

28 December 2018

VIA EMAIL

Meg Kinnear, Esq.
Secretary-General
ICSID
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433

Comments on Proposed Amendments to 2006 ICSID Rules

Dear Ms. Kinnear:

The partners of the International Dispute Resolution Group of Debevoise & Plimpton LLP write in response to ICSID's invitation to comment on the Proposed Amendments to the 2006 ICSID Rules and Regulations ("Proposed Amendments").

We commend ICSID for the progress it has made toward modernizing, simplifying, and streamlining its Rules. We are pleased to present our comments on the Proposed Amendments here in the hope that they will further assist ICSID as it finalizes the new Rules.

For ease of review, our comments are divided into three sections. *First*, we highlight Proposed Amendments that we believe will improve the overall efficiency and fairness of the ICSID system. *Second*, we address certain Proposed Amendments that risk undoing some of these gains and provide suggestions for how these may be modified. *Finally*, we encourage ICSID to reconsider some of the suggestions made in our 31 March 2017 Letter regarding certain new and amended Rules.

The Proposed Amendments Take Several Steps toward Improving Efficiency and Fairness in International Arbitration

At the outset, we recognize the meaningful steps toward improving both fairness and efficiency that are already reflected in ICSID's Proposed Amendments. As practitioners that act for both investors and States, we are committed to the effective and efficient resolution of our clients' disputes. At the same time, we acknowledge that it is ICSID's role as one of the world's leading arbitral institutions to maintain equality between parties to a dispute and ensure that each receives due process. Several of the Proposed Amendments strike just this balance.

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

In particular, **Proposed Arbitral Rules 11(3), 13(2), 14, and 16(4)**—which impose a duty on the Tribunal to act in an expeditious and cost effective manner, encourage active case management, and allow for a Claimant to elect to have its Request for Arbitration considered as the Memorial—reflect overall improvements in the efficiency of the ICSID system.¹ Similarly, **Proposed Arbitral Rule 29**, which allows the proceedings to continue while a disqualification challenge is pending, **Proposed Arbitral Rule 67(3)**, which imposes a time limit on the tribunal to rule on a request for stay of enforcement of an award, and **Proposed Arbitral Rules 69–79** on Expedited Procedures are welcome changes to ICSID procedure that will allow for the more timely resolution of parties’ disputes.² **Proposed Arbitral Rule 19(4)** on allocation of costs also incentivizes the parties to conduct proceedings in an efficient and cost-effective manner.³ Finally, we commend ICSID on going green by making the default for all filings electronic, as reflected for example in **Proposed Arbitral Rule 3**.⁴

We are pleased to note that these and other Proposed Amendments reflect how we at Debevoise think of the procedural issues faced in international arbitration, and we encourage ICSID to adopt them in its final Rules.

Specific Concerns about Certain Proposed Amendments

While the Proposed Amendments improve upon the old ICSID regime in several respects, certain new Rules and Proposed Amendments may only partially achieve, or even run counter to, ICSID’s stated objective of streamlining its arbitral procedure. We call attention to the following four new provisions contained in the Proposed Rules that risk decreasing the overall efficiency and fairness of the ICSID system:

- A. **Proposed Arbitral Rule 35 – Manifest Lack of Legal Merit.** This Proposed Amendment allows for an objection that “a claim” is manifestly without legal merit, and states that the objection may be made to “the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal . . . no later than 30 days after the constitution of the Tribunal.” However, as drafted and

¹ See Debevoise Efficiency Protocol (2018) ¶¶ 3–6; see also Debevoise’s 31 March 2017 Letter to the ICSID Secretary-General, at 3–4.

² See Debevoise’s 31 March 2017 Letter to the ICSID Secretary-General, at 4, 9, 12.

³ See *id.*, at 6.

⁴ See Debevoise Efficiency Protocol (2018) ¶ 12; see also Debevoise’s 31 March 2017 Letter to the ICSID Secretary-General, at 6.

in conjunction with the deadline, this Rule appears to preclude the striking out of counterclaims and defenses that are manifestly without legal merit. This creates an unfair distinction between the parties that bring claims and those that defend against them, and exacerbates the problem of unnecessary litigation and added time and expense.⁵

- B. **Proposed Arbitral Rule 42 – Tribunal-Appointed Experts.** This Proposed Arbitral Rule, for the first time, explicitly provides for tribunal-appointed experts. While this may be appropriate in certain circumstances, it does not necessarily encourage the efficiency of the proceedings and may, in fact, have a deleterious effect. Tribunal-appointed experts are often not accountable to clients in the way party-appointed experts are. The tribunal directs the work of these experts; however, it is the parties that pay for it. As a result, there is seldom the kind of discipline over the process to make it satisfactory. For example, in one case in which our firm is involved, the tribunal announced its intention to appoint a tribunal expert in August 2015. As ICSID will be aware, the appointment of the tribunal expert opened an entire new phase of the proceedings, after the evidentiary hearing and two rounds of fulsome post-hearing briefs. This new phase will extend until Spring 2019, *five-and-a-half years* after the relevant hearing in that case.

Instead of encouraging tribunal-appointed experts, both parties and the tribunal would be better served by a rule that encourages meetings of party-appointed experts with each other and perhaps with the tribunal, either before or after their reports are to be drafted, to narrow the scope of the dispute presented to the tribunal.⁶

- C. **Proposed Arbitral Rule 59 – Timing of the Award.** Under this Proposed Amendment, the Tribunal “shall render the Award as soon as possible and in any event no later than . . . 240 days after the last written or oral submission” on all matters, save applications for Manifest Lack of Legal Merit (in which case the award shall be rendered within 60 days of the final submission), or Preliminary Objections (120 days). We appreciate ICSID’s desire to shorten the overall time to award. However, as drafted, the proposed deadlines are still prone to abuse and are out of step with current practice under other major arbitral rules.

First, 240 days from final submission is still too long for the rendering of an ICSID award. In our experience, tribunals do not need eight months to draft an award. Moreover, by setting a target date of eight months, this becomes the

⁵ Debevoise’s 31 March 2017 Letter to the ICSID Secretary General, at 10.

⁶ *Id.*, at 8.

benchmark in ICSID proceedings and tribunals will have little incentive to submit an award before then. An eight-month deadline also goes against the trend toward more timely, final resolution of international disputes. For example, in ICC arbitrations, the target for submission of draft awards to the ICC Court is three months from the last substantive hearing or submission, and the deadline is set at six months from the Terms of Reference.⁷ Similarly, in SCC arbitrations, the deadline for the award is six months from the referral to the tribunal.⁸ While State parties to ICSID proceedings may require longer periods because of internal prerogatives and processes that exist within sovereigns, the same is not true of arbitrators.

Second, it is not advisable to calibrate the deadline from the final submission in the proceeding. In doing so, the Proposed Amendment creates a perverse incentive for prolonged post-hearing submissions and delayed awards. If the deadline runs from the date of the last written submission—and post-hearing briefs are not otherwise constrained—a tribunal can effectively delay the rendering of an award by allowing drawn-out post-hearing briefing. As a result, the Proposed Amendment imposes no meaningful deadline on the award.

Finally, the Proposed Amendment imposes no consequence for non-compliance. This, too, is out of step with current practice in other major arbitral institutions, such as the ICC, which takes into consideration the diligence and efficiency of the tribunal when determining arbitrator fees.⁹

⁷ International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration ¶ 119 (“sole arbitrators are expected to submit draft awards within two months, and three-member arbitral tribunals within three months after the last substantive hearing on matters to be decided in the award or the filing of the last written submissions concerning such matters (excluding cost submissions), whichever is later”); International Chamber of Commerce Rules of Arbitration (2017), Rule 31(1) (“The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference”).

⁸ Stockholm Chamber of Commerce Arbitration Rules (2017), Art. 43 (“The final award shall be made no later than six months from the date the case was referred to the Arbitral Tribunal pursuant to Article 22. The Board may extend this time limit upon a reasoned request from the Arbitral Tribunal or if otherwise deemed necessary.”).

⁹ International Chamber of Commerce Rules of Arbitration (2017), Appendix III, Article 2 (2) (“In setting the arbitrator’s fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 38(2) of the Rules), at a figure higher or lower than those limits.”).

To promote efficiency and create the proper incentive for timely awards, ICSID should require that (i) an award must be signed within 180 days of the final hearing; (ii) any extensions may only be granted by the Secretariat for due cause shown, and (iii) arbitrators' fees will be proportionately reduced if any awards are released after the deadline.¹⁰

- D. **Proposed Arbitral Rule 60 – Contents of the Award.** While the increased specificity of this rule clearly attempts to improve efficiency, as drafted, it is not likely to affect the overall length of the award. There is no question that shortening the descriptions of the proceedings and the submissions of the parties, as well as including in the award only the “relevant” facts, will increase efficiency and encourage compliance with the deadline for issuing the award (*see* subsections (f), (g), and (h)). However, subsection (i) requires further modification if the Proposed Amendment is to achieve its goal. The ICSID Convention requires that the Award “deal with every question submitted to the tribunal,” so the rule must necessarily reflect that language. However, more can be done to clarify the inherent ambiguity of “every question” that has been submitted. Whether or not a question has been submitted may be uncertain. Tribunals therefore err on the conservative side by providing a decision on every possible question raised, and then reasons for each of those decisions, in order to avoid an argument on annulment that the tribunal did not decide a particular question.

To accomplish the goal of the revised subparagraph (i), there should be a requirement that at some point in the proceedings the parties and tribunal agree on a list of “questions” that must be decided. This would eliminate the uncertainty and potential arguments on annulment that an issue had not been decided. It could be required at or around the time of the initial procedural conference and then confirmed before the final evidentiary hearing.

Further Recommendations Based on Debevoise’s March 2017 Suggestions

Finally, we draw your attention to the suggestions we made in March 2017 that have not been adopted in the current draft of the Proposed Amendments, but which may merit further consideration.

First, ICSID should adopt rules for the appointment of **Emergency Arbitrators** *before* the constitution of the tribunal. Although **Proposed Arbitral Rule 50(7)** allows for recourse to other courts and tribunals, in practice, such relief may not be available because it is severely limited by the terms of Rule 50(7), which require that the “instrument recording the parties’ consent to arbitration” allow for such recourse. As we previously noted, in some cases, the

¹⁰ Debevoise’s 31 March 2017 Letter to the ICSID Secretary-General, at 11.

availability of emergency relief can be a matter of life and death.¹¹ The need for access to emergency arbitration is even more acute in light of **Proposed Arbitral Rule 4**, which appears to no longer allow for a party to communicate directly with the tribunal in urgent circumstances.

Second, in order to achieve greater efficiency and active case management through the entire proceedings, ICSID should adopt Rules that require the tribunal to set aside sufficient time for conferencing and deliberation throughout the course of the proceedings, not only after the hearing (*see* **Proposed Arbitral Rule 16(4)**). In order to be effective, these commitments, including the fixing of actual dates for deliberation, should be incorporated into the standard draft of Procedural Order No. 1.¹² ICSID should also require that the tribunal set the entire schedule for the arbitration at the first procedural conference, which would include a decision on whether to bifurcate or trifurcate the proceedings (*see* **Proposed Arbitral Rule 37**).¹³ To incentivize the tribunal, ICSID should adopt a fee scale for arbitrators, in line with those used by other arbitral institutions, that takes into consideration the diligence and efficiency of the tribunal in light of the circumstances of the case.¹⁴

Third, ICSID should clarify and expand on **Proposed Arbitral Rule 50**, which addresses **Provisional Measures**. Specifically, we suggest that the language used in Rule 50(1) reflect the binding nature of a tribunal’s recommendation of provisional measures, consistent with well-established precedent. As previously noted, we suggest that the Proposed Amendment also specify the standard applicable to any reconsideration of an order of provisional measures.¹⁵

Finally, ICSID should ICSID should consider expressly providing that there is no scope to “reconsider” interim decisions prior to award.¹⁶ This could be achieved by amending

¹¹ *See id.*, at 9–10 § V.B (citing *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19, in which one of the claimants, Dan Adamescu, died due to health complications while in Respondent’s custody before the tribunal was able to rule on a request to amend the terms of Mr. Adamescu’s detention to allow him to receive necessary medical care).

¹² Debevoise’s 31 March 2017 Letter to the ICSID Secretary General, at 3 § I.A.

¹³ *Id.*, at 7 § IV.A.

¹⁴ *Id.*, at 11 § VII.A.

¹⁵ *See id.*, at 10 § VI.C (suggesting that a tribunal grant a request for the modification or revocation of a provisional measures order 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 provisional measures granted”) (internal citation omitted).

¹⁶ *Id.*, at 8 § V.F; *see, e.g., ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent’s Request for Reconsideration, dated 10 March 2014 ¶ 21 (“In a request for reconsideration, the tribunal majority held ‘decisions . . . to be incorporated into the Award . . . have res judicata effect’ and are ‘intended to be final and not to be revisited by the Parties or the Tribunal in any later phase of their

Proposed Arbitral Rule 63, which currently allows for an application for “revision” of an award to be made “within 90 days after the discovery of a fact of such nature as decisively to affect the Award, and in any event within three years after the Award . . . was rendered,” in keeping with existing Arbitration Rule 50. Encouraging substantive challenges to decisions and awards will seriously undermine, not promote, any form of efficiency. By maintaining a three-year period following the rendering of an award, this Proposed Amendment risks creating an appeal mechanism that will also undermine the finality—and, potentially, the enforceability—of ICSID awards. Instead, the new rule should be redrafted to preserve the principle of finality by only allowing the 90-day period for revision, and clarifying that both awards and interim decisions of a tribunal, once made, are binding for the purposes of the case.

* * *

As always, we appreciate your consideration of our comments and suggestions, and remain available to discuss them further if that would be helpful.

Yours sincerely,

Catherine M. Amirfar
 Donald Francis Donovan
 Tony Dymond
 Mark W. Friedman
 Lord (Peter) Goldsmith QC
 Gareth Hughes
 Mark D. Johnson
 Antoine F. Kirry
 Wendy J. Miles QC
 Ina C. Popova
 Dietmar W. Prager
 Natalie L. Reid
 David W. Rivkin
 Samantha J. Rowe
 William H. Taft V

arbitration proceedings.”); *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador’s Reconsideration Motion, dated 10 April 2015 ¶ 43 (endorsing the *ConocoPhillips* majority’s statement and refusing to reopen its earlier decision on jurisdiction and liability, explaining that “once the tribunal decides with finality any of the factual or legal questions put to it by the parties [. . .] such a decision becomes *res judicata*”); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20 (Annulment Proceeding), Decision on the Application for Annulment, dated 22 August 2018 ¶ 173 (the Annulment Committee affirmed the tribunal’s approach to reconsider a prior decision only where “under the exceptional circumstance,” the tribunal had been “deliberately misled as to facts, the knowledge of which the Tribunal would have reached a different decision.”).

Christopher K. Tahbaz
Patrick Taylor