

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
- Rules of Procedure for Arbitration Proceedings (**Arbitration Rules**).

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.



Section 2

Tribunal Secretaries



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 Aconquija 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 adaptations 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.²

² We would like to acknowledge the assistance of Myles Farley, Associate, Melbourne, Australia in preparing this submission.



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