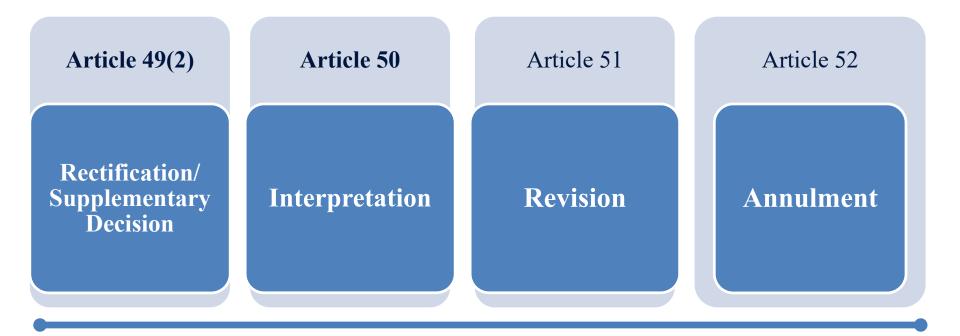
Relevant Provisions

- ICSID Convention, Articles 50-52
- ICSID Arbitration Rules, Articles 50-55



ICSID System is Self-Contained

- No domestic court review of decisions or Awards
- Post-award remedies under the ICSID Convention:







Article 52 of the ICSID Convention

When?

• 5 grounds for annulment, Article 52(1)(a) to (e)

Time limits

- 120 days after the award is rendered
- In case of corruption of a Tribunal member, 120 days after discovery and within 3 years of award

Who decides?

• Ad hoc Committee of 3 members appointed from Panel of Arbitrators

Stay of enforcement

• Stay of enforcement may be granted during proceeding

Decision

• Decision on annulment can annul award in full or in part

Annex 28 – <u>List of Decisions on Annulment</u>





Annulment - Grounds

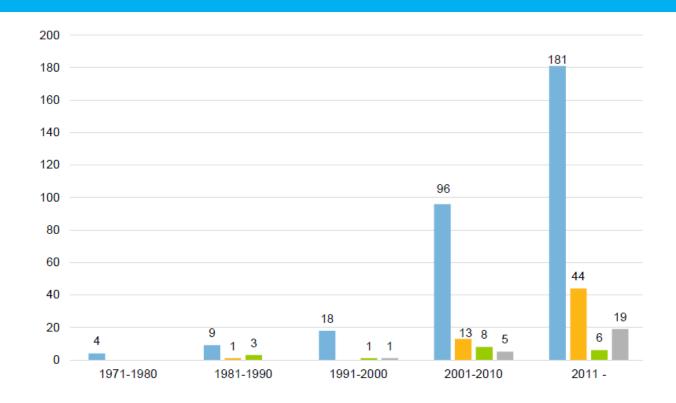
- The Tribunal was not properly constituted
- The Tribunal has manifestly exceeded its powers
- Corruption on the part of a Tribunal member
- A serious departure from a fundamental rule of procedure
- The Award fails to state the reasons on which it is based

Annex 29 – Background Paper on Annulment





Annulment Outcomes – June 30, 2019

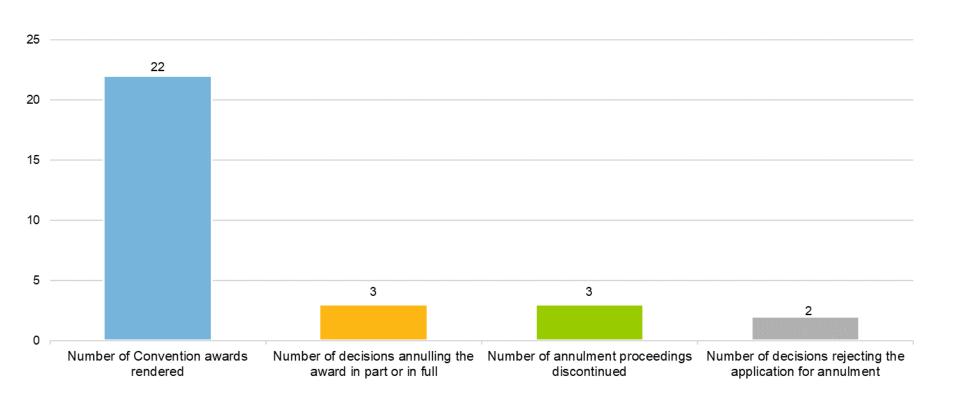


- Number of Convention awards rendered
- Number of decisions rejecting the application for annulment
- Number of decisions annulling the award in part or in full
- Number of annulment proceedings discontinued





Annulment Outcomes in SEAP Cases – June 30, 2019







Annulment – *Ad hoc* Committee

- The Chairman of the Administrative Council appoints an ad hoc Committee of 3 persons from the Panel of Arbitrators
- Nationality restrictions apply
 - o cannot be same nationality as parties or tribunal members that rendered award





Stay of Enforcement in Annulment Proceedings

Article 52(5) of the ICSID Convention

When?

• When a party wishes to stay the enforcement of an obligation in the award

Who may stay enforcement?

• The Secretary General provisionally before *ad hoc* Committee is constituted and *ad hoc* Committee during the proceeding

Time limits

• May be requested in Application or at any time during the proceeding

Procedure

- Request must specify the circumstances that require the stay of enforcement
- Each party is given the opportunity to file observations

Condition

• Stay of enforcement may be subject to bond or other security





Partial or Full Annulment

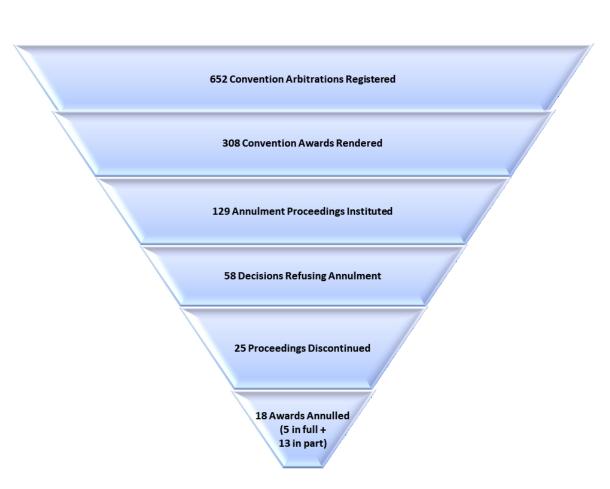
- A full annulment means the Committee upheld one or more grounds for annulment in respect of the entire award
- A partial annulment means Committee upheld one or more grounds in respect of a part of the Award the consequences of the annulment depend on the relevant part annulled
 - o E.g. CMS Gas v. Argentina annulled liability under umbrella clause
 - E.g. TECO v. Guatemala annulled specific holdings on damages, interest and costs





Consequences of Partial or Full Annulment

- The binding force of the annulled portion of the award is terminated
- A party is entitled to resubmit the dispute following annulment grounds for annulment
 - 18 Awards annulled in part or in full, 9 of which have led to resubmissions







Annulment is not Appeal

Article 53 of the ICSID Convention

- Limited & extraordinary remedy
- Maintains integrity of the process
- Can annul the original Award in its entirety or in part
- Either party may resubmit the dispute to a new Tribunal

See Annex 29 – 2016 Background Paper on Annulment for the Administrative Council of ICSID





Comparing Review Mechanisms in ISDS

Table 3 - Investment Arbitration			
Action	Country of Origin	Abroad	
Enforcement UNCITRAL	National arbitration law If "non-domestic": New York Convention	New York Convention	
Enforcement ICSID	 No "Country of Origin" Art. 54 ICSID Convention Automatic enforcement in all Contracting States 		
Setting aside UNCITRAL	 National arbitration law Courts have exclusive jurisdiction 	Not possible	
Setting aside ICSID	 No "Country of Origin" Art. 52 ICSID Convention Ad hoc Committee 		

Annex 30 - A. van den Berg - Should the Setting Aside of the Arbitral Award be Abolished? ICSID Review, vol. 29, No. 2, (2014), p. 284





Part XI: Recognition and Enforcement of Awards

Relevant Provisions

ICSID Convention, Articles 53-55







Recognition and Enforcement of Awards

Articles 53 and 54 of the ICSID Convention

- ICSID Awards are binding and parties must comply with them
- Awards are treated as final judgments of national courts of Member States
- Pecuniary obligations can be enforced in any Member State
- National courts proceed on the basis of a certified copy of the award and cannot review the award
- Limitation: Rules on State immunity from execution apply





Existing Recognition and Enforcement Mechanisms in ISDS

ICSID Convention – Simplified Mechanism	Non-ICSID Convention – Separate Recognition & Enforcement
Simplified recognition and enforcement mechanism:	Separate recognition and enforcement:
No review of the Award by domestic courts	Under domestic law based on the UNCITRAL Model Law
Obligation to enforce pecuniary obligations upon presentation of certified award	Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards





Compliance with ICSID Awards

- Compliance is important to maintain confidence in the process
- Could be considered by providers of political risk insurance
- Non-compliance is a breach of ICSID Convention and could lead to a State-to-State dispute for treaty violation before the ICJ





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