THE INVESTMENT TREATY ARBITRATION REVIEW

Third Edition

Editor
Barton Legum

THE LAWREVIEWS

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THIRD EDITION

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PREFACE

The past year has confirmed the usefulness of *The Investment Treaty Arbitration Review*'s contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to their conclusions. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This third edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Dentons
Paris
April 2018

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Admissibility and Procedural Issues

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RULES OF INSTITUTIONS

Hiroki Aoki and Naoki Iguchi[1]

I INTRODUCTION

i Selection of arbitration rules in investment treaty arbitration

In the majority of investment treaty arbitrations, investors are entitled to submit an investment dispute to arbitration under the rules designated in the bilateral investment treaties (BITs). BITs usually specifically provide the foundation of the jurisdiction of ICSID as well as arbitration under the UNCITRAL Arbitration Rules, for example:

> *[t]he investment dispute shall at the request of the disputing investor be submitted to either: (b) arbitration in accordance with the ICSID Convention, if the ICSID Convention is available; (c) arbitration under the ICSID Additional Facility Rules, if the ICSID Additional Facility Rules are available; (d) arbitration under the UNCITRAL Arbitration Rules, or (e) if agreed with the disputing Contracting Party, any arbitration in accordance with other arbitration rules.*[2]

A smaller number of investment treaty arbitrations are based on investment agreements instead of BITs. If the country of the investor and the host state have not entered into a BIT, the investor needs to specifically agree with the host state to submit the investment dispute to arbitration under specific rules, such as the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (the ICSID Rules), which require that disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration.

II THE ICSID CONVENTION AND THE ICSID RULES

i The ICSID Convention

History and Member States

As at 1 January 2018, 153 countries have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention was signed by the first contracting states in 1965. The ICSID Convention established the International Centre for Settlement of Investment Dispute (ICSID) in Washington, DC, in the United States. ICSID is funded by the World Bank.

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1 Hiroki Aoki and Naoki Iguchi are partners at Nagashima Ohno & Tsunematsu.

2 Article 15(2) of the 2012 Japan/Korea/China Triparty Agreement for the Promotion, Facilitation and Protection of Investment (the 2012 Japan/Korea/China Investment Treaty).

Belize, the Dominican Republic, Ethiopia, Guinea-Bissau, Kyrgyzstan, Russia, Thailand and Mexico have signed the ICSID Convention but have not yet ratified it (List of Contracting States and Other Signatories of the Convention (ICSID/3)). Brazil, India, Vietnam and South Africa are large economies that have not signed.

Overview

The ICSID Convention contains various provisions in addition to the procedural rules for arbitration. Since the ICSID Convention creates a fundamental basis for ICSID's dispute resolution function and mechanism, it has also provided a basis for other subordinate rules and regulations, which include the Administrative and Financial Regulations; the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings; the Rules of Procedure for Conciliation Proceedings; and the Rules. For the purpose of practical use, this chapter focuses on the ICSID Convention and the Rules.

The ICSID Convention also sets out procedural provisions that directly impact arbitration procedures. Among them, there are some provisions that are unique compared with popular rules of arbitration for conventional commercial arbitration, including those detailed in the following subsections.

Jurisdiction (Article 25)

Jurisdictional conditions for access to arbitration under the ICSID Convention are: (1) the dispute must be between an ICSID Member State and an individual or company that qualifies as a national of another ICSID Member State; (2) the dispute must be a legal dispute arising directly out of an investment; and (3) the disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration (Article 25). Those are considered to be mandatory requirements to resolve the dispute by ICSID arbitration.

Requirement (3) may be satisfied by a specific submission clause in investment agreements entered into between investors and host states. In the great majority of investment treaty arbitrations, this requirement has been satisfied by the state's prior agreement in BITs, for example, '[e]ach Contracting Party hereby gives its consent to the submission of an investment dispute by a disputing investor to the arbitration set out in paragraph 3 in accordance with the provisions of this Article'.[3]

Most BITs, as well as Article 25(1) of the ICSID Convention, adopt a concept of 'investment', which has been argued in many cases in connection with the jurisdiction. One of the leading cases in this regard is *Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), which stated:

> *[t]he Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the ICSID Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be 'in direct relation to an investment' is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre.*

The *Salini* tribunal further held that '[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation

3 Article 15(4) of the 2012 Japan/Korea/China Investment Treaty.

in the risks of the transaction [citation omitted]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.'

Since each of the ICSID tribunal's awards are not treated as binding precedents for subsequent tribunals, tribunals have taken different approaches in determining and applying the criteria for 'investment'.

Award and its recognition and enforcement (Articles 53 to 55)

An award is final and binding. Each party must comply with it pursuant to its terms. The awards may not be set aside by the courts of any Member State (Article 53). If a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID Member State as though it were a final judgment of that state's courts (Article 54(1)). In summary, awards rendered in the ICSID arbitration are preferred.

A party seeking recognition or enforcement in a Member State must provide a copy of the award certified by the ICSID Secretary-General to a competent court (Article 54(2)). Certified copies are sent to the parties on the date of dispatch of the award, and the parties may request additional copies at any time.

However, it should be noted that, although Member States must recognise and enforce the award, each state's laws relating to 'sovereign immunity' from execution continue to apply (Article 55). Accordingly, investors are sometimes confronted with the problem of execution, even after obtaining a winning award. ICSID does not formally assist a winning party's enforcement procedure in state courts.

Accordingly, an unsatisfied party has to consider various measures to press the state to accept the award. For example, if a party finds difficulty in enforcing the award and informs ICSID of such a situation, ICSID may contact the non-complying party to request further information on how to comply with the award, which may be helpful for the performance by the state. Another *de facto* enforcement measure would be publication (see below).

Annulment (Articles 50 and 52)

ICSID provides annulment as a post-award remedy. It is intended to be a safeguard against the violation of fundamental legal principles relating to the process (Article 52 and Rules 50 and 52–55). A party may apply for full or partial annulment of an award on the basis of one or more of the following five grounds:

a the tribunal was not properly constituted;
b the tribunal has manifestly exceeded its powers;
c there was corruption on the part of a member of the tribunal;
d there has been a serious departure from a fundamental rule of procedure; or
e the award has failed to state the reasons on which it is based.

The application for annulment has to be submitted within 120 days after the award is rendered (Article 52(2)).

An *ad hoc* committee will decide the application. The *ad hoc* committee is comprised of three members appointed from the panel of arbitrators by the Administrative Council. The Rules apply, *mutatis mutandis*, to an annulment proceeding (Rule 53). A party may request stay of enforcement of the award pending the committee's annulment decision (Article 52(5) and Rule 54).

The committee's decision on annulment is not an award and may not be annulled through an ICSID annulment procedure. However, the decision is equated to an award for purposes of its binding force, recognition and enforcement (Article 53(2)).

If an award is annulled in whole or in part, a party is entitled to submit a request resubmission, identifying the original award and explaining in detail (Rule 55(1)). The resubmission request will be examined by a new tribunal.

Publication (Article 48)

The ICSID Convention provides that ICSID shall not publish the award without the consent of the parties; in other words, ICSID can publish the award if the parties agree to it. The parties may agree to publish the award or annulment decision on ICSID's website. If the parties do not agree, ICSID will publish excerpts of the decision's legal reasoning (Rules 48(4) and 53). Arbitrators owe confidentiality obligations (Rule 6).

On the other hand, the ICSID Convention and Rules do not have any provision to prohibit the parties from publishing the award. In practice, most commercial agreements have a confidentiality clause that requests parties to arbitration to keep the procedure and award confidential, unless otherwise required under the applicable law (e.g., mandatory disclosure to investors). Unlike commercial arbitration, parties to investment treaty arbitration are not necessarily parties to commercial agreements and, in such case, are not bound by contractual confidentiality obligations. Accordingly, unless otherwise agreed during the arbitration procedure, the parties may unilaterally publish the awards and decisions. In many situations, the purpose of publishing is to make the outcome transparent and urge the losing party to perform the award.

ii ICSID Rules

Overview

The ICSID Arbitration Rules apply as a basic set of rules for ICSID arbitration, together with the ICSID Convention.

Appointment of arbitrators (Rule 3)

Absent a prior agreement between the parties or specified rules in the investment treaty, ICSID invites the parties to agree on the number of arbitrators and the method of their appointment (Rule 2).

The number of arbitrators is one or any uneven number. The parties are otherwise free to adopt any workable method of appointment that suits their needs, including provisions on time limits and special procedures. The parties are free to appoint arbitrators from the ICSID Panel of Arbitrators.

The Rules provide a method and timeline for appointing arbitrators. In a three-arbitrator tribunal, the Rules assume that the president of the tribunal be appointed by agreement of the parties (Article 37 and Rule 3). If the tribunal is not constituted within 90 days after the registration of the case, either party may request the Chairman of the Administrative Counsel of ICSID to appoint the arbitrator not yet appointed and designate the president of the tribunal (Rule 5). Certainly, the ICSID Convention and Rules allow parties to agree on the method of appointment and will follow such agreed method, including exchange of a list of candidates between the parties. If the parties cannot appoint all the arbitrators, including the chairman of the tribunal, the ICSID default mechanism will operate.

Sessions of the tribunal (Rule 13)

The first session should be held within 60 days after the constitution of the tribunal, unless the parties agree otherwise (Rule 13(1)). The dates of that session shall be fixed by the president of the tribunal after consultation with its members and the Secretary-General of ICSID. The secretary of the tribunal will assist the tribunal to fix the date by contacting the parties to enquire about their availability for the session.

The parties may agree on any location for the first session, provided that the tribunal approves such venue and there are suitable facilities. The tribunal often proposes a venue for the parties' consideration. If there is no agreement, an in-person meeting will take place by default at the seat of ICSID in Washington, DC (Article 63 of the ICSID Convention and Rule 13(3)). The World Bank's facilities in Washington, DC or Paris, France, are the most popular places for the first session. ICSID can also provide other premises of the World Bank. ICSID has also entered into collaboration agreements with some popular arbitration institutions. The first session can be held in person, by telephone or by videoconference. In fact, increasing numbers of first sessions have been held by telephone or videoconference, for the purpose of saving time and costs.

The purpose of the first session of the tribunal is to ascertain the parties' agreements or separate views on procedural questions such as the applicable arbitration rules, languages to be used, place of proceedings and the procedural calendar. The session enables the tribunal to set a schedule and establish specific rules for each case in a procedural order.

Unlike traditional commercial arbitration, the Secretary of the Tribunal, who is appointed by the Secretary-General (Administrative and Financial Regulation 25) will have an active function in the procedures. The secretary of the tribunal circulates a draft agenda approved by the tribunal to the parties for their comments well in advance of a first session. The draft agenda has been developed by ICSID taking into account standard procedural items, such as the procedural calendar (Rule 20). The agenda is often accompanied by a draft procedural order to guide the parties in reaching agreements on specific issues.

At the first session, the tribunal sometimes allows oral submissions of either party, if such a party submits a request for bifurcation of the proceeding, a request for provisional measures or a request to dispose of the matter because the claim is manifestly without legal merit.

The president of the tribunal will issue a procedural order based on the agreements reached and the procedural decisions taken by the tribunal. The procedural order will be circulated to the parties by the secretary of the tribunal promptly after the first session.

Evidence (Rules 33, 34, 35 and 36)

The parties should file evidence in support of their claim or defence with their written pleadings or instruments (Rules 24 and 33).

The ICSID Convention and Rules allow various types of evidence to be filed in the written procedure; namely, documentary evidence (e.g., exhibits, witness statements and expert reports) or non-documentary evidence (e.g., audio and video files) (Rule 34 (2) (b)). Demonstrative exhibits (e.g., PowerPoint presentations, charts and graphs) may be used at a hearing provided they contain no new evidence and identify the evidence on record relied on. Site visits may be allowed by the tribunal upon a party's request (Rule 37(1)). If the evidence is in a language other than the procedural language, it must be submitted in the original language together with a translation (Administrative and Financial Regulation 30 (3) and (4)).

The tribunal decides any disagreement about the admissibility of the evidence (Rule 34 (1)). The parties and the tribunal often agree that the tribunal may be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (the IBA Rules of Evidence) when considering the admissibility of evidence and other evidentiary issues. The tribunal has the discretion to consider the relevance, weight and credibility of the evidence submitted by the parties (Rule 34 (1)).

Like commercial arbitration, each party produces its own witnesses and appoints its own experts. The tribunal may call upon the parties to produce further witnesses and experts if it deems it necessary (Article 43 of the ICSID Convention and Rule 34).

Oral procedure – hearings and procedural sessions (Rule 29)

The oral procedure follows parties' written submissions (Rule 29). The oral procedure consists of 'hearings' and 'procedural sessions'. Most hearings are held in person, while procedural sessions (such as the first session of the tribunal) are often held by telephone or videoconference.

Usually, hearings will take place in the following order: (1) opening statements, (2) witness examination, (3) expert examination and (4) closing arguments. A tribunal may put questions to counsel, witnesses and experts (Rule 32). The parties may agree that there should be no opening or closing statement, or that the closing statement should be replaced by post-hearing briefs.

While the Rules refer to general principles on 'Marshalling of Evidence' (Rule 33), 'Evidence: General Principle' (Rule 34), 'Examination of Witnesses and Experts' (Rule 35) and 'Witnesses and Experts: Special Rules' (Rule 36), the ICSID Convention and Rules do not have detailed rules on how witnesses and experts are examined. In practice, a party that intends to cross-examine a witness or expert calls that witness. Fact witnesses and experts are required to make a declaration before testifying (Rules 35(2) and (3)). Fact witnesses are often not allowed to attend the hearing until after their testimony.

After seeking the views of the parties, the tribunal will decide the manner in which the record of the hearings shall be kept (Rule 20(g)). In practice, ICSID usually keeps audio recordings and written transcripts of hearings. In many cases, the parties ask the court reporter to prepare a verbatim transcript of the entire hearing in electronic format.

Public access to the hearings

Unlike Conciliation Rule 27(1), which requires the conciliation hearing should be held in private, the ICSID Convention and Rules applicable to investment treaty arbitration do not set out default rules on the privacy of the hearings. If the hearing is open to the public, ICSID provides a video link from the hearing room that is broadcast to a separate room in the premises of the hearing that is open to the public.

Decision-making of the tribunal (Rules 15 and 16)

The deliberations of the tribunal shall take place in private and remain secret (Rule 15), usually immediately after a hearing or procedural session. Deliberations can also be held by telephone or videoconference or by correspondence (Rule 16(2)).

Decisions of the tribunal shall be taken by a majority of the votes of all its members. The tribunal is generally allowed to have a deliberation by correspondence, but in such a case all members must be consulted. The parties may agree that the president of the tribunal

decides without consulting the other members in urgent situations, subject to possible reconsideration of the decision by the full tribunal. Such decisions typically relate to the extension of time limits and other urgent procedural questions (Rule 26(1)).

iii The Additional Facility Rules

ICSID stipulated the 1978 Additional Facility Rules for investment disputes that fall outside the scope of the ICSID Convention. The ICSID Additional Facility Rules are widely referred to in investment treaties of which either party is not a Member State of the ICSID Convention.

iv Recent developments

ICSID initiated the amendment process in October 2016 and invited Member States to suggest topics that merited consideration. In January 2017, ICSID also invited suggestions from the public in early 2018. The Secretariat has recently published those suggested comments on its website. It is expected that ICSID will consider and incorporate the lessons learned from the development of investment treaty arbitration practice.

III UNCITRAL RULES

i Overview

The UNCITRAL Arbitration Rules introduced in 1976, or as revised in 2010 (the UNCITRAL Rules), have also been extensively used in investment arbitrations under various BIT and FTA investment chapters. The UNCITRAL Rules ware tailored mainly for *ad hoc* arbitration, but a number of arbitration institutions accept the administration of the arbitration under the UNCITRAL Rules.

ii Key features of the UNCITRAL Rules

Commencement of arbitration

Arbitration may be commenced by communicating to the respondents a notice of arbitration (Article 3.1). Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant the response (Article 4.1).

Selection of arbitrators

If parties have not agreed on the number of arbitrators previously or within 30 days after the respondents' receipt of the notice of arbitration, three arbitrators shall be appointed (Article 7.1).

If the parties have not reached agreement within 30 days (1) after receipt by other parties of a proposal for the appointment of a sole arbitrator, or (2) after the appointment of the second arbitrator (if three arbitrators are to be appointed), the appointing authority shall use the 'list procedure' for selecting the arbitrator, as set forth in Article 8.2.

Challenge to arbitrators

Any arbitrator may be challenged if 'circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence' (Article 12.1). A party that intends to

challenge an arbitrator shall send notice of its challenge within 15 days either after it has been notified of the appointment of the challenged arbitrator, or after the circumstances mentioned above became known to that party (Article 13.1).

Seat of arbitration

If the parties have not previously agreed on the place of arbitration, it shall be determined by the arbitral tribunal with regard to the circumstances of the case (Article 18.1).

The arbitral proceedings and the award will be subject to the national legislation applicable in the jurisdiction where the seat is situated. This is the notable difference from the ICSID Rules.

Arbitral procedure

Subject to the Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and that each party is given a reasonable opportunity of presenting its case (Article 17.1). As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration (Article 17.2).

Preliminary measures

Article 26.2 lists examples of the interim measures available to the party as follows:

a maintain or restore the status quo pending determination of the dispute;

b take action that would prevent, or refrain from taking action that is likely to cause:
- current or imminent harm; or
- prejudice to the arbitral process itself;

c provide a means of preserving assets out of which a subsequent award may be satisfied; or

d preserve evidence that may be relevant and material to the resolution of the dispute.

The party requesting an interim measure is required to satisfy the arbitral tribunal for the following requirements (Article 26.3):

a harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

b there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

These are the characteristic provisions of UNCITRAL Rules since some other institutional rules do not provide such a detailed list of examples and the requirements, but just leave it to the tribunal's discretion.

Costs

The arbitral tribunal shall fix the costs of arbitration in the final award or in another decision (Article 17.2). Within 15 days of receiving the arbitral tribunal's determination of fees and expenses, any party may refer for review such determination to the appointing authority. The appointing authority may make adjustments to the tribunal's determination and such adjustment shall be binding upon the arbitral tribunal (Article 41.4 (b) and (c)).

Confidentiality and transparency – the UNCITRAL Transparency Rules

In 2013, the UNCITRAL Rules were amended and the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration (the UNCITRAL Transparency Rules) were introduced.

The UNCITRAL Transparency Rules are applicable to arbitration initiated pursuant to a treaty concluded on or after 1 April 2014, unless the parties to the treaty have agreed otherwise (Article 1 of the UNCITRAL Transparency Rules). It can be applied to arbitration based on a treaty concluded prior to 1 April 2014 when the parties to the relevant treaty, or disputing parties, agree to their application.

The UNCITRAL Transparency Rules went further than the other arbitration rules such as the ICSID Rules with regard to the transparency. The key elements are as follows.

Possible ISDS reform

At UNCITRAL, states have begun debates about the possible reform of investor–state dispute settlement (ISDS). UNCITRAL mandates a working group to proceed to: (1) first identify and consider concerns regarding ISDS; (2) consider whether reform was desirable in light of any identified concerns; and (3) if the working group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the UNCITRAL Commission.

Publication of information and documents

Upon the filing of notice of arbitration, (1) the name of the disputing parties, (2) the economic sector involved and (3) the treaty under which the claim is being made shall be published (Article 2). Further, the following documents shall be published:

a a notice of arbitration and response thereto;
b subsequent written statements or submissions, including a statement of claim and a statement of defence;
c a table listing all exhibits to the written submission and to expert reports and witness statements (but not the exhibits themselves), if the table has been prepared in the proceedings;
d expert reports and witness statements, upon request by any person to the tribunal;
e any written submissions by a non-party to the arbitration;
f transcript of hearings (where available); and
g tribunals orders, decisions and awards.

Third-party submissions

Non-disputing parties to the treaty and any other third party may make a submission with the tribunal's permission (Articles 4 and 5). In determining whether to allow such submission by the third party (other than the non-disputing party), the tribunal shall consider:

a whether the third party has a significant interest in the proceedings; and
b the extent to which the submission would assist the tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

Hearings

Hearings shall be public and the tribunal shall make the logistical arrangements to facilitate public access to hearings (Article 6).

Information to be made available to the public under the UNCITRAL Transparency Rules shall be through the central repository, the function undertaken by the Secretary-General of the United Nations.

IV THE PCA RULES

The PCA Arbitration Rules 2012 (the PCA Rules) were introduced by the Administrative Council of the Permanent Court of Arbitration (PCA) on 17 December 2017. The PCA Rules are a consolidation of four prior sets of procedural rules that the PCA established in the 1990s. The PCA Rules can be applied to a disputes involving at least one state, state-controlled entity or intergovernmental organisation (collectively, 'the states').

The PCA Rules basically follow the UNCITRAL Rules, but have some characteristic features, such as:

a the PCA Rules confirm that agreement by the states to arbitrate under the PCA Rules constitutes a waiver of any right of immunity from jurisdiction, although immunity relating to enforcement must be expressed explicitly (Article 1.2);

b the International Bureau of the PCA at Hague shall serve as registry for the proceedings (Article 1.3). The parties to the arbitration must communicate their submissions and all communications to the arbitral tribunal to the International Bureau of the PCA (Articles 3.1, 4.1, 17.4, 20.1 and 21.1);

c the Secretary-General of the PCA is the mandatory appointing authority (Article 6.1);

d the PCA Rules clearly provide an option to appoint five arbitrators (Articles 9.1 and 10.1). Arbitrators do not need to be members of the PCA (Article 10.4);

e notice of challenge to an arbitrator needs to be sent within 30 days (as opposed to 15 days under the UNCITRAL Rules) after the basis for the challenge became known to the party (Article 13.1). In rendering the decision on a challenge, the PCA may indicate reasons for the decision, unless the parties agree that no reasons shall be given (Article 13.5);

f the PCA Rules set out a clear provision that the arbitrator may perform a site visit after consultation with the parties (Article 27.3);

g the PCA Rules clarify the applicable laws in cases involving only states, only states and intergovernmental organisations, or intergovernmental organisations and private parties (Article 35.1);

h Before fixing the costs of arbitration, the arbitral tribunal is required to submit its determination to the PCA for review (Article 41.3); and

i the deposit shall be directed to the PCA instead of the arbitral tribunal (Article 43.1).

V THE SCC RULES 2017

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is a major arbitration institution for investment arbitration, particularly for energy disputes. The SCC announced that the SCC Arbitration Rules are the third most commonly used arbitration rules in investment disputes, and the SCC is the second-largest investment arbitration institute after ICSID. Between 1993 and 2016, 92 investor–state disputes have been registered at the SCC.

The latest SCC Rules are the SCC Rules 2017, entering into force on 1 January 2017. Key features of SCC Rules 2017 include:

a the introduction of Appendix III, which is specifically applied to investment treaty disputes. Under Appendix III, third persons and non-disputing treaty parties may request or be invited to make written submissions;

b there is no special rule for investment arbitrations of the confidentiality and transparency. Therefore, unless otherwise agreed by the parties, the confidentiality of the arbitration and the award shall be maintained (Article 3);

c the default number of arbitrators is three for the investment arbitration (Article 2 of Appendix III);

d a request for arbitration needs to be filed to the SCC, and the secretariat of SCC shall send a copy to the respondent. The secretariat sets a time limit on the answer (Article 9);

e the board of the SCC may request further details from either party on any of their written submission. If the party fails to comply with the board's request, the board may dismiss the case or the counterclaim or set-off (Article 10);

f the board of the SCC shall dismiss a case, in whole or in part, if the SCC manifestly lacks jurisdiction over the dispute (Article 12);

g the proposal of appointment of an administrative secretary needs to be submitted to the SCC, and is subject to the parties' approval. The administrative secretary's fees shall be paid from the fees of the arbitral tribunal (Article 24);

h a party may request a summary procedure determining any issues where: (1) an allegation of fact or law material to the outcome of the case is manifestly unsustainable; (2) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or (3) any issue of fact or law material to the outcome is suitable for the summary procedure for any other reason (Article 39);

i the final award shall be made no later than six months from the date the case was referred to the arbitral tribunal, unless the board of the SCC extends the time limit (Article 43); and

j a party may apply for the appointment of an emergency arbitrator until the case has been referred to an arbitral tribunal. The SCC board shall seek to appoint an emergency arbitrator within 24 hours of receipt of application. Any emergency decision on interim measures shall be made no later than five days from the date the application was referred to the emergency arbitrator (Appendix II).

VI THE SIAC IA RULES 2017

In 2016, Singapore International Arbitration Centre (SIAC) introduced a new set of rules for the investment arbitrations, which came into effect on 1 January 2017 (the SIAC IA Rules 2017). The SIAC IA Rules 2017 can be applied in any dispute involving states (no qualification of 'investor' or 'investment' is required under the Rules, without prejudice to any requirements under the underlying instruments). The SIAC IA Rules 2017 are largely based on the SIAC Arbitration Rules 2016, which are mostly used for commercial arbitration, but include some unique provisions:

a they provide for a state immunity clause similar to the PCA Rules (Article 1.3);

b the parties may agree that the arbitral tribunal shall be composed of one, three or any other odd number of arbitrators (Articles 5.1 and 5.2);

c a default list procedure shall be adopted if party fails to agree on: (1) a sole arbitrator within 42 days; or (2) a presiding arbitrator if there are multiple arbitrators. The list procedure is similar to the one in the UNCITRAL Rules, but the SIAC Court shall communicate at least five names (as opposed to three names in the UNCITRAL Rules) (Article 8);

d the Rules clearly provide that where the parties are of different nationalities, the SIAC Court shall appoint a different nationality than the parties in principle (Article 5.7);

e 'Statement of Claim' and 'Statement of Defence' in the SIAC Rules 2016 is replaced by 'Memorial' and 'Counter-Memorial', and the witness statement or expert report supporting the claim needs to be accompanied with the factual and legal submissions (Articles 17.2 and 17.3). Reply and rejoinder shall be filed by agreement of the parties, or if deemed necessary by the tribunal (Article 17.4);

f a third party or non-disputing contracting state may make written submissions subject to the terms and conditions under the Rules (Article 29);

g by agreeing to use the IA Rules, the parties shall be deemed to have allowed SIAC to publish limited information as follows (Article 38):

- the nationality of the parties;
- the identity and nationality of the tribunal;
- the treaty, statute or other instrument under which the arbitration has been commenced;
- the date of commencement;
- whether the proceedings are ongoing or have been terminated; and
- redacted excerpts of the reasoning of the tribunal and redacted decisions by the SIAC Court on challenges to arbitrators;

h third-party funding: the tribunal may order the disclosure of (Article 24(l)):

- the existence of a party's third-party funding arrangement;
- the identity of the third-party funder and, where appropriate, details of the third party;
- the funder's interest in the outcome of the proceedings; and
- whether or not the third-party funder has committed to undertake adverse costs liability.

The tribunal may take into account any third-party funding arrangements in apportioning the costs of the arbitration (Article 33.1);

i early dismissal may be applied by a party if a claim or defence is manifestly without legal merit; manifestly outside the jurisdiction of the tribunal; or manifestly inadmissible (Article 26). This rule was the same in the SIAC Rules 2016;

j application for an emergency arbitrator may be available only when the parties expressly agree on the application of the emergency arbitrator provisions (Article 27.4); and

k within 90 days from the date on which the tribunal declares the proceedings closed, the tribunal shall submit the draft award to the SIAC Registrar (Article 30.3).

VII THE CIETAC IA RULES 2017

On 19 September 2017, CIETAC released its Investment Arbitration Rules (CIETAC IA Rules 2017), which became effective on 1 October 2017. It was announced on their implementation that the purpose of the CIETAC IA Rules 2017 is to support Chinese enterprises throughout the implementation of the 'Belt and Road Initiative'.

The CIETAC IA Rules 2017 provide transparency rules including public access to hearings and documents submitted in the arbitration. They also provide the rules pertaining to third-party submissions following the recent trend implemented in other rules, as we have seen above.

As for third-party funding, Article 27 requires that parties receiving third-party funding disclose, without any delay, the existence and nature of the arrangement and the identity of the funder.

One of the unique features of the CIETAC IA Rules is Article 43, which allows the arbitral tribunal to mediate the case during the pendency of the arbitration by itself.

Appendix 1

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Hiroki Aoki is a partner at Nagashima Ohno & Tsunematsu Singapore LLP. He is specialised in dispute resolution and has a wide range of experience in international arbitration under various arbitration rules including ICC, SIAC, JCAA and UNCITRAL and litigation in various jurisdictions. He graduated from University of Tokyo (LLB) in 2000, University of Michigan (LLM) in 2004, and has work experience at Ministry of Land, Infrastructure, Transport and Tourism of Japan (2000–2006). He was admitted to practise law in Japan and joined Nagashima Ohno & Tsunematsu in 2007. He has been working in Singapore since 2013.

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