An Outline of Procedure in an Investment Treaty Arbitration—Strategy and Choices

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1 Introduction

The procedure of investment arbitrations varies a great deal, and the experience in one case may not hold for another. Despite the case-specific nature of each investment treaty procedure, however, there are a number of common elements and fixed variables. An understanding of these elements and variables allows the reader to draw conclusions as to how a specific arbitration will likely play out and plan accordingly. This chapter offers an introduction to international investment arbitration and provides a general overview of the process.

Like international commercial arbitration, investment arbitration reflects elements of civil law and common-law procedure. The hybrid nature of investment treaty arbitration is a key element to keep in mind when determining an arbitration strategy. Like many civil law systems, investment arbitration places great emphasis on the written submissions that precede the hearing. Each party makes its case in the written submissions, which present all of the evidence it relies upon to establish its case. However, as in common-law proceedings, the hearings are often multi-day affairs that feature cross-examination of witnesses by counsel and active questioning by the arbitral tribunal. The importance of arbitration hearings should not be underestimated by clients from civil law jurisdictions.

From a practical perspective, an investment treaty procedure can be divided into three sequential phases: (1) the preparation of the case; (2) the written and oral submissions; and (3) post-hearing activity.

2 Case Preparation

The preparation of the case includes the period from the inception of the dispute to the first procedural session with the arbitral tribunal. It is in many respects the most important phase of the case. During this time, the parties
select the counsel to represent them, conduct an initial analysis of the case, select the arbitrators and decide on the specific procedure for the arbitration. Each of these decisions is critical. Many parties make the mistake of devoting insufficient resources to this period of the case and these decisions. This mistake is difficult to overcome later in the procedure.

2.1 Initial Assessment of the Case

For the claimant, the preparation period begins when a problem arises with its foreign investment and the claimant realizes that an investment treaty may either provide a possible solution or assist in a political or negotiated resolution of the issue. With the help of external counsel, the claimant first conducts a legal and factual assessment of the case.1 The principal documents relevant to the case are collected and witnesses are interviewed. A chronology of events is prepared, and the facts are analyzed in terms of the substantive and jurisdictional standards of the applicable investment treaty.

In some instances, several investment treaties may be available to the investor. For example, when the investment is indirectly held through several companies, the claimant may have a choice between the investment treaties in force between the host State and the home States of those holding companies. Investment protection provisions vary from one treaty to another and from one generation of treaties to the next. In such instances, legal and factual analysis conducted during the initial preparation period can assist in the claimant’s choice of the relevant treaty.

This initial phase allows the claimant to frame its claims under the treaty and draft a short notice of dispute to the attention of the respondent State. This notice of dispute, or notice of intention to submit a dispute to arbitration, is distinct from the request for arbitration discussed below. Under most investment treaties, the notice of dispute will trigger the so-called ‘cooling-off’ period. During this period, the parties are required to take steps to resolve the dispute amicably. The minimum duration of this negotiation period is prescribed in the applicable treaty and usually runs from three to six months.

Under most investment treaties the cooling-off period is a precondition for submitting a dispute to arbitration. It is thus essential to promptly send such notice to the State to minimize the overall duration of the arbitration. Under most treaties, there are no formal requirements for the notice of dispute. It usually consists of a simple letter addressed to the head of State with copy to the relevant ministries. This letter must identify the claimant’s investment in

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1 For a detailed discussion of the pre-arbitration considerations from the claimant’s perspective, see Chapter 2 by O. Thomas Johnson and David Z. Pinsky in this volume.