

Suggestions for amendments to the ICSID Rules

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Efforts to speed up proceedings, including ICSID's proposed new rules for expedited proceedings, would be more effective if accompanied by measures aimed at helping governments respond more quickly to requests for arbitration and to actively participate in proceedings. Suggestions in this regard include the establishment of critical databases of ICSID members' addresses for service, and of its members' contacts for ISDS matters. Another suggestion is to put in place measures to enable the ICSID Secretariat to engage more effectively with members of its Administrative Council.

Establishing Critical Databases

ICSID could establish, and keep updated, a database of addresses for service of its members. This would ensure that arbitration notices and requests are addressed and transmitted to the right offices, thereby enabling both claimants and the Centre to more quickly serve arbitration notices and requests on the relevant office within a respondent government. At the same time, it would help shorten the reaction time of governments to such notices and requests.²

Secondly, ICSID could establish and maintain a database of its members' contacts for institutional matters, generally. This may, or may not, be the same as the contact for service of process. For

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² Some recent investment treaties require the provision of address for service of notices under the treaty – including those related to the initiation of arbitration proceedings. Examples include the CETA as well as the Canadian BITs with Cameroon and with Burkina Faso. While the treaty with Cameroon actually contains the addresses for service, the treaty with Burkina Faso merely contains an undertaking of the Parties to provide each other with the information by diplomatic note.

instance, while the Attorney General's office could be the address for service of process, the contact for administrative matters could be the agency or ministry responsible for investment promotion. It could also be both. To achieve the establishment of the databases, ICSID may simply need to amend its Administrative and Financial Regulations 20 and 24.

Administrative and Financial Regulation 20 is the basis on which ICSID currently maintains several public lists. These include information on the date of entry into force of the Convention for the country; excluded territories for purposes of the ICSID Convention; designated constituent subdivisions or agencies for purposes of the Centre's jurisdiction; class or classes of dispute that a member State would or would not consider submitting to the jurisdiction of the Centre; designated competent court of other authority for the recognition and enforcement of awards; and legislative or other measures taken by the country to give effect to the Convention.³ Although these are information referred to in the Convention, the list could be extended to include other information that would help the Centre to be more effective.

With regard to communications with member countries on administrative matters, Regulation 24 currently provides that unless a specific channel of communication is notified by the State, "all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State's representative on the Administrative Council ..." This effectively means that communications are usually sent to staff of the Central Bank who typically have little day to day dealings with ISDS matters.⁴

³ In addition, under Regulation 21, ICSID maintains a public list of persons designated to its panels of arbitrators and of conciliators by each member government.

⁴ Examples include communications about amendments to the Centre's rules; and notice and agenda of annual meetings of the Administrative Council.

It could even be argued that by starting with “[u]nless a specific channel of communication is notified by the State concerned,” Regulation 24 anticipates that members would advise the Centre of specific channels of communication. The database could therefore be established on the strength of that provision. However, for the avoidance of ambiguity, clear provisions could be inserted in amendment to either or both Regulations 20 and 24.

Aside from ensuring a more efficient takeoff of proceedings, these databases would also greatly assist ICSID in better targeting its outreach and capacity building efforts.

However, even if the Regulations were to be amended, and the databases are established, for the databases to be kept up to date and useful, ICSID would need to engage more meaningfully with its members on a regular basis. The easiest way to achieve this would be through making changes to the manner in which the Administrative Council operates.

Changes to workings of the Administrative Council

The ICSID Administrative Council is the Centre’s governing body. By virtue of Article 4 of the ICSID Convention, it is made up of “one representative of each Contracting State.” While the government may designate any person to be its representative on the Administrative Council, in the absence of such a designation, the country’s World Bank Governor shall be its representative on the Administrative Council.⁵ It is Chaired by the President of the World Bank.

⁵ The World Bank Boards of Governors consist of one Governor and one Alternate Governor appointed by each member country. The office is usually held by “the country's minister of finance, governor of its central bank, or a senior official of similar rank.” The Governors and Alternates serve for terms of five years and can be reappointed. <http://www.worldbank.org/en/about/leadership/governors>

Functions of the Administrative Council include approving changes to the Centre's rules and regulations; appointment of the Secretary General and Deputies, and approving the budget of the Centre and its annual reports. In addition, the Convention reserves certain functions for its Chairman, including acting as appointing authority and determining challenges to arbitrators.

With time, the appointing-authority functions assigned to the Chair of the Administrative Council are being increasingly performed by the ICSID Secretary General. This is in part in reflection of the fact that those functions require certain expertise that rightly reside in the office of the Secretary General. On the other hand, the other functions of the Council continue to be performed by the membership as devised over 50 years ago, regardless of how much the Centre and the wider ISDS system have evolved in that time.

As a result, today, even the complex discussions around the extensive changes proposed to ICSID rules are being conducted on behalf of many countries by Central bankers and officials of the Ministries of Finance. These are professionals who are no doubt the best and brightest in the field of public finance, but who may be lesser equipped to debate contemporary issues on ISDS.

The suggestions to address this situation include making changes to the way in which member states are represented on the Administrative Council; and establishing a committee of the Administrative Council that would be better engaged with the Secretariat on a regular basis.

Change in representation of Member States on the Administrative Council

ICSID Member States could ensure that their representation on the Administrative Council are by persons with the relevant expertise. This could be achieved by appointing representatives to the

Council that may not necessarily be their World Bank governors.⁶ Indeed, a strict reading of the Convention would suggest that such appointees need not even be government officials, nor even nationals of the member government.⁷

Establishment of Standing Committee on the Administrative Council

As a complement to this, the Administrative Council could establish a standing committee specifically focused on and engaging with the ICSID Secretariat. Article 6 of the ICSID Convention makes this possible by providing that:

“(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.”

Such a committee would ideally be composed of representatives of member countries who have the requisite expertise to deal with ICSID – related issues. This could include the representative on the Administrative Council or, perhaps, officials from the justice ministry or some other agency - like the investment promotion agency, who are sometimes involved in the negotiation of the contracts and treaties that ultimately form the basis of some of the proceedings brought before the Centre.

⁶ Countries could appoint their Administrative Council representatives through competitive means. This is the method that has been employed by countries such as France and the United Kingdom in designating members of the Panels of Arbitrators and Conciliators. See for example, an October 2018 announcement by the French Government: <https://icsid.worldbank.org/en/Documents/Appel%20à%20candidatures.pdf>

⁷ Under Article 13 of the Convention, persons designated by a Contracting State to the ICSID Panel of Conciliators or of Arbitrators “may but need not be its nationals.”

It is noteworthy that the work done in setting up ICSID itself was conducted by a Committee of the Governors of the World Bank. According to the report of the Executive Directors of the World Bank accompanying the Convention,

“The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task.”⁸

While a standing committee of the Administrative Council would provide a useful platform for the Secretariat to easily engage with member States on issues like the updating of the Panels of Arbitrators and Conciliators; and information in the databases of members, it is recognized that certain risks exist.

A more active Administrative Council could become unduly meddlesome in the work of the Secretariat, which must remain neutral at all times. This risk is particularly heightened by the fact that the Secretariat is also charged with acting as secretaries in cases involving the same member States either in their capacity as respondent or as home State of the investor. Care must therefore be taken in engaging with the members to ensure that certain lines are not crossed.

⁸ <http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section02.htm>