PUBLIC COMMENTS TO
AMENDMENT OF ICSID’S RULES
AND REGULATIONS
(2016-2018)
Rule 5 (1) of Arbitration Rules

Dear Sirs,

Below is my proposal to amend the Rule 5 (1) of Arbitration Rules.

"(1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment. Likewise, the party shall inform the Secretary-General of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship that subsequently arises during the proceeding".

Since the involvement of a third-party funder may create situations of conflict of interest for the arbitrators, the proposed amendment would protect -inter alia- the independence and impartiality of ICSID arbitrators.

To my judge, the involvement of a third-party funder may raise conflict of interests in certain circumstances. For example, a conflict of interest may arise if the same arbitrator is appointed in different arbitrations, by Funded Parties funded by the same Third Party Funder.

Kind regards,

Prof. Dr. Carlos Matheus López

www.cmlarbitration.com
Suggestions for amendments to the Arbitration Rules

Dear Madams, Sirs,

In response to your invitation of 24 January to file suggestions for potential amendments to the ICSID Arbitration Rules, I respectfully submit the following:

Rules 6.- add a third paragraph:

(3) The Tribunal may appoint an administrative secretary, subject to the agreement of the parties regarding both the identity of the person and the arrangement of the fees and costs incurred by such administrative secretary; for the purposes of the Rules, the administrative secretary is not deemed to be a “member” of the Tribunal.

Rule 9.- Modify the rule in the following terms:

(1) A party proposing requesting the disqualification of an arbitrator pursuant to Article 57 of the Convention, or otherwise, shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General within 30 days from the notice of the acceptance of appointment of such arbitrator or of the circumstances that give rise to the request, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) notify the Tribunal of the request; transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and

(b) notify the other party of the request proposal.

(3) The arbitrator to whom the request proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be, furnish explanations to the Secretariat within 10 days after he or she has received the proposal.
(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to. The Secretariat shall take the decision within 30 days after receiving the proposal and notify the Tribunal and the Parties of the grounds for the decision.

(6) The proceeding shall be suspended until a decision has been taken on the request proposal.

**Rule 22.**- Modify as follows:

[...]

(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall may be rendered and the record may be kept in both one of the procedural languages, provided the parties and the Tribunal agree. In such a case, and upon the request of a party, translation of the award to the other language may be made available to the parties within 30 days of the dispatch of the award per Rule 48.

**Rule 39.**- Replace “recommendation/recommend/recommended” with “order/ordered”

**Rule 41.**- Add the following paragraph:

(7) If the Tribunal decides that the requesting party did not exhaust required local administrative or judicial remedies per article 26 of the Convention, it shall render a decision to that effect, without prejudice of the requesting party’s right to bring the claim in the future.

**Rule 47.**- Modify as follows:

(1) The award shall be in writing and shall contain:

[...]
(f) a brief summary of the proceeding;

(g) a statement of the relevant facts as found by the Tribunal;

(h) the summary of the submissions of the parties;

(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and

(j) any decision of the Tribunal regarding the cost of the proceeding, with the reasons upon which the decision is based.

(2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.

(3) Any member of the Tribunal may attach his or her individual opinion to the award whether he dissents from the majority or not, or a statement of his dissent.

Rule 46.- modify as follows:

(1) The Tribunal shall declare the proceeding closed as soon as possible after the evidenciary hearing is held but not later than 90 days thereafter;

(2) After the closure the proceeding, no new evidence or submission shall be presented, unless otherwise allowed by the Tribunal;

(3) The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 90 days after closure of the proceeding. Upon request from the Tribunal the Secretariat may, however, extend this period by a further 30 60 days if it would otherwise be unable to draw up the award.

Rule 48.- Modify as follows:

[...]
(4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.

Yours sincerely,

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Suggested Changes to the ICSID Rules and Regulations

1. Disclosure requirements – Suggested changes for ICSID Arbitration Rule 6

Rule 6
Constitution of the Tribunal

(2) […]

“Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and a non-party having a substantial interest in the proceedings (if any); and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party.[…]”

Note: The proposed text seeks to protect the integrity of the proceedings. A non-party may potentially be a “third-party funder” of the arbitration, which by nature will have a direct economic interest in the outcome of the proceedings. The proposal is in accordance with the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, which acknowledges that third-party funders and insurers in relation to the dispute “may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party.” (Explanation to General Standard 6) The disclosure of potential conflict of interest with third-party funders has become increasingly important due to the growing number of cases using this type of financing. Recently, the 2016 ICC Guidance Note on Disclosure and Third-Party Funding states that arbitrators should consider, when evaluating whether to make a disclosure, “relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.”

2. Challenges of arbitrators – Suggested changes for ICSID Arbitration Rule 9

Rule 9
Disqualification of Arbitrators

(1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, within [30] days from the date when the party making the challenge knew or should have known of the facts or circumstances on which the disqualification is based, file its proposal with the Secretary-General, stating its reasons therefor.

(2) The Secretary-General shall forthwith:

(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and

(b) notify the members of the Tribunal, and the other party of the proposal;

(3) The arbitrator(s) to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be. The Chairman shall use his best efforts to take that decision on the admissibility of the disqualification within [15] days after he has received the
If admissible, and unless it relates to a sole arbitrator or to a majority of the members of the Tribunal, the Chairman, through the Secretary-General, shall forthwith transmit the proposal and any explanation furnished by the arbitrator concerned to the other members of the Tribunal.

(4) Unless the proposal relates to a majority of the members of the Tribunal, the Whenever the other members has to decide on the merits of a proposal, they shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. Those members shall provide a reasonable time to the other party to comment in writing before taking a decision on the merits. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal or after he has been notified from the failure of the other members of the Tribunal to reach a decision, as the case may be. The Chairman may require at any time further information from the challenging party and/or the challenged arbitrator.

(6) The proceeding shall be suspended until a decision has been taken on the proposal. The decision shall be made in writing, with reasons. The Centre shall promptly include in its publications excerpts of the decision taken.

**Note:** The proposed text establishes a time-limit for the party submitting the challenge, preventing “last minute” challenges and the unnecessarily suspension the proceedings. Pursuant to Article 58 of the Convention the decision on any proposal to disqualify an arbitrator shall be taken by the other members of this Tribunal. This is not the approach followed by other institutions, which authority to decide on the challenges is given to the institution itself (e.g. Article 14 of the 2017 ICC Arbitration Rules; Article 10 of the 2014 LCIA Arbitration Rules). This trend seeks to avoid the challenging task for the other members of the Tribunal to decide on the disqualification of their pair. The proposed text considers the limitations established by the Convention regarding the decision-making but enables the Chairman to have a more active role and preventing unnecessary delays of the proceedings. Finally, the fact that the decision needs to be reasoned and available to the public intends to contribute to the transparency of the process. This in practice may reduce the number of challenges of arbitrators.

3. **Legal Representation – Suggested changes to ICSID Arbitration Rule 18**

**Rule 18**

**Representation of Parties**

(1) Each party may be represented or assisted by agents, counsel or advocates duly authorized representatives whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party. The same notification process applies to any changes of the parties’ representatives during the arbitration proceedings. A party may oppose in writing to such a change where a relationship between the other newly-appointed party representative and a member of the Tribunal could create a conflict of interest. The Secretary-General shall forthwith transmit the objection to the Chairman of the Administrative Council, who
shall use his best efforts to take that decision on the approval of the change within 30 days. The proceeding shall be suspended until a decision has been taken on the objection.

(2) For the purposes of these Rules, the expression “party” includes, where the context so admits, any agent, counsel or advocate any representatives authorized to represent that party.

**Note:** Changes in Party Representation in the course of the arbitration, as has been pointed out by the 2013 IBA Guidelines on Party Representation in International Arbitration, may threaten the integrity of the proceedings because of conflict of interest between a newly-appointed Party Representative and one or more arbitrators. Contrary to the 2014 LCIA Arbitration Rules which requires the Tribunal’s prior approval of the new appointment (Article 18), the proposed text follows the same logic of the challenges of arbitrators in an abbreviated manner. Indeed, a challenge to any party representatives on the basis of a conflict of interest with one or more arbitrators put in jeopardy the composition of the Tribunal or even the finality of the award. Therefore, it is appropriate that the Centre takes similar measures to safeguard the integrity of the proceedings.

4. **Submissions by Non-disputing Parties – Suggested changes to ICSID Arbitration Rule 37**

   **Rule 37**
   
   **Visits and Inquires; Submissions of Non-disputing Parties**

   (3) In cases where the basis of consent invoked to establish the jurisdiction of the Centre is an International Investment Agreement in force between two or more Contracting States, the Tribunal shall allow or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Contracting State, Party to the treaty. The Tribunal shall not draw any inference from the absence of any submission or response from the non-disputing Contracting State.

   The Tribunal shall ensure that the a non-disputing party submission, including those from a non-disputing Contracting State, does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submissions.

   **Note:** The proposed text is based on Article 5 of the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The rule is intended to allow the intervention of non-disputing Parties to the treaty which is the base of the claims, particularly but not exclusively, the home state of the investor, for purposes of interpretation of any provision of the treaty that is at issue in the dispute. This is particularly important in cases where the terms of the treaty are silent as to what standard should be applied by the tribunal. This is the case of most of the IIAs concluded between the 1960s and the 1990s. Moreover, such intervention has been adopted by recent IIAs (e.g., IIAs adopted under U.S. Model BIT; Canada Model BIT; ASEAN Comprehensive Investment Agreement). The ultimate purpose of the rule is to avoid misinterpretations of the treaty.

5. **Contents of the Request – Suggested changes to ICSID Institution Rules Rule 2**
Rule 2

Contents of the Request

(1) The request shall:

[...]

(g) state, if the requesting party is benefiting from a third-party funding, the name and address of the third party funder. Where the financing agreement is concluded or the donation or grant is made after the submission of the Request, such statement shall be submitted by the benefiting party in writing to the Secretary-General without delay. For purposes of the statement, third-party funding includes any person or entity that is contributing funds, or other material support, and that has a direct economic interest in, or a duty to indemnify the party for, the award to be rendered in the arbitration. This provision shall apply, mutatis mutandis, in the event the responding party is benefiting from a third-party funding, in accordance with the Arbitration Rules.

Note: The disclosure obligation of the presence of a third-party funder in the Request of Arbitration seeks to prevent unwilling consequences of belated disclosure or non-disclosure, particularly potential conflicts of interest between the funder and one or more arbitrators. Because the Respondent may also be financed by a third-party, such disclosure obligation shall apply, mutatis mutandis, to any communication received from the Responding party to the Request of Arbitration in accordance with the Arbitration Rules. The proposal is in accordance with the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration, which require parties to disclose “any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.” (General Standard 7) The proposed definition of third-party funder is based on the definition provided by the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. This disclosure obligation has been also included in IIAs as a means to increase transparency in the proceedings and prevent potential conflict of interests (e.g., E.U. recent negotiated treaties such as CETA).
Dear Ms Kinnear,

With respect to the suggestions, I would like to mention two:

• I suggest that a fast track procedure is being created for non-complex cases with a litigation value of less than 20 million where the decision is made in one round or the jurisdictional issues are resolved through an order instead of an award. In such fast track procedures, the default rule should be one arbitrator unless the IIA or the parties provided for three.

• As regards the conditional request for annulment (extending the scope of annulment from merits to jurisdiction or vice versa by) by the defendant, we suggest that defendant is being obliged to pay the registration fee and the administrative cost of the "counter-claim".

Best regards,

Herfried Wöss

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Myopic Amici? The Participation of Non-disputing Parties in ICSID Arbitration

Fernando Dias Simões†

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I. The ‘Growing Pains’ of Investor-State Arbitration

Investor-state arbitration has been attracting substantial scrutiny and criticism over the last few years. Scrutiny because there has been a sharp increase in the number of arbitration proceedings being launched by investors against states, with some significant awards making the headlines.1 Criticism because a number of defending states, public interest groups, and other stakeholders have voiced concerns about the way in which this dispute settlement mechanism is structured and operated.2 While these criticisms focus on different issues with varying impact on the overall nature and efficiency of investor-state arbitration, together they have led to a sizeable literature on a purported ‘crisis’ of the system.3 So loud and

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vigorous was the tone of some of the critiques that some authors referred to the existence of a ‘backlash’ against investor-state arbitration. Signs of dissatisfaction can be seen in the fine-tuning of the substance and procedure of investment treaties in ways that reveal concerns about previous trends and, even more clearly, in the withdrawal of some states from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Taken together, these developments suggest the existence of, at least, ‘growing pains’ and call for a re-thinking and re-shaping of the of investor-state dispute settlement mechanism.

Two of the most frequent critiques that have been levelled against investor-state arbitration are of a procedural nature, as they focus on institutional features of the system that are considered problematic: the lack of transparency of the proceedings, and the existence of limited opportunities for public participation.

First, investor-state arbitration has been accused of lacking

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transparency. Transparency is an essential constituent of good governance, for investors and states alike. In the realm of investment arbitration the concept refers to the extent to which the general public may be alerted to the existence of a dispute, have access to key arbitration documents including the final award, and attend oral hearings. For the most part, the investment arbitration process parallels the commercial arbitration mechanism, where disputing parties are masters of the proceedings and generally favour confidentiality. The applicable procedural rules are often the same as those applicable to ordinary commercial cases, except in disputes governed by the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID Arbitration Rules), which were designed specifically for investor-state arbitrations. As a result, confidentiality has been a traditional feature of investment arbitration. The topic has assumed considerable importance over the last years, not only in academic circles but also in the media, with some accusing the investor-state

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arbitration system of being secret.  
Several commentators have criticised the emulation of the private and confidential model, as investor-state arbitration is a different creature from commercial arbitration. Investment disputes often raise public interests because their subject matter impacts on the provision of public services such as water, waste management, electricity, or gas; or touches upon sensitive socio-political concerns such as environmental protection – which are normally absent from commercial arbitration. In such proceedings, investors challenge measures adopted by the host-state that the latter frequently argues to be in the public interest. The arbitral tribunal scrutinises the conduct of the host state against the standards of protection prescribed in international investment agreements. As investor-state functions as an equivalent of judicial review of governmental measures, substantial public interests are


14 Kate Miles, Reconceptualising International Investment Law: Bringing the Public Interest into Private Business, in INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 295, 296 (Meredith Lewis & Susy Frankel eds., 2010) [hereinafter Reconceptualising].


Because the controversy is so deeply connected with national policies, its resolution will have direct effects on the community. The public has an interest in assuring that decisions are made using proper procedures and taking due account of public interests. The outcome of the case may limit the future legislative and administrative freedom of manoeuvre of states, affecting their ability to pursue public welfare policies. The opacity of investment arbitration has been considered a “lamentable violation of public law principles” that may hamper efforts to track down disputes, evaluate their features, and gauge their consequences. While confidentiality suits commercial disputes well, it is not appropriate in investor-state arbitration, where tribunals are frequently required to balance investment protection with varied societal concerns. Such proceedings are public by their very nature and need to be accessible to the community at large.

A second common criticism regards the lack of openness of the investment arbitration system to public participation. Because it
is modelled after commercial arbitration, where the only relevant interests are those of the disputing parties, normally investor-state arbitration does not permit public access to the proceedings.\textsuperscript{27} However, this confidential atmosphere is incompatible with the public interest nature of many investments disputes. While commercial arbitration is a system of settling disputes between (mostly) private parties, investor-state arbitration necessarily involves states with their public interest considerations. Since matters of public concern are frequently at the heart of the controversy, third parties such as public interest groups and non-governmental organisations (NGOs) want to have access to the decision-making process.\textsuperscript{28} The problems dealt with by investment tribunals are often societal challenges and quite understandably civil society wants to have its say.\textsuperscript{29} More specifically, third parties want to be allowed to submit briefs, consult the documents, and attend the hearings.\textsuperscript{30} This would increase the transparency of the proceedings but also allow for the incorporation of broader policy considerations into the dispute resolution process. While confidentiality and privacy are traditional features of arbitration, the political legitimacy of the dispute settlement mechanism is put at risk if genuine stakeholders cannot participate in decisions affecting their rights and interests.\textsuperscript{31} The deeper the connection between the dispute and public interests, the greater the need for transparency and public input in the decision-making process.\textsuperscript{32}

The specific characteristics of investor-state arbitration justify a greater measure of transparency and public participation. The fact

\textsuperscript{27} See EFILA, supra note 7, at 14.

\textsuperscript{28} See generally OECD, supra note 10 (discussing Third Party [NGO] access to ISDS).

\textsuperscript{29} Brigitte Stern, Civil Society’s Voice in the Settlement of International Economic Disputes, 22 ICSID Rev. 280 (2007).


\textsuperscript{31} Buckley, supra note 16.

\textsuperscript{32} Maciej Zachariasiewicz, Amicus Curiae in International Investment Arbitration: Can It Enhance the Transparency of Investment Dispute Resolution?, 29 J. INT’L ARB. 205, 206 (2012) [hereinafter Zachariasiewicz].
that tribunals are dealing with what are essentially public law issues requires that the population of the host state be informed about the conduct of governments and arbitrators.\textsuperscript{33} Citizens will not be pleased if they feel that unknown and unelected people are deciding the future of their country under a veil of secrecy.\textsuperscript{34} In the words of Nigel Blackaby, “there is a risk of this new child [investment arbitration] dying in infancy, delicate and overprotected by its parents from exposure to the outside world”.\textsuperscript{35} The perceived lack of transparency and openness poses a serious challenge to the investor-state mechanism. The system needs to be reformed under penalty of dying before it can survive its growing pains.\textsuperscript{36}

\textbf{II. Amicus Curiae as a Remedy for the Ills of the System}

Responding to public criticism and pressure, over the last decade the investor-state arbitration mechanism has been adjusting its structure to accommodate the participation of third parties, namely through the figure of amicus curiae. An amicus curiae, literally “a friend of the court”, is, according to Black’s Law Dictionary, “a person who is not a party to a law suit but who petitions courts or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.”\textsuperscript{37} Normally amici curiae are individuals or organisations who do not have the right to participate in the dispute as parties but want to intervene because the outcome of the proceedings may affect their interests.\textsuperscript{38}

The participation of non-disputing parties in investment arbitration has been justified as a useful tool to promote different public interests. First, amicus participation increases the

\begin{itemize}
\item\textsuperscript{33} Stephan Schill, \textit{International Investment Law and Comparative Public Law – an Introduction}, in \textit{INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW} 3, 15 (Stephan Schill ed., 2010).
\item\textsuperscript{34} Alexis Mourre, \textit{Are Amici Curiae the Proper Response to the Public’s Concerns on Transparency in Investment Arbitration}, \textit{5 L. & Prac. Int’l Cts. & Tribunals} 257, 266 (2006) [hereinafter Mourre].
\item\textsuperscript{36} Franck, \textit{supra} note 3, at 1625.
\item\textsuperscript{37} \textit{Amicus Curiae}, \textit{BLACK’S LAW DICTIONARY} (8th ed. 2004).
\item\textsuperscript{38} Lance Bartholomeusz, \textit{The Amicus Curiae before International Courts and Tribunals}, \textit{5 Non-State Actors & Int’l. L.} 209, 273 (2005) [hereinafter Bartholomeusz].
\end{itemize}
transparency of the system. Their involvement in the proceedings draws the general public’s attention to a controversy that may have a significant impact on public interests and public finances.

Second, the participation of third-parties also promotes greater accountability of investment arbitration, addressing a democratic deficit that has been identified in the system. Citizens are given a chance to assess how diligent the state is in the protection of public interests and in the use of public funds.

Third, it increases the openness of investment treaty arbitration to civil society, ensuring that the broader community does not perceive it as “secretive.” This is in line with the changing nature of investment arbitration, where tribunals are increasingly required to settle disputes that touch upon public interests. The participation of civil society in the proceedings is meant to safeguard the public interests at stake and ensure the sensitivity of governmental entities towards the


40 Triantafilou, supra note 21, at 575.

41 Bastin, supra note 37, at 227; Choudhury, supra note 24, at 808; Amokura Kawharu, Participation of Non-Governmental Organizations in Investment Arbitration as Amici Curiae, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 275, 285 (Michael Waibel et al. eds., 2010); VanDuzer, supra note 8, at 685.

42 Blackaby & Richard, supra 19 at 257; Choudhury, supra note 24 at 808; Chiara Ragni, The Role of Amicus Curiae in Investment Disputes: Striking a Balance Between Confidentiality and Broader Policy Considerations, in FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS 86, 87 (Tullio Treves et al. eds., 2014) [hereinafter Ragni]; Triantafilou, supra note 21, at 575; Carl Zoellner, Third-Party Participation (NGO’s and Private Persons) and Transparency in ICSID Proceedings, in THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 179, 200 (Rainer Hofmann & Christian Tams eds., 2007) [hereinafter Zoellner].

43 Triantafilou, supra note 21, at 575.

44 Levine, supra note 37, at 217.

possible consequences of the arbitral award.\footnote{E. Triantafilou, Amicus Submissions in Investor-State Arbitration After Suez v. Argentina, in Arbitration International, 2008, 24(4), pp. 575-576.} Without public input, public interests are less likely to be elaborated upon by the tribunal. Allowing for amicus curiae participation shows the community that investment tribunals are cognisant of societal concerns such as the protection of public health or the environment.\footnote{Mourre, supra note 32, at 266.} Besides contributing to the advancement of several public interests (greater transparency, accountability, and openness), amicus curiae participation has also been justified as a way to help investment tribunals in rendering better awards.\footnote{Id. at 265.} For different reasons, disputing parties may lack the necessary ability or the appropriate incentives to submit all of the relevant facts, legal arguments, and policy implications to the tribunal.\footnote{McLachlan, Shore & Weiniger, supra note 20, at 59-60.} Amici can draw the attention of arbitrators to interests that do not necessarily coincide with those of the state,\footnote{Markus W. Gehring & Avidan Kent, International Investment Agreements and Sustainable Development: Future Pathways, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 561, 561–71 (Shawkat Alam et al. eds., 2013)} providing the tribunal with its scientific or technical knowledge and offering an additional lawyer of information relevant to the dispute.\footnote{Magraw Jr. & Amerasinghe, supra note 8, at 337, 347.} While arbitrators are required to have appropriate qualifications and experience, this does not mean that they are necessarily able to understand all the aspects of a dispute.\footnote{Gómez, supra note 9, at 544.} The main function of amici curiae is, therefore, to assist the tribunal by offering information and arguments different from those of the disputing parties.\footnote{De Brabandere, supra note 37, at 107.} Amici are given a role in investment arbitration and, in a broader sense, in the making of international law and policy\footnote{Tomoko Ishikawa, Third Party Participation in Investment Arbitration, 59 INT’L}, opening the door for some creative
legal thinking and possibly even helping to reduce the perceived fragmentation of international law. Third party involvement in the proceedings may contribute to improve the quality of awards but also to the development of international investment law as a whole.

Traditionally, investment treaties contained no express provisions concerning the participation of non-parties, neither prohibiting it nor giving an express legal ground for it. In proceedings conducted pursuant to the ICSID Arbitration Rules, Rule 32(2) required the consent of both investor and host state for third parties to attend the hearings. Regarding the submission of briefs by non-disputing parties, the rules were completely silent.

As a result of the mounting pressure for greater public participation in investor-state arbitration, ICSID amended its Arbitration Rules in 2006. The new text of Rule 32(2) governs oral hearings as follows:

Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

The amendment basically consisted in a change in language from ‘the tribunal shall decide, with the consent of the parties’ to ‘unless either party objects’. It now suffices that neither party objects for third parties to be allowed to attend oral hearings. The revised version contraries the private character of hearings but still

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55 De Chazournes, supra note 37, at 335.
56 Bartholomeusz, supra note 36, at 278.
57 Levine, supra note 37, at 217.
58 Id. at 204.
59 Id. at 211.
60 Id. at 200.
61 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES art. 32(2) (2006).
62 Id.
63 Id.
allows the parties to veto public access to them. While the result is thus essentially the same, the rationale is different. There is the also additional requirement that the tribunal has to consult with the Secretary General before allowing non-disputing parties to attend hearings. The last sentence of Rule 32(2), requiring the tribunal to establish procedures for the protection of proprietary or privileged information, did not exist prior to the amendment.

As regards the submission of briefs by third parties, a new provision – Rule 37(2) – was introduced:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

The new rule makes an express reference to the participation of non-disputing parties in arbitral proceedings, namely by allowing them to file written submissions. This basically corresponds to the figure of amicus curiae. Pursuant to Rule 37(2), the decision is

64 Citation needed
66 ICSID, supra note 59, at r. 32(2).
67 Id.
68 Id. at r. 37(2).
69 Id.
within the full discretion of the tribunal, even though there is the obligation to consult both parties first and to consider, among other things, the three factors mentioned in paragraphs a) to c). The tribunal should also ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party and that both parties are given an opportunity to present their observations on the non-disputing party submission. The decision on whether to accept amicus curiae briefs cannot be vetoed by the parties. Naturally, if both parties object the tribunal may find it harder to justify the alleged advantages of third-party participation. Still, the final decision rests with the tribunal.

The new rule ratified past arbitral practice, as different investment tribunals had previously considered that they had the power to accept or refuse amicus submissions. It is a noteworthy example of a growing movement in favour of greater public participation in investor-state arbitration. This trend has been hailed as ‘one of the most important evolutions weathered by international law in recent decades’, a ‘groundbreaking’ and ‘fascinating’ development. Amicus curiae is becoming an ‘entrenched’, ‘standardised’ feature of investment arbitration, a symbol of the emergence of the idea of civil society in the settlement of investment disputes.

III. Myopic Amici?

The involvement of amici curiae in investment arbitration is

70 Id.
71 Id.
72 De Brabandere, supra note 37, at 223.
73 Miles, supra note 14, at 374.
74 Wong & Yackee, supra note 47, at 268.
75 De Brabandere, supra note 37, at 112.
76 Ibid.
78 VanDuzer, supra note 8, at 720.
becoming more common in disputes that raise public policy considerations.\textsuperscript{81} As a result, critiques of the system based on lack of transparency and openness to public participation are diminishing in tone.\textsuperscript{82} The 2006 amendments to the ICSID rules endowed the system with greater transparency and facilitated the participation of civil society in the proceedings.\textsuperscript{83} Despite these amendments, the ICSID Rules do not go far enough in ensuring a full application of the public participation principle. Amici curiae normally request permission from the tribunal to submit briefs.\textsuperscript{84} Moreover, frequently amici also seek authorisation to consult the disputing parties’ documents, respond to questions from the tribunal, attend the hearings and make oral submissions, and even cross-examine witnesses.\textsuperscript{85} However, the access by non-disputing parties to arbitration documents and hearings is still handled rather restrictively under the ICSID Arbitration Rules.\textsuperscript{86} The changes introduced in 2006 constituted a modest improvement, of limited practical effect.\textsuperscript{87} A review of the ICSID jurisprudence shows that arbitral tribunals have only occasionally allowed amici curiae a role which goes beyond the filing of written submissions.\textsuperscript{88}

While Rule 37(2) of the ICSID Rules empowers tribunals to grant third parties amicus curiae status, it does not regulate the access to documents.\textsuperscript{89} As a result, amici’s access to key arbitral documents is normally dependent upon the parties’ consent.\textsuperscript{90} Furthermore, the tribunal may deny access by arguing that documents are already publicly available or are privileged.\textsuperscript{91} Even if a tribunal decides to grant access to documents, it may still place conditions on the use of that information, for instance, by banning

\textsuperscript{81} \textit{Id.} at 740.
\textsuperscript{82} \textit{VanDuzer, supra note} 8, at 687.
\textsuperscript{83} \textit{Id.} at 687.
\textsuperscript{84} \textit{Id.} at 703.
\textsuperscript{85} Bartholomeusz, \textit{supra} note 36, at 277; Bastin, \textit{supra} note 37, at 212.
\textsuperscript{86} \textit{Id.} at 210.
\textsuperscript{87} Levine, \textit{supra} note 37, at 214; \textit{VanDuzer, supra note} 8, at 722; Zachariasiewicz, \textit{supra} note 30, at 221.
\textsuperscript{88} Citation needed
\textsuperscript{89} Levine, \textit{supra} note 37, at 211.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{VanDuzer, supra note} 8, at 698.
any public disclosure.\textsuperscript{92}

The access of non-disputing parties to hearings is also problematic. Rule 32(2) stipulates that the tribunal can allow non-parties to attend the arbitration hearings unless either party objects.\textsuperscript{93} Proposals for the inclusion of an expanded right of non-disputing parties to attend hearings failed to reach the required majority during the discussions that led to the 2006 amendments.\textsuperscript{94} The revised rule is disappointing\textsuperscript{95} and of limited practical impact,\textsuperscript{96} as the opening of the hearings to amici can still be blocked by the parties. Without public access to the hearings, investment arbitration remains rather opaque.\textsuperscript{97}

According to information provided by the ICSID,\textsuperscript{98} amicus curiae participation has been requested in a total of 20 cases. Requests were denied in six\textsuperscript{99} and granted in at least ten cases.\textsuperscript{100} In

\begin{itemize}
  \item \textsuperscript{92} Leon E. Trakman, \textit{The ICSID and Investor-State Arbitration}, in \textit{REGIONALISM IN INTERNATIONAL INVESTMENT LAW} 253, 283 (Leon E. Trakman & Nicola W. Ranieri eds., 2013).
  \item \textsuperscript{93} CATHERINE A. ROGERS \& ROGER P. ALFORD, \textit{THE FUTURE OF INVESTMENT ARBITRATION} 79 (2009).
  \item \textsuperscript{94} Alessandra Asteriti & Christian J. Tams, \textit{Transparency and Representation of the Public Interest in Investment Treaty Arbitration}, in \textit{INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW} 787, 794 (Stephan W. Schill ed., 2010).
  \item \textsuperscript{95} Mourre, \textit{supra} note 32, at 270.
  \item \textsuperscript{97} Miles, \textit{supra} note 14, at 304–05.
  \item \textsuperscript{100} Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae Granted (Mar. 17, 2006); Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency
\end{itemize}
four cases a request was decided by the tribunal, but whether it was accepted is unknown.\textsuperscript{101} The continuation of the proceedings without any reference to the submission of amicus briefs in the case details provided by ICSID allows one to assume that the requests were denied. A review of the ten cases where the participation of non-disputing parties was accepted shows that the position of arbitral tribunals regarding the access of amici curiae to arbitral documents and oral hearings has varied according to the circumstances of the case.

In \textit{Suez and Vivendi v. Argentina}, the amici’s request for access to arbitral documents was refused.\textsuperscript{102} The tribunal recalled that Rule 37(2) did not deal with the amicus curiae’s access to the record and thus provided no guidance.\textsuperscript{103} While recognising that amicus must have sufficient information on the subject matter of the dispute in order to be of any assistance, the tribunal considered that the petitioners had sufficient information without access to the

\begin{footnotesize}
\begin{enumerate}
\item Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12; RREEF Infrastructure (G.P.) Ltd. v. Kingdom of Spain ICSID Case No. ARB/13/30; Antin Infraestructure Services Luxembourg S.à.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/31; Eiser Infrastructure Ltd. v. Kingdom of Spain (ICSID Case No. ARB/13/36).
\item Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission Granted, at No. 24 (Feb. 12, 2007).
\end{enumerate}
\end{footnotesize}
arbitration record. The amici’s request to attend the hearings was also rejected based on the opposition of the claimants. In *Suez and Interagua v. Argentina*, the tribunal was exactly the same and the decision closely similar. In *Biwater v. Tanzania*, the tribunal denied access to the parties’ written pleadings due to the investor’s objection. The tribunal did not feel that the information was necessary, as this was a “very public and widely reported dispute” and the information that led to the amici’s application to intervene was sufficient to make further submissions. The tribunal also denied access of amici to the oral hearings in the absence of both parties’ consent. Nevertheless, the tribunal reserved the right to ask the amici specific questions in relation to their written submission. This case provides a good illustration of the limitations of the current ICSID Rules. The amici had to file a written submission without knowing key arbitral documents. The potential relevance and usefulness of their submission was irremediably affected because they had no access to the allegations made by the claimant and the respondent’s defense. The tribunal later justified its divergence on one of the amici’s assertions by noting that they did not have all the relevant information. Because they were denied access to the key arbitral documents, the amici were, if not totally blindfolded, at least myopic. They were not totally ignorant of the circumstances of the case – because it was a “very public and widely reported dispute” – but did not perceive

104 *Id.*

105 *Id.* at No. 4.

106 *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae Granted* (Mar. 17, 2006).


108 *Id.* at No. 65.

109 *Id.* at No. 69–72.

110 *Id.* at No. 72.

111 *Id.*


113 See *Biwater Gauff (Tanzania) Ltd. v. United Republic Tanzania, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status Granted, at No. 60(c)* (Dec. 1, 2016) (holding that the Arbitral Tribunal “will be better placed after the April hearing to make further determination on this issue”).
it with a clear vision. Their comprehension of the facts and issues raised was blurred. Because they were not given the chance to read the claim and reply, go through the parties’ submissions, and attend the hearings, they were seriously prevented from exercising their function. Restraining public input in this way seems a perverse decision.

In *Piero Foresti and others v. South Africa*, the tribunal allowed the access of amici to a redacted version of the parties’ key documents despite the strong objections of the claimants. While the arbitration was discontinued shortly afterwards, the fact is that this decision, the first of its kind by an ICSID tribunal, was a clear step towards greater transparency in investment arbitration. The tribunal held that access to documents was necessary to enable the non-disputing parties to focus their submissions upon the issues arising in the case and to know the parties’ positions on those issues. The adopted solution preserved the confidentiality of sensitive information while giving amici the opportunity to make a useful contribution.

In August 2008, the European Commission (EC) applied to the tribunal in *Electrabel v. Hungary* for permission to make a written submission as a non-disputing party. After consulting the parties, the request was accepted by the tribunal. The EC was granted access to some of the parties’ pleadings (in redacted form) but was not authorised to attend the hearing. In September 2008, the EC also requested participation as a non-disputing party in *AES Summit*

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114 *Id.* at No. 65.
120 Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Procedural Order Concerning the Application of a Non-Disputing Party to File a Written Submission Granted (Apr. 28, 2009).
121 *Id.*
122 *Id.*
Generation and other v. Hungary. The EC also petitioned for access to the parties’ written submissions but it was refused due to lack of consent by both parties. The EC did not request permission to attend the hearings. In April 2009, the EC also requested authorisation to take part in the case Ioan Micula and others v. Romania. The petition was accepted and the EC was allowed access to the parties’ pleadings, except for confidential or legally privileged documents. The representatives of the EC attended the oral hearing where they provided clarifications to their written submission and answered the parties’ questions. In these three cases the amicus curiae was none other than the EC, who participated in the proceedings in order to clarify issues relating to the scope and content of European Law related to the disputes. Being the ‘guardian of the treaties’, the EC has a vested interest in becoming involved in such arbitrations. This is a significant development in that it means that the grant of amici curiae status is not limited to non-government or private organisations.

In another case, Pac Rim Cayman v. El Salvador, the tribunal invited non-disputing parties to make applications for participation as amici curiae. Several public interest groups successfully

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123 AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award Decision, at No. 3.18 (Sept. 23, 2010).
124 Id. at No. 3.22.
125 Id. at No. 3.1–3.39.
126 Micula v. Romania, ICSID Case No. ARB/05/20, Application of a Non-Disputing Party to File a Written Submission Granted (May 15, 2009).
127 Micula v. Romania, ICSID Case No. ARB/05/20, Award Decision, at No. 36(6) (Dec. 11, 2013).
128 Id. at No. 73.
129 The same happened in a case administered by the UNCITRAL. Achmea B.V. v. The Slovak Republic, UNCITRAL PCA Case No. 2008-13, Award (Dec. 7, 2012).
submitted requests. For the first time in the history of investment arbitration, oral hearings were transmitted live via internet. Amici were also provided with access to the transcripts.

Finally, in Philip Morris and others v. Uruguay, the ICSID received a request for amicus participation from the World Health Organization and the WHO’s Framework Convention on Tobacco Control Secretariat. The request was accepted. The amici did not request access to documents or hearings.

This excursion through the ICSID case law shows that while initial requests for access to documents and hearings were rejected, recently non-disputing parties have occasionally been granted rights beyond the mere submission of briefs. In Piero Foresti and others v. South Africa the tribunal granted access to the parties’ key documents. In Ioan Micula and others v. Romania the amicus was allowed not only access to the parties’ pleadings but also to hearings. In *Pac Rim Cayman v. El Salvador*, amici had access to the arbitral documents and followed the hearings via the internet. However, this only happened because the dispute was

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133 See *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, http://www.italaw.com/cases/783 [https://perma.cc/83L8-785X]. Furthermore, the Republic of Costa Rica and the United States of America have also made written submissions on the interpretation of the Dominican Republic – Central America – United States Free Trade Agreement. *Id.*


135 *Id.*


137 *Id.* at para. 29.

138 *Id.*

139 Citation needed


142 See Zengerling, *supra* note 139, at 127.
subject to the Dominican Republic – Central America – United States Free Trade Agreement, whose article 10.21(1) provides that arbitral documents shall be made available to the public, and that hearings shall be conducted in public.\textsuperscript{143} In one case subject to the ICSID Rules (Electrabel v. Hungary) the amicus was allowed access to key documents but not to hearings.\textsuperscript{144} In another case (AES Summit Generation and other v. Hungary) the request for access to the parties’ written submissions was rejected, and there was no request for permission to attend the hearings.\textsuperscript{145} Finally, in one case (Philip Morris and others v. Uruguay) the amici did not require permission for access to documents or hearings, so it is not possible to know how the tribunal would have decided such requests.\textsuperscript{146}

This survey shows that the extension of participatory rights of amici curiae beyond the presentation of written submissions has been timid. There were a few exceptions but they do not allow to identify a clear trend towards greater transparency and public participation in proceedings under the ICSID Rules. As a result, amici have a myopic vision of the dispute. The efficiency of amicus participation without access to arbitral documents and hearings is doubtful for different reasons. First, without having access to the key arbitral documents, potential amici cannot fully understand the nature of the dispute and the issues raised therein and decide whether they want to intervene.\textsuperscript{147} Non-parties are unlikely to have a complete picture of the dispute by relying solely on the tiny description available on the ICSID website or by reading press reports.\textsuperscript{148} Second, if not granted access to the parties’ submissions, amici have difficulties in determining whether they can actually ‘assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular


\textsuperscript{145} AES Summit Generation Ltd. v. Hungary, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf [https://perma.cc/8AUM-U479].

\textsuperscript{146} See Morris v. Uruguay, supra note Error! Bookmark not defined., at para 16.

\textsuperscript{147} See Bernasconi-Osterwalder, supra note 25, at 206.

\textsuperscript{148} See Blackaby, supra note 19, at 272.
knowledge or insight that is different from that of the disputing parties’, as stipulated in the ICSID Arbitration Rules.\textsuperscript{149} Without access to relevant documents and proceedings, the ability of amici to formulate effective, meaningful, and informed submissions is seriously limited;\textsuperscript{150} even worse, they may end up giving opinions based on inaccurate or incomplete information.\textsuperscript{151} As they do not know whether the parties have already addressed their main concerns or what arguments they have already presented,\textsuperscript{152} there is also a risk of overlap or redundancy. As a result, the disputing parties may have to comment on submissions which may be useless or repetitive.\textsuperscript{153}

In their current state the ICSID rules provide a limited solution to the perceived problem of lack of public participation in investment arbitration. Amicus curiae have been justified as a useful tool to, inter alia, increase the transparency of the dispute settlement mechanism.\textsuperscript{154} However, this objective is ancillary to the true purpose of amicus curiae, which is to assist the tribunal by providing the arbitral panel with arguments, perspectives and expertise that

\textsuperscript{149} See Bernasconi-Osterwalder, supra note 24, at 205; Orellana, supra note 113, at 101.

\textsuperscript{150} See Bernasconi-Osterwalder, supra note 24, at 206; Blackaby, supra note 19, at 268; Nicholas Hachez & Jan Wouters, International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?, in Investment Law within International Law: Integrationist Perspectives 417, 439 (Freya Baetens ed., 2013); Magraw, Jr., supra note 8, at 344; Miles, supra note 22, at 374–75; Rahim Moloo, Evidentiary Issues Arising in an Investment Arbitration, in Litigating International Investment Disputes: A Practitioner’s Guide 287, 310 (Chiara Giorgetti ed., 2014); Kyla Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments, 16 RECIEL 230, 231 (2007); Wong, supra note 47, at 266, 269.

\textsuperscript{151} See James Harrison, Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?, in Human Rights in International Investment Law and Arbitration 396, 406 (Pierre-Marie Dupuy et al. eds., 2009); Triantafilou, supra note 21, at 577.


\textsuperscript{154} Probably referencing Maxwell piece below.
the disputing parties may not provide.\textsuperscript{155} Granting amicus curiae status to non-disputing parties is a fundamental gateway for public participation in the arbitration process. Naturally, the effectiveness and usefulness of this participation will depend upon the transparency of the proceedings, in particular the extent of access to key documents which enables the amici to understand the nature of the dispute and the arguments under discussion. Hence, a distinction should be drawn between transparency and public participation. One thing is to have access to information on the dispute; another is to be able to take part in the arbitral proceedings, not passively but actively, having a chance to influence the course of the proceedings. If amici are not given a proper chance to get acquainted with the statements of claim and defence and other essential documents, and attend the hearings, they are seriously prevented from exercising their role. Without effective knowledge of the essential elements of the dispute, amici are precluded from making informed submissions and instil public concerns into the decision-making process. The openness of proceedings to civil society through the participation of amici curiae requires a higher measure of transparency. Indeed, openness implies a form of active transparency – amici need to be able not only to ‘see’ what is going on but also to actively participate in the proceedings. Naturally, the issues of transparency and third party participation are intimately linked. Transparency allows for more informed public participation; just like third party participation increases the transparency of the process.

\textbf{IV. The Need for a More Efficient Therapy}

Amicus curiae participation has been hailed as a mechanism that raises public policy considerations which are necessary to properly decide disputes deeply associated with public interests.\textsuperscript{156} In some cases the legitimacy of adjudicative decisions which affect regulatory concerns requires views other than those of the investor and host state to be represented in the process.\textsuperscript{157} The participation of non-disputing parties in the proceedings allows for the introduction of public interests and common concerns in the


\textsuperscript{156} See Newcombe, \textit{supra} note 43, at 30.

\textsuperscript{157} See Van Harten, \textit{supra} note 23, at 159.
arbitration system.\textsuperscript{158} However, concerns regarding the openness of the dispute settlement mechanism may continue to linger in the absence of rules that endow amici curiae with proper participation rights.\textsuperscript{159} The ICSID Rules grant amici curiae the right to file amicus briefs without simultaneously granting them access to the arbitration proceedings.\textsuperscript{160} The 2006 reform seems to have stopped in the middle of the road towards greater public participation,\textsuperscript{161} constraining the potential advantages of amicus curiae intervention.\textsuperscript{162} Admitting amici without granting them true participatory rights is at most a 'political quick fix'.\textsuperscript{163} Ten years have elapsed since the last amendment to the ICSID Arbitration Rules.\textsuperscript{164} Over the last decade, tribunals, disputants, and non-disputing parties had the opportunity to get acquainted with the ICSID provisions on the participation of non-disputing parties and to test their advantages and shortcomings. The time is ripe to fine-tune them according to the lessons learned from the existent case law.

A movement towards the expansion of participatory rights of amici curiae is already noticeable in the negotiation of international investment treaties. A few recent investment agreements have incorporated express rules allowing for amicus curiae participation and granting them access to arbitral documents and hearings. In arbitral proceedings conducted under these instruments the disputing parties will not have the possibility of refusing public participation since the procedure to be applied by the tribunal is determined not only by the applicable rules of the arbitration institution but also by those laid down in the investment treaty.\textsuperscript{165} “While this method of attaining amicus curiae participation is not as all-encompassing as amending the ICSID Arbitration Rules, it has an incremental effect.”\textsuperscript{166} If this trend becomes widespread, the ICSID may consider that extensive participatory rights are an

\textsuperscript{158} See Magraw Jr., \textit{supra} note 8, at 343; Ragni, \textit{supra} note 40, at 87.
\textsuperscript{159} Citation needed
\textsuperscript{160} See Magraw Jr., \textit{supra} note 8, at 344.
\textsuperscript{161} See Zachariasiewicz, \textit{supra} note 30, at 223.
\textsuperscript{162} See Ragni, \textit{supra} note 40, at 98.
\textsuperscript{163} See Blackaby, \textit{supra} note 19, at 274.
\textsuperscript{164} See ICSID Regulations and Rules, \textit{supra} note 59.
\textsuperscript{165} See De Brabandere, \textit{supra} note 62, at 163.
\textsuperscript{166} See Bastin, \textit{supra} note 37, at 232.
integral part of the concept of amici curiae and should therefore be granted whenever this status is conceded to non-disputing parties.

In the framework of the North American Free Trade Agreement (NAFTA)\textsuperscript{167}, the public access to arbitration documents is much easier than under the ICSID Arbitration Rules. In a 2001 Statement,\textsuperscript{168} the Free Trade Commission clarified that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.\textsuperscript{169} The NAFTA parties agreed to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of confidential business information; information which is privileged or otherwise protected from disclosure under the Party’s domestic law; and information which the Party must withhold pursuant to the relevant arbitral rules, as applied.\textsuperscript{170} The parties reaffirmed that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.\textsuperscript{171}

Similarly, article 29(1) of the 2012 U.S. Model Bilateral Investment Treaty\textsuperscript{172} provides that the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing party and make them available to the public: pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions, minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal.\textsuperscript{173} Article 3 of the UNCITRAL Rules on

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\textsuperscript{167} See http://www.naftanow.org/.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{173} Id.
Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014, also requires the following documents to be made available to the public, subject to some limitation on confidential or protected information: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal. Finally, article 9.23 (Transparency of Arbitral Proceedings) of the Trans-Pacific Partnership, as released in November 2015, provides that, subject to some limitations, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing parties and make them available to the public: the notice of intent; the notice of arbitration; pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions; minutes or transcripts of hearings of the tribunal, if available; and orders, awards and decisions of the tribunal.

The ICSID Arbitration Rules contain no express provision on the access of non-disputing parties to arbitral documents. Thus, the tribunal can decide the question under the general procedural powers contained on Article 44 of the ICSID Convention. Such a decision is not subject to the consent of the parties, unless there is a confidentiality order made earlier in the proceedings. In order to

176 ICSID Convention, Regulations and Rules, art. 42 (Apr. 2006).
file informed submissions, amici normally need to have access to more information than that publicly available. However, sometimes tribunals consider that the information in the public domain is sufficient and thus deny access to the arbitral record. This approach to the problem is also a result of the traditional assimilation of the principle of confidentiality – habitually seen as one of the cornerstones of arbitration – in the settlement of investor-state disputes. However, investment disputes are frequently associated with public interest and common concerns. Therefore, the level of confidentiality should be lower in investment arbitration than in commercial arbitration. As the ICSID Arbitration Rules are silent on which documents should be made public and which should remain confidential, the tribunal has the discretion to determine which documents should be made accessible to amici in each case.

The ICSID Arbitration Rules should be amended, expressly granting amici the right to access key arbitral documents. The existence of public interests associated with investor-state arbitrations should lead to a presumption of publicity of the proceedings, unless confidentiality can be justified, in whole or in part. If amici are provided with essential documents they have a better opportunity to make an insightful contribution to the proceedings. Timely disclosure of information is vital to better participation, and the disadvantages are minimal. In cases where parties express legitimate concerns about the disclosure of confidential or privileged information the tribunal should ask the disputing parties to summarize the facts, issues and arguments.

The legal instruments mentioned above are useful sources of

178 Id.
180 Id. at 374.
181 Id.
inspiration in shifting the role of amici in ICSID arbitrations from passive witnesses to active participants.

The last years have also witnessed a growing trend in favour of allowing public access to the arbitral hearings. Within NAFTA, Canada, the United States, and Mexico have agreed that investor-state hearings should be open to the public. 186 Similarly, article 29(2) of the 2012 U.S. Model Bilateral Investment Treaty provides: ‘The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.’ 187 However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. 188 The tribunal shall make appropriate arrangements to protect the information from disclosure. 189 Pursuant to article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, hearings for the presentation of evidence or for oral argument shall be public. 190 Where there is a need to protect confidential information or the integrity of the arbitral process, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection. 191 The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). 192 However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible. 193 The second paragraph of article 9.24 of the Trans-Pacific Partnership also establishes the open nature of

188 Id.
191 Id.
192 Id.
193 Id.
hearings.\textsuperscript{194} The tribunal is required to determine, in consultation with the disputing parties, the appropriate logistical arrangements and make appropriate arrangements to protect protected information.\textsuperscript{195} The approach taken in the Trans-Pacific Partnership is different from previous provisions on procedural transparency because its application is mandatory and arbitral hearings can only be closed temporarily.\textsuperscript{196} It is a substantial step towards greater transparency and openness in investment arbitration.

As the current text of rule 32(2) requires the consent of the parties, public access to the proceedings remains conditional.\textsuperscript{197} In practice, most hearings and are not open because one of the parties objects to the presence of third parties at the hearings, even when the dispute presents a clear public interest.\textsuperscript{198} ICSID tribunals should have the power to decide for themselves whether to permit amici’s access to hearings. This could be achieved simply by removing the prerequisite of ‘the consent of the parties’\textsuperscript{199} mentioned on rule 32(2) or by introducing criteria similar to those contained in rule 37(2) concerning written submissions.\textsuperscript{200} This change has been suggested previously but was not included in the amendments of 2006.\textsuperscript{201} The removal of the veto power of the parties would increase the sphere of activity of amici curiae.\textsuperscript{202} An evolution of the rule in this sense seems unstoppable in the long run.\textsuperscript{203} NAFTA, the 2012 US Model BIT, the UNCITRAL Rules on Transparency in

\textsuperscript{194} Trans-Pacific Partnership, article 9.23.

\textsuperscript{195} Id.


\textsuperscript{197} ICSID Convention, Regulations and Rules, r. 32(2) (Apr. 2006).

\textsuperscript{198} ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW: PROCEDURAL ASPECTS AND IMPLICATIONS 162, 163 (2014).

\textsuperscript{199} ICSID Convention, Regulations and Rules, r. 32(2) (Apr. 2006).

\textsuperscript{200} Id. at r. 32(7).


\textsuperscript{203} Carl S. Zoellner, Third-Party Participation (NGO’s and Private Persons) and Transparency in ICSID Proceedings, in THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES - TAKING STOCK AFTER 40 YEARS 206 (Rainer Hofmann & Christian Tams eds., 2007).
Treaty-based Investor-State Arbitration and Chapter 9 of the Trans-Pacific Partnership constitute powerful examples of how the publicness of arbitral hearings is becoming an entrenched principle in modern investment instruments. According to Parra, the time may have come for ICSID to reverse the general rules regarding access to documents and attendance at hearings; more specifically, ICSID might amend its rules to provide for the publication of all documents generated in proceedings, unless or to the extent decided otherwise by the arbitrators, and for tribunals to have full authority to allow third parties to attend or observe hearings. 204

The expansion of the participatory rights of amici curiae should, naturally, be made with caution. Still, if concerns regarding confidential information and the cost and time-efficiency are properly taken into account, it seems possible to strike an appropriate balance between preserving the traditional features of arbitration and enhancing the systemic legitimacy of state-investor dispute resolution. 205 Most, if not all, potential costs of increased transparency can be avoided if tribunals carefully exercise their discretion in the fields of transparency and third party participation. And, because the parties choose their arbitrators and trust them to rule on the substantive issues, there is no convincing reason why tribunals should be unfit to properly manage these procedural competence as well. 206

While ICSID Arbitration Rules and international investment agreements are not amended, the expansion of the role of amici curiae will depend, to a large extent, on the efforts of amici themselves. A revision of these instruments takes time and requires negotiating efforts. As a result, the conditions of confidentiality and lack of capacity for amicus submissions are likely to remain the predominant practice for investor-state arbitration for the years to come. 207 The scenario does seem likely to change in the near future,

207 Kate Miles, Reconceptualising International Investment Law: Bringing the Public Interest into Private Business, in INTERNATIONAL ECONOMIC LAW AND NATIONAL
particularly due to the nature of arbitration as a process driven by the parties’ agreement.\textsuperscript{208} Still, amicus status may be the only available route for public participation in many cases.\textsuperscript{209} Third parties interested in having access to the proceedings and actively taking part in them should strive to win and deepen the familiarity and trust that states and tribunals have with and in them. By making reasonable and targeted demands, which seek to augment by gradations the current structure of the system and not to overhaul it holistically, amici curiae will be more likely to achieve institutional reform granting them greater access.\textsuperscript{210} As the participation of non-parties becomes more frequent, amici curiae may strive for tribunals to lessen current limits on access to documents and hearings. Alternatively, parties – namely, states – with an interest in hearing from a particular third party may request the tribunal to hear them a fact or expert witness. In this case they will have access to the record and their testimony will be subject to the same scrutiny at the oral hearing as that of any other witness.\textsuperscript{211}

Civil society plays an increasing role in the debate surrounding the evolution of the international investment law and policy regime. This process will more and more involve, if not require, a multi-stakeholder process that takes into account the concerns of civil society, reflecting the pluralistic nature of modern societies.\textsuperscript{212} It may be said that non-disputing parties are filling a gap in regulatory order by placing certain issues on the political agenda, and


contesting the very future of that regulatory order by their actions. Overall, the nature of investor-state arbitration calls for a greater measure of public participation. When crucial public interests are involved, public interest groups and NGOs should be given a fair and adequate opportunity to voice their concerns about the possible impact of the arbitral award in the community at large. Greater public participation also adds a measure of accountability for the arbitrators, giving them greater incentive to consider the public’s interest.

The ICSID Arbitration Rules, as they currently stand, are clearly unsatisfactory. The procedural flaws identified previously perpetuate a system and culture that is antagonistic to the proper consideration of public policy issues in investment disputes. A reform is necessary so as to strike a proper balance between public policy concerns and investment promotion and protection. The principle of public participation should be, if not completely assimilated, at least better balanced against other rationales of the investor-state dispute settlement mechanism. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Transparency elevated the principle of transparency into one of the global norms in international investment law. NAFTA, the 2012 US Model BIT and similar BITs and Chapter 9 of the Trans-Pacific Partnership also set higher standards that turn public participation into a cornerstone of the investor-state arbitration system. After one decade of consolidation of the figure of amici curiae, the time is ripe for ICSID to endow non-disputing parties with the necessary tools to perform their function with greater benefit to the parties, the arbitration community, and the public at large.

213 Peter Muchlinski, Policy Issues, in The Oxford Handbook International Investment Law 3, 8 (Peter Muchlinski et al. eds., 2008).
214 Kate Miles, Reconceptualising International Investment Law: Bringing The Public Interest Into Private Business, in International Economic Law And National Autonomy 307 (Meredith Lewis & Susy Frankel eds., 2010).
Ideas for ICSID Amendments in 2017: 
Exploring Early Mediation or Conciliation
Christine Sim*

In 1982, Broches noted that:

“[T]here is a growing wish to explore the possibilities of conciliation, possibly in an attempt to combine the advantages of both procedures. The idea of a convention to recognize and enforce agreements arrived at after conciliation has been suggested by Dr. Otto-arndt Glossuer, the well-known German arbitration expert, but I think that is too tricky an enterprise. I think we have other more pressing worries.”¹

More than 34 years later, in 2016, approximately 36-40% of ICSID arbitrations are consistently settled or withdrawn before the final award.² Out of the 444 concluded investor-state cases to date, approximately 26-28% of investor-state arbitrations are settled before an award.³ There is therefore, the potential for settlement of roughly one-third of investment arbitrations by mediation or conciliation.

This brief discussion paper discusses the enduring suitability of investment disputes for mediation or conciliation, and suggests amendments to improve the use of mediation or conciliation to build in windows for settlement of ICSID disputes. Mediation and conciliation are used interchangeably in this paper.

A. THE VALUE OF MEDIATION OR CONCILIATION FOR INVESTMENT DISPUTES

1. Preserving investor-State relationships
The informal mediation or conciliation environment is likely to be warmer than that of the

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adjudicative forum. The "win-win" character of the conciliatory process is a major advantage since it facilitates the maintenance of a harmonious business relationship, whereas the use of an adjudicative form may rupture this connection.⁴ Conciliation can be particularly effective in "cases in which the parties are engaged in an ongoing long-term project, involving significant amounts in sunk costs, where it is necessary to resolve disputes while the project is still continuing. Disputes in oil and gas explication projects, mining and long-term infrastructure projects are well-suited.⁵ The relationship between the investor and the State in *Hess Equatorial Guinea Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea*⁶ which has continued with further investments, despite a suspended conciliation process and threat of international dispute settlement proceedings, is a good example of the compatibility of conciliation with preserving long-term investment projects.

2. Saving ‘face’

Where "bringing disputes settlement proceedings against a state is regarded as an 'unfriendly act' that may imply diplomatic costs in inter-state relations", conciliation procedures with its consensual outcomes may be more acceptable as it is a "softer" form of dispute settlement which is "less threatening to the sovereignty of host states".⁷ In 1961, the executive director representing several Latin American States at the World Bank Mr Machado noted that as a cultural matter, "[c]onciliation enabled a government to save face."⁸ The conciliation commission’s report was considered extremely useful in certain cultures that placed particular emphasis on pride and reputation.

3. Saving costs

If unsuccessful, it has been argued that conciliation as a process itself is a waste of time and costs. Roughly 64% of respondents are developing countries. Legal and procedural expenses divert much-needed financial and human resources away from development priorities.⁹ Prime examples of unsuccessful conciliations are *Togo Electricité v Republic of Togo*,¹⁰ *RSM v Cameroon*,¹¹ wherein the conciliation procedures that preceeded arbitration appear on hindsight, to have been a complete waste of costs by duplicating the dispute settlement process.
If successful however, conciliation is less costly than other adjudicative methods.\textsuperscript{12} It also reduces enforcement risks and narrows pleadings. According to one practitioner, a complex international dispute can be resolved within six months, with proper professional mediation.\textsuperscript{13} If a small claim is involved, conciliation should be preferred since it will be more cost-effective than litigation.\textsuperscript{14}

B. THE PROBLEM WITH MEDIATION OR CONCILIATION USED AS A STEP BEFORE ARBITRATION

A survey in 2016 showed that the most common practice of combining non-binding dispute settlement with binding arbitration in commercial disputes was sequential, using a 'stacked' dispute resolution clause.\textsuperscript{15}

Using conciliation as a step to arbitration is however, not the most efficient way to use conciliation in encouraging settlement of investment disputes. In practice, practitioners and government officials facing claims from foreign investors will know that structuring an unsuccessful conciliation or mediation as a preliminary step to arbitration lends itself to being used as a significant delay tactic.\textsuperscript{16} Coe has accurately identified the problem—the chief weakness of the conventional two-step model of med-arb is that arbitration makes no progress during the conciliation process.\textsuperscript{17}

C. RE-CONSTRUCTING MEDIATION OR CONCILIATION INTO THE ARBITRATION PROCEEDINGS

1. Arb-Med-Arb

The purpose and most effective use of Alternative Dispute Resolution (ADR) is often “building in complementary resolution methods, not usurping current adjudicatory procedure”.\textsuperscript{18} One proposal for reforming ICSID conciliation as a popular and effective tool for resolving investment disputes, is

\begin{itemize}
\item \textsuperscript{14} Linda C Reif, Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes, 14 Fordham International Law Journal 578 (1990–91) (‘Reif’), p 634.
\item \textsuperscript{15} Dilyara Nigmatullina, ‘The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study’ (2016) Volume 33 Issue 1 Journal of International Arbitration 37, p 49.
\item \textsuperscript{16} Jack C Coe Jr, ‘Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch’, (2005) Vol 12UC Davis J. Int’l L. & Pol’y 7 (‘Coe’), p 31: There may be reasons, especially for a respondent sovereign, to welcome delay. For a state facing multiple claims, delay may be a method of managing it resources. It may also be, however, a tool for effecting more Machiavellian strategies.”
\item \textsuperscript{17} Coe, p 32.
\end{itemize}
to structure conciliation as a mechanism to be used during the arbitration. This creates optimal “intertwining between negotiation and third-party dispute settlement” and “mixing those characteristics”. Such an intertwining Arb-Med-Arb approach has seen great success in domestic legal systems such as Germany, Singapore, Switzerland and China where the same or different judges regularly interact with the parties in the course of proceedings to attempt to settle the case.

Tribunals have been instrumental in the settlement of many ICSID arbitration cases. In 1982, Broches reported that out of 10 ICSID arbitration cases concluded, 6 were discontinued after settlement. He remarked that "even in those instances where the disputants went beyond the edge of the water, they got out again and settled the case." On hindsight, it is precisely because these parties had gone “beyond the edge” by instituting binding proceedings, that they were able to reach a settlement.

The system provided under the SIAC-SIMC Arb-Med-Arb Protocol of the Singapore International Mediation Centre started in November 2014 may be considered as a model. The Protocol provides that after receipt of the notice of arbitration and response, the case will be referred to mediation. To prevent delay of the arbitration, the mediation is limited to eight weeks. If settlement attempts fail, parties will revert to arbitration. The looming threat of the strict timeline of an arbitration can be a significant motivation for negotiating settlements.

2. Exploring mediation or conciliation at the first procedural conference

In 1996, a prominent counsel at ICSID Ziadé suggested that pre-hearing conferences between the parties to arbitration proceedings led to early settlements. Under the 1984 ICSID Arbitration Rules, it was envisioned that the first pre-hearing conference between the Arbitral Tribunal and the parties would be used to facilitate an early amicable settlement. Using the first procedural conference call of an ICSID arbitration to explore whether conciliation could resolve the dispute, could reduce ICSID’s
arbitration caseload. The first procedural conference also intervenes at an early stage, when both parties to the dispute may be more flexible in their ability to act, and their relationship may still stand on positive ground.\textsuperscript{28} Non-monetary or policy-based alternatives are more readily available and acceptable at this stage.\textsuperscript{29}

3. **Early costs estimates**

It has also been suggested that an early evaluation given by the conciliator of the estimated costs of the potential arbitration and a forecast of timelines with potential delays, may be helpful to incentivise settlement.\textsuperscript{30} Estimates of future costs could assist parties in weighing the costs and benefits of proceeding with conciliation or arbitration. Disputing parties are often unable to predict just how astronomical costs of legal representation and proceedings could become.

4. **Calling ‘time out’**

Conciliation without a time limit can also be used as a dilatory tactic.\textsuperscript{31} It is recommended that the ICSID conciliation commission’s powers to determine that a dispute cannot be settled should be strengthened. To master efficient timelines, provisions may be adopted such as ICC Conciliation Rule 4: “The conciliator shall inform the parties of his appointment and set a time-limit for the parties to present their respective arguments to him”.\textsuperscript{32} There is no requirement that the ICC conciliator invite written statements. Time limits can be issued in procedural orders.\textsuperscript{33}

5. **Flexibility in using experts**

Procedures for mediation or conciliation requires a certain degree of flexibility and goodwill from the parties.\textsuperscript{34} A good example is in a case involving several infrastructure projects, two disputing governments agreed to appoint an even number of conciliators, comprising one legal and one technical expert. The findings of those two experts were not binding, but served as the basis for successful negotiations concluding with a settlement.\textsuperscript{35}

6. **Allowing third party participation**

Third party participation in the mediation or conciliation should be explored. It has been

\textsuperscript{28} Constatin, p 34.
\textsuperscript{29} Constatin, p 34.
\textsuperscript{30} Schneider, p 141.
\textsuperscript{32} ICC Conciliation Rules 1988, Article 4.
\textsuperscript{33} ICSID Conciliation Rules, Rule 19.
\textsuperscript{34} Schreuer, p 444; Reif, pp 586-587, 634-368.
recognized that getting governments to compromise is difficult, because "the central government or the competent ministry alone may... require mechanisms and procedures through which the negotiator on the side of the host State receives from other departments involved the necessary information and authority to conduct the negotiations and reach settlement" and "budgetary authority is of particular importance."\textsuperscript{36} Depending on the control and audit process of that state, it is critical that every competent institution is involved in the conciliation.\textsuperscript{37} Non-governmental organizations may wish to participate in the process, and failure to include them could result in repercussions on the legitimacy of conciliation.\textsuperscript{38}

\section*{7. Safeguards for conflict risks}

It remains important to note that it is not ideal that arbitrators act as conciliators in politically sensitive investment disputes.\textsuperscript{39} Arbitrators descending into the fray as mediators is a practice only culturally accepted in a handful of jurisdictions.\textsuperscript{40} Thus, a 2009 commission studying the low rate of settlement in international arbitrations, encouraged arbitrators to facilitate settlements, but concluded with a slew of warnings. Some notable warnings were that "[a]rbitrators should not meet with the Parties separately”, they should not “obtain any information from one Party which is not shared with the other Parties”, “arbitrators must also avoid putting pressure on the parties to settle”, and most fatally, “[i]f, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign”.\textsuperscript{41}

\section*{8. Early neutral evaluation}

Government officials also face limitations on authority to settle and risks of personal liability.\textsuperscript{42} Written recommendations of a respected conciliator could be helpful to government officials in justifying their recommendations to settle. An early neutral evaluation given by an evaluative mediator could assist in narrowing the legal issues in dispute or the divide in quantum. The difference

\textsuperscript{36} Schneider, p 144.  
\textsuperscript{37} Schneider, p 144.  
\textsuperscript{38} Franck, p 184.  
\textsuperscript{40} Centre for Effective Dispute Resolution Commission on Settlement in International Arbitration, Draft Paper for Consultation (2009), Chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler (‘CEDR’), p 1, para 1.3.  
\textsuperscript{41} CEDR, recommendations 4.2.6, 4.2.7, and 4.3.  
between private negotiations on the side and evaluative conciliation is the expertise and trust of a third party neutral, who would provide a rational view on the merits of the case. The arbitrators cannot provide this, and the parties cannot glean such information from procedural orders alone. Commonly, the claimant’s expert’s calculation is several times larger than the respondent’s expert’s calculation.

9. **Consider strict time limits**

A limited timeframe for ICSID conciliation is worth considering. The conciliation procedures in Annex V of the UN Convention on the Law of the Sea were designed with a one-year termination date. Setting an ‘expiry date’ for the conciliation ensures that parties cannot use conciliation to delay compulsory dispute settlement procedures.

10. **Provisions for ‘consent’ awards**

In order to circumvent the problem of unenforceable settlement agreements, an amendment of the ICSID arbitration rules, to structure in a window for early mediation or conciliation, could make it part of the arbitration process. If a settlement is reached, the result would be a consent award, enforceable under the ICSID Convention, the New York Convention and recognized as an arbitral award under domestic laws. In 2013, 40 out of 471 ICC arbitration awards were consent awards.

D. **CONCLUSION**

These suggestions are part of the author’s larger study on ICSID Conciliation. The ICSID Conciliation Rules have remained largely untouched since 1968. It is hoped that the 10 suggestions above are starting points for the Secretariat’s work in updating and modernizing the ICSID Rules and Regulations.

In particular, it is suggested that the following amendment be made to ICSID Arbitration Rule 20:

**Rule 20**

**Preliminary Procedural Consultation**

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to

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43 See for example, United Nations Convention on the Law of the Sea Annex V, Article 7:
“1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.

2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties.”


ascertain the views of the parties regarding questions of procedure and whether the parties are willing to attempt mediation or conciliation by a third party. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

(a) the number of members of the Tribunal required to constitute a quorum at its sittings;

(b) the language or languages to be used in the proceeding;
(c) the number and sequence of the pleadings and the time limits within which they are to be filed;
(d) the number of copies desired by each party of instruments filed by the other;
(e) dispensing with the written or the oral procedure;
(f) the manner in which the cost of the proceeding is to be apportioned; and
(g) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

(3) For the purposes of ascertaining the views of the parties regarding whether they are willing to attempt mediation or conciliation by a third party, the President of the Tribunal shall, in particular, seek their views on the following matters:

(a) the selection of a mediator or conciliator;
(b) the time limit for mediation or conciliation;
(c) the confidentiality and ‘without prejudice’ nature of the mediation or conciliation;
(d) the procedures for mediation or conciliation; and
(e) the costs of the mediation or conciliation.
ICSID Rules Amendments

Proposals from Freshfields Bruckhaus Deringer LLP (International Arbitration Group)

The following proposals are made in response to the communication from the ICSID Secretariat, dated 25 January 2017, to contribute suggestions for amendments to the ICSID rules.

Appointment of arbitrators (Arbitration Rules 1-4, Institution Rules 2 and 3)

To allow for a speedier constitution of arbitral tribunals, consider:

- Requiring claimant, in the Request for Arbitration, to (i) nominate arbitrators and (ii) propose a method for constituting the Tribunal if no previous agreement exists; and
- Shortening the time-limits and simplifying the procedure applicable under Rule 2 (agreement by the parties on the method of appointment).

Disqualification of arbitrators (Arbitration Rule 9)

To improve efficiency and fairness in the conduct of proceedings, consider:

- Abolishing the mandatory suspension of proceedings following an arbitrator challenge, to discourage parties from filing strategic challenges in order to delay proceedings (for instance, the SIAC Investment Arbitration Rules provide that the SIAC Registrar may order a suspension of the proceedings until a challenge is resolved; see Rule 12.4). In those circumstances, the impact on Arbitration Rule 8 concerning the Incapacity and Resignation of the Arbitrators should also be considered; and
- Setting a strict time-limit for challenging the arbitrator(s) and deciding on a challenge, eg, 30 days.

Copies of instruments (Arbitration Rule 23)

- Consider simplifying Arbitration Rule 23 (requiring filing of hard copies of materials) by providing for the electronic filing of documents as a default, unless otherwise agreed by the tribunal and the parties.

Counter-claims (Arbitration Rule 31)

- Consider amending Arbitration Rule 31 (Written Procedure) to reflect the possibility of counterclaims, which may require additional briefing.
**Provisional measures (Arbitration Rule 39)**

To improve legal certainty, consider:

- Explaining the categories of provisional measures that may be ordered (e.g., through a non-exhaustive list as in Article 26.2 of the UNCITRAL Arbitration Rules);
- Setting a standard for the award of provisional measures (see, e.g., Article 26.3 of the UNCITRAL Arbitration Rules);
- Clarifying the availability of orders for security for costs and the criteria for making such orders (see, e.g., LCIA Arbitration Rule 25.2);
- Amending Arbitration Rule 39 to provide content to the term “recommend” provisional measures, i.e., by specifying the consequences of any default (e.g., the possibility of drawing appropriate inferences and taking any actions the Tribunal deems appropriate);
- Including provisions for the appointment of an emergency arbitrator (in light of concerns regarding compressed timelines in investor-State arbitrations and the interaction of emergency relief with cooling-off periods, an opt-in framework may be preferable – see, e.g., Rule 27.4 and Schedule 1 of the SIAC Investment Arbitration Rules; see also ICC Arbitration Rule 29(5) and LCIA Arbitration Rules Article 9.B, para 9.14).

**Preliminary objections (Arbitration Rule 41(5))**

To improve the efficiency of proceedings in general and the usefulness of the preliminary objections procedure under Rule 41(5), consider:

- Setting a time limit for the decision on the preliminary objections (see, e.g., Rule 26 of the SIAC Investment Arbitration Rules); and
- Extending the preliminary objections procedure to defences which are manifestly without legal merit (see, e.g., Rule 26 of the SIAC Investment Arbitration Rules).

**Time limit for the rendering of the Award (Arbitration Rules 38 and 46)**

To improve the efficiency of proceedings, consider:

- Making Rules 38 and 46 into a meaningful time limit for the rendering of the Award (with extensions to be granted by the ICSID Secretariat on good grounds), e.g., by linking the close of proceedings to the submission of the last post-hearing briefs, rather than leaving the step entirely to the discretion of the Tribunal; and
- Imposing an absolute time limit for rendering the Award beyond which any delay would result in the withholding of a percentage of arbitrators’ fees (see ICC policy on efficiency of proceedings launched in early 2016).
Annulment proceedings
To improve the efficiency of annulment proceedings, consider providing expressly for the possibility of a summary procedure (as in Article Rule 41(5)) on the ground that a request for annulment is manifestly without legal merit.

Consolidation of proceedings
To improve the efficiency of proceedings, consider allowing consolidation of closely-related cases or claims, based on specified criteria (see, eg, NAFTA Art. 1126(2), ICC Article 10).

Requirement of Efficient Administration
Inclusion in the Arbitration Rules of a general provision requiring the Tribunal to conduct the proceedings in a fair and efficient manner (see, eg, UNCITRAL Rules, Article 17(1)). This could be added as a new provision preceding current Arbitration Rule 13, at the start of Chapter II of the Arbitration Rules (“Working of the Tribunal”).

Payment of Arbitrators
The ICSID Administrative and Financial Regulations do not provide for a pre-determined payment schedule for the payment of arbitrators. In practice, arbitrators are paid on an ongoing basis with the advances of the parties covering 3 to 6 month periods.

Providing for the payment either after specific milestones are reached, or for 50 percent of fees during the proceedings, and 50 percent upon issuance of the award, could encourage a more efficient administration of the case.

Additional Facility Rules

Article 4(2) Additional Facility Rules
This article provides that in the event of an application for approval of access to the AF under Article 2(a) (ie, conciliation/arbitration proceedings which are not within the jurisdiction of [ICSID] because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State), the Secretary-General shall give her approval only if “(a) [she] is satisfied that the requirements of that provision are fulfilled at the time”, and (b) the parties consent to the jurisdiction of [ICSID] in the event the jurisdictional requirements under Article 2(a) shall have been met when proceedings are instituted.

The reference to “at the time” in the English version of Article 4(2)(a) creates ambiguity with respect to the moment when the assessment by the Secretary-General of the ratione personae requirements of Article 2(a) must take place – ie, on the date of filing of the application for approval of access, or on the date the Secretary-General effectively approves access to the Additional Facility. This issue became relevant in the context of Venezuela’s withdrawal from the ICSID Convention in 2012, when at least one request for approval of access to the Additional Facility (together with a Request for Arbitration against Venezuela), was submitted to ICSID before the
denunciation took effect, but was approved (and the underlying case registered) by the Secretary-General after denunciation took effect. As it was later confirmed by the Tribunal in the case in question (Rusoro v Venezuela, Award, paras. 241-268), the reference to “at the time” in Article 4(2)(a) must be understood as referring to the date when approval of access is requested. It is therefore suggested that the wording in Article 4(2)(a) be amended to read “(a) he is satisfied that the requirements of that provision are fulfilled at the time the application is made”. This amendment will also bring the English version of Article 4(2)(a) in line with its French and Spanish versions.
Rules and Regulations Reform - Expedited Procedures for Small Claims

Although ISDS is meant to enable investors of all sizes to protect their investments, the reality is that the system is designed for large claims. Following developments in the commercial arbitration world, ICSID might consider expedited procedures or a “small claims” mechanism in the investor state context. Proposals for ‘small-claims’ procedures might seem counter-intuitive in light of opposition to some newly ISDS proposed mechanisms, under the TPP and CETA. Yet there are good reasons to seriously explore the idea. A well-functioning system for small investors, or investors with small claims, would assist in the expeditious resolution of a broad range of investment disputes. It could address lower value claims, and effectively cut costs through a streamlined process with one arbitrator.

I am currently working on an article that makes the case for such mechanism, with the thesis being that a procedure that reigns in expenses, provides expedited processes for arbitration, and preserves the rights of third parties to make submissions, would be a win-win, and attractive to states as well. A variety of institutions might be able to provide such a mechanism, including the PCA or commercial arbitration centers, however given ICSID’s central place in the investor state dispute resolution infrastructure, it would be ideally placed to be at the forefront of such a move.

I would be delighted to discuss this idea further in response to your invitation to propose changes to ICSID rules and regulations.

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ICSID Rules and Regulations

Submissions to the ICSID Secretariat on revisions to the ICSID Rules and Regulations

31 March 2017 |
Executive summary

We understand that the Secretariat of the International Centre for the Settlement of Investment Disputes (ICSID) has invited suggestions regarding potential amendments to the ICSID Rules and Regulations.

We have set out in these submission our initial suggestions for potential amendments to the ICSID Rules and Regulations, drawing on the Firm’s experience in these matters and as well as comments and opinions of the international arbitration community.

These suggestions relate to:

1. the appointment and independence and impartiality of arbitrators;
2. the use of tribunal secretaries;
3. the introduction of emergency arbitrator procedure;
4. the costs and complexity of proceedings.

We emphasise that we have focused on amendments that could be made to the ICSID Rules and Regulations as opposed to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). We understand that the ICSID Convention can only be amended by unanimous ratification, acceptance or approval of the amendment by all 153 Contracting States, pursuant to Article 66 of the ICSID Convention.

However, the ICSID Rules and Regulations can be amended by a majority decision of two thirds of the members of the Administrative Council of ICSID, pursuant to Article 6(1) of the ICSID Convention. Indeed, the ICSID Rules and Regulations have been amended a number of times. The last set of amendments was made in 2006.

In this submissions, we refer to the ICSID Rules and Regulations (collectively, ICSID Rules and Regulations) as follows:

- Administrative and Financial Regulations (Regulations);
- Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules);
- Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and

We also understand that the Secretariat will compile background papers concerning various proposals for amendment taking into account the suggestions received and that the Secretariat will make proposed draft amendments available to ICSID Member States and the public and will seek their feedback in a subsequent consultation process. We would be pleased to continue being involved in the consultation process.
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Section 1

Appointment of arbitrators and their independence and impartiality
1. **Appointment of arbitrators and their independence and impartiality**

1.1 Issues that can be addressed include the appointment of arbitrators and their independence and impartiality. There are many concerns about how arbitrators are appointed, the time it takes for the constitution of a tribunal, whether arbitrators are really independent and impartial, whether they have sufficient time available to deal with the case and how challenges are addressed.

1.2 Some measures that may be considered to address some of these issues are set out below.

**Stricter time limits for the appointment of arbitrators**

1.3 Articles 37 to 40 of the ICSID Convention relate to the constitution of the Tribunal. Article 37 provides that the Tribunal shall be constituted “as soon as possible” after registration of the Request for Arbitration. It also provides that, unless the parties have agreed otherwise (Article 37(2)(b)):

(a) the Tribunal shall consist of three arbitrators; and

(b) the parties shall each appoint one arbitrator and the third (who shall be the president of the tribunal) shall be appointed by agreement of the parties.

1.4 Article 38 provides that if the Tribunal has not been constituted within 90 days after the notice of registration of the Request for Arbitration (or such other period as the parties agree), then the Chairman shall at the request of either party and after consulting with the parties, appoint the arbitrator or arbitrators not yet appointed.

1.5 The Arbitration Rules provide a process for the appointment of the arbitrators in the event that the parties have not otherwise agreed.

1.6 First, Arbitration Rule 2 provides a process for agreeing on the number and method of appointment of the arbitrators. This process takes at least 30 to 50 days:

(a) within 10 days of the registration, the requesting party may propose the number of arbitrators and the method of appointment;

(b) within 20 days of receipt of the proposal, the other party may accept the proposal or make another proposal; and

(c) within 20 days after receipt of the reply, the requesting party shall notify the other party whether it accepts or rejects such proposals.
1.7 If no agreement is reached within 60 days, then either party may inform the Secretary-General that the Tribunal is to be appointed in accordance with Article 37(2)(b) and Arbitration Rule 3.

1.8 Second, Arbitration Rule 3 then provides a default process if the parties have not or cannot agree on the number of arbitrators or the method of appointment:

(a) either party may communicate to the other party the name of the arbitrator that it appoints and the name of an arbitrator it proposes to be the president and invite the other party to agree to that proposal;

(b) the other party may then "promptly" communicate the name of the arbitrator that it appoints and whether or not it agrees to the proposed president or the name of another proposed president; and

(c) the initiating party may then "promptly" upon receipt communicate whether or not it concurs with the proposed president or suggest another name.

1.9 Arbitration Rule 3 does not provide any time limits for this process. The only time limit is provided in Article 38, which provides that the Chairman may step in if the Tribunal has not been constituted within 90 days of the notice of registration, "or such other period as the parties may agree".

1.10 In practice, it is common for the parties to extend the 90 day period at least once or even a number of times. Indeed, it often takes up to 4 or 6 months or even longer before the Tribunal is constituted.

1.11 If the Parties have gone through the process in Arbitration Rule 2, then up to 2 months (or even more than) may have passed since the registration of the Request for Arbitration before the parties have even agreed on the number of arbitrators and the method of appointment. A further 2 to 3 months or even 4 months may pass before the Tribunal is constituted.

1.12 Of course, it is understood, and it must be kept in mind, that the appointment process is a very important part of the arbitration proceedings and is always subject to the parties agreement. In particular, if the parties want to extend the time limits for the appointment process then they should be entitled to do so. Further, it may take time for the State involved (who is usually the respondent in the proceedings) to engage counsel and then give proper consideration to the appointment of its arbitrator.

1.13 Having said that, the appointment process should not be used by either party as a delaying tactic. Whilst there are a number of potential delays that may occur during the process, the appointment process is one of the first delays that may occur.
1.14 For this reason, we would suggest that the appointment process be made more efficient through the following amendments to the Arbitration Rules:

(a) Arbitration Rule 2 be removed completely. The appointment process may be set out in the arbitration agreement (in the investment treaty or the free trade agreement). If it is not, then the parties may still agree on the number and method of appointment of the arbitrators regardless of the existence of Rule 2. However, the practical effect of Arbitration Rule 2 is that the parties spend 50 to 60 days (at least) going through the process in Arbitration Rule 2 in order to reach agreement on a process identical or similar to that set out in Arbitration Rule 3 anyway. It would be more efficient if the parties went straight to Arbitration Rule 3 if they have not voluntarily agreed on the number and method of appointment (in the arbitration agreement or otherwise);

(b) alternatively, we suggest that the time limits in Arbitration Rule 2 be shortened from a total period of 60 days to 30 days. As this process is only relating to the number and method of appointment, the parties should be able to consider and agree the proposals within shorter time frames. We would suggest:

(i) the requesting party include the number and method of appointment of the arbitrators in the Request for Arbitration. If it is not included in the Request for Arbitration then the parties should proceed straight to Arbitration Rule 3. This would assist with pushing the process forward but would not prevent the parties from otherwise agreeing the number and method of appointment even if it was not included in the Request for Arbitration;

(ii) the other party then respond to the proposal within 10 days rather than 20 days;

(iii) the requesting party then respond to any counter-proposal by the other party (if appropriate) within 10 days; and

(iv) either party may inform the Secretary-General within 30 days after registration that the parties will proceed in accordance with Article 37(2)(b) and Rule 3;

(c) Arbitration Rule 3 be amended so each party must propose more than 1 name for the President. We suggest that at least 3 names be proposed for the President in each proposal and that time limits be included (rather than simply saying “promptly”). Accordingly, we suggest that Arbitration Rule 3 be amended as follows:
(i) the requesting party shall communicate to the other party the name of the arbitrator that it appoints and at least 3 names it proposes for the President within 10 days of the notice of registration;

(ii) the other party shall communicate the name of the arbitrator that it appoints and respond to the proposal or make a counter-proposal of at least 3 names within 20 days of receipt of the requesting party’s proposal; and

(iii) the requesting party shall communicate its response to the counter-proposal or provide its own counter-proposal within 20 days of receipt of the other party’s proposal.

1.15 These suggestions would assist the parties with the constitution of the Tribunal within the 90 day period stated in Article 38. This may prevent the parties from delaying the process and assist with the constitution of the Tribunal within 3 months of the registration of the Request for Arbitration.

Appointing authority

1.16 Article 38 of the ICSID Convention provides that it is the Chairman of the Administrative Council (who is the President of the World Bank) who appoints any arbitrator or arbitrators that have not been appointed.

1.17 For the sake of transparency, we would suggest that the Arbitration Rules provide that the Chairman make any appointments as the appointing authority under Article 38 after consultation with a specially appointed committee within the Secretariat.

1.18 The committee could be referred to as the Appointing Committee and could be appointed by the Administrative Council. It could consist of 10 members, who have knowledge and experience with appointing arbitrators and have some knowledge of the arbitrators to be appointed.

1.19 Indeed, a similar approach may already be followed internally but this suggestion would make that process more transparent.

Challenge of arbitrators

1.20 There have been many suggestions to improve the process for the challenge of arbitrators. In particular, it has been suggested that the Administrative Council appoint a “Challenge Committee” under the Arbitration Rules to decide challenges to arbitrators. This would mean that challenges would be decided by a body separate to the tribunal.

1.21 One suggestion would be that the Challenge Committee was made up of 5 persons chosen by the Chairman. The Challenge Committee could also then assist the Chairman with his or her function to decide challenges.

1.22 However, we appreciate that the difficulty with this suggestion is that it would require a change to the challenge procedure set out in Article 58
of the ICSID Convention. Article 58 provides that the decision on a challenge of an arbitrator is to be made by the other members of the Tribunal. It is only if the other members are equally divided or more than one arbitrator has been challenged that the challenge is determined by the Chairman. Article 58 can only be changed in accordance with Article 66 of the ICSID Convention.

1.23 Having said that, one suggestion would be for the Administrative Council to appoint a Challenge Committee, who would first consider the challenge made to an arbitrator, on the basis that the Challenge Committee makes a recommendation to the other members of the Tribunal, who are to decide on the challenge. The other members of the Tribunal could then consider the challenge and the Challenge Committee's recommendation and then make their own decision.

1.24 Whilst this suggestion would not require an amendment to Article 58, it would assist the other members of the Tribunal with making the decision of a challenge. It may also assist in providing some consistency to the challenge procedure as the Challenge Committee would be able to consider all challenges and provide consistent recommendations.

1.25 The downside of this suggestion is that it may take longer for the challenge to be decided (noting that the arbitration proceeding is suspended during the challenge process). However, time limits could be included to reduce the time. For example:

(a) the challenge could be referred to the Challenge Committee within 5 days of it being made;

(b) the other party could provide a response to the challenge within 10 days of receipt of the challenge, which would be provided to the Challenge Committee at the same time as the other members of the Tribunal;

(c) the Challenge Committee must make a recommendation within 30 days of receipt of the response; and

(d) the other members of the Tribunal should try to make a decision within 10 days of the recommendation.

1.26 Whilst this would add an additional step, it may assist the other members of the Tribunal and indeed reduce the overall time that it takes for them to consider and decide on the challenge.

1.27 We also consider it appropriate to consider introducing a more restrictive time limit for bringing challenges against the arbitrators. Currently, Arbitration Rule 9 provides for challenges to be brought "promptly, and in any event before the proceeding is declared closed". In practice, this has resulted in multiple challenges being brought within the same set of proceedings, or parties failing to bring a challenge within a reasonable time after they knew or should have known of the facts giving rise to the challenge, thereby causing substantial delays.
1.28 Other arbitral institutions have recently addressed this issue by introducing strict deadlines by which a challenge must be brought. These provisions usually provide for a time limit relative to the commencement of proceedings and/or relative to the time at which the party became aware of the alleged grounds for challenge. We therefore propose an amendment to Arbitration Rule 9 providing for a party to give notice of any challenge:

(a) within 30 days following receipt of the relevant arbitrator’s declaration signed pursuant to Arbitration Rule 6(2); or

(b) within 30 days after it became aware or should reasonably have been aware of the relevant grounds for bringing a challenge under Article 57.

1.29 This suggestion may prevent delays in commencement of the challenge process.

Code of conduct

1.30 It has been suggested that a Code of Conduct for Arbitrators be developed. This could address a number of issues that have been raised with respect to arbitrators, such as conflicts of interest and the availability of arbitrators. Arbitrators would not be bound by the Code of Conduct but the Code could be used as a set of guidelines to encourage consistent practice amongst arbitrators appointed to ICSID Tribunals and ICSID ad hoc Committees.

1.31 The Code of Conduct could draw on the codes and guidelines of other institutions, such as the Chartered Institute of Arbitrators, the AAA (“The Code of Ethics for Arbitrators in Commercial Disputes” (2004)), the LCIA (“LCIA Notes for Arbitrators” (2015)) and the IBA Guidelines on the Conflict of Interest in International Arbitration (2014).

1.32 The Code of Conduct could address the following:

(a) limiting the ability of arbitrators to also act as counsel and/or stipulating a certain period of grace during which arbitrators cannot act as counsel. This would prevent potential conflicts (e.g. where the arbitrator is being asked to decide a point that he is arguing in another case) and possibly reduce the number of challenges made. A number of arbitrators have chosen to take this approach voluntarily. However, we note that there are arbitrators who have strongly opposed taking that position;

(b) guidelines relating to conflicts of interest specific to investment arbitrations. The IBA Guidelines on the Conflict of Interest in International Arbitration can be relied upon in investment arbitrations. Indeed, many of the conflicts that arise would be covered by these guidelines. The Code of Conduct could refer to the guidelines expressly and/or then include some additional potential conflicts that may arise in the investment arbitration
context. For example, the area of so-called "issue conflict" is a potential conflict that could be addressed;

(c) arbitrators are required to disclose any circumstances that may impact their independence, including their availability and other commitments. The Code of Conduct could require the arbitrators to also disclose the number of cases in which they are acting as arbitrators in order to limit the number of cases that they take on. This approach has been adopted by the ICC as some arbitrators take on too many cases and then do not have time to attend hearings or it can be difficult to find hearing dates as the arbitrators are too busy, which can delay the proceedings and/or the arbitrators do not have sufficient time available to prepare the award which may delay the completion and issue of the award; and

(d) the engagement of Tribunal secretaries, as discussed in Section 2 below.

1.33 Any such Code of Conduct should be linked to the declarations required under Arbitration Rule 6, such that the relevant arbitrator acknowledges its contents, pledges to abide by it and commits to apprise the parties of any potential issues that may arise during the proceedings.
2. **Tribunal Secretaries**

2.1 In ICSID cases, the Secretary-General appoints a Secretary to each Tribunal pursuant to Regulation 25. The Secretary usually only assists with administrative and organisational matters. The Secretary does not usually become involved in substantive issues. In fact, Arbitration Rule 15 provides that only the members of the Tribunal are to take part in the deliberations. Arbitration Rule 15 states:

"(1) The deliberations of the Tribunal shall take place in private and remain secret.

(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise."

2.2 In most cases, the ICSID Secretary is the only administrative secretary appointed during the arbitration. However, in some cases, the arbitrators may use assistants that they work with to informally assist them in the arbitration in addition to the ICSID Secretary. There is also a concern that the ICSID Secretary and/or the "unofficial" secretary may assist the arbitrators with substantive issues. Indeed, there have been criticisms not only in commentaries but also by other arbitrators involved in ICSID arbitrations as to the inappropriate use of tribunal secretaries and other assistants.¹

2.3 Accordingly, it may still be useful for guidance to be provided to the arbitrators as to the tasks and activities of the ICSID Secretary. This may also prevent arbitrators from using "unofficial" secretaries.

2.4 We suggest that guidelines as to the engagement of secretaries and the tasks and matters in which they should be involved be included in the Code of Conduct for Arbitrators (if this was to be introduced). The guidelines could draw on the existing notes and guidance provided by arbitral institutions such as the:

(a) ICC - "Note on the Appointment, Duties and Remuneration of Administrative Secretaries" (2012);

(b) LCIA - "LCIA's position on the appointment of Secretaries to Tribunal";

(c) AAA - "The Code of Ethics for Arbitrators in Commercial Disputes" (2004);

(d) HKIAC - "Guidelines on the Use of a Secretary to the Arbitral Tribunal"; and

(e) UNCITRAL "Notes on Organizing Arbitral Proceedings".

¹ See, for example, the comments made by Professor Dalhuisen in his Additional Opinion in Compañía de Aguas del Aconcagua SA & Vivendi Universal SA v Argentine Republic ICSID Case No ARB/97/3 (Annulment Proceeding), 30 July 2010.
2.5 Accordingly, we suggest that the following points relating to Tribunal Secretaries be included:

(a) the Secretary's role is to be limited to "organisation and administrative tasks" such as transmitting communications on behalf of the Tribunal, organising the Tribunal's files and organising hearings (this should be expressly stated to clearly identify the scope and limits of the secretary's role);

(b) the Secretary may assist the Tribunal by, for example, preparing chronologies of events, summarising the parties' submissions and evidence, carrying out research on factual and legal issues upon instruction of the Tribunal, and preparing memoranda relating to factual and legal issues; and

(c) the Tribunal cannot delegate any decision-making functions to the Secretary. This is worth including because Arbitration Rule 15 provides the Tribunal may determine "otherwise" with respect to the deliberations which may indicate that they may determine that the Secretary shall be present during deliberations of the Tribunal. For example, the Secretary cannot draft any substantive parts of the Tribunal's orders, decisions or awards.

2.6 Including these points in the Code of Conduct would clarify the scope and extent of the Tribunal Secretary's role.
Section 3

Emergency arbitrator procedure
3. **Emergency arbitrator procedure**

3.1 Article 47 of the ICSID Convention provides that a tribunal may recommend provisional measures that preserve the respective rights of either party. The Arbitration Rules provide that provisional measures may only be sought from national courts if this is provided for in the parties’ arbitration agreement or consent to arbitration. This is provided for in only a few investment treaties.

3.2 It may often take 4 to 6 months or even longer to constitute the Tribunal in an investment arbitration (as discussed in Section 1 above). This means that a party cannot obtain provisional measures until the Tribunal has been constituted. The Tribunal may request submissions and even possibly a hearing from both parties before it will decide whether or not to grant the provisional measures.

3.3 Thus, it may take up to 6 months or even longer from the commencement of the arbitration up to the obtaining of provisional measures. This issue was considered but not pursued at the time of the 2006 amendments to the Arbitration Rules.

3.4 Due to the potential impact of this delay, it is suggested that the concept of an emergency arbitrator be introduced. Emergency arbitrators have been introduced in various arbitration rules that are used in commercial arbitrations and have been used successfully in a variety of different circumstances. For example, there have been about 50 emergency arbitrators appointed under the SIAC Rules which have considered interim measures in many different types of cases.

3.5 The emergency arbitrator could be introduced in the ICSID context with some adaptions to the concept and process that is being used in the commercial arbitration context. For example:

(a) the applicant (usually the investor) could apply for a recommendation for emergency provisional measures at the time of submitting the request for arbitration or soon after;

(b) the application would be made to the ICSID Secretariat;

(c) the application would be made on notice to the other party (usually the State);

(d) an emergency arbitrator could be appointed by the Chairman, within 10 days;

(e) the State could be given the opportunity to provide a short response to the request for provisional measures within a short timeframe (e.g. 21 days from receipt of the request);

(f) the emergency arbitrator would be required to make a recommendation on the request within a short period, say 14 days of his or her appointment;
(g) the emergency arbitrator would be required to take into account the same considerations as a Tribunal when determining whether or not to recommend the provisional measures requested;

(h) the emergency arbitrator would only be providing a recommendation as to provisional measures, similar to a Tribunal;

(i) the emergency arbitrator’s recommendation would only be in place until the Tribunal was constituted and had an opportunity to consider the applicant’s request; and

(j) once the Tribunal has considered the request, then at that time the emergency arbitrator’s recommendation would no longer be in place.

3.6 We emphasise that the emergency arbitrator would only be making a recommendation, just as the Tribunal currently has the power to do under Article 47 of the ICSID Convention. We also emphasise that this procedure would not have any effect on the Tribunal and its ability to consider the application once it has been constituted. The Tribunal will then have an opportunity to reconsider the same application and make its own recommendation.
Section 4  Costs and complexity of proceedings
4. **Costs and complexity of proceedings**

4.1 There has been extensive criticism that ICSID arbitrations are complex, very long and very expensive. We have set out some suggestions that could address some of these issues.

**Early dismissal of claims**

4.2 Arbitration Rule 41(5) provides that a party (usually the State party) may file an objection that a claim is manifestly without legal merit. The Tribunal may then decide on the objection after giving the parties an opportunity to present their observations on the objection.

4.3 There have been various suggestions in the commentaries that this mechanism could be improved as it is not used as often as it could be. The difficulty for many Tribunals is that the Tribunal may have limited information before it at the time that it is requested to decide on the objection. The information received may not be sufficient for the Tribunal to determine whether or not the claim is “manifestly without legal merit”.

4.4 We suggest that this mechanism be improved by providing further guidance in the Arbitration Rules as to how this process could be implemented. For example, the Arbitration Rules could provide in addition to the existing provisions in Arbitration Rule 41(5) that:

(a) the other party will provide a response to the objection within 14 days of receipt of the objection;

(b) the requesting party may provide a rejoinder to that response within 14 days of the receipt of the response;

(c) the Tribunal may request further information from the parties if it believes it is required to decide on the objection;

(d) the Tribunal may convene a short oral hearing to decide upon the objection, if so requested by one of the parties. Otherwise, the Tribunal will decide the objection on the written submissions received from the parties; and

(e) the Tribunal must render an award setting out its decision within 45 days of the hearing or receipt of the last pleading if there is no hearing.

4.5 This suggestion may assist the Tribunal in determining how to proceed with such an objection.

**Conciliation**

4.6 Part III of the ICSID Convention provides for conciliation. There are also Conciliation Rules to assist with the conciliation process.

4.7 However, in practice, very few parties go through a conciliation (or mediation) process before or during the arbitration proceedings.
4.8 Usually the investment treaty or free trade agreement being invoked as the basis for the claim provides for a "cooling off" period during which the parties must negotiate and try to resolve the dispute. In many cases, there are no real or substantive negotiations. There may be one or two meetings between the parties but no real progress is made or it may be that the attendees at the meetings do not have the necessary authority to settle the dispute.

4.9 In contrast, many commercial disputes in many parts of the world are often resolved through mediation or conciliation. The main benefit of this process is that the parties find an amicable resolution without incurring the expensive costs and the significant amount of time involved in arbitration proceedings.

4.10 We appreciate that the considerations in investment arbitrations are very different. In many cases it will be difficult for the State or even for both parties to be able to find a solution that is acceptable to both parties. Also, it may be difficult for the State to enter into a settlement (particularly if the settlement terms require a substantial payment by the State to the investor) without that settlement being directed by an independent third party. Indeed, the State may prefer to have the dispute heard by an independent third party and receive a binding decision (i.e. an award) before it starts settlement negotiations with the investor.

4.11 Nonetheless, one suggestion would be to require the Tribunal to encourage the parties to try conciliation before they continue with the arbitration process. We note that Arbitration Rule 21(2) provides that a pre-hearing conference may be held with the Tribunal at the request of the parties "to consider the issues in dispute with a view to reaching an amicable settlement".

4.12 We suggest this approach be incorporated in other parts of the Arbitration Rules to encourage the Tribunal to discuss the possibility of conciliation and settlement with the parties. For example, during the preliminary procedural consultation under Arbitration Rule 20, the President of the Tribunal could request the Parties to provide their views on the possibility of trying conciliation before proceeding with the arbitration proceedings. Arbitration Rule 20 could be amended to include this as an additional matter to be considered. This could also then be discussed at the pre-hearing conference held pursuant to Arbitration Rule 21.

Time limit for the award

4.13 Arbitration Rule 46 provides that the award shall be drawn up and signed within 120 days after the closure of the proceedings. It also provides that the Tribunal may extend this period by a further 60 days if it would otherwise be unable to draw up the award. This is a total of 180 days (6 months) for the Tribunal to prepare and issue the award.
4.14 However, in practice, many awards are issued after 6 months. There are a number of different suggestions for addressing the potential delays in the issue of awards relating to issues of liability and quantum:

(a) the Arbitration Rules could provide stricter time limits - for example, Arbitration Rule 46 could provide that the Tribunal must issue the award within 120 days and that this period can only be extended by a further 60 days with approval by the Chairman. To obtain approval, the Tribunal must explain why the drafting of the award is delayed;

(b) the Code of Conduct (if introduced) could state that the arbitrators undertake to take all reasonable measures to issue an award within 120 days at the minimum and 180 days in exceptional circumstances; or

(c) the Secretariat could place more pressure on a Tribunal to issue its award within 120 days and if a further 60 days is required, then the Tribunal is to provide reasons as to why the extension is necessary.

4.15 In addition, we suggest that further time limits be included in Arbitration Rule 46 (or a separate Arbitration Rule) for interim decisions or awards. For example, we suggest:

(a) a decision on an objection under Arbitration Rule 41(5) be decided within 45 days of the hearing or the last submission if there is no hearing (as suggested above);

(b) a decision on objections to jurisdiction must be decided within 60 days of the jurisdiction hearing (or the last submission if there is no hearing), with the possibility of an extension of 30 days upon approval of the Chairman;

(c) a decision on a request for provisional measures be decided upon within 30 days of the receipt of the last submission or the hearing (if there is a hearing);

(d) a decision on the challenge of an arbitrator be decided upon within 30 days of receipt of the challenge (or longer if the procedure suggested above is adopted); and

(e) a decision on any procedural issues such as requests for disclosure be decided within 30 days or as soon as reasonably possible thereafter.

4.16 These suggestions may improve some of the delays that occur during the arbitration.

Consolidation of related proceedings

4.17 There have been a few cases where there are two or more related proceedings. Some of those cases have been run in parallel (such as the UNCITRAL arbitrations, Lauder v Czech Republic (Lauder case)
and CME Czech Republic BV v Czech Republic (CME case)). Other cases have been consolidated (such as Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic).

4.18 The Arbitration Rules do not provide for consolidation of arbitrations. It is only recent free trade agreements (usually regional free trade agreements) that provide for consolidation. Most investment treaties and free trade agreements do not provide for consolidation. Indeed, there may be conceptual difficulties in consolidating two related cases that have arisen under two different bilateral investment treaties (as in the Lauder and CME cases). So far consolidation of related cases has occurred on an ad hoc basis.

4.19 Even though there are conceptual difficulties, there are inherent time and costs savings that may be achieved if related arbitrations were consolidated. Also, it would avoid the possibility of inconsistent and conflicting decisions (as occurred in the Lauder and CME cases).

4.20 Consideration could be given to different ways in which the possibility of consolidation could be taken into account in appropriate cases. For example:

(a) the Arbitration Rules could provide for consolidation in appropriate cases. The Arbitration Rule would need to set out in detail the basis upon which a Tribunal could consider consolidation. For example, consolidation may be provided where:

(i) the parties have agreed to consolidation; or

(ii) all of the claims in the arbitrations are made under the same arbitration agreement; or

(iii) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same or related parties, the disputes in the arbitration arise in connection with the same or related legal relationship and the arbitration agreements are compatible;

(b) the Tribunal could request the parties to consider consolidation during the preliminary procedural consultation as an option if there are related cases. The parties could be asked whether they would consider the consolidation of the two or more cases.

4.21 Whilst it may be useful to have the option to consolidate, it is anticipated that this option would only be exercised occasionally.

Class actions

4.22 An issue that may be related to the issue of consolidation is class actions. There have been some class actions that have been brought before ICSID Tribunals, such as, the cases of Abaclat and Others v
Argentina (ICSID Case No. ARB/07/5) and Ambiente Ufficio S.P.A. and Others v. Argentina (ICSID Case No. ARB/08/9).

4.23 The Arbitration Rules could provide further clarification and guidance in relation to class actions. For example:

(a) clarifying the ability of investors to bring class action type claims (mass claims / group proceedings)

(b) providing specific guidelines as to what constitutes a class action or group claim could be considered;

(c) providing specific requirements that need to be fulfilled to obtain the consent of all of the members of the class action;

(d) clarifying the rights and responsibilities of class members, including the ability of class members to opt-in or opt-out of the relevant class; and

(e) ensuring accountability and transparency in the formulation of the class, the participation of class members in the arbitral process and distribution of the funds from any judgement to successful mass claimants.

4.24 This would assist in the event that further class actions are brought under the ICSID Convention and the Arbitration Rules.
Section 5  Conclusion
5. **Conclusion**

5.1 These are our initial suggestions. Other suggestions that may be considered go beyond a review of the ICSID Rules and Regulations. Compliance with arbitration awards would be one of the key examples of such an issue.

5.2 We would be pleased to discuss these or other suggestions with you further. Please feel free to contact us if you have any questions or would like to discuss this further.

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3 We would like to acknowledge the assistance of Myles Farley, Associate, Melbourne, Australia in preparing this submission.
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SUGGESTIONS FOR ICSID RULES AND AMENDMENTS.


May I humbly suggest the amendment of these rules and sub-rules at 9(2), 9(3) and 9 (4) to remove the responsibility of determining the validity of the disqualification/challenge of an arbitrator in any given case, from other members of the same Tribunal. I believe other arbitrators on the ICSID Panel who have no connection with the case in question (similar to an ad hoc Committee of three constituted for annulment proceedings) should consider such challenges either in conjunction with the Secretary General or with the Chairman of the Administrative Panel as already provided. Some challenges come in much later at a stage of the proceedings when members of a tribunal may have formed a close working relationship and a special rapport geared towards resolving the case in hand.

The problem is there may well be perceptions of bias and where such a relationship has been formed. Even if not, in my personal view and from experience, for other members of a tribunal to consider the validity of a challenge against another member of their tribunal undoubtedly, puts other members of the tribunal in a difficult and awkward position. The LCIA in London I believe, has a model that works in this manner and they (the LCIA) went on to publish the outcomes of such challenges in a Special Challenges Issues collated in Arbitration International, Vol. 27 No.3 2011. The same should also apply to the appointment of conciliators under Rule 9 of the Conciliation Rules. If such an amendment is accepted may I suggest the anonymised publication of such outcomes for the guidance and information of other panelists and institutions.

In my view the same amendment could be extended to the appointment of arbitrators and conciliators under Article 15 of the Additional Facility Rules. In my view the problem of perception of bias is not eradicated or minimised even if the decision is taken in the absence of the challenged arbitrator or conciliator.

2) Time Frames for Applying for Annulment Proceedings based on Corruption.

Article 52 (2) of the ICSID Convention and Rule 50 (2)(ii) of the Rules provide time frames within which to seek annulment of proceedings based on corruption as being within 120 days after discovery or in any event within 3 years. In countries with transparent developed political and socio-economic infrastructures in place those time frames maybe
ideal. But in third world countries or underdeveloped countries where there is an acute and perhaps deliberate lack of transparency and lack of the necessary infrastructure it may take longer to find out such information particularly in countries ruled by either repressive military or other forms of authoritarian rulers. It may take a considerable length of time to discover such corrupt practices. Were it not for wiki-leaks most citizens in such countries were blissfully unaware of how far involved their rulers and members of the elite in those countries were neck deep in corrupt practices. May I therefore suggest, a time frame of 240 days and 6 years within which to seek the annulment of the proceedings after the discovery of corruption.

Thank you for your time.

Ike Ehiribe

31 March 2017

London.
31 March 2017

By email only: icsidideas@worldbank.org

Dear Sirs,

Response to Consultation on ICSID Rules

We refer to your press release dated 25 January 2017, inviting others interested in the ICSID process to provide suggestions regarding potential amendments to the ICSID Rules.

Our company, Woodsford Litigation Funding Limited, is based in London, UK, and is one of the longest established litigation and arbitration funders globally. We are a member of the Association of Litigation Funders (ALF) in London and self-regulated by the ALF’s Code of Conduct. Over the years, we have considered funding and have funded a large number of ICSID cases, and we therefore have a keen interest in the ICSID procedure and Rules.

We note that the ICSID Rules do not currently make any provision for the involvement of third party funders in ICSID cases or provide for any ‘regulation’ of the same. We consider this to be a sensible approach. For what is a multibillion dollar industry, there are remarkably few reported problems or disputes between litigation funders and the litigants they fund. This speaks well of both the litigation funders and the lawyers who advise litigants in relation to funding arrangements. Those who call for regulation (or further regulation) of the litigation funding industry might do well to recall the maxim ‘if it ain’t broke, don’t fix it’.

We also consider that the way in which an ICSID claimant chooses to fund its claim against a respondent state is not a matter which should concern the state or an arbitral panel. Arbitration is a consensual process and how one party choose to fund its business, including any disputes it may choose to pursue, is a private matter for that party and should not be of relevance to the counterparty to any such disputes or a tribunal.

However, if notwithstanding the above, ICSID is at any stage minded to introduce any rules or regulations concerning funders and/or their involvement in ICSID arbitrations, we would welcome an opportunity to comment on any proposals before they are formally implemented.

Yours faithfully

Charlie Morris

Senior Investment Officer
Woodsford Litigation Funding
NOTE

Provisional Measures During Suspension of ICSID Proceedings

Matthew Coleman¹ and Thomas Innes²

Abstract—The purpose of provisional measures in the context of arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) is to preserve the theoretically existing rights of the requesting party in circumstances of urgency and necessity pending the final determination of the dispute. Under the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules), proceedings are ‘suspended’ when a vacancy arises on an ICSID tribunal (i.e., when the tribunal is truncated), and also when a proposal to disqualify an arbitrator is made. A question arises as to whether an ICSID tribunal is empowered to order provisional measures during the period when proceedings are suspended in these circumstances. The authors conclude that it is evident from the object and purpose of Article 47 of the ICSID Convention, as supplemented by ICSID Arbitration Rule 39, and the relevant interpretative context, that a suspension of proceedings does not extend to the consideration of a request for provisional measures. This conclusion is reinforced by the fact that under ICSID Arbitration Rule 39(2) tribunals are required to accord priority to requests for provisional measures. Nevertheless, the most appropriate course of action will often be for the tribunal to issue an interim order requiring the parties to maintain the status quo pending the determination of the request for provisional measures after the suspension has ended.

I. INTRODUCTION

The purpose of provisional measures in the context of arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention) is to preserve the theoretically existing rights of the requesting party in circumstances of urgency and necessity pending the final determination of the dispute. Consequently, the power to issue such measures is of fundamental importance to the arbitral process. Under the ICSID Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules),
proceedings are ‘suspended’ when a vacancy arises on an ICSID tribunal (ie when the tribunal is truncated), and also when a proposal to disqualify an arbitrator is made. A question arises as to whether an ICSID tribunal is empowered to issue provisional measures during the period when proceedings are suspended. Suspension of proceedings is increasingly common, especially in light of the increasing frequency of parties proposing the disqualification of an arbitrator. As such, it would seem that the question posed will inevitably fall to be decided in the near future.

This note considers whether a tribunal is capable of issuing provisional measures during a period of suspension. It focuses primarily on suspensions following a vacancy arising on a tribunal.

In reviewing these matters, we begin by setting out the legal framework in relation to the suspension of ICSID proceedings and requests for provisional measures (see Section II). Thereafter, in Section III, we consider the status of an ICSID tribunal during a period of suspension. It will be shown that ICSID tribunals continue to exist (ie are not deconstituted) during such a period, and are expressly required by the applicable procedural regime to discharge certain functions. The question is whether determining provisional measures requests is such a function. This is addressed in Section IV where we argue that it is evident from the object and purpose of the provisional measures facility in Article 47 of the ICSID Convention, as supplemented by ICSID Arbitration Rule 39, and the relevant interpretative context, that a suspension of proceedings does not extend to the consideration of a request for provisional measures. This conclusion is reinforced by the fact that under ICSID Arbitration Rule 39(2) tribunals are required to accord priority to requests for provisional measures. Nevertheless, in Section V, we argue that the most appropriate course of action will often be for the tribunal to issue an interim order requiring the parties to maintain the status quo pending the determination of the request for provisional measures following the filling of the vacancy.

The power to issue provisional measures during a period of suspension following a proposal to disqualify an arbitrator is briefly considered in Section VI. Finally, in Section VII we propose an amendment to ICSID Arbitration Rule 39 to reflect our thesis, so as to ensure clarity in relation to these matters.

II. THE LEGAL FRAMEWORK

A. Suspension of Proceedings

The ICSID Convention itself does not provide for the suspension of proceedings. However, the ICSID Arbitration Rules provide two instances where the ‘proceeding’ is ‘suspended’. First, proceedings are suspended pursuant to ICSID Arbitration Rule 10(2) when a vacancy arises on a tribunal following the disqualification, death, incapacity or resignation of an arbitrator, and remain suspended until that vacancy is filled.3

3 See also Convention on the Settlement of Investment Disputes between States and National of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention) art 56.
Second, when a proposal to disqualify an arbitrator is made under Article 57 of the ICSID Convention, 4 proceedings are suspended pending the decision on that challenge pursuant to ICSID Arbitration Rule 9(6). In cases where the tribunal is composed of more than one arbitrator and a minority of its members’ appointments have been challenged by a party, the other members are empowered to decide on the disqualification request. 5 If the other members are equally divided as to their decision (and in cases where the proposal is to disqualify a sole arbitrator or a majority of the tribunal’s members), the Chairman of ICSID’s Administrative Council is empowered to decide on the proposal. 6

B. Provisional Measures

An ICSID tribunal’s power to issue provisional measures is pursuant to Article 47 of the ICSID Convention. Article 47 provides: ‘Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.’ Article 47 is supplemented by ICSID Arbitration Rule 39, which inter alia requires that the tribunal accords priority to the consideration of such a request. 7 The scope of the power to issue provisional measures has been considered extensively elsewhere 8 and need not be repeated for the purposes of this note.

Further, ICSID Arbitration Rule 39(1) provides that a request for provisional measures may be ‘request[ed]’ ‘[a]t any time after the institution of the proceeding’. Nevertheless, the issue is whether any such request can be decided upon at any time after the institution of the proceeding, and particularly during a period of suspension. Neither the ICSID Convention nor the ICSID Arbitration Rules expressly address this question. However, for the reasons set out below, we consider that ICSID tribunals are empowered to issue provisional measures during a period of suspension.

III. THE TRIBUNAL’S STATUS DURING A PERIOD OF SUSPENSION ARISING FROM A VACANCY

As noted above, Article 47 of the ICSID Convention provides that any provisional measures can only be issued by the tribunal. 9 Consequently, in analysing whether provisional measures can be ordered during a period of suspension arising from a

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4 ibid art 57 provides that a party to an ICSID arbitration may propose the disqualification of any of the tribunal’s members on the basis of facts indicating a manifest lack of the qualities required by art 14(1) of the Convention (ie high moral character, recognized competence in the fields of law, commerce, industry or finance, capable of being relied upon to exercise independent judgment) or owing to ineligibility in terms of arts 37–40 of the Convention. As regards the latter, in practice the most likely characteristic to be challenged relates to the shared nationality of the challenged arbitrator with a party to the dispute.


6 See ICSID Convention (n 3) art 58 and ibid ICSID Arbitration Rules.

7 ICSID Arbitration Rules (n 5) r 39(2).


9 See also ICSID, ‘Rules of Procedure for Arbitration Proceedings (Arbitration Rules) 1968’ (1993) 1 ICSID Rep 63, 99 Note A (ICSID Arbitration Rules 1968) [it is the Tribunal that must make the recommendation (for provisional measures)].
vacancy on the tribunal, it is important to first consider whether the tribunal continues to exist during that period. In considering this, two arguments can be made:

- Under the first, the proceedings are suspended but the tribunal remains in existence during the suspension.
- Under the second, the proceedings are suspended and the tribunal itself is deconstituted and then reconstituted at the beginning and end of the period of suspension respectively. Under this argument, since there is no tribunal during the suspension, there is no body capable of ordering provisional measures during that period.

For the reasons set out below, our view is that the first argument is correct. As such, the question is: what parts of the proceedings are suspended? In particular, is the tribunal’s power to order provisional measures caught by the suspension? Those questions are considered in Section IV below.

A. Deconstitution and Reconstitution of the Tribunal

There is no reference to deconstitution or reconstitution of tribunals in the context of suspensions in the ICSID Convention or the ICSID Arbitration Rules. In fact, there is no express reference to deconstitution whatsoever in the Convention or the Rules.

As regards the notion of reconstitution, the only express reference is in an entirely separate context: namely, in the procedures relating to the interpretation or revision of rendered awards. In such situations, the tribunal has already issued its final award in the case and consequently its mandate had been brought to an end; the tribunal must therefore implicitly have been deconstituted (ie ceases to exist as an entity) 45 days after the date on which the award was rendered.10 Thus, ICSID Arbitration Rule 51(2) provides a means for the original arbitral tribunal to be ‘reconstituted’ to address a party’s request for interpretation or revision of the award.11 This language is, of course, entirely appropriate in that context because the arbitration must have come to an end 45 days after the issuance of the final award.

However, the arbitration has not come to an end when proceedings are suspended pending the filling of a vacancy on a tribunal. In such circumstances,

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10 It appears from the ICSID Arbitration Rules that the tribunal ceases to exist 45 days after the rendering of the award as opposed to the date of rendering the award itself. This is because under r 49, any request for a supplementary decision on, or the rectification of, the award made in that period is to be determined by the original tribunal itself. Unlike with r 51(2), there is no reference to the tribunal being ‘reconstituted’ for this process so it must remain in existence until the expiry of the 45-day period.

11 Of course, it is possible that an application for interpretation or revision of an award be made within 45 days after the date on which the award was rendered and also that within those 45 days the Secretary-General transmits the notification to the tribunal and the parties that the members of the tribunal are willing to consider the application. In those circumstances, ICSID Arbitration Rule 51(2) would be engaged and the tribunal would be ‘deemed to be reconstituted’. However, this reconstitution would not be strictly necessary because the tribunal would not have been deconstituted by that point. As such, in those circumstances, the reference in ICSID Arbitration Rule 51(2) to the tribunal being ‘reconstituted’ should rather be understood as an extension of the still-existing tribunal’s mandate to cover the interpretation or revision proceedings. Although this double-usage of the term ‘reconstituted’ is not ideal, it is justifiable on the basis that it avoids the need to express the same rule for applications for interpretation or revision filed (and where agreement is notified) both within and after the 45-day period. In any event, it does not detract from our thesis because the notion of reconstitution in the circumstances described in no way implies that the tribunal has ceased to exist prior to the reconstitution.
the proceedings are simply halted temporarily. Support for this position can be found in the fact that the term ‘suspended’ is adopted in ICSID Arbitration Rules 9(6) and 10(2), while the term ‘discontinuance’ is used elsewhere in ICSID’s rules.12 Whereas ‘discontinuance’ carries a sense of finality (which is effected in ICSID procedure),13 ‘suspended’ suggests a mere temporary delay in the proceedings. Indeed, as will be seen below, in the context of ICSID arbitration a suspension does not even apply to all matters before the tribunal: it is expressly required to continue to deliberate on certain issues.

B. The Continued Operation of the Tribunal During Suspension Following a Resignation of a Tribunal’s Member

Under Rule 10, the ICSID Secretary-General is required to notify the parties of a resignation14 and the proceedings are deemed to be suspended upon the issuance of this notification.15 Thereafter, in the event that the resigning arbitrator was appointed by one of the parties, ICSID Arbitration Rule 8(2) requires that ‘the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto’.16 Thus, the scheme of the ICSID Arbitration Rules is such that the tribunal remains in existence during the period of suspension, and is required to make a determination during that period as to whether or not it consents to the resignation. Professor Schreuer appears to acknowledge this when he writes, ‘[s]ince the resigning member ceases to be a member upon submitting the resignation, the...Tribunal will consist only of the remaining members’.17

Similarly, where proceedings are suspended pursuant to ICSID Arbitration Rule 9(6) following a proposal to disqualify an arbitrator, the remaining members of the tribunal will often be required to decide on the disqualification request,18 thereby confirming that the tribunal must remain in existence when the proceedings are suspended in such circumstances.

Consequently, the ICSID Arbitration Rules specifically require tribunals to undertake various tasks while proceedings are suspended. For such tasks to be performed, the tribunal must remain in existence when proceedings are suspended. In addition, it is possible to observe that several ICSID tribunals have permitted various other aspects of the arbitration to continue during periods of suspension (although that has not included determining requests for provisional measures).19

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12 Specifically, see ICSID Arbitration Rules (n 5) rr 43–45 and ICSID Administrative and Financial Regulation (2006) art 14(3)(d). We note that the distinction between suspension and discontinuance can also be found in the International Court of Justice’s Rules of Court: see arts 79 and 88–89, respectively. For further discussion on this matter, see s IV.D below.
13 ibid.
14 See ICSID Arbitration Rules (n 5) r 10(1).
15 See ibid r 10(2).
16 (emphasis added). Such determination being relevant to the procedure for filling the vacancy left by the resigning arbitrator: see ICSID Convention (n 3) art 56(3).
18 See Section II.A above.
19 See Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration (Kluwer 2012) para 2-093. Based on a review of this practice, Daele concludes that a suspension [under ICSID Arbitration Rules (n 5) r 9(6)] is ‘not absolute’.
C. Conclusion Regarding the Existence of the Tribunal

Therefore, there is nothing in the ICSID Convention or ICSID Arbitration Rules to suggest that a tribunal ceases to exist during a period of suspension. In fact, tribunals are required to continue to perform certain functions during a period of suspension, which demonstrates that they must continue to exist (otherwise they would not be able to carry out those functions). Thus, in light of the foregoing analysis, our conclusion is that the tribunal itself remains in existence during a period of suspension following a vacancy. It is only the ‘proceeding’ that is suspended. The scope of proceedings that are suspended is considered in the following section.

Our conclusion can be compared with the approach taken by the ICSID Secretary-General. In our experience, the wording adopted by the ICSID Secretary-General following the filling of a vacancy on a tribunal is that: ‘the tribunal is deemed to have been reconstituted as of today in accordance with ICSID Arbitration Rule 12’ (the authors’ paraphrasing). However, as discussed above, the term ‘reconstituted’ is not used in the ICSID Convention or the ICSID Arbitration Rules in the context of suspensions. A difficulty with this term is that it can be used in two senses: to reconstruct (which is consistent with the second of the arguments posited at the beginning of this section), or to change the form and organization of an institution (which is consistent with the first of the arguments posited at the beginning of this section). Although it is unclear as to which sense is intended by the ICSID Secretary-General when the term ‘reconstituted’ is used in this context, given that the ICSID Convention and ICSID Arbitration Rules clearly do not provide that the tribunal ceases to exist, it may be presumed that the ICSID Secretary-General’s use of this term is merely intended in the sense that the tribunal has undergone a change in its composition.

IV. THE SCOPE OF PROCEEDINGS COVERED BY A SUSPENSION ARISING FROM A VACANCY

If the tribunal remains in existence during a period of suspension of the proceedings, it is necessary to determine the scope of proceedings covered by the suspension. The very nature of a suspension of proceedings implies that the tribunal must be precluded from undertaking certain activities. The obvious contenders for what activities are suspended include the proceedings in relation to the tribunal’s jurisdiction or competency, the merits of the dispute, and issues of quantum; it is highly likely that these proceedings would be caught by the suspension. However, it is submitted that a suspension of proceedings does not preclude the tribunal from deciding on provisional measures requests brought before or during the suspension period, which are inherently urgent in nature.

This submission is based on: the object and purpose of the provisional measures mechanism (Section IV.A); the presumption of exclusivity of proceedings during an ICSID arbitration (Section IV.B); the procedures governing provisional measures requests made prior to the constitution of a tribunal (Section IV.C);

20 On this point, see also Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan, ICSID Case No ARB/12/1, Decision on Claimant’s Request for Provisional Measures (13 December 2012) para 17.
the contrasting use of the terms ‘suspended’, ‘suspend’, ‘discontinuance’ and ‘stays’ in ICSID arbitration procedure (Section IV.D); and by existing international practice within and outside of ICSID (Section IV.E). Each will be considered in turn. In addition, Section IV.F will address the most likely argument against our submission, which is based on ICSID Arbitration Rule 12.

A. The Object and Purpose of Provisional Measures

A consideration of the object and purpose of the provisional measures facility in the ICSID Convention is a useful place to begin this analysis. First, it is to be noted that the mandate afforded to tribunals by Article 47 of the ICSID Convention is to ‘recommend any provisional measures which should be taken to preserve the respective rights of either party’ (emphasis added). According to the ICSID Convention’s travaux préparatoires, the inclusion of what became Article 47 was to grant tribunals ‘the power to prescribe provisional measures designed to preserve the status quo between the parties pending its final determination on the merits’.\(^{22}\) They also indicate the intention that ‘[i]f a dispute was properly before the arbitral tribunal, it would seem reasonable to empower it to order the parties not to take action which would make it impossible to comply with a later award’.\(^{23}\) This intention was echoed in the notes to the 1968 version of ICSID Arbitration Rule 39, which stated that Article 47 ‘is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award’.\(^{24}\) The importance of the object and purpose of the provisional measures mechanism to the present discussion is best assessed in light of Article 26 of the ICSID Convention, which is discussed in the following subsection.

B. ICSID Convention Article 26 and Arbitration Rule 39(6)

Article 26 of the ICSID Convention provides as follows: ‘Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...’. It is said that Article 26 ‘creates a presumption’\(^{25}\) that ‘once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum, national or international, and are restricted to pursuing their claim through ICSID’.\(^{26}\) This presumption will only be rebutted when the parties have agreed to allow concurrent recourse to a separate forum.

Historically, the application of Article 26 to exclude the availability of recourse to domestic courts for provisional measures was a subject of uncertainty and subject to significant debate.\(^{27}\) Fortunately, this matter was clarified in 1984

\(^{22}\) ICSID, *History of the ICSID Convention*, vol II (ICSID 1968) 216.
\(^{23}\) ibid 515.
\(^{24}\) ICSID Arbitration Rules 1968 (n 9) 99 Note A.
\(^{25}\) Schreuer and others (n 17) 380 para 110 of the commentary to art 26.
\(^{26}\) ibid 351 para 1 of the commentary to art 26.
by the adoption of what is now ICSID Arbitration Rule 39(6), which provides that:

Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Thus, a party to ICSID arbitration is only permitted to seek provisional measures from a domestic court if the parties have expressly agreed to permit such an action.

Consequently, it is to be presumed that in the majority of ICSID arbitrations, a party’s only option to obtain provisional measures is to make a request to the tribunal under Article 47 of the ICSID Convention. Given this exclusivity in the majority of ICSID arbitrations, and the intention to empower tribunals to prevent parties from taking actions which would make it impossible to give effect to a later award, it would be contrary to all reason to bar consideration of a provisional measures request during a period of suspension. Therefore, any interpretation of Article 47 of the ICSID Convention and ICSID Arbitration Rules 9(6), 10(2) and 39 that prohibits an ICSID tribunal from hearing a request for provisional measures during a suspension would be entirely contrary to the object and purpose of the provisional measures mechanism provided by the Convention.

C. ICSID Arbitration Rule 39(5)

The structure of ICSID Arbitration Rule 39 further supports our thesis that a suspension of proceedings does not preclude the tribunal from deciding on a request for provisional measures. Specifically, it should be noted that Rule 39(5) addresses situations where provisional measures are requested prior to the constitution of the tribunal at the outset of proceedings. It provides that in such circumstances, the ICSID Secretary-General may fix the time limits for the parties to present their observations on the request. The intention behind this is to allow the tribunal to consider the request as soon as it is constituted. In essence, it streamlines the procedure in the absence of the tribunal. However, no equivalent mechanism is included to allow the Secretary-General to fix time limits when the proceedings are suspended. In our view, the reason for this is that no special mechanism is required in such circumstances: the remaining members of the tribunal are able to decide on the request immediately.

D. ‘Suspended’, ‘Suspend’, ‘Discontinuance’ and ‘Stays’ in ICSID Arbitration

The use of the term ‘suspended’, when contrasted with other terms used in ICSID’s rules and procedures, is also an important indication as to its scope. We have already contrasted the term ‘suspended’ with the term ‘discontinuance’ as evidence that the tribunal continues to exist and act during a period of suspension.28 In addition, the term ‘suspended’ as used in the context of ICSID Arbitration Rules 9(6) and 10(2) can further be contrasted with the term ‘stay the

28 See s III.A above.
proceeding’ in ICSID Administrative and Financial Regulation 14 and also with the use of the term ‘suspend’ in Rule 41(3), each of which are considered below.

(i) ‘Stay the proceeding’
ICSID Administrative and Financial Regulation 14 addresses the requirement incumbent on the parties to an ICSID arbitration to make advanced payments to cover the fees and expenses of the tribunal’s members and affiliated costs. The Regulation provides that if a party fails to make a payment required of it within 30 days, ICSID’s Secretary-General ‘shall inform both parties of the default and give an opportunity to either of them to make the required payment’. 29 If the payment is still not made within 15 days, Regulation 14(3)(d) provides that the Secretary-General ‘may move that the…Tribunal stay the proceeding’. 30 Further, should the proceeding remain stayed for non-payment for more than six months consecutively, the Secretary-General may move that the tribunal discontinue it. 31

The decision to use the words ‘stay the proceeding’ in this context suggests the existence of a meaningful distinction between it and the term ‘suspended’ used in ICSID Arbitration Rules 9(6) and 10(2). In this regard, it should be noted that a stay of the proceeding pursuant to Regulation 14(3)(d) is a necessary precursor to a discontinuance, and arguably results in an outright cessation of all the tribunal’s activities. In contrast, a suspension pursuant to ICSID Arbitration Rules 9(6) or 10(2) is only ever intended to be a mere temporary delay to the proceedings because once the vacancy is filled or the disqualification proposal is rejected, the proceedings will continue. Further, as was explained above, such suspension does not prevent the tribunal from taking a number of actions, including (in our view) decisions on provisional measures requests.

(ii) Suspension on bifurcation
It is also helpful to compare the use of the term ‘suspended’ in ICSID Arbitration Rules 9(6) and 10(2) with the term ‘suspend’ in Rule 41(3). The latter applies where a party to the arbitration has raised an objection to the jurisdiction or competence of the tribunal to hear the dispute. In such circumstances, the tribunal can either elect to consider those objections alongside the merits, or it can decide to bifurcate proceedings and consider the objection as a preliminary matter. 32 Pursuant to ICSID Arbitration Rule 41(3), where the tribunal elects to bifurcate proceedings, it is the proceedings on the merits which are suspended pending the decision on the preliminary objection. However, there is no indication in ICSID Arbitration Rule 41(3), express or otherwise, that other parts of the proceedings come to an end upon such a suspension. Therefore, this use of the term ‘suspend’ is further evidence that a suspension does not cover all aspects of the proceedings.

30 It should be noted that the provisions regarding the stay of enforcement of an ICSID award during interpretation, revision or annulment proceedings [see ICSID Convention (n 3) arts 50(2), 51(4) and 52(5) and ICSID Arbitration Rules (n 5) r 54] are not relevant to this discussion.
31 See ICSID Administrative and Financial Regulation (n 12) art 14(3)(d). The Regulation requires that the Secretary-General provides notice to the parties before doing so and requires, so far as possible, that there be consultation with the parties.
32 See ICSID Convention (n 3) art 41(2) and ICSID Arbitration Rules (n 5) r 41(3).
E. Existing International Practice

(i) ICSID

Although we consider that ICSID tribunals are empowered to issue provisional measures during a period of suspension, the reported practice of the ICSID Secretariat suggests that it may not share this view. An example of the Secretariat’s approach to this issue can be found in the Decision on Claimant’s Request for Provisional Measures of 13 December 2012 issued in *Tethyan Copper Company Pty Limited v Pakistan*.

In those proceedings, Pakistan first applied under Article 57 of the ICSID Convention to disqualify the Claimant’s arbitrator, which resulted in the suspension of proceedings pursuant to ICSID Arbitration Rule 9(6). On the same day, but after Pakistan’s submission was filed, the Claimant filed a request for provisional measures. As is recorded in the eventual decision on the request for provisional measures, ‘[t]he Secretariat informed the Parties that, in light of the suspension of the proceedings, Claimant’s submission would be sent to the Tribunal once the proceedings resumed’. This approach is inconsistent with our thesis and those parts of the ICSID Convention and ICSID Arbitration Rules on which it is based.

(ii) Other international tribunals

The ICSID Secretariat’s apparent approach is also inconsistent with the prior practice of the Tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS) in the *Mox Plant Case (Ireland v UK)*. In that case, there was a question as to the division of competence in respect of the Convention as between the European Community and its Member States. Further, there was a real possibility that the European Court of Justice would be called on to determine that issue. In light of this, the Tribunal decided that ‘further proceedings on jurisdiction and the merits in this arbitration will be suspended’ until the European situation had been resolved.

The power to issue provisional measures in disputes under the UNCLOS is contained in Article 290 of that Convention. Neither the UNCLOS nor the other procedural rules applicable in the *Mox Plant Case* expressly empowered the Tribunal to issue provisional measures during the period of suspension. (Thus, the express situation was equivalent to that with ICSID arbitrations.) Nevertheless, when announcing its decision to suspend the proceedings, the Tribunal ‘stated its willingness, in the circumstances [then] prevailing, to consider the possibility of prescribing provisional measures if either Party considered that such measures are necessary to preserve the respective rights of the Parties or to prevent serious harm to the marine environment’. In Procedural Order No 3, the Tribunal considered

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33 *Tethyan Copper Company Pty Limited v Pakistan* (n 20).
34 ibid para 10.
38 *Mox Plant* (n 35) para 31.
such a request from Ireland in detail and made its determinations thereon, in spite of the proceedings having been suspended.39

It is important to note that (at the relevant time) the Tribunal hearing the case consisted of HE Judge Thomas A Mensah (President), Prof James Crawford SC, Maître L Yves Fortier CC QC, Prof Gerhard Hafner, and the late Sir Arthur Watts KCMG QC. The vast experience of the Tribunal’s members undoubtedly adds great weight to the persuasive force of the stance that it took. Arguably, it took that stance on the basis that it is in the interests of justice that provisional measures requests be considered even during periods where the tribunal’s consideration of the substantive issues has been suspended.

Accordingly, the Mox Plant Tribunal’s decision is entirely consistent with and, in our submission, supports the thesis put forward in this note.

F. The Counterargument Based on ICSID Arbitration Rule 12

The best argument against our thesis would appear to be one based on ICSID Arbitration Rule 12. In relevant part, Rule 12 states: ‘As soon as a vacancy on the Commission has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred’ (emphasis added). Some authors consider that the consequence of Rule 12 is that the ICSID Convention and ICSID Arbitration Rules do not allow truncated tribunals (ie ‘tribunals operating with less than a full complement of members’).40 It is most likely true that an ICSID tribunal cannot render an award if truncated (in the sense that there is a vacancy).41

However, in our opinion, it is wrong to say that the ICSID Convention and ICSID Arbitration Rules do not allow truncated tribunals whatsoever: it has already been shown that truncated ICSID tribunals are expressly empowered to act in certain situations. The question is whether truncated ICSID tribunals can exercise other powers of general application that are conferred on tribunals by the ICSID Convention or ICSID Arbitration Rules but that have not been expressly extended to truncated tribunals.

One view is that a truncated ICSID tribunal can only do that which truncated tribunals have been expressly granted power to do. However, that view is not consistent with the approach taken by the ICSID Convention and ICSID Arbitration Rules. That approach can be summarized as follows: in regard to non-truncated ICSID tribunals, the rule is that they can act where the ICSID Convention or ICSID Arbitration Rules provide the power to act, or they can act pursuant to their residual discretion provided by Article 44 of the ICSID Convention.42 In the absence of any indication to the contrary, the same approach must also be true for truncated ICSID tribunals: they can exercise any power expressly conferred on ICSID tribunals or pursuant to their residual discretion

39 While it is true that the Mox Plant was not truncated at the time it issued Procedural Order No 3, as set out in Section IV.F below, truncation is not the determining factor as to the availability of provisional measures. Rather, the question is whether or not the suspension of proceedings extends to requests for provisional measures. The Mox Plant Tribunal’s approach to that question is clear.
40 See eg Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration (2nd edn, Kluwer 2011) 137.
42 For the text of ICSID Convention (n 3) art 44, see n 44 below.
except insofar as the suspension of proceedings restrains them from doing so. This leads us back to the main questions considered in this section: what is the scope of a suspension of proceedings? In particular, does such a suspension prohibit a truncated tribunal from determining a request for provisional measures? For the reasons set out above, the answer is no: a truncated ICSID tribunal is able to exercise the power to issue provisional measures conferred by Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 because that power is not caught by the suspension of proceedings.

As regards ICSID Arbitration Rule 12, the authors' view is that this rule must be understood to only require that those aspects of the proceedings that were suspended by ICSID Arbitration Rule 10(2) be continued from the point reached at the time the vacancy arose. It does not in itself prohibit any actions being taken in the arbitration. In particular, Rule 12 does not in itself require that requests for provisional measures cannot be determined during a period of suspension. So long as such proceedings are not caught by the suspension, Rule 12 will not apply to them.

G. Conclusion Regarding Scope of Suspensions

In light of the foregoing, it is submitted that the language adopted in the ICSID Arbitration Rules and the ICSID Administrative and Financial Regulations demonstrates that the scope of a suspension pursuant to ICSID Arbitration Rules 9(6) or 10(2) does not cover all aspects of the proceedings. In particular, it does not cover those procedural matters which the ICSID Arbitration Rules expressly direct the remaining members of the tribunal to undertake during the period of suspension. Nor does it cover the consideration and determination of requests for provisional measures. This is confirmed by the lack of a special mechanism for addressing provisional measures during suspension (which is to be contrasted with the existence of such a mechanism for requests made prior to the constitution of the tribunal) and the interpretative consequence of using the term ‘suspended’ in this context (as opposed to ‘discontinuance’ or ‘stay’). In fact, permitting tribunals to decide on provisional measures requests is required by the ICSID Convention, since not to do so would be contrary to the object and purpose of Article 47 (especially given the presumption of exclusivity of proceedings during ICSID arbitration) and would have the potential to allow a party to fundamentally compromise proceedings. Such a lacuna could not be intended, especially given that the remaining members of a suspended tribunal are tasked with exercising other powers [for example, those under ICSID Arbitration Rule 8(2)]. The remaining members must also be responsible in such circumstances for protecting the theoretically existing rights of the parties in situations of urgency and necessity.

V. SHOULD A TRIBUNAL DEFER A DECISION ON A PROVISIONAL MEASURES REQUEST DURING A PERIOD OF SUSPENSION ARISING FROM A VACANCY?

From a legal perspective, for the reasons given above, ICSID tribunals have the power to order provisional measures during a period of suspension arising from a
vacancy. Nevertheless, it is important to consider whether there are any practical considerations that influence how that power should be exercised.

In this regard, it should first be noted that disputing parties will generally expect that all contentious matters before the tribunal be adjudicated by a tribunal composed of three members (unless a sole arbitrator has been chosen). The exercise of the power to order provisional measures during a period where there is a vacancy on the tribunal is contrary to this expectation, even though such action is legally permissible. Given the importance that should be placed on satisfying the disputing parties’ mutual expectations as regards the arbitral process (which is conducive to the effective resolution of the dispute), a tribunal with a vacancy on it should be cautious about how it exercises its power to order provisional measures during a period of suspension. In determining whether to exercise this power in such circumstances, tribunals should first consider the degree of urgency of the request.

A. The Degree of Urgency

Urgency must, of course, be demonstrated in all requests for provisional measures. However, the threshold is low: it is generally accepted that all that must be shown is that the conduct complained of is likely to be taken before the tribunal will issue its final award in the arbitration. Given this low threshold, there is clearly a relatively wide spectrum of urgency which is amenable to provisional measures relief. On the one hand, some requests will be of such an extremely urgent nature that there is a need for resolution of the matter within hours or days. By contrast, many requests can reasonably be disposed of by the tribunal less expeditiously, ie within a matter of weeks or months.

Where a request for provisional measures is made during a period of suspension, but the nature of the underlying conduct is such that the request can be disposed of after the suspension has ended without prejudicing the rights of the requesting party, generally the tribunal should entirely defer consideration of the request until the suspension ends. This course of action would not breach the requirement under ICSID Arbitration Rule 39(2) to accord priority to provisional measures requests. Indeed, this course of action will often be most appropriate so as to ensure that both parties are given ample (as opposed to cursory) opportunity to comment on the matter and to ensure that the tribunal has sufficient time to fully consider the matter. In such circumstances, the tribunal should (during the period of suspension) fix time limits for the parties to file their observations on the matter and address all other procedural matters related to the request so as to promote efficiency.

However, it may occasionally be the case that the nature of the conduct on which the request is based is such that to prevent an immediate prejudice to the theoretically existing rights of the requesting party, the request must be disposed of before the suspension has ended. In such circumstances, and assuming that it is accepted that tribunals may order provisional measures during a period of suspension, the members of the tribunal’s duty to protect the theoretically existing rights of the parties in situations of urgency and necessity and to accord priority to

43 See Sarooshi (n 8) 366–7 and Mouawad and Silbert (n 8) 387–93.
the provisional measures request require that the tribunal takes action prior to the suspension ending.

B. Interim Orders

The question is: what action should be taken in such situations of immediate urgency? The tribunal has to balance on the one hand the parties' mutual expectation that contentious matters before the tribunal be adjudicated by a tribunal composed of three members with on the other hand the requesting party’s right to protection of is theoretically existing rights of the parties in situations of urgency and necessity and to accord priority to the provisional measures request. We consider that the appropriate balance is as follows: the tribunal must take action in relation to the request prior to the suspension ending and the most appropriate action will often be to issue an interim order requiring the parties to maintain the status quo pending the determination of the request following the filling of the vacancy. Although there is no express power under the ICSID Convention and the ICSID Arbitration Rules to issue such interim orders, the practice of ICSID tribunals indicates that they are nevertheless empowered to make them.45

VI. SUSPENSION OF PROCEEDINGS FOLLOWING A REQUEST FOR DISQUALIFICATION OF ARBITRATORS

It was argued above that the ICSID Convention and ICSID Arbitration Rules empower a tribunal to consider a request for provisional measures during a period of suspension arising from a vacancy on a tribunal, ie pursuant to ICSID Arbitration Rule 10(2). It was also argued that an interim order may often be the most appropriate course of action. These conclusions and the reasons on which they are based are in many respects equally applicable to suspensions pursuant to ICSID Arbitration Rule 9(6) following a challenge to an arbitrator. In fact, it has already been shown that tribunals continue to exist following a proposal to disqualify an arbitrator because the unchallenged members will often be required to decide on the disqualification request.

However, unlike with suspensions arising from a vacancy, here the challenged arbitrator remains a member of the tribunal pending the decision on the

44 A textual basis for the power can nevertheless be found in the residual discretion provided by art 44 of the ICSID Convention (n 3), which provides (in relevant part) that: ‘If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.’ For a concurring view on this point, see J Cameron Mowatt and Celeste Mowatt, ‘Border Timbers and others v Zimbabwe and von Pezold and others v Zimbabwe’ (2013) 28(1) ICSID Rev—FILJ 33, 36.

45 Full discussion of this matter is outside of the scope of this note. For the ICSID practice, see Directions of 13 June 2012 in Bernhard von Pezold and others v Republic of Zimbabwe, ICSID Case No ARB/10/15 and Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe, ICSID Case No ARB/10/25, paras 3 and 7; Perenco Ecuador Limited v Republic of Ecuador, ICSID Case No ARB/08/6, Decision on Provisional Measures (8 May 2009) paras 28, 35 and 64; City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/06/21, Letter to the Parties from the Tribunal's Secretary (16 October 2007); and City Oriente Limited v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No ARB/06/21, Letter to the Parties from the Tribunal’s Secretary (34 October 2007). For commentary on the Direction in the cases against Zimbabwe, see ibid Mowatt and Mowatt 34–6. See also Matthew Coleman and Thomas Innes, ‘ICJ Order on Timor-Leste’s Request for Provisional Measures Against Australia and its Implications on Investor-State arbitration’ Practical Law (12 March 2014) <http://uk.practicallaw.com/8-560-5608?q=> accessed 15 January 2015; and Kaufmann-Kohler and Antonietti (n 27) 537–8.
disqualification request. Given that ICSID Arbitration Rule 39(2) requires that tribunals accord priority to requests for provisional measures, it is arguable that any determination of a proposal for disqualification should be halted pending the consideration of any request for provisional measures by the full tribunal. However, this could potentially disadvantage a party that has applied for both a disqualification of an arbitrator and provisional measures where there are genuine reasons for removing the arbitrator. As such, in practice the most appropriate course of action will often be to issue an interim order pending the decision on the disqualification request and the filling of any vacancy that may arise as a result of it. The arguments in favour of such action being taken will be particularly strong where there is any suggestion that the proposal to disqualify the arbitrator was made to frustrate an existing (or contemplated) request for provisional measures.  

VII. MOVING FORWARD: REVISION OF THE ICSID ARBITRATION RULES

While we have concluded that ICSID tribunals have the power to issue provisional measures during a period of suspension, we consider that it would be preferable to expressly recognize the aforementioned power in the ICSID Arbitration Rules so as to ensure clarity in this area. We note the recent reports that the ICSID Secretariat is in the initial stages of efforts to revise ICSID’s rules and regulations. In this regard, we propose the following addition to ICSID Arbitration Rule 39:

[A] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 9(6) or 10(2), the Tribunal may, during that period of suspension, determine the request and in addition or alternatively issue an interim order requiring the parties to maintain the status quo pending the determination of the request.

If Sentence A was adopted (or Sentence B below), it would be necessary to add a further paragraph to Rule 39 codifying the tribunal’s general right to issue interim

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46 Such a situation may have arisen in Joseph Charles Lemire v Ukraine. In that arbitration, the Claimant filed a request for provisional measures. The circumstances were such that that request had to be determined within one month of it being filed. However, a few days after the request was filed, the Respondent filed a proposal to disqualify the arbitrator appointed by the Claimant and proceedings were therefore suspended. The Respondent denied any suggestion that this proposal had anything to do with the Claimant’s request for provisional measures. The Respondent’s proposal was dismissed in time for a decision on the request for provisional measures to be taken (though the request was withdrawn following a change of the Respondent’s position on the matter that gave rise to it), so it was not necessary for the Tribunal to determine the request for provisional measures during the period of suspension. It is, however, notable that the Tribunal maintained the schedule for the parties filing submissions on the request for provisional measures throughout the period of suspension. See Joseph Charles Lemire v Ukraine, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) paras 18–24, 433, 445–446 and 474.


48 Using the term ‘Tribunal’ here has the following consequences. Where the suspension is due to a vacancy on the tribunal [ICSID Arbitration Rules (n 5) r 10(2)], it is the remaining arbitrators who are empowered to determine the provisional measures request. Where the suspension is due to a challenge to an arbitrator [ICSID Arbitration Rules (n 5) r 9(6)], the full tribunal (including the challenged arbitrator) is empowered to determine the provisional measures request. [See Schreuer and others (n 17) 1211 para 9 of the commentary to art 58]. As regards the second consequence, our reasons for considering it proper that the challenged arbitrator should be involved in determining the provisional measures request were set out in Section VI above.
orders in all other circumstances. Doing so would prevent any argument that the inclusion of such a power in Sentence A, but not generally, indicates that the power is not available generally.

If, however, there is appetite for a more progressive development, we would propose the addition of the following two paragraphs to ICSID Arbitration Rule 39 (ie instead of Sentence A above):

[B] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 9(6), the Tribunal may, during that period of suspension, determine the request and in addition or alternatively issue an interim order requiring the parties to maintain the status quo pending the determination of the request.

[C] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 10(2) in circumstances where the proceeding was suspended pursuant to Rule 10(2) following the disqualification, death, incapacity or resignation of an arbitrator appointed by one of the parties, the power to determine the provisional measures request and issue an interim order during that period of suspension lies with the President of the Tribunal alone. [D] Where a request is made pursuant to paragraph (1) [of Rule 39] during a period where a proceeding is suspended pursuant to Rule 10(2) in circumstances where the proceeding was suspended pursuant to Rule 10(2) following the disqualification, death, incapacity or resignation of the President of the Tribunal, the parties are required provisionally to maintain the status quo pending the determination of the request, unless the remaining members of the Tribunal unanimously order otherwise.

With Sentence C, the aim is to ensure that the party whose appointed arbitrator has departed the tribunal is not prejudiced by that fact (hence only the President is empowered to make the order). With Sentence D, the intention is to guard against disagreement between the remaining, party-appointed arbitrators resulting in prejudice to the party requesting provisional measures.

VIII. CLOSING REMARKS

This note has argued that the ICSID Convention and ICSID Arbitration Rules empower a tribunal to consider a request for provisional measures during a period of suspension. Indeed, they require that such a request be accorded priority, including when proceedings are suspended. However, the most appropriate action to satisfy this requirement will often be for the tribunal to issue an interim order requiring the parties to maintain the status quo pending the determination of the request, to be taken after the suspension ends.

49 In terms of wording, the authors suggest the following: 'The Tribunal may issue an interim order requiring the parties to maintain the status quo pending the final determination of the request.'

50 The only difference between Sentences A and B is the deletion of the reference to ICSID Arbitration Rule 10(2). That provision is addressed by Sentences C and D.

51 ie akin to the automatic provisional stay of enforcement of an award when requested in an application for revision or annulment of the award: see ICSID Convention (n 3) arts 51(4) and 52(5).
Response of the European Federation for Investment Law and Arbitration (EFILA) to Invitation to File Suggestions for ICSID Rules Amendments

Response of the European Federation for Investment Law and Arbitration (EFILA) to Invitation to File Suggestions for ICSID Rules Amendments

(dated 31 March 2017)

The European Federation for Investment Law and Arbitration (EFILA) is an independent Brussels-based think tank that serves as a platform for a merit-based discussion on all aspects of European and international investment law, including arbitration.

EFILA is a non-profit international association under Belgian law (AISBL). More information about EFILA and its activities and projects: www.efila.org

EFILA welcomes the invitation to suggest ICSID rules amendments and proposes as follows:

- EFILA suggests shortening of the deadlines envisaged in the procedure for constituting the tribunal in the absence of previous agreement (Rule 2) to, e.g., 10-20-10 days, with the default process being able to be triggered immediately after the end of the 40-day period.

- EFILA suggests including a fee for making challenges of arbitrators in order to discourage challenges which are without merit and which may be made to unduly delay or obstruct the proceedings.

- EFILA suggests setting out the tasks of the administrative secretary in the Rules, or at least stating that the tasks of the administrative secretary should be fixed in consultation with the parties.

- EFILA suggests modification of Rule 13 (Sessions of the Tribunal) to state that the tribunal, after having consulted the parties, may hold hearings at any place it considers appropriate as we do not see any good reason for one party to be able to force everyone else on a case to travel to Washington DC for a hearing, in case another venue would be more convenient.

- EFILA notes that Rule 23 (Copies of Instruments) is outdated. We therefore suggest that after the tribunal is constituted, it should be free to determine how many hard copies (if any) it requires of given types of communications, as long as the ICSID Secretariat is always copied.

- EFILA notes that the current formulation of Rule 32(2) (The Oral Procedure) implies that either party can block the attendance of amici curiae and other members of public at a hearing. To improve public confidence in the system, we suggest modification that permits a tribunal to allow attendance of third parties after consulting the parties, in a
similar manner as the tribunal can allow amici to make submissions in writing after consulting the parties under Rule 37(2).

- EFILA suggests including the possibility for the tribunal to request that an amicus provide security for the parties’ reasonable costs in commenting on the submission of the amicus as a condition for allowing the amicus to make a submission.

- EFILA notes that the current wording of Rule 38 (Closure of the Proceeding) is too lax to impose discipline on tribunals. To make proceedings shorter and more efficient, we suggest a rule specifying that the closure of the proceedings should take place within a certain amount (e.g. 90) of days of the last agreed submission by either party, or the end of the hearing, whichever is later.

- EFILA notes that some confusion is present among the legal community about whether provisional measures can be recommended to protect rights that are uncertain as they are the subject of the dispute. We suggest to clarify this by adding “including [alleged/hypothetical/potential] rights” or “including rights the existence of which is the subject of determination by the Tribunal” after “for the preservation of its rights” in the first sentence of Rule 39(1) (Provisional Measures).

- EFILA suggests making it clear, in line with rules of other institutions, that the first procedural meeting (First Session) may, where appropriate, be held by other means than a physical meeting in order to speed up the initial stages of the proceedings, in particular the filing of preliminary objections pursuant to Rule 41(5).

- Regarding Rule 48(4) (Rendering of the Award), EFILA notes that many important rulings of ICSID tribunals are not included in an award, but in a decision or order. We contend that where ICSID Secretariat is prevented from publishing such a decision or order due to lack of party consent, it should have the power to publish extracts, if it considers them important for the development of international law. We doubt that the word “promptly” is sufficient to encourage ICSID not to delay publication so we suggest setting down a specific deadline. In order not to overly burden the ICSID Secretariat, we also suggest replacing “shall” with “may, if such publication would, in the opinion of the Secretary-General, further the development of international law in relation to investments”.

- EFILA notes that the current wording of Rule 50(1)(c)(iii) (The Application) implies that parties can seek annulment of an award without giving any indication as to the shortcomings in the process or the award on which it is based, simply by citing all or most of the grounds in Article 52(1) of the Convention. We suggest that a request for annulment should
contain information concerning the reasons for which the award is subject to annulment pursuant to one of the annulment grounds.

• EFILA also notes that the current period in which an aggrieved party may seek an annulment of an award is too long and is used to delay the proceedings. To make proceedings shorter and more efficient, we suggest its reduction.

• EFILA notes that if the original tribunal cannot be reconstituted, having a new tribunal interpret an award issued by an earlier, different tribunal, is not an authentic interpretation and risks in fact amending the award. We therefore suggest eliminating Rule 51(3) (Interpretation or Revision: Further Procedure).

• EFILA suggests addressing the issue of concurrent proceedings.
31 March 2017

BY EMAIL

Meg Kinnear, Esq.
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Proposed Amendments to 2006 ICSID Rules

Dear Ms. Kinnear:

The partners of the International Dispute Resolution Group of Debevoise & Plimpton LLP are pleased to present suggestions regarding potential amendments to the 2006 ICSID Rules and Regulations (the “Rules”).

Debevoise’s Commitment to Efficiency and Fairness in International Arbitration

As one of the world’s leading arbitral institutions, ICSID plays a key role in the resolution of investment disputes involving states. We therefore welcome ICSID’s willingness to adapt its Rules to address the evolving needs and concerns of its users and other interested parties.

At Debevoise, we place significant emphasis on ensuring that arbitration proceedings are efficient and tailored to the needs of the particular case. In our experience, ICSID proceedings often take too long and cost too much, partly because the Rules do not provide the structure or incentives to encourage arbitration tribunals and parties to resolve disputes in an efficient and timely fashion. We believe that it is in the interest of all parties that procedures be efficient and promote the swift and timely resolution of disputes, while still ensuring equality between the parties and respecting due process rights. We therefore fully support ICSID’s stated objective “to simplify the dispute settlement procedure to make it increasingly cost and time effective, while continuing to ensure due process and equal treatment of the parties.”

To that end, we provide in this letter suggestions regarding potential amendments to the Rules that are designed to promote ICSID arbitration as an efficient dispute resolution mechanism. While some of our suggestions relate to existing Rules, others invite ICSID to consider new rules that reflect the evolution of arbitration practices.
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I. ESTABLISHMENT OF THE TRIBUNAL

A. Constitution of the Tribunal (Rule 6(2)). Rule 6(2) requires each arbitrator to sign a declaration before or at the first session of the Tribunal. To promote efficiency, and to ensure that the Tribunal members have sufficient availability to fulfill their obligations expeditiously, ICSID should require each arbitrator to confirm as part of the same declaration (i) his/her commitment to conduct the proceedings fairly and efficiently, by adopting procedures suitable to the circumstances of the arbitration, (ii) the days or weeks in the next two years that he/she has already committed to other cases or other obligations that make him/her unavailable, and (iii) his/her commitment that he/she will not take on new appointments that will conflict with his/her responsibilities to the case subject to the appointment.

B. Duties of the Tribunal. To emphasize the Tribunal’s obligations towards the parties, ICSID should include a rule establishing that the Tribunal’s general duties at all times during the arbitration shall include (i) a duty to act fairly and impartially as between all parties, and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute. See LCIA Rules, Article 14.4.

C. Disqualification of Arbitrators (Rule 9(1)). Rule 9(1) requires that disqualification challenges made under Article 57 of the ICSID Convention (the “Convention”) be filed “promptly, and in any event before the proceeding is declared closed.” In some cases, parties appear to seek to disqualify arbitrators as a way to delay the proceedings. For example, in ConocoPhillips v. Venezuela, Venezuela filed six different requests to disqualify L. Yves Fortier over the course of five years. 1 To deter parties from seeking to disqualify arbitrators as a delaying tactic, ICSID should:

1. First, impose specific time limits for filing such challenges, for example, within 30 days of receiving the notice of appointment of that arbitrator, or within 30 days of the date on which the proposing party became, or could have reasonably become, aware of the circumstances giving rise to the challenge;

2. Second, preclude parties from proposing the disqualification of the same arbitrator a second time, unless there is a material change in the circumstances that existed at the time of the first proposal; and

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1 See e.g., ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 27 February 2012; Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014; Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015.
3. *Third*, replace Rule 9(6), which suspends the proceeding “until a decision has been taken on the proposal,” with a rule giving arbitrators who are not subject to the disqualification challenge the authority to continue the proceedings pending the resolution of the disqualification challenge.

II. **Working of the Tribunal**

A. *Fixed Dates for Deliberations (Rules 14, 15).* To avoid delays in the issuance of the award, and to ensure that the Tribunal engages in a thorough discussion of the issues immediately before and after the hearing, ICSID should require the Tribunal to set aside *(i)* dates immediately before the hearing for a conference among themselves, and *(ii)* dates immediately after the hearing, or within 30 days of the end of the hearing, for deliberations. To ensure that these dates are available, they should be set in the procedural order decided at the preliminary procedural conference (*see Section III.B.2 below*). When arbitrators wait until the hearing to set their deliberations, conflicting schedules often prevent them from getting together for a long time. This delay reduces the impact of the hearing and causes substantial delay in drafting the award.

B. *Arbitrators’ Fees.* As a method to incentivize arbitrators to pursue the twin goals of efficiency and fairness, in setting the arbitrators’ fees, ICSID should take into consideration *(i)* the diligence and efficiency of the arbitrator, *(ii)* the time spent working on the arbitration, *(iii)* the rapidity of the proceedings, *(iv)* the complexity of the dispute, and *(v)* the timeliness of the submission of the draft award. ICSID could adopt a fee scale similar to that contained in Appendix III of the ICC Rules.

III. **General Procedural Provisions**

A. *Tailored Procedures (Rules 19, 20).* ICSID should adopt rules that encourage Tribunals and the parties to adopt procedures that are appropriate for the particular case and are designed to lead to an efficient resolution. For example:

1. *First,* the Rules should require the respondent to file an answer, including any jurisdictional objections and counterclaims, within 45 days of the receipt of the request for arbitration and, in any event, *before* the first procedural conference (*see UNCITRAL Rules, Article 4*). The Secretariat could have the authority to grant a short extension if requested prior to the constitution of the Tribunal. It is inefficient for a procedural schedule to be set and for the investor to have to proceed with further submissions without any knowledge of the respondent state’s position.

2. *Second,* the Tribunal should ask the parties to agree on a preliminary list of issues to be addressed by the Tribunal.
3. Third, the Tribunal should be encouraged to adopt a thumbs-up-thumbs-down procedure, including with respect to jurisdictional, merits, or other interim decisions. In this procedure, the Tribunal issues a brief decision, without stating reasons, as soon as possible after the parties have completed their respective submissions and pleadings on the issue, but no later than 30 days after the last submission or hearing date (see also Section IV.B below). For example, if the Tribunal decides to reject a jurisdictional challenge, it can simply say so, order the parties to proceed with a pre-set schedule on the merits, and issue the decision later or in its award on the merits. If the Tribunal accepts the challenge, it can inform the parties not to proceed further and issue its award whenever it is ready (within appropriate time limits). We have used this procedure effectively in several cases. Just this month, in a simple statement, the Tribunal in Tethyan Copper Company v. Islamic Republic of Pakistan rejected Pakistan’s last defense on liability and confirmed the commencement of the damages phase. To accomplish this, ICSID should revise Rule 47(1)(i), which requires that all awards state their reasons, to expressly allow the Tribunal to issue brief decisions prior to the full award.

4. Finally, the parties should be able to grant authority to the President of the Tribunal to rule on certain aspects of the procedure, including document requests (see also Section V.A.3 below).

B. Setting the Procedural Schedule (Rules 19, 20). ICSID should adopt rules that require the Tribunal to set the entire schedule for the arbitration at the first procedural conference. These rules should:

1. First, require the parties and the Tribunal to decide whether or not to bifurcate or trifurcate the proceedings, by separating jurisdiction, liability or quantum phases.

2. Second, require that the procedural schedule includes, inter alia, (i) deadlines and hearing dates that include all phases of the case, if it is to be bifurcated or trifurcated, (ii) deadlines for the parties’ submission of their detailed statements of position, (iii) dates for meet-and-confer sessions between the parties and with the Tribunal, to narrow disputes relating to document discovery, (iv) dates for a pre-hearing procedural conference during which the parties and the Tribunal may consider the procedures, (v) dates immediately before the hearing for the Tribunal to hold a

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conference among themselves, (vi) dates immediately after the hearing, or within 30 days of the hearing, for the Tribunal to conduct its deliberations, (vii) dates for the issuance of the award and any interim decisions, and (viii) any other dates that would facilitate the timely resolution of the proceedings (see Sections II.A above, and IV.B, V.A.2 and VII.A below).

C. **Procedural Meetings (Rules 20, 21).** In order for procedural conferences to be meaningful, productive and effective, party representatives with the requisite authorization should be present at all procedural conferences to make decisions and engage fully in the discussions. ICSID should also consider rules encouraging the parties and their counsel to attend procedural meetings with the Tribunal in person whenever possible, because they lead to more in-depth discussions and reduce subsequent disputes.

D. **Electronic Filings (Rule 23).** Rule 23 requires that “every request, pleading, application, written observation, supporting documentation, if any, or other instrument be filed...in the form of a signed original.” ICSID should instead provide that filings be electronic, unless the parties are unable to do so. Debevoise, for example, has successfully implemented hyperlinked electronic memorials in proceedings under the ICC, ICDR, UNCITRAL and LCIA Rules. Hard copies of the parties’ submissions would only be provided upon request. In addition, when hard copies are submitted, the default rule should be that submissions and other communications are submitted directly to the Tribunal, with copies to the Secretariat. The current practice of making all submissions through the ICSID Secretariat is cumbersome and consumes time of the Secretariat that could be better spent.

E. **Costs Allocation (Rule 28).** ICSID should incentivize the parties to conduct the proceedings in an expeditious and cost-effective manner, including by not raising myriad meritless arguments. In *Occidental v. Ecuador*, for example, Ecuador was successful on only one out of 20 grounds for annulment.\(^3\) ICSID should provide a list of factors that the Tribunal should consider in making decisions as to costs, including (i) the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner, (ii) the number and nature of issues on which the parties were ultimately successful, and (iii) the compliance or non-compliance with provisional measures. *See* ICC Rules, Articles 29(4), 38.

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\(^3\) *See* Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Ecuador’s Memorial on Annulment, 12 August 2013; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶ 68, FN 51 (noting that there were additional sub-arguments to the 13 main grounds that Ecuador raised).
IV. JURISDICTIONAL PROCEDURES

A. Considering Jurisdictional Objections in the Initial Procedural Schedule (Rules 19, 20). As noted above, ICSID should adopt rules that require the Tribunal to set the entire schedule for the arbitration at the first procedural conference (see also Section III.B.2 above). These rules should require the parties and the Tribunal to decide whether or not to bifurcate or trifurcate the proceedings, by separating jurisdiction, liability or quantum phases.

B. Decisions on Jurisdictional Objections (Rule 41(6)). In order to avoid unnecessarily prolonging the proceedings as a result of jurisdiction objections, ICSID should (i) set shorter time limits for the issuance of decisions on jurisdiction, and (ii) use a thumbs-up-thumbs-down procedure (see Section III.A.3 above).

V. WRITTEN AND ORAL PROCEDURES

A. Document Requests (Rules 33, 34). In order to promote efficiency, ICSID should:

1. First, introduce rules requiring the parties to limit and focus requests for the production of documents. For example, discovery requests regarding electronic documents could be drafted in such a way as to take account of how documents are stored, for example, by specifying specific search terms and using hit counts. The standards set forth in the IBA Rules of Evidence generally provide an appropriate balance of interests, but the nature of requests could be adapted to the nature of electronic documents. In addition, the rules could require that, in deciding the propriety of individual requests, Tribunals must balance the cost of producing responsive documents against the materiality and relevance of the documents sought.

2. Second, introduce procedures that encourage the parties and the Tribunal to discuss and confer on the issues related to document requests. When Tribunals simply decide discovery disputes on the basis of written submissions, they are much less able to determine the relevance of the documents sought and the cost of producing them. Relevant procedures include, for example, (i) scheduling meet-and-confer conferences between the parties aimed at resolving as many outstanding issues as possible, as well as (ii) conference calls with the Tribunal following such conferences to further narrow points of disagreement (see Section III.B.2 above). Debevoise has successfully organized such meet-and-confer conferences with opposing counsel in many cases.
3. Third, introduce a rule granting the President of the Tribunal the authority to rule on document requests, where appropriate (see Section III.A.4 above).

B. Expert Evidence (Rules 34, 35). ICSID should encourage (i) meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing, and (ii) the parties not to present experts on issues of law unless the Tribunal and counsel are not qualified to act under that law. From our experience, meetings of experts frequently reduce the issues in dispute and permit much more focused questioning at the hearing.

C. Examination of Witnesses and Experts (Rules 35, 36). ICSID should encourage Tribunals to adopt procedures for examining witnesses and experts at the hearing that ensure the most efficient resolution of the issues, including the use of (i) written witness statements as direct testimony to focus the evidence and hearings, and (ii) conferencing/hot-tubbing for experts.

D. Post-Hearing Submissions. ICSID should adopt rules stating that closing arguments at the end of a hearing should be the default and that the Tribunal should not request post-hearing submissions from the parties unless appropriate and necessary. When such submissions are requested, ICSID should require Tribunals to ensure the efficient resolution of the issues, by, for example, (i) identifying and limiting the issues on which the Tribunal may benefit from further exposition, (ii) imposing page limits, and (iii) using detailed outlines rather than narrative briefs to focus the issues and to make the briefs more useful to the Tribunal. In arbitrations under the ICC Rules, LCIA Rules, the Milan Chamber of Commerce Rules, and the Convention, for example, Debevoise has used detailed outlines for post-hearing briefs to present the hearing testimony on a particular topic in a focused way and avoid repetition of argument.

E. Visits and Inquiries (Rule 37(1)). ICSID should adopt rules requiring that (i) the parties cooperate with the Tribunal to the extent the Tribunal considers it necessary to visit any place connected to the dispute or to conduct an inquiry there, and (ii) any such visit or inquiry proceed in a way that maintains equality between the parties.

F. Reconsideration of Interim Decisions Prior to an Award (Rules 25, 38(2)). Although most arbitration tribunals have found that they lack the power to reconsider interim decisions prior to an award, neither the Convention nor the

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4 See, e.g., Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Decision on Ecuador’s Reconsideration Motion, 10 April 2015; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017; ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of
Rules squarely address this point. Consistent with principles of efficiency and fairness that undergird the international arbitration regime, ICSID should clarify that decisions of the Tribunal, once made, should be binding for the purposes of the case. If ICSID concludes that parties should have some basis to seek reconsideration of the Tribunal’s decisions, it should limit reconsideration to very exceptional circumstances.

VI. PARTICULAR PROCEDURES

A. Expedited Procedures. ICSID should adopt expedited procedures if the amount in dispute does not exceed, for example, USD 10 million. This threshold appears appropriate based on a finding that the amount in dispute in 11.86% of ICSID cases does not exceed USD 10 million. Such expedited procedures could involve the appointment of a sole arbitrator (as opposed to a three-member Tribunal), who would have discretion to adopt such procedural measures as he/she deems appropriate. After consulting the parties, and subject to their agreement, the arbitrator could, for example, (i) limit or eliminate document production, (ii) limit the number, length and scope of written submissions and written witness evidence, and (iii) decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. See, e.g., ICC Rules, Article 30 and Appendix VI.

B. Emergency Arbitrators. Subject to the terms of the Convention and the parties’ agreement, ICSID should adopt rules for the appointment of emergency arbitrators before the constitution of the Tribunal.

1. In situations where time is of the essence and there is risk of irreparable harm if the status quo is not swiftly preserved, having to wait for a Tribunal to be established before being able to seek provisional measures is often harmful to the claimant.

2. The fact that a sovereign is involved does not alter the claimant’s need for relief and, in some cases, may even accentuate it. For example, in Occidental v. Ecuador, even though the respondent state had seized the claimant’s assets and taken over the claimant’s operations even before the request for arbitration had been filed, the claimant had to wait more than six months for a hearing on its request for provisional measures and more than a year for a

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5 See Investment Treaty Arbitration: How much does it cost? How long does it take? Allen & Overy Publications, 18 February 2014 (finding, based on a review of 221 ICSID cases, that the amount in dispute was between USD 0–10 million in 11.86% of the cases, between USD 10–25 million in 9.6% of the cases, and between USD 25–50 million in 10.17% of the cases).
Similarly, in *Nova Group Investments, B.V. v. Romania*, one of the claimants, Dan Adamescu, died due to health complications before the Tribunal was able to rule on the claimants’ provisional measures request seeking, *inter alia*, an amendment of the terms of Mr. Adamescu’s detention to allow him to receive the necessary medical care.\(^6\)

3. Many other arbitral institutions such as the ICC, ICDR, HKIAC, LCIA, and CIETAC have adopted rules providing for the appointment of emergency arbitrators. The SCC and SIAC have also adopted these rules in the investment arbitration context (see SCC Rules, Appendix II; SIAC (IA) Rules, Schedule 1), and they have been successfully invoked by investors.\(^8\) Such rules in the ICSID context could, for example, specify the procedure for (i) appointing and challenging emergency arbitrators, (ii) obtaining emergency measures, and (iii) seeking reconsideration of these measures once the Tribunal is appointed. See, e.g., ICC Rules, Article 29 and Appendix V.

C. **Provisional Measures (Rule 39(3)).** Under Rule 39(3), the Tribunal “may at any time modify or revoke its recommendations” on provisional measures. This Rule, however, does not specify the applicable standard for reconsidering provisional measures. Some arbitration tribunals have granted such requests when there are “changed circumstances, which make it urgent and necessary to adopt a new decision on provisional measures, which can suspend, terminate or modify the scope of the provision measures granted.”\(^9\) ICSID should specify the applicable standard for reconsidering provisional measures, and may wish to use similar language as quoted above.

D. **Scope of Preliminary Objections that a Claim Is Without Legal Merit (Rule 41(5)).** Under Rule 41(5), a party may raise preliminary objections that “a claim is manifestly without legal merit.” To avoid the parties having to waste time, energy and expense on briefing frivolous and unmeritorious arguments, ICSID should expand Rule 41(5) to allow a party to raise

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9. *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014, ¶ 9; *Hydro S.r.l & Others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Claimant’s Request for a Partial Award and Respondent’s Application for Revocation or Modification of the Order on Provisional Measures, 1 September 2016, ¶ 4.1.
preliminary objections against “a claim, counterclaim, or defense” that is manifestly without legal merit.

E. **Multi-Party Proceedings.** While the consolidation of two or more proceedings may generate significant cost and time savings, neither the Convention nor the Rules address the availability of such a procedure. ICSID should introduce procedures granting the Secretariat or the Tribunal the power to consolidate two or more proceedings into one multi-party proceeding in the event that it finds that (i) there are issues of fact or law common to the two proceedings so that a consolidated proceeding would be more efficient than separate proceedings, and (ii) no party would be prejudiced as a result of such consolidation through undue delay or otherwise.

F. **Mass Claims.** Although the Convention and the Rules are silent on the issue, arbitration tribunals have relied on Article 44 of the Convention and Rule 19 to find that mass claims are allowed.\(^{10}\) ICSID should (i) introduce procedures granting the Tribunal the power to oversee mass claims and to craft suitable procedures applicable to such claims, and/or (ii) specify the circumstances in which mass claims would be acceptable in investment arbitration proceedings. For example, in *Abaclat v. Argentina*, the Tribunal found that such claims may be acceptable where “claims raised by a multitude of claimants are considered identical or at least sufficiently homogenous.”\(^{11}\)

**VII. The Award**

A. **Issuance of the Award (Rule 46).** Rule 46 currently requires that awards “be drawn up and signed within 120 days after closure of the proceeding.” However, Tribunals generally wait to close the proceeding until they are ready to issue the award. As a result, the rule does not provide any meaningful deadline. To promote efficiency and the expeditious resolution of cases, ICSID should instead require that (i) awards must be drawn up and signed within six months of the final hearing or final submission, (ii) any extensions may only be granted by the Secretariat, and (iii) the arbitrators’ fees will be proportionately reduced if any awards are issued after the stipulated deadline. In order to meet these deadlines, dates for deliberations should be included in the original procedural order (*see* Section III.B.2 above).

B. **Non-Pecuniary Relief.** ICSID should clarify in the Rules that Tribunals have the power to award both pecuniary and non-pecuniary damages, assuming that non-pecuniary damages are available under the applicable law. Although the obligation to enforce an award under Article 54 of the Convention only covers

\(^{10}\) *See*, e.g., *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶¶ 517–519; *Ambiente Ufficio S.p.A. and Others v. The Argentine Republic*, ICSID Case No. ARB/08/09, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 169; *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, ¶ 324.

\(^{11}\) *See* *Abaclat*, ¶ 540.
pecuniary obligations, arbitration tribunals have not interpreted Article 54 as precluding the award of non-pecuniary relief such as an injunction or an order for specific performance.\textsuperscript{12}

VIII. INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

A. Stay of Enforcement Pending Annulment (Rule 54(1)). Under Rule 54(1), “[t]he party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates.” In order to deter award debtors from disposing of their assets during the annulment phase, ICSID should require (i) the party seeking to stay enforcement to provide security for costs, and (ii) the Tribunal or Committee to rule on such requests within a specific timeframe.

* * *

We very much appreciate your consideration of our suggestions and remain available to discuss further if that would be helpful.

Yours sincerely,

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Christopher K. Tahbaz
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\textsuperscript{12} See, e.g., Enron Creditors Recovery Corp. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶¶ 79–81 (finding that it had jurisdiction to order injunctions or to require a state to perform certain acts); Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 744 (ordering Zimbabwe to return legal title to farms expropriated from the claimants); Ioan Micula and others v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 166–168 (finding that it had the power to order restitution of the legal framework previously in force in Romania, and dismissing Romania’s jurisdictional objection on that basis).
March 31, 2017

ICSID Secretariat
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Illustrative Suggestions for Amendments to the ICSID Arbitration Rules

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide input to the ICSID Secretariat regarding proposed revisions to ICSID’s arbitration rules.

CCSI, as a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment, including related dispute resolution mechanisms, and the impacts such investment and dispute resolution can have on inclusive, rights-compliant sustainable development. While not comprehensive, our comments below briefly highlight some issues that we believe need to be addressed on a priority basis in order to help address some of the gaps regarding the legitimacy and fairness of investor-state arbitration. This submission is not meant to be exhaustive. CCSI looks forward to opportunities to further engage in ongoing discussions on priorities and options for reform.

We thank you for your consideration of this submission.

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Recognizing and safeguarding the rights and interests of non-parties

Disputes between two litigating parties often impact the rights and interests of those not party to the litigation or arbitration. In recognition of that reality, the procedural rules governing some systems of dispute resolution (1) provide a mechanism for mandatory or permissive joinder by those interested or affected non-parties, and (2) require dismissal of cases when a non-party’s rights will be affected by the dispute resolution proceedings but cannot join them.

ICSID’s arbitration rules (like other arbitration rules commonly used in investor-state arbitration) contain no such protections for interested and affected non-parties. Consequently, the litigation positions adopted in and outcomes of investor-state arbitral disputes risk harming the rights of other natural and legal persons. We thus urge that ICSID address this issue to ensure fairness to non-parties and recommend adoption of a rule mandating dismissal of claims or cases in which (1) the rights or interests of non-parties will be affected by the arbitration, and (2) those non-parties are not willing or able to join the arbitration as parties.

Improving transparency of the dispute resolution process

Nearly four years ago, the United Nations Commission on International Trade Law (UNCITRAL), recognizing “the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,” adopted its Rules on Transparency in Treaty-Based Investor-State Arbitration (the “Transparency Rules”). ICSID, however, has yet to similarly update its rules and bring them in line with modern norms regarding transparency and good governance.

In other contexts, the World Bank Group has highlighted the significance of transparency for improved governance of, and accountability regarding, investment. The World Bank’s recently revised Environmental and Social Standard (ESS), for example, highlights the importance of open access to land or resources, in claims for injunctive or declaratory relief, and in cases requiring judgments on the validity of a court/arbitral award received by a non-party to the litigation/arbitration in a separate proceeding.

Risk to the rights and interests of non-parties may be particularly acute in cases involving disputes over access to land or resources, in claims for injunctive or declaratory relief, and in cases requiring judgments regarding the legitimacy of non-parties’ rights or actions.

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1 There are innumerable circumstances in which arbitration/litigation can affect non-parties’ rights and interests; this submission does not purport to catalogue them. Nevertheless, they can include situations in which the dispute involves

- a challenge to the validity of a court/arbitral award received by a non-party to the litigation/arbitration in a separate proceeding;
- a claim by shareholders regarding alleged harms to a non-party corporation; and
- a claim by one entity to obtain a permit or other permission to use or occupy land over which there are also competing claims by individuals or communities.


and transparent engagement around investment projects *throughout their life-cycle* “as an essential element of good international practice.” To be meaningful, this transparency regarding investor-state relations must include dispute resolution processes at the national and international levels.

Indeed, the lack of transparency investor-state dispute settlement has been identified by critics as one of the features that undermines the legitimacy and accountability of the current system. UN human rights experts, among others, have publicly voiced concern about the impact of investor-state dispute settlement on human rights, pointing to *inter alia* the lack of transparency in the current system.

Supporters of investor-state arbitration are also concerned about the lack of transparency, as they recognize that transparency of the system is inexorably tied to its legitimacy. Proponents often argue that the system can improve domestic rule of law in the host state. However, by excluding interested third parties (including project-affected sectors of host state citizens) from accessing information about disputes, the current system arguably runs counter to rule of law principles of equality, accountability, fairness, and procedural and legal transparency. Moreover, the lack of transparency prevents states and investors from understanding the law that applies to them, and their rights and obligations under that law.

We urge ICSID and its state parties to recall UN member states’ commitments under Goal 16 of the Sustainable Development Goals to *inter alia* promote the rule of law, and to “[d]evelop effective, accountable and transparent institutions at all levels.” Fulfilling these commitments requires, among other things, ensuring transparency of investor-state arbitrations.

In this effort to ensure transparency of international arbitration, ICSID is aided by the work of UNCITRAL, which established an important framework for transparency of treaty-based investor-state arbitration, and by the growing number of treaties that also require transparency of the investor-state disputes that arise under them. Importantly, ICSID could and should also advance the standard for its peers by ensuring transparency of contract-based disputes in addition to treaty-based investment disputes.

Owing to the significance of investor-state contracts for the governance and outcomes of international investment, consensus is emerging on the need for greater transparency around these

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5 *Id.*, para. 1.
7 See e.g., “Investor-State dispute settlement undermines rule of law and democracy, UN expert tells Council of Europe,” (April 19, 2016); “International trade: UN expert calls for abolition of Investor-State dispute settlement arbitrations” (October 26, 2015); “UN experts voice concern over adverse impact of free trade and investment agreements on human rights” (June 2, 2015).
8 See e.g., Benjamin K. Guthrie, “Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law,” (2013) 45 *NYU Journal of International Law & Politics* 1151 (for a summary of arguments in support of this statement).
10 UN Sustainable Development Goals (SDGs) Targets 16.3 and 16.6 respectively.
11 On the significance of investor-state contracts for the governance and outcomes of international investment, see e.g., Kaitlin Cordes, Lise Johnson, and Szoke-Burke, “Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections,” Columbia Center on Sustainable Investment (2016); Lorenzo Cotula, “Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive
agreements. This consensus is evident in certain guidelines and principles regarding responsible international investment, and in the steps that some host states have taken to advance or require contract disclosure. Moreover, proactive disclosure of investor-state contracts is arguably required under existing host and home state obligations to respect, protect and fulfill rights to participation and access to information, protected under several existing human rights treaties to which many (or most) ICSID contracting and signatory states are party. This obligation to proactively disclose arises from both the general public interest nature of investor-state contracts (which involve the exercise of state powers and form a key source of rules governing international investment), and from the specific implications that investor-state contracts can have for affected individuals and communities in the context of international investment. The rationale underlying arguments for proactive disclosure of investor-state contracts can be extended to investor-state disputes based in, or concerning, these agreements. Investor-state disputes can, among other things: result in the interpretation of contractual commitments in a manner that profoundly affects the underlying investment, and rights and obligations of the contracting parties; allow for enforcement of investor-state contracts deemed illegal or invalid under domestic law; and require or result in the renegotiation of these agreements.

The need for transparency of investor-state contracts thus implies a need for transparency of any processes and outcomes that may affect the content and enforcement of these agreements, including investor-state dispute settlement. These issues should therefore also form a part of ICSID’s upcoming efforts to modernize its rules.

Promoting transparency of ownership

Driven in part by tax planning strategies and regulatory arbitrage, ownership structures for investments are increasingly and infamously complex. One consequence is that respondent states may have difficulty assessing whether investor/claimants are actually entitled to protection under the relevant investment treaty that is being invoked. Rather than requiring states to embark on costly and wasteful efforts to disentangle corporate ownership structures each time they face a case, the

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12 For example, following a review of guidelines and principles regarding land governance and responsible investment, the Columbia Center on Sustainable Investment found that most prominent best practice recommendations call for transparency around land-based investments, with many such guidelines calling for disclosure of land contracts specifically. See Columbia Center on Sustainable Investment, “Recommended Transparency in Land-Based Investment: A Summary of Relevant Guidelines and Principles,” (March 2016). More generally, the UN Principles for Responsible Contracts, endorsed by the Human Rights Council in 2011, recommend that “[t]he contract’s terms should be disclosed.” See UN Principles for Responsible Contracts (2015). The Principles were endorsed as part of the Guiding Principles on Business and Human Rights on June 16, 2011. See UN Human Rights Council Resolution 17/4 on Human rights and transnational corporations and other business enterprises (UN Doc. A/HRC/RES/17/4).

13 With respect to extractive industry investments, contract disclosure is fast becoming the norm among Extractive Industry Transparency Initiative (EITI) countries. As of March 2017, at least 29 host states had published some contracts, licenses or leases pertaining to extractive industry projects. See Don Hubert and Rob Pitman, “Past the Tipping Point? Contract Disclosure within EITI,” Natural Resource Governance Institute (March 2017). A handful of states have also taken steps to disclose investor-state contracts concerning commercial agriculture and forestry projects.


15 Id.
ICSID arbitration rules should require companies to fully disclose their corporate family structures and beneficial owners when filing a request for arbitration. In addition to helping reduce the time and expense of arbitration by clarifying certain issues at the outset of the dispute, such a rule on early disclosure would also likely reduce incentives for companies to abuse the flexibilities afforded by corporate law, and would enable other interested and potentially affected individuals and entities such as creditors and shareholders to be aware of the case.

Preventing abuse of requests for interim measures

In a growing number of cases, investor/claimants in investor-state disputes are seeking interim measures of injunctive relief that aim to compel states to halt their own governmental investigations of or claims against the investor relating to the investor’s alleged wrongdoing. In other cases, requests for interim measures of injunctive relief ask for an order compelling the state to halt litigation private parties have brought against the investor, or to stop private parties from collecting sums awarded against the investor through separate legal proceedings.

These types of requests can potentially interfere with legitimate government and private actions to hold investors accountable for harms they cause in the host state. Given the persistent challenges that many host countries and communities face in terms of securing relief for injuries caused by projects involving foreign investment, giving investors these added tools for avoiding responsibility is particularly problematic.

Revision of ICSID’s arbitration rules should therefore seek to prevent investors from abusing requests for interim measures through, for example, bans on such requests or rules requiring imposition of financial penalties on investors who seek to shut down any non-frivolous case or investigation against the investor.

Preventing actual and apparent conflicts of interest

The independence and impartiality of dispute settlement mechanisms, including investor-state arbitration, is critical for preserving the credibility and viability of such mechanisms. Under current ICSID arbitration rules, however, guarantees of independence and impartiality are inadequate.

Among the issues that should be addressed in this context are the practice of arbitrators wearing “dual hats” – simultaneously practicing both as arbitrators and counsel in investor-state arbitral disputes. ICSID arbitration rules should be revised to preclude that practice. Similarly, the procedures by which challenges are decided should be revised. The present system, whereby a challenge to one arbitrator is resolved by his/her two fellow arbitrators, “does not fulfill the

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17 See, e.g., Luke Eric Peterson, ICSID Tribunal Orders State-Owned Companies to Work to Get Local Court Injunction Lifted, IAReporter (Jul. 20, 2016); Luke Eric Peterson, In “Show Cause” Proceeding, Chevron Quantifies Alleged Losses Due to Ecuador’s Failure to Block Enforcement of Lago Agrio Judgment, IAReporter (Nov. 19, 2013).

appearance-of-independence requirement, and thus undermines the normative and sociological legitimacy of arbitral tribunals.\(^\text{19}\)

**Addressing concerns raised by third-party funding**

The apparent rise of third-party funding in investor-state arbitration raises a host of concerns relating to, among other things, potential conflicts of interests and the ability of respondent states to recover costs awarded against unsuccessful and insolvent claimants. Depending on the nature of the funding arrangement, third-party funding may also potentially impact the fundamental question of who is the investor/claimant, and whether that investor/claimant is – and should be – protected under international investment treaties and the ICSID Convention given the object and purpose of those instruments.

It is crucial to launch a multi-stakeholder dialogue on the role of third-party funders in ICSID investor-state arbitration, and to consider rules for governing whether, in what circumstances, and under what conditions different funding arrangements may be permitted.\(^\text{20}\)

**Ensuring legitimacy of settlement agreements\(^\text{21}\)**

A significant percentage of investor–state dispute settlement claims are reportedly settled between the parties to the dispute before an award is issued.\(^\text{22}\) While settlements can be seen as positive outcomes, saving parties the time and expense of arbitration and permitting more certainty over an outcome, in the context of disputes involving governments, settlements raise threats to principles of good governance, including government accountability, respect for the rule of law, transparency, and respect for citizens’ rights and interests under domestic law and international human rights norms.\(^\text{23}\) When a settlement agreement also includes the settlement of a counterclaim, the threats are exacerbated.

Settlements can significantly impact, often negatively, the rights and interests of non-parties to the dispute,\(^\text{24}\) and could also allow a governments to avoid legislatively established norms that govern


\(^{20}\) The Singapore Investment Arbitration Centre (SIAC) is the first arbitration institution to include rules expressly addressing third party funding. See, e.g., SIAC Investment Arbitration Rules, Rules 24.1 & 33.1.


\(^{23}\) See United Nations, Office of the High Commissioner on Human Rights (UN OHCHR). *Good governance and human rights.*

the rulemaking process. While various rules and mechanisms exist in some domestic contexts for public and judicial oversight of settlement agreements, ICSID’s arbitration rules do not currently contain protections for non-party rights and interests, or mechanisms for ensuring public oversight of proposed settlement agreements. As such, any rule revisions surrounding settlement would need to go hand-in-hand with rule revisions surrounding transparency and the rights and interests of non-parties.

Ensuring legitimacy of the rule revision process

To date, roughly 600 investor-state arbitrations have been brought against states around the world under ICSID’s arbitration rules. ICSID’s arbitration rules thus have significant and growing implications for issues of fundamental importance around the world.

The mere fact that the cases are brought against states, involving allegations of government wrongdoing and potential liability, makes them important matters of public concern. But the nature of the disputes and the range of laws, policies, practices, actions and omissions they challenge magnify these arbitrations’ relevance for non-parties. And, just as the public needs to be enabled to play a greater role in framing the substantive standards of protection that are used as the basis for investor-state cases (both treaty- and contract-based), the public must be engaged in this rule revision process. This is particularly so given that the content of procedural rules can play a determinative role in shaping substantive outcomes. We therefore commend ICSID for enabling public participation in this phase of its process, and emphasize the importance of continued efforts to ensure meaningful participation of diverse stakeholders around the world as this initiative advances.

26 See supra n.21.
INVESTOR-STATE ARBITRATION SERIES -March 2017

Potential Amendments to ICSID Rules and Regulations

Professor Claudiu-Paul Buglea Ph.D
ABOUT THE REQUEST FORMULATED BY ICSID

In October 2016, the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID or the Centre) had begun working on further updating and modernizing the ICSID Rules and Regulations by asking Member States for preliminary suggestions of topics or themes for „Possible Rule Amendments for ICSID Arbitration”.

In January 2017, the Secretariat of the Center formulated a request by inviting others interested in the ICSID process to provide suggestions regarding „Potential Amendments to ICSID Rules”. The ICSID Secretariat wishes to explore how to simplify the dispute settlement procedure to make it increasingly cost and time effective, while continuing to ensure due process and equal treatment of the parties, among other things. One of the guiding principles will be to maintain the balance between the interests of investors and States to ensure continued integrity of the process.

ABOUT THE AUTHOR

Mr. Claudiu-Paul Buglea is the Chairman of the Interdisciplinary Research Center in International Arbitration at the University of Bucharest, as well is dean and full professor at the Faculty of Law, Private Law Section, University of Bucharest, where his research focuses on international investment.

Professor Buglea has taught courses on international investment law as well as private international law at University of Bucharest. He has written extensively in the field of international commercial law, including many publications on international contracts and on international investment treaty practice.
Suggestions for Rule Amendments on ICSID Arbitral Rules and Regulations

Submitted by

Center in International Arbitration Research
University of Bucharest

1. The Center in International Arbitration Research of the Bucharest University (CIAR-UB or the Center) is a unique institution located in the heart of Bucharest. The Center comprises high-level academics and professionals with national and international law practice experience and young researchers devoted to researching the field of international arbitration.

CIAR-UB seeks to provide a framework for critical and constructive debate about the functions, content and working of law in the international arbitration community. The Center also has a proactive role within the International Arbitration Research Area, undertaking high quality research activities, in close contact with the industry and various institutions. More specific, the Center aims to favor the research in international arbitration and other related disciplines, and to combine theoretical and practical research with experimental innovative applications aiming at solving complex law issues.

2. Recent decisions have reinforced an increasingly widespread belief in the arbitration world that there exists only a remote chance of success when challenging arbitrators in ICSID proceedings.

Indeed, while there have been over 40 challenges lodged against sitting ICSID arbitrators, the replacement of an arbitrator proved to be problematic, in the absence of a voluntary resignation. Practitioners and commentators point two potential flaws of the system.

2.1. First, the substantive threshold under ICSID, which requires a “manifest” lack of required qualities, is unusually high compared to other rules or national arbitration laws.
This threshold to evaluate the grounds for a challenge has been criticized as too strict and difficult to meet.\(^1\)

Lower thresholds allow for a challenge to arbitrators in circumstances that give rise to “justifiable doubts” as to the impartiality or independence of an arbitrator.\(^2\) For instance, UNCITRAL Arbitration Rules require only the presence of “justifiable doubts” as to an arbitrator’s independence and impartiality.

There is no easy solution to this. The fact that this requirement is established in the ICSID Convention makes altering it a daunting task – one that would entail agreement by all member States.

Article 57 and Article 58 of the ICSID Convention provide that a party may propose the disqualification of an arbitrator “on account of any fact indicating a manifest lack of the qualities” of impartiality or independence.\(^3\)

2.2. Secondly, the decision on a challenge is taken by the unchallenged members of the arbitral tribunal.

The more common procedure of requesting a third party to take a decision is adopted only when a sole arbitrator or a majority of the arbitral tribunal is challenged.\(^4\) In that case, challenges to ICSID arbitrators are decided by the Chairman of the ICSID Administrative Tribunal, who is also the President of the World Bank.

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\(^1\) Critics highlighted that despite the substantial increase of cases before ICSID and the more recent increase in challenges to arbitrators, successful challenges remain rare. Because numerous challenges are tactical and spurious, however, this criticism remains difficult to assess. See Constantine Partasides, Head of Arbitration at Freshfields London, The Art of Selecting the Right Arbitrator, Lecture at London School of Economics (Nov.2011), http://www.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1252.

\(^2\) Please See e.g., UNCITRAL Arbitration Rules, art. 12(1) (2010).

\(^3\) See, ICSID Convention, supra note 3, arts. 57, 14. Article 57 provides: “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.” Article 14 (1) provides: “(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”

The method by which challenges are decided may increase the confidence in the ICSID arbitration process.

Moreover, if ICSID implements this proposal with special attention to challenges predicated upon repeat appointments, it is possible that more challenges will be upheld, thereby widening the pool of arbitrators and increasing the diversity of arbitrators who hear international investment disputes.

Various arbitral institutions (e.g. London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC) or Romanian Court of International Commercial Arbitration), vest authority for deciding arbitrator challenges in the institution, not in the other members of the tribunal.

Given that ICSID already decides certain arbitrator challenges, it therefore has the infrastructure and the know-how to agree on all challenges.

At a recent conference⁵, Professor Sussan D. Franck⁶ stated that arbitral institutions have the primary role in increasing gender diversity among arbitrators by regulating this approaches and as well the practitioners have an important role, due to the fact that parties appoint approximately 75 percent of all arbitral tribunal members. Successful challenges to regularly appointed arbitrators may incentivize parties to appoint different arbitrators or select individuals to serve for the first time on an ICSID tribunal, thereby increasing diversity.


⁶ Professor Franck is an expert in the fields on international economic law, dispute settlement, and the empirical analysis of international law. Her faculty profile can be viewed here: https://www.wcl.american.edu/faculty/franck/.
Establishment of the Tribunal – Suggested changes to ICSID Arbitration Rule 1

Rule 1
General Obligations

1. […]
2. […]
3. The majority of the arbitrators shall not be discriminated on the bias of race, color, gender identity or age and they shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by consent of the parties whether in a contract, treaty, statute or other instrument. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the consent of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

4. No person, woman or man, who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the same parties to a dispute may be appointed as a member of the Tribunal.
Suggested changes to ICSID Arbitration Rule 2

Rule 2
Method of Constituting the Tribunal in the Absence of Previous Agreement or

Appointment and the Number of Arbitrators

1. […]

   a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator, or of a specified uneven number of arbitrators and indicate the method proposed for their appointment. The parties shall not make any discrimination based on race, color, gender identity or age of the proposed arbitrator(s).

Note for Rule 1 & Rule 2:

Promoting gender equality and arbitrator diversity should be a core objective in the ICSID's Arbitration binding Rules: equality is a fundamental value of the human race. The Arbitration Rules and the ICSID Secretariat shall aim to promote equality in all its standards and rules. As the Universal Declaration of Human Rights proclaims:

„Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”
Suggested changes to ICSID Arbitration Rule 9

Rule 9 - Disqualification of Arbitrators

(1) Any nominated arbitrator may be disqualified by any party if facts and circumstances cast justifiable doubts as to the arbitrator’s impartiality or independence. If the arbitrator has serious doubts as to his or her understanding to be independent and impartial, he or she must decline the appointment.

(2) The nominated arbitrator may be disqualified only for reasons of which parties become aware after the appointment or confirmation has been made.

(3) A Party that intends to disqualify an arbitrator shall render a written notice of disqualification to the Secretariat in accordance with the requirements of Rule 9.4, within 30 days after the receipt of the notice of appointment or confirmation of the arbitrator who is being disqualified or within 30 days after the facts and circumstances stated in Rules 9.1. and 9.2. are acknowledged by that Party.

(4) The written notice of disqualification shall specify the facts and circumstances on which the disqualification is based. The date of receipt of the written notice of disqualification is deemed to have been submitted on the day it was received by the Secretary-General. Such communication or notice may be made by registered post, email, courier, delivery against receipt, or by any other means of high tech that provides a record of the sending thereof. The party requesting the disqualification of an arbitrator shall provide all supplied written communications in a number of copies for each party, plus one for the arbitrator who is being disqualified, as well for all members of the Tribunal or for any appointed arbitrator if the Tribunal has not yet been constituted, and shall notify the Secretary-General on the accomplishment of these formalities.

(5) After receiving the written notice of disqualification under Rule 9.4., the Secretary-General may order an interruption of the arbitral proceedings until the disqualification request is concluded. If necessary, the Secretary-General may request the other Party or Parties, the arbitrator concerned or any other
members of the arbitral tribunal to give comments in writing within 20 days from the date they were informed about the disqualification.

(6) When an arbitrator is to be disqualified by a Party and the other Party or Parties may agree to the disqualification, the Administrative Council shall remove the arbitrator after the Party or the Parties, the arbitrator concerned and any other members of the arbitral tribunal have had an opportunity to comment in writing within the period of time given by the Rule 9.5. The arbitrator may also have the opportunity to withdraw from the office voluntarily.

(7) Where an arbitrator is removed or voluntarily withdraws from the office in accordance with the Rule 9.6., a substitute arbitrator shall be appointed in accordance with the Rule 2.
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Suggestion for Amendment of the ICSID Arbitration Rules -- Rule 41(1)

Dear ICSID,

I suggest to amend Rule 41(1) of the ICSID Arbitration Rules as follows:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General and after its constitution with the Tribunal within the time limit fixed by the Tribunal. If the Tribunal has not fixed a time limit, a party shall file the objection no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time

With kind regards,

Albert Jan van den Berg
Potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (ICSID)

Attorney-General's Department

25 January 2017
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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council’s Constituent Bodies. The Law Council’s Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council’s six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.
Acknowledgement

The International Law Section is grateful for the assistance of its International Arbitration Committee for preparing this submission at short notice. Given the tight deadline the Section appreciates the input of its Co-Chair, Damian Sturzaker and co-opted non-committee members including Dr Sam Luttrell, Monty Taylor, Richard Braddock and Matthew Lee.
Executive Summary

1. The Commonwealth Attorney-General’s Department has sought views on potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (ICSID).

2. ICSID is among the world’s leading institutions for the settlement of investor-State disputes. ICSID has periodically modernized its rules and regulations to ensure they best serve all facility users. The last such amendment occurred in 2006. ICSID has now begun work to further update and modernise the existing ICSID Rules and Regulations. This amendment process is intended to focus on simplification of the dispute settlement procedure to improve cost and time effectiveness, while ensuring due process and equal treatment of the parties. ICSID has also noted that the balance between the interests of investors and States, which is a basic pillar of the ICSID Convention and Rules, must be maintained to ensure continued credibility and confidence in the process.

3. ICSID has asked its Member States, including Australia to provide suggestions on potential rule amendment or concerning improvement of the arbitration and conciliation procedures of ICSID by 31 January 2017.

4. We understand that as part of this project, the ICSID Secretariat will conduct surveys and prepare background papers concerning various procedural rules for potential amendment. It will in due course provide these papers and proposed draft amendments to the Member States and seek their feedback.

5. The International Law Section of the Law Council of Australia has identified a number of areas in which amendments could be made to the ICSID procedures including:
   - Develop clear ICSID standards regarding conflict of interest considerations when constituting tribunals;
   - The ICSID Secretariat, in consultation with the Chairman of the Administrative Council, should provide guidelines for interpreting Article 57 for the uniform development and consistent application of principles;
   - Remove the “automatic suspension” rule for arbitrator challenges;
   - Clarify the issue of costs in the context of arbitrator challenges;
   - Formally establish a pool of arbitrators to serve solely as ad hoc committee members and exclude those arbitrators from serving as counsel;
   - Amend the ICSID Rules to introduce an express “equal treatment” provision;
   - Increase the transparency of ISDS proceedings; and
   - introduce a provision that clarifies the test for provisional measures.
Comments on potential rule amendments or improvements to the arbitration and conciliation procedures of the International Centre for Settlement of Investment Disputes (ICSID)

6. Owing to time constraints to provide a submission, the International Law Section has not had the opportunity to seek the views of all of its members on the Exposure Draft. The International Law Section notes that the call for submissions was made in late December 2016. Submissions to the Committee were due on 23 January 2017. The time of year meant that most if not all organisations were closed and detailed consultation with members was difficult. The International Law Section understands that there will be further rounds of consultation with ICSID and would appreciate the opportunity to have further input to the process.

7. A number of the most significant challenges facing the ICSID system could likely only be remedied through amendment of the ICSID Convention, rather than the Rules. For example, the establishment of an appellate body would require Art. 53 to be amended, expanding the definition of “Contracting State” would likely require Art. 1(2) to be amended and reform of the challenge mechanism would require Art. 58 to be amended. The method for appointing ad hoc committee members is also prescribed under the Convention, rather than the Rules.

8. This submission outlines commonly identified areas of concern within the ICSID Rules of Procedure for Arbitration Proceedings (“the Rules”). It proceeds to suggest revisions which address some of these issues.

Constitution of Tribunal: Conflicts of Interest

9. Conflicts of interest and duties to disclose are governed by Rule 6, which mandates that arbitrators sign a declaration and disclose any conflicts. Article 14(1) of the ICSID Convention (“the Convention”) stipulates that appointed arbitrators should “be relied upon to exercise independent judgment”. There are no other provisions governing how conflicts of interest should be responded to when constituting a tribunal.

10. Consequently, decisions are made with inconsistent regard to the IBA Guidelines on Conflicts of Interest in international arbitration, or are made as otherwise subjective judgments. The challenge process, in cases where the appointment is disputed under Article 57, requires an apparently higher threshold to succeed than the ‘justifiable doubts’ standard held under the UNCITRAL Arbitration Rules. In reaching a decision to disqualify, once again only inconsistent consideration is often given to the IBA Guidelines. There is also a perception (whether reasonable or not) that a number of arbitrators are repeatedly subject to—largely unsuccessful—challenges on the basis of conflicts of interest.¹ This brings to light a degree of dissatisfaction with the procedure for constituting a tribunal.

11. Other perceived conflicts of interest relate to arbitrators concurrently acting as counsel in separate proceedings. Several of the publicised challenges to arbitrators in

ICSID have arisen as the result of this dual-role issue. Clearer guidelines are required to minimise the persistence of this trend, thereby bolstering ICSID’s legitimacy.

Suggestions

- Formally incorporate the International Bar Association Guidelines on Conflicts of Interest in International Arbitration as ICSID policy mutatis mutandis
- Develop clear ICSID standards regarding conflict of interest considerations when constituting tribunals.

Disqualification of Arbitrators

12. Article 57 of the Convention provides the standard required to disqualify an arbitrator, namely “a manifest lack of the qualities” outlined in Article 14(1) above. Many commentators have enunciated concern regarding the ambiguity of how Articles 57 and 14(1) interact, which has been the subject of contradictory interpretations throughout ICSID’s history.

13. Some of the inconsistency in interpretation can be explained by the most common means by which challenges are determined subject to Article 58, that is, by decision of the unchallenged tribunal members. Evidently, revising the Convention is beyond the scope of this inquiry. Rather, the Rules could include guidelines for coherent interpretation of Article 57. These should stipulate the precise interpretation of “manifest”, and how and to what extent this threshold differs from the more common “justifiable doubts” formulation.

Suggestion

- The ICSID Secretariat, in consultation with the Chairman of the Administrative Council, provide guidelines for interpreting Article 57 for the uniform development and consistent application of principles.

Remove "automatic suspension" rule for arbitrator challenges

14. Under Rule 9(6) of the ICSID Arbitration Rules, the proceeding is automatically (“shall be”) suspended as soon as a challenge is filed, and it remains suspended “until a decision has been taken on the proposal”. This rule of automatic suspension operates as an incentive to challenge arbitrators because it signals to parties that challenges are a guaranteed way of buying time. As an illustration, we refer to the case of Conoco Phillips v Venezuela: in that case, Venezuela filed six separate challenges to the same arbitrator; all six challenges were frivolous and all were dismissed, but they extended the proceeding by over 13 months, with zero consequence to Venezuela (no costs orders were made). No other major system of international arbitration contains a rule prescribing automatic suspension of proceedings when an arbitrator is challenged: the norm is to provide that the proceedings may be suspended pending determination of

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a challenge. We recommend that Rule 9(6) of the ICSID Rules be amended by simply changing to "shall" to "may".

15. For further discussion of the problems that arise from the current wording of Rule 9(6), see Dr S Luttrell’s article “Testing the ICSID Framework for Arbitrator Challenges”, ICSID Review, Vol. 31, No. 3 (2016), pp. 597–621.

Clarify costs powers for arbitrator challenges

16. Amendments are also needed to clarify the issue of costs in the context of arbitrator challenges. The issue here is that the incentive offered by Rule 9(6) (automatic suspension) is heightened by the fact that unsuccessful challengers are rarely (if ever) ordered to pay costs. Indeed, where the Chairman of the ICSID Administrative Council decides the challenge (for example, because the challenge is to more than one arbitrator), it is not clear whether he or she even has the power to award costs. Accordingly, we suggest that Rule 9 be amended by addition of the following sub-rules:

(a) "(7) In deciding the proposal, the other members of the Tribunal or the Chairman (as the case may be) may decide that the party that made the proposal shall pay some or all of the fees and expenses incurred by the Tribunal in connection with the proposal.

(b) (8) Where during the proceeding a party makes more than one proposal pursuant to Article 57 of the Convention in respect of the same member of the Tribunal, the other members of the Tribunal or the Chairman (as the case may be) may decide that the party that made the proposals shall pay some or all of the fees and expenses incurred by the Tribunal and the other party (or parties) in connection with the subsequent proposal."

Annulment Procedures

17. Under Rule 50 a party may, inter alia make an application for annulment of an award within 120 days of the rendering of the award. Arguably 120 days is a needlessly long window in which to file an annulment application. Consideration could be given to shortening this time. We note this would require an amendment to Article 52 and may be beyond the ambit of the current review.

18. The constitution and function of ad hoc committees which determine the annulment of awards have also frequently been subject to criticism. Alleged conflicts are perceived to arise where appointees to ad hoc committees were members of tribunals whose awards are subject to their own annulment proceedings. Others have raised concerns regarding annulment committee members who act as counsel in separate ICSID arbitrations.

19. As annulment is the only possible form of review provided under the Convention (which expressly prohibits judicial review of awards in domestic courts), its legitimacy — both perceived and actual — is of utmost importance to uphold ICSID’s esteem. Ensuring coherency within the annulment regime and the application of Article 52 is fundamental to this goal.

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Suggestions

- Formally establish a pool of arbitrators to serve solely as \textit{ad hoc} committee members; and
- Exclude \textit{ad hoc} committee members from serving as counsel in ICSID arbitrations.

Introduce "equal treatment" provision

20. The ICSID Rules should be amended to introduce an express "equal treatment" provision. We recommend that the text of Article 18 of the UNCITRAL Model Law be adopted. Commentators suggest that in ICSID cases, investors and States are not always treated equally in procedural terms.

21. For arbitration to be effective as a means of resolving disputes between private entities and sovereign States, the disputing parties must be placed on the same footing. The introduction of an express equal treatment obligation will help achieve this objective. Equal treatment is a norm of due process (and therefore part of customary international law) and so the introduction of such a rule should not be controversial.

Transparency

22. ICSID could consider increasing the transparency of ISDS proceedings in areas such as those covered by the recent amendments to the UNCITRAL (2013) Rules. Some commentators consider that UNCITRAL has now overtaken ICSID in terms of the level of transparency which applies to ISDS disputes (under applicable treaties). We accept that States could sign-up to the Mauritius Convention but submit that amending the ICSID Rules may be a more effective way to do this. Furthermore consideration should be given to providing:

   (a) Public access to information regarding when ISDS disputes commence;

   (b) Reasons for granting/denying third party access.

23. In addition live-streams of hearings such ICSID Case No. ARB/12/12 (Vattenfall v Germany) as recently provided\textsuperscript{6} should be encouraged to contribute to education and transparency.

Cost and Time Efficiency

24. The length of proceedings is a particular concern in investment arbitration. Those in the investment arbitration community submit that consideration be given to introducing some procedural safeguards. Time limits for awards, as appear in the institutional rules of other centres, could be a useful starting point.

25. A mechanism needs to be added so that arbitrators issue awards more quickly. Average time now is 8 months to a year. Stakeholders should not have to wait so long to have awards issued. One proposal is that ICSID could adopt the new ICC rule that reduces the fees to arbitrators due to undue delay.

\textsuperscript{6} \text{http://isdsblog.com/2016/10/14/vattenfall-v-germany-live-stream/}
26. Security for costs: this remains on the radar as well, particularly since Panama filed its memo with ICSID last year. A rule amendment to specifically empower tribunals to award security for costs would likely provide States with some protection against 'judgment proof' claimants.

Elucidate test for provisional measures

27. Provisional measures are an important part of the ICSID process, for both States and investors. However, neither the ICSID Convention nor the ICSID Rules provides any real guidance on the test that a Tribunal is to apply to determine whether or not provisional measures should be granted. This uncertainty makes the process of seeking (and opposing) provisional measures more time-consuming and expensive than it is in other arbitration systems. Accordingly, we recommend that consideration be given to amending Rule 39 to introduce a provision that elucidates the test for provisional measures under Article 47 of the ICSID Convention. The elucidation need not be binding or exhaustive – it could be in the form of an inclusive list of relevant considerations only ("may take into account the following factors [...]”). However, some guidance would be useful. Given that ICSID practice is relatively stable in this area (i.e. an "ICSID test for provisional measures" can be gleaned from the jurisprudence), the list should not be too difficult to construct. Guidance may be taken from Article 17A of the UNCITRAL Model Law.
November 16, 2017

Meg Kinnear
Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID)
ICSID
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433
The United States of America

Re: ICSID Rules Amendment Project

Dear Ms. Kinnear:

1. Below please find some suggestions, based on my experience as counsel for claimants or respondents, or as arbitrator in ICSID cases, for amendments as per your kind request pursuant to the amendment consultations launched by ICSID under your auspices.

   I. **Increased supporting documents and prima facie pre-registration scrutiny**

   2. Consideration should be given to reinforce scrutiny of the supporting documents at the registration stage and thus ICSID Institution Rule 2 safeguards given the serious allegations and high monetary claims made against States and some of the questionable claims that have had to be entertained. ICSID Institution Rule 2 for example could require, prior to the registration of the case, the documentation, or alternatively, when this documentation is claimed to have been seized and thus not in the possession of claimant, the information necessary to verify ownership/standing in the claimed investment. This would help to avoid or deter obviously fraudulent claims, or at least ensure that respondent States are provided early on with the information necessary to identify and
potentially raise jurisdictional objections, be it *ratione personae, ratione materiae, or ratione temporis*, under Rule 41(5) of the ICSID Arbitration Rules where the case manifestly lacks merit. In the current state of affairs, respondent States are often left with no choice but to await the Memorial, or even the document production phase after a first full round of pleadings on jurisdiction, merit, and quantum, or following its own extensive investigations, before being able to secure basic information on claimant’s standing and identify otherwise valid and strong jurisdictional objections (see, e.g., Saba Fakes v. Turkey/ICSID Case No. ARB/07/20; Cementownia v. Turkey/ICSID Case No. ARB(AF)/06/2; Libananco v. Turkey/ICSID Case No. ARB/06/8; Burimi v. Albania/ICSID Case No. ARB/11/18; and Dagher v. Sudan/ICSID Case No. ARB/14/2). Good faith claimants would only benefit from such an amendment, as it will reinforce the integrity of the process.

II. **Requirement that respondent States submit a summary Answer to the RfA**

3. Consideration should be given to address the adverse consequences of the fact that under the ICSID Convention and present ICSID Arbitration Rules, the respondent State does not have an obligation, as under the ICC or UNCITRAL Arbitration Rules, to submit an Answer to the Request for Arbitration. The first time that a respondent State has no choice but to set out its position is therefore in the Counter Memorial, namely after the claimant has filed a Notice of Dispute, a Request for Arbitration, and then a Memorial.

4. As a result, the dispute cannot be narrowed down before the Parties have already set out in great detail their respective position by way of a first full round of submission on jurisdiction, merits, and quantum, potentially resulting in significant waste, both in terms of time and costs, if it turns out that the respondent State did not wish to dispute certain facts or legal issues.

5. Yet, it would be unwise to impose a requirement on the respondent State that it submits an Answer to the Request for Arbitration similar to that provided under the ICC or UNCITRAL Arbitration Rules, as the stakes in ICSID arbitrations are too high, and respondent States often need time to organize some sort of tender to retain counsel, and then undertake an initial document gathering exercise. This is even more so in light of the current shortcomings, flagged in point I above, of Rule 2 of the ICSID Arbitration Rules. Such a requirement may thus unfairly prejudice States, or cause them to submit answers that are incomplete, inaccurate, or substandard.
6. One solution however could be to include a provision at Rule 13 of the ICSID Arbitration Rules enabling the Tribunal, when appropriate, to request respondent States to set out their defences in a non-exhaustive and without prejudice manner within 15 days of the First Session, so as to have a better understanding of the likely disputed issues, as well as the requirements in terms of timing and management, specific to the case at hand, including to assess possible bifurcation, while affording the claimant a better opportunity to concentrate the Memorial on the core disputed issues.

III. **Stricter deadlines for the submission of the Memorial and Counter Memorial**

7. Consideration should be given to set a fixed deadline at Rule 31 of the ICSID Arbitration Rules for the submission of the Memorial, which would then serve as the starting point for working out dates for the submission of the Counter Memorial, Reply, and Rejoinder.

8. It could be provided, for example, that the Memorial be submitted, by default, within 30 days of the First Session. This would be all the more justified since there is no requirement to submit an Answer to the Request for Arbitration, and that usually a significant amount of time lapses between the Request for Arbitration and the First Session, namely at least 120 days (four months) under the default appointment procedure provided for in Rule 4 of the ICSID Arbitration Rules, which can moreover be extended by agreement of the Parties. Taking into account the additional month or two, or more, for the Parties and the Tribunal to agree on a date on which to hold the First Session, more than six months can have lapsed between the Request for Arbitration and the First Session. The claimant could during this period work on the Statement of Claim, especially as the respondent State will not submit an Answer in the meantime. We have managed to submit the Memorial on the day of the First Session, or within 30 days thereof, in Lahoud v. Congo/ICSID Case No. ARB/10/4, Arif v. Moldova/ ICSID Case No. ARB/11/23, EuroGas & Belmont v. Slovakia/ICSID Case No. ARB/14/14, and Attila Dogan v. Oman/ICSID Case No. ARB/16/7, or even in Bank Melli & Bank Saderat v. Bahrain under the UNCITRAL Arbitration Rules, which shows that this is a very workable solution.

9. Such a requirement would moreover benefit investors who are not necessarily familiar with the process and may find an additional delay after the First Session to be a standard practice or requirement. It would also ensure procedural economy in general as respondent States often use the fact that claimants require an additional three or four
months after the First Session to submit the Memorial, to in turn request six months or more to prepare the Counter Memorial.

10. Regarding the date for the submission of the Counter Memorial, a provision of a 3-month default rule, subject to adaptation by the Tribunal where appropriate (see Article 15 of the LCIA Arbitration Rules) would be reasonable. Such a flexible starting point is moreover necessary as there is too much inconsistency, and thus uncertainty, unfairness in the practice of the different tribunals. Some are excessively lax (see Caratube v Kazakhstan/ICSID Case No. ARB/13/13 or Attila Dogan v Oman/ICSID Case No. ARB/16/7, where respondent was granted 6 months, and this moreover, as the latter case is concerned, from the time of the decision, issued 3 months after the submission of the Memorial, rejecting the request for bifurcation). Other tribunals want to impress and flex their muscles, as in Burimi v. Albania/ICSID Case No. ARB/11/18, where the respondent was required to file its Counter Memorial within two months and was rejected a request for an extension/reconsideration of the same, which led to tensions and even a letter addressed directly to you that ultimately caused the Tribunal to reconsider its position and grant Albania the minimum 3 month time that it required.

11. Therefore, having a 30-day fixed delay for the submission of the Memorial, and a three month flexible starting point for the Counter Memorial will ensure that time, costs, foreseeability and reputation is preserved for all, while still giving the Tribunal the flexibility to turn 30 days into 60 and three months into four, but not much more, except in compelling circumstances.

12. A second “Session” could then be provided for in the ICSID Arbitration Rules for the Tribunal to address the way forward and establish a procedural calendar for the submission of the Reply and the Rejoinder. This would “pressure” arbitral tribunals to read the submissions so as to prepare for the Second Session and would allow them to use this opportunity to give appropriate directions on what and how they wish certain questions to be addressed going forward.

IV. First Session

13. Consideration should be given to amend Rule 13 of the ICSID Arbitration Rules to require that, save for exceptional circumstances, the First Session (which some overbooked or blasé or busy tribunals/counsel have turned into a bureaucratic useless step over the
phone) be held in person as it is important for all players to meet and be able to voice and hash out any misunderstanding regarding the applicable ground rules and expectations (see point IX below), as well as to discuss deadlines and the management of the case going forward, so as to avoid any unnecessary issues down the line and thus save time and costs. This is all the more important in the context of ICSID proceedings where counsel as well as certain arbitrators may not be very familiar with the process and/or have different legal/arbitral background and expectations, as well as for the further reasons set out in point IX below.

V. The double hat “issue”

14. It is not advisable to impose any bans/rigid rules but rather a case to case approach on the “double” hat issue or non-issue.

15. There should not be any restrictions on lawyers acting as counsel to sit as arbitrators, as their practical experience as counsel have great added valued when addressing procedural motions or substantive issues ranging from appreciating a party’s difficulty in accessing documents or need to be granted an extension. Arbitrators that regularly act as counsel are also less likely to be dependent on future appointments and the risks associated therewith. Their exclusion would moreover significantly reduce the pool of available ICSID arbitrators.

16. There is moreover no need for such strict bans as issue conflicts can, are and should continue to be resolved on a case by case basis via disclosures at the appointment stage and challenges if need be.

17. It is, however, not generally advisable that arbitrators, whose awards have been annulled, or are subject to annulment proceedings, be appointed as *ad hoc* Committee members, even if only to lift the serious conflict or at least discomfort caused by any reliance by the annulment applicants before these *ad hoc* Committee members on ICSID decisions that have annulled these *ad hoc* Committee members’ awards in support of the annulment applications (see Togo Electricité v. Togo/ICSID Case No. ARB/06/7 and reliance by annulment applicants before *ad hoc* Committee President Albert Jan van den Berg on the *ad hoc* Committee decision in Enron v. Argentina/ICSID Case No. ARB/01/3 that had partially annulled an award precisely rendered by the tribunal including Albert Jan van den Berg).
VI. **Collegial body in charge of default appointments/ICSID Panel**

18. Consideration should be given to create a collegial body, headed by ICSID’s Secretary General, and composed of rotating prominent arbitration specialists within and outside ICSID (which could consist of a mix of practitioners, state officials, in house counsels and academics), to oversee default appointments by way of ballots or otherwise, both for the underlying ICSID arbitrations and for *ad hoc* Committees. This will provide investors and States with assurances as to the independent nature of the process for the selection of the arbitrators that will decide disputes that often involve very high stakes for all parties involved, as well as to correct perceptions or misperceptions of the last decades and thus reassure the international arbitration community as well as investors and ICSID Member States that no one is being neglected be it by omission or privileged for one reason or another.

19. ICSID should call more often on arbitrators on the ICSID Panel appointed by Sovereign States as this is what the bargained for ground rules provide but refuse appointment of unexperienced candidates to the ICSID Panel or warn member States that it serves no purpose to appoint unexperienced candidates to the ICSID Panel of Arbitrators as they will never be selected by ICSID.

VII. **Collegial Body to Rule on Challenges**

20. For some of the same reasons set out in point VI above, a collegial body should be considered to rule on challenges of any of the arbitrators before the constitution of the Tribunal when the appointment has been made by the Secretary General. This would lift the present discomfort for a party to raise challenges to arbitrators already appointed and would allow for proper checks and balances, as opposed to leaving this in the hands of the person who appointed the challenged Tribunal member.

VIII. **Tribunal secretaries**

21. Consideration should be given to implement provisions to ensure that the secretary of the Tribunal in the underlying arbitration is not appointed as secretary of the *ad hoc* Committee tasked with reviewing the award rendered in the underlying arbitration. This is because the secretary, whatever his or her degree of contribution in the underlying arbitration, has had some meaningful involvement therein, as well as access to confidential information, be it concerning the arbitrators’ interactions, deliberations, and
shifts in opinion, the evolution of the draft award, or the factual, legal, and quantum issues considered, so that if the award is perceived as flawed, the secretary may feel or be perceived as having some responsibility. Even if the secretary did not approve the award rendered in the underlying arbitration, he or she may be tempted to directly or indirectly influence the ad hoc Committee. ICSID appears in fact to have already implemented corresponding measures.

22. On the other hand, consideration should be given to increase the role of the Tribunal’s secretary to enable some degree of influence and/or pressure regarding the effectiveness and procedural economy during the arbitration and regarding the timeline for the rendering of the award. If his or her role in this respect is officially legitimized in the Arbitration Rules or otherwise, the secretary will be more successful in diplomatically pushing late arbitrators who tend to be otherwise dismissive of such interventions.

IX. **Procedural efficiency and timely rendering of awards**

23. It has become too common for extensive time to lapse, sometimes up to two years, between the hearing and the rendering of the award and to serve standard excuses, ranging from complexity of cases to dissents. In general, it should be made clear that it is unacceptable to receive awards more than a year after the evidentiary hearing, whether or not there are post hearing briefs.

24. The ICC’s recent practice, however, of informing the parties that the arbitrators’ fees have been reduced due to a delay in the rendering of the award is not the correct approach. It undermines the authority of the Tribunal in its adjudicatory function. Any process for controlling the delay in rendering the award should remain confidential, and overseen by the ICSID Secretariat, potentially via the Tribunal’s secretary, without opening up the issue with the Parties to the extent possible.

25. The same applies to ICC’s recent policy to reduce or increase arbitrators’ fees based on whether they complied with the three months deadline as of the last hearing or substantive pleading submitted by the parties. Each case, depending on the nature of the dispute, extent of the parties’ submissions, or professional manner in which each party put forward its case and engaged with the opposing side, will call for more or less time to render an adequate and high quality award, regardless of the amount in dispute. Moreover, the ICC’s recent practice has had the perverse effect of encouraging requests from the
President for several additional rounds of post-hearing briefs, even when the same is not necessary, merely to afford the President more time to draft the award solely to avoid being penalized.

26. The above being said, the exercise of the foregoing pressure by the ICC has led some arbitrators to privilege working on ICC awards rather than ICSID or other awards.

27. What is needed is some pressure and transparency but more importantly stricter procedural timetables and procedural efficiency.

28. Even before their appointment but with the caveat/mind-set that most in demand are often the most diligent, timely and efficient, candidates considered for the mandate of arbitrator should indicate the number of cases pending as arbitrator or as counsel and the exact stages thereof, as well as their existing hearing engagements for the upcoming 24 months so that the parties know what they are getting into. The ICSID Secretariat should also call the President appointed to stress the importance both for the Parties and for ICSID that the arbitration be conducted and concluded with an award in a timely manner, including by indicating that the award is in principle expected to be rendered within e.g. 6 to 9 months from the evidentiary hearing, irrespective of post hearing briefs or dissents and have him or her sign a statement to this effect together with the co-arbitrators.

29. As I already stated above (point IV), the First Session should always, save for exceptional circumstances, be held in person, so as to hash out any misunderstandings between the parties, as well as with the Tribunal and its expectations. A summary Answer to the Request for Arbitration, on a non-exhaustive and without prejudice basis would also help to narrow down the issues in dispute. The Tribunal should also invite the claimant to indicate at the First Session, especially if it is expected to submit its Memorial within 30 days thereof, the number of witness and expert testimonies it expects to rely on, so as to have a first impression of the complexity and extent of evidence to examine at the hearing.

30. At the same time, the Tribunal should remind the Parties that they should give guidelines about their expectations and how they perceive the process. There is a Turkish expression which says “each person eats yoghurt in its own way”. Arbitrators and practitioners do things differently -- hence costs, delays and misunderstandings. Guidelines could and should be given during the First Session to Parties to, for example, focus on quality rather than quantity, and that each party is not expected to match the other side’s number of
witnesses and/or experts, or even to call each one of them, if not strictly necessary, as the failure to do so will not be construed as an admission to the same. Moreover, the Tribunal should take advantage of the First Session to indicate how it expects pleadings to be structured, what factual and legal issues it expects to be extensively pleaded (often, experienced tribunals no longer require a detailed course on applicable standards under international law, save for particularly contentious issues), and how it expects cross examinations to be conducted. Similarly, expectations should be exchanged in terms of document production. Some arbitrators expect or find normal 100 document production requests whereas others, like in a recent pending case, have written *ex officio* upon receipt of the document production to warn the applicant that these extensive requests will be considered for allocating costs, which is inappropriate from all perspectives and moreover entails prejudgment, thus giving rise to tense correspondences with the Tribunal.

31. As set out at point III above, it is advisable to hold a second “Session” in person or by phone this time, so as to encourage the Tribunal to read the Memorial and the Counter-Memorial and allow the Tribunal to give appropriate directions on the way forward. Then, upon completion of written exchanges, the Tribunal should take advantage of the pre-hearing conference call, having read the Reply and the Rejoinder, to identify the issues on which it expects particular emphasis to be put by the Parties in their opening statements, as well as the manner in which it wishes evidence to be presented in a user friendly way for purposes of drafting the award.

32. Once the hearing is concluded, the ICSID Secretariat, be it through the Tribunal’s secretary or otherwise, should closely follow the Tribunal’s progress in drafting the award, including by way of updates from the Tribunal every 45 days after the hearing, whether or not post-hearing briefs have been ordered, as the Tribunal should be able to advance on other portions of the award in the meantime. No more than one day for the collective preparation, in the presence of all Tribunal members, and one day for deliberations, should be allowed, save for specific circumstances justifying a derogation.

33. Efforts should also be made to impress on the tribunals in general to work on the award as soon as possible after the hearing, as the less time has elapsed between the hearing and the rendering of the award, the better is the Tribunal’s recollection of the evidence presented during the hearing, and in turn the higher is the quality of the ultimate award.
34. The ICSID Secretariat should scrutinize, offer transparency and strongly sanction double bookings by arbitrators, which have become far too common. In one UNCITRAL investment case, a co-arbitrator cancelled the scheduled hearing, despite both Parties having done their utmost to comply with the agreed procedural timetable, alleging an inadvertent double booking, when it later became known and confirmed by the President that the arbitrator in question had in fact cancelled the hearing because that arbitrator did not want to forego an appointment on the Court of Arbitration for Sport in relation to the Olympic Games. Similarly, there have been many cases where scheduled hearings have been postponed or reduced because of subsequent conflicting engagements. And the Parties are, as arbitrators are well aware, left in these circumstances powerless and in any event unwilling to engage in tense correspondence with their decision makers.

35. All cancellations or reductions of hearings should be run via and communicated via and authorized by the Secretary General upon substantiation as Tribunal members, when confronted with a request to postpone or reduce, tend to want, and this rightly so, to protect their colleagues on the panel and preserve a good working relationship.

36. The ICSID Secretary General should be allowed not to confirm a co-arbitrator or President or propose that his or her appointment be reconsidered by the Parties because of the delays or postponement experienced by this same arbitrator in the past.

X. **Dissenting opinion**

37. Consideration should be given to include a provision that would allow the Secretary General to fix a deadline (to be communicated or not to the Parties) for the rendering of a dissent upon the request of any member of the Tribunal.

XI. **Scrutiny of the Award**

38. Consideration collegiate body should scrutinize awards to pressure the Tribunal to make an effort re quality and timing as there is a considerable and growing disparity in this regard. This is reinforced by the fact that there is no scrutiny at the enforcement stage and no review *per se* at the annulment stage that could pressure Tribunal members to be more attentive to quality, whereas quality control is even more so required precisely because of the pro-enforcement ICSID regime.
XII. **Interim Awards**

39. It may be difficult given the corresponding changes/modifications/State consents that this would entail, yet advisable to allow issuance of interim awards available in other institutions and under UNCITRAL Rules for purposes of provisional measures and interim awards on costs.

    * * * *

40. In closing, allow me to congratulate ICSID for having initiated a procedure for possible amendment of the ICSID Rules and Regulations, and for having invited me to submit comments on the same.

Sincerely,

[Signature]

Hamid G. Gharavi
INVESTOR-STATE MEDIATION TASK FORCE

Response to ICSID on its Invitation to File Suggestions for Rule Amendments

25 September 2017

This Note advocates the further use of mediation as a component of any reformed multilateral investor-state dispute settlement (“ISDS”) system. It responds to the Invitation to File Suggestions for Rule Amendments launched by the International Centre for the Settlement of Investment Disputes (“ICSID”) Secretariat on 25 January 2017. In particular, this Note recommends, first, that the place of mediation should be made explicit as a means to settle disputes between investors and host states in the reformed ICSID Regulations and Rules (the “Rules”); second, that the Secretariat disseminate mediation information and develop ICSID mediation support services; third, that, in due course, the Secretariat consider implementing a standalone set of Mediation Rules, which IMI would be happy to help prepare; and, fourth, that the Secretariat offer client and Mediator education and training.

This Note is submitted by the Task Force on Investor-State Mediation established by the International Mediation Institute in 2013 (the “Task Force”). The International Mediation Institute ("IMI") is a non-profit foundation registered in The Hague, Netherlands. Its principal function is to develop global, professional standards for experienced mediators, advocates and others involved in collaborative dispute resolution and negotiation processes. IMI is the only organization in the world to transcend local jurisdictions to develop global, professional standards for experienced mediators, advocates and others involved in collaborative dispute resolution and negotiation processes. IMI also convenes stakeholders, promotes understanding and disseminates skills in a non-service provider capacity.

I. The Case for Mediation

Mediation presents a credible and compelling option for both investors and states to settle disputes arising from investment activities. Mediation takes account of broader economic and non-economic goals, more appropriately and completely construing the positive impact that investment projects can have for both the investor and the host state. Built on the basis of contract law, mediation creates a means for creatively bringing greater attention to needs, interests or concerns which might not, or could not, have been fully countenanced at the time of forming of the contract, or those considerations which might have arisen or developed since the time of contract formation. That flexibility of perspective is further supported by the procedural context and means by which mediation seeks to remedy disputes: mediation creates an informal context for negotiation and problem resolution and, importantly, reserves decision-making to investors and states rather than obliging the parties to cede authority to either an arbitral tribunal or a court.

Mediation gives states and investors an opportunity to arrive at practical solutions in a process that is less constrained by either the contract or the law. In so doing, in some circumstances, mediation permits and even facilitates the continuance of the investment relationship, with its larger intended economic and social benefits. The Task Force encourages the inclusion of specific language offering mediation as part of the ICSID ISDS system. The Task Force also observes that there will be subsequent need to, first, develop and incorporate guidelines or rules for the mediation process itself and, second, ensure that the process is carried out by specialised investment mediators. To the extent possible, it is recommended that mediation processes be referenced not only at the international level.
as part of ISDS, but also at the domestic level as part of Conflict Management Mechanisms (“CMMs”), and, more concretely, as part of Systemic Investment Retention Mechanisms (“SIRM s”). As discussed later in this Note, the Task Force has launched initiatives to explore these matters.

Given that investment, unlike trade, requires relationships and not just transactions, it is important to have a mediation process which not only problem-solves, but which also facilitates understanding among the parties. At its best, mediation makes the preservation of long term, strategic relationships and the projects which flow from those relationships, more likely. In any event, mediation provides investors and states with an opportunity to take control of their dispute, narrow if not entirely resolve disputes and realise significant economic and non-economic benefits. Mediation, with its great procedural flexibility, is uniquely suited to facilitate effective dialogue, especially through the use of co-mediation, which can be used as means of adding additional skills and for bringing cultural sensitivity to bear.

II. The Case for Mediation at ICSID

Mediation is in keeping with the spirit of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). The ICSID Convention was developed with “the need for international cooperation for economic development, and the role of private international investment therein” explicitly borne in mind. Moreover, “particular importance [was attached] to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire”. As discussed above, mediation presents a credible and compelling option for both investors and states to settle disputes arising from investment activities. In addition to being more expedient and less costly, mediation facilitates the preservation of the trade and investment relationship between the parties, an aspiration central to international development. Moreover, mediation proceedings might be conducted before, during, or after arbitral proceedings.

Mediation is a malleable process that might be used in conjunction with ICSID’s present ISDS offerings. While the exact method of inclusion deserves further discussion, it bears noting that there are several means by which mediation might be added to any dispute resolution component. Most simply, mediation could be added by specific reference during the so-called “cooling off” periods (i.e., waiting periods, or requirements for the negotiation and resolution of disputes) that are common to investor-state treaties. Going further, the adoption of a mediation obligation, concurrent with court or arbitral processes and subject to a unilateral “opt out” by either the state or investor, might be considered. In all such cases, ICSID can add value to the proceedings by encouraging and facilitating the use of mediation. The Rules and/or administrative practices of ICSID should reference that facilitative role.

Furthermore, it is in the interest of the Parties to promote mediation alongside arbitral proceedings. Highlighting mediation as a viable dispute resolution option would, in keeping with ICSID’s mission, go far to both facilitating and expediting the ISDS process, therein reducing the costs—both of time and treasure—imposed on states and investors. As noted, mediation complements arbitration.

In the Task Force’s experience, ambivalence regarding settlement and mediation is a disservice to clients, and especially so states. First, failing to make explicit what options are available for the “agree[ing] on a settlement” is contrary to the best interests of the client—both investors and states—as mediation is more amicable, less costly and may be conducted in conjunction with ISDS arbitration. Moreover, and particularly with regard to states, the Task Force has found that there is often a general unawareness of mediation as a viable ISDS option. Even where there is awareness, knowledge regarding the most basic elements of mediation, such as where funds for the process and for settlement might come from, are left unanswered. Such questions have largely been resolved or developed in the case of arbitration, and ICSID actively facilitates such procedures. Thus, a specific reference to mediation in the Rules would go quite far towards broadening the conflict management vision of clients. In highlighting and specifying mediation as an option alongside arbitral proceedings,
the Rules can provide both legitimacy and the long-acknowledged, best-practice deference to mediation that is recognized in modern state judicial systems and commercial contracts.

III. Suggestions for the ICSID Rules Review

By way of amending the Rules and, conjointly, the Secretariat’s subsequent practice, the Task Force recommends four things: first, that the existing settlement component already present in the Arbitration Rules be developed, with specific reference to mediation being made in the amended version; second, that the Secretariat publish mediation guidance and develop a suite of mediation support services; third, that the Secretariat consider joining the major international arbitration and ADR-provider organisations in promoting the use of mediation through the promulgation of a standalone set of Mediation Rules; and fourth that the Secretariat continue its active role in providing mediation education and training to investors, states, party representatives, mediators and other stakeholders and interested parties.

A. Make Explicit the Place of Mediation in the Arbitration Rules

Mediation and negotiated ISDS already occurs alongside the arbitration of disputes brought for settlement under the ICSID Convention, and the Rules already speak implicitly to such settlement. Indeed, although not specifically referred to by name, mediation is allowed for under the existing Rules. As such, amending the Rules to further develop the place for mediation is in keeping with the spirit of the Rules, and is a matter of improving an element of the Rules that is presently underdeveloped and underutilised.

Specifically, the Task Force urges the Secretariat to expand the settlement component of Rule 43 of its Arbitration Rules, explicitly positing mediation as a viable ISDS settlement option.

The settlement process mentioned in the Arbitration Rules, though appropriately simple, lacks specificity. Presently, the process is initiated and conducted entirely by the parties, without any particular involvement of the either the Secretariat or the Tribunal: per Rule 43 of the Arbitration Rules, where the Tribunal has yet to be constituted, the parties need only notify the Secretary-General that they desire to discontinue arbitral proceedings; where the Tribunal has been constituted, the full and signed settlement must be filed with the Secretary-General. Nothing more is stipulated. Thus, while Rule 43 specifically permits the parties to discontinue arbitration proceedings by themselves “agree[ing] on a settlement or otherwise […] discontinu[ing] proceedings”, it makes no indication as to how that settlement might be reached. This is a missed opportunity. Rule 43 should make specific reference to the use of mediation.

B. Develop a “Suite” of Mediation Resources, and Encourage Settlement and Mediation as Part of Secretariat Activities

The Secretariat is uniquely suited to remind the parties of the benefits of settlement and to encourage such settlement through mediation. Such assistance can be provided in several ways. Providing the parties with information on how mediation works, how to select a mediator and how mediation might proceed in connection with an on-going arbitration would all be helpful. By way of example, ICSID might look to the Mediation Guide adopted by the Energy Charter Conference.

The Secretariat can go further, offering its assistance in identifying sources for the selection of mediators and providing the parties with names and CVs of suitable, experienced mediators, scheduling mediation conferences, acting as a repository for mediator fees and disbursing fees to mediators as appropriate and facilitating the process of turning mediated settlements into Consent Awards. This “suite” of mediation services, detailed in writing and made widely available, will give confidence to parties considering mediation and make it more likely that parties accessing ICSID mediation will have a positive experience with the mediation process.

Throughout the dispute resolution process, the Secretariat should encourage settlement communications between and amongst the parties. In particular, the Secretariat should consider a recurring, standard mediation reference as part of a short, administrative conference, both at an early
stage, as well as at some selected mid-point in the arbitral process to remind the parties that mediation and settlement are always available options.

C. Consider Promulgating a Standalone Set of Mediation Rules

In time, the Task Force urges the Secretariat to consider developing a separate set of Mediation Rules comparable to its existing Arbitration Rules and Conciliation Rules.

The development of ICSID Mediation Rules would go some way towards both legitimising the use of mediation for Investor/State disputes and providing parties with helpful structure and procedural guidance. Major arbitral institutions and professional bodies, including the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), and the International Bar Association (IBA), offer mediation rules and/or administrative support for mediation, in addition to arbitration. The IBA Rules for Investor-State Mediation, in particular, were specifically designed to address the needs of parties to investor-state disputes and might prove easily adaptable to ICSID procedures.

Mediation Rules need not be complex—indeed, they ought not to be complex. In terms of procedural components, they need only stipulate the basics needed to structure a mediation, including (1) what is necessary to form the Agreement to mediate; (2) what constitutes the beginning and end of mediation; (3) what is the procedure for Mediator selection; (4) what powers, and limitations thereon, the Mediator has; (5) stipulate that the Mediator(s) be impartial and independent; (6) assurances of confidentiality of proceedings; and (7) the possibility and impact of negotiated settlement on ancillary proceedings and possible enforcement options. With regard to enforcement, ICSID is well and uniquely positioned to provide innovative leadership. Drafters will want to reference ongoing discussions at UNCITRAL regarding the enforcement of agreements reached in mediation. The Task Force would be happy to offer its assistance in the drafting of such a set of rules and in developing an administrative framework for facilitating mediation.

D. Offer Party and Mediator Guidance, Education and Training

Beyond affirmatively amending the Arbitration Rules to include explicit reference to mediation, publishing mediation guidance for parties, detailing areas of ICSID administrative support for mediation and promulgating a standalone set of Mediation Rules, the Task Force encourages the Secretariat to continue developing education and training materials and programmes focused on the nature of mediation and how it might be used, either in lieu of or alongside arbitral proceedings.

In addition to periodic reminders and instruction on the use of mediation, the Secretariat should provide client and mediator education and training programmes. The Secretariat, in cooperation with IMI and others, is already engaged in providing mediator skills training programmes tailored for Investor-State disputes. A pilot training programme took place on June 12–14, 2017 at ICSID’s facilities in Washington, D.C. This training covered the context and framework of investor-state dispute settlement, considerations specific to investor-state mediation, intercultural competency, process design, conduct of an effective investor-state mediation and ethical challenges, among other topics. ICSID has also recently sponsored a high-level mediation education forum for state and investor representatives. Continuing ICSID guidance, education and training for investors, states and prospective mediators will facilitate more frequent and effective use of mediation in investor-state disputes.
IV. Additional IMI IS Task Force Support

The Task Force has actively promoted its findings. First, in 2014, it prepared a response to the European Commission. In that note, Response to the European Commission Public Consultation on Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in Transatlantic Trade and Investment Partnership (TTIP) (7 June 2014) (“ISDS Note”), the Task Force observed that there are several benefits to mediation and to why mediation might be particularly beneficial in the ISDS context. The Task Force reiterates the points and reasoning that it therein proffered in support of the use of mediation, as well as the accompanying supporting documentation (e.g., mediation reference list; IBA Rules for Investor-State Mediation). The Task Force’s initial ISDS Note is of value to this Consultation and, as such, is attached hereto (Annex 2).

Bearing in mind its own earlier recommendations to the European Commission, the Task Force has prepared a holistic set of Investor-State Mediation Competency Criteria (“Criteria”), also attached hereto (Annex 3). Recognising that investment disputes are particular in their nature, and that mediation is as much of an art as a science, the Criteria seek to lay out a series of areas in which the ideal investor-state mediator would be competent. The Criteria have been discussed in the Global Pound Conference (GPC) Blog in a piece entitled Investor-State Mediation: Not Whether, Or Even When, But How. The GPC was established to facilitate the development of commercial dispute resolution tools, at domestic, regional and international levels. In that piece, the Task Force takes greater account of mediation’s unique ability to facilitate and further the greater investment relationship. Task Force members assisted the Energy Charter Secretariat in formulating its Mediation Guide (July 2016), which specifically advocates for the use of mediation in Energy Charter Treaty disputes.

After developing the Criteria, the Task Force turned its attention to the development of educational and consultative opportunities to test the Criteria. The Task Force is uniquely qualified to pursue this work given its geographic, cultural and gender diverse membership of investor-state experts drawn from academia, government and the private sector. A list of Task Force current members is included at the end of this Note (Annex 1). Specifically desirous of seeing the Criteria normalized in investor-state conflict management and dispute resolution architecture, the Task Force has entered into informal partnerships to pilot and explore the expansion of the Criteria. In addition to the aforementioned cooperative pilot 2017 IS Mediator training programme that is being developed with the Energy Charter Secretariat, CEDR and ICSID, the Task Force is also exploring academic partnerships, with the goal of providing the investor-state community with data, case studies, new and useful insights.

* * *

It bears specifically reemphasising that the Task Force is not advocating that mediation supplant the place of either arbitration or courts, as appropriate. Rather, the Task Force urges that mediation is a particularly useful and efficient tool for the continuation of the investment relationship (where possible), or for the partial or final resolution of disputes. Further, unlike other dispute resolution mechanisms, mediation can be used at different stages of a dispute—for instance, mediation might be used at the point that the dispute first arises, or at any subsequent stage, up to and including final adjudication. Moreover, even after a decision has been made, mediation can be used with the aim of facilitating its enforcement. Together, mediation and adjudication can operate in a mutually supportive sense.

* * *

In summary, the Task Force urges the ICSID Secretariat to do the following to do the following:

1. Make an explicit reference to mediation in the ICSID Arbitration Rules.
2. Disseminate mediation information and develop ICSID mediation support services
3. Consider promulgating standalone ICSID Mediation Rules, which the Task Force would be happy to help draft alongside the Secretariat; and
4. Offer client and Mediator education and training

We remain at the Secretariat’s disposal to further elaborate on any of the matters discussed herein.

Mark E. Appel, Task Force Chair

Conrad C. Daly, Task Force Secretary
ANNEXES:

  - Appendix A: Relevant Provisions in Recent Investment Mediation Rule;
  - Annex A: IMI Investor-State Mediator Task Force Members (7 Jun. 2014);
  - Annex B: Reference List;
  - Annex C: IBA Rules for Investor-State Mediation (4 Oct. 2012);
    - Appendix A: Model Statement of Independence and Availability;
    - Appendix B: Qualifications for Mediator;
    - Appendix C: Choice of Mediator Through Designating Authority;
  - Annex D: Reference text proposed in Table 7 of the EU Consultation.

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ANNEX 1:

IMI INVESTOR-STATE MEDIATOR TASK FORCE
CURRENT MEMBERS

25 September 2017

- Mark APPEL - Task Force Chair; Arbitrator & Mediator, ArbDB Chambers (London, UK)
- Conrad C. DALY - Task Force Secretary; Consultant, The World Bank; Of Counsel, GRC Counsel LLP (Washington, DC, USA)
- Mohamed ABDEL RAOUF, Partner, Abdel Raouf Law Firm (Cairo, Egypt)
- Alejandro CARBALLO LEYDA, General Counsel, Energy Charter Secretariat (Brussels, Belgium)
- James CLAXTON, Professor, Kobe University (Kobe, Japan)
- Michael COVER, Arbitrator & Mediator, ArbDB Chambers (London, UK)
- Mustaqeem DE GAMA, Counsellor, South African Mission to the WTO (Geneva, Switzerland)
- Roberto ECHANDI, Lead Private Sector Specialist, IFC, World Bank Group (Washington, DC, USA)
- Mariam GOTSIRIDZE, Lawyer, Doughty Street Chambers (Washington, DC, USA)
- Olfa HAMDI, Advanced Work Packaging Institute (San Francisco, CA, USA)
- Mariana HERNANDEZ CRESPO GONSTEAD, Professor, University of St. Thomas (Minneapolis, MN, USA)
- Wolf VON KUMBERG, Managing Director, Global Resolution Services, Ltd. (London, UK)
- Bart LEGUM, Partner, Head of Investment Treaty Arbitration Practice, Dentons (Paris, France)
- László MOLNÁR, Partner, Technopolis Innovation Center (Budaörs, Hungary)
- Vilawan MANGKLATANAKUL, Director, Ministry of Foreign Affairs (Bangkok, Thailand)
- Karen MILLS, Founder & Arbitrator, Karim Syah Law Firm (Jakarta, Indonesia)
- Frauke NITSCHKE, Sr. Counsel/Team Leader, ICSID, World Bank Group (Washington, DC, USA)
- Eloise OBADIA, Partner, Derains & Gharavi (Washington, DC, USA)
- Naa Lamle ORLEANS-LINDSAY, Principal Legal Officer, Ghana Investment Promotion Centre (GIPC) (Accra, Ghana)
- Jeremy SHARPE, Partner, Shearman & Sterling, LLP (London, UK)
- Marie TALASOVA, Head of International Legal Services Department, Ministry of Finance (Prague, Czech Republic)
- Hannah TÜMPEL, Director of Communications and Engagement, United World Colleges (London, UK)
- Sarah VASANI, Head of Investment Arbitration, Addleshaw Goddard (London, UK)
- Nancy WELSH, Professor Law and Director of Dispute Resolution Program, Texas A&M University School of Law (Fort Worth, TX, USA)
ANNEX 2:

INTERNATIONAL MEDIATION INSTITUTE INVESTOR-STATE MEDIATION TASKFORCE

Response to the European Commission
Public Consultation on Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS)
in Transatlantic Trade and Investment Partnership (TTIP)

7 June 2014

This note responds to the Public Consultation launched by the EU Commission – Directorate General for Trade on Modalities for Investment Protection and Investor-State Dispute Resolution in the context of the negotiation of the Transatlantic Trade and Investment Partnership. In particular, it responds to Question 7 of the Consultation as it relates more specifically to the “usefulness of mediation as a means to settle disputes” between investors and host States.

This note is submitted by the Taskforce on Investor-State Mediation established by the International Mediation Institute in 2013 (the “Taskforce”). The International Mediation Institute (“IMI”) is a non-profit foundation registered in The Hague, Netherlands. Its principal function is to develop global, professional standards for experienced mediators, advocates and others involved in collaborative dispute resolution and negotiation processes.

IMI established the Taskforce to further this objective in the specific context of investor-state mediation and with the following specific objectives in mind: (1) offering practical guidelines to make use of ISM during the cooling off period; (2) determining minimum standards of knowledge, skills and relevant experience for involved neutrals; (3) assisting parties in finding competent and suitable neutrals; (4) ensuring the identification of a Designating Authority in cases of party disagreement; (5) providing procedural tools (e.g., model documents, decision trees, and case assessment tools; (6) maintaining the distinction between Mediation Rules and Conciliation Rules; (7) enabling creative hybrids; and (8) using arbitral consent awards to implement mediated settlements.

The Taskforce membership provides a broad perspective on these issues, as it includes developed and developing state officials, members of the secretariat of international dispute resolution institutions, in-house counsel of users of investor-state dispute resolution and counsel and arbitrators active in this domain. A number of members of the Taskforce participated in the drafting and implementation of the International Bar Association Rules for Investor-State Mediation. The individuals who are members of the Taskforce are listed in Annex A to this note. Each member participates in the Taskforce in the member's personal capacity. Members employed by the United States Government or the European Commission have abstained from this note and the discussions leading to its preparation.

Introduction. Investor-state disputes may appropriately be resolved, and are resolved, by agreement between the parties. Statistics indicate that between 30 and 40 percent of these disputes are resolved by such agreement. Experience with mediation in other contexts has shown that it materially increases the chances of the parties' reaching an agreed resolution of their dispute. Mediation is preferable to arbitration in multiple respects:

- Mediation may resolve the dispute early on and avoid the substantial costs and delays

of arbitration;

- A mediated resolution is more likely to be implemented because it is a product of both parties’ agreement;

- Mediation allows the parties to control the outcome, rather than placing its resolution in the hands of non-parties who can never understand the dynamics of the dispute as well as the parties do.

Mediation presents a credible and compelling option for both investors and states to settle disputes arising from investment activities. Mediation places emphasis on broader economic goals and the positive impact investment projects can have for both the investor and the host State. Mediation will encourage parties to move potential disputes away from a strictly legal interpretation of investment treaty provisions in an adversarial setting and facilitate solutions that are less costly and more effective than the award of monetary compensation. When properly used, with competent neutrals, it can generate significantly faster, less expensive and more satisfactory outcomes.

Numerous in-depth analyses and discussions demonstrate that mediation is a viable option for resolution of investment disputes. We do not intend to develop them further at this stage since abundant research and discussions are widely available in support of investment mediation.

**Specific Responses on Mediation.** An initial step to encourage the use of mediation would be to include specific language in the treaty text offering mediation not only during the cooling-off period but also at any subsequent time with the consent of the parties.

In addition to recourse to the domestic courts of the host State or to international arbitration, investment treaties have traditionally allowed for a time period for the parties to seek amicable settlement of the dispute before an arbitration may be commenced. This period, known as an amicable settlement or “cooling off” period, is usually limited to 3 or 6 months. However, few BITs establish the means or modalities by which the parties may reach such amicable settlement.

Recent years have seen increasing emphasis on a broad range of dispute settlement options for foreign investors faced with a problem with the host State of their investment. Real momentum has been regained recently with the emergence of regional investment treaties such as the ASEAN CCIA, COMESA CIA, and the revised Arab League Investment Treaty. Several model BITs from developing and developed countries, such as Morocco, Egypt and Thailand also include mediation among the options available to settle investment dispute.

This latest generation of treaties goes beyond allowing mediation in the “cooling-off”

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period. In these treaties, contracting states expressly propose a stand-alone option to mediate, as a full-fledged alternative mechanism to which disputing parties may resort. In and by itself, this approach constitutes an encouragement to mediation. The concern is that without providing for mediation in the treaty or agreement itself, the parties may perceive that if they suggest mediation it may appear that they do not have confidence in their own position or case.

The Taskforce encourages this approach to be adopted in the TTIP. The inclusion of specific language offering mediation is an important factor favoring mediation (1). At the same time, in order to provide a meaningful alternative mechanism, the treaty text must incorporate guidelines or rules for the mediation process itself (2) and must ensure the process is carried out by specialized investment mediators (3).

(1) Regarding the proposed wording, we suggest that the following features or provisions be included in any text:

- **Include a stand-alone Annex on Investment Mediation:** An earlier version of the draft text of CETA contained such an annex. The Taskforce suggests that this would be most helpful as it gives the parties wanting to embark on mediation not only the option but a complete roadmap that guides them step by step through the various phases and outcome of a mediation.

- **Gives the state the option to propose mediation:** The collaborative nature of mediation suggests that either party should be able to propose or resort to a mediation, and not only the investor. From a policy point of view, this would give states the possibility of initiating mediation at an early stage. A strict timeframe within which to mediate should not be prescribed so that it remains an option at any time until final resolution of the dispute. Further, it should be clear that mediation can be held alone or in parallel with other proceedings. This would avoid mediation being used as a dilatory technique by a party to an arbitration or a domestic court proceeding, while also building in flexibility to commence mediation at any opportune time during the dispute.

- **Makes specific reference to concurrent proceedings:** Mediation can be conducted in parallel to any of the main alternatives in dispute resolution: domestic courts, international arbitration, state-state procedures and be conducted in parallel with these or by itself. The IBA Inter-Mediation Rules (“IBA ISM Rules”) provide for this possibility and also for the required level of confidentiality to ensure that there is no negative interference with an arbitration or a court proceeding. This provision is useful to support a mediation process.

- **Option for co-mediation:** Co-mediation is where instead of a single mediator, there are two mediators that work in tandem to assist the parties in resolving their dispute. Co-mediation can facilitate a mediation that bridges the cultural, language and other divisions between the parties. In addition to avoiding differences in culture, legal background, language, experience with mediation, this feature can take into account that one of the parties to the mediation is a state where the decision-making may require more time and special procedures. Co-mediation can permit at least one of the mediators to be fully conversant with this circumstance, with the language, with the legal and administrative issues at stake. In addition, co-mediation would help assure both parties to the mediation that they are understood and their concerns and expectations are heard. The IBA ISM Rules as well as the recently revised ICC Mediation Rules launched on 1st January 2014 specifically provide for the possibility of resort to mediation by more than one mediator. Similarly, the ICDR, WIPO or other bodies provide specifically for this option, including the possibility of hybrid processes.

- **Propose a mediation management conference:** The text of the treaty or relevant rules should require that a mediation management conference be held before the parties take their final decision to go along with mediation or stop it. This mediation management conference will allow the parties to address essential issues such as the actual power to negotiate and mediate, the schedule, venue, language, scope of the mediator’s role and a number of other ground
rules that will allow the mediation to proceed and avoid deadlock.

A mediation management conference also provides a forum for addressing a critical issue in mediation involving investors and states: identifying who has the authority to make decisions on participation in a mediation process itself and on the outcome at various stages. For the mediation to succeed, there must be participants with sufficient authority on both sides.

(2) Reference to the IBA Investor-State Mediation Rules or inclusion of a set of treaty-specific rules in an Annex. To foster recourse to mediation the parties will need guidance as to the steps and the essential elements of the mediation process. This may be done by referring to the IBA ISM Rules that have been specifically developed for investment disputes. Other rules could also be referred to in order to give the parties a broader range of options. In addition, the TTIP should give the parties the option of selecting whether to have institutional support for the mediation, and include a short summary of the main features of the IBA ISM Rules.

(3) Establishing or referring to a roster of mediators: The role and expertise required from an arbitrator and from a mediator are not identical and an expert arbitrator may not necessarily be an expert mediator (and vice-versa). This would also apply to former judges as proposed in the draft negotiating text. To further enhance effectiveness, an offer of mediation in investment treaties should be accompanied by awareness and capacity-building for states and investors on the qualities of an appropriate mediator for investor-state disputes. Such capacity-building should include the development of a pool of specialized and expert investor-state mediators for selection by parties and institutional support to administer mediations.

The Taskforce does not support the establishment of a formal roster of such mediators for purposes of TTIP. However, it does favor collaboration between the Contracting Parties and dispute-resolution institutions, non-governmental organizations and the private sector with a view toward disseminating the information on competency criteria for specialized mediators and promoting open resources to help make informed decisions while choosing mediators. The collaboration in this general sense initiated by NAFTA Article 2022 can serve as a potential guide.

(4) Creating a TTIP Mediation information website to facilitate the initiation and the conduct of mediation proceedings. The website could contribute to address the need for awareness and capacity-building among public officials, the business community, lawyers and practitioners about how to use mediation, how to conduct a mediation, how to prepare for a mediation. This could give rise to technical cooperation between the two contracting parties, the US and the EU, to exchange best practices, develop new approaches and build on existing expertise. It is one of the tasks that we have assigned to our group the IMI Taskforce on Investor-State Mediation.

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We remain available to the negotiating parties to further elaborate on any of the matters discussed above.

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ANNEXES

Annex A: Taskforce Members..........................................................5
Annex B: Reference List.................................................................6
Annex D: Reference text proposed in Table 7 of the EU Consultation ..................18
Annex A: Taskforce Members

- Anna Joubin-Bret—Taskforce Co-Chair; Avocat à la Cour, Cabinet d’avocats—France
- Barton Legum—Taskforce Co-Chair; Partner, Dentons, Paris—France
- Conrad C. Daly—Taskforce Secretary; Consultant, World Bank—USA

- Mohamed Abdel Raouf, Secretary General, Cairo Regional Centre for International Commercial Arbitration—Egypt
- Suzana M. Blades, Senior Counsel Arbitrations, Conocophillips—USA
- Prof. Jack J. Coe Jr., Pepperdine University School of Law—USA
- Silvia Constain, Deputy Chief of Mission, Colombian Embassy—USA
- Roberto Echandi, Global Product Leader, Investment Policy, World Bank—USA
- Prof. Susan D. Franck, Washington and Lee University School of Law—USA
- Tan Ai Leen, Register, Singapore International Arbitration Centre (SIAC)—Singapore
- Fatma Khalifa, Egyptian State Lawsuits Authority—Egypt
- Meg Kinnear, Secretary-General, International Centre for Settlement of Investment Disputes (ICSID), World Bank—USA
- Jeremy Lack, ADR Neutral—Switzerland
- Annette Magnusson, Secretary General, Arbitration Institute, Stockholm Chamber of Commerce—Sweden
- Vilawan Mangklatanakul, Ministry of Foreign Affairs, Government of Thailand—Thailand
- Michael McIlwrath, Senior Counsel Litigation, GE Infrastructure, Oil and Gas—Italy
- Karen Mills, Arbitrator, Karim Syah Law Firm, Jakarta—Indonesia
- Frauke Nitschke, Legal Counsel, International Centre for Settlement of Investment Disputes (ICSID), World Bank—USA
- Michael Ostrove, Head of Arbitration, DLA Piper LLP Paris—France
- Eduardo Silva Romero, Partner, International Arbitration, Dechert LLP—France
- Margrete Stevens, Consultant on Investment Treaty, King & Spalding—USA
- Hannah Tuempel, Manager, International Centre for ADR, ICC—France
- Prof. Nancy Welsh, Pennsylvania State University, Dickinson School of Law—USA
Annex B: Reference List


International Bar Association, International Bar Association Mediation Committee, 


UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT IN DEVELOPING COUNTRIES*, xi. U.N. Doc.


Article 1. Scope of Application
1. These rules are designed for the mediation of investment–related differences or disputes involving States and State entities, whether or not they arise out of contract between the parties. These rules apply when:
   a) the mediating parties have agreed that these rules shall apply, whether before or after a difference or dispute arises, or
   b) the mediating parties have authorized the mediator or another person or institution to design a mediation process and that mediator, person or institution adopts these rules in whole or in part.
2. The parties may agree to exclude or vary any of these rules at any time. These rules apply unless otherwise agreed or derogated from by the parties.
3. When any of these rules is in conflict with a provision of law from which the parties or a party cannot derogate, that provision prevails.
4. References in these rules to the mediator shall include co-mediators, unless the context otherwise indicates.

Article 2. Commencement of Mediation
1. The mediation shall be deemed to have commenced:
   a) on the date on which the request described in Article 2(2) is received by a party, if the parties agreed to mediation under these rules before the differences or disputes arose; or
   b) on the date on which the parties agreed to mediate under these rules, if the parties did not agree to mediation before the differences or disputes arose.
2. A party wishing to initiate mediation under these rules shall send a written request to mediate to the other party or parties and to the mediation institution that the parties have agreed will administer the mediation, if any.
3. The request shall contain: (a) a summary of the differences or disputes sufficient to identify the matter giving rise to the request; (b) an identification of any treaty, contract or other legal instrument to which the differences or disputes relate; (c) the names and contact details of the requesting party and its representative(s); and (d) either a reference to the agreement to mediate or an invitation to the other party or parties to mediate under these rules.
4. Mediation under these rules may take place at any time, regardless of whether court, arbitration or other dispute resolution proceedings have been initiated.

Article 3. Independence and Impartiality of Mediator
1. The mediator shall be impartial and independent.
2. Prior to accepting an appointment as a mediator, any person under consideration shall provide a signed and dated Statement of Independence and Availability, in the form annexed as Appendix A, to the parties or any Designating Authority (as defined in Article 4).
3. In the Statement of Independence and Availability, the person under consideration shall: (a) disclose any facts or circumstances that might call into question the mediator’s independence or impartiality in the eyes of the parties; (b) state the mediator’s availability and willingness to conduct the mediation expeditiously and efficiently within the time limit agreed by the parties or, in the absence of such an agreement, within a reasonable time limit following the mediator’s appointment; and (c) state the mediator’s proposed fee basis.
4. If, during the course of the mediation, a mediator becomes aware of any facts or circumstances that might call into question the mediator’s independence or impartiality in the eyes of the parties, the mediator shall disclose those facts or circumstances to the parties in writing without delay.

Article 4. Designation of Mediator
1. There shall be a sole mediator, unless the parties designate two co-mediators pursuant to Article 6.
2. The parties may designate as a mediator any person whom they consider to be suited to assist them in resolving their differences or disputes.
3. In considering potential mediators, the parties may wish to take into account, but are not bound by, the qualifications set out in Appendix B ("Qualifications for Mediator").

4. At any point during the consideration of potential mediators, the parties may jointly or separately contact any potential mediator. In the event that a party makes a separate contact, the discussion shall be limited to the potential mediator's availability, independence, impartiality and qualifications.

5. The parties shall jointly designate the mediator within 21 days from the date of commencement of the mediation.

6. If the parties have not jointly designated a mediator within 21 days, the parties shall within 14 days agree on an institution or person that shall assist them in choosing a mediator ("Designating Authority") in accordance with the procedure set out in Appendix C ("Choice of Mediator Through Designating Authority").

7. If the parties do not agree on a Designating Authority within 14 days, then the Secretary-General of the Permanent Court of Arbitration at The Hague shall select a Designating Authority upon the request of either party.

Article 5. Resignation and Replacement of Mediator
1. The parties may by written consent agree to replace the mediator at any time.

2. If, during the course of the mediation, a party objects for any reason to a mediator continuing to act, then that party shall notify the mediator, the other party and any Designating Authority. The notification should preferably state the reasons for the objection.
   a) Any other party to the mediation may comment in writing on the objection within 7 days of receipt of the objection.
   b) Following consideration of the objection and any comment on the objection, the mediator shall in the mediator's sole discretion: (i) resign as mediator; (ii) hold a telephone conference or in-person meeting with the parties to discuss the objection; or (iii) if the other party or parties agree, consult directly with the objecting party at a meeting or otherwise to discuss the objection.
   c) If a party maintains its objection after the mediator has taken action in accordance with Article 5(2)(b)(ii) or (iii), the mediator shall resign and a new mediator shall be designated pursuant to these rules.

3. If a mediator resigns, is incapacitated or otherwise becomes unable to perform the mediator's functions, a new mediator shall be designated pursuant to these rules.

Article 6. Designation, Resignation and Replacement of Co-Mediators
1. If the parties agree to co-mediation, the parties jointly or the Designating Authority shall designate two mediators. The procedures and rules set out in Articles 4 and 5 above shall apply to the designation of, objections to, and replacement of, each of the co-mediators.

2. In the event that one co-mediator resigns, is incapacitated or otherwise becomes unable to perform the functions of a mediator, the parties shall, following consultation with the remaining mediator and any Designating Authority, decide whether to continue with a single mediator or to designate a new co-mediator in accordance with Article 4.

3. The parties may decide to relieve one co-mediator of that co-mediator's functions and to continue the mediation with the remaining mediator. The parties shall first consult with and obtain the agreement of the mediator with whom they wish to continue the mediation.

Article 7. Role of Mediator
1. The mediator shall be guided by principles of fairness, objectivity, independence and impartiality.

2. The mediator shall not have the authority to impose on the parties any partial or complete settlement of the differences or disputes.

3. Following consultation with the parties, the mediator may take decisions with regard to the procedural conduct of the mediation, including the language(s) of the mediation and the place, the format, times and dates of the mediation sessions.

4. In conducting the mediation and in taking procedural decisions, the mediator shall take into account the wishes of the parties, the circumstances of the case and the overall goal of a cost efficient and timely settlement of the differences or disputes.
5. Unless the parties agree otherwise, by accepting the designation as mediator the mediator agrees not to act in any other role, including that of counsel, arbitrator, expert or witness, in respect of:
   (a) differences or disputes that are the subject of the mediation; or (b) during the pendency of the mediation, any differences or disputes in which a party is directly involved as a disputant.

**Article 8. Conduct of the Mediation**

1. The mediation shall be conducted in accordance with the parties’ wishes and with the assistance of the mediator.

2. The mediator shall assist the parties to reach an agreement on a settlement of their dispute on a voluntary basis in which the parties make free, informed and self-determined choices as to the process and the outcome. The parties shall cooperate with the mediator and each other in good faith to advance the mediation as expeditiously and efficiently as possible.

3. The mediator may communicate with the parties orally or in writing, together or individually, at any point during the mediation. The mediator may conduct meetings with one party only.

4. No information provided orally by a party to the mediator during a separate meeting may be disclosed to any other party by the mediator, unless the party explicitly so authorizes the mediator. Any written material that one party provides to the mediator with the intention that it not be shared with the other party or parties shall be clearly labeled as "Confidential – For Mediator's Use Only" or words to similar effect.

5. In a co-mediation, each co-mediator shall share with the other co-mediator all written or oral communications received from a party or parties. The co-mediators shall coordinate their efforts and jointly conduct the mediation.

6. The mediator may at any time during the mediation suggest or request that a party provide such additional information or material as the mediator sees fit.

7. If requested by the parties, the mediator may make recommendations concerning an appropriate resolution of the differences or disputes.

8. With the agreement of the parties and subject to Article 10, the mediator may consult one or more experts. Any such expert shall be governed, mutatis mutandis, by Article 3.

**Article 9. Mediation Management Conference**

1. As soon as practicable following the mediator’s designation, the mediator shall convene a mediation management conference with the parties, whether in person, by telephone or by any other means of telecommunication, to discuss:
   a) the conduct of the mediation, in particular any outstanding procedural issues such as the languages and location of the mediation sessions;
   b) a provisional timetable for the conduct of the mediation;
   c) confidentiality and privacy arrangements, including any legal disclosure obligation that may affect such arrangements;
   d) the applicability of any relevant prescription or limitation periods and whether the parties wish to address such periods by agreement;
   e) whether the parties wish to agree in writing not to commence or not to continue any arbitral or judicial proceedings relating to the differences or disputes that are the subject of the mediation while the mediation is pending;
   f) whether special arrangements for the approval of a settlement agreement need to be made; and
   g) the financial arrangements, such as the calculation and payment of the mediator’s fees and expenses.

2. During the mediation management conference, each party shall inform the other party and the mediator of the name and contact details of its representative(s) and any other person participating on its behalf in the mediation.

3. At the mediation management conference, to the extent possible, or as soon as possible thereafter, each party shall:
   a) either identify a representative who is authorized to settle the differences or disputes on its behalf or describe the process necessary for a settlement to be authorized; and

b) communicate to the mediator and the other party, for discussion, the names of any non-party whose participation in the mediation it deems to be necessary or useful to facilitate the settlement of the differences or disputes.

4. By agreeing to mediate under these rules, a party undertakes to participate in the mediation management conference. A party may withdraw from the mediation at any time after the mediation management conference. Prior to withdrawing from the mediation, a party must notify the other party or parties and the mediator of its intention to withdraw, preferably stating its reasons. Prior to a party’s withdrawal from the mediation, the mediator shall hold a meeting with all parties in person, by telephone or by any other means of telecommunication.

Article 10. Privacy and Confidentiality

1. The mediation shall be private. Unless the parties and the mediator otherwise agree, no person other than the mediator, the parties, their representatives or other people identified pursuant to Article 9.2 shall be permitted to attend, hear or view any part of the mediation or any communications relating to the mediation.

2. Subject to any agreement between the parties and the mediator and to the specific exceptions set out below, all documents prepared and communications made in connection with the mediation shall be confidential and shall not be used for any other purpose, including, in particular, in legal proceedings.

3. The confidentiality obligation described in Article 10(2) shall not extend to:
   a) the fact that the parties have agreed to mediate or a settlement resulted from the mediation, unless the parties otherwise agree in writing;
   b) the terms of a settlement or partial settlement, unless and to extent that the parties otherwise agree in writing;
   c) the disclosure of documents or information:
      i) prepared by the disclosing party in connection with the mediation, if they contain no information provided by any other party or the mediator and do not refer to the mediation;
      ii) as evidence that a settlement agreement was reached when any other party disputes it;
      iii) for the purpose of enforcing or homologating a settlement agreement, subject to any requirement provided in the agreement;
      iv) to comply with a pre-existing legal disclosure obligation that was made known to the other parties in the agreement to mediate or at the Mediation Management Conference, provided that the disclosure shall be as limited as permissible;
      v) to comply with a court order or similar instrument requiring disclosure, provided that the disclosure shall be as limited as permissible and shall be made only after written notice to the other party or parties and the mediator, and an opportunity to contest the disclosure under such order or instrument;
      vi) required to prevent a serious crime or eminent threat to public safety, provided that the disclosure shall be as limited as is reasonable in all circumstances; and
      vii) that, at the time of disclosure, has demonstrably entered into the public domain through no direct or indirect breach of the confidentiality obligations set forth above.
      viii) Except with respect to Article 10(3)(c)(i) and (vii), any disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible.

5. Every person participating in the mediation shall be deemed to have agreed to be bound by the provisions of this Article 10. At the request of the mediator such person shall confirm that agreement in writing.

6. Except for the sole purpose of a post-mediation dispute regarding the mediator's fees or expenses, no party or other participant in the mediation shall:
   a) attempt to compel the mediator to disclose anything in relation to or about the mediation, including any notes or other documents made by the mediator, or any information or documents obtained during the mediation, including information relevant to whether a settlement agreement was made; or
b) call, attempt to call or compel, or cause the mediator to be compelled to appear as a witness in any legal proceedings relating to the mediation or information acquired by the mediator in relation to the mediation.

7. The provisions of this Article 10 shall survive the termination of the mediation and continue in full force and effect unless provided otherwise by a signed agreement among all parties and the mediator.

**Article 11. Settlement and Termination of Mediation**

1. The mediator shall declare the mediation terminated in writing:
   a) upon the signing of a settlement agreement by the parties;
   b) upon the withdrawal of any party pursuant to Article 9.4; or
   c) if, following consultation with the parties, the mediator determines that the parties will not resolve the differences or disputes through the mediation.

2. The declaration of termination shall be made and sent to all parties without delay. The mediation shall be deemed terminated as of the date of transmission of the declaration to the parties.

**Article 12. Costs and Fees**

1. The mediator’s fees and expenses, and the administrative expenses of the Designating Authority, if any (together the “Costs”), shall be borne by the parties in equal shares. A party shall be free to pay any other party’s share of the Costs, if it wishes to do so. A party’s other expenditures shall remain the responsibility of that party. The parties are required to pay the Costs irrespective of whether a settlement agreement is concluded.

2. If a mediator resigns prior to the termination of the proceeding, the parties shall pay the fees and expenses that the mediator incurred prior to termination, unless the mediator and the parties have agreed otherwise.

3. The fees of the mediator shall be calculated on the basis of the hours spent by the mediator on the mediation, unless a flat fee or other basis is agreed among the parties and the mediator. The mediator’s hourly rate or fees shall be agreed upon at the outset of the proceedings. If no party objects to the mediator’s proposed hourly rate or other fee basis within 14 days of receipt of the Statement of Independence and Availability, then that proposal shall be deemed accepted. The mediator shall be reimbursed for reasonable expenses incurred in the course of the proceedings, such as travel, accommodation or other expenses.

4. After the mediator’s designation, the mediator may invite the parties to pay an initial deposit for the mediator’s fees and expenses. The amount of the initial deposit shall be decided by the mediator based on the mediator’s estimate of the time likely to be spent on the matter at least through the mediation management conference. During the course of the mediation, the mediator may request such additional deposits as the mediator deems necessary to cover anticipated fees and expenses. The mediator may decide not to proceed with the mediation until payment of the initial deposit, or, if applicable, any subsequent deposit.

5. After the termination of the mediation, the mediator shall send a final invoice for the mediator’s fees and expenses to the parties. If the amount of any deposits is not sufficient to cover the final invoice, the shortfall shall be paid by the parties immediately in equal shares. If the amount of any remaining deposits is greater than the final invoice, then any excess will be returned to the parties in the proportions originally paid.

6. If the parties have recourse to a Designating Authority, the Designating Authority shall set the amount of its administrative expenses. The Designating Authority need not proceed with the matter until the administrative expenses have been paid. If necessary, the Designating Authority may request from the parties such additional amounts as become necessary should the circumstances envisaged under Article 5 and Appendix C to these rules arise.
APPENDIX A
Model Statement of Independence and Availability

In Mediation Proceeding between [xxx]

<table>
<thead>
<tr>
<th>Family Name(s):</th>
<th>Given Name(s):</th>
</tr>
</thead>
</table>

Please tick all relevant boxes

**ACCEPTANCE**

I agree to serve as mediator or, if applicable, co-mediator and conduct mediation pursuant to the IBA Rules for Investor-State Mediation, subject to any modifications agreed to by the parties. I confirm that I am familiar with the rules.

**NON-ACCEPTANCE**

I decline to serve as mediator in this mediation proceeding. *(If you tick here, simply date and sign the form without completing any other sections.)*

**AVAILABILITY**

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this mediation expeditiously and efficiently within the time limit agreed to by the parties or within an appropriate time frame following my appointment. I understand that it is important to complete this mediation as promptly as reasonably practicable. My current professional engagements are as below for the information of the parties.

<table>
<thead>
<tr>
<th>Principal professional activity:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><em>(e.g. lawyer, mediator, academic)</em></td>
<td></td>
</tr>
</tbody>
</table>

Are you already aware of any other professional engagements or activities likely to require a substantial time commitment from you in the next 12-18 months? *(If yes, please provide details below and/or, if necessary, on a separate sheet.)*

**INDEPENDENCE** *(Tick one box and provide detailed information, if necessary.)*

In deciding which box to tick, you should take into account whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favor of disclosure. Any disclosure should be complete and specific, identifying among other things relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

- **Nothing to disclose:** I am independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties.

- **Acceptance with disclosure:** I am independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties, I draw attention to the matters on the attached sheet.

Date: Signature:

---

The information requested in this form is disclosed solely to the parties and their counsel in the mediation proceeding referenced above under the IBA Investor-State Mediation Rules for the purposes of that proceeding and shall remain confidential.
APPENDIX B

Qualifications for Mediator

In considering prospective mediators, the following qualifications may be taken into consideration:

- Experience as mediator;
- Mediation training, including any accreditation as a mediator by an internationally recognized organization;
- Experience in any form of dispute resolution proceedings involving States or State agencies or instrumentalities, in particular including investor-State disputes, peace negotiations, border disputes and trade disputes;
- Experience in any form of dispute resolution proceedings involving commercial entities, including particularly disputes relating to the substantive field of the investment at issue;
- Regional or international stature;
- Experience in dealing with governments;
- Experience as mediator in cross-cultural disputes;
- Experience in dealing with parties of the nationalities at issue;
- Ability to communicate with the parties in the languages in which they and/or the key participants in the mediation are most comfortable communicating; and
- The advisability of appointing a mediator of a nationality other than the nationalities of the parties.
APPENDIX C
Choice of Mediator Through Designating Authority

1. Unless the parties jointly request the Designating Authority directly to designate a mediator, the Designating Authority shall as soon as practicable, and if possible within 14 days of acceptance by the Designating Authority of its appointment, provide the parties with a list of at least three potential mediators, together with the potential mediators’ Curriculum Vitae and Statements of Independence and Availability.

2. In considering potential mediators, the Designating Authority shall take into account, but not be bound by, the recommended qualifications set out in Appendix B. Within 14 days of receipt of the list, the parties shall either agree on the name of a mediator or shall each return the list to the Designating Authority with an indication of any potential mediators that they deem unacceptable and an order of preference for any potential mediators they deem acceptable. If a party does not return the list within the allotted time frame, all potential mediators on the list shall be deemed acceptable. From among the mediators whom the parties have deemed acceptable, and taking into account the order of preference expressed by the parties, the Designating Authority shall designate a mediator.

3. If none of the potential mediators on the list provided by the Designating Authority is deemed acceptable by the parties, then the Designating Authority shall, using its discretion, designate a mediator and shall provide the parties with the mediator’s Curriculum Vitae and Statement of Independence and Availability. If any party objects to the mediator so designated within 7 days of receipt mediator’s Curriculum Vitae and Statement of Independence and Availability, then the Designating Authority shall consult with the parties. If, after consultation, the objecting party maintains its objection, then the Designating Authority shall designate another mediator pursuant to paragraph 4, above.
# Annex D: Reference Text Proposed in Table 7 of the EU Consultation

## Example of provisions commonly found in bilateral investment treaties (BITs)

<table>
<thead>
<tr>
<th>Text developed in EU-Canada agreement (CETA)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article x-21: Procedural and Other Requirements for the Submission of a Claim to Arbitration</strong></td>
</tr>
</tbody>
</table>

1. An investor may submit a claim to arbitration under Article x-22 (Submission of a Claim to Arbitration) only if the investor:
   a) delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;
   b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination;
   c) fulfils the requirements of the notice requesting a determination of the respondent;
   d) fulfils the requirements related to the request for consultations;
   e) does not identify measures in its claim to arbitration that were not identified in its request for consultations;
   f) provides a declaration, where it has initiated a claim or proceeding, seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, that:
     i. a final award, judgment or decision has been made; or
     ii. it has withdrawn any such claim or proceeding;
      The declaration shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; and
   g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.

2. Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, both the investor and the locally established enterprise shall provide a declaration pursuant to subparagraph 1(f) and a waiver pursuant to subparagraph 1(g).

3. The requirements of paragraphs 1(f), (g) and 2 do not apply in respect of a locally established enterprise where the respondent or the investor’s host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling the requirements in subparagraph 1(f), (g) or 2.

4. Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.

5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:
   i. where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;
ii. where the Tribunal dismisses the claim pursuant to Article x-29 (Claim manifestly without legal merit) or Article x-30 (Claims Unfounded as a Matter of Law); or
where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.

<table>
<thead>
<tr>
<th>Article x-23: Proceedings under different international agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where claims are brought both pursuant to this Section and another international agreement and:</td>
</tr>
<tr>
<td>a) there is a potential for overlapping compensation; or</td>
</tr>
<tr>
<td>b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section,</td>
</tr>
<tr>
<td>a Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article x-19: Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The disputing parties may at any time agree to have recourse to mediation.</td>
</tr>
<tr>
<td>2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this chapter and shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the Services and Investment Committee pursuant to Article x-42(5)(d).</td>
</tr>
<tr>
<td>3. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from the roster established pursuant to Article x-25 (Constitution of the Tribunal) or requesting the Secretary General of ICSID to appoint a mediator from the list of chairpersons established pursuant to Article x-25 (Constitution of the Tribunal).</td>
</tr>
<tr>
<td>4. Disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator. If the disputing parties agree to have recourse to mediation, Articles x-18(5) and x-18(7) (Consultations) shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.</td>
</tr>
</tbody>
</table>
The aim of the IMI Competency Criteria for Investor-State Mediators ("Criteria") is to assist parties, institutions, designating authorities and other appointing bodies in selecting competent and suitable mediators, or co-mediators, for disagreements involving private sector entities and States, by listing criteria that can help inform and guide their choices. Ideally, these Criteria should be applied cumulatively.

Mediation presents a credible and compelling option for both investors and States seeking to settle disagreements and disputes arising from investment activities. Mediation can be used in conjunction with, or in parallel to, investment arbitration, notably as a means to reach early settlement during the "cooling off" period provided for in treaties. When properly used with competent and suitable mediators, mediation can generate significantly more expedient, less expensive and more satisfactory outcomes in line with the overall objective of the long-term investment relationship between foreign investors and a State.

While a pool of Investor-State arbitrators has developed over the recent years, and while, in parallel, mediation of international disputes has gained momentum, there is as yet no readily available pool of accredited or identifiable Investor-State mediators from which parties can choose their mediator or co-mediator. Further, as good arbitrators do not necessarily make good mediators, and not all competent mediators may be suitable for mediating investment disputes, it is important for the parties and appointing bodies to carefully carry out due diligence before appointing their mediator. The skillset used by mediators differs considerably from those of conciliators, adjudicators, and arbitrators, and, while there is often overlap, many of those skills do not crossover. Co-mediation may also be a useful way of combining qualities found in different candidates and assisting in dealing with cultural nuances and the complexities of Investor-State disagreements.

At the outset, two issues should be emphasized:

1. Investment disputes are particular, as they involve private parties on the one hand, and States on the other, and, therefore, may involve issues of public interest, public international law or sovereignty.

2. Mediation is as much an art as a science, and Investor-State mediators should be not only competent but also suitable for each dispute.

* * *

Ideally, selected Investor-State mediators should have satisfactory levels of knowledge and experience in each of the following areas:

1. Understanding of Investor-State issues

An Investor-State mediator should be informed on, and advised of, common issues that may arise in the course of investment disagreements. The mediator may be helpful in resolving not only substantive issues but also procedural ones (e.g., who has authority to represent the State, public interest defences, transparency concerns, sovereign immunity claims). The mediator should, therefore, have a solid understanding of, or familiarity with, procedural and substantive issues that may arise in Investor-State dispute settlement proceedings.

The mediator should be familiar with international investment processes, international commerce, financing mechanisms, public international legal issues and international arbitration procedures (e.g., ICSID, UNCITRAL and ICC). The mediator need not be an expert in all of these fields but should have sufficient background knowledge to understand complex issues arising from disputes involving the domestic and international responsibilities of States, and the inherent risk for companies investing abroad, independent of the dispute’s subject matter. Mediation allows participants to meet, interact and
share their interests and concerns with their counterparty(-ies) and the mediator(s) in a safe and confidential manner. This social aspect of the process allows the participants to explore solutions that might not be available in arbitration or other adjudicative forms of dispute resolution.

2. Experience in mediation and other dispute resolution processes

An Investor-State mediator should be familiar with a wide range of dispute resolution processes, as well as with how to safely combine them. The mediator should understand how to address the potential for adverse impact on parallel arbitration or court proceedings. The mediator should know how to assist the parties in the following:

1. Diagnosing the dispute and the risks of it escalating;
2. Identifying likely timing issues and deadlines;
3. Understanding the need to address proper party representation and ratification issues, taking into account the particular requirements for binding settlements;
4. Explaining the mediation process in detail and its possible outcomes, making sure that the right participants are present and that necessary internal processes are in place to allow effective communication between those present and those authorized to make decisions;
5. Convening and conducting the mediation process, and guiding the parties through it, being sure to address the needs of States regarding transparency and public and media access as appropriate, and balancing those needs with confidentiality, and establishing and maintaining trust among participants;
6. Foreseeing and addressing possible procedural issues and obstacles;
7. Understanding the possible impact of various procedural options on the parties’ social behaviour (e.g., triggering “pro-social” as opposed to “anti-social” behavioural patterns);
8. Recognizing the formalities needed to allow the parties and the State to enter into enforceable settlement agreements, including the budgetary and financial approval requirements to make payments.

3. Experience with different forms of negotiation, mediation and conciliation

An Investor-State mediator should be experienced in different forms of negotiation, mediation and conciliation, and should have experience in conducting international mediations involving a State or a state entity and a private party as either a sole or co-mediator. The mediator should be a trained, certified or accredited professional mediator, with strong intercultural and interpersonal skills, and should be comfortable managing different types of mediation processes (e.g., evaluative, facilitative, transformative), and working with other mediators or dispute resolution or other experts as part of a team (e.g., as co-mediators), as may be appropriate. The mediator should understand that mediation is not only a legal but also a political and social process, and should know how to bring in appropriate experts when needed.

The mediator should know how to assist participants in using mediation to meet the various legal, political, social and/or cultural considerations that might arise in the course of resolving the disagreement, and should be familiar with relevant rules, guidelines and codes of ethics applying to Investor-State mediation. Experience in international negotiations, particularly in settlement negotiations involving investment disputes or international disputes involving a State, could present an alternative to experience as a mediator.

4. Understanding of arbitration and adjudication

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1 At the time of preparing this set of competency criteria, the pool of experienced mediators with Investor-State dispute settlement experience is small and still being developed. These Criteria aim at encouraging the development of new expertise in Investor-State dispute settlement. It is advisable to treat them flexibly, and to revisit them once a sizable pool has emerged and experience has been gathered.

2 See, e.g., IBA Rules for Investor-State Mediation (2012).
An Investor-State mediator should be familiar with different forms of arbitration and adjudication. Although it is useful to have experience working as an arbitrator, tribunal secretary, party representative, advocate, legal counsel, advisor or neutral in international commercial arbitration or adjudication proceedings, or with Investor-State arbitrations, such experience is not essential. More importantly, the mediator should be familiar with differences between institutional and ad-hoc proceedings, civil law and common law approaches to dispute resolution, and ethical issues and guidelines affecting arbitration and mediation.\(^3\) The mediator should also understand enforceability issues and UNCITRAL texts on the recognition and enforcement of arbitral awards, as well as provisions regarding the possible use of consent awards or arbitral awards on agreed terms.

The mediator should have previous knowledge or experience with disputes involving a State as a party (e.g., Investor-State arbitrations, international commercial arbitrations or adjudications). The mediator also should have an ability to synthesize complex information and provide a structural framework for identifying any applicable norms and dispositive issues (e.g., issues of fact and law), while at the same time enabling the parties to focus on their future interests, the social dynamics between key participants, and any external procedural requirements (e.g., transparency, public access, media) that may influence the handling of their discussions.

5. **Intercultural competency**

An Investor-State mediator should have strong and demonstrated competencies in dealing with cross-cultural situations. The mediator should understand culturally-shaped preferences and expectations, especially in international cross-border disputes and in different organizational cultures (e.g., governmental, business) in relation to decision-making approaches and attitudes towards time and information exchange. The mediator should be able to appreciate nuances involved in different types of diplomacy, approaches to “cooling-off” periods, and how to convene, prepare for, coordinate, and conduct different types of meetings in different settings.\(^4\)

6. **Other competencies**

An Investor-State mediator should also be familiar with various tools and technologies that can assist the participants in communicating more effectively, reducing costs and saving time, such as online webinar or video-conferencing systems, data-analysis tools (e.g., decision trees, mind maps) and process management skills. Such tools will hopefully give participants a greater sense of predictability, helping them to better manage budgets and deadlines. Familiarity with issues arising from third party funding is also desirable. Although familiarity with the particular industry relevant to the disagreement (including technical, economic and legal trends, as well as common business practices and public policies) may be helpful, such should not be considered a necessary criterion for appointment. Co-mediation and/or expert participation might also be employed as means of bringing additional know-how to the mediation.

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\(^3\) See, e.g., IBA Guidelines on Conflicts of Interest in International Arbitration (2014) and IBA Rules on the Taking of Evidence in International Arbitration (2010).

\(^4\) The provisions contained in the Criteria for Approving Programs to Qualify Mediators for IMI Inter-Cultural Certification may also be relevant, in particular the Cultural Focus Areas set out in Appendix 1 to those Criteria, available at [https://imimediation.org/intercultural-certification-criteria](https://imimediation.org/intercultural-certification-criteria) (retrieved 15 Sep. 2016).
Appendix A:

Relevant Provisions in Recent Investment Mediation Rules

The following qualifications have been identified in recent publications, which should be taken into consideration when seeking prospective Investor-State mediators:

1. The IBA Investor-State Mediation Rules (2012) – Appendix B

“In considering prospective mediators, the following qualifications may be taken into consideration:

- Experience as mediator;
- Mediation training, including any accreditation as a mediator by an internationally recognized organization;
- Experience in any form of dispute resolution proceedings involving States or State agencies or instrumentalities, in particular including investor-State disputes, peace negotiations, border disputes and trade disputes;
- Experience in any form of dispute resolution proceedings involving commercial entities, including particularly disputes relating to the substantive field of the investment at issue;
- Regional or international stature;
- Experience in dealing with governments;
- Experience as mediator in cross-cultural disputes;
- Experience in dealing with parties of the nationalities at issue;
- Ability to communicate with the parties in the languages in which they and/or the key participants in the mediation are most comfortable communicating; and
- The advisability of appointing a mediator of a nationality other than the nationalities of the parties.”

2. The European Union’s Trade and Investment Partnership Agreements

The draft EU–U.S. Transatlantic Trade and Investment Partnership Agreement proposed by the European Commission sets the following criteria for the selection of a mediator:

“The [...] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.”


Appendix B:
Members of the IMI Taskforce on Investor-State Mediation

Chair:
- Mark Appel, ArbDB Chambers (London, UK)

Former Co-Chairs:
- Anna Joubin-Bret, Partner, Cabinet Joubin-Bret (Paris, FR)
- Barton Legum, Partner & Head of the Investment Treaty Arbitration Practice, Dentons (Paris, FR)

Secretary:
- Conrad C. Daly, Consultant, The World Bank; Of Counsel, GRC Counsel LLP (Washington, DC, USA)

Members:
- Suzana Blades, Counsel, International Arbitration, ConocoPhillips (Houston, TX, USA)
- Colin Brown, Legal Officer, Directorate General for Trade, European Commission (Brussels, BE)
- Jack J. Coe, Jr., Professor of Law, Pepperdine University (Malibu, FL, USA)
- Silvia Constain, Fellow, Weatherhead School of International Relations, Harvard University (Cambridge, MA, USA)
- Roberto Echandi, Lead Private Sector Specialist, Trade & Competitiveness Global Practice, IFC World Bank Group (Washington, DC, USA)
- Susan D. Franck, Professor of Law, American University, Washington School of Law (Washington, DC, USA)
- Jason Fry, Partner & global co-Head of the International Arbitration Group, Clifford Chance (Paris, FR)
- Olfa Hamdi, Founder, Advanced Work Packaging Institute (San Francisco, CA, USA)
- Fatma Khalifa, Counsellor, Foreign Disputes Department, Egyptian State Lawsuit Authority (Cairo, EG)
- Meg Kinnear, Secretary General, ICSID World Bank Group (Washington, DC, USA)
- Jeremy Lack, Attorney-at-Law & ADR Neutral (Geneva, CH)
- Annette Magnusson, Secretary General, Arbitration Institute of the Stockholm Chamber of Commerce (Stockholm, SE)
- Vilawan Mangklatankul, Director, Treaty Section, Ministry of Foreign Affairs of Thailand (Bangkok, TH)
- Michael McIlwrath, Global Chief Litigation Counsel, Oil & Gas division, General Electric (Florence, IT)
- Karen Mills, Founder & Arbitrator, Karim Syah Law Firm (Jakarta, ID)
- Frauke Nitschke, Senior Counsel, ICSID World Bank Group (Washington, DC, USA)
- Eloïse Obadia, Partner, Derains & Gharavi International (Washington, DC, USA)
- Michael Ostrove, Partner & Global Chair of the International Arbitration Group, DLA Piper (Paris, FR)
- Mohamed Abdel Raouf, Director, Cairo Regional Arbitration Center for International Commercial Arbitration (Cairo, EG)
- Eduardo Silva Romero, Partner & co-Chair of International Arbitration global practice, Dechert (Paris, FR)
- Jeremy Sharpe, former Chief of Investment Arbitration, Office of the Legal Adviser, U.S. Department of State (Washington, DC, USA); Partner, Sherman and Sterling (London, UK)
- Margrete Stevens, Consultant, International Arbitration Practice Group, King & Spalding (Washington, DC, USA)
- Hannah Tümpel, former Senior Counsel and Manager ICC International Centre for ADR (Paris, FR); Director of Communications and Engagement, UWC International (London, UK)
- André von Walter, Legal Officer, Directorate General for Trade, European Commission (Brussels, BE)
- Nancy Welsh, Professor of Law, The Pennsylvania State University, Dickinson School of Law (Carlisle, PA, USA)
ICCA PROPOSALS ON THE REVISION OF THE ICSID RULES

INTRODUCTION

In drafting its proposals below, ICCA has been mindful that any amendments to the ICSID Rules should take into equal consideration the interests and rights of both investors and States in order to ensure that all parties to ICSID proceedings maintain confidence in the process.

Accordingly, in ICCA’s view, one of the paramount objectives for the new rules should be to achieve the correct balance between the different concerns that all users of the ICSID system have expressed.

SECTION I: SUGGESTIONS FOR POTENTIAL ICSID RULES AMENDMENTS

1. Review Procedure for Appointment and Disqualification of Arbitrators, Explore Feasibility of Code of Conduct for Arbitrators

• ICCA proposes the development by ICSID of a guideline for States as to the qualities required of individuals who are designated to the Panel of Conciliators and Panel of Arbitrators, building on those requirements set out in Article 14(1) of the Convention. The guideline could be published on ICSID’s website and sent directly to all ICSID Contracting Parties.

• ICCA suggests that ICSID consider preparing a paper reviewing ICSID practice on dealing with disqualification proposals and provide guidelines based on this practice.

• In order to expedite tribunal appointment in the absence of prior party agreement, ICCA suggests that ICSID Arbitration Rules 2 and 3 be revised as follows:
  o Within 20 days of the registration of a Request for Arbitration, the parties shall seek to reach agreement on the process for appointing the tribunal.
  o If no such agreement is reached in that time, the claimant(s) will then have 20 days to appoint an arbitrator.
  o Following that appointment, the respondent will have 20 days to make its appointment.
  o Following that appointment, the parties have an additional 30 days to agree on a President.
  o If the Parties cannot agree on a President, then, in accordance with Article 38 of the Convention, the Chairman of the Administrative Council will appoint the President.

• In order to discourage frivolous challenges to tribunal members, ICCA proposes that:

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1 This proposal is presented to ICSID on behalf of ICCA by a Sub-Committee comprised of Loretta Malintoppi, Stanimir Alexandrov and Eduardo Zuleta (as co-chairs), and Mélida Hodgson, Janet Whittaker, Patrick Childress and Naomi Briercliffe.
o the automatic suspension of proceedings upon a challenge application being made in Arbitration Rule 9(6) is deleted. Instead, whether or not suspension is warranted could be decided on by the remaining tribunal members within 15 business days of the challenge being submitted, or any other reasonable period determined by the tribunal that allows the parties to be heard; and

o a new Arbitration Rule is inserted confirming that the truncated tribunal may make an adverse costs award against a party if, in the view of the tribunal, the challenge was frivolous.

2. **Clarify Rules on Preliminary Objections and Bifurcation**

- ICCA suggests that the preliminary objection procedure under Arbitration Rule 41(1) to (4) be clarified to remove uncertainty regarding the appropriate timing of preliminary objections and the legal standard that applies to requests for bifurcation. Specifically, ICCA proposes that:
  
  o in line with existing practice in a number of cases, respondents be required to file standalone jurisdictional objections within 30 days of the claimant filing its Memorial. If respondents wait to file jurisdictional objections until the Counter-Memorial is due, then they must lodge those objections as part of a broader Counter-Memorial addressing both jurisdiction and the merits; and
  
  o guidance is provided in Arbitration Rule 41 as to when a presumption should/should not exist in respect of bifurcation when a jurisdictional objection is raised.

- ICCA proposes that a review of the practice of tribunals with regard to Arbitration Rule 41(5) is undertaken to assess whether this provision is working effectively and what, if anything, needs to be expanded/refined in light of that review.

3. **Explore Possible Provisions on Consolidation of Proceedings and Parallel Proceedings**

- Unlike other arbitral rules, the ICSID Arbitration Rules currently do not address consolidation. ICCA suggests that the revised Arbitration Rules include provisions addressing when consolidation is an appropriate measure, as well as issues such as procedural rights and confidentiality when consolidation takes place.

- In particular, ICCA proposes that the revised Arbitration Rules contain provisions:
  
  o mandating that tribunals “shall” consolidate multiple proceedings if all parties agree; and
  
  o empowering tribunals to force consolidation of cases if certain criteria are met.

- The more detailed content of the new Arbitration Rules on consolidation should be developed based on provisions in other arbitral rules and the practice of investment tribunals.
4. **Modernize Institution Rules, Means of Communications and Filing of Briefs and Supporting Documentation, and General Functions of the Secretariat**

- ICCA recognises that the ICSID Secretariat will be best placed to comment on revisions that are required to the Arbitration and Institution Rules in order to address this issue. The following proposals are, however, made:
  
  o in order to increase efficiency and avoid paper wastage, ICCA would support any amendments to the Arbitration and Institution Rules that result in the filing of all documents electronically only. Parties already often submit all submissions and supporting materials by email and by uploading them to the ICSID Box, OneDrive or another platform. If this were to become the only required method of submission, paper copies and USBs could be avoided entirely.

  o Alternatively, at a minimum:
    
    - ICCA proposes that each tribunal be required to agree on a common format for paper submissions. Arbitrators should not be able to “custom order” printed submissions according to their individual preferences.

5. **Modernize and Simplify Rules concerning the First Session, Procedural Consultation and Pre-Hearing Conference**

- In order to expedite proceedings, ICCA proposes that Arbitration Rule 13 be amended to provide that first sessions are to be held by telephone conference, unless one of the parties makes a request for an in-person meeting and the tribunal considers that request to be justified.

- ICCA suggests that the revised Arbitration Rules provide that the tribunal shall issue the first procedural order in the case, setting out details of the arbitral procedure, within 90 days of the tribunal’s constitution.

6. **Modernize Rules on Witnesses and Experts and Other Evidence**

- ICCA proposes that Arbitration Rule 33 regarding “Marshalling of Evidence” be deleted on the basis that that this provision is not followed in practice.

- ICCA suggests Arbitration Rule 35 be expanded to indicate that witness and expert conferencing may be ordered by tribunals in appropriate circumstances. ICSID could issue guidance to tribunals and parties, perhaps in the form of a practice direction supplemental to the Arbitration Rules, on how conferencing is to be carried out and in which circumstances it is appropriate.

- Arbitration Rule 34(1) currently provides that “[t]he Tribunal shall be the judge of admissibility of any evidence adduced and of its probative value.” In order to ensure greater consistency in tribunal practice, ICCA suggests that this Rule be amended to include guidelines/indications pertaining to the admissibility of evidence (for example, limited use of hearsay). Such guidelines could potentially be based on/make reference to the IBA Rules on the Taking of Evidence in International Arbitration.
• ICCA proposes that the ICSID Secretariat provides guidance (in a practice direction or a model procedural order) on how evidence should be produced, i.e. how exhibits should be numbered, whether or not publicly available legal authorities should be annexed, how to deal with electronic documents, meta data, etc. This will encourage greater consistency in the treatment of evidence across ICSID cases and will lead to greater efficiency in the arbitral process.

• The ICCA Sub-Committee also considered the possibility of amending the Arbitration Rules to provide that tribunals may, if they were to consider it appropriate, issue orders/directions regarding the structure and content of expert evidence, or the expert evidence process in general. This proposal was, however, ultimately dropped on the basis of concerns about restricting the ability of parties freely to choose how to present their case. It was noted that tribunals may, however, give directions to parties on the presentation of expert evidence in the tribunal’s first session or at the pre-hearing conference.

7. Explore Possible Provisions for Suspension of Proceedings and Clarify Rules on Discontinuance when Parties Fail to Act

• ICCA proposes that Arbitration Rule 44 be amended to provide guidance on the time limit that should be set for a party to file an objection to a discontinuance request filed prior to the constitution of the tribunal.

• In order to encourage procedural efficiency, ICCA suggests that the time frame provided in Arbitration Rule 45 be reduced to 3 months.

• ICCA proposes that the revised Arbitration Rules 44 and 45 clarify that tribunals/the Secretary-General (as appropriate) have the power to allocate and award costs as they see fit in the event of the discontinuance of proceedings.

8. Reflect Best Practices for Preparation of Award, Separate and Dissenting Opinions

• ICCA suggests that ICSID considers developing best practice guidelines on the preparation of awards.

• ICCA suggests that the revised Arbitration Rules:

  o permit tribunals to sign awards in counterparts and/or using electronic signatures; and

  o provide that all awards will be deemed to have been signed “at the place where the proceedings are held”, regardless of the actual location of the arbitrators when they sign the award.

• ICCA proposes that Arbitration Rule 47 be amended to clarify that tribunals must “address” every question submitted by the parties, but need not reach a “decision” on questions that will not be determinative of the tribunal’s award. This would allow tribunals the discretion to skip aspects of the legal analysis if, for reasons of judicial
economy, they believe that is the most appropriate approach (provided that sufficient reasons are provided to satisfy the requirements of Article 48(3) of the ICSID Convention).


- ICCA supports the inclusion in the revised Arbitration Rules of a rebuttable presumption that costs are allocated in favor of the prevailing party on specific claims, but would encourage the inclusion of examples of circumstances in which applying the “loser pays” principle may not be appropriate. Tribunals should retain discretion to award costs as they deem appropriate if a party prevails on some, but not all, claims.

- ICCA proposes that the new Arbitration Rules envisage the ability of tribunals to order the payment of costs before the award for situations such as frivolous submissions and rejection for irrelevance or immateriality of a significant number of document requests.

- ICCA supports the inclusion in the revised Arbitration Rules of a requirement for a party who applies for the annulment of an ICSID award to provide security for payment of that award if it wishes to benefit from a stay of enforcement (Arbitration Rule 54).


- ICCA proposes that Arbitration Rule 39 be amended to:
  - include guidance as to the circumstances in which provisional measures may be issued. In developing such guidance, ICCA recommends that the approach of other arbitral rules (such as the UNCITRAL Rules) on provisional measures and the current practice of tribunals is considered; and
  - specify explicitly that security for costs may be ordered as a provisional measure.

- In addition, ICCA suggests that the following be considered:
  - the feasibility of simplifying/abbreviating the provisional measure application process;
  - whether a presumption should be adopted that costs relating to the application are awarded in the decision regarding provisional measures; and
  - the development of a procedure for appointing emergency arbitrators along the lines of the system that the Stockholm Chamber of Commerce has adopted.

11. **Clarify and Streamline Procedure in Annulment Proceedings**

- In order to expedite annulment proceedings, ICCA suggests that the revised Arbitration Rules include a presumption that there will be no post-hearing submissions in annulment proceedings.
• The ICCA Sub-Committee considered a suggestion that ICSID considers whether Arbitration Rule 52(1) should be revised to impose restrictions on who may be appointed as *ad hoc* committee members. Members of the Sub-Committee were, in particular, concerned that an individual should not be appointed to an *ad hoc* annulment committee if that individual has any interest in the outcome of the annulment proceedings. A view was expressed, however, that the requirements for appointments to an annulment committee should not differ from those for appointments to a tribunal.

12. **Explore Possible Provisions on Transparency, Clarify Rules on Non-Disputing Party Participation**

• ICCA would support the alignment of the transparency provisions in the ICSID Rules more closely with more recently-adopted rules (e.g. UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration).

• ICCA would encourage the inclusion in the Arbitration Rules of a provision stating that, unless otherwise agreed by the parties (including in the relevant arbitration agreement), all submissions and decisions (pleadings, witness statements, expert reports, amicus briefs, and decisions from the tribunal) will be public, except for redactions that a party affirmatively requests on grounds of confidentiality.

• ICCA proposes that the Arbitration Rules provide that, unless otherwise agreed by the parties (including in the relevant arbitration agreement), and subject to confidentiality issues being appropriately addressed, all hearings are to be open to the public and, provided the costs involved are not significant, broadcast publicly via webcast.

• ICCA proposes the revision of Arbitration Rule 48(4) to mandate the publication of legal excerpts of the legal reasoning of the tribunal within 60 days (rather than “promptly”).


• ICCA proposes that ICSID considers issuing guidelines for limiting submission length, volume of document production, and frivolous applications.

• ICCA notes that the 6-month time limit for preparing an award in Arbitration Rule 46 is not realistic and not generally observed. In order to encourage tribunals to be more expeditious in their issuing of awards, ICCA proposes as follows:
  o that Arbitration Rule 46 be revised to:
    ▪ provide that tribunals must issue awards as soon as possible after the final hearing (or the submission of final post-hearing briefs); and
    ▪ require tribunals to provide the parties with an update on the status of the preparation of an award six months after the final hearing (or the submission of final post-hearing briefs), and then again every three months thereafter until the award is issued; and
12 December 2017

- that Arbitration Rule 38(1) be modified so that tribunals must declare the proceedings closed within 20 or 30 days from the end of the hearing, or the last exchange of post-hearing briefs.

- The ICCA Sub-Committee considered a proposal that a one-year deadline be imposed for the issue of awards, but no agreement on this was reached. The concern from those against the proposal was that the inclusion of such a deadline may send the wrong message to tribunals, which should be encouraged to issue awards as soon as possible.

- ICCA suggests that Arbitration Rules 31 and 32 be updated to note that a further written phase (i.e. post-hearing submissions) may follow the oral phase of any proceedings. ICCA proposes, however, that the Arbitration Rules include a prohibition on more than one round of post-hearing submissions.

- ICCA notes that Arbitration Rule 23 regarding “Copies of Instruments” is out of date. If all filings are to be electronic (in line with ICCA’s proposal above), this Rule will become superfluous. If not, ICCA proposes that parties should be required to provide only one hard copy of documents per tribunal member. ICSID may be provided with a copy on request.

- ICCA suggests the inclusion of an Arbitration Rule that provides that there will be no post-hearing submissions unless requested by a party, and in which case the tribunal shall decide on the merits of that request.

- The ICCA Sub-Committee considered a proposal that the Arbitration Rules should be amended to provide that submissions on costs should include costs figures only (i.e. there will be no substantive argument on how the tribunal should apportion costs). No agreement was, however, reached on this suggestion. The concern from those who did not agree with the proposal was that parties should be entitled to make submissions on how costs should be apportioned, in particular if the Arbitration Rules are amended to include a presumption that costs will follow the event (as proposed above).

14. **Explore Possible Provisions on Third Party Funding**

- ICCA proposes that issues such as transparency (in particular imposing disclosure of third party funding arrangements), conflicts of interest, and security for costs be addressed in new provisions in the revised Arbitration Rules.
SECTION II: SUGGESTIONS FOR CHANGES TO ICSID ADDITIONAL FACILITY RULES AND SUGGESTIONS FOR NEW ICSID-AFFILIATED RULES

1. Potential changes to ICSID Additional Facility Rules
   a. The suggestions for ICSID Rule amendments are also suggested *mutatis mutandis* for the ICSID Additional Facility Rules.

2. ICCA proposes the following new ICSID-affiliated rules could be developed for cases to be administered by the ICSID Secretariat:
   a. Rules for contractual disputes between private parties;
   b. Rules for disputes between State-owned entities and private parties; and
   c. Rules for disputes between private parties and States, which do not involve an investment.
BY EMAIL

Meg Kinnear, Esq.
Secretary-General
International Centre for Settlement of
Investment Disputes
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433
U.S.A.

7 February 2018

Re: Suggestions of Arnold & Porter Partners for the Amendment of the
ICSID Rules and Regulations

Dear Ms. Kinnear:

The undersigned partners of Arnold & Porter Kaye Scholer LLP (“Arnold & Porter”) have the honor of writing to you in response to the invitation from the International Centre for Settlement of Investment Disputes (“ICSID”) for suggestions concerning the possible amendment of ICSID’s Rules and Regulations. As international arbitration partners at an international law firm with significant experience in investor-State arbitrations under the ICSID Convention and the ICSID Additional Facility Rules, on behalf of both claimants and respondent States, we hereby offer certain suggestions in connection with possible amendments to the ICSID Rules and Regulations.

We clarify that the suggestions presented in this letter represent the views of the undersigned partners and should not be attributed to any past, present, or future client of Arnold & Porter. The suggestions are designed to contribute to the objectives of the rule amendment process set out by ICSID, namely to modernize the rules based on case experience, to increase time and cost efficiency of ICSID arbitration, and to make ICSID proceedings less paper-intensive.

1. **Tribunal’s written questions**

To contribute to the efficiency of the proceedings, and to encourage the parties to an arbitration to focus mainly on the issues that are truly relevant, consider introducing a requirement that the tribunal present to the parties, preferably after the first round of written pleadings, a written list of questions for the parties to address in their subsequent pleadings and/or at the hearing.

2. **Summary procedure**

To avoid a situation in which the parties go through a lengthy arbitral proceeding, only for the case to be decided on the basis of a discrete issue, such that the full pleading of all other issues was ultimately rendered unnecessary and wasteful, consider expressly authorizing the tribunal to instruct the parties, either *sua sponte* or following a party’s application, to brief specific jurisdictional, admissibility, and/or merits issues, where the tribunal has reason to believe that the case potentially could be decided on the basis of such issues. Preferably, such a “summary procedure” would take place after the first round of pleadings in the context of either the jurisdictional and/or the merits phase, as the case may be.

The introduction of the summary procedure could be implemented by amending Rule 41 of the ICSID Arbitration Rules (“Arbitration Rules”).

We note that similar procedures are available in arbitration proceedings conducted in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 39) and the Investment Arbitration Rules of the Singapore International Arbitration Centre (Article 26).

3. **Procedure for deciding on a proposal to disqualify an arbitrator**

To address a frequently-voiced criticism of the current procedure for seeking the disqualification of an arbitrator, which calls upon the other members of the tribunal to decide on any proposal to disqualify a fellow arbitrator, consider introducing a requirement that, before taking a decision on such proposal, the other members of the tribunal should seek the opinion of the Chairman of the Administrative Counsel. The expectation would be that the members of the tribunal would base their decision concerning the disqualification request on the opinion of the Chairman of the
Administrative Counsel. Reliance on the decision of the Chairman would help the other members of the tribunal avoid a perception of bias or deference in favor of their fellow arbitrator.

This proposal could be implemented as an amendment to the Arbitration Rules and be consistent with Article 58 of the ICSID Convention, which calls upon the other members of the tribunal to decide any proposal for the disqualification of an arbitrator.

4. Consequences of a proposal to disqualify an arbitrator

To limit the scope for abusive use of proposals to disqualify an arbitrator and avoid the unnecessary delay that ensues from the automatic suspension of the proceedings while the proposal is being decided, consider:

- subject to implementation of the suggestion in point 3 above, explicitly authorizing the other members of the tribunal to decide immediately on the proposal to disqualify, thus lifting the automatic suspension of the proceedings where the challenge is dismissed, with the full reasoned decision to follow later;

- amending Rule 9(6) of the Arbitration Rules to provide that, following the submission by a party of a proposal to disqualify an arbitrator, the members of the tribunal who are not subject to the challenge shall enjoy the discretion to decide that the automatic suspension of the proceedings would be inappropriate under the circumstances;

- introducing the presumption that, where a proposal to disqualify an arbitrator is unsuccessful, the costs associated with the process of deciding the proposal and any associated procedural complications should be borne by the party that made the proposal.

5. Applicability of Arbitration Rules in annulment proceedings

There is some tension between Article 52(4) of the ICSID Convention and Rule 53 of the Arbitration Rules: whereas the former states that only certain ICSID Convention provisions apply (mutatis mutandis) in the context of an annulment proceeding, the latter appears to state that all provisions of the Arbitration Rules apply (mutatis mutandis) in an annulment proceeding. To avoid any confusion, the Centre should consider clarifying
which provisions of the Arbitration Rules apply in the context of an annulment proceeding.

6. **Applicability of Arbitration Rules in supplementation or rectification proceedings**

The Centre also should consider clarifying which provisions of the Arbitration Rules (if any), apart from Rule 49 (Supplementary Decisions and Rectification), apply in a supplementation or rectification proceeding.

7. **The power of the Chairman of the Administrative Council to make a recommendation on the allocation of costs**

Consider introducing an arbitration rule that vests in the Chairman of the Administrative Council the authority to make a recommendation to the arbitral tribunal on how the costs of the proceedings should be allocated between the parties with respect to any portion of the proceedings that involved the Chairman or the ICSID Secretariat (e.g., actions prior to the constitution of the tribunal, and proposals to disqualify one or more members of a tribunal).

8. **Time limits for closure of the proceedings and issuance of the award**

To increase efficiency and celerity in the conclusion of proceedings, consider:

- amending Rule 38 of the Arbitration Rules so as to require that the proceedings be declared closed within a specific time period from the end of the final hearing or the filing of the last post-hearing written submissions;

- amending the Arbitration Rules and Regulation 14 of the ICSID Administrative and Financial Regulations so as to authorize the Secretary-General to reduce the fees of the arbitrators where, contrary to Rule 46 of the Arbitration Rules, an award has not been drawn up and signed within the specified period of time after closure of the proceedings;

- amending the Arbitration Rules so as to require, where the proceedings have been bifurcated to hear preliminary or jurisdictional objections in a separate phase, that
the tribunal issue its ruling within a specific time period from the end of the hearing or final written submissions on the preliminary or jurisdictional objections.

9. Statement of arbitrators’ fees

To provide the parties with greater transparency as to the progress of the proceedings, consider requiring that every three months:

- the Secretariat provide the parties with a statement of costs, including an up-to-date statement of the individual arbitrators’ fees (but without identifying the arbitrators by name);

- where the tribunal is in the phase of deliberations (e.g., following a hearing on jurisdiction and/or merits), the tribunal periodically provide the parties with information about the status of its deliberations and the date on which it expects to issue the decision or award.

10. The “costs follow the event” principle

Consider adopting a rule that embodies the general principle that “costs follow the event” (that is, that the costs of the arbitration should be borne by the unsuccessful party or parties), unless the tribunal decides that, in light of the parties’ respective conduct or other relevant circumstances, costs should be apportioned on a different basis.

We note that similar provisions can be found in the 1976 UNCITRAL Arbitration Rules (Article 40(1)), the 2010 UNCITRAL Arbitration Rules (Article 42), and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 50).

11. Disclosure of persons with financial interest in the outcome of the proceedings

To limit the scope for conflicts of interests, increase transparency, and provide each party with confidence in the other party’s ability to cover a potential adverse award of costs, consider requiring the parties to disclose the identity of all natural and legal persons with a direct financial interest in the outcome of the proceedings, including the ultimate
beneficial owners of any non-public companies involved in the proceedings, and the identity of third-party funders, if applicable.2

12. **Scope of document production**

To reduce costs and improve the efficiency of the proceedings, consider introducing a rule that expressly confirms the principle that, as a general matter, document production in ICSID arbitrations should be narrow in scope. Such a rule could be relied upon by parties and arbitral tribunals in erring on the side of restrictiveness in their interpretation of document production issues.

13. **Principle of procedural efficiency**

To encourage time and cost efficiency, consider introducing a rule expressly adopting the general principle that the tribunal and the parties shall act in an efficient and expeditious manner. We note that a provision to that effect appears in the 2010 UNCITRAL Arbitration Rules (Article 17(1)).

14. **Burden of proof; number and order of written pleadings on jurisdiction**

To provide greater clarity and obviate a debate that frequently arises in ICSID arbitral proceedings, consider:

- specifying that the claimant bears the burden of proof in establishing a case on both jurisdiction and merits;

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2 For these purposes, ICSID could adopt a definition of “third-party funders” that is similar to that which appears in the IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 6, namely: “Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms ‘third-party funder’ and ‘insurer’ refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.”
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- specifying that the respondent bears the burden of proving any affirmative defenses that it raises, including when such defenses are raised as preliminary objections;

- amending Rule 31 of the Arbitration Rules to clarify that, unless the parties agree otherwise and except in special circumstances, in a non-bifurcated proceeding each party will address jurisdictional issues in no more than two sets of written pleadings (including the claimant’s memorial).

Similarly to the first two suggestions listed above, we note that Article 27 of the 2010 UNCITRAL Arbitration Rules clarifies which party bears the burden of proof.4

15. Security for costs

Consider expressly authorizing the tribunal to require a party to provide security for costs, where the other party has established that there are facts or circumstances that suggest that the party that is the subject of the request for security for costs might not comply with an adverse award of costs.

16. Tribunal assistants

To limit the scope for conflicts of interests, consider:

- amending Rule 5 of the Arbitration Rules to require each arbitrator to declare, at the time of accepting his or her appointment, whether he or she intends to use the services of an assistant and, if so, to disclose the proposed identity and proposed method and amount of remuneration of the assistant;

- amending Rule 5 of the Arbitration Rules to provide each party with the right to object to an arbitrator’s use of an assistant, to an arbitrator’s choice of an assistant, or to the proposed method and/or amount of remuneration of an assistant;

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3 For example, if there has already been a Rule 41(5) or other summary proceeding.

4 Article 27(1) of the 2010 UNCITRAL Arbitration Rules provides that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”
introducing a rule defining the permitted scope of an assistant’s responsibilities, including the principle that an arbitrator may not delegate, either formally or informally, any decision-making authority to an assistant; and

- amending Rule 6 of the Arbitration Rules to require that assistants to an arbitrator or to the tribunal sign a declaration of independence and confidentiality.

17. Stay of enforcement of the award

Several ad hoc annulment committees have recognized that for the provisional stay of enforcement under Rule 54(2) of the Arbitration Rules to continue, the applicant must demonstrate that circumstances exist that require or would justify the continuation of the provisional stay of enforcement of the award. To enshrine this prevailing view in the Arbitration Rules, consider amending Rule 54 to clarify that the provisional stay shall be automatically terminated unless a party can demonstrate that circumstances exist that require that the provisional stay of enforcement of the award be continued.

18. Electronic filings

To modernize the Arbitration Rules, increase cost efficiency, and make the ICSID arbitration procedure less paper-intensive, consider:

- specifying that a document submitted only in electronic form can qualify as an “original” for purposes of the Administrative and Financial Regulations and the Arbitration Rules;

See, e.g., Ol European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25), Decision on Stay of Enforcement of the Award, 4 April 2016, paragraph 94: “The ad hoc Committee, therefore, based on the preceding statements and the relevant provisions of ICSID regime governing stays of enforcement, finds that it is for the party seeking the continuation of the stay to show that such circumstances exist, and thus, that the stay of enforcement of the Award should be continued. The Applicant bears the burden of proof that there are circumstances in the instant case that, in the discretion of this ad hoc Committee, require the continuation of the stay of enforcement”; and Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), Decision on Stay of Enforcement of the Award, 31 August 2017, paragraph 75: “This rule is clear in that the party that requests the stay carries the burden of proof of the circumstances that would justify the stay or its continuation. […] Hence, it is for Ecuador, as requesting party, to prove that circumstances exist that require the stay to be continued.”
specifying that an electronic signature can satisfy the signature requirement in Rule 23 of the Arbitration Rules;

- amending Rule 23 of the Arbitration Rules to provide that, as a general rule, all the documents listed in Rule 23 (namely, “every request, pleading, application, written observation, supporting documentation, if any, or other instrument”) shall be filed in electronic form only;

- allowing the tribunal and parties to agree on the logistical arrangements for the printing and delivery of any of the documents listed in Rule 23 of the Arbitration Rules, to the extent that the Centre, members of the tribunal and/or the parties require hard copies of such documents.

* * *

We appreciate the opportunity to offer our suggestions as part of the ICSID rule amendment process. We would be pleased to participate in any subsequent consultation process, following the publication by the Secretariat of the draft amendments.6

Sincerely,

Paolo Di Rosa
Dmitri Evseev
Gaela K. Gehring Flores
Patricio Grané Labat
Anton A. Ware
Mallory B. Silberman

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