

Updated Backgrounder on Proposals for Amendment of the ICSID Rules

On November 12, 2021, the International Centre for Settlement of Investment Disputes (ICSID) published its latest working paper with proposed changes to modernize its rules for resolving disputes between foreign investors and States (*WP # 6*). ICSID also proposed to close the consultation phase and proceed to a vote on the amended rules in early 2022. The proposed amendments offer States and investors a range of effective dispute settlement mechanisms, including arbitration, conciliation, mediation and fact-finding.

WP # 6 builds on the previous working papers published in August 2018 ([WP # 1](#)), March 2019 ([WP # 2](#)), August 2019 ([WP # 3](#)), February 2020 ([WP # 4](#)) and June 2021 ([WP # 5](#)).

Reflecting growing consensus on the proposed rules, there are very few changes between *WP # 5* and *# 6*. The changes that have been made primarily concern the ICSID arbitration rules (ICSID Convention and Additional Facility), and are noted in the commentary below.

We encourage readers to refer to ICSID's [backgrounder on WP # 5](#) for a more detailed overview of the status of the rule amendments text.

Updates in *WP # 6*

- *Obligation to Disclose Third-Party Funding.* The amended rules would oblige parties to disclose the name and address of any non-party from which they received funding, directly or indirectly, ***WP # 6 adds that the parties must disclose the names of the persons and entities that own and control a funder that is a juridical person.*** The disclosure obligation applies throughout the proceeding. The name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest. Should parties require further information concerning third-party funding, this may be ordered by the Tribunal pursuant to the usual rule on disclosure of information (AR 14(4), AR 36(3)).
- *Security for Costs.* *WP # 6* maintains the new stand-alone AR 53 that would allow a Tribunal to order security for costs. This rule states that the Tribunal must consider the relevant party's ability and willingness to comply with an adverse decision on costs, the effect of providing security on a party's ability to claim or counterclaim, the conduct of the parties and any other relevant circumstances. The Tribunal must consider all evidence adduced in relation to these circumstances, including the existence of third-party funding. ***WP # 6 clarifies that the legal standard to be applied to the question of whether a Tribunal should order security for costs is in the discretion of the Tribunal (AR 53(2)(a)).***
- *Enhanced Transparency.* The ICSID Convention requires the consent of both parties to publish an Award. Since the ICSID Convention is not being amended at this time, this rule stays in place. However, a new provision (first proposed in *WP # 1*) deems that a party has given consent to publish awards unless it objects in writing within 60 days. If a party does object, the proposed rules permit ICSID to publish legal excerpts of the award, with

an established process and timeline to do so (AR 62). Awards, orders and decisions under the ICSID Additional Facility Arbitration Rules will be published with redaction of confidential information ((AF)AR 73). Under both sets of arbitration rules, decisions and orders will be published with redactions agreed to by the parties or decided by the Tribunal (AR 63, (AF) AR 73). The Centre will also publish written submissions or supporting documents with consent of the parties. However, **WP # 6 specifies that these can only be submissions and supporting documents filed by a party.**

- *Non-Disputing Parties and Non-Disputing Treaty Parties.* The proposed rules contain detailed rules on submissions of non-disputing parties (AR 67) and non-disputing Treaty Parties (AR 68). In addition to other conditions, **WP # 6 adds that the Tribunal may impose conditions with regard to publication of the submission (AR 67(4)). WP # 6 also clarifies that a non-disputing Treaty Party may make its submission orally or in writing, or both, depending on the Tribunal's determination (AR 68(1)) and that the non-disputing Treaty Party may have access to relevant documents, unless either party objects (AR 68(3)).**

- *Expedited Proceedings.* Parties may opt to use newly drafted rules for expedited proceedings featuring additional and shortened timelines (AR 75-86). Parties may also agree to opt out of an expedited proceeding. The expedited rules may be particularly helpful in providing access to investment arbitration for small and medium sized companies, and it is hoped that consent to apply the expedited process will be included in contracts and in treaties. **WP # 6 clarifies that, if an arbitrator is unavailable to proceed with an expedited arbitration, the arbitrator may offer to resign (AR 75(3)).**

Next Steps

WP # 6 reflects the consensus developed over the past five years of meetings, discussions, consultations and drafting. As a result, ICSID is hopeful that Member States will be supportive of the proposed amended rules as they currently stand.

ICSID proposes to close the consultation period now, and to place the proposed amended rules before the membership in January 2022. If adopted, the updated rules would be in place by early summer 2022. We believe that the work of Member States on the amended rules has been extensive, and that it is time to incorporate these updated rules into the daily practice of parties in ICSID cases.

In the interim, any questions on *WP # 6* or the process of amendment are welcomed by ICSID and should be sent to icsidideas@worldbank.org.