Berkeley Journal of International Law

Volume 4
Issue 2 *Fall*

Article 15

1986

ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)

ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)†

TABLE OF CONTENTS

† Reprinted with permission of the International Centre for Settlement of Investment Disputes.

ICSID RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

INTRODUCTORY NOTES

A. The Rules of Procedure for Arbitration Proceedings (hereinafter, and in accordance with Rule 56(2), the "Arbitration Rules") of the International Centre for Settlement of Investment Disputes were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

B. These Rules are supplemented by the Administrative and Financial Regulations of the Centre,[1] in particular by Regulations 13, 14, 15(2) and (3), 21, 23-31 and 34(1).

C. These Rules cover the period of time from the dispatch of the notice of registration of a request for arbitration until an award is rendered and all challenges possible to it under the Convention have been exhausted. The transactions previous to that time are to be regulated in accordance with the Institution Rules.[2]

D. Unlike the Administrative and Financial Regulations and the Institution Rules, from whose provisions the parties can only derogate to the extent permitted by a particular Regulation or Rule, Article 44 of the Convention provides that the Arbitration Rules (except those that merely reproduce binding provisions of the Convention) apply only to the extent that the parties do not otherwise agree. Moreover, as a safeguard against amendments that might not suit the parties, these Rules apply in the form "in effect on the date on which the parties consented to arbitration"; however, if any such amendments are helpful, nothing prevents the parties from accepting, by mutual accord, the Rules in their amended form. Finally, whenever the parties do not agree on some procedural point that is also not, or is only inadequately covered by these Rules, then the Tribunal has a residual power to decide the question (Article 44 of the Convention); that provision is, in fact, only declaratory of the inherent power of any arbitral tribunal to formulate its own rules of procedure in the event of a *lacuna*.

E. To sum up, subject to those Articles of the Convention from which the parties may not depart, there are three possibilities: The parties may agree on their own rules for the conduct of the case. If they do not, these Rules will apply in the form existing on the "date of consent" (see Institution Rule 2(3) and Note M thereto). Where the Rules do not cover a procedural question that arises, or the parties have agreed that the existing Rule should not apply but have not agreed on a substitute, the Tribunal will decide the question.

CHAPTER 1
ESTABLISHMENT OF THE TRIBUNAL

Rule 1
General Obligations

(1) Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.

(2) Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

1. These rules are available from ICSID, 1818 H Street, N.W., Washington, D.C. 20433. Telephone: (202) 477-1234.
2. *Id.*

(3) Except if each member of the Tribunal is appointed by agreement of the parties, nationals of the State party to the dispute or of the State whose national is a party to the dispute may be appointed by a party only if appointment by the other party to the dispute of the same number of arbitrators of either of these nationalities would not result in a majority of arbitrators of these nationalities.

(4) No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.

NOTES

A. The rules relating to the method of the constitution of the Tribunal differ according to whether, at the time of the registration of the request, the parties are, or fail to be, in agreement on "the number of arbitrators and the method of their appointment". If such an agreement exists, it may be embodied in a compromissory clause in the instrument under which the dispute has arisen, or in an *ad hoc compromis*; in either case, the present Rule applies immediately. However, if at the time of the registration of the request the parties are not in agreement, Rule 2(1) should be used first to assist them in reaching an accord; if they fail, Rule 2(3) applies.

B. The Convention leaves the parties considerable freedom regarding the constitution of the Tribunal. However, it does state certain conditions, which they must observe regardless of any agreement between them:

(i) the number of arbitrators must be uneven (Article 37(2)(a));

(ii) the majority of the arbitrators must be nationals of States other than the Contracting State party to the dispute and the State whose national is a party to it, unless each and every arbitrator is appointed by agreement of both parties (Article 39); and

(iii) arbitrators appointed from outside the Panel of Arbitrators must possess the qualities required for those serving on that Panel (Article 40(2)).

All this is recalled by the reference, in paragraph (1) of this Rule, to Section 2 of Chapter IV of the Convention.

C. Subject to these restrictions, the parties may agree to have recourse to a sole arbitrator (e.g., if their dispute is restricted to a specific point of interpretation of a legal instrument); or they may choose a Tribunal consisting of three arbitrators—the number singled out by the Convention for the eventuality that no agreement is reached (see Article 37(2)(b)); or they may select the figure five or any other uneven number.

D. Again, as regards the method of appointment the parties are free. They may decide to appoint the arbitrators themselves (as foreseen, for instance, in Article 37(2)(b) of the Convention) or to delegate this task, or part of it, to others—e.g., to the Chairman of the Administrative Council or even to the arbitrators they themselves have appointed; such delegation may be unconditional or may apply only if the parties fail within a specified period to make the appointments themselves. They may, but need not, agree to restrict the selection of arbitrators to the Panel of Arbitrators (cf. Article 40(1) of the Convention).

E. In view of this variety of solutions that the parties may adopt, this Rule, which merely expresses their main procedural obligations once they have agreed, must necessarily be couched in very general terms. Thus Article 37(1) of the Convention requires that the Tribunal shall be constituted "as soon as possible after registration of a request", and accordingly, paragraph (1) of this Rule enjoins the parties to proceed "with all possible dispatch" (see also Institution Rule 7(d)).

F. Paragraph (2) sets out a concomitant duty of the parties. While Institution Rule 3 permits the requesting party (or the parties jointly) to set forth in the request itself any agreement regarding the number of arbitrators and the method of their appointment, and Institution Rule 7(c) requires the Secretary-General to invite the parties to provide him with this information if they had not previously done so, the present Rule enjoins them to do so "as soon as possible".

G. Paragraph (3) is designed to ensure the fair application of Article 39 of the Convention. That provision does not absolutely prohibit the appointment by either party of one of its nationals or a national of the State of which that party is a national as arbitrator; however, if the Tribunal is to consist of three arbitrators, such an appointment by the party acting first would block the other party from making a similar appointment, for in that case the majority of the arbitrators could not be "nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute" as required by Article 39 of the Convention. Thus, as compared to the party acting first, the other party would be put at a disadvantage through no fault of its own. As was noted in paragraph 36 of the Report of the IBRD Executive Directors accompanying the Convention (hereinafter the "Report"), the rule laid down in Article 39 "is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal composed of not more than three members". However, where the number of arbitrators is larger, the effect of the restriction is less severe; thus if the Tribunal is composed of five members, the Convention and consequently paragraph (3) of this Rule permits the appointment by either party of one, but prohibits the appointment of two, arbitrators of the specified nationalities.

H. Paragraphs (3) and (4) are formulated so as to express general restrictions, applicable to the appointment of arbitrators whether agreement on the constitution of the Tribunal precedes the registration of the request (as foreseen in Rule 1) or is only reached by the procedure suggested in Rule 2, or follows the automatic formula on which Rule 3 is based. In that latter case, Rule 1(3) is implemented by means of the more specific limitations stated in Rule 3(1)(a)(i) and (b)(i).

I. If a dispute first submitted to conciliation, under the auspices of the Centre or otherwise, is not settled thereby, the next step may be arbitration (see Note C to Institution Rule 1); or arbitration under the Convention may follow on some other, inconclusive, arbitration proceeding. Paragraph (4) of this Rule is based on the general principle that no person should twice take part in an impartial investigation of the same dispute. As stated, this restriction would apply only if the previous proceeding had actually taken place. It is applicable to appointments made by anyone, for example: by the parties, by the Chairman of the Administrative Council, or by the other arbitrators acting pursuant to a power to co-opt additional members. However, the parties may by agreement waive it.

J. Administrative and Financial Regulation 12 provides, *inter alia*, that the Secretary-General, the Deputy Secretaries-General and members of the staff of the Centre may not serve on any Tribunal.

Rule 2
Method of Constituting the Tribunal in the Absence of Previous Agreement

(1) If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:

(a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;

(b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:

(i) accept such proposals; or

(ii) make other proposals regarding the number of arbitrators and the method of their appointment;

(c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

(2) The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.

(3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 37(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Tribunal is to be constituted in accordance with that Article.

NOTES

A. The Convention visualizes the process of formation of the Tribunal by the parties in two stages, the first concerned with determining the number of arbitrators and the method of their appointment and the second with their actual appointment. The first stage may have been completed at the time of the registration of the request, though the Convention does not require this as a precondition for registration. As soon as this stage is completed—be it before or after the registration—the provisions of Rule 1 apply.

B. It is desirable to give the parties an opportunity of reaching agreement on the form and method of the constitution of the Tribunal, if they had not done so by the time of the registration of the request. The purpose of this Rule is to provide a procedure therefor. However, the parties are free to agree to follow any other procedure to this end. In view of the wide choice of substantive solutions that they may adopt (see Notes C and D to Rule 1), they may, for instance, agree on a procedure according each party two (instead of merely one) opportunities of formulating proposals and, for that purpose, extend the 90-day time limit established in Article 38 of the Convention (as well as the several time limits stated in this Rule).

C. Since Article 38 of the Convention allows a total of 90 days from the dispatch of the notice of registration to the completion of the constitution of the Tribunal (though the parties may by agreement set either a longer or shorter interval), it is desirable that the first stage (determination of the method of constituting the Tribunal) be completed well before this entire period has elapsed. Consequently, certain time limits have been set in paragraph (1) of this Rule, and paragraph (3) provides that if within 60 days no agreement on composition can be reached, then either party may unilaterally require the establishment of a Tribunal in accordance with the formula in Article 37(2)(b) of the Convention.

D. Clearly, it is for the party that filed the request for arbitration to be prepared to take the initiative, and subparagraph (1)(a) requires that party to do so almost immediately after it is notified of the registration of its request. While the requesting party takes the initiative, the principle of the equality of the parties requires that the other party should have an opportunity of making its views bear fully on the process of the formation of the Tribunal. Therefore, if it does not desire to accept the proposals made by the requesting party, it may formulate its own—but it must act within 20 days.

E. The requirement in paragraph (2), that all communications pursuant to paragraph (1) pass through or at least be communicated to the Secretary-General, reflects the general policy on "Means of Communication" expressed in Administrative and Financial Regulation 24(1). In addition, if agreement is reached, its terms must be communicated by the parties to the Secretary-General, a requirement which corresponds to that already stated in Rule 1(2).

F. Though the parties have a wide choice of solutions regarding the constitution of the Tribunal, the task of forming it may prove laborious. However, the Convention contains adequate safeguards against complete frustration should the parties be unable to agree or fail to cooperate (cf. Report, paragraph 35). Thus, if no agreement is reached (under the procedure

provided in paragraph (1) or otherwise) concerning the constitution of the Tribunal, the latter will automatically consist of three members appointed as provided in Article 37(2)(b) of the Convention. Paragraph (3) of this Rule provides that either party may terminate the attempt to reach agreement on a formula other than that provided in the Convention, if at least 60 days have elapsed since the dispatch of the notice of registration; however, once an agreement has been reached, neither party may withdraw from it by invoking this Rule. The parties may of course agree to substitute some other time limit or conditions for the 60 days stated in this paragraph.

Rule 3
Appointment of Arbitrators to Tribunal Constituted in Accordance with Convention Article 37(2)(b)

(1) If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:

(a) the party taking action under Rule 2(3) or otherwise the requesting party shall, in a communication to the other party:
  (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
  (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;

(b) promptly upon receipt of this communication the other party shall, in its reply:
  (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
  (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;

(c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

NOTES

A. This Rule applies whenever a Tribunal is to be constituted by the parties "in accordance with Article 37(2)(b)", i.e., either because they have specifically agreed to adopt that formula or because the parties have failed to agree on any other formula and one of them has chosen to invoke Rule 2(3).

B. The stated procedure is largely self-explanatory. In conformity with the principle of the equality of the parties, it provides each of them with an opportunity of naming one candidate for appointment as third arbitrator. Of course, the parties may agree that each should have the possibility of reiterating this nominating procedure. They may provide for this if they are hopeful about the outcome of their efforts and may even, to this end, extend the 90-day limit mentioned in Article 38 of the Convention. Alternatively, where the parties "agree that they will not

agree", they may, by mutual accord, reduce this period and request, possibly jointly, the Chairman of the Administrative Council to intervene.

C. For the reasons given in Note G to Rule 1, subparagraphs (1)(a)(i) and (1)(b)(i) prohibit the appointment by either party of an arbitrator who has the nationality of the State party to the dispute or the same nationality as the other party—but this restriction does not apply with respect to the person proposed, by either party, to be the jointly appointed President of the Tribunal.

D. No time limits are established for the steps provided for by this Rule. However, the parties must (unless they agree to extend the 90-day limit in Article 38 of the Convention) act promptly, for otherwise either of them can require the Chairman to intervene in the appointment of the arbitrators. Of course, if a party acts promptly to appoint its arbitrator, the other party cannot, through its own delay followed by a request to the Chairman pursuant to Article 38, prevent the diligent party from making at least that appointment to the Tribunal that that party can make by itself.

E. The requirement in paragraph (2), that all communications pursuant to this Rule pass through or at least be communicated to the Secretary-General, reflects the general policy on "Means of Communication" expressed in Administrative and Financial Regulation 24(1).

F. In view of the variety of formulae that the parties may agree to with respect to the constitution of a Tribunal, it is not practical to establish any detailed rules regarding the appointment procedure applicable if the Tribunal is to be constituted in accordance with a formula other than that set forth in Article 37(2)(b) of the Convention. Therefore, except for Rule 1(3) (which is based on Article 39 of the Convention) and 1(4), no such rules have been included here. Of course, the parties are always free to follow, to the extent applicable, the provisions of Rule 3 in making appointments to a Tribunal differently constituted.

Rule 4
Appointment of Arbitrators by the Chairman of the Administrative Council

(1) If the Tribunal shall not have been constituted within 90 days after notice of the registration of the request for arbitration has been dispatched by the Secretary-General, or such other period as the parties may agree, either party may, through the Secretary-General, address a request in writing to the Chairman of the Administrative Council to appoint the arbitrator or arbitrators not yet appointed and, unless the President of the Tribunal shall already have been designated or is to be designated later, to designate an arbitrator to be the President of the Tribunal. The Secretary-General shall forthwith send a copy of that request to the other party.

(2) The Chairman shall comply—with due regard to Articles 38 and 40(1) of the Convention—with that request within 30 days after its receipt, or such longer period as the parties may agree. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.

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

NOTES

A. Article 37(1) of the Convention requires the Tribunal to be constituted "as soon as possible after registration of a request", and Article 38 assumes that, in principle, the parties will succeed in their task within 90 days "after notice of registration of the request has been dispatched by the Secretary-General". After this period, each party may request the Chairman of the Administrative Council to intervene and see to it that the Tribunal is constituted. Since this

basic safeguard against the frustration of the proceeding is provided by the Convention in the interest of the parties, they may, by agreement, extend or reduce the 90-day period.

B. The request to the Chairman to intervene must be made through the Secretary-General (cf. Administrative and Financial Regulation 24(1)). Either party may make such a request, or both may do so jointly. It goes without saying that any request to the Chairman to act under Article 38 of the Convention will have to be accompanied by precise information on the appointments already made and the agreement, if any, between the parties regarding the constitution of the Tribunal (see also Rules 1(2), 2(2) and 5(1)).

C. From that information the Chairman should be able to determine the number of arbitrators to be appointed by him. Thus, the parties may have agreed on a sole arbitrator but have failed in their endeavor to appoint him; or, in accordance with the procedure provided for in Rule 3(1), each may have appointed an arbitrator, but both could not agree on the third arbitrator; or, in pursuing the procedure under that Rule the initiating party may have appointed one arbitrator but have failed to elicit any response by the other party; etc. Thus, the Chairman may have to appoint one, two or more arbitrators.

D. If the parties have not agreed on any other formula for the constitution of the Tribunal, then pursuant to Article 37(2)(b) of the Convention, the Chairman must apply the formula in that Article.

E. The principal object of a request pursuant to Article 38 of the Convention is that the Chairman should "appoint the arbitrator or arbitrators not yet appointed". But, if the Tribunal is to consist of more than one arbitrator, the Chairman may also have to specify ("designate") which arbitrator is to be the President of the Tribunal, unless the President has already been designated. This could occur for example, if the parties have agreed that the President shall be elected by the arbitrators themselves and they fail to do so.

F. Under paragraph (2) the Chairman must make his appointments within 30 days after the receipt of the request. Again, this period—introduced in the interest of the parties—may be extended by agreement between them. Where in the light of the information at his disposal the Chairman is hopeful, provided his time is extended, of being able to make appointments agreeable to the parties, he might himself make a suggestion to them to this effect.

G. The Chairman should be aided in his task by the consultations which he must hold with "both parties as far as possible"—bearing in mind the 30-day time limit. In the process of such consultations he may ascertain their views and desires. Consultations may be held jointly, or separately with each party; they may be oral, or the parties may state their positions and views in writing. It is the duty of the Chairman to press for these consultations, but whether they take place or not, this obligation does not fetter his power to make such appointments as he deems proper.

H. When acting under Article 38 of the Convention and in accordance with this Rule, the Chairman must make all appointments from the Panel of Arbitrators and no national of the Contracting State party to the dispute or of the Contracting State whose national is party thereto may be appointed by him (see Articles 38 and 40(1) of the Convention).

I. Once an appointment has been made by the Chairman pursuant to paragraph (2), the Secretary-General must promptly notify the parties thereof. At the same time he must, pursuant to Rule 5(2), seek confirmation that the person concerned accepts his appointment.

Rule 5
Acceptance of Appointments

(1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.

(2) As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee.

(3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

NOTES

A. The purpose of paragraph (1) is to ensure that the Centre is kept informed of appointments for which the parties are, directly or indirectly, responsible. Yet it is not easy to define the duty of each party with precision, for an arbitrator may be appointed by:

(a) a party by itself;
(b) both parties jointly—for instance, as a sole arbitrator or as the third arbitrator provided for in Article 37(2)(b) of the Convention;
(c) a person or body outside the dispute—e.g., by the Chairman of the Administrative Council.

B. The expression "appointment" contains an element of ambiguity. Nobody is under an obligation to serve as arbitrator solely because he has been "appointed"—not even a person included in the Panel of Arbitrators, as he has only agreed that he is "willing to serve thereon" (see Article 12 of the Convention). He may well refuse to accept an appointment in a specific case. While it may be presumed that in practice a party, or both parties, or the Chairman of the Administrative Council or any other outside body responsible for the appointment will first informally inquire whether a person under consideration is willing to serve as arbitrator in the specific dispute (in this connection, attention is called to Article 60(2) of the Convention concerning the possibility of an agreement on the fees of the arbitrators) before they appoint him, it is necessary to obtain from each arbitrator formal confirmation that he accepts his appointment. Only after the arbitrator has thus signified his acceptance can he be considered as effectively appointed. Because of this, paragraph (2) requires the Secretary-General to seek an "acceptance" from each appointee.

C. If a person appointed fails to accept, the authority that made the original appointment should be given the opportunity of selecting another arbitrator. Accordingly, under paragraph (3) the Secretary-General must promptly notify the parties (and possibly the Chairman) of such an event; in addition, in view of the short time limit specified in Article 38 of the Convention, this paragraph establishes a presumption that a person who does not respond at all within 15 days (a time limit which the parties can of course agree to extend) to the Secretary-General's inquiry, is unwilling to accept the appointment. In order to assure speed, no particular form is specified for the acceptance. It thus may be given orally, by telephone or cable—in any way satisfactory to the Secretary-General; Rule 6(2) provides for the later signature of a formal declaration.

D. While in general the party or other authority that made the original appointment is given an opportunity of making a new one if the first appointee fails to accept, if in the meantime the time limit established in accordance with Article 38 of the Convention has elapsed, either party can instead require the Chairman to make the new appointment in order to complete the constitution of the Tribunal.

Rule 6
Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

"To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____

_____ and _____.

"I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

"I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes and in the Regulations and Rules made pursuant thereto."

Any arbitrator failing to sign such a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

NOTES

A. It is useful to specify unambiguously the time when a Tribunal is deemed to be constituted, and this is accomplished by paragraph (1). Since the date is one on which the Secretary-General dispatches a notification to the parties (a date which he must mark on the notification—see Administrative and Financial Regulation 29(1)), there can be no doubt about it.

B. It is also useful to specify unambiguously when the proceeding is deemed to have begun. Since Article 56(1) of the Convention appears to relate that date closely with that of the constitution of the Tribunal, paragraph (1) combines these two dates. Thus it is clear that it is from that time on that the composition of a Tribunal must remain unchanged (see Rule 7).

C. Since each arbitrator is given only 15 days to accept his appointment (Rule 5(3)), he may not be able to do so in a formal writing. However, paragraph (2) of this Rule requires each arbitrator to file, early in the proceeding, a declaration attesting his impartiality and his willingness to be bound by certain basic and essential obligations.

D. If an arbitrator fails to file the requested declaration in due time, he shall be deemed to have resigned within the meaning of Rule 8(2), and he will have to be replaced as provided in Rule 11.

Rule 7
Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

NOTES

A. Since Article 56(1) of the Convention provides that after "a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged", the present Rule applies only before these specified events. No "replacement" can be permitted afterwards, though the composition of the Tribunal might be changed due to the death, disability, resignation or disqualification of an arbitrator (see rules 6(2) and 8-11).

B. Rule 6(1) specifies that the Tribunal shall be deemed to be constituted and proceedings to have begun at the time when the Secretary-General notifies the parties of the acceptance by all arbitrators of their appointments. This, then, is the date up to which the parties are free to replace an arbitrator.

C. Since the parties are, except as otherwise specifically provided in the Convention, in complete control of the proceeding, they can by their joint consent replace any arbitrator—whether he was appointed by one of the parties, by both parties, by an outside authority at the request of the parties, or by the Chairman of the Administrative Council acting pursuant to Article 38 of the Convention or otherwise.

Rule 8
Incapacity or Resignation of Arbitrators

(1) An arbitrator who becomes incapacitated shall, as soon as possible, notify thereof the other members of the Tribunal and the Secretary-General.

(2) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

NOTES

A. Article 56(1) of the Convention provides that, after the Tribunal has been constituted and proceedings have begun (see Rule 6(1)), the composition of the Tribunal shall remain unchanged. The only exceptions allowed are the filling of vacancies created by death, incapacity, resignation or disqualification.

B. In view of the fact that the work of a Tribunal may be carried out in many different ways—through frequent or infrequent, long or short sessions, or even largely through correspondence—it is not feasible to give a general definition of incapacity. If an arbitrator finds that over an extended period (measured relative to the speed of work of the Tribunal) he is unable to participate, he should either, pursuant to paragraph (1) of this Rule, declare himself incapacitated or, pursuant to paragraph (2), resign.

C. Resignation presupposes, as a rule, an explanation by the resigning arbitrator. While paragraph (2) does not specify any "permissible" grounds for resignation, an arbitrator is expected to do so, if, for instance, he may have an interest in the result of the dispute. In fact, in view of the qualities he is required to possess, a candidate is unlikely to accept an appointment as arbitrator where his personal interest is involved and, if he realizes such involvement after the appointment, he may be trusted to resign. The experience of other international arbitral bodies has, in this respect, apparently been reassuring; it therefore seems unnecessary to particularize grounds for resignation.

D. While no person can be prevented from resigning as arbitrator, the Convention in Article 56(3) (and this Rule in paragraph (2)) requires that if such an arbitrator was appointed by one of the parties the Tribunal must decide whether it "consents" to the resignation. If the Tribunal fails to do so, the consequence is not that the arbitrator must continue to serve, but rather that his replacement will be appointed by the Chairman of the Administrative Council and not by the party that had made the original appointment (Rule 11(2)(a)). The intention of this provision is to lessen the possibility of a party inducing an arbitrator appointed by it to resign, so as either to enable his replacement by a more tractable person or merely to delay the proceeding.

E. Notification of an incapacity or the submission of a resignation creates a vacancy on the Tribunal, whose consequences are dealt with in Rules 10-12. It should also be noted that Rule 6(2) provides that the failure of an arbitrator to submit the written declaration provided for therein shall be deemed to constitute a resignation; paragraph (2) of this Rule, as well as Rules 10-12 therefore apply to such a resignation and the consequent vacancy.

Rule 9
Disqualification of Arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
(b) notify the other party of the proposal.

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

(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall take that decision within 30 days after he has received the proposal.

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

NOTES

A. Under Article 57 of the Convention, a party may propose the disqualification of an arbitrator on account of any fact indicating a manifest lack of the qualities required by Article 14(1) or on the ground that he was ineligible for appointment under Section 2 of Chapter IV (see the restrictions relating to nationality in Articles 38 and 39, and the requirement of listing on the Panel of Arbitrators in Article 40(1)).

B. A proposal to disqualify an arbitrator must be filed promptly, and in any event before the proceeding is declared closed (see Rule 38). Promptness must be measured relative to the time when the proposing party first learns of the grounds for possible disqualification. If it receives this information so late that it can no longer make a proposal before the proceeding is declared closed, its remedy is to request an annulment of the award pursuant to Article 52 of the Convention (Rule 50).

C. In accordance with Article 58 of the Convention, a decision on disqualification is normally taken "by the other members of the . . . Tribunal", and never by the Tribunal itself. Consequently, paragraph (4) of this Rule provides that the decision shall be taken in the absence of the arbitrator concerned (but cf. Rule 8(2)). Article 58 also provides that a decision on disqualification must be made by a simple majority vote of the other members—in case of equal division the decision being referred to the Chairman of the Administrative Council.

D. The Chairman may be called upon to decide whether a proposal for a disqualification is well-founded, if it concerns a sole arbitrator or a majority of the arbitrators, or when the votes of the other arbitrator are equally divided (see Note C). In all these cases he must take his decision within 30 days after he receives the proposal.

E. Paragraph (6) provides that as long as the constitution of the Tribunal is in doubt because of a disqualification proposal, the proceeding must be suspended. If the proposal is rejected, the proceeding can then continue; if it is accepted, a vacancy is automatically created and Rule 10 applies.

Rule 10
Procedure during a Vacancy on the Tribunal

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification,

death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.

(2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

NOTES

A. A vacancy may be created on the Tribunal by:
- (a) the death of an arbitrator;
- (b) the incapacity of an arbitrator, which he must notify to the other members of the Tribunal and to the Secretary-General (Rule 8(1));
- (c) the resignation of an arbitrator in accordance with Rule 8(2);
- (d) the failure of an arbitrator to sign the required declaration in due time (Rule 6(2));
- (e) a positive decision on a proposal to disqualify an arbitrator (Rule 9).

B. The Secretary-General's notification of a vacancy required by paragraph (1) of this Rule, has a dual effect:
- (a) it requires the suspension of the proceeding (paragraph (2) of this Rule)—which can later only be resumed in accordance with Rule 12;
- (b) it sets in motion the machinery for filling the vacancy (Rule 11).

C. Even though the normal quorum requirement for sittings of the Tribunal is a mere majority (Rule 14(2)), and decisions are taken by a mere majority of the votes of all the members (Article 48(1) of the Convention and Rule 16(1)), it would be improper to proceed with the arbitration while the membership of the Tribunal is incomplete.

Rule 11
Filling Vacancies on the Tribunal

(1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.

(2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:
- (a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or
- (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 30 days of the notification of the vacancy by the Secretary-General.

(3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(2), 4(3), 5 and, *mutatis mutandis*, 6(2).

NOTES

A. This rule applies whenever there is a vacancy on the Tribunal, for any of the reasons listed in Note A to Rule 10.

B. The general rule is that the new appointment shall be made in the same way as the original one (i.e., the one by which the arbitrator was appointed whose removal from the Tribunal created the vacancy). Thus if the original appointment had been made by one of the parties, that party should (subject to paragraph (2)(a) of this Rule) make the new appointment; if the

arbitrator had been appointed jointly, there should be a new joint appointment; if the arbitrator had been appointed by a third party, or by the Chairman pursuant to Article 38 of the Convention, the new appointment should be made in the same way.

C. To guard against undue delay, a 30-day limit is stated in paragraph (2)(b) which operates in a similar manner as the 90-day limit in Article 38 of the Convention. Of course the parties are free to shorten or lengthen this period by their joint agreement. The Chairman himself, if he must make an appointment has 30 days to do so pursuant to Rule 4(2), which is incorporated into this Rule by paragraph (3) hereto.

D. Paragraph (3) provides that, except as specifically stated otherwise in this Rule, appointments to fill a vacancy must conform in substance and procedure to the Rules relating to original appointments.

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

NOTES

A. This Rule applies whenever a vacancy on the Tribunal has occurred for any of the reasons listed in Note A to Rule 10, and has been filled in accordance with Rule 11.

B. This Rule specifies how the proceeding shall continue once an arbitrator has been replaced. It is obviously undesirable and unnecessary that the entire proceeding start afresh, since the new arbitrator is able to read the written procedure (Rules 29 and 30). On the other hand, he ought to be in the position to require that the oral procedure (Rules 31-34, and perhaps 36) be started again.

CHAPTER II
WORKING OF THE TRIBUNAL

Rule 13
Sessions of the Tribunal

(1) The Tribunal shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General, and with the parties as far as possible. If, upon its constitution, the Tribunal has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Tribunal, and with the parties as far as possible.

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

(3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a

place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

NOTES

A. As used in these Rules, a "session" of the Tribunal refers to one or more "sittings" (see Rule 14) which are held without any extensive pauses and usually in the same place.

B. Paragraph (1) provides that the first session should, in principle, commence within 60 days after the constitution of the Tribunal (Rule 6(1)). This limit is provided in conformity with the general principle of non-frustration of proceedings underlying the Convention (see Report, paragraph 35) and of the avoidance of undue delays. As a rule, it should enable the President of the Tribunal to undertake meanwhile the preliminary consultation regarding the procedural framework for the proceeding (see Rule 20). However, should the preparation of the case require extension of the 60-day period or the parties wish to reduce it, this limit may be altered by agreement between them. Such a different period may indeed be already stated in the request, in accordance with Institution Rule 3.

C. Time limits for subsequent sessions are determined by the Tribunal which, once the proceeding has begun, is the best judge of the prospects for its progress. Of course, where appropriate, the Tribunal may dispose of the case in a single session, continuing *de die in diem* until concluded.

D. Within these time limits the power to fix the actual dates of each session rests with the President of the Tribunal (see paragraphs (1) and (2)), as does the power to fix the date and hour of sittings (Rule 14(3)). He should, however, consult its other members and—in view of the physical arrangements involved—the Secretary-General. He should also, in order to suit the convenience of the parties, consult them "as far as possible" before fixing the dates. If one of the parties fails to cooperate and does not appear or present its case, Article 45 of the Convention and Rule 42 apply.

E. If the parties agreed that the President of the Tribunal be elected by its members, the Tribunal will have no President upon its constitution. In such cases the dates of the first session must be fixed by the Secretary-General.

F. Paragraph (3) concerns the place at which the Tribunal shall meet. This place may be, under Articles 62 and 63 of the Convention:

(a) the seat of the Centre (defined in Article 2 of the Convention);

(b) the seat of any institution with which the Centre has made the necessary arrangements (Article 63(a) of the Convention singles out the Permanent Court of Arbitration as an example of such an institution); or

(c) any other place agreed by the parties (in which case Article 63(b) of the Convention requires them to obtain the approval of the Tribunal, and also to consult with the Secretary-General—who is charged by the Administrative and Financial Regulation 26(1) with making or supervising the necessary arrangements).

In addition, Rule 36 provides for special visits and local inquiries by the Tribunal, pursuant to Article 43(b) of the Convention.

G. The phrase "in good time" in paragraph (4) must be construed in relation to the geographical location of the parties and their means of communication, and also to the time limits provided for the session. In the course of the preliminary consultation (see Rule 20) the parties may agree what the period of notice should be.

Rule 14
Sittings of the Tribunal

(1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.

(2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.

(3) The President of the Tribunal shall fix the date and hour of its sittings.

NOTES

A. This Rule deals with the powers of the President of the Tribunal in relation to its "sittings" and the quorum required for their validity. The "sittings", which are part of a "session" (see Rule 13 and Note A thereto), consist either of "hearings" (see Rule 31) or of "deliberations" (see Rule 15).

B. If a Tribunal is constituted in accordance with Article 37(2)(b) of the Convention, the "third" arbitrator acts as its President. If formed otherwise, the presidency is determined by the terms agreed by the parties for its constitution (see also Note E to Rule 4). They themselves may decide who shall be President, or they may leave the decision to the members of the Tribunal after it has been constituted. Thus it may happen that the Tribunal will have no President upon its constitution and this possibility is foreseen in Rule 13(1); in addition Rule 17 makes provision for the contingency that the President may be unable to act.

C. Paragraph (2) provides that ordinarily only a simple majority of the Tribunal is required at its sittings. This Rule is designed to avoid the rigid requirement of the unremitting attendance of all members of the Tribunal on all occasions, and also makes it more difficult for a minority of the arbitrators to delay or frustrate the proceeding through their deliberate absence. However, the parties may agree to change this Rule if they so desire—but keeping in mind that Article 48(1) of the Convention provides that the decisions of the Tribunal shall be taken by a majority of the votes of all its members (see also Rule 16(1) and Notes A and B thereto).

Rule 15
Deliberations of the Tribunal

(1) The deliberations of the Tribunal shall take place in private and remain secret.

(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

NOTES

A. Paragraph (1) is designed to assure the independence of the arbitrators, by allowing them not to make public—directly or indirectly—what their individual arguments in the course of the deliberations were, and how they voted. This strengthens the collective character of the Tribunal.

B. Paragraph (2) restricts attendance at the deliberations of the Tribunal. The Rule is flexible: it permits but does not require the Tribunal to request the attendance at its deliberations of the Secretary-General (or of the Secretary appointed by him for the proceeding pursuant to Administrative and Financial Regulation 25). The Secretary-General may assist in the efficient development of the proceeding but, of course, will not take part in the deliberations.

C. In addition, the Tribunal may decide to admit other persons—which it might do if it requires interpreters, translators or secretarial staff.

Rule 16
Decisions of the Tribunal

(1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

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

NOTES

A. The first sentence of paragraph (1) paraphrases Article 48(1) of the Convention, which is evidently intended to apply to all decisions of the Tribunal—whether they relate to the adoption of the award or to procedural orders. (The French version of Article 48(1) speaks of "*toute question*", the Spanish version of "*todas las cuestiones*".)

B. The second sentence of paragraph (1) merely elucidates the phrase "majority of the votes of all its members", by providing that abstention shall be deemed a negative vote. This Rule does not require that all the arbitrators be present when each decision is taken; this depends on the quorum requirements agreed by the parties (see Rule 14(2) and Note C thereto); however, by the same reasoning on which the first sentence is based, absentees and other non-participants are counted as casting, in effect, negative votes. It should also be recalled that the award need only be signed by those members of the Tribunal "who voted for it" (Article 48(2) of the Convention and Rule 47(2)).

C. Paragraph (2) provides a convenient mechanism for the Tribunal to make decisions, without the expense and loss of time of a meeting. The Rule is not restricted to particular types of decisions, though it is expected that it will probably be used more frequently for procedural than for substantive matters. Of course, this Rule, too, can be altered by agreement of the parties or by a majority of the Tribunal. It should also be noted that this paragraph does not change the voting rule stated in paragraph (1), which (as indicated in Note B), is in any case independent of the number of members of the Tribunal actually participating in a decision.

Rule 17
Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

NOTES

A. These Rules assign a number of functions to the President of the Tribunal, some of which he is to perform at sittings of that body (see, e.g., Rules 14(1) and 34(1)), while others will usually be performed outside of a meeting (see, e.g., Rules 13(1) and (2), 20(1), 25(1) and (2) and 49(4)). Since the Rules do not require all members of the Tribunal to be present to constitute a quorum (Rule 14(2)), it is in the former situation desirable to provide for the possibility of some other member of the Tribunal substituting for the President; this may also be necessary whenever the resignation or disqualification of the President is being considered pursuant to Rules 8(2) or 9(4). The same is also true with respect to the actions to be taken outside of a meeting, in which connection it will be recalled (see Rule 16(1)) that decisions can be taken by a mere majority and thus do not require the participation of the President. In the absence of a provision providing for such substitution, a proceeding might have to be halted completely during a disability of the President.

B. This Rule generally applies only to the incapacity of an existing President, and not in the event of a vacancy in that office. If the vacancy exists because no President has yet been elected, the final sentence of Rule 13(1) covers the principal *lacuna* (but see Note C to Rule 20), except that this Rule should be applied at the initial sitting(s) until the election is accomplished. Since under other circumstances a vacancy in this office can only arise if the arbitrator who served as President is somehow removed from the Tribunal (by any of the methods listed in Note A to Rule 10), no provision for a substitution of functions need be made since in that event the proceeding must be suspended pursuant to Rule 10(2).

C. The parties may of course agree to a different order of succession than that provided for in this Rule.

Rule 18
Representation of the Parties

(1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

(2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

NOTES

A. In disputes between States, the parties are represented before international tribunals by "agents", usually "assisted" by "counsel". The general management and control of the case is in the hands of the agent who acts as intermediary between the party and the Tribunal and is the official and full representative of the government. In some standing intergovernmental tribunals open to individuals, the latter must be represented by "counsel" and States by "agents". On the other hand, some international arbitral or administrative tribunals permit individuals and, in certain cases, even States or intergovernmental organizations to appear "in person". Accordingly, Rule 18 permits, but does not require, representation by "agents" or "counsel" or "advocates" (cf. Article 22 of the Convention). This will probably result in States being represented by agents, though it is not unthinkable that an "agency" of a Contracting State (cf. Article 25(1) of the Convention) might appear "in person" through one of its officers rather than through an outside "agent" (e.g., a diplomatic or economic representative of the government).

B. It is not mandatory that a party select a lawyer to act on its behalf, though self-interest should ensure that the parties will select representatives of acknowledged competence in the law. The terms "agent", "counsel" and "advocate" do not imply any specific legal or other qualifications and cover attorneys, *avocats*, barristers, solicitors, teachers of law, and other persons with appropriate legal or administrative training and experience. Hence, no party can object to a lack of professional qualifications of the opponent's representative.

C. It is not intended—as in disputes between States—to draw a distinction between the authority of an "agent" on the one hand and that of a "counsel" or "advocate" on the other. The party concerned must render it clear by the terms of its designation whether it is "represented" or solely "assisted" by an agent, counsel or advocate and what the scope of the authority of each such person is. Similarly, if a party desires that all communications and notices in connection with the proceeding be sent to a particular person, it must so inform the Secretary-General (see Institution Rule 7(b) and Note C thereto).

CHAPTER III
GENERAL PROCEDURAL PROVISIONS

Rule 19
Procedural Orders

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

NOTES

A. While the parties, acting in concert, may exercise a large measure of control over the conduct of the proceeding (see Introductory Note D), it is still necessary that the Tribunal itself make the specific orders for the conduct of the proceeding, whether these be based on the Convention, on the agreement of the parties, on these Rules, or failing any of these sources, on a decision of the Tribunal itself (see Article 44 of the Convention and Introductory Note E).

B. Rule 20 indicates the method by which the agreement and the individual views of the parties with respect to procedural points are to be ascertained by the Tribunal. Of course, the parties can communicate any agreement they may have reached on procedural points at the very earliest stage of the proceeding (see Institution Rule 3).

C. The Tribunal's procedural orders are made by a majority of the votes of all its members (cf. Articles 44 and 48(1) of the Convention, and see Rule 16(1) and Note A thereto).

Rule 20
Preliminary Procedural Consultation

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;
(b) the language or languages to be used in the proceeding;
(c) the number and sequence of the pleadings and the time limits within which they are to be filed;
(d) the number of copies desired by each party of instruments filed by the other;
(e) dispensing with the written or the oral procedure; and
(f) the manner in which the cost of the proceeding is to be apportioned.

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

NOTES

A. This Rule is designed to enable the Tribunal—particularly by means of preliminary consultations by its President—to create, in cooperation with the parties, a concrete procedural framework within which it can issue the requisite orders under Rule 19. Since the Convention allows the parties extensive powers to settle procedural questions by agreement (see especially Article 44 and Introductory Note D), the Tribunal should spare no effort to seek cooperation with the parties, as well as between the parties, lest the arbitration be hindered by extensive procedural arguments. It may, for example, adopt the practice of the President of the International Court of Justice in discussing procedural points with the parties from time to time, in a kind of informal pre-trial conference.

B. In making its orders, the Tribunal should be guided, in the first place, by information furnished by the parties from the beginning (see Institution Rule 3) or as a result of the preliminary inquiry by its President (paragraph (1) of this Rule). However, in addition, the Tribunal must throughout the proceeding, as and when procedural issues arise, explore the views of the parties and—subject to the provisions of the Convention—seek to give effect to any agreement between the parties. Thus, this principle—an emanation of the consensual character of all proceedings under the Convention (cf. Report, paragraph 39)—applies not only to the matters listed in paragraph (1), but also to the arrangements for the taking of evidence, to the admissibility of counterclaims, to any provisional measures, and to the place of the proceeding (see Articles 43, 46, 47 and 63 of the Convention), etc. Indeed it is of wider application and may also cover such substantive issues as the determination of the law that the Tribunal is to apply and its power to decide the dispute *ex aequo et bono* (see Article 42 of the Convention).

C. The preliminary inquiry by the President should be carried out as early as possible after the constitution of the Tribunal (see Rule 6 (1)). If, upon its constitution, the Tribunal has no President, he must undertake it upon his designation or election (see Note B to Rule 17). The President determines the mode of the inquiry. He may call on the parties to express their views in writing and/or ask them or their representatives to meet him for this purpose.

D. The items listed in paragraph (1) are covered more specifically by the following Rules:

(a) Quorum requirement—Rule 14(2);
(b) Procedural languages—Rule 2];
(c) Pleadings—Rule 30;
(d) Numbers of copies of instruments to be filed—Rule 22;
(e) Written and oral procedure—Rule 28;
(f) Apportionment of costs—Rule 27 (see Article 61(2) of the Convention).

Rule 21
Procedural Languages

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages for this purpose.

(2) If the parties agree on one procedural language, or both parties select the same, that language shall be used for all instruments, at the hearings and for the minutes, as well as for the orders and the award of the Tribunal.

(3) If the parties agree on two procedural languages, or each party selects a different one, any instrument may be filed in either such language. Statements made before the Tribunal or by one of its members in one procedural language shall, unless the Tribunal decides to dispense therewith, be interpreted into the other procedural language. The orders and the award of the Tribunal shall be rendered and the minutes kept in both procedural languages, both versions being equally authentic.

(4) Notwithstanding paragraphs (2) and (3), the Tribunal may authorize the use of a language other than a procedural language for a specified part of the proceeding. In such event it shall determine to what extent translation and interpretation into and from the procedural languages is required.

(5) If a party uses a language other than an official language of the Centre, it shall be wholly responsible for the arrangements for and the special

expenses incurred by any translation and interpretation into and from that language.

NOTES

A. This Rule deals with the language regime for the settlement of a specific dispute (as to the language of the request for arbitration, see, however, Institution Rule 1(1)). The official languages of the Centre are specified in Administrative and Financial Regulation 34(1), and the availability of its translation and interpretation facilities is dealt with in Regulation 27.

B. In conformity with the consensual character of all proceedings under the Convention, paragraph (1) leaves the linguistic regime of the proceeding to the determination of the parties. It may be expected that they will be guided by considerations of expediency and economy of time and cost, taking into account the linguistic attainments of all participants in the proceeding (including the members of the Tribunal), the documentary material, the facilities of the Centre as well as their own resources. The President of the Tribunal will explore the extent of their agreement in the course of the preliminary consultation undertaken in accordance with Rule 20 (1)(b).

C. Whether one or two procedural languages are agreed to by the parties or selected by them separately, paragraphs (2)-(4) generally allow the Tribunal considerable discretion. Thus, even where there are two procedural languages, the Tribunal may, under paragraph (3), dispense with interpretation at hearings. And, more importantly, it may authorize, under paragraph (4), the use of any language for a specified part of the proceeding; the Tribunal might find this power useful where one language can be adequately used as the procedural language provided the use of another language is admitted for a limited part of the proceeding. The Tribunal can also avail itself of this power if any part, witness or expert declares that he is unable to depose in any of the procedural languages.

D. By Administrative and Financial Regulation 27(1) the Centre undertakes to furnish any necessary interpretation and translation from one official language of the Centre into another. While under Regulation 27(2) the Centre may also provide, if feasible, such services in relation to other languages, the Centre is not bound to do so. It is for this reason that paragraph (5) of the present Rule emphasizes the primary responsibility of the party using a nonofficial language both to make the arrangements for and to cover the expenses incurred in using such a language—whether it does so pursuant to paragraph (1) (in which case presumably both parties would share the burden of these arrangements), or with the *ad hoc* approval of the Tribunal pursuant to paragraph (4).

E. The language requirements relating to "supporting documentation" (Rule 23) are set forth in Administrative and Financial Regulation 30 (3).

Rule 22
Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

(a) before the number of members of the Tribunal has been determined: five;
(b) after the number of members of the Tribunal has been determined: two more than the number of its members.

NOTES

A. While this Rule does not apply to the original request for arbitration (which, however, is governed to the same effect by Institution Rule 4(1)), it applies to every other instrument filed in the proceeding, including those introduced in applying for a supplementary decision on or for the rectification, interpretation, revision or annulment of an award (see Rules 49-51). The

number of copies of supporting documents is regulated by Rule 23 and through it by Administrative and Financial Regulation 30(2), so as to be generally equal to the number of required copies of the instrument to which the documentation relates.

B. Pursuant to Administrative and Financial Regulation 28(1)(a), the original of every instrument filed in a proceeding is to be deposited in the archives of the Centre for permanent retention.

C. The consultations on the basis of which the Tribunal may make decisions under this Rule should be started by the President pursuant to Rule 20(1)(d).

Rule 23
Supporting Documentation

(1) Every request, pleading, application, written observation or other instrument filed by a party may be accompanied by supporting documentation, in such form and number of copies as required by Administrative and Financial Regulation 30.

(2) Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

NOTES

A. These Rules distinguish between "instruments" (e.g., requests, pleadings, applications, written observations, etc.) by which a party expresses or argues its various claims, motions and positions, and "supporting documentation" which consists of written (including pictorial) evidentiary material introduced in support of an instrument. In principle, therefore, documentation should never be introduced without relating it to a particular instrument (and consequently paragraph (2) of this Rule indicates that preferably it should be filed together with such instrument).

B. Administrative and Financial Regulation 30, to which reference is made in this Rule, establishes requirements for the form of original documentation (including the possibility of substituting certified copies or extracts), for the number of copies to be filed, and for the languages to be used.

C. If any document is filed after the expiration of the time limit indicated in paragraph (2), it will ordinarily be disregarded unless the Tribunal, pursuant to Rule 25(3), decides otherwise.

Rule 24
Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

NOTE

This Rule relates only to "accidental" errors ("*erreurs matérielles*"), i.e., to slips, misprints, misnomers, wrong dates or amounts resulting from a clerical error or obvious miscalculation. In a sense, it is complemented by the rule under which it is the Secretary-General's duty to bring to the notice of the party filing an instrument or document, any failure to conform to the applicable requirements (Administrative and Financial Regulation 24(2)).

Rule 25
Time Limits

(1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.

(2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.

(3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

NOTES

A. Paragraph (1) confers on the Tribunal the power to fix time limits "where required"—that is to say where they are not provided by the Convention or these Rules. Such time limits will be contained in orders made by the Tribunal (Rule 19), which will primarily be guided by any agreement between the parties (see Rule 20 (2)).

B. Though delay is a risk of international proceedings, it seems advisable to provide the Tribunal with the power to extend time limits fixed by it. Extension may be applied for *ex parte*. It can be assumed that it will certainly be granted if both parties concur. See also Rule 42(2)(a) for the requirement to grant a period of grace in case of a default.

C. Since decisions relating to time limits must frequently be made while a Tribunal is not in session, paragraph (1) provides that the Tribunal may delegate to its President the power to fix such limits, and paragraph (2) provides, in effect, for an automatic delegation of the power to extend such time limits. In either case, if the President is unwilling to act without the consent of his colleagues (or if these or the parties do not wish to entrust him with this authority), a decision by correspondence (Rule 16 (2)) can be taken.

D. Paragraph (3) provides the sanction for failure by a party to comply with a time limit. However, to prevent injustices the rule is not inflexible and the Tribunal is given power to make exceptions. If it does so, it must, however, make certain that the other party is not injured thereby—i.e., if it permits one party to introduce an instrument or document at a late stage in the proceeding, it must permit the other party to file its observations thereon within reasonable time limits.

E. The calculation of time limits is specified in Administrative and Financial Regulation 29.

Rule 26
Waiver

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

NOTES

A. This Rule expresses a principle applied in the civil procedure of many countries, and should prove useful in arbitration proceedings instituted under the Convention. Its application is, of course, limited by restrictions contained in the latter, such as by the provision relating to default (Article 45 of the Convention; see Rule 42).

B. It is not practicable to state a time limit within which objections must be filed, for this depends both on the nature of the procedural violation and on the pace of the proceeding. Thus, while a Tribunal is meeting in daily sittings, an objection to the delayed introduction of a document might have to be taken immediately if it is to be effective, but between sessions an objection might reasonably be filed with a certain delay.

Rule 27
Cost of Proceeding

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) At any state of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 13, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre, and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

NOTES

A. Administrative and Financial Regulation 13(3)(d) provides that in the absence of a decision by the parties or the Tribunal, the current payments to be made to the Centre (to enable it to make certain payments pursuant to Regulation 13(2) and for the use of its services and facilities in connection with the proceeding) are to be divided equally between the parties. Paragraph (1) of this Rule is designed to authorize the Tribunal to provide for some other division, if it considers it appropriate and unless the parties have agreed otherwise.

B. In particular, under paragraph (1)(b), the Tribunal may decide to charge one party (always without prejudice to the ultimate disposition, pursuant to Article 61(2) of the Convention, of the cost of the proceeding) with all or a major share of the cost of a particular part of the proceeding. For example, if one party, pursuant to Article 43(b) of the Convention, desires to have the Tribunal visit a place connected with the dispute, the Tribunal may decide to do so at the cost of that party.

C. Paragraph (2) is designed to assist the Tribunal in securing the information which it needs in order to formulate (pursuant to Article 61(2) of the Convention), that part of its award which specifies the definitive division of the cost of the proceeding between the parties. Part of the costs referred to in that paragraph are the expenses referred to in Rule 33(4).

D. If the proceeding is discontinued at the request of or due to the neglect of the parties (see Rule 43(1), 44 or 45), no award is made and the parties must settle between themselves the division of the costs previously incurred or paid by them. If the proceeding is terminated by a decision of the Tribunal that it lacks jurisdiction, such a decision must be embodied in an award (see Rule 41(5)) to which Article 61(2) of the Convention and paragraph (2) of this Rule apply; the same is true if an agreed settlement is embodied in an award (Rule 43(2)).

CHAPTER IV
WRITTEN AND ORAL PROCEDURES

Rule 28
Normal Procedures

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

NOTES

A. In conformity with the rules of most international tribunals, Rules 28 *et seq.* divide the principal part of the proceeding into two distinct phases: the written procedure (i.e., the request for arbitration and the pleadings) and the oral procedure (i.e., the hearings). On the other hand, in keeping with the general flexibility of the arbitral process under the Convention and its consensual character (cf. Report, paragraph 39), the parties are free to determine what use they will make of those two phases and in what order they should follow each other. Thus, for instance, if a joint request concerns merely the interpretation of a legal provision, they might agree to dispense with the pleadings. This is less likely to happen when the request is unilateral. However, the parties may agree—at the outset of the proceeding or subsequently after the pleadings have clarified the issues—to dispense with the hearings, with the ensuing economy of time and cost.

B. This Rule, though primarily relevant to the principal proceeding on the dispute itself, in effect also applies appropriately to subsidiary parts of the proceeding, such as to a re-opened proceeding (see Rule 38(2) and Note A thereto), to several of the "particular procedures" (e.g., Objections to Jurisdiction—Article 41 of the Convention and Rule 41; Ancillary Claims—Article 46 and Rule 40; Provisional Measures—Article 47 and Rule 39) and to the post-award remedies (Articles 49(2) and 50-52, and Rules 49-55).

Rule 29
Transmission of the Request

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

NOTES

A. The request by which the arbitration was instituted also forms part of the written procedure in the dispute and consequently should be transmitted to the Tribunal as soon as the latter is constituted (as to that time, see Rule 6(1)).

B. The request and the supporting documentation may be needed by the Tribunal if it must make any decision on the Centre's jurisdiction or its own competence, pursuant to Article 41 of the Convention (Rule 41). In addition, the request may contain other procedural or substantive provisions agreed by the parties concerning the settlement of their dispute (see Institution Rule 3). It may therefore be of importance to the Tribunal in formulating its orders for the conduct of the proceeding (see Rules 19 and 20(2)).

Rule 30
The Written Procedure

(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:

(a) a memorial by the requesting party;
(b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal deems it necessary:

(c) a reply by the requesting party; and
(d) a rejoinder by the other party.

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

(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

NOTES

A. The written procedure consists of the request for arbitration and the pleadings (though Rule 28 foresees the possibility of dispensing with the latter—see Note A thereto). The requirements relating to the request are set forth in Institution Rules 1-4 and in Rule 29 above. The views of the parties concerning the number and sequence of the pleadings, the number of copies to be filed and the time limits for filing are to be ascertained during the preliminary consultation required by Rule 20(1); in its light, the Tribunal makes the requisite orders pursuant to Rule 19. The formal requirements as to the pleadings are covered by Rules 21(2) and (3), 22 and 23, and the Tribunal's authority to fix time limits by Rule 25.

B. Paragraph (1) normally limits the parties to one "round" of pleadings—i.e., to a memorial and a counter-memorial. Further pleadings are admissible only if, during the preliminary consultation or subsequently, the parties agree or the Tribunal determines that they are necessary.

C. As regards the order of pleadings, paragraph (2) distinguishes between proceedings pursuant to a unilateral request and those where a request is made jointly by the parties (see Institution Rule 1(2)). In the former case, the filing is normally consecutive; in the case of a joint request, it may be simultaneous. Procedurally, consecutive pleading has the advantage that the responding party has an opportunity of meeting the case—and only the case—of its opponent, with the ensuing economy in the presentation of its own case; that party need not grope in the dark. Simultaneous pleading involves the risk of needless effort in pleading facts and law—possibly supported by voluminous documentary evidence—that in the event are not contested; moreover, a party may be disinclined to reveal the whole of its case or evidence until it files its second pleading, leading to procrastination. Because of this, consecutive pleading is preferred by the writers, has become the usual method of filing before the International Court of Justice, and is normally adopted in commercial arbitration; however, simultaneous filing is the classical procedure still used before *ad hoc* tribunals in intergovernmental arbitration. In view of the doubts concerning the efficacy of simultaneous filing, paragraph (2) envisages that the parties to a joint request may agree that one of them should be considered as the "requesting party" and that, consequently, the pleadings should be filed consecutively; if they cannot so agree, the pleadings will have to be filed simultaneously.

D. The time limits for the filing of pleadings are determined by the Tribunal (paragraph (1) and Rule 25(1)). Normally, the parties will be granted equal time, but if consecutive filing is used the requesting party may be granted less time for its memorial than the other party for its counter-memorial as the former can be presumed to have carefully considered its case before it decided to initiate the proceeding and formulated its request. The pleadings are to be filed with the Secretary-General (see Administrative and Financial Regulation 24(2)).

E. Paragraph (3) lists the elements of the several pleadings. Their scope represents an adaptation of common law practice to the procedure of the civil law. These provisions, tested by international arbitration practice, are designed to prevent procedural arguments concerning the scope of pleadings, even if the parties have differing legal backgrounds. Where, however, the parties share a common experience with an identical or similar system of procedure, they may agree on different contents and functions for the pleadings.

F. The parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute (in this connection, see Article 48(5) of the Convention and Rules 37(2) and 48(4)).

Rule 31
The Oral Procedure

(1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.

(2) The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.

(3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

NOTES

A. "Hearings" take place at "sittings" of the Tribunal, which constitute part of a "session" (see Note A to Rule 13 and Note A to Rule 14); they are conducted under the control of the President of the Tribunal (see Rule 14(1)). The parties may appear "in person" or through representatives (see Rule 18). The provisions relating to witnesses and experts are set forth in Rules 34 and 35. The language regime of the hearings is governed by Rule 21. Finally, the oral procedure may be dispensed with entirely (see Rule 28).

B. The hearings permit the oral development of the arguments of the parties. Normally an opening statement by or on behalf of the requesting party is followed by a statement by or on behalf of the other party, followed, again, by a reply and a rejoinder. Just as the pleadings (see Rule 30(3)), these statements may be concluded by submission (which should afterwards be deposited in writing). If oral evidence is submitted by a party, this may follow its first statement and be followed by an examination of its witnesses. The Tribunal may, however, decide on a different sequence—particularly if it has itself called for certain evidence (see Article 43 of the Convention or Rule 33(2)). It will be guided by the principle that full and equal opportunity should be afforded to both parties and by any agreement between them (see Rule 20(2)). To preserve flexibility and adequate discretion for the Tribunal, these Rules contain no specific guidance on this point. Should the arrangement of the hearings present complex or controversial problems, these may be discussed by the President of the Tribunal with the parties in the preliminary consultation (Rule 20(1)).

C. It seems to follow from Article 48(5) of the Convention that, as a matter of principle, arbitration proceedings should not be public and paragraph (2) of this Rule is formulated accordingly. As to the right of the Secretary appointed for the proceeding to be present, see Administrative and Financial Regulation 25(c). The Tribunal may require any expert or witness to absent himself from the hearing when not giving testimony.

D. Under paragraph (3) each member of the Tribunal has the right to put questions. He need not make his intention known to the President beforehand. On the other hand, since the hearings are under the control of the President (Rule 14(1)), the latter will, when several questions are put, determine the order in which these should be answered. He will also rule whether,

at the request of a party, it may answer a question at a later date. As to the examination of witnesses and experts, see Rule 34(1).

Rule 32
Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

NOTE

The purpose of this Rule is principally to prevent surprise to the opposing party, but also to facilitate the task of the Tribunal in arranging the proper conduct of the hearings. The Rule relates both to the evidence of witnesses and experts (see Rules 34 and 35) and also to any visits and local inquiries (see Rules 33(2)(b) and 36). "Precise" information on the evidence should include the names, addresses, etc. of witnesses and experts. The "indication of the points to which such evidence will be directed" should assist the Tribunal and the other party in forming a preliminary view as to its admissibility and relevance (see Rule 33(1)); these issues may, of course, be argued at the hearings.

Rule 33
Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

(a) call upon the parties to produce documents, witnesses and experts; and
(b) visit any place connected with the dispute or conduct inquiries there.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

NOTES

A. Paragraph (1) of this Rule reflects long-standing international practice. It confers on the Tribunal the power to determine the admissibility, relevance and materiality of evidence. Hence the Tribunal has full power to decide whether particular evidence (e.g., documents, interrogatories, written depositions, oral evidence by witnesses and experts given before the Tribunal or before a commissioner) should be admitted. It is also unfettered, subject to the principle of the

equality of the parties, in its discretion in determining the relevance and in evaluating the materiality of any such evidence, i.e., in assessing its "probative value". Thus it can appraise its "weight" according to the balance of probabilities. Moreover, the Tribunal is not bound to base its findings on evidence alone: It may take judicial notice of certain facts.

B. Paragraph (2) paraphrases Article 43 of the Convention. It applies, as do most other provisions of these Rules (see Introductory Note D), "except as the parties otherwise agree" (see Article 43 of the Convention). The general power of an international tribunal to call on the parties to produce documents, supply explanations, call upon experts, and require the appearance of witnesses is found in many international instruments. Therefore the expression "other evidence" in the Convention can be interpreted to include not only witnesses but also independent experts, including experts on national law who (in view of Article 42(1) of the Convention) may be of special importance.

C. In accordance with paragraph (2), the Tribunal may call for specific evidence or order the measures envisaged in sub-paragraph (b) "at any stage of the proceeding". Thus it can order the production of a document even after it has closed the written procedure. It may be presumed that, in general, it will determine what additional documentary evidence it requires and make an order accordingly even before the oral procedure begins. This may be discussed by the President with the parties during the preliminary consultation (Rule 20(1)), or in connection with the communications anticipating the evidence (Rule 32).

D. The first sentence of paragraph (3) embodies a principle which has received general recognition. This duty to cooperate with the Tribunal can be deduced from the mutual consent of the parties to submit their dispute to arbitration. Indeed, the Tribunal, which has no powers to compel the production of evidence, may find it difficult to discharge its task without the full cooperation of the parties in this matter. The second sentence of the paragraph requires the Tribunal to take "formal note" of any failure by a party to comply with its obligations. But since a party may not be in a position to produce the evidence required (for want of powers of compulsion or because the evidence may be located outside its jurisdiction), the Tribunal must also note any reasons given for such failure.

E. For the sake of clarity, paragraph (4) confirms that the expenditures incurred by the parties in connection with any evidence produced and measures taken are governed by Article 61(2) of the Convention. Accordingly, they must be assessed and attributed by the Tribunal in its award (in this connection, see also Rules 27 and 47(1)(j)).

Rule 34
Examination of Witnesses and Experts

(1) Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.

(2) Each witness shall make the following declaration before giving his evidence:

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

(3) Each expert shall make the following declaration before making his statement:

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

NOTE

Under this Rule, witnesses and experts in general depose "before the Tribunal"—the exceptions being covered by Rule 35. They are examined by the "parties" (cf. Rule 18(2)). The examination is under the control of the President of the Tribunal (see Rule 14(1)) and he as well as all other members may put questions.

Rule 35
Witnesses and Experts: Special Rules

Notwithstanding Rule 34, the Tribunal may:

(a) admit evidence given by a witness or expert in a written deposition; and

(b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination. Minutes shall be kept in accordance with Rule 37, *mutatis mutandis*.

NOTES

A. Rule 34 provides that, in principle, evidence by witnesses and experts shall be given "before the Tribunal". However, since the Tribunal may encounter certain difficulties in obtaining such evidence (because it has no power of compulsion) and since international tribunals are not fettered by the technical evidentiary rules of national law, the present Rule admits, for practical reasons, two exceptions to the general principle.

B. Under subparagraph (a) the Tribunal may receive, and indeed call for, evidence in the form of a written deposition by a witness or expert. The probative value of such evidence may, however, be the subject of objections by the parties at the hearings, on which the Tribunal must then make a decision pursuant to Rule 33(1). It may require that such depositions be "notarized" or attested in any appropriate manner.

C. Subparagraph (b) is formulated sufficiently broadly to enable the Tribunal to appoint either one of its members or some other person or body as a "commissioner" before whom the examination shall take place, and also to enable it to appoint an examiner. As a safeguard, both parties must consent to this procedure, and both may participate in the examination.

Rule 36
Visits and Inquiries

If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry. Minutes shall be kept in accordance with Rule 37, *mutatis mutandis*.

NOTE

This Rule specifies the procedure for implementing Article 43(b) of the Convention and Rule 33(2)(b). Its language is sufficiently broad to enable the Tribunal to conduct an inquiry at "any place connected with the dispute", or to entrust it to a commissioner or some body or organization (cf. also Rule 35(b)).

Rule 37
Minutes

(1) The Secretary-General shall keep minutes of all hearings; these shall include:

(a) the place, date and time of the hearing;
(b) the names of the members of the Tribunal present;
(c) the designation of each party present;
(d) the names of the agents, counsel and advocates present;
(e) the names, descriptions and addresses of the witnesses and experts heard;
(f) a summary record of the evidence produced;
(g) a summary record of the statements made by the parties;
(h) a summary record of questions put to the parties by the members of the Tribunal, as well as of the replies thereto; and
(i) any order made or announced by the Tribunal.

(2) The minutes of the hearing shall be signed by the President of the Tribunal and the Secretary-General. These minutes alone shall be authentic. They shall not be published without the consent of the parties.

(3) The Tribunal may, and at the request of a party shall, order that the hearings be more fully recorded.

NOTES

A. The functions of the Secretary-General under paragraphs (1) and (2) of this Rule will ordinarily be performed by the Secretary he is to appoint for the proceeding pursuant to Administrative and Financial Regulation 25.

B. For reasons of economy, but also in order to attain a measure of informality, this Rule does not require either a shorthand record or the electronic recording of a hearing. On the other hand, it does not exclude the possibility of including in the minutes, at the request of the party concerned, a verbatim record of any statement. Paragraph (3), moreover, permits a party or the Tribunal to require that a verbatim or other complete record of the hearing be made by any appropriate means. If done so at the request of a party, the Tribunal may require it, at least provisionally, to bear the resulting costs in accordance with Rule 27(1)(b).

C. The provisions of this Rule also apply, *mutatis mutandis*, to the special examination of witnesses and experts pursuant to Rule 35(b), and to visits and inquiries by the Tribunal pursuant to Rule 36.

Rule 38
Closure of the Proceeding

(1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.

(2) Exceptionally, the Tribunal may, before the award has been rendered, re-open the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

NOTES

A. Closure of the proceeding is considered to be without prejudice to the discretionary power of the Tribunal to re-open it on its own initiative or on motion of either party. However, paragraph (2) emphasizes the exceptional character of a re-opening. Since the new evidence, or the need for clarification, may require both further written and further oral procedures, it is the "proceeding" that may be re-opened.

B. The closure of the proceeding marks the time limit before which any proposal to disqualify an arbitrator, pursuant to Article 57 of the Convention, must be filed (see Rule 9(1)). On the other hand, the requirement in Rule 27(2) to file statements of costs incurred should be complied with "promptly after the closure of the proceeding".

C. After the award has been rendered (see Article 49(1) of the Convention and Rule 48(2)), the case is closed, but the provisions of the Convention on the supplementation, rectification, interpretation, revision or annulment of the award (Articles 49(2) and 50-52 of the Convention and Rules 49-55) may apply.

CHAPTER V
PARTICULAR PROCEDURES

Rule 39
Provisional Measures

(1) At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

NOTES

A. This Rule provides the procedural framework for implementing Article 47 of the Convention, which is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award. Because of the generality of this principle, not only can a party request the Tribunal to recommend provisional measures at any time during the proceeding, i.e., in principle from its institution (Institution Rule 6(2)), but in practice only from the constitution of the Tribunal (Arbitration Rule 6(1)) since it is the Tribunal that must make the recommendation—until the award is rendered (Rule 48(2)), but the Tribunal may also make recommendations on its own initiative (see paragraph (3) of the present Rule).

B. However, this power of the Tribunal exists (pursuant to Article 47 of the Convention) only "except as the parties otherwise agree"; moreover, unless the parties otherwise agree, the Tribunal only has the power to "recommend". This restriction is not as serious as it appears, for not only is the authority of a recommendation emanating from an international tribunal very considerable but the Tribunal can normally take into account in its award the effects of any non-compliance with its recommendations.

C. Paragraph (2) is based on the assumption that to preserve the rights of a party speedy action may be required. Accordingly the President of the Tribunal may, if he considers the request as urgent, propose a decision to be taken by correspondence (Rule 16(2)), or even convene the Tribunal for a special session.

D. The measures recommended must be "provisional" in character and be appropriate in nature, extent and duration to the risk existing for the rights to be preserved. Paragraph (3) therefore allows the Tribunal to recommend measures other than those proposed by the moving party, and to modify or revoke its recommendations as circumstances may require.

E. In order to avoid surprises or unintentionally unfair dispositions, paragraph (4) requires that both parties be given an opportunity to present their observations before the Tribunal makes

its recommendations or modifies or revokes them. The Tribunal must decide how this opportunity will be given.

Rule 40
Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

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

(3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

NOTES

A. Article 46 of the Convention deals with two types of ancillary claims: (i) "incidental or additional claims"; and (ii) "counter-claims". The former are presented, as a rule, by the party that originally requested the institution of the proceeding, the latter—which may be a form of defense—by the other party. (A claim ancillary to a counter-claim is conceivable.) Both types of claims require safeguards ensuring that the party against whom they are directed should not be taken by surprise.

B. Consequently, ancillary claims are subject to three preliminary conditions (the first two of which appear in Article 46 of the Convention):

(a) To be admissible such claims must arise "directly" out of the "subject-matter of the dispute" (French version: "*l'objet du différend*"; Spanish version: "*la diferencia*"). The test to satisfy this condition is whether the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute, the object being to dispose of all the grounds of dispute arising out of the same subject matter.

(b) Such claims must also be "within the jurisdiction of the Centre" (as to the meaning of this phrase, see Report, paragraph 22) and, in particular, "within the scope of the consent of the parties" (cf. Institution Rule 2(1)(c)). The Tribunal must, if need be, examine *proprio motu* whether this condition is satisfied (see Rule 41(2)).

(c) Finally, as regards form, an ancillary claim must be filed within certain time limits (see paragraph (2) of the present Rule and Note C, below).

C. Unless there is a special justification by the moving party, an ancillary claim must be presented in the course of the written procedure. Thus, an incidental or additional claim is to be presented by the requesting party "not later than" in its reply (i.e., its second pleading—see Rule 30(1)); it may of course present that claim already in its memorial (the first pleading). A counter-claim must be presented not later than the counter-memorial (i.e., the first pleading filed by the responding party). A party may present an ancillary claim at a later date only if there is justification considered adequate by the Tribunal.

D. Normally the written procedure on an ancillary claim is restricted to one "round". However, the Tribunal may decide otherwise.

Rule 41
Objections to Jurisdiction

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall render an award to that effect.

NOTES

A. Under the Convention, the Tribunal is "the judge of its own competence" (Article 41(1)) and must also decide objections to the jurisdiction of the Centre (Article 41(2)) (as to the meaning of the phrase "jurisdiction of the Centre", see Report, paragraph 22). The Tribunal is not bound to assume jurisdiction merely because the Secretary-General, by registering a request for arbitration, has implicitly acknowledged that, in his view, the dispute in question is not "manifestly outside the jurisdiction of the Centre" (see Article 36 (3) of the Convention and Institution Rule 6 (1)). Therefore, in spite of the registration the Tribunal may decide that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within its own competence.

B. An objection to the jurisdiction of the Centre or to the competence of the Tribunal (for the sake of brevity, in these Notes referred to as "objections to jurisdiction") will usually be raised by one of the parties (as foreseen in paragraph (1) of this Rule). However, it may also be raised by the Tribunal on its own initiative (paragraph (2)), and indeed the Tribunal has special responsibility to do so if one of the parties has defaulted (see Rule 42(4)). In either case, the procedure followed is similar, and both parties must have an opportunity to present their observations (see paragraph (3) of this Rule).

C. Paragraph (1) requires that any objection to jurisdiction be made "as early as possible". The earliest that this can be done is of course immediately after the institution of the proceeding (i.e., after registration of the request—see Institution Rule 6) since the Secretary-General himself is not authorized under Article 36(3) of the Convention to take account of any material not contained in the request itself. In any case, an objection to jurisdiction cannot be considered by the Secretary-General even after registration, but will be taken up as the first order of business of the Tribunal upon its constitution. On the other hand, the facts on which an objection may be

based might not be known to the party concerned at the time the proceeding is instituted or an ancillary claim is introduced. A State may, for instance, not know that, at the time of registration, the other party had been its national (cf. Article 25(2)(a) of the Convention). Hence, while an objection to jurisdiction should be made "as early as possible", the specific limits laid down in paragraph (1) do not apply if "the facts on which the objection is based are unknown to the party at that time".

D. Whenever an objection to jurisdiction is raised, either by one of the parties or by the Tribunal itself, the proceeding on the merits must be suspended and both parties must be given an opportunity to file observations. However, such suspension is only necessary if the objection relates to the dispute itself and not merely to an ancillary claim; in the latter case the Tribunal need not suspend consideration of the merits of the principal claim, but it might do so with respect to the merits of the ancillary claim in question until the parties have filed their observations on that challenge.

E. Thereafter, the Tribunal has, under paragraph (4), three possibilities: It may deal with the objection as a preliminary question and, if it deems it well founded, end the proceeding without adjudicating on the merits. It may overrule the objection and resume the proceeding on the merits. Finally, it may join the objection to the merits—a course it is likely to adopt where the facts on which the objection is based are closely connected with the merits and a decision on the objection might prejudice the decision on the latter.

F. If the Tribunal finds an objection to jurisdiction, relating to the dispute itself, to be well founded, paragraph (5) requires it to express this decision in an award. Such an award should conform to the provisions of Articles 48 and 49 of the Convention (see also Rules 46-48), and the appropriate post-award remedies specified in Articles 49(2) and 50-52 of the Convention (see also Rules 49-55) apply; such an award should also include a decision on the cost of the proceeding in accordance with Article 61(2) of the Convention (see also Rule 27(2) and Note D thereto). If the Tribunal's decision that it lacks jurisdiction relates only to an ancillary claim, or if it decides against an objection relating either to the dispute itself or to an ancillary claim, such a decision should be reflected in the principal award, in accordance with Article 48(3) of the Convention (see also Rule 47(1)(i)).

G. Objections to jurisdiction, as well as any observation filed by the parties, should conform to the requirements established for all instruments filed in the proceeding, in particular those specified in Rules 21-25 and in Administrative and Financial Regulations 24 and 30.

Rule 42
Default

(1) If a party (in this Rule called the "defaulting party") fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.

(2) The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:

(a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or
(b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

The period of grace shall not, without the consent of the other party, exceed 60 days.

(3) After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the

consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party.

(4) The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

NOTES

A. Failure of a party to appear or to take part in a conciliation proceeding under the Convention entails closure of the proceeding (see Article 34(2) of the Convention); in arbitration proceedings, on the other hand, default need not have this consequence. The Tribunal must continue to discharge its task if it is requested to do so (see Article 45(2) of the Convention). And if it does so and renders its award, the latter is binding on both parties—as a consequence of the mutual consent on which the jurisdiction of the Tribunal is based.

B. A request pursuant to paragraph (1) may emanate from either party to the dispute, not only from the party that made the original request for the institution of the proceeding. It can be made "at any stage" but must be made "prior to the discontinuance of the proceeding". Since neither the Tribunal nor the defaulting party should be exposed indefinitely to a re-opening of the proceeding, if neither party takes any step in the proceeding during six consecutive months (i.e., if one party defaults and the other fails to make a request pursuant to Rule 42(1) within six months), the Tribunal must take action to discontinue the proceeding pursuant to Rule 45.

C. An immediate consequence of the request is that the defaulting party must be placed on notice and granted a "period of grace" (as required by Article 45 (2) of the Convention), which under paragraph (2) of this Rule may not, without the consent of the other party, exceed 60 days (since presumably the defaulting party already had adequate time to prepare its case before the default). However, such a period need not be granted where the Tribunal is satisfied that the defaulting party does not intend to participate in the proceeding—e.g., because it has made a formal declaration to that effect. Otherwise the granting of the period is obligatory.

D. In conformity with Article 45(2) of the Convention, the Tribunal is "to deal with the questions submitted to it and render an award". The Tribunal is therefore not confined to making an award in favor of the party appearing; it may instead decline its jurisdiction or render an award in favor of the defaulting party (see Note E below).

E. In accordance with Article 45(1) of the Convention, paragraph (3) of this Rule provides that neither the default nor the request should prejudice the substance of the decision of the Tribunal. Neither affects the substantive rights of the parties or any earlier submission; they only alter their procedural position. After the Tribunal has, on the expiration of the period of grace, resumed consideration of the request, the proceeding is no longer fully "contentious" in the sense that expression is used in national civil procedures; the initiative is shifted to the Tribunal as far as the substantiation of the submissions is concerned. The Tribunal must now *proprio motu* examine:

(a) whether the dispute comes within the jurisdiction of the Centre and otherwise within its own competence (as to its inherent powers in this respect, see also Rule 41(2)); the Tribunal must, even if its jurisdiction has not been contested by the parties, end the proceeding unless it is satisfied that it is competent (Rule 41(5)); and

(b) the substantive merit of the "assertions" made by both parties in order to satisfy itself whether their submissions are well founded in fact and law. To this end, it may call on the active party for observations, evidence or explanations.

Rule 43
Settlement and Discontinuance

(1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

(2) If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

NOTES

A. This Rule deals with the contingency of the parties agreeing to settle their dispute or to discontinue the proceeding on some other basis (e.g., in order to substitute a conciliation proceeding). Rule 44, on the other hand, provides for discontinuance at the unilateral request of a party; finally, Rule 45 provides for discontinuance at the initiative of the Tribunal if both parties are inactive for a long period of time. (See also Administrative and Financial Regulation 13(3)(d) (final sentence) concerning the Secretary-General's power to move a discontinuance for long continued non-payment of charges, and Institution Rule 8 concerning the right of unilateral withdrawal before registration of the request.)

B. Paragraph (1) of the Rule will be invoked by the parties if they both merely wish to discontinue the proceeding, for any reason, without any award being rendered. If the Tribunal has already been constituted, it is required to issue an order noting the discontinuance. In view of the consensual character of this procedure, the Secretary-General is given the same duty and authority as the Tribunal, to be exercised if the joint request is submitted before the Tribunal is constituted (see Rule 6(1)); this obviates the necessity of constituting the Tribunal merely for this purpose. Such an order, whether issued by the Tribunal or the Secretary-General, is not an award, and therefore would not normally contain any provision regarding the division of expenses in accordance with Article 61(2) of the Convention (see also Rule 27(2)).

C. In addition, if the parties have reached a settlement, they may under paragraph (2) request the Tribunal to embody the terms agreed between them in an award. The Tribunal is given discretion on whether to comply with such a request, since it may instead decide that it lacks jurisdiction (see Rule 41(2) and (5)), or that it considers it improper for the Tribunal to become a party to a particular settlement. If the Tribunal complies, the settlement acquires, as far as possible, the force of an award rendered pursuant to the Convention. In this form, it benefits from the provisions of Articles 53 and 54 (and therefore also of Article 27) of the Convention: thus each Contracting State must recognize such an award as binding and enforce the pecuniary obligations thereunder. On the other hand, Articles 50 to 52 of the Convention (interpretation, revision and annulment) cannot have full application with regard to such an award. It should be noted that an award can only be rendered by a Tribunal, and not by the Secretary-General.

Rule 44
Discontinuance at Request of a Party

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an

order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

NOTES

A. The several Rules relating to discontinuance of proceedings are cited in Note A to Rule 43.

B. Before the proceeding has been instituted (i.e., before the request for arbitration has been registered) unilateral discontinuance can be effected by withdrawal of the request for arbitration pursuant to Institution Rule 8. However, it is generally considered that once an arbitration proceeding has been instituted, each party acquires by a *litis contestatio* an interest in endeavoring to secure from the Tribunal a positive pronouncement in its favor. Consequently, this Rule provides that if either party wishes to discontinue the proceeding unilaterally, the acquiescence of the other party must be obtained; but, so as not to permit such party to block a discontinuance by inaction, intentional or unintentional, a time limit is to be set for its response.

C. It should be noted that, practically, under this Rule the agreement (express or implied) of both parties must be secured for discontinuance. Thus the effect of this Rule is not greatly different from that of Rule 43(1). Consequently, here too the Secretary-General is given the same authority as the Tribunal to arrange for the discontinuance of the proceeding if the request is made before the Tribunal is constituted (see Rule 6(1))—thus obviating the necessity of constituting the Tribunal merely for this purpose.

D. An order discontinuing a proceeding under this Rule, whether issued by the Tribunal or the Secretary-General, is not an award, and therefore would not normally contain any provision regarding the division of expenses in accordance with Article 61(2) of the Convention (see also Rule 27(2)).

Rule 45
Discontinuance for Failure of Parties to Act

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

NOTES

A. If for six months no action is taken by the parties, it can be presumed that they have abandoned the proceeding and are no longer interested in a decision of their dispute. This Rule provides that in that contingency, the Tribunal must order the discontinuance of the proceeding. It must, however, first give them notice, and they may thereupon agree to extend the six-month period, if, for instance, they are in the course of negotiating a settlement.

B. The failure of the parties to act may date from before the constitution of the Tribunal (see Rule 6(1))—e.g., if after the registration of the request for arbitration (see Institution Rule 6(1)), neither party takes any step to constitute the Tribunal. Since any time after 90 days have passed either party can, under Article 38 of the Convention, unilaterally require the Chairman of the Administrative Council to constitute the Tribunal, and under Article 45(2) a party may unilaterally request the Tribunal to render an award, it is undesirable for a proceeding to stay in limbo indefinitely. Consequently, by analogy to Rules 43 and 44, the Secretary-General is given the same authority as the Tribunal to cause discontinuance of the proceeding if neither party has taken action to have the Tribunal constituted within six months.

C. An order discontinuing a proceeding under this Rule, whether issued by the Tribunal or the Secretary-General, is not an award, and therefore would not normally contain any provision regarding the division of expenses in accordance with Article 61(2) of the Convention (see also Rule 27(2)).

D. If the inaction of the parties takes the form of non-payment of the advances and supplemental charges due from them to the Centre pursuant to Administrative and Financial Regulation 13(3)(a), then the Secretary-General is empowered to move the Tribunal to stay the proceeding before the funds he has previously received have been entirely exhausted. If a proceeding is stayed on this basis for a period in excess of six months, then the Secretary-General may, pursuant to the final sentence of Regulation 13(3)(d), move that the Tribunal discontinue the proceeding. That Regulation is thus closely coordinated with the present Rule.

E. It should also be noted that the power of the parties to extend indefinitely, by their agreement, the six-month period provided for in this Rule, makes it unnecessary to include in these Rules any explicit provision for the consensual stay of the proceeding.

CHAPTER VI
THE AWARD

Rule 46
Preparation of the Award

The award shall be drawn up and signed within 60 days after the closure of the proceeding. The Tribunal may, however, extend this period by a further 30 days if it would otherwise be unable to draw up the award.

NOTE

The closure of the proceeding is provided for in Rule 38. Signature of the award means signature by each member of the Tribunal that voted for it (see Article 48(2) of the Convention); since it is not required that all arbitrators sign at the same time (see Rule 47(2) and Note C thereto), the 60- or 90-day limit is intended to refer to the last signature to be affixed (see also Rule 48(1), first sentence). The date the award is "rendered" is determined in accordance with Article 49(1) of the Convention and Rule 48(2), subject to the final sentence of Article 49(2) of the Convention.

Rule 47
The Award

(1) The award shall be in writing and shall contain:

- (a) a precise designation of each party;
- (b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
- (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
- (d) the names of the agents, counsel and advocates of the parties;
- (e) the dates and place of the sittings of the Tribunal;
- (f) a summary of the proceeding;
- (g) a statement of the facts as found by the Tribunal;
- (h) the submissions of the parties;
- (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
- (j) any decision of the Tribunal regarding the cost of the proceeding.

(2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.

(3) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

NOTES

A. Subparagraph (1)(i) of this Rule is based on Article 48(3) of the Convention; subparagraph (1)(j) on Article 61(2); paragraph (2) on Article 48(2); and paragraph (3) on Article 48(4).

B. In accordance with Article 48(1) of the Convention (and Rule 16(1)), the decision of the Tribunal on every question must be taken "by a majority of the votes of all its members". This formula holds regardless of any quorum requirement set pursuant to Rule 14(2) and whether the decision is one taken at a sitting or is taken by correspondence (see Rule 16(2) and Note C thereto).

C. The award need not necessarily be "drawn up and signed" (see Rule 46) at a sitting of the Tribunal. Whether or not the decisions were taken by correspondence, or in the absence of one or more members of the Tribunal, it is only necessary that each member who voted for the award should sign it (Article 48(2) of the Convention and paragraph (2) of this Rule) within the time limit established in accordance with Rule 46. Since the signatures need not be affixed simultaneously, it is provided that each signature should be dated. After every favorable arbitrator has signed, Rule 48(1) applies.

D. Consideration has been given to the formulation of a provision to cover the contingency that a Tribunal might be unable to reach a majority decision on an issue, in particular on the amount of damages to be awarded. It was, however, concluded that with respect to most questions, which admit of only a positive or a negative answer, no problem can arise under Article 48(1) of the Convention, since if a proposition (such as a submission) fails to achieve a majority it is automatically decided negatively. (In this connection it should be recalled that Rule 16(1) provides explicitly, as Article 48(1) of the Convention requires implicitly, that abstentions shall be counted as negative votes, and that Article 37(2) of the Convention requires the Tribunal to consist of an uneven number of arbitrators.) If the question is not one susceptible of merely two possible answers (such as the determination of an amount), a decision can normally be reached by a proper sequence of votes by which alternatives are successively eliminated. Since this aspect of the proceeding will be controlled by the President of the Tribunal (Rule 14(1)) it was considered unnecessary and presumptuous to attempt to specify a precise voting procedure for this purpose, which in any case could not cover every situation.

Rule 48
Rendering of the Award

(1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:

(a) authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and

(b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.

(2) The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(3) The Secretary-General shall, upon request, make available to a party additional certified copies of the award.

(4) The Centre shall not publish the award without the consent of the parties.

NOTES

A. Subparagraph (1)(b) and paragraph (2) of this Rule are based on Article 49(1) of the Convention. Paragraph (4) reproduces Article 48(5)—in this connection, see also Administrative and Financial Regulation 21(2). The Secretary-General's functions pursuant to paragraphs (1) and (3) are in consonance with Regulation 28.

B. In order to avoid the inconvenience and additional expense that might be caused if the Tribunal were required to reconvene merely to read the award, these Rules do not require that the award be delivered at a sitting of the Tribunal. Nor need it be signed on the same date by all members of the Tribunal who voted for it. If, because of their locations, members sign on different dates, the Secretary-General's responsibility for prompt action under paragraph (1) must be measured relative to the date on which the last required signature is added. Though not stated explicitly, that date should also mark the time limit within which individual opinions and statements of dissent should be filed with the Secretary-General in order to be "attached" to the award (see Article 48(4) of the Convention and Rule 47(3)) so as to permit him to comply fully with paragraph (1) of this Rule.

Rule 49
Supplementary Decisions and Rectification

(1) A request for a supplementary decision on or the rectification of an award pursuant to Article 49(2) of the Convention shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;

(b) indicate the date of the request;

(c) state in detail:

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

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

(d) be accompanied by the fee for lodging the request, as required by Administrative and Financial Regulation 15(2).

(2) Upon receiving the request, the Secretary-General shall forthwith register it in the Arbitration Register, except that he shall instead inform the requesting party of his refusal to register it if he received the request more than 45 days after the award was rendered.

(3) After registering the request, the Secretary-General shall forthwith:

(a) notify both parties of the registration;

(b) transmit to the other party a copy of the request and of any accompanying documentation; and

(c) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

(4) The President of the Tribunal shall consult its other members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the further procedure for the consideration of the request.

(5) Rules 46-48 shall apply, *mutatis mutandis*, to any decision of the Tribunal pursuant to this Rule.

NOTES

A. This Rule implements the procedure provided for in Article 49(2) of the Convention.

B. The procedure pertaining to the filing and registration of a request in accordance with this Rule is roughly analogous to that for the filing and registration of an original request for arbitration in accordance with the Institution Rules. It is, however, especially important that the request adequately identify the award to which it relates, and state in detail the defects sought to be corrected. In this connection it should be noted that a single application may relate to both types of remedies (supplementary decision and rectification) (but cf. Note B to Rule 50).

C. The Secretary-General's authority to refuse to register a request made pursuant to Article 49(2) of the Convention is restricted to the contingency that the request is not made within the time limit prescribed by the Convention: taking into account Administrative and Financial Regulation 29, a request must be "delivered at the seat of the Centre" no later than the 45th day after the certified copies of the award were dispatched to the parties.

D. Unlike an interpretation, revision or annulment of an award (see Chapter VII of these Rules), a supplementary decision on or the rectification of an award can only be made by the Tribunal that rendered the award. If, for any reason, that Tribunal cannot be reconvened, the only remedy would be a proceeding under Chapter VII of these Rules.

E. In conformity with Article 49(2) of the Convention, paragraph (5) provides that decisions made under the present Rule should in general conform to the requirements established for an award. Administrative and Financial Regulation 28(2) requires that any "supplementary decision" and "rectification" be reflected on all certified copies of an award issued by the Secretary-General. Article 49(2) of the Convention and Rule 50(2)(a)-(c) provide that for the purposes of a proceeding to interpret, revise or annul an award, the relevant time limits shall be measured from the date on which a decision under the present Rule was rendered.

CHAPTER VII
INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

Rule 50
The Application

(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;
(b) indicate the date of the application;
(c) state in detail, in an application for:
  (i) interpretation, the precise points in dispute;
  (ii) revision, the change sought in the award as well as the full particulars necessary to show that the conditions laid down by Article 51(1) and (2) of the Convention are fulfilled;

(iii) annulment, the grounds on which the application is founded pursuant to Article 52(1) of the Convention as well as the full particulars necessary to show that the conditions laid down by Article 52(2) of the Convention are fulfilled; and

(d) be accompanied by the fee for lodging the application, as required by Administrative and Financial Regulation 15(2).

(2) Upon receiving the application, the Secretary-General shall forthwith register it in the Arbitration Register, except that he shall instead inform the requesting party of his refusal to register it if:

(a) it is an application for revision which he received more than three years after the award or any subsequent decision pursuant to Rule 49(5) was rendered;

(b) it is an application for annulment based on Article 52(1)(a), (b), (d) or (e) of the Convention which he received more than 120 days after the award or any subsequent decision pursuant to Rule 49(5) was rendered;

(c) it is an application based on Article 52(1)(c) of the Convention which he received more than three years after the award or any subsequent decision pursuant to Rule 49(5) was rendered.

(3) After registering the application, the Secretary-General shall forthwith:

(a) notify both parties of the registration; and

(b) transmit to the other party a copy of the application and of any accompanying documentation.

NOTES

A. This Rule and the subsequent ones in this Chapter are designed to implement the several procedures provided for in Articles 50-52 of the Convention.

B. The procedure pertaining to the filing and registration of an application in accordance with this Rule is roughly analogous to that for the filing and registration of an original request for arbitration in accordance with the Institution Rules. It is, however, especially important that the application adequately identify the award to which it relates and state in detail the grounds on which the particular remedy is sought. A single application may relate to only one of the three types of remedies (interpretation, revision, annulment); if a party seeks more than one type of remedy, it must file separate applications. This is necessary, both because of the separate time limits provided for in the Convention, and also because of the different procedures: interpretation or revision are considered by a Tribunal, annulment by an *ad hoc* Committee. Similarly, an application under this Rule must be made separately from a request under Rule 49.

C. The Secretary-General's authority to refuse to register an application made pursuant to Article 51 or 52 of the Convention is restricted to the contingency that it is made outside the *absolute* time limits prescribed by the Convention (i.e., three years after the date on which the award—or any supplement or rectification—was rendered in the case of a revision, and either 120 days or three years after such date in the case of an annulment). The Convention also specifies certain *variable* time limits: Article 51(2) imposes a 90-day limit "after the discovery of [the] fact" on which the request for revision is based and Article 52(2) imposes a similar 120-day limit "after discovery of the corruption"; but the Secretary-General might not be in a position to evaluate compliance with these limits. Therefore the Secretary-General's authority to refuse registration has been restricted to the unambiguous situations (in this connection attention is called to Administrative and Financial Regulation 29), but he is of course not precluded from calling the other applicable time limits to the attention of a party wishing to file an application and to remind it that the registration of an application does not preclude the competent Tribunal or Committee from deciding that an application is not receivable, as having been filed after the

expiration of either the applicable absolute or the variable time limit established by the Convention.

Rule 51
Interpretation or Revision: Further Procedures

(1) Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:

(a) transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and

(b) request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.

(2) If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal by the same method as the original one, in accordance with Chapter I of these Rules (excepting Rule 2).

NOTES

A. Articles 50(2) and 51(3) of the Convention provide that a request for interpretation or revision shall "if possible, be submitted to the Tribunal which rendered the award"; only if this is not possible should a new Tribunal be constituted. This Rule is designed to implement these provisions.

B. Paragraphs (1) and (2) of this Rule prescribe how the Secretary-General is to attempt to reconstitute the Tribunal that rendered the original award. In particular, paragraph (2) is analogous to Rule 6(1), which relates to the original constitution of a Tribunal. However, there is no provision corresponding to Rule 6(2), since each member of the original Tribunal must already have signed a declaration relating to the dispute. The date of the reconstitution of the Tribunal may be of particular significance in connection with the stay of enforcement of an award pursuant to Rule 54(2).

C. Paragraph (3) prescribes how a new Tribunal is to be constituted, if the original one cannot be reconstituted. The procedure prescribed is precisely that applicable to the original constitution of a Tribunal, except that it is specified that the method of constituting the new Tribunal (i.e., the number of arbitrators and the method of their appointment) should be the same as in the case of the original Tribunal. It is hoped that thereby the speed of constituting the new Tribunal can be advanced. For this reason Rule 2, prescribing the procedure to be used for agreeing on the method of constituting a Tribunal, is inapplicable here; Rule 1(2), requiring the parties to inform the Secretary-General of any agreement reached by them relating to the constitution of the Tribunal, is also normally inapplicable, except if the parties agree to override this provision of the present Rule and agree on a different (probably simpler) type of Tribunal.

Rule 52
Annulment: Further Procedures

(1) Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

(2) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Rule 6(2) shall apply, *mutatis mutandis*.

NOTES

A. Unlike a request for the interpretation or revision of an award (see Rule 51), a request for an annulment should, by its nature, not be considered by the original Tribunal but must be submitted to an *ad hoc* Committee of three persons appointed by the Chairman of the Administrative Council from the Panel of Arbitrators. This procedure is fully prescribed by Article 52(e) of the Convention, and consequently Chapter I of these Rules is inapplicable to the constitution of such a Committee, except that a declaration in a form analogous to that specified in Rule 6(2) must be signed by each member of the Committee.

B. Paragraph (2) prescribes the date of the constitution of the Committee in the same way as Rule 6(1) specifies the date of the constitution of a Tribunal. This date may be of particular significance in connection with the stay of enforcement of an award pursuant to Rule 54(2).

Rule 53
Rules of Procedure

Chapters II to V (excepting Rules 39 and 40) of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award, and Chapter VI shall similarly apply to the decision by the Tribunal or Committee.

NOTES

A. The consideration of an application for the interpretation, revision or annulment of an award, whether conducted before the reconstituted original Tribunal or before a new one, or before an *ad hoc* Committee, may involve all the same elements as the original proceeding—though generally both the legal and the factual issues will be fewer and more specific. Thus legal points may have to be argued by instruments similar to pleadings, and it may be necessary to conduct hearings both to enable the parties to present their views orally and perhaps even to receive evidence (e.g., relating to the fact on the basis on which a revision is claimed or to the alleged corruption on which an application for annulment is grounded)—see also Note B to Rule 28.

B. The Tribunal or Committee will have authority, under Rule 19, to make any necessary orders for the revived proceeding. For the sake of simplicity, such a body will be entitled to assume that any procedural dispositions agreed to by the parties with respect to the original proceeding (e.g., the procedural languages (see Rule 21), the number of copies of instruments to be filed (Rule 22)) will remain unchanged. Similarly, unless a party indicates otherwise, it may be assumed that its representatives appointed pursuant to Rule 18(1) will continue with unchanged authority.

C. Rules 39 and 40, relating respectively to provisional measures and to ancillary claims, are not applicable to the procedures here specified. However, instead of provisional measures, a Tribunal or Committee is empowered, by Rule 54, to stay or refuse to stay the enforcement of part or all of the award it is reviewing.

Rule 54
Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

NOTES

A. This Rule is designed to implement Articles 50(2) (final sentence), 51(4) and 52(5) of the Convention.

B. Stays of enforcement of an award may be granted under three circumstances:

(a) automatically but only provisionally, if a party applying for a revision or annulment of the award requests such a stay in its application (paragraph (2) of the present Rule);

(c) as a matter of discretion, by a Committee that has decided to annul part of an award and considers that enforcement of the unannulled portion might give one party an unfair advantage in light of the fact that the annulled portion might be reconsidered and reinstated by a new Tribunal pursuant to Article 52(6) of the Convention and Rule 55(3) (paragraph (3) (final sentence) of the present Rule).

C. A Tribunal or Committee, acting pursuant to paragraph (1) of this Rule, may decide to stay the enforcement of "part or all" of the award, as the circumstances appear to justify. However, a stay granted automatically at the request of a party in accordance with paragraph (2) can only relate to the entire award, for otherwise the moving party would be able to select the stay of only those portions of the award as are contrary to its interests; the Secretary-General thus has no discretion as to the granting or the refusal of the stay of enforcement of an award, except that if he refuses to register an application for lack of timeliness (see Rule 50(2)) then no stay of enforcement can be based on that application.

D. Paragraph (4) is formulated analogously to Rule 39(1) and (4), relating to the recommendation of provisional measures by a Tribunal.

E. Administrative and Financial Regulation 28(2) requires that the Secretary-General indicate any stay of enforcement which has been granted with respect to an award, on each certified copy of such award issued by him while the stay is in effect.

Rule 55
Resubmission of Dispute after an Annulment

(1) If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. Such a request shall be addressed in writing to the Secretary-General and shall:

(a) identify the award to which it relates;
(b) indicate the date of the request;
(c) explain in detail what aspect of the dispute is to be submitted to the Tribunal; and
(d) be accompanied by the fee for lodging the request as required by Administrative and Financial Regulation 15(3).

(2) Upon receipt of the request, the Secretary-General shall forthwith:

(a) register it in the Arbitration Register;
(b) notify both parties of the registration;
(c) transmit to the other party a copy of the request and of any accompanying documentation;
(d) invite the parties to proceed, as soon as possible, to constitute a new Tribunal by the same method as the original one, in accordance with Chapter I of these Rules (excepting Rule 2).

(3) If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in accordance with the procedures set forth in Rule 54, stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

(4) Except as otherwise provided in paragraphs (1)-(3), these Rules shall apply to a proceeding on a resubmitted dispute in the same manner as if such dispute had been submitted pursuant to the Institution Rules.

NOTES

A. This Rule is designed to implement Article 52(6) of the Convention.

B. The procedure pertaining to the filing and registration of a request pursuant to this Rule is roughly analogous to that relating to the filing and registration of an original request for arbitration in accordance with the Institution Rules. It is, however, especially important that the request adequately identify the award to which it relates, and state in detail what aspects of the former dispute (the one to which the annulled award related) are to be considered by the new

Tribunal. Since the Convention establishes no time limit for the filing of a request under Article 52(6), nor indicates any other clear prohibition, the Secretary-General is not given any authority to refuse registration; of course, if he receives a request which relates to an award that has not been annulled in whole or in part, he would presumably have to treat it as a nullity.

C. Paragraph (2)(d) provides that the new Tribunal is to be constituted "by the same method as the original one", and for this reason Rule 2 is made inapplicable. This provision is designed to simplify the procedure for constituting the Tribunal, and may of course be overridden by agreement of the parties (in which contingency Rule 1(2) would apply).

D. Paragraph (3) provides that if the original award had only been annulled in part, then the new Tribunal shall not reconsider any portion of the award not so annulled. This is in accordance with the first sentence of Article 53(1) of the Convention, which indicates that awards shall not be subject to appeal except as provided in the Convention. If an *ad hoc* Committee empowered to annul all of an award has decided to annul only a part thereof (as it is entitled to do under Article 52(3) of the Convention), then the only possible remedy with respect to the unannulled portion is a request for revision made pursuant to Article 51 of the Convention.

CHAPTER VIII
GENERAL PROVISIONS

Rule 56
Final Provisions

(1) The texts of these Rules in each official language of the Centre shall be equally authentic.

(2) These Rules may be cited as the "Arbitration Rules" of the Centre.

(3) The headings of the Chapters and Rules are for convenience of reference only and are not part of these Rules.

NOTES

A. The official languages of the Centre are specified in Administrative and Financial Regulation 34(1). At present these are English and French, but Spanish will be added automatically as soon as a Spanish-speaking State becomes a party to the Convention.

B. Whenever a new official language is added the Secretary-General will prepare a text of these Rules in that language for the approval of the Administrative Council.