

COMMENTARY

Summary Comments to the Proposals for Amendment of the ICSID Arbitration Rules

Submitted by IISD

This commentary is based on the second working paper on proposals for rule amendments (Working Paper #2) published by the ICSID Secretariat on March 15, 2019.

1.0 Background

In October 2016, during the 50th Annual Meeting of the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID), ICSID member states were advised of ICSID's intention to launch consultations in 2017 on potential amendments to its sets of rules and regulations.¹

Based on input from states and the public on the topics for rule amendments up to July 2018, the secretariat published proposed rule amendments in an initial working paper (WP #1) in early August 2018.

After carrying out consultations with and receiving further comments from states and the public with respect to WP #1, the secretariat issued an updated working paper (WP #2) on March 15, 2019. Volume 1 of WP #2 contains the updated proposed rules, with redline and an explanation of the changes made by the secretariat and how they respond to comments received; Volume 2 compiles the text of the rules currently proposed to ICSID member states.²

A meeting of state experts to discuss the proposed rule amendments took place in Washington, D.C. on April 7–9, 2019. The secretariat hoped to achieve broad consensus at that meeting so that a final proposal can be sent to members, allowing them to vote on the amendments in October 2019. The secretariat also welcomes comments on WP #2 by states and the public by June 10, 2019.

¹ <https://icsid.worldbank.org/en/Pages/News.aspx?CID=196>. See Box 1 for background on ICSID (the Convention, the Centre, and the Rules and Regulations).

² All documents are available at <https://icsid.worldbank.org/en/amendments>



This document provides summary comments to WP #2. This commentary focuses exclusively on select aspects of the proposed amendments to the ICSID Arbitration Rules (AR)³ and to the Arbitrator Declaration⁴ that merit further development. It also addresses some key aspects not covered in the current draft.⁵

Box 1: ICSID: The Convention, the Centre, and the Rules and Regulations

Convention on the Settlement of Investment Disputes between States and Nationals of Other States

(ICSID Convention): Formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank) and submitted on March 18, 1965 to member governments of the World Bank for their consideration with a view to its signature and ratification. It entered into force on October 14, 1966, when it had been ratified by 20 countries. To date, it has been ratified by 154 states.

International Centre for Settlement of Investment Disputes (ICSID): Established by the ICSID Convention, it provides facilities for conciliation and arbitration of investment disputes between states and nationals of other states.

The Convention is not part of the current amendment process. It is complemented by the ICSID Regulations and Rules adopted by the ICSID Administrative Council. All ICSID Regulations and Rules are part of the current amendment process.

There are different sets of ICSID Rules and Regulations, each serving distinct functions. They include the following:

Administrative and Financial Regulations: 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: Address the initiation of arbitration and conciliation under the ICSID Convention. 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: May be used to settle disputes between an ICSID contracting state and nationals of another contracting state. ICSID Convention awards are treated as a final judgement of the contracting states' courts.

Arbitration and Conciliation under the ICSID Additional Facility (AF): Are in most ways the same as those of the ICSID Convention but have different jurisdictional requirements. One of the parties—the claimant or respondent—must be a contracting state or a national of one.

Fact-Finding under the ICSID Additional Facility: 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.

Source: https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf; https://icsid.worldbank.org/en/Documents/Amendment_Background.pdf

³ WP #2, v. 1, pp. 444–624.

⁴ WP #2, v. 1, pp. 850–855

⁵ These include Expanded Review of Decisions (Section 7.0) and Third-Party Intervention and Joinder (Section 9.0).



2.0 General Remarks

The proposed amendments in WP #2 fail to appropriately address many concerns expressed by states and other stakeholders with respect to treaty-based investor–state arbitration. While signalling an effort to improve the procedural rules governing ICSID arbitration, they fall short of promoting meaningful reform of investor–state dispute settlement (ISDS).

The need for meaningful reform has been identified in various forums, including other bodies within the United Nations System, such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL). A significant number of investor–state arbitrations are conducted under ICSID rules, which thus have significant influence on the regime generally.

At a more fundamental level, many priority reforms identified by states may not be achieved through amendment of the ICSID Arbitration Rules, according to the secretariat’s responses in WP #2 to numerous suggestions received with respect to WP #1. If the analysis provided by the secretariat is considered legally accurate, ICSID member states should, in parallel to the rule amendment process, consider amending the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).

Table 1. Proposed amendments to the ICSID AR addressed in this commentary and their perceived feasibility in light of the Convention

Section below	Proposed amendment of the ICSID AR	(According to the ICSID Secretariat*)	
		Feasible in light of the ICSID Convention**	Requires amendment to ICSID Convention***
3.1	Expedited Arbitration <i>Proposed Chapter XII: Proposed AR 73–84</i>	Yes	
3.2	Time Limits Applicable to the Tribunal <i>Proposed AR 11</i>	Yes	
3.3	Tribunal-Appointed Experts <i>Proposed AR 38</i>	Yes	
3.4	Allocation of Costs by Tribunal: (1) costs-follow-the-event allocation;(2) mandatory shifting of all costs to the claimant if the claim is dismissed for manifest lack of legal merit <i>Proposed AR 50</i>		Requires amendment to ICSID Convention Article 61(2)
3.5	Security for Costs <i>Proposed AR 51</i>	Yes	
3.6	Consolidation: mandatory when triggered by the respondent <i>Proposed AR 43</i>	Yes	



Section below	Proposed amendment of the ICSID AR	(According to the ICSID Secretariat*)	
		Feasible in light of the ICSID Convention**	Requires amendment to ICSID Convention***
4.0	Counterclaims: (1) investor's consent to arbitrate a claim is deemed consent to arbitrate counterclaims; (2) counterclaims arising directly or indirectly out of the subject matter of the dispute are deemed to be within ICSID jurisdiction <i>Proposed AR 45</i>	N/A	
5.1	Prohibiting double-hatting: arbitrator-counsel dual role deemed a fact indicating a manifest lack of the qualities required in an arbitrator <i>Proposed AR 22</i>		Requires amendment to ICSID Convention
5.2	Enacting mandatory Code of Conduct applicable to all arbitrators and ad hoc annulment committee members <i>Proposed AR 12</i>	Yes	
5.3	Subjecting decisions on a proposal for disqualification to judicial review or validation by the Chair <i>Proposed AR 22</i>		Requires amendment to ICSID Convention Article 58
5.3	Allowing parties to agree on a different decision-maker (other than the co-arbitrators) on a proposal for disqualification <i>Proposed AR 22</i>		Requires amendment to ICSID Convention Article 58
5.4	Mandatory roster system: requiring party appointments be made from the ICSID Panel of Arbitrators <i>Proposed AR 15</i>		Requires amendment to ICSID Convention Article 40
6.0	Clarifying the circumstances and conditions under which provisional or interim measures may be ordered, and placing the burden on the moving party to prove their urgency <i>Proposed AR 44</i>	N/A	
7.0	Expanding grounds for review of decisions <i>No proposed rule; see WP #2, v. 1, para. 4.34</i>	N/A	
8.0	Requiring disclosure of third-party funding agreements <i>Proposed AR 13</i>	Yes	
8.0	Prohibiting certain types of third-party funding <i>Proposed AR 13</i>	Yes	



Section below	Proposed amendment of the ICSID AR	(According to the ICSID Secretariat*)	
		Feasible in light of the ICSID Convention**	Requires amendment to ICSID Convention***
9.0	Providing that tribunals may allow affected non-parties to join or intervene in arbitrations that could affect their rights <i>No proposed rule</i>	N/A	
10.0	Providing for mandatory publication of awards without the consent of the disputing parties <i>Proposed AR 61</i>		Requires amendment to ICSID Convention Article 48(5)
10.0	Adopting higher standards of transparency <i>Proposed Chapter X: Proposed AR 61–66</i>	Yes	

Notes:

*WP #2, v. 1, published by the ICSID Secretariat, does not indicate whether any other body assessed the feasibility of proposed rule amendments with or without the need to amend the ICSID Convention.

** “Yes” is indicated if the ICSID Secretariat has not stated in WP #2, v. 1 that the proposed rule amendment would require an amendment to the ICSID Convention. “N/A” (not applicable) is indicated if the rule amendment is proposed in this document but is not analyzed by the secretariat in the working paper.

*** This column indicates the proposed rule amendments which, according to the ICSID Secretariat’s assessment in WP #2, v. 1, would require an amendment to the ICSID Convention. Specific provisions are only mentioned if indicated in the working paper.

3.0 Costs and Duration

3.1 EXPEDITED ARBITRATION

A chapter on expedited arbitration (EA)⁶ forms part of ICSID’s efforts to reduce costs and the length of ICSID arbitration. While several states and practitioners support the chapter, other states “observed that the short time limits could present challenges, but did not oppose the process given the requirement of consent from both disputing parties to EA chapter.”⁷

Shorter time limits under the EA procedure would impose additional constraints on states, particularly developing countries, many of which struggle to secure the human and financial resources to defend the state in resource- and time-consuming arbitrations. The proposed rules require consent from the investor and the respondent state to opt in to the EA process, but once the state has consented, it is effectively locked in for the duration of the proceedings. The proposed rule states: “The parties may agree to opt out of an expedited arbitration by jointly notifying the Tribunal and Secretary-General of their agreement. Upon such notification, only Chapters I-XI [the regular, non-expedited procedure] shall apply to the arbitration.”⁸ ICSID member states should consider an alternative rule to allow greater flexibility for states that may need, for any number of legitimate reasons, to pull out of the expedited procedure without the investor’s consent.

⁶ Proposed Chapter XII, comprising proposed AR 73–84.

⁷ WP #2, v. 1, para. 468.

⁸ Proposed AR 84(1) on Opting Out of Expedited Arbitration.



3.2 TIME LIMITS APPLICABLE TO THE TRIBUNAL

The proposed rule on Time Limits Applicable to the Tribunal imposes a best-efforts obligation on the tribunal to “meet all applicable time limits.”⁹ If “special circumstances” prevent the tribunal from complying with a time limit, the tribunal “shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered.”¹⁰ While this new provision could have been a useful tool to reduce the length of arbitral proceedings, its wording renders it vague and non-binding on the tribunal.

ICSID member states should consider clarifying the meaning of the “special circumstances” that may prevent a tribunal from complying with a time limit. During the rule amendment process, stakeholders sought guidance of what they might mean, but the secretariat replied that “the term is intentionally left flexible as it is difficult to provide an exhaustive list.”¹¹ One example, according to the secretariat, is “if the Tribunal is diverted from drafting the Award because the parties file other requests (e.g., for provisional measures) that must be addressed in priority.”¹²

The difficulty in preparing a list should not be an impediment: there is no need for the list to be exhaustive. An illustrative list of situations or categories of situations that would warrant delay could provide useful guidance to tribunals and parties alike. For example, the list could indicate whether “special circumstances” could relate to personal circumstances of the arbitrators (e.g., illness, death of a close family member) or to the volume of documents or the number of other requests submitted by the parties (such as in the secretariat’s example above).

It could also be useful for ICSID member states to consider a list of situations or categories of situations that could not be considered “special circumstances” for purposes of the application of the rule. For example: arbitrators are not allowed to invoke caseloads in other arbitral proceedings as “special circumstances” warranting their non-compliance with time limits.

In other parts of the proposed rules, the tribunal has obligations to consult with the parties on certain matters. For example, the tribunal “shall consult” with the parties prior to making a procedural decision or order¹³ and on the appointment of a tribunal expert, including on the terms of references and fees of the expert.¹⁴ ICSID member states may consider a similar solution for the interpretation of “special circumstances” in proposed AR 11(2), by requiring the tribunal to consult with the parties on whether a particular event qualifies as a “special circumstance” that justifies delaying time limits applicable to the tribunal.

The proposed rule on Time Limits Applicable to the Parties attaches grave consequences to the non-compliance by a party with time limits:¹⁵ “An application or request filed after the expiry of the time limits in Articles 49, 51 and 52 of the Convention shall be **disregarded**. A procedural step taken or document received after the expiry of any other time limit [that is, those set by the tribunal] shall be **disregarded** [except if the other party does not object or the tribunal concludes that “special circumstances” justify the failure] [emphasis added].” In turn, the proposed rule on Time Limits Applicable *to the Tribunal*, as mentioned above, is a mere best-efforts obligation on the tribunal and attaches no consequences to the tribunal’s non-compliance with time limits.

ICSID member states may consider ways to remedy this imbalance, by removing the “best-efforts” language from proposed AR 11(1) and by providing for penalties for non-compliance by the tribunal. For example, the revised rules could provide for a reduction in fees as a consequence of a delay. Further, the secretariat could also keep a public record of unjustifiable arbitrator delays. Such transparency and penalties would provide incentives for arbitrators to comply with time limits and ensure expeditious proceedings.

⁹ Proposed AR 11(1).

¹⁰ Proposed AR 11(2).

¹¹ WP #2, v. 1, para. 115.

¹² *Id.*

¹³ Proposed AR 26(3) on Orders, Decisions and Agreements.

¹⁴ Proposed AR 38(2) on Tribunal-Appointed Experts.

¹⁵ Proposed AR 10(4).



3.3 TRIBUNAL-APPOINTED EXPERTS

The proposed rule on Tribunal-Appointed Experts expressly allows a tribunal to “appoint one or more independent experts to report to it on specific matters within the scope of the dispute.”¹⁶ Although the provision “reflects ICSID practice on Tribunal appointment of independent experts” and “similar provisions can be found in other arbitration rules,”¹⁷ it could lead to significant cost increases for the disputing parties. The rule specifies that “the Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert,”¹⁸ and the ICSID Secretariat indicates that “the parties can always agree under proposed AR 26(4) that a Tribunal-expert not be appointed.”¹⁹

Accordingly, to avoid cost increases that may be unnecessary, ICSID member states should consider explicitly stating in proposed AR 38 that tribunal experts may only be appointed subject to the agreement of both disputing parties.

3.4 ALLOCATION OF COSTS BY TRIBUNALS

ICSID Convention Article 61(2) provides that “the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

In the current rule amendment process, several states have suggested amendments with respect to the allocation of costs. Suggestions included (1) a default rule providing for a costs-follow-the-event allocation instead of full discretion of the tribunal and (2) the mandatory shifting of all costs of the proceeding to the claimant if the claim is dismissed for manifest lack of legal merit. However, as indicated in WP #2, amendments to the ICSID Arbitration Rules in this respect would not conform with the full discretion tribunals have on cost assessment and allocation under ICSID Article 61(2). ICSID member states should consider implementing the proposed changes by means of an amendment to the ICSID Convention.

3.5 SECURITY FOR COSTS

Many states face difficulties in recovering “a substantial part or any of their costs in defending unsuccessful, frivolous or bad faith claims by investors,” including when investors “used shell companies, or became impecunious.”²⁰ Under the current ICSID Arbitration Rules, tribunals may only grant security for costs through their general power to take conservatory, interim or provisional measures to preserve the parties’ rights.²¹ Proposed AR 51 innovates in adding a dedicated provision to security for costs, aimed at addressing these difficulties.

However, proposed AR 51(1) applies not only to claims by investors but to counterclaims made by states. This imposes additional hurdles on states to assert a counterclaim, by requiring states to provide security *for the costs of the investor* in defending the counterclaim (see Section 4.0 below). It must be recalled that security for costs is intended to remedy an imbalance between the parties: “states, given their permanence, [are] in a different position from investors, who might be unwilling or unable to pay.”²² While states often face problems enforcing an order of costs against claimants who declare bankruptcy, move across jurisdictions or hide their assets, investors can rely on the enforcement mechanism of the ICSID Convention to obtain satisfaction from a state. Furthermore, although investors increasingly rely on third-party funders that pay for their legal fees and

¹⁶ Proposed AR 38(1).

¹⁷ WP #2, v. 1, para. 250.

¹⁸ Proposed AR 38(2).

¹⁹ WP #2, v. 1, para. 254. Proposed AR 26(4) concerns the possibility that the disputing parties have a separate agreement on procedural matters, which the tribunal must apply.

²⁰ UN Doc. A/CN.9/964, paras. 129–130, <https://undocs.org/en/A/CN.9/964>.

²¹ ICSID Convention Article 47 and current AR 39 on Provisional Measures.

²² UN Doc. A/CN.9/964, para. 130, <https://undocs.org/en/A/CN.9/964>.



costs, such funders cannot be ordered to pay the state's costs, as they are not parties to the arbitration.²³ ICSID member states should consider providing for the security for costs *of the state only*, amending proposed Rule 51(1) accordingly.

Proposed AR 51(3) lists factors that a tribunal shall consider in determining “whether to order a party to provide security for costs.” While including such a list is useful to provide guidance to tribunals, ICSID member states may also consider adding a provision listing circumstances in which the arbitral *must* order security for costs; for example, where:²⁴

- a) there is a reason to believe that the investor will be unable to pay, if ordered to do so, a reasonable part of attorney fees and other costs to the Contracting Party which is the party to the dispute; or
- b) there is a reason to believe that the investor has structured the enterprise or divested assets to avoid the consequences of the arbitral proceedings; or
- c) the investor has disclosed the existence of a third-party funding arrangement in which the third-party funder has not committed to irrevocably undertake adverse costs liability.

Proposed AR 51(5) provides that, in case of non-compliance with a tribunal order to provide security for costs, “the Tribunal may suspend the proceeding until the security is provided,” and, after 90 days, “may, after consulting with the parties, order the discontinuance of the proceeding.” One state suggested that discontinuance of the proceeding should be mandatory, but the secretariat rejected this to balance “Tribunal discretion with due process and flexibility to account for the circumstances of the case.”²⁵ Past cases have shown that tribunals have tended to exercise their discretion and flexibility in respect of security for costs overwhelmingly in favour of investors. Indeed, there are only two known cases in which a state was granted an order for security for costs.²⁶ As such, ICSID member states should consider adopting mandatory discontinuance, to avoid prolonging proceedings at the end of which respondent states may be unable to recover their costs.

3.6 CONSOLIDATION

Foreign investors may pursue claims against host states “on different legal bases, including investment treaties and contracts, as well as in different forums, including state courts, domestic arbitration, international arbitration either institutional or ad hoc.”²⁷ Beyond the negative impacts on consistency and predictability of investment-related dispute settlement, the issue of multiple claims raises concerns because it increases the costs of arbitration proceedings and risks leading to multiple recovery of the same damage.

Responding to numerous comments on the issue, the ICSID Secretariat proposed AR 43 on Consolidation or Coordination of proceedings concerning common questions of law or fact. This could lead to more fairness and efficiency in dispute settlement and avoid the possibility of inconsistent or conflicting awards. In addition to this, ICSID member states could determine that consolidation should be mandatory for the tribunal when triggered by the respondent state, allowing for greater cost savings and expediency of arbitral proceedings.²⁸

²³ See <https://www.iisd.org/library/iisd-best-practices-series-security-costs>.

²⁴ See <https://www.iisd.org/library/iisd-best-practices-series-security-costs>.

²⁵ WP #2, v. 1, para. 369.

²⁶ RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10) and Serafin García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela, (UNCITRAL, Caso CPA No. 2013-3)

²⁷ UN Doc. A/CN.9/964, para. 44, <https://undocs.org/en/A/CN.9/964>.

²⁸ WP #2, v. 1, paras. 305, 307.



4.0 Counterclaims

Under the current ICSID Convention and AR, for a respondent state to bring a counterclaim against an investor, three requirements must be met: (1) the parties must consent to submit counterclaims to ICSID arbitration; (2) the counterclaim must arise directly out of the subject matter of the dispute; and (3) the counterclaim must be within the jurisdiction of ICSID.²⁹

The way these requirements have been interpreted made counterclaims virtually impossible in treaty-based investor–state arbitration, for three reasons. First, since investors are not party to the treaty giving rise to the arbitration, and depending on the underlying treaty, it is quite difficult to demonstrate their implied consent to counterclaims. Investors also lack any incentive to provide explicit consent to counterclaims when submitting their request for arbitration. Second, since very few investment treaties explicitly impose substantive obligations on investors, most counterclaims raised by respondent states may not be understood to arise directly out the subject matter of the dispute. This means that they may not be viewed as treaty-based but instead as relying on other instruments such as domestic law or promises made by investors. Third, the stringent jurisdictional requirement for bringing counterclaims has made it impossible for a counterclaim to survive on its own if the original claim brought by the investor is dismissed on jurisdictional grounds.³⁰

Therefore, member states should seize the opportunity presented by the rule amendment process to revise both the ICSID Convention and the ICSID Arbitration Rules so as to modify the requirements for submitting and maintaining counterclaims and provide clarification. Revised rules in both instruments should address the peculiar nature of treaty-based investor–state disputes and ensure that respondent states can exercise their right to bring counterclaims in practice. In particular, member states could consider amending ICSID Convention Articles 25 and 46 as needed with a view to providing that:

1. consent of an investor to arbitrate a claim shall also be deemed consent to arbitrate any counterclaims brought by the state, provided that such counterclaims are within ICSID jurisdiction; and that
2. any counterclaims arising directly or indirectly out of the subject matter of the dispute, even when based on legal instruments other than the instrument invoked by the investor in its claim, are deemed to be within ICSID jurisdiction.

5.0 Independence and Impartiality

Ensuring that investment arbitrators are independent and impartial is among the most fundamental requirements if arbitration is to be perceived as a legitimate means to resolve investor–state disputes. The community of international lawyers acting in investment arbitrations—whether as arbitrators or as counsel—is relatively small. In this context, high standards to avoid actual or apparent conflicts of interest of arbitrators, and ensuring that they can render decisions independently and without bias is critical. These issues have become priorities for states and other stakeholders concerned with the fairness and legitimacy of investment arbitration.

An increasing number of modern investment treaties and models adopt approaches aimed at raising independence and impartiality standards for investment arbitrators. For example, the Canada–European Union

²⁹ ICSID Convention Article 25(1) provides: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” In addition, ICSID Convention Article 46 provides that “[e]xcept as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.”

³⁰ See, for example, *Teinver, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, July 21, 2017, paras. 1047–1067. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/italaw9235.pdf>; and *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 7, 2011, paras. 859–877. Retrieved from <https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf>



Comprehensive Economic and Trade Agreement (CETA),³¹ in addition to creating a standing tribunal for the adjudication of investor–state disputes, sets comprehensive ethics standards for tribunal members. CETA Article 8.30 determines that tribunal members must comply with the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration. Importantly, it also provides that, “upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.” This provision was designed to resolve the very frequent and critical “double-hatting” problem—lawyers simultaneously serving as arbitrators and counsel in investment arbitrations. In addition, instead of giving co-arbitrators the power to decide on challenges to a tribunal member, CETA gives such decision-making power to the President of the International Court of Justice. Another example is the 2019 Dutch model BIT, which establishes several professional and ethical requirements for tribunal members, including compliance with the IBA guidelines and a clear prohibition on double-hatting: “Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.”³²

ICSID member states should revise ICSID rules to provide for stricter standards of independence, impartiality and avoidance of conflicts of interest of arbitrators. They should begin by amending the ICSID Convention and rules to forbid the arbitrator–counsel dual role. They could then incorporate by reference an existing set of ethics rules for arbitrators or develop ICSID’s own code of conduct for arbitrators.

5.1 DOUBLE-HATTING: ARBITRATOR–COUNSEL DUAL ROLE

Proposed AR 26(3)(b) on Acceptance of Appointment requires a party-appointed arbitrator to “provide a signed declaration in the form published by the Centre, addressing matters including the arbitrator’s independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.” The declaration referred to is the Arbitrator Declaration contained in WP #2, v. 1, p. 850–851. Instead of prohibiting the arbitrator–counsel dual role, it merely requires the arbitrator to disclose “investor–state cases in which [the appointee has] been or [is] currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator, or expert” (Arbitrator Declaration, para. 4(b)).

Some stakeholders have suggested amending the grounds and standard of disqualification in AR 22 on Decision on the Proposal to Disqualification, or providing that double-hatting “be deemed a fact indicating a manifest lack of the qualities required in an arbitrator.” However, the secretariat rejected these proposals, arguing that the grounds for disqualification are established in the ICSID Convention and their alteration would require an amendment to the treaty, not the ARs.³³ ICSID member states should keep these considerations in mind and consider discussing amendments to the ICSID Convention in this regard.

5.2 CODE OF CONDUCT

Other stakeholders proposed including principles to regulate arbitrator conflicts of interest in proposed AR 12(1) on Constitution of the Tribunal. The secretariat again failed to adopt the suggestion, arguing that “ICSID and UNCITRAL Working Group III Secretariats are currently working on a background paper concerning a Code of Conduct for arbitrators. This Code could be incorporated in ICSID cases through the Arbitrator Declaration, once consensus is reached.”³⁴ ICSID member states should ensure expedient agreement on a code of conduct that is binding on all arbitrators and annulment committee members, building on existing instruments.³⁵

³¹ Comprehensive Economic and Trade Agreement between Canada and the European Union, Oct. 30, 2016. Retrieved from <http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf> [hereinafter CETA].

³² Dutch Model BIT, March 3, 2019, Art. 20(5). Retrieved from <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>

³³ WP #2, v. 1, para. 183.

³⁴ WP #2, v. 1, para. 121.

³⁵ See, for example, the CETA standards and the IBA code mentioned above.



5.3 DISQUALIFICATION OF ARBITRATORS

Finally, stakeholders proposed that that “decisions on a proposal [for disqualification under proposed AR 22] should be subject to judicial review or validated by the Chair,” and that “the non-challenged arbitrators should only decide the proposal if the parties agree, or that the parties be able to agree on a different decision-maker.”³⁶ By removing the decisions on challenges to arbitrators from the co-arbitrators or the Chair to another decision-maker, these proposals could enhance the (perceived) independence and impartiality of ICSID tribunals. However, the ICSID Secretariat rejected these proposals, pointing to ICSID Convention Article 58: “The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be [...]” ICSID member states should keep these proposals in consideration and evaluate the possibility of amending the ICSID Convention accordingly.

5.4 PARTY APPOINTMENTS

The disputing parties’ right to appoint arbitrators to arbitral tribunals is one of the factors that have led to concerns about the independence and impartiality of arbitrators and the legitimacy of the investment arbitration regime. In deciding on an arbitrator appointment, disputing parties tend to consider whether the candidate is likely to decide in their favour. Therefore, even when the arbitrator is not actually biased in their favour, there is an unavoidable appearance of bias. Individual arbitrators may be inclined to decide in the interest of the appointing party or be more generally inclined to decide either in favour of claimant investors or respondent states. These perceptions taint the credibility of the arbitration regime.

To avoid these problems, many modern investment treaties and treaty models are moving away from party-appointed arbitrators. An example is the EU proposal for an investment court system, incorporated in the Canada–EU CETA and the Vietnam–EU free trade agreement (FTA). In that proposal, the divisions of tribunal members that hear specific cases are appointed not by the disputing parties, but by the president of the permanent tribunal, who draws names from a pre-existing roster of tribunal members. Appointments are made “on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.”³⁷ Under the 2019 Dutch model BIT, all tribunal members are appointed (after consultation with the disputing parties) by an appointing authority, which is the Secretary-General of ICSID in case of arbitrations pursuant to the ICSID Convention or the Additional Facility. However, “in making appointments the Secretary-General of ICSID is not limited to the Panel of Arbitrators.”³⁸

In revising its arbitration rules, ICSID member states should consider providing for alternatives to the existing system of party-appointed arbitrators. This would distance the composition of the arbitral tribunal from the disputing parties, and help to resolve the issue of apparent bias of party-appointed arbitrators. ICSID could consider a roster system under which arbitrators are drawn only from a fixed list of potential arbitrators. Tribunals to hear cases would be formed either through a lottery system or by nomination by an independent appointing authority. In the latter case, the appointing authority should be independent not only from the disputing parties and non-disputing state parties, but also from the ICSID Secretariat and the World Bank Group.

Stakeholders have suggested that proposed AR 15³⁹ be revised to require that “any appointments by the parties under this provision be made from the ICSID Panel of Arbitrators.” This would implement the roster system with arbitrators drawn from a compulsory list, as suggested above (although not by lottery or nomination by an independent authority). The ICSID Secretariat, however, rejected the suggestion,⁴⁰ as it would contradict ICSID Convention Article 40: “(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.” Once again, ICSID member states should consider amending the ICSID Convention to establish a roster system, moving away from the party appointment.

³⁶ WP #2, v. 1, para. 184.

³⁷ CETA Article 8.27(7).

³⁸ Dutch Model BIT, Art. 20(1)–(2).

³⁹ Appointment of Arbitrators of a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention.

⁴⁰ WP #2, v. 1, para. 148.



6.0 Interim Measures

Current AR 39 allows tribunals to “recommend any provisional measures which should be taken to preserve the respective rights of either party,” upon a moving party’s request specifying “the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

Proposed AR 44(1) on Provisional Measures continues to allow such measures, and includes a non-exhaustive list of the types of measures that tribunals may recommend. Proposed AR 44(3) clarifies that, in deciding whether to recommend provisional measures, the tribunal shall consider whether they are urgent and necessary, the effect they may have on each party, and all other relevant circumstances.

Given the extraordinary nature of such relief, a revision of the ICSID Arbitration Rules should further clarify the narrow circumstances and precise conditions under which these provisional or interim measures may be ordered, and should place the burden on the moving party to prove its need for and the urgency of the measure requested.

Further, the revised rules should specify the safeguards to prevent a disputing party from abusing the use of these measures. This could include imposing a maximum duration of each provisional or interim measure granted; requiring the moving party to post financial or other forms of security to cover potential costs and damages caused by their request; and requiring the moving party to fully disclose any other relevant information that the tribunal may find relevant for its determination of the request, even if the information may not be in their interest.

7.0 Expanded Review of Decisions

Disputing parties’ rights to challenge awards under the ICSID Arbitration Rules are limited. Although the ICSID Convention allows the party to ask for the constitution of an “annulment committee,”⁴¹ this only provides the disagreeing party a drastic and limited remedy. The ad hoc committee may only choose between leaving the original award intact or declaring it void (either fully or in parts),⁴² and may not substitute its own decision on the merits.⁴³ The only redress open to a party whose award has been annulled is to resubmit the dispute to another arbitral tribunal.

The annulment committee’s power of review is also strictly limited.⁴⁴ For example, annulment committees have declared that even if an award is based on manifest errors of law or fact, the award must nevertheless stand because such errors are not a ground for annulment under the ICSID Convention.⁴⁵

The ICSID Secretariat indicated that “a question was received as to whether the Centre had further considered the establishment of a mechanism for appeal of awards in investment arbitration.”⁴⁶ While the secretariat made no proposals in this respect, ICSID member states could consider revising ICSID Convention Articles 50–52 to expand the grounds of review of decision in order to ensure consistency and correctness of arbitral awards in law and fact.

⁴¹ ICSID Convention, Art. 52.

⁴² Id.

⁴³ As noted by the annulment committee in *MTD v. Chile*: “[T]he role of an ad hoc committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new one.”

MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile, ICSID Case No. ARB/01/7, decision on the application of annulment, para. 54, Mar. 21, 2007.

⁴⁴ ICSID Convention, Art. 52(1).

⁴⁵ See, for example, *MINE v Republic of Guinea*, ICSID Case No ARB/84/4, decision on annulment, Dec. 14, 1989; *Amco Asia Corp. et al v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application by Parties for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990 and the Application by Respondent for Annulment of the Supplemental Award of October 17, 1990, Dec 17, 1992; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment, Sep. 25, 2007.

⁴⁶ WP #2, v. 1, para. 434.



8.0 Third-Party Funding

Third-party funding (TPF) is becoming increasingly common in investor–state arbitration. TPF is “generally defined as an agreement by an entity (the ‘third-party funder’) that is not a party to a dispute to provide funds or other material support to a disputing party (usually the claimant or a law firm representing the claimant), in return for a remuneration, which is dependent on the outcome of the dispute.”⁴⁷ TPF reinforces the structural imbalance in the ISDS regime as states typically do not have access to it. This is because TPF is predicated on the funder receiving a portion of the ultimate award, and a state can virtually never be the recipient of an arbitral award—except potentially in light of a counterclaim, which are very difficult to bring and maintain, as noted above.⁴⁸ In the context of UNCITRAL deliberations on ISDS reform,⁴⁹

it was said that the practice of third-party funding raised ethical issues, and might have negative impacts on ISDS proceedings. It was further pointed out that third-party funders might gain excessive control or influence over the arbitration process, which could lead to frivolous claims and discouragement of settlements (A/CN.9/935, para. 89). Issues raised in relation to third-party funding include potential conflicts of interest, third-party control and influence on the ISDS proceedings, impact on confidentiality, on costs and security for costs, as well as on speculative, marginal and/or frivolous claims.

In the same context, “the following possible solutions were suggested for further consideration: (i) prohibiting third-party funding entirely in ISDS cases; (ii) regulating third-party funding, for example, by introducing mechanisms to ensure transparency in the arrangements (which could also assist in ensuring the impartiality of the arbitrators).”⁵⁰

Proposed AR 13 narrowly focuses on “avoid[ing] conflicts of interest between arbitrators and third-party funders by requiring disclosure of the existence of third-party funding and the name of the funder” (WP #2, v. 1, para. 128). This seems minimalistic. ICSID member states should consider at a minimum expanding the disclosure requirements, by requiring disclosure of the entire funding agreement, as well as requiring the tribunal to take into account the existence of TPF in assessing a claim for security for costs, as proposed above. States should also ensure that arbitrators are not permitted to act as advisors to third-party funders, under the proposals related to arbitrator impartiality.

However, whether minimal or extensive, transparency in third-party funding is insufficient to address the broader concerns identified beyond arbitrators’ conflicts of interest. The mere existence of third-party funding has negative consequences in that it allows speculative financiers to have “a stake in the outcome and a voice in the determination of which cases to bring, which arbitrators to choose and which cases to settle.”⁵¹ Recognizing these negative consequences, member states should consider banning certain types of TPF entirely from ICSID arbitration.

9.0 Third-Party Intervention and Joinder

Due to the public interest involved in their resolution, investor–state arbitration proceedings and decisions often have impacts beyond the disputing parties and their rights, also affecting non-party stakeholders. Among these are individuals affected by foreign investment activities, local communities or Indigenous Peoples in the area where the investment was made, labour unions, environmental protection entities and civil society organizations.

Many domestic courts or processes offer avenues for these stakeholders to intervene in disputes between companies and the government or to bring a claim against a government or a company in case of harm. Some arbitral institutions have also begun to expand opportunities for third-party joinder.⁵²

⁴⁷ UN Doc. A/CN.9/WG.III/WP.157, para. 5, <https://undocs.org/en/A/CN.9/WG.III/WP.157>.

⁴⁸ UN Doc. A/CN.9/964, para. 120, <https://undocs.org/en/A/CN.9/964>.

⁴⁹ UN Doc. A/CN.9/WG.III/WP.157, para. 16, <https://undocs.org/en/A/CN.9/WG.III/WP.157>.

⁵⁰ UN Doc. A/CN.9/WG.III/WP.157, para. 37, <https://undocs.org/en/A/CN.9/WG.III/WP.157>.

⁵¹ See <https://www.iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia>.

⁵² See Manuel Gómez Carrión, *Joinder of Third Parties: New Institutional Developments*, ARB. INT’L. (April 2015).



However, at ICSID meaningful participation of affected non-party stakeholders is very limited. Provisions on transparency and on third-party submissions (*amicus curiae*), while useful and necessary, are insufficient to allow affected third parties to participate in the proceeding in a meaningful manner. The complexity of investment disputes nowadays requires more sophisticated tools for all affected parties to assert their rights.

In the current rule amendment process, the ICSID Secretariat has not moved beyond the existing approach of *amicus curiae* submissions. Proposed AR 65 on Submission of Non-disputing Parties, as the ICSID Secretariat acknowledges, “maintains the two-step process in the current rules whereby permission to file must be obtained prior to filing the substantive [non-disputing party] submission.”⁵³ Even when permitting the submission, the tribunal is entitled (but not obligated) to “provide the non-disputing party with access to relevant documents filed in the proceeding,” but is forbidden from doing so if either party objects.⁵⁴ This imposes significant limitations on the ability of *amici curiae* to make meaningful submissions.

Analyzing and building on domestic law provisions on third-party intervention and joinder, member states should work on revising the ICSID Convention and Arbitration Rules so that ICSID tribunals—whether at their discretion or on specified grounds—may allow affected non-parties to join or intervene in arbitrations that could affect their rights. By implementing potential revisions in this area, ICSID member states would help prevent tribunals from rendering decisions that negatively affect the rights of third parties.

10.0 Transparency

The fact that investor–state arbitration invariably involves a public party requires a high level of transparency in proceedings, to allow citizens and other stakeholders of the states involved—both the home state and the host state—to be aware of the implications of disputes. It also allows citizens to have access to relevant information to exercise democratic oversight of their governments’ action and to monitor states’ obligation to act transparently. Transparency in proceedings has become even more important as investor–state arbitration tribunals often decide issues involving public interests affecting a wide range of stakeholders and high claims for monetary damages with significant impacts on government budgets and spending.

After a six-year negotiation process, UNCITRAL formally adopted in July 2013 the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, in force since April 2014.⁵⁵ By requiring publication of the notice of arbitration, the details of the case, all written submissions and claims and all decisions of the arbitral tribunal, the UNCITRAL Transparency Rules have been referred to by treaties as an acceptable standard for investment arbitration. Furthermore, transparency in investor–state arbitration is becoming the rule rather than the exception in modern investment treaties and treaty models. CETA, for example, incorporates the UNCITRAL Transparency Rules and builds on them, including additional provisions to further strengthen transparency in proceedings.

In its proposed Chapter X on Publication, Access to Proceedings and Non-Disputing Party Submissions, the ICSID Secretariat regrettably shies away from incorporating the same or higher transparency standards than those of the UNCITRAL Transparency Rules.

ICSID Convention Article 48(5) requires consent of the parties to publish awards; accordingly, the secretariat rejects as impossible the proposals of several states who urged mandatory publication of awards.⁵⁶ Although the secretariat notes that “a proposal to amend Art. 48 of the Convention could be discussed after the current rule amendment process concludes if Members would like to address this,”⁵⁷ ICSID member states may wish to consider amending the ICSID Convention in this respect even before or concomitantly with the current rule amendment process.

⁵³ WP #2, v. 1, para. 423.

⁵⁴ Proposed AR 65(6).

⁵⁵ International Institute for Sustainable Development (IISD). (2017). *Transparency and the UNCITRAL arbitration rules*. Retrieved from <http://www.iisd.org/project/transparency-and-uncitral-arbitration-rules>

⁵⁶ WP #2, v. 1, para. 406.

⁵⁷ WP #2, v. 1, para. 407.



The ICSID Arbitration Rules were revised in 2006—for the first time in 40 years, since the ICSID Convention came into force in 1966—and that revision process addressed some of the concerns regarding transparency in investor–state arbitration proceedings. However, in light of the recent developments described above, further improvements are necessary and urgent. Investor–state arbitration should not remain fastened to a commercial arbitration model traditionally built on notions of confidentiality. Instead, ICSID member states should take a leadership role in revising the ICISD AR and, where necessary, the ICSID Convention to go beyond recent reform initiatives and ensure higher standards of transparency. By doing so, ICSID member states would signal to investors and citizens that ICSID arbitration can respond to modern developments and appropriately address widely voiced concerns about transparency.

© 2019 The International Institute for Sustainable Development
Published by the International Institute for Sustainable Development.

INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT

The International Institute for Sustainable Development (IISD) is an independent think tank championing sustainable solutions to 21st-century problems. Our mission is to promote human development and environmental sustainability. We do this through research, analysis and knowledge products that support sound policy-making. Our big-picture view allows us to address the root causes of some of the greatest challenges facing our planet today: ecological destruction, social exclusion, unfair laws and economic rules, a changing climate. IISD's staff of over 120 people, plus over 50 associates and 100 consultants, come from across the globe and from many disciplines. Our work affects lives in nearly 100 countries. Part scientist, part strategist—IISD delivers the knowledge to act.

IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Province of Manitoba and project funding from numerous governments inside and outside Canada, United Nations agencies, foundations, the private sector and individuals.

Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700
Website: www.iisd.org
Twitter: @IISD_news

