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Moving with the times: amending the ICSID rules*

by

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One important contribution to the evolution of investor-state dispute settlement (ISDS) has been the periodic updates of the procedural rules of the International Centre for Settlement of Investment Disputes (ICSID). To date, ICSID's rules have been amended three times. The most recent amendment in 2006 included strengthened disclosure requirements for arbitrators,¹ enhanced transparency, third-party participation,² and the potential for respondents to obtain early dismissals of cases manifestly lacking legal merit.³ These innovations have been emulated in the rules of several other arbitral institutions.

ICSID is working on the fourth update to its procedural rules, and the changes envisioned are the most extensive to date. They cover arbitration, conciliation, fact-finding, and mediation under the Convention and the Additional Facility, the Administrative and Financial Regulations and the Institution Rules. It is no exaggeration to say that every word, comma and period has been scrutinized.

On August 3, 2018, ICSID released the Working Paper on "[Proposals for amendment of the ICSID rules](#)". The Working Paper proposes specific textual changes to the rules with commentary on the rationale for each proposal. It is the product of a tremendous amount of time and thought from the ICSID Secretariat, and extensive input from states and the public.

The Working Paper unveils a proposed set of rules that are improved in form and function. Provisions have been re-drafted using plain, gender-neutral language, and their sequencing better reflects the chronology of an ICSID case. It also includes mechanisms to reduce the time and cost of proceedings. For example, all filing would be electronic, and the request for arbitration could serve as the first memorial, thus decreasing the time for briefing in the early stages of a case. "Fast-track" provisions are also suggested, which could be applied by consent of the parties.

Additionally, several states raised issues related to third-party funding. Currently, the ICSID rules do not contain provisions that expressly address third-party funding. However, the issue has been dealt with by tribunals, usually involving applications for disclosure of information about third-party funding in the context of requests for security for costs. States also noted that disclosure is important to avoid conflicts of interest that may arise with third-party funders. Therefore, under the proposed rules, both parties must advise whether a claim or defense is being funded by a third party as soon as the claim is registered, and arbitrators must disclose whether they have any relationship to that funder.

Transparency was another topic that was raised by states and the public. Particularly prominent was an interest in making case-related materials public, which is critical for consistency and coherence in ISDS decision-making. As a result, the Working Paper suggests mandatory publication of awards or extracts of awards, decisions and orders, with a process to redact confidential or protected information. It is also important to note that states may further enhance the transparency of ICSID proceedings through their treaties or by ratifying the Mauritius Convention. Thus, the ICSID rules provide only the baseline for transparency in ICSID arbitration proceedings.

New provisions have also been drafted on the disqualification of arbitrators, security for costs, allocation of costs, tribunal appointed experts, and consolidation of cases. Throughout the Working Paper, care has been taken to balance the interests of states and investors. This balance was a fundamental principle for the original drafters of the ICSID rules and has underpinned the success of the rules in practice.

The Working Paper is intended to generate discussion, and ultimately consensus, on the next generation of ICSID rules. To that end, ICSID is holding a two-day consultation with its 154 members in late September, providing an opportunity for states to reflect and comment on the proposed rules. A series of regional and online consultations is also planned for the fall. States and the public are encouraged to submit written comments until December 28, 2018.

On January 1, 2019, ICSID should be able to assess which proposals are widely endorsed, which are largely supported but would benefit from a further re-draft and which are best shelved for another day. The goal is to submit a package of amendments in 2019 or 2020 to the ICSID Administrative Council. Approval will require a two-thirds vote for ICSID Convention rules and a majority vote for ICSID Additional Facility rules.

Once adopted, the amended rules will apply to all cases based on consent given after the new rules are brought into force. Given that ICSID administers over 70% of all international investment disputes, the amendment process offers a significant opportunity to introduce practical improvements to ISDS that will have an impact in the near term. Thanks to the collective efforts of states, the public and the ICSID Secretariat, the changes made today will help ensure that the ICSID rules remain “state of the art” well into the future.

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¹ [ICSID Arbitration Rule 6\(2\)](#) and [Arbitration \(Additional Facility\) Rule 13\(2\)](#).

² [ICSID Arbitration Rule 32\(2\)](#) and [Arbitration \(Additional Facility\) Rule 39\(2\)](#).

³ [ICSID Arbitration Rule 41\(5\)](#) and [Arbitration \(Additional Facility\) Rule 45\(6\)](#).

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