

*Comments by the Italian Republic on proposed changes of  
ICSID rules and regulations.*

On August 3, 2018, the International Centre for Settlement of Investment Disputes (ICSID) published a comprehensive set of proposed changes to modernize its rules for resolving disputes between foreign investors and states. States and the public were invited to submit written comments on the proposals until December 28, 2018.

The Italian Republic thanks ICSID for such proposals. Italy highly appreciates this exercise and finds proposed changes in line with the principles of consistency, efficiency and transparency that should orientate amendments to the mechanism.

As known, the Commission on behalf of the EU and its Member States presented a paper commenting on the proposed changes, to which Italy contributed and whose content it fully shares.

However, and entirely in line with what is stated in the European Commission's submission, Italy intends to present hereby a few additional observations:

**Third party funding and security for costs**

A proposed rule (AR 21) imposes a new obligation on the parties to disclose whether they have third-party funding, as well as the source of such funding, and to keep such disclosure of information current through the proceeding, while they are not required to disclose the funding agreement or its contents for this purpose.

Italy shares the view expressed by the European Commission to this end, and equally welcomes the inclusion of the requirements proposed by ICSID.

It would yet add that also disclosure on the terms of the agreement might be required to ensure full transparency and correctly evaluate how these could actually affect the proceedings.

In Italy's understanding, this would not only permit to highlight possible conflicts of interest (since the very beginning of the procedure, as the proposal rightly requests the party to inform of the third-party funding at registration or as soon as undertaken after registration), but also to ensure that equality of arms is ensured throughout the procedure.

Italy understands that this approach might be considered to go beyond what is needed for the soundness of the procedure, and in this light proposes that the tribunal be given the faculty to request disclosure of the terms of the agreement, under its general powers of management of the procedure.

Italy would thus propose that, on the one side, rules should prescribe arbitrators to disclose any possible conflict of interests raising from third party funding at the time of their appointment, and that, on the other, they should be given the faculty to ask for disclosure of the terms of the agreement in the course of the procedure, either by their own initiative or under request of one of the parties.

Italy shares the view of the Commission that the existence of third party funding could be a relevant factor for the respondent when assessing whether it is useful to request security for costs, as well as that the tribunal should not automatically order security for costs in the presence of third party funding, but be given a faculty to do so, in order to be able to proceed under a case-by-case approach.

### **Initial and special procedures – objection by respondent prior to establishment of the tribunal**

Italy appreciates the attempt by ICSID to upgrade rules on initial (AR 34 ff) and special (AR 50 ff) procedures. It would however recommend that a mechanism of objection by the respondent be conceived also before the tribunal is set, as it is found in other sets of rules for investment arbitration, such as SCC and ICC. Italy is aware that at this stage information on the case is scarce but at least a preliminary check can be done on *prima facie* elements of admissibility and lack of jurisdiction. A procedure could be set permitting the claimant to react to opposition by the respondent.

### **Constitution of the tribunal – appointment of the president**

Although Italy sees the efficiency gains that exist in favoring appointment by ICSID of the president in the situations where parties do not seem to be able to find agreement, it would suggest that, within the framework of the Convention, this process be left in the hand of parties to the possible maximum extent, to ensure ownership of the exercise. Italy suggests to this end to possibly consider mechanisms to facilitate selection by the parties, for instance evaluating the various alternatives that are currently elaborated by

various fora or any alternative leading to a fair and shared selection that would improve efficiency.

### **Code of conduct of arbitrators**

Italy does support such tool. It understands that such an exercise is already undertaken by ICSID together with UNCITRAL and highly appreciate joint work to reach common standards. To contribute to this exercise, Italy submits as Annex 1 the Code of Conduct that the Arbitration Chamber of the Italian Chamber of Commerce has produced to this end.

### **Simplification of procedural steps – reduction of paper submissions**

Italy also highly appreciates the efforts of ICSID to reduce the use and delivery of papers. Without intending to force arbitrators and the other party to get fully rid of papers, it favors any solution that would permit reduction of printing and consequent delivery of extremely heavy and costly sets of documents. Of course, a very efficient and safe mechanism of storage of documents in soft copy must be guaranteed, but Italy is confident that this is a goal that can be easily achieved (also in the light of the already highly appreciated ICSID procedures to that end).

# CODE OF ETHICS

## CODE OF ETHICS OF ARBITRATORS

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### Art. 1 - Acceptance of the Code of Ethics

1. An arbitrator accepting a mandate in an arbitration administered by the Chamber of Arbitration of Milan shall act in accordance with the Rules of the Chamber of Arbitration and this Code of Ethics, independent of the party that appointed him.
2. This Code of Ethics shall apply by analogy to Expert to the arbitral body appointed in the arbitral proceedings administered by the Chamber of Arbitration.

### Art. 2 - Party-appointed arbitrator

A party-appointed arbitrator shall be bound by all the duties under this Code of Ethics throughout the entire course of the proceedings; he may contact the party or its counsel regarding the appointment of the President of the Arbitral Tribunal if asked to appoint him. The indications given by the party shall not be binding on the arbitrator.

### Art. 3 - Competence

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to perform his task with the necessary competence with respect to his adjudicating function and the subject matter of the dispute.

### Art. 4 - Availability

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to devote the necessary time and attention to the arbitration to perform and complete his task as expeditiously as possible.

### Art. 5 - Impartiality

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to perform his task with the necessary impartiality characterizing the adjudicating function he undertakes in the interest of all parties.

### Art. 6 - Independence

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be objectively independent. He shall remain independent during the entire arbitral proceedings as well as after the award is filed, during the period in which annulment of the award can be sought.

### Art. 7 - Statement of impartiality and independence

1. In order to guarantee his impartiality and independence, the arbitrator shall supply the written statement provided for by the Rules of the Chamber of Arbitration when accepting his mandate
2. All doubts as to the opportunity to disclose a fact, circumstance or relationship shall be resolved in favour of disclosure.
3. Where facts, circumstances and relationships that should have been disclosed are

subsequently discovered, the Chamber of Arbitration may deem that this fact is a ground for replacing the arbitrator during the proceedings or not confirming him in other arbitral proceedings.

### **Art. 8 - Development of the proceedings**

The arbitrator shall promote a thorough and expeditious development of the proceedings. In particular, he shall decide on the date and manner of the hearings in such a way as to allow for the equal treatment of all parties and the full compliance with the due process of law.

### **Art. 9 - Unilateral contacts**

In the entire course of the proceedings, the arbitrator shall refrain from all unilateral contact with the parties or their counsel. Where there is such a unilateral contact, the arbitrator shall immediately notify the Chamber of Arbitration so that the Chamber can inform the other parties and arbitrators.

### **Art. 10 - Settlement**

The arbitrator may at all stages suggest the possibility of a settlement or conciliation of the dispute to the parties but may not influence their decision by indicating that he has already reached a decision on the outcome of the proceedings.

### **Art. 11 - Deliberation of the award**

The arbitrator shall refrain from any obstructive or non-cooperative behaviour and promptly participate in the deliberation. He shall remain free to refuse to sign the award where the decision is taken by majority vote by the Arbitral Tribunal.

### **Art. 12 - Costs**

1. The arbitrator shall not accept any direct or indirect arrangement on fees and expenses with any of the parties or their counsel.
2. The arbitrator shall be entitled to a fee and reimbursement of expenses as solely determined by the Chamber of Arbitration in accordance with its Schedule of Fees, which is deemed to be approved by the arbitrator when accepting his mandate.
3. The arbitrator shall avoid superfluous expenses that can increase the costs of the proceedings in an unjustified manner.

### **Art. 13 - Violation of the Code of Ethics**

The arbitrator who does not comply with this Code of Ethics shall be replaced by the Chamber of Arbitration, which may also refuse to confirm him in subsequent proceedings because of this violation.