

8 Ways ICSID Proposal Would Change Arbitration

By **Sarah Reynolds, Soledad O'Donnell and James Coleman** (August 31, 2018, 12:56 PM EDT)

Twelve years after its last major update, the International Center for Settlement of Investment Disputes proposed extensive rule revisions on Aug. 3, 2018. Amid widespread challenges to the legitimacy of investor-state arbitration and as the arbitral center celebrates its 50th anniversary, the ICSID secretariat embarked on its fourth — and most extensive — rule amendment process.

The revisions draw on lessons learned from administering more than 650 cases and aim to modernize and streamline the arbitration process. To that end, the secretariat proposes possible changes focused on transparency, early disclosure of third-party funding, arbitrator appointment and challenges, mediation and conciliation, electronic filing, time limits and access to ICSID's Additional Facility. The secretariat also proposes fully redrafting the rules in plain, gender-neutral language, reorganizing the rules in a user-friendly manner, and removing inconsistencies among the English, French and Spanish versions of the rules. While the proposed changes are extensive, they shy away from hotly contested issues such as the creation of an appellate mechanism.

ICSID member states and the public are invited to submit written comments on the proposals until Dec. 28, 2018. After consideration of these comments, proposed amendments will go to the Administrative Council for a vote in 2019 or 2020. Because these proposed amendments are to the ICSID Convention Regulations and Rules, the changes must only be approved by two-thirds of ICSID contracting states. Changes to the ICSID Convention itself, in contrast, require endorsement from all contracting states, the number of which recently increased from 153 to 154 after Mexico's July 27, 2018, ratification of the Convention took effect on Aug. 26.

These proposals come at a troubling time for investor-state arbitration, which faces increasing backlash from nongovernmental organizations and criticism from populist politicians. The European Court of Justice struck a further blow to investor-state arbitration with its March 6, 2018, decision in *Slovak Republic v. Achmea BV*. There, the court concluded that arbitrations under bilateral investment treaties between European Union member states are incompatible with European Union law. As an alternative to investor-state arbitral tribunals —



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including ICSID tribunals — Cecilia Malmström, the European Union’s trade commissioner, is actively promoting the development of a multilateral investment court.

The Aug. 3 proposals, which ICSID Secretary-General Meg Kinnear called “an important milestone in ensuring that the ICSID rules continue to provide states and investors with a range of modern dispute settlement options,” include the following:

Enhanced Transparency

The Convention requires the consent of both parties for an award to be published. Under a proposed new rule, a party is deemed to have consented unless it objects within 60 days. If a party objects, the proposed rule permits publication of legal excerpts of the award.

Third-Party Funding

At a time when third-party funding is becoming widespread in international arbitration, a proposed rule clarifies that parties must disclose whether they are funded by third parties and the source of the funding so that the arbitrators may adequately assess conflicts of interest. Despite the absence of this requirement from the current rules, some ICSID arbitral tribunals — including the tribunals in *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan and EuroGas Inc.* and *Belmont Resources Inc. v. Slovak Republic* — have already required third-party funding to be disclosed.

Arbitrator Appointment and Challenges

The proposed rule changes require an enhanced declaration of independence and impartiality from arbitrators. The process for challenging arbitrators is also revised, with one change being an expedited schedule for filing a challenge.

Expanded Dispute Resolution Offerings

The secretariat has responded to requests from contracting states and investors to increase access to mediation by proposing an entirely new set of mediation rules. Under the proposed new rules, mediation is not bound by the jurisdictional constraints of the Convention or the requirements set out for arbitration and conciliation. Given a growing trend of including mediation in new bilateral investment treaties and contracts, increasing ICSID’s capacity to provide mediation is a welcome development.

ICSID’s conciliation rules will be significantly amended if the proposals are accepted. There are numerous proposals to introduce greater flexibility for this cooperative, nonadversarial dispute resolution process. Among them are electronic filing, enhanced confidentiality rules, bars on the collateral use of statements, encouragement of the use of a sole conciliator, and the filing of a brief initial statement, while allowing conciliators to request additional written submissions, instead of requiring the initial filing of lengthy written submissions.

Under the proposals, access to Additional Facility arbitration and conciliation is extended to cases in which both the claimant and the respondent are not ICSID contracting states or nationals of one. The Additional Facility was created in 1978 to offer arbitration and conciliation for certain disputes — usually where one of the parties is not a contracting state or national of one — that fall outside the scope of the Convention.

Electronic Filing

Under the proposed new rules, all filings are electronic unless there are special reasons for paper filing.

New Timelines

The proposals introduce optional expedited arbitration. If parties select expedited arbitration within 20 days of notice of registration, they must select a tribunal within 30 days of registration. The first session is then held within 30 days. Following that, memorials and countermemorials must be filed within 60 days with a 200-page limit. Then replies must be filed within 40 days with a 100-page limit. The hearing is held 60 days after the last written submission.

The secretariat has also proposed new timelines for issuing awards. The proposal requires that awards be rendered within 60 days of the last submission on an application for manifest lack of legal merit, within 180 days of the last submission on a preliminary objection and within 240 days of the last submission on all matters.

Security for Costs

ICSID tribunals, such as the tribunal in *RSM Production Corporation v. Saint Lucia*, have ruled that they may order security for costs under the current rules but only in “exceptional” circumstances. This strict standard is difficult to meet even in cases where ordering security for costs appears reasonable.

A proposed new rule expressly allows tribunals to order security for costs and dispenses with the exceptional circumstances requirement. Instead, tribunals are to consider the relevant party’s ability to comply with an adverse decision on costs, as well as any other relevant circumstances. A party’s failure to comply with an order compelling security for costs could lead to a tribunal suspending the arbitration for 90 days and, subsequently, ending the arbitration. As well as protecting respondents from an impecunious claimant with frivolous claims, the consideration of other relevant circumstances may forestall attempts to create judgment-proof claimants through the establishment of special purpose vehicles. States will likely welcome the new rule because they are frequently unable to fully collect on costs awards.

Clearer Instructions for Filing a Case

The proposed new rules provide a checklist of what must be included in a request to initiate arbitration and conciliation proceedings. This provides parties with better guidance on opening proceedings and may speed up their initial stages.

Conclusion

This is a fractious time for investor-state arbitration, as well as international investment law in general. In an effort to provide comfort, ICSID is engaging in the most extensive rule-revision process in the arbitral center’s history. It is further welcome that the ICSID secretariat appears willing to listen to stakeholders and to create opportunity for their input. In the last 50 years, ICSID has contributed to the development of international investment law and shaped accepted practice on the conduct of international arbitrations. Through these proposals, it may continue to do so.

The proposals, if adopted, will modernize ICSID's rules, enhance transparency, bring clarity to some contested issues (such as third-party funding and security for costs), and, in response to requests from stakeholders, expand ICSID's dispute resolution offerings. The current rules will remain unchanged until the proposals go to ICSID's Administrative Council for a vote in 2019 or 2020. The proposals may, in the short term, provide practitioners with guidance on accepted practices regarding security for costs, disclosure of third-party funding, and arbitrator impartiality and independence.

Written comments on the proposals may be submitted to icsidruleamendment@worldbank.org until Dec. 28, 2018.

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