A central issue with the investor-State dispute settlement system (ISDS) concerns the considerable time required for cases to reach a conclusion. The interval from the request for arbitration until the rendering of an arbitral award typically lasts years, with several cases extending over a decade. At ICSID, the primary venue for ISDS, parties have been known to then bring annulment proceedings, not only to challenge awards but also to further prolong the process in the hopes of forcing a settlement. Excessive delays can undermine the credibility of the system to the detriment of all parties involved. Protracted legal contests burden States, particularly when they face questionable claims and lack sufficient resources, and deny recoveries for investors with legitimate grievances, exacting enormous costs for both sides. This chapter first offers in-depth analysis of the various stages of the arbitral proceedings at ICSID. It provides comprehensive new statistical information on key stages. It then examines the dispute settlement process of other international institutions to glean insight from a comparative perspective as to what might streamline the ISDS process so that parties can receive more expeditious awards.

1 Factors Affecting ICSID Awards

When assessing the time required to receive an ISDS award through ICSID, a variety of factors must be considered. Disputes have their own unique characteristics that may affect how long they last. Among other things, they may vary in their parties, arbitrators, counsel, witnesses, experts, documentary evidence, social, legal and economic environment, in addition to the nature, complexity and size of claims. For some cases, tribunals may determine it necessary to bifurcate or trifurcate the arbitral proceedings into phases with separate hearings for jurisdiction, merits and damages. For other cases, a resignation of an arbitrator may require that a tribunal must be reconstituted. A multiparty case involving different investors with extensive witnesses and documents in
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multiple languages may require unique logistics and timetables. In addition, counsel and parties often seek extensions for submissions, document production, hearing preparation and exploration of settlement options. One survey revealed that parties and external counsel themselves “contribute most to the length of proceedings.”¹ The pleadings and hearing stages of the proceedings usually account for the largest portion of time.² Proceedings can be suspended due to incomplete submissions, challenges against arbitrators or mutual agreement. A myriad of factors, therefore, can affect how long it will take for parties to receive an award and the wait is not always attributable to the tribunal, the ISDS system or ICSID.

2 Longer than Expected with Moderate Progress

A comprehensive review of ICSID cases reveals that the system takes longer than previous studies indicated.³ An analysis of pending and concluded cases that have been registered with ISCID shows that awards require over four years to be rendered. This significantly exceeds figures from earlier studies.⁴ The data confirm that the ICSID process takes longer for a dispute to be finalized through an award. At the same time, in recent years, gradual progress appears to have been achieved in expediting the process.

More specifically, as of December 1, 2013, ICSID awards take on average 4.1 years, or 1,493 days, to be rendered. The present analysis differs from previous studies in several regards. First, it calculates the starting point of proceedings from the date of registration by ICSID instead of the request for arbitration. Not only do many cases not provide information concerning the

¹ 2010 International Arbitration Survey: Choices in International Arbitration, at p. 32, http://www.arbitrationonline.org/survey/; Albert Jan van den Berg, Time and Costs: Issues and Initiatives from an Arbitrator’s Perspective, 28 ICSID Rev. 218 (2013) (excessive time is “sometimes due to arbitrators, but in most cases it is due to the parties”).
² Lucy Reed et al., Guide to ICSID Arbitration, at pp. 149–50 (2d ed. 2010).
³ This article focuses on ICSID cases, which occupy 70 percent of known ISDS cases and where the most information exists regarding the process. Cases brought under the remaining venues such as the Permanent Court of Arbitration, Stockholm Chamber of Commerce, International Chamber of Commerce, ICSID Additional Facility and ICSID Conciliation and ad hoc cases were excluded from the analysis.
⁴ The most prominent study to date found that ICSID cases took 3.6 years. The study reviewed 115 ICSID cases where an award was rendered and measured the time from the request for arbitration to a final award. Anthony Sinclair et al., ICSID Arbitration: How long does it take? 4 Global Arb. Rev. (2009).