

## Backgrounder on Proposals for Amendment of the ICSID Rules

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. The proposed amendments offer States and investors a range of effective dispute settlement mechanisms, including arbitration, conciliation, mediation and fact-finding. This backgrounder introduces the ICSID rules and highlights proposed changes to them.

### Framework for the ICSID Rules and Regulations

There are different sets of ICSID rules and regulations, each serving distinct functions. They include:

- *Administrative and Financial Regulations.* These deal with the procedures of ICSID’s governing body, the [Administrative Council](#); the functions of the ICSID Secretariat; and the finances of ICSID and the cases it administers.
- *Institution Rules.* These rules address the initiation of arbitration and conciliation under the ICSID Convention.<sup>1</sup> They apply to the period between filing a request for arbitration or conciliation to the dispatch of the notice of registration.
- *Arbitration and Conciliation Rules under the ICSID Convention.* The procedural rules for arbitration and conciliation under the ICSID Convention may be used to settle disputes between an ICSID Contracting State—the term given to States that have ratified the ICSID Convention—and nationals of another Contracting State. The rules benefit from a robust enforcement mechanism, as Contracting States agree that an ICSID Convention award will be treated as a final judgement of their courts. This is a distinguishing feature of arbitration under the ICSID Convention.
- *Arbitration and Conciliation under the ICSID Additional Facility.* The Additional Facility (AF) rules for arbitration and conciliation are in most ways the same as those of the ICSID Convention, but have different jurisdictional requirements. Currently, they may be used between an ICSID Contracting State or its national, and a non-Contracting State or a national of a non-Contracting State. In other words, one of the parties—the claimant or respondent—must be a Contracting State or a national of one.

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<sup>1</sup> The ICSID Convention, which entered into force in 1966, establishes the institutional and legal framework for investor-State dispute settlement. To date, it has been ratified by 154 States.



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- *Fact-Finding under the ICSID Additional Facility.* The Additional Facility also includes rules for fact-finding, which offers States and foreign nationals the opportunity to constitute a committee to make objective findings of fact that could resolve a legal dispute between the parties.

### **Changes Proposed Throughout the ICSID Rules**

- *Improved Drafting and Language.* The rules have been fully redrafted in plain, modern, gender-neutral language and re-organized in a user-friendly manner. Inconsistencies amongst the English, French and Spanish-language versions of the rules have been resolved, so the rules read the same in all three languages.
- *Reduced Time and Cost.* All filing would be done electronically, unless there are special reasons to maintain paper filing. This makes processes faster, more environmentally friendly and less expensive. New time limits have also been proposed to expedite cases.

### **Changes Proposed to the Administrative and Financial Regulations**

- *More Flexible Decision Making by the Administrative Council.* The Administrative Council meets once a year in the fall. At this meeting, ICSID Contracting States exercise many of their governance responsibilities. Between these meetings, the Chairman of the Administrative Council may call for a vote—but only if it relates to a matter that must be decided before the next annual meeting. This latter requirement is removed in the proposed rules, allowing a greater range of issues to be decided by the Administrative Council between the annual in-person meetings.

### **Changes Proposed to the Institution Rules**

- *Clearer Instructions for Filing a Case.* The proposed rules provide a checklist of what must be included in a request to initiate arbitration and conciliation proceedings. They also recommend additional types of information, which—if the case is registered—will expedite subsequent proceedings. This provides better guidance to those filing a case, assists the Secretary-General in screening new requests, and, speeds up the opening stages of the case once it is registered.

### **Changes Proposed to ICSID Arbitration Rules**

- *Obligation to Disclose Third-Party Funding.* The proposed rules introduce an obligation by the parties to disclose whether they have third-party funding, and if so, the source of the funding. This 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.

- *Enhanced Transparency.* It is important to note that 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 deems that a party has given consent to publish awards, decisions and orders 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. Awards, orders and decision under the Additional Facility Arbitration Rules will be published with redaction of confidential information.
- *Initial procedures.* An express rule allowing bifurcation is proposed. A request for bifurcation of preliminary objections would need to be made within 30 days of the memorial on the merits or ancillary claim. Preliminary objections would need to be filed as soon as possible, at the latest on the date for filing the counter-memorial if the objection relates to the main claim.
- *New Rule on Security for Costs.* A new, stand-alone rule would allow a Tribunal to order security for costs. The rule states that the Tribunal must consider the relevant party's ability to comply with an adverse decision on costs and any other relevant circumstances.
- *Disqualification of Arbitrators.* The process for challenging arbitrators has been revised, including the introduction of an expedited schedule for parties filing a challenge. An enhanced declaration of independence and impartiality is also proposed for arbitrators.
- *Timing of Awards.* New timelines are proposed for issuing awards. Awards must be rendered within 60-days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on all other matters.
- *Expedited Proceedings.* Parties may opt to use newly drafted rules for expedited proceedings featuring additional and shortened timelines.

### **Changes Proposed to the ICSID Additional Facility Rules**

- *Expanded Access to the Additional Facility.* As noted, the ICSID Additional Facility rules currently require that one of the parties—the claimant or respondent—is an ICSID Contracting State or a national of one. The proposed rules extend the availability of Additional Facility arbitration and conciliation to cases where both the claimant and the respondent are not ICSID Contracting States or nationals of a Contracting State. This



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gives a greater range of States and foreign investors access to ICSID's dispute resolution services.

- *Inclusion of Regional Economic Integration Organizations.* The proposed Additional Facility Rules also provide regional economic integration organizations (REIOs) with access to AF dispute settlement. This reflects the fact that increasingly States are negotiating international investment agreements (IIAs) as regional entities and may sign an IIA as an REIO. The inclusion of REIOs means that the definition of a “national of another State” must be revised to include persons that are nationals of any constituent State of an REIO party to the dispute.
- *New Rules on Mediation.* ICSID is proposing an entirely new set of rules on mediation. They respond to the requests by States and investors to provide greater mediation capacity, and more generally, to the objective of ICSID to provide parties with a greater breadth of dispute resolution tools.
- *Revamped Rules for Conciliation and Fact-Finding.* The rules for conciliation have been amended significantly, aiming to introduce greater flexibility into the process. The rules for fact-finding are also completely revised to be more simple, user-friendly and cost-effective.

### **Process Going Forward**

- *Commenting on the Proposals.* States and the public are invited to submit written comments on the proposals until December 28, 2018. Questions and comments on the ICSID rules amendment process should be directed to [icsidruleamendment@worldbank.org](mailto:icsidruleamendment@worldbank.org). Comments will be posted on the ICSID website.
- Amendments to the ICSID rules require the approval of two-thirds of [ICSID Member States](#). A vote on the amendments is expected in 2019 or 2020.