

Modernizing ICSID's Rules for Resolving Investment Disputes



By *Martina Polasek and Damon Vis-Dunbar*^[1]

The procedural rules of the [International Centre for Settlement of Investment Dispute](#) (*ICSID*) have been successfully applied to hundreds of cases since they were first adopted in 1967, a remarkable testament to the innovative spirit and foresight of the original drafters. The robustness of the rules has also made the task of gradual modernization much easier.

The rules have, in fact, evolved over the last 50 years. In 1978, the [ICSID Additional Facility](#) was created, offering arbitration, conciliation, and fact-finding services to disputes that fall outside the scope of the ICSID Convention – namely where only one of the parties is an ICSID Member State or national of one, or where the dispute does not arise “*directly*” out of an investment between a state and a foreign national.

There have been three subsequent rounds of rule changes, the most recent of which entered into force in April 2006. Those amendments included strengthened disclosure requirements for arbitrators; expanded transparency provisions (including a

provision allowing open hearings); and a new rule allowing a party to obtain an early dismissal of a case due to manifest lack of legal merit^[2].

As readers of this blog may be aware, ICSID is now in the process of updating its rules for the fourth time. Notably, the amendments under consideration are the most extensive to date. They cover the ICSID Regulations and Rules, adopted pursuant to the ICSID Convention; the Additional Facility Rules; the Administrative and Financial Regulations; and the Institution Rules.

What is not on the table at this point is amendments to the ICSID Convention itself. This would require the unanimous support of ICSID's 154 Member States; in contrast, changes to the ICSID Regulations and Rules require two-thirds approval of the membership, and the Additional Facility Rules need a simple majority. Nonetheless, ICSID is encouraging States to consider changes to the Convention in the future and has flagged a number of potential areas in its [Working Paper on Amendments](#). In the meantime, much can be done to modernize ICSID's rules within the existing framework of the Convention.

So, what does ICSID want to achieve in this amendment process, and what types of changes to the rules are being proposed?

At the most practical level, ICSID sees opportunities to make the rules clearer and easier to follow. This can be done through the re-ordering of certain provisions, so the sequencing better reflects the chronology of an ICSID case. Some rules would also benefit from a re-draft using plain, gender-neutral language.

In addition, the proposed amendments seek to address some of the new issues in investor-State dispute settlement, such as third-party funding, and to incorporate some best practices developed during ICSID's experience with administering investment disputes into the rules. The amendments also touch

on issues that have been raised in the context of broader discussions on ISDS reform, such as an interest – expressed by States and investors – in reducing the time and cost of proceedings.

The amendment process has also been an opportunity to hear suggestions from States and other stakeholders. At the outset, ICSID asked States and the public to suggest the changes they would like to see featured in the updated rules and it has tried to accommodate those suggestions where possible.

On 3 August 2018, the ICSID Secretariat published [proposals](#) for specific amendments to the rules. These are presented in a synopsis document in [English](#), [French](#), [Spanish](#), [Chinese](#), [Russian](#) and [Arabic](#); a [document that consolidates](#) the proposed draft rules; and a [working paper](#) that provides context and explanation to the proposed changes.

The changes are far too numerous to summarize in an article of this length, but these are some of the highlights:

- *Transparency* – A proposed provision deems that a party has given consent to publish Convention awards unless it objects in writing within 60 days after the award is issued. If a party does object, the proposed rules permit ICSID to publish legal excerpts of the award, with an established process and timeline to do so. In addition, all orders and decisions, and awards under the Additional Facility would be published, with provision to redact confidential information from these documents. The result would be to provide the public with greater access to procedural and substantive decisions.

- *Third-Party Funding* – Parties would be obliged to disclose whether they have third-party funding, and if so, the source of the funding. The name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest.

– *Security for Costs* – A new, stand-alone rule allows a tribunal to order security for costs. The rule states that in exercising its discretion to order security for costs, the tribunal must consider the relevant party's ability to comply with an adverse decision on costs and any other relevant circumstances.

– *Initial Procedures* – An express rule is proposed for bifurcation of proceedings. A request for bifurcation of preliminary objections would need to be made within 30 days of the memorial on the merits or ancillary claim. Preliminary objections would have to be filed as soon as possible, and at the latest on the date for filing the counter-memorial if the objection relates to the main claim.

– *Disqualification of Arbitrators* – The process for challenging arbitrators has been revised, including the introduction of an expedited schedule for parties to file a challenge and a requirement to challenge within 20 days after a party knows or should have known the facts relevant to the disqualification. An enhanced declaration of independence and impartiality is also proposed for arbitrators.

– *Timeliness of Decisions, Orders and Awards* – New timelines are proposed for issuing decisions, orders and awards. Most procedural orders and decisions (g., a decision on provisional measures), must be issued within 30 days after the last submission. Awards must be rendered within 60-days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection if it has been bifurcated, and 240 days after the last submission on all other matters.

– *Other Time and Cost Reduction Measures* – Tribunals are given tools to provide guidance and directions to the

parties to conduct the proceeding in an expeditious and cost-effective manner. Among other things, the tribunal may convene a case management conference to identify uncontested facts and narrow the issues in dispute. A further measure that will reduce costs is that all filings will be made electronically without any paper copies.

– *Expanded Access to the Additional Facility* – The proposed rules extend the availability of Additional Facility (**AF**) arbitration and conciliation rules to cases where neither the claimant nor respondent are ICSID Contracting States or nationals of a Contracting State. The proposed Additional Facility Rules also provide regional economic integration organizations with access to AF dispute settlement, reflecting the fact that increasingly States are negotiating investment agreements as regional entities.

– *New Rules on Mediation* – An entirely new set of rules on mediation is proposed. This responds to the requests by States and investors to provide greater mediation capacity, and more generally, to the objective of ICSID to provide parties with a greater breadth of dispute resolution tools.

ICSID now wants to hear your feedback on the proposals. We are inviting written comments on the proposals until 28 December 2018. In the new year, we will further fine-tune the proposals based on the input received. The goal is to submit a package of proposals to ICSID's Administrative Council – the Centre's governing body – by October 2019 or 2020. Once adopted, the amended rules will apply to all cases based on consent given after the new rules are brought into force, making an immediate and concrete impact on investor-state dispute settlement proceedings.

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[\[2\] Arbitration Rule 41\(5\)](#), and [Article 45\(6\)](#) of the Arbitration (Additional Facility) Rules.

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