

A few steps to a faster ICSID

Why does the average ICSID case take almost five years to reach an award? And what can be done about it? **Adam Raviv** of Wilmer Cutler Pickering Hale and Dorr in Washington, DC, sets out some simple ideas to speed up proceedings

It is a truth universally acknowledged that investment arbitrations are drawn-out affairs. Proceedings before the International Centre for Settlement of Investment Disputes (ICSID), in particular, are frequently criticised for their excessive length. The 19 ICSID Convention awards issued in 2012 came after an average of nearly five years of proceedings. Moreover, an award is often, to paraphrase Churchill, merely the end of the beginning, thanks to the annulment applications that so frequently follow.

Delay can, and does, happen at every step of the ICSID process. It can take a long time to constitute a tribunal. Pleadings and evidentiary disclosure often proceed at a snail's pace. Bifurcation of the arbitration can stretch out the process into multiple extended stages. The tribunal can take more than a year to issue an award. And a party that seeks annulment or other review of the award can drag the proceeding out for years more.

This article reviews the stages of the ICSID arbitration process and offers some suggestions on how to achieve a faster ICSID each step of the way.

Constitute the tribunal early

Once an ICSID case is registered, it takes an average of nearly seven months to constitute the arbitral tribunal. By contrast, courts can assign judges within days or even hours of a case being filed.

A lengthy constitution period is the price the parties pay for the ability to select their decision-makers. But

this does not explain why the process has to take so long, particularly where ICSID's arbitration rules aim to limit the selection process to no more than 120 days.

One solution is to change the rules to provide that if the parties have not appointed the members of the tribunal within a certain deadline – perhaps 90 days after submission of the request for arbitration or registration of the case – then the ICSID secretariat will be required to make the missing appointments. The current rules allow a party to request an institutional appointment if the tribunal is not constituted within 90 days, but a mandatory rule will prompt ICSID to act in the face of dithering parties. Such a rule, in turn, will prompt parties to appoint arbitrators quickly, or see their chance at autonomy disappear.

Another change would be to begin the constitution process with the claimant's request for arbitration, rather than waiting until after the ICSID secretariat registers the case, which typically takes another month. There is little reason why registration and constitution should happen sequentially rather than concurrently. The ICSID arbitration rules could require a request for arbitration to include a proposed tribunal structure and method of appointment. And the respondent, once notified of the request, could be given a deadline to respond to that proposal, regardless of whether or when the case has been registered.

Moreover, if a claimant's constitution proposal provides for party-appointed arbitrators – as they nearly always do – the rules can also require the claimant to nominate its party-appointed arbitrator, and the president, if contemplated

under the proposal, in the request for arbitration. In practice, claimants sometimes do this anyway, but mandating it can further streamline the process, allowing appointment to happen at the same time as the request.

Minimise arbitrator challenges

ICSID arbitration rule 9(6) provides that an arbitration will be suspended when a party has proposed the disqualification of an arbitrator. Perhaps due process requires such a rule, without which a case risks proceeding under an unfit adjudicator. But the result is that an arbitrator challenge brings the proceeding to a halt. Moreover, there are no clear time limits for bringing or resolving arbitrator challenges, other than an aspirational 30-day deadline for challenges resolved by the secretariat.

Though many tribunals do move admirably fast in responding to a disqualification request, a solution to the occasional delay is to impose a strict deadline for deciding these challenges. Tribunals and the secretariat should treat proposals to disqualify as emergency motions, because the case cannot go forward until they are resolved. An arbitrator who is too busy to rule on such an emergency motion should not accept the appointment in the first place.

Likewise, although the ICSID rules generally require parties to propose disqualification “promptly”, a specified time limit – and a clear indication that failure to raise a timely objection will waive the right to object – would help ensure these challenges are brought as early as possible. As would tribunals’ refusal to consider the merits of challenges that are brought too late, which in practice does not always happen even when a challenge is woefully tardy.

In addition, cost-shifting is a potential safeguard against meritless arbitrator challenges. A party that asserts an unsuccessful challenge should be ordered to pay the other side’s costs of responding to the challenge, regardless of the outcome of the case as a whole. Having the prospect of immediate payment being due if a challenge is unsuccessful – as most are – would focus the mind of the party bringing the challenge more than the possibility of these fees being a small part of a final award that may be years away.

Make rule 41(5) work harder

First adopted in 2006, ICSID rule 41(5) allows a party, shortly after the constitution of the tribunal, to request dismissal of a claim that is “is manifestly without legal merit”. Although rule 41(5) is a welcome addition to the rules for anyone who wants to speed up the ICSID process, it can nonetheless be modified into a more robust tool. In particular, the word “manifestly” in the rule seems to set an unnecessarily high bar to dismissal.

To date, only two ICSID cases – *Global Trading v Ukraine* and *RSM Production v Grenada* – have been disposed of entirely based on rule 41(5) objections. Those two decisions came just nine days apart from one another in December 2010. They were also two of the fastest awards in the history of ICSID. Since then, no respondent has succeeded in getting a case dismissed under rule 41(5), although a few other tribunals have partially dismissed or narrowed down claims.

Rule 41(5) would seem like an attractive way for a respondent to end a case early. But there have been relatively

few attempts to use the rule for this purpose, and even fewer successes. Part of the problem is that tribunals have made dismissals under rule 41(5) a tall order. The first tribunal to consider a rule 41(5) objection, in *Trans-Global Petroleum v Jordan*, concluded that it could only dismiss a claim under the rule in “clear and obvious cases” where the respondent could establish its argument “with relative ease and despatch”. Subsequent tribunals have followed this guidance.

Perhaps this is the correct reading of the current wording of rule 41(5), but does it make the standard so difficult that it renders the rule nearly toothless? Should a rule 41(5) dismissal be achievable only where a claim is so weak that – as occurred in *Trans-Global* – even the claimant’s own counsel admits that it should be dismissed?

If a claim is legally deficient on its face, it should not survive early dismissal where it is merely “without legal merit” but not “manifestly” so. It is one thing if a case presents significant factual questions that can only be resolved after evidentiary exchanges and witness testimony. But if a tribunal has a purely legal question in front of it, should it not try to resolve that question sooner rather than later? Deleting the word “manifestly” from rule 41(5) would allow for early consideration of these issues.

Take control of the pleading and evidentiary schedule

The period between the constitution of the tribunal and the merits hearing is the heart of an ICSID arbitration, in which the primary pleadings on the merits of the case (and often on jurisdiction) and exchanges of evidence take place. This stage of the arbitration typically takes years. Of the cases in which ICSID Convention awards were issued in 2011 and 2012, the average case took 32 months to get from constitution to the hearing (or the final hearing in cases with more than one). The main reason for the drawn-out period is not just the number of pre-hearing pleadings – typically two for each side – but rather the length of time that parties are given between submissions.

A common explanation of the drawn-out process is that respondents, as state actors subject to bureaucracy and political considerations, simply need more time to prepare a defence than private actors would. This explanation may give away too much. State entities are constantly involved in disputes of all kinds in national courts. The fact that an ICSID case might require political decision-making hardly makes the case unique. Senior government officials play a role in all sorts of proceedings, from highly publicised criminal cases and regulatory actions to major civil suits brought by or against the state. If an arbitral tribunal tells a state respondent that it has little patience for political hold-ups, the respondent’s bureaucratic gears will usually speed up accordingly.

And, of course, excessive delay by a state respondent in an ICSID proceeding will draw out the process on both sides. If the state takes forever to submit its brief, the claimant will demand – and a fair-minded tribunal will be inclined to grant – an equally long time for its own next submission.

Although many parties complain about the length of ICSID proceedings, the briefing schedule is one area in which the parties themselves are largely responsible for how

long it takes. One simple solution is for tribunals to propose a reasonably brisk case schedule at the outset of the case and make clear to the parties that they will not respond kindly to serious departures from that schedule. If the tribunal protects the schedule, its proposal will provide a heavy anchor on the proceeding: a party that asks for a major change from the tribunal's desired schedule will be risking its wrath.

Another solution would be to modify the ICSID arbitration rules to provide a default briefing schedule – perhaps 60 or 90 days for the memorial and counter-memorial and 30 or 45 days for the reply and rejoinder. Though tribunals may expand this schedule at their discretion, having these numbers set forth in the rules will likely help establish clearer norms.

A related problem to address is the practice of handing out extensions like M&Ms. Often, an initially reasonable schedule is rendered null as both parties request extensions and get them without any consequences. The current ICSID arbitration rules provide no guidance on whether to grant an extension. They simply provide that the tribunal “may extend any time limit that it has fixed”. Perhaps the rules should be modified to set a specific standard, such as allowing an extension only “when justice so requires”, to borrow a phrase from the US Federal Rules of Civil Procedure.

A creative tribunal might also require parties seeking an extension to offer something in return to “reimburse” the other side and the tribunal for their inconvenience. Perhaps the party requesting an extension could offer to take less time than originally scheduled for a subsequent filing, or to give up several hours to present its case at the hearing, or even offer some monetary incentive. This tit-for-tat requirement might be included in the tribunal's initial procedural order, so that no party can complain it is being surprised.

Bifurcation: a double-edged sword

Many ICSID proceedings are bifurcated into separate jurisdictional and merits (and sometimes quantum) stages. In theory, this allows the tribunal to avoid addressing issues that may not be relevant to the ultimate outcome of the case. In practice, if a case is not resolved in the first stage, bifurcation will stretch out the arbitration for years.

Is this trade-off worth it? Although jurisdictional objections in investment proceedings are ubiquitous, less than a quarter of ICSID cases are ultimately dismissed for lack of jurisdiction. And when a case is bifurcated and the tribunal at the end of the jurisdictional stage decides it does have jurisdiction, the result is usually a very long case. Out of 14 cases initiated since 2003 in which ICSID tribunals issued separate public jurisdictional decisions and final awards, on average it took 38 months between the jurisdictional finding and the award.

Tribunals have considerable discretion as to how to respond to jurisdictional objections. Given the history of extremely long bifurcated proceedings, and the fact that most cases are not dismissed for lack of jurisdiction, the presumption should be against breaking up the proceeding into multiple stages. This is different from the current practice, where tribunals will typically grant non-frivolous requests for bifurcation unless the jurisdictional questions are intertwined with the merits.

Moreover, costs should be shifted as a default when a respondent unsuccessfully objects to jurisdiction in a bifurcated case, regardless of the ultimate outcome of the case. The respondent has advanced a losing position in a distinct stage of the proceeding, and its insistence on dividing up the proceeding has delayed the resolution of the case as a whole. Cost-shifting will deter long-shot jurisdictional objections and efforts to seek bifurcation that are more likely to delay, rather than accelerate, the resolution of the case.

Can we limit deliberations?

The ICSID rules provide that an award “shall be drawn up and signed within 120 days after closure of the proceeding.” However, tribunals can, and many do, wait to “close” the proceeding until long after the hearing and any subsequent submissions. Thus, the average time from hearing to award is more than a year.

Hearings are typically followed by further written submissions – sometimes comprehensive, sometimes targeted. However, it would be a rare arbitrator who does not have clear ideas of the outcome of the case by the end of the merits hearing, particularly where the tribunal members deliberate among themselves during the hearing or shortly afterward. And nothing stops tribunals from at least beginning to draft an award even if the final post-hearing brief has not been filed.

Writing an ICSID award is a substantial endeavour. But even an award that is hundreds of pages long does not take three experienced attorneys, working full time, one year or more to produce. Awards take a long time not only because they are hard work, but because arbitrators do not devote all their time to a single case.

Logically, one would expect the number of an arbitrator's appointments to correlate – however roughly – with the speed of deliberations by tribunals on which the arbitrator sits. If so, there may be a case for institutional limits on the number of appointments the arbitrator may accept in simultaneous cases. Such limits would obviously clear the arbitrator's plate of too many cases (though there is certainly a danger that other work will fill the arbitrator's freed-up time). Moreover, an arbitrator anxious to take on new appointments might feel more urgency to move the process along and issue an award with dispatch.

Another solution might be to bring alternative fee arrangements – in particular, a ceiling on fees for a particular matter – to the world of investment arbitrators. One hopes and expects that it would be the rare arbitrator who drags out deliberations simply to bill more time to the parties. But once an arbitrator hits the limit and knows that further work on an award will be pro bono, he or she may feel an urge to finalise things.

A more drastic remedy would be to impose a hard time limit – say, six months – on issuing an award. The clock can start ticking at the end of the merits hearing or the submission of the last post-hearing pleading. Though we can debate how to “punish” a tribunal that fails to issue its award within the prescribed time, a clear rule would likely be followed in most cases and would deter too-busy arbitrators from accepting appointments.

Deferring and shortening annulment proceedings

By now, it is fair to say that applying for annulment of an award has become the rule rather than the exception. More than two-thirds of the ICSID Convention awards rendered in 2011 and 2012 were followed by applications for annulment. And annulment is typically a long process: between mid-2007 and mid-2012, the average annulment proceeding took 26 months from registration to decision. Can annulment proceedings be shortened and can we do more to discourage meritless annulment applications?

Staying enforcement of an award: a highly rubbery stamp

One way to deter meritless applications is to make it harder to get a stay of enforcement while the application is pending. By the end of last year, 23 ad hoc annulment committees had issued public decisions on whether to continue stays of enforcement. They continued the stay every time, even though two thirds of those annulment applications would go on to be rejected in their entirety. Moreover, ad hoc committees have expressly rejected the notion that the merits of an annulment application should have bearing on the decision whether to continue the stay.

But recently, one committee bucked the trend. In March 2013, in *SGS Société Générale de Surveillance v Paraguay*, for apparently the first time ever, an ad hoc committee rejected a request for a continuing stay of enforcement. The SGS committee's decision may be an outlier, or it may be a promising sign of tougher consideration of stay applications. If the latter, it may indicate to losing parties that applying for annulment will not necessarily allow them to stave off enforcement of an award.

Truncate the written submissions and hearing

ICSID annulment proceedings closely match the proceedings in the original arbitration, with multiple rounds of lengthy written submissions typically 60 or 90 days apart, followed by a hearing. The same extensions and other delays that happen during the initial arbitration can recur in annulment. The result is that annulment can take just as long as the original proceeding.

Much ink has been spilled on the difference in legal scope between annulment and appeal. But while an appeal before a court or other body can address a far greater range of issues than an ICSID annulment application, an appellate proceeding is usually much more limited than the original one. For example, US appellate courts, far from allowing appeals to mirror the trial court proceedings, normally allow the parties to submit three briefs, all with strict time limits and word limits.

Few, if any, litigators are up in arms about the short time limits and word limits on appellate briefing. And one would be hard-pressed to find a judge who thinks the appellate process would benefit from longer briefing schedules and written submissions of unlimited size. Nonetheless, common practice and institutional inertia continue to treat ICSID annulment proceedings as if they were a second full arbitration, despite the supposedly narrow range of issues that can be raised in annulment. If the time limits for annulment submissions were halved, or even cut by two thirds, does

anyone really think the quality of the pleadings would be substantially diminished (unless word count is a proxy for quality)?

Extended deadlines in annulment proceedings are particularly questionable where there is nearly always a great deal of time, after the underlying award is issued, before the written annulment submissions even begin. The ICSID arbitration rules could be modified to impose a time limit on submissions in annulment proceedings, and might require the applicant to submit its first memorial a certain number of days after the underlying award is issued, regardless of when the annulment application is filed or registered or the ad hoc committee is constituted.

Limit annulment deliberations

Despite the limited scope of annulment review, annulment decisions still take a long time. Between mid-2007 and mid-2012, ad hoc committee deliberations took an average of six months. No rule requires an ad hoc committee to issue its decision within a particular timeframe. Even if a strict requirement is not advisable, an aspirational time limit in the ICSID rules or procedures would likely encourage committees to issue their decisions in a reasonable time frame, and perhaps set a default norm that committees would be loath to depart from.

More cynically, as discussed above, one might want to consider whether the method of compensation for arbitrators and ad hoc committee members gives them an incentive to drag out their deliberations and drafting. Under the current ICSID fees schedule, adjudicators are paid US\$3,000 per day. Although the daily rate is not at all excessive in the context of high-end legal practice, being paid by the day might unconsciously encourage arbitrators to devote more time than necessary to their work on a case.

Make cost-shifting the norm in annulment

Historically, the majority of ad hoc committees have split costs between the parties, regardless of the outcome of the annulment proceeding. Opinions vary on whether applying cost-shifting, or "the cost follows the event," properly furthers ICSID's policy goals. However, if one of those goals is to expeditiously reach final enforceable awards, cost shifting as the default outcome will help achieve it. Knowing that they will have to pay the other side's legal fees if annulment is denied – as it usually is – disappointed parties will think twice before pursuing long-shot annulment efforts.

Delay is not inevitable

Excessive length is not an inevitable element of investment arbitration. Some straightforward modifications of ICSID's rules and practices can go a long way toward shortening the process and discouraging parties from stretching things out. Doing so will enhance ICSID's perceived legitimacy as a dispute resolution mechanism, encourage investor confidence in the process, and promote the goals for which the ICSID Convention was enacted.

The views expressed in this article are the author's alone and do not reflect the views of his firm. A longer scholarly article on the same topic is forthcoming in Transnational Dispute Management.