

## **THE ICSID RULES AMENDMENT PROCESS**

### **BACKGROUND**

On October 7, 2016, ICSID advised its 153 member States that it was beginning the process to further update the ICSID rules and regulations. Amendments to the ICSID rules require approval of two-thirds of the member States (ICSID Convention Article 6).

This is the fourth rules amendment process in ICSID history. The first two amendment processes were in 1984 and 2003, although the changes made in these two exercises were relatively modest.

The third amendment process took place from 2004 to 2006, resulting in some innovative changes that came into effect on April 10, 2006. The 2006 amendments were preceded by a discussion paper released on October 22, 2004 titled [Possible Improvements of the Framework for ICSID Arbitration](#) and a working paper released on May 12, 2005 on [Suggested Changes to the ICSID Rules and Regulations](#). A number of the 2006 amendments responded to discussions among States and civil society about investment arbitration. For example, the 2006 amendments included provisions to enhance transparency in the arbitral process. Arbitration Rule 48 was amended to require publication of awards with consent of the parties or excerpts of awards where parties did not agree to publication. Amended Rule 32 provided that hearings would be open unless either party objected. Amendments to Rule 37 allowed non-disputing parties to apply to file an amicus submission in a case and established criteria for their participation. That rule has subsequently been invoked more than 45 times, and has resulted in amicus submissions from diverse parties such as environmental groups and the European Union. Another significant amendment made in 2006 was Rule 41(5). That rule provided for early dismissal of a case that was manifestly without legal merit, and was intended to give parties a procedural tool to minimize the time and cost spent on a case that ultimately could not succeed. Similar changes were incorporated in the Additional Facility Rules in 2006. These amendments have had far-reaching effects on the practice of investment arbitration, and have been widely emulated in the rules of other arbitral institutions, in newly negotiated investment treaties, and in parts of the Mauritius Convention and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

### **THE CURRENT ICSID AMENDMENT PROCESS**

ICSID launched the current amendment process in October 2016 by inviting member States to suggest topics that merited consideration. In January 2017, ICSID issued a similar invitation to the public inviting suggestions for rule amendments. The Secretariat has collected these comments and is preparing background papers on potential amendments.

There are several overriding goals for this round of amendments. First, they are intended to modernize the rules based on case experience. Given ICSID's administration of more than 600 cases, a number of lessons can be learned and they should be incorporated into the rules from time to time. Second, the amendments will make the process increasingly time and cost effective while maintaining due process and a balance between investors and States. Third, ICSID hopes that the rule amendments will make the procedure less paper-intensive and more environmentally friendly.

Investment arbitration still tends to generate reams of hard copy and amendments addressing this could save time, money and trees!

## POTENTIAL AREAS FOR AMENDMENT

While the full scope of proposed amendments remains to be discussed, the following topics are among those to be canvassed in background papers:

- *Appointment of Arbitrators*: there will be suggestions to streamline the arbitrator appointment process;
- *Code of Conduct for Arbitrators*: the ICSID rules currently require a declaration that an arbitrator meets the required qualifications in the Convention, however some recent treaties have included more elaborated codes of conduct outlining expectations. This could be incorporated in the ICSID process;
- *Challenge of Arbitrators*: the number of challenges to arbitrators has increased in recent years, and a number of proposals have raised legal questions including the capacity of an arbitrator to resign before constitution of the tribunal, whether a stay of proceedings should be automatic in every case, and the potential for an award of costs due to an unsuccessful challenge;
- *Third Party Funding*: views on third party funding vary among jurisdictions, with some States expressly allowing such funding and others prohibiting it. The key issue identified for procedural reform is whether there should be disclosure of third party funding for the purposes of conflict checking and/or for the purposes of security for costs;
- *Consolidation*: a number of commentators on investor-state dispute settlement are concerned about a lack of consistency or coherence in case law. While this is not universal, there are examples of holdings that are difficult to reconcile. Consolidation of cases is one mechanism that could reduce costs and increase the likelihood of consistent awards. Consolidation is available under the current ICSID rules with consent of the parties, and has been formally adopted in some new investment treaties. It could be elaborated in an amendment to the ICSID rules as well;
- *Modernize means of communication*: The ICSID Secretariat has vastly increased the use of technical means of communication and hearing presentation, and the rules should be updated to reflect this practice;
- *Preliminary Objections*: ICSID introduced Rule 41(5) in 2006 and it has been invoked in over 20 cases. Experience with Rule 41(5) demonstrates a few areas that could be clarified and these will be advanced for discussion;
- *First Session*: The first session and preliminary procedural consultation are usually merged in practice and this might be formally incorporated in the rules. In addition, other improvements to the first session will be suggested;
- *Witnesses, Experts and Other Evidence*: Some delegations have suggested expressly addressing practices such as witness conferencing or clarifying best practice for tribunals to appoint their own expert;

- *Discontinuance*: one potential area to expedite proceedings is to reduce the time for discontinuance of a case where the parties fail to pay the requested advances;
- *Awards and Dissents*: several delegations have suggested stricter time frames for closure of proceedings and issuance of awards. In addition, the timing of a dissent could be linked to the timing of the main award so that the full reasoning is available to the parties in a reasonable time frame. More generally, there appears to be consensus on reiterating the obligation to issue timely awards and to determine disputes in an economic fashion;
- *Security for Costs*: In practice, tribunals have found that they have authority to order security for costs, however there is no express rule governing the process or elaborating considerations for such an order. An express rule on security for costs might assist parties significantly;
- *Security for Stay of Enforcement of Awards*: Similar to security for costs, parties might be assisted by an express rule addressing when an ad hoc committee could order security on a stay of enforcement of awards;
- *Allocation of Costs*: ICSID tribunals have full discretion to award costs and to consider the factors they deem most relevant in the individual case. While early cases frequently divided costs evenly, modern tribunals more often consider factors such as the relative success of parties and their conduct during the litigation when assessing costs. Clarifying the bases for awards of costs or adopting a presumption concerning liability for costs might provide more certainty for disputing parties, and will be a topic for discussion;
- *Annulment*: a number of practical changes will be suggested for the annulment mechanism, including streamlining the time for annulment proceedings, clarifying the process for cross applications on annulment, and clarifying the record to be used on annulment;
- *Publication of Decisions and Orders*: The rules currently require publication of awards or of award excerpts if parties do not consent to publish the full award. However, this rule does not address decisions and orders. As decisions and orders may include important procedural or substantive determinations, consideration will be given to methods of increasing their availability. This would assist parties in knowing the applicable law and would enhance the potential for consistent awards.

## **NEXT STEPS**

ICSID is currently preparing background papers to assist States and others to evaluate potential amendments. These background papers will explain the basis for a proposed change, note relevant considerations, and suggest the potential wording or structure of amendments. The timing of release of the background papers and the estimated entry into effect of any amendments will depend on the scope of the suggestions received. However, the Centre hopes to publish these papers by early 2018 so that they can serve as the basis for consultation and next steps.

In addition, in the course of reviewing proposed amendments, ICSID also plans to highlight improvements that could be effected through a practice change rather than a rule amendment, and

to adopt such changes. In some cases, specific choices might be left to States in their investment treaties, reflecting differing policy preferences of individual States. In addition, ICSID will note areas governed by the ICSID Convention where change would have to be effected through a Convention amendment. While Convention amendments are not contemplated by this amendment process, such amendments could be addressed in the future if consensus to do so emerges during the discussions.

On a closing note, the capacity of investment law and arbitration to adapt and evolve in a rapid time frame is notable. The changes seen in the last two decades are unparalleled in international law practice. The next iteration of the ICSID rules continues this evolution, and will fine-tune the current procedural rules. We look forward to this discussion with stakeholders as an opportunity to continue to offer the most effective dispute mechanism possible to resolve investment disputes.