

THE RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS IN INTERNATIONAL INVESTMENT LAW

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Abstract

This article examines conciliation as an alternative dispute resolution mechanism in resolving investment dispute. Conciliation being a highly flexible and an informal method of dispute settlement involves a third party that assists the disputants in reaching an agreed settlement. The Convention on the Settlement of Investment Dispute between States and Nationals of other States establishes a Centre known as the International Centre for Settlement of Investment Disputes (ICSID) which facilitates arbitration and conciliation proceedings for resolving investment disputes. This article reveals that irrespective of the fact that arbitration is largely patronized in the Centre, conciliation has being regarded as a highly flexible and less expensive process for resolving investment disputes. This article examines the rules of procedure for conciliation proceedings specifically under the ICSID Convention for resolving investment disputes.

Keywords: Conciliation, International Centre for Settlement of Investment Disputes (ICSID), Investment disputes

INTRODUCTION

Conciliation is an informal process in which the third party tries to bring the parties to an agreement by lowering tension, improving communication, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement, either informally or in a subsequent step, through formal mediation¹. The concept of investment remains nebulous as there is no generally acceptable definition of it. Simply put, it is the spending or setting aside money for future financial gain. An ordinary individual sees investment as the purchase of financial assets i.e. stocks, bonds etc. Economists hold a different approach in defining investment by attributing it to the increase in real capital in an economy, such as an increase in factories and machinery or in its human capital.

Under France model BIT², Article 1 – Definitions, investment is seen as:

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¹ See Leo Kanowitz (1985): Cases and Materials on Alternative Dispute Resolution American Casebook Series, West Publishing Co.

² Protection of Foreign Investment through Modern Treaty Arbitration: Diversity and Harmonisation, Anne Hoffmann ASA Special No 34

http://www.lalive.ch/data/publications/vhe_Of_capital_import%3B_The_definition_of_%27investment%27_in_international_investment_law.pdf accessed June 15 2014

1. The term “investment” means every kind of assets, such as goods, rights and interests of whatever nature, and in particular though not exclusively:

a) movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights;

b) shares, premium on share and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party;

c) title to money or debentures, or title to any legitimate performance having an economic value;

d) intellectual, commercial and industrial property rights such as copyrights, patents, licenses, trademarks, industrial models and mockups, technical processes, know-how, trade names and goodwill;

e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, including those which are located in the maritime area of the Contracting Parties.

Under UK model BIT (2005)³ Article 1 – Definitions, investment was attributed to the following:

“Investment” means every kind of asset and in particular, though not exclusively, includes:

i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

ii) shares in and stock and debentures of a company and any other form of participation in a company;

iii) claims to money or to any performance under contract having a financial value;

iv) Intellectual property rights, goodwill, technical processes and know-how;

v) business concessions conferred by law or under contract, including concessions to search or, cultivate, extract or exploit natural resources.

US model BIT (2004)⁴ Article 1 – Definitions defines investment as:

“Investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

a) an enterprise;

³ Ibid

⁴ 2012 U.S. Model Bilateral Investment Treaty <http://www.state.gov/documents/organization/188371.pdf> accessed July 30, 2014

- b) shares, stock, and other forms of equity participation in an enterprise;*
- c) bonds, debentures, other debt instruments, and loans;*
- d) futures, options, and other derivatives;*
- e) turnkey, construction, management, production, concession, revenue- sharing, and other similar contracts;*
- f) intellectual property rights;*
- g) licenses, authorisations, permits, and similar rights conferred pursuant to domestic law; and*
- h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.*

One of the exceptional features of international investment law relates to the major role of bilateral treaties in investment relations. Alongside over 2,600 bilateral treaties some rules on foreign investment are included in regional such as the Energy Charter Treaty⁵, the Framework Agreement on the ASEAN Investment Area (1998), the ASEAN Comprehensive Investment Agreement (2009) and Multilateral Treaties such as World Trade Organization Agreement on Trade Related Investment Measures (1994).

However, the key multilateral treaty in international investment law is the ICSID Convention (International Centre for Settlement of Investment Disputes)⁶ which limits the jurisdiction of its centre to disputes between one contracting state and a national of another contracting state. Owing to the fact that an important aspect of the efficiency of any dispute settlement mechanism lies in its ability to avoid uncertainties concerning the appropriate forum where a dispute is to be resolved. Hence, a duplication or multiplication of available fora for the settlement of a particular dispute may lead to protracted litigation before the merits of a dispute are even touched. Significantly, the provision of the ICSID Convention provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The ICSID Regulation and Rules comprise Administrative and Financial Regulations; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institutional Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

It is trite that while commercial disputes between private parties are usually determined before national courts, economic disputes are usually adjudicated upon by the International Court of Justice or other judicial dispute settlement systems. Disputes between states and private parties relating to investment were mostly settled either before national courts or through ad hoc arbitration (neither was appropriate). For such disputes no appropriate forum seemed to be available to adjudicate on this kind of disputes. ICSID seeks to close this gap in available procedure.

It is at the thrust of this paper to examine specifically the rules of procedure for conciliation proceedings in international investment law. This will be examined under the ICSID Convention. It is pertinent to note that the ICSID Convention makes provision for both conciliation and arbitration but ICSID arbitration has being much more patronized than conciliation. Conciliation

⁵ Energy Charter Secretariat: Energy Treaty and Related Documents
http://www.encharter.org/fileadmin/user_upload/document/EN.pdf accessed July 25, 2014

⁶ International Centre for Settlement of Investment Disputes (ICSID) Convention, Regulation and Rules: Washington, D.C. 20433, U.S.A

being a highly flexible and an informal method of dispute settlement involves a third party that assists the disputants in reaching an agreed settlement. A significant advantage of ICSID Conciliation is based on the fact that it is less expensive than arbitration and also settlement resides in the hands of the parties to the dispute thereby preventing hostility or antagonisms.

Rules of Procedure for Conciliation Proceedings

It is well settled law that justice must not only be done but must be seen to be done. Hence national courts or arbitral tribunals have rules or procedure that helps attaining the ultimate objective of the law. The ICSID Convention lays down rules of procedure for instituting conciliation proceedings for investment disputes.

Pursuant to Rule 1 of the ICSID Conciliation rules which make provision for the general obligations of the disputing parties give notice for the request of conciliation as a means of resolving their dispute. It stipulates that:

1. Upon notification of the registration of the request for conciliation the parties shall, with all possible dispatch, proceed to constitute a Commission, with due regard to Section 2 of Chapter III 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 conciliators and the method of their appointment.

After the request of conciliation, a commission must be set up. The Agreement between the parties ordinarily should contain the number of conciliators but in a situation where there is no provision, Rule 2 makes provision for methods of constituting the commission in the absence of previous agreement.

1. If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators 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 conciliator or of a specified uneven number of conciliators 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 conciliators 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 29(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Commission is to be constituted in accordance with that Article.

It is worthy of note that still on the proper constitution of the commission Article 29(2)(b) of the ICSID Convention must be taken into consideration. Article 29(2)(b) stipulates that:

Where the parties do not agree upon the number of conciliators and the method of their appointment, the commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

The above provision must be read alongside with Rule 3⁷ of the rules of procedure for conciliation proceedings under the ICSID Conciliation rules. It provides that appointment of conciliators to a commission must be constituted in accordance with Article 29(2)(b) of the convention:

- 1) If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention:
 - a. either party shall, in a communication to the other party:
 - i. name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and
 - ii. invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;
 - b. promptly upon receipt of this communication the other party shall, in its reply:
 - i. name a person as the conciliator appointed by it; and
 - ii. concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator 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 conciliator proposed by that party to be the President of the Commission.
- 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.

Moreover Rule 4⁸ stipulates that:

- 1) If the Commission is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the conciliator or conciliators not yet appointed and to designate a conciliator to be the President of the Commission.
- 2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the conciliators shall elect the President of the Commission and they fail to do so.
- 3) The Secretary-General shall forthwith send a copy of the request to the other party.
- 4) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make an appointment or designation, with due regard to Article 31(1) of the Convention, he shall consult both parties as far as possible.
- 5) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

⁷ Ibid

⁸ Ibid

Hence where the commission has not being properly constituted within three months, the Chairman of the Administrative Council may appoint the conciliators on behalf of the disputing parties.

Rule 5⁹ lays down procedure for the acceptance of the appointments made by the Chairman of the Administrative Council. The party or parties concerned shall notify the Secretary-General of the appointment of each conciliator and indicate the method of his appointment.¹⁰ As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of a conciliator, he shall seek an acceptance from the appointee.¹¹ If a conciliator 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 conciliator in accordance with the method followed for the previous appointment.¹²

The conciliator so appointed must sign a declaration which shall be in the following manner:

“To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission 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 report drawn up by the Commission.

“I 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 between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.

“A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto.”¹³

Failure to sign the above declaration amounts to resignation of being a conciliator to the dispute to be determined.

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

It must not go without saying that there arises a situation where a conciliator may be incapacitated in carry out the functions of a conciliator. In such circumstances, Rule 8 stipulates procedure for the removal of such conciliators. Rule 8¹⁴:

⁹ Ibid

¹⁰ Rule 5 paragraph 1

¹¹ Rule 5 paragraph 2

¹² Rule 5 Paragraph 3

¹³ Rule 6 paragraph 2

¹⁴ Ibid

- 1) If a conciliator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of conciliators set forth in Rule 9 shall apply.
- 2) A conciliator may resign by submitting his resignation to the other members of the Commission and the Secretary-General. If the conciliator was appointed by one of the parties, the Commission shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Commission shall promptly notify the Secretary-General of its decision.

Under Article 57¹⁵ a party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. These qualities include:

“...a person of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgement...”¹⁶

Where the above qualities are lacking a conciliator may be disqualified. Rule 9 makes provision as to the disqualification of conciliators:

- 1) *A party proposing the disqualification of a conciliator pursuant to Article 57 of the Convention shall promptly, and in any event before the Commission first recommends terms of settlement of the dispute to the parties or when the proceeding is closed (whichever occurs earlier), 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 Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman of the Administrative Council;*
 - b. *and notify the other party of the proposal.*
- 3) *The conciliator to whom the proposal relates may, without delay, furnish explanations to the Commission or the Chairman, as the case may be.*
- 4) *Unless the proposal relates to a majority of the members of the Commission, the other members shall promptly consider and vote on the proposal in the absence of the conciliator 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 conciliator concerned and of their failure to reach a decision.*
- 5) *Whenever the Chairman has to decide on a proposal to disqualify a conciliator, he shall use his best efforts to 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.*

After the commission has being constituted, The Commission shall hold 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 Commission after consultation with its members and the Secretary-General. If upon its constitution the Commission has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General

¹⁵ Ibid

¹⁶ Article 14(1)

shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.¹⁷ Also the dates of subsequent sessions shall be determined by the Commission, after consultation with the Secretary-General and with the parties as far as possible.¹⁸ The Commission 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 Commission. Failing such approval, the Commission shall meet at the seat of the Centre.¹⁹ The Secretary-General shall notify the members of the Commission and the parties of the dates and place of the sessions of the Commission in good time.

The Convention's Conciliation rules has giving the Commission the power to make the orders required for the conduct of the conciliation proceeding.²⁰ As early as possible after the constitution of a Commission, 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 matters²¹:

- a. The number of members of the Commission required to constitute a quorum at its sittings;
- b. The language or languages to be used in the proceeding;
- c. The evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
- d. The number of copies desired by each party of instruments filed by the other; and
- e. The manner in which the record of the hearings shall be kept.

In the conduct of the proceeding the Commission shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.²²

The problem of language is inevitable as we human understand things differently with different languages. Hence the ICSID Convention in the course of attaining positive dispute resolution, makes provision for parties to agree on the language to be used for the conciliation proceedings. Under Rule 21²³:

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 Commission, 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 (i.e., English, French and Spanish) for this purpose.
2. If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Commission so requires, to translation and interpretation. The recommendations and the report of the

¹⁷ Rule 13 paragraph 1

¹⁸ Rule 13 paragraph 2

¹⁹ Rule 13 paragraph 3

²⁰ Rule 19

²¹ Rule 20 paragraph 1

²² Rule 20 paragraph 2

²³ Ibid

Commission shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Significantly, the rules of procedure for conciliation proceedings, precisely stipulate the functions of the Commission so constituted. It includes:

1. In order to clarify the issues in dispute between the parties, the Commission shall hear the parties and shall endeavor to obtain any information that might serve this end. The parties shall be associated with its work as closely as possible.
2. In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make—orally or in writing—recommendations to the parties. It may recommend that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute; it shall point out to the parties the arguments in favor of its recommendations. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made.
3. The Commission, in order to obtain information that might enable it to discharge its functions, may at any stage of the proceeding:
 - a. request from either party oral explanations, documents and other information;
 - b. request evidence from other persons; and
 - c. with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.²⁴

To attain justice, the parties must endeavor to cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call. The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake. The parties must also comply with any time limits agreed with or fixed by the Commission.²⁵

Furthermore, under Rule 24²⁶ as soon as the Commission 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. Parties must file their written statements and this procedure is seen under Rule 25 stipulating that:

1. Upon the constitution of the Commission, its President shall invite each party to file, within 30 days or such longer time limit as he may fix, a written statement of its position. If, upon its constitution, the Commission has no President, such invitation shall be issued and any such longer time limit shall be fixed by the Secretary-General. At any stage of the proceeding, within such time limits as the Commission shall fix, either party may file such other written statements as it deems useful and relevant.
2. Except as otherwise provided by the Commission after consultation with the parties and the Secretary-General, every written statement or other instrument shall be filed in the

²⁴ Rule 22

²⁵ Rules 23

²⁶ Ibid

form of a signed original accompanied by additional copies whose number shall be two more than the number of members of the Commission.

Every written statement 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. Regulation 30²⁷ provides that:

“Documentation filed in support of any request, pleading, application, written observation or other instrument introduced into a proceeding shall consist of one original and number of additional copies specified in paragraph (2). The original shall, unless otherwise agreed by the parties or ordered by the competent Commission, Tribunal or Committee, consist of the complete document or of a duly certified copy or extract, except if the party is unable to obtain such document or certified copy or extract (in which case the reason for such inability must be stated). The number of additional copies of any document shall be equal to the number of additional copies required of the instrument to which the documentation relates, except that no such copies are required if the document has been published and is readily available. Each additional copy shall be certified by the party presenting it to be true and complete copy of the original, except that if the document is lengthy and relevant only in part, it is sufficient if it is certified to be true and complete extract of the relevant parts, which must be precisely specified. Each original and additional copy of a document which is in a language approved for the proceeding in question shall, unless otherwise ordered by the competent Commission, Tribunal or Committee, be accompanied by a certified translation into such a language. However, if the document is lengthy and relevant only in part, it is sufficient if only the relevant parts, which must be precisely specified, are translated, provided that the competent body may require a fuller or a complete translation. Whenever an extract of an original document is presented pursuant to paragraph (1) or a partial copy or translation pursuant to paragraph (2) or (3), each such extract, copy and translation shall be accompanied by a statement that the omission of the remainder of the text does not render the portion presented misleading.”

Moreover the 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. The above regulation must run alongside this rule to have an effective written statement.

It is well settled that conciliation is a private dispute resolution mechanism, thus Rule 27²⁸ as regards hearing makes provision that:

The hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret.

The Commission 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 Commission may attend the hearings

For a person to prove his/her case witnesses must be called and in special circumstance experts in particular fields or disciplines may be called to shed more light to the dispute at hand. Rule 28 states that:

²⁷ Administrative and Financial Regulations (ICSID Convention)

²⁸ Ibid

1. Each party may, at any stage of the proceeding, request that the Commission hear the witnesses and experts whose evidence the party considers relevant. The Commission shall fix a time limit within which such hearing shall take place.
2. Witnesses and experts shall, as a rule, be examined before the Commission by the parties under the control of its President. Questions may also be put to them by any member of the Commission.
3. If a witness or expert is unable to appear before it, the Commission, in agreement with the parties, may make appropriate arrangements for the evidence to be given in a written deposition or to be taken by examination elsewhere. The parties may participate in any such examination.

Chapter five of the ICSID Convention on the rules of procedure for conciliation proceedings laid down grounds for termination of proceedings. One of them is on the grounds of jurisdiction. Pursuant to Rule 29²⁹:

1. Any objection that the dispute is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Commission shall be made as early as possible. A party shall file the objection with the Secretary-General no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time.
2. The Commission may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within the jurisdiction of the Centre and within its own competence.
3. Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission shall obtain the views of the parties on the objection.
4. The Commission may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Commission overrules the objection or joins it to the merits, it shall resume consideration of the latter without delay.
5. If the Commission decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall close the proceeding and draw up a report to that effect, in which it shall state its reasons.³⁰

Jurisdiction is a fundamental requirement as it goes to the root of the dispute. In the case of *SPP v Egypt* where the tribunal held that the ICSID Convention does not require that:

“...consent to the Centre’s jurisdiction must specify whether the consent is for the purposes of arbitration or conciliation. Once consent has been given to the jurisdiction of the Centre, the Convention and its implementing regulation afford the means for making the choice between the two methods of dispute settlements. The Convention leaves that choice to the party instituting the proceedings.”³¹

Proceedings will come to a close if the parties reach agreement on the issues in dispute, after which the Commission shall draw up its report noting the issues in dispute and recording that the

²⁹ Ibid

³⁰ Ibid

³¹ *SPP v Egypt*, Decision on Jurisdiction 11, 14 April 1988, 3 ICSID Reports 156.

parties have reached agreement.³² At the request of the parties, the report shall record the detailed terms and conditions of their agreement. Also if at any stage of the proceeding it appears to the Commission that there is no likelihood of agreement between the parties, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of the parties to reach agreement.³³ If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate. The report of the Commission must however be drawn up and signed within 60 days after the closure of the proceeding.³⁴

Notably the report must have the following characteristics pursuant to Rule 32³⁵:

1. The report shall be in writing and shall contain, in addition to the material specified in paragraph (2) and in Rule 30:
 - a) A precise designation of each party;
 - b) A statement that the Commission was established under the Convention, and a description of the method of its constitution;
 - c) The names of the members of the Commission, 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 Commission; and
 - f) A summary of the proceeding.
2. The report shall also record any agreement of the parties, pursuant to Article 35 of the Convention, concerning the use in other proceedings of the views expressed or statements or admissions or offers of settlement made in the proceeding before the Commission or of the report or any recommendation made by the Commission.
3. The report shall be signed by the members of the Commission; the date of each signature shall be indicated. The fact that a member refuses to sign the report shall be recorded therein.

Pursuant to Rule 33³⁶ the following must take place after the report is prepared.

1. Upon signature by the last conciliator to sign, the Secretary-General shall promptly:
 - a. authenticate the original text of the report and deposit it in the archives of the Centre; and
 - b. dispatch a certified copy to each party, indicating the date of dispatch on the original text and on all copies.
2. The Secretary-General shall, upon request, make available to party additional certified copies of the report.
3. The Centre shall not publish the report without the consent of the parties.

Procedural details of conciliation proceedings may be seen in the case of *RSM Production Corporation v Republic of Cameroon*³⁷ where the subject of the dispute was on Hydrocarbons

³² Rule 30 Paragraph 1

³³ Rule 30 paragraph 2

³⁴ Rule 31

³⁵ Ibid

³⁶ Ibid

exploration and exploitation concession agreement. On September 19, 2011 the Secretary-General registers a request for the institution of conciliation proceedings. On December 6, 2011 following appointment by the claimant, J. Caleb Boggs III (U.S.) accepts his appointment as conciliator. On December 23, 2011 following appointment by the respondent, Jean-Pierre Ancel (French) accepts his appointment as conciliator. On February 17, 2012 the Commission is constituted in accordance with Article 29(2)(a) of the ICSID Convention. Its members are: Marino Baldi (Swiss), President, appointed by the Chairmen of the Administrative Council pursuant to the parties' agreement; J. Caleb Boggs III (U.S.), appointed by the claimant; and Jean-Pierre Ancel (French), appointed by the respondent. On February 17, 2012 following appointment by the Chairman, Marino Baldi (Swiss) accepts his appointment as Commission President. On April 4, 2012 the commission holds a first session in Paris. April 30, 2012 the respondent files a request for the commission to order the joinder of third party to the conciliation proceedings. On May 14, 2012 the claimant files observations on the respondent's request of April 30, 2012. On June 12, 2012 the commission decides on the respondent's request of April 30, 2012. On August 09, 2012 the Commission issues Procedural Order No.1 regarding the participation of a third party to the proceedings. On August 17, 2012 the Commission issues Procedural Order No.2 concerning the procedural calendar. On September 07, 2012 the claimant files a statement of facts while on September 28, 2012 the respondent files a statement of facts. On the 19 and 20 of December 2012 the Commission holds a hearing on the merits in Paris. April 15, 2013 the Commission declares the proceedings closed in accordance with Article 34(2) of the ICSID Conciliation Rules 30(2). On June 11, 2013 the Commission renders its Report. Also in the case of *Shareholders of SESAM v Central African Republic*³⁸ where the subject matter of the dispute was on log production and processing enterprise. On August 13, 2007 the Secretary General registers a request for the institution of conciliation proceedings. On February 04, 2008 the Commission is constituted. Its members are Emmanuel Gaillard (French), President; Pierre Mayer (French); and Antoine Grothe (Central African). On March 19, 2008 the Commission holds a first session in Paris. On March 26, 2008 the respondent files objections to jurisdiction. On April 04, 2008 the claimants file observation in response to the objections to jurisdiction. On April 11, 2008 the claimants file a request for recourse to arbitration. On April 25, 2008 the respondent files observations in response to the claimants request for recourse to arbitration. On May 14, 2008 the Commission notes that there is no likelihood of agreement between the parties. On July 28, 2008 the commission declares the proceedings closed in accordance with ICSID Conciliation Rule 30(2). On August 13, 2008, the Commission issues its report. See also the case of *Togo Electricite v Republic of Togo*.³⁹

CONCLUSION

Bilateral investment treaties have a predominant role in investment disputes and this fact raises several questions regarding the between investment and non-investment treaties. Though investment tribunals have seriously examined arguments regarding the interactions between such treaties, thus far no investment tribunal has absolved a party to investment disputes from its investment obligations (or significantly reduced the amount of compensation to be paid to the

³⁷ ICSID Case NO. CONC/11/1

³⁸ ICSID Case No.: CONC/07/1

³⁹ ICSID Case No.: CONC/05/1

injured party) in such cases. Despite the major role of treaties, customary rules of international law play a significant role in investment disputes, prominently to fill gaps in existing treaty law (lacuna) and interpret the particular treaty provisions in light of customary law. An examination of decisions rendered by investment tribunals indicates that investment tribunals that pronounce various customary rules are inclined not to discuss the existence (or lack of) of the separate components of 'practice' and 'opinion juris', and that they frequently rely on decisions of international courts and tribunals as well as decisions of international bodies.

General principles of law played a significant role in the formative period of international investment law, prominently in oil concession arbitration and in the pre-BIT era⁴⁰ but recent empirical studies indicate that they are largely neglected by contemporary arbitral tribunal. The relative insignificant role of general principles of law in contemporary investment jurisprudence may be explained by the inter-relationship between the various sources of international investment law as well as inherent vague character of this source of law.⁴¹

Though 'judicial decisions' are considered as a 'subsidiary' source of public international law, almost all investment awards include numerous references to prior decisions of investment tribunals. Notwithstanding tribunals' statements regarding the absence of the doctrine of precedent in international investment law, investment tribunals are likely to follow accretion of rulings on the same subject matter (in similar circumstances) and develop jurisprudence constant to enhance stability and predictability in this sphere.

There are currently two conceptual approaches to the definition of the notion of investment in international investment law. One of them is based on an attempt to develop general, purportedly objective criteria that could be applied across the board, regardless of the context. The other a more subjective approach prefers to focus on the definition that parties have in fact agreed in the applicable bilateral or multilateral investment treaty. While these two approaches do not necessarily always lead to a different outcome, in certain circumstances they may, and in hard cases where the existence of an investment constitutes the very subject matter of the dispute, they often do.

These conceptual issues may be addressed and largely eliminated if the concept of investment is defined by reference to the way in which the investor has in fact accounted for, or at least could have accounted for, its business activities. It is suggested that any ongoing cross-border business that may be presented in the form of a balance sheet that shows owner's equity (or another form of owner's capital contribution) may be considered an investment in the legal sense.

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⁴⁰ Such as the Iran-US Claims Tribunal

⁴¹ Growing the numbers of treaties and tribunals' pronouncement regarding customary rules

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