

International Centre for Settlement of Investment Disputes

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Suggested Changes to the ICSID Rules and Regulations

Working Paper of the ICSID Secretariat

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**Suggested Changes
to the
ICSID Rules
and Regulations**

1. By letter of October 22, 2004, the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID or the Centre) sent to the members of the Administrative Council of the Centre an ICSID Secretariat Discussion Paper entitled “Possible Improvements of the Framework for ICSID Arbitration.”

2. The Discussion Paper, also dated October 22, 2004, suggested some changes to the ICSID Arbitration Rules and the Additional Facility Arbitration Rules. The suggested changes concerned preliminary procedures; publication of awards; access of third parties to the proceedings; and disclosure requirements of arbitrators. The Discussion Paper also suggested that ICSID might strengthen its conciliation services and expand its training activities. A further possibility considered in the Discussion Paper was the establishment by ICSID of a mechanism for the appeal of awards in investment arbitrations. The Discussion Paper explained that this was a possibility that ICSID might pursue as an alternative to the creation of individual appeal mechanisms under different investment treaties of member countries.

3. In addition to sending the Discussion Paper to members of the Administrative Council for their comments, the Secretariat of the Centre sought comments on the Paper from business and civil society groups and from arbitration experts and institutions around the world. The present Working Paper outlines the results of this extensive consultation and makes several follow up suggestions.

4. The members of the Administrative Council and others who provided comments on the Discussion Paper expressed appreciation for the initiative to review the framework for ICSID arbitration and identify possible improvements. There was general agreement that, if international appellate procedures were to be introduced for investment treaty arbitrations, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. Most, however, considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper. The Secretariat will continue to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism.

5. Uniformly positive comments were received on the strengthening of the Centre's conciliation and training activities. These are areas where ICSID might achieve most by joining forces with other organizations working in these fields. A separate paper of the Secretariat on such possible collaborative efforts will be issued in due course.

6. There were generally favorable reactions to the suggestions in the Discussion Paper for changes to the ICSID Arbitration Rules and Additional Facility Arbitration Rules. As mentioned above, these suggested changes concerned preliminary procedures; publication of awards; access of third parties to the proceedings; and disclosure requirements of arbitrators. Although the reactions were generally favorable, the suggestions regarding access of third parties in particular elicited some disagreement. Concerns were expressed that any provisions on access of third parties to proceedings should subject such access to appropriate conditions ensuring, for example, that the third parties do not by their participation unduly burden parties to the proceedings.

7. Attached are drafts of the suggested changes to the ICSID Arbitration Rules which take account of these and other comments received on the Discussion Paper. The drafts are accompanied by explanatory notes giving the background and rationale of each proposed change. Where applicable, the changes would also be incorporated into the Additional Facility Arbitration Rules. This paper also takes the opportunity to make it clear in the ICSID Administrative and Financial Regulations that increases in the applicable arbitrator fee may only be sought through the Centre.

8. Comments on the changes suggested in this Paper may be sent to the ICSID Secretariat by June 30, 2005. A revised set of proposed amendments will then be prepared for submission to the Administrative Council of the ICSID.

Preliminary Procedures – Suggested changes to ICSID Arbitration Rule 39

Rule 39 Provisional Measures

(1) At any time ~~during~~ after the institution of the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

[...]

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal upon its constitution.

~~(56)~~ Nothing in this Rule shall prevent the parties, ...

Note: As noted in the Secretariat's Discussion Paper of October 22, 2004, under the ICSID Arbitration Rules, provisional measures may only be sought from national courts if provided for in the consent to arbitration of the parties. Even where such measures are urgently needed, the parties must await the review and registration of the request for arbitration, and the constitution of the arbitral tribunal, before filing a request. Thereafter, the tribunal would have to allow the parties enough time to file observations before it could recommend provisional measures.

The suggested changes introduce a procedure for the expedited filing of requests for provisional measures, and of all the observations of the parties on such a request, prior to the constitution of a tribunal. Such a procedure would reduce delay and ensure that the tribunal is able to consider the request once it is constituted, especially where the measures are urgently required.

Preliminary Procedures - Suggested changes to ICSID Arbitration Rule 41

Rule 41

Preliminary Objections to Jurisdiction

(1) [...]

(2) [...]

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) [...]

(5) A party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties an opportunity to present their observations shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to its authority to decide on other objections that the parties may make in the course of the proceeding.

~~(5)~~ If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without merit, it shall render an award to that effect.

Note: The Secretariat's Discussion Paper of October 22, 2004, notes that the Secretary-General's power to screen requests for arbitration does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. In such cases, the request for arbitration must be registered and the parties invited to proceed to constitute the arbitral tribunal.

It is suggested to make it clear, by the introduction of a new paragraph (5), that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim on the merits. The change would be helpful in addressing any concerns about the limited screening power of the Secretary-General.

Preliminary Procedures - Suggested changes to ICSID Arbitration Rule 41 (cont.)

At the same time, this may be an opportunity to introduce some flexibility and make the suspension of the proceeding on the merits of the case, on the raising of a preliminary objection to jurisdiction, discretionary for the tribunal.

Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 45.

Publication of Awards - Suggested changes to ICSID Arbitration Rule 48

Rule 48 Rendering of the Award

[...]

(4) The Centre shall not publish the award without the consent of the parties. The Centre ~~may shall~~, however, promptly include in its publications excerpts of the legal ~~rules applied by conclusions of~~ the Tribunal.

Note: As stated in the Discussion Paper of October 22, 2004, Article 48(5) of the ICSID Convention and the first sentence of Arbitration Rule 48(4) preclude the Centre from publishing a Convention award without the consent of the parties. However, the Centre may publish excerpts from the legal holdings of the award.

The suggested changes would facilitate the prompt release of excerpts, by making their early publication mandatory, and clarify the wording of the provision. Prompt publication of the excerpts is particularly important in view of the increase in the number of pending cases at the Centre.

Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 53(3).

Access of Third Parties - Suggested changes to ICSID Arbitration Rule 32

Rule 32 The Oral Procedure

[...].

(2) After consultation with the Secretary-General and with the parties as far as possible, The the Tribunal shall decide, with the consent of the parties, which may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may, to attend or observe all or part of the hearings. The Tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements.

[...]

Note: In certain cases, it could be useful to have hearings open to persons other than those directly involved in the proceeding. The suggested changes would make clear that this might be considered by a tribunal after consultation with the Secretary-General and both parties as far as possible. Such consultation with the parties would ensure that any objection or concern they may have will be taken into account by the tribunal in considering whether to allow any third parties to attend or observe the hearings. The changes would also require the tribunal for such cases to prescribe procedures to protect proprietary information and make the appropriate logistical arrangements.

Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 39(2).

Access of Third Parties - Suggested changes to ICSID Arbitration Rule 37

Rule 37

Visits and Inquiries; Submissions of Non-disputing Parties

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties as far as possible, the Tribunal may allow a person or a State that is not a party to the dispute (hereafter called the “non-disputing party”) to file a written submission with the Tribunal. In determining whether to allow such a filing, the Tribunal shall consider, among others 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, unduly burden or unfairly prejudice either party, and that both parties are given an opportunity of presenting their observations on the non-disputing party submission.

Note: The suggested changes would make clear that ICSID tribunals may accept and consider written submissions from a non-disputing person or a State, after consulting both parties as far as possible. The tribunal would have to be satisfied that any such submissions would assist the tribunal in the determination of a factual or legal issue within the scope of the dispute, that the non-disputing party has a significant interest in the dispute and that this would not disrupt the proceeding or unfairly burden either party.

Similar changes would be made to the Additional Facility Arbitration Rules, by introducing a new paragraph to Article 41.

**Disclosure requirements for Arbitrators - Suggested changes to ICSID
Arbitration Rule 6**

**Rule 6
Constitution of the Tribunal**

[...]

(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:

“To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.

[...]

“Attached is a ~~A~~ statement of (a) my past and present professional, business and other relationships (if any) with the parties ~~is attached hereto~~ and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

[...]

Note: As pointed out in the Discussion Paper of October 22, 2004, the suggested changes expand the scope of disclosures of arbitrators to include any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment. They also extend the period of time over which disclosures are to be made, by requiring that the obligation be continuous. The Secretary-General would upon receiving the declaration transmit it to the other members of the tribunal and to both parties.

Expanding the disclosure requirements for arbitrators has become particularly important with the large number of new cases being registered by the Centre and the increased scope for possible conflicts of interest.

Similar changes would be made to the corresponding provisions in the Additional Facility Arbitration Rules, Article 13(2).

Fees of Arbitrators - Suggested changes to ICSID Administrative and Financial Regulation 14

Regulation 14 Direct Costs of Individual Proceedings

(1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an *ad hoc* Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as "Committee") shall receive:

(a) a fee for each day on which he participates in meetings of the body of which he is a member;

(b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;

[...]

The amounts of the fees referred to in paragraphs (a) and (b) above shall be determined from time to time by the Secretary-General, with the approval of the Chairman, in the expectation that a member of a Commission, a Tribunal or an *ad hoc* Committee will only in exceptional circumstances request higher amounts, and may be changed, not more than once a year, in order to take account of monetary changes in the cost of living. Any such request for a higher amount must be made through the Secretary-General and not directly to the parties to the proceeding.

Note: The Secretary-General, under ICSID Administrative and Financial Regulation 14, sets standard daily fees for members of conciliation commissions, arbitral tribunals and annulment committees. In accordance with Article 60(2) of the Convention, however, the parties and the commission, tribunal or committee may agree on a different rate of remuneration than the standard fee. The suggested changes would make it clear that requests for increases in the applicable rate will only be made in exceptional circumstances and must be made through the Centre. At the same time, drafting improvements are suggested to avoid repetition in stating the Secretary-General's power to set the fees.