

Updated Backgrounder on Proposals for Amendment of the ICSID Rules

On June 15, 2021, the International Centre for Settlement of Investment Disputes (ICSID) published its latest working paper with proposed changes to modernize its rules for resolving disputes between foreign investors and States (WP # 5). The proposed amendments offer States and investors a range of effective dispute settlement mechanisms, including arbitration, conciliation, mediation and fact-finding.

WP # 5 builds on the previous working papers published in August 2018 ([WP # 1](#)), March 2019 ([WP # 2](#)), August 2019 ([WP # 3](#)) and February 2020 ([WP # 4](#)). Each of these working papers reflect the input received in more than 125 public consultations, the extensive written comments sent to the Secretariat, and three in-person consultations with States. All of the proposals advanced by ICSID, and the written feedback on them, have been published on the [ICSID rule amendment website](#) in English, French and Spanish, making this the most transparent and inclusive rules amendment process to date at ICSID.

This backgrounder summarizes the proposed changes in WP # 5 and the current status of the rule amendments text. Reflecting growing consensus on the new rules, there are fewer changes between WP # 4 and # 5 than between the earlier working papers. However, where the proposed rules have been further modified in WP # 5, this is flagged in the commentary below.

Framework of the Amendment Proposals

Currently there are different sets of ICSID rules and regulations, each serving distinct functions. The proposed amendments maintain these categories and add a stand-alone set of fact-finding rules and mediation rules. Thus, the amended ICSID rules comprise:

- *Administrative and Financial Regulations.* These deal with the procedures of ICSID's governing body, the Administrative Council; the functions of the ICSID Secretariat; and the finances of ICSID and the ICSID Convention cases it administers.
- *Institution Rules.* These address the initiation of arbitration and conciliation under the ICSID Convention. They apply to the period between filing a request for arbitration or conciliation to the dispatch of the notice of registration.
- *Arbitration and Conciliation Rules under the ICSID Convention.* The procedural rules for arbitration and conciliation under the ICSID Convention may be used to settle disputes between an ICSID Contracting State—States that have signed and ratified the ICSID Convention—and nationals of another Contracting State. The rules benefit from a robust enforcement mechanism, as Contracting States agree that an ICSID Convention award will be treated as a final judgement of their courts. This is a unique feature of arbitration under the ICSID Convention.

- *Arbitration and Conciliation under the ICSID Additional Facility.* The Additional Facility (AF) Rules for Arbitration and Conciliation were introduced in 1978. They are largely the same as the rules under the ICSID Convention but have different jurisdictional requirements. Currently, only one of the parties—either the claimant or respondent—must be a Contracting State or a national of one. As discussed below, the availability of the ICSID AF Rules is expanded in the amended rules.
- *ICSID Fact-Finding Rules.* The proposals include a stand-alone set of rules for fact-finding, which offer States and foreign nationals the opportunity to constitute a Committee to make objective findings of fact that could resolve a legal dispute between the parties.
- *ICSID Mediation Rules.* ICSID has also developed new, stand-alone, mediation rules, allowing parties to pursue a mediated resolution of all—or part—of a dispute with the assistance of a mediator.

Changes Proposed Throughout the ICSID Rules

- *Improved Drafting and Language.* The rules have been redrafted in plain, modern, gender-neutral language and are re-organized in a user-friendly manner. Inconsistencies amongst the English, French and Spanish-language versions of the rules have been resolved, so the rules read the same in all three languages. WP # 5 maintains a decision taken during the third consultation with States, with respect to gender-neutral language. The Administrative Regulations for each set of rules have adopted a general provision stating that the masculine gender in French or Spanish is the gender-neutral form and refers to both the masculine and feminine gender.
- *Reduced Time and Cost.* Starting with WP # 1, ICSID has proposed that all filing of documents would be done electronically under the new rules, unless there are special reasons to maintain paper filing. This makes processes faster, more environmentally friendly and less expensive. Electronic filing has already been implemented during the pandemic and is working very well. New time limits have been proposed throughout the rules to expedite cases, and both Tribunals and parties have an obligation to act in a cost-effective and expeditious manner. In addition, Tribunals must hold one or more case management conferences to clarify and narrow the issues in dispute and identify uncontested issues (AR 31). These time and cost-related provisions remain largely unchanged in WP # 5. As described below, a new set of expedited arbitration rules have also been proposed.

Changes Proposed to the ICSID Administrative and Financial Regulations

- *More Flexible Decision Making by the Administrative Council.* As previously proposed, the regulations in WP # 5 and separate amendments adopted by the Administrative Council in May 2021 would allow the Council to conduct more business through correspondence votes and remotely, rather than waiting for the in-person Annual Meetings.
- *List of Contracting States.* In addition to the information currently required, the list of ICSID Contracting States (ICSID/3) would include the contact details of the authority in each State to whom documents should be notified, making correspondence simpler and ensuring

documents are received by the appropriate authority.

Changes Proposed to the Institution Rules

- *Checklist of Instructions for Filing a Case.* The proposed rules provide a checklist of what must be included in a request to initiate arbitration and conciliation proceedings. WP # 5 adds that a description of the investment must include a statement on its ownership and control. The rules also recommend additional types of information, which—if the case is registered—will expedite subsequent proceedings. WP # 5 notes that information recommended for inclusion in the Request for Arbitration includes procedural proposals agreed by the parties, including with respect to the use of expedited arbitration, and further information about the entities that own or control a requesting party that is a juridical person (IR 3). This provides better guidance to those filing a case, assists the Secretary-General in screening new requests expeditiously, and accelerates the initial stages of the case once it is registered.

Changes Proposed to ICSID Arbitration Rules

- *Obligation to Disclose Third-Party Funding.* WP # 5 maintains an obligation by the parties to disclose the name and address of any non-party from which they received funding, directly or indirectly, and no longer excludes representatives of a party from the disclosure obligation when they are provide third party funding. The disclosure obligation applies throughout the proceeding. The name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest. Should parties require further information concerning third-party funding, this may be ordered by the Tribunal pursuant to the usual rule on disclosure of information (AR 14(4), AR 36(3)).
- *Disqualification of Arbitrators.* Unchanged in WP # 5 is the process for challenging arbitrators, including the introduction of an expedited schedule for briefings. Parties may agree not to suspend proceedings in whole or in part while a disqualification is pending, allowing them to minimize the delay caused by such an application. Disqualification decisions are to be issued within 30 days of the final briefing by the parties. An enhanced declaration of independence and impartiality is also proposed for arbitrators (AR 22-23).
- *Orders and Decisions.* WP # 5 specifies that orders and decisions must indicate the reasons upon which they are made, which reflects existing practice.
- *First Session.* The first session must be held within 60 days of constituting the Tribunal, and the first procedural order must be issued within 15 days after the session. WP # 5 provides that first sessions may be held in person or remotely and that parties should discuss whether a hearing should be held in person or remotely. If a first session cannot be convened within 60 days of the constitution, the Tribunal may hold the first session between the parties and the President of the Tribunal alone, or among the Tribunal members based on written submissions by the parties. Again, this will ensure expedition at the start of the proceeding (AR 29).
- *Initial Procedures.* As in the previous working papers, rules allowing an objection that a claim is manifestly without legal merit (AR 41) and on bifurcation (AR 42-45) are proposed.

Bifurcation requires the Tribunal to consider all relevant circumstances, including the extent to which bifurcation would materially reduce the time and cost of proceedings, would dispose of all or a substantial part of the dispute and can address questions practically in separate phases (AR 42). WP # 5 specifies that the proceeding on the merits is suspended if the Tribunal orders bifurcation, unless the parties agree otherwise (AR 42(5) and AR 43(3)). Preliminary objections are also dealt with in the rules, including rules for preliminary objections with or without bifurcation (AR 43-45). Provisional measures require the Tribunal to consider urgency and necessity and the effect the measures would have on both parties (AR 47). Parties may agree to consolidate or coordinate related proceedings (AR 46). Ancillary claims such as counterclaims remain available in AR 48. With regard to default, WP # 5 clarifies the procedure when the defaulting party fails to act (AR 49(6)).

- **Rules on Costs.** As proposed earlier, in exercising their discretion to award costs, Tribunals must consider: (1) the outcome of the proceeding or any part of it; (2) the conduct of the parties including the extent to which they acted in a cost-effective manner and complied with the rules, orders and decisions; (3) the complexity of the issues; and (4) the reasonableness of the costs claimed (AR 52). In WP # 5, if the Tribunal renders an Award that a claim manifestly lacks legal merit under AR 41(3), the prevailing party shall be awarded its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs (AR 52(2)). A new stand-alone AR 53 that would allow a Tribunal to order security for costs is maintained in WP # 5. This rule states that the Tribunal must consider the relevant party's ability and willingness to comply with an adverse decision on costs, the effect of providing security on a party's ability to claim or counterclaim, the conduct of the parties and any other relevant circumstances. WP # 5 adds that the Tribunal must consider all evidence adduced in relation to these circumstances, including the existence of third-party funding.
- **Timing of Awards.** WP # 5 also maintains the timelines for rendering awards proposed in earlier working papers. Under the proposed rules, awards must be rendered within 60-days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on all other matters (AR 58).
- **Enhanced Transparency.** It is important to note that the ICSID Convention requires the consent of both parties to publish an Award. Since the ICSID Convention is not being amended at this time, this rule stays in place. However, a new provision (first proposed in WP # 1) deems that a party has given consent to publish awards unless it objects in writing within 60 days. If a party does object, the proposed rules permit ICSID to publish legal excerpts of the award, with an established process and timeline to do so (AR 62). Awards, orders and decisions under the ICSID Additional Facility Arbitration Rules will be published with redaction of confidential information ((AF)AR 73). Under both sets of arbitration rules, decisions and orders will be published with redactions agreed to by the parties or decided by the Tribunal (AR 63, (AF)AR 73). The Centre will also publish any written submissions or supporting documents with consent of the parties. In addition, a party may request that a written submission it filed in a proceeding be published and either party may ask the Tribunal to decide any disputed redactions in this submission. The Centre will publish the written

submission in accordance with the Tribunal's decision. This procedure is available only for written submissions and is not available for supporting documents (AR 64). Hearings will be open unless either party objects (AR 65). AR 66 defines confidential or protected information for the purposes of publication, and WP # 5 specifies that protected personal information cannot be publicly disclosed.

- *Expedited Proceedings.* Parties may opt to use newly drafted rules for expedited proceedings featuring additional and shortened timelines (AR 75-86). As first proposed in WP # 3, parties may also agree to opt out of an expedited proceeding. The expedited rules may be particularly helpful in providing access to investment arbitration for small and medium sized companies, and it is hoped that consent to apply the expedited process will be included in contracts and in treaties.

Changes Proposed to the ICSID Additional Facility Rules

- *Expanded Access to the Additional Facility.* As first proposed in WP # 1, the updated rules extend the availability of ICSID Additional Facility Arbitration and Conciliation to cases where both the claimant and the respondent are not ICSID Contracting States or nationals of a Contracting State. This gives access to ICSID's dispute resolution services to a greater range of States and foreign investors, and effectively means that all ISDS cases will be eligible for ICSID administration under either the ICSID Convention or the ICSID Additional Facility.
- *Inclusion of Regional Economic Integration Organizations.* Also consistent with the first working paper, the proposed ICSID Additional Facility Rules provide regional economic integration organizations (REIOs) with access to AF dispute settlement. This reflects the fact that increasingly States are negotiating international investment agreements (IIAs) as regional entities and may sign an IIA as an REIO.

Stand-alone Rules on Fact-finding and on Mediation

- *Updated Rules on Fact-finding.* ICSID is proposing updated and stand-alone rules on fact-finding. These allow parties to jointly request a fact-finding Committee of one or more persons to determine a procedural protocol and to make specific fact-findings in the dispute. The fact-finding rules have a broad scope of application, permitting ICSID to administer fact-finding proceedings that relate to an investment and involves a State or REIO with the consent of the parties. The fact-finding rules have not been revised significantly from WP # 4 to WP # 5.
- *New Rules on Mediation.* ICSID is also proposing a stand-alone set of rules on mediation. They respond to the requests by States and investors to provide greater mediation capacity, and more generally, to the objective of ICSID to offer parties a greater breadth of dispute resolution tools. Similar to the fact-finding rules, the mediation rules have a broad scope of application, allowing ICSID to administer any mediation proceeding that relates to an investment and involves a State or a REIO where the parties have given their consent. The proposed mediation rules have not been revised significantly from WP # 4 to WP # 5. In tandem, ICSID has been offering training on using mediation in ISDS.

Next Steps

WP # 5 reflects the most recent comments of Member States while maintaining consistency with the ICSID Convention, offering a balanced set of rules which treat all parties equally, and retaining a clear framework that respects the need for a timely and effective process. WP # 5 also reflects the consensus developed over the last four years of meetings, discussions, consultations and drafting. As a result, ICSID is hopeful that Member States will be supportive of the text in WP # 5 and will now be ready to move to the voting stage based on this iteration of the text. Member States have nevertheless been invited to send any final written comments on WP # 5 to the ICSID Secretariat by the end of August 2021.

ICSID's objective is to place the proposed amended rules before the membership, hopefully by the end of 2021 and, if adopted, to have these in place by early 2022. We believe that the work of Member States in this regard has been extensive, and that it is time to incorporate these updated rules into the daily practice of parties in ICSID cases.

In the interim, any questions on WP # 5 or the process of amendment are welcomed by ICSID and should be sent to icsidideas@worldbank.org.