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# ICSID Amends its Arbitration Rules

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## ICSID makes changes in the face of public criticism

The recent explosion in investor-state arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”), the arbitration arm of the World Bank, has been the subject of much discussion. Indeed, as a result of the perceived impact of investor-state arbitration on public interests, criticism has arisen in the media and elsewhere regarding certain aspects of ICSID arbitration. For example, an editorial on September 27, 2004 in *The New York Times* entitled “The Secret Trade Courts” offered the following views: “Some arbitration is necessary in international trade... But the arbitration process itself is often one-sided, favoring well-heeled corporations over poor countries, and must be made fairer than it is today. Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt...There is no appeal. And the rules of the game are such that when companies seek to recover damages, arbitration panels tend to focus narrowly on the issue of whether a company’s profits were affected by a government action. They need not consider whether the action or law in question was necessary to protect the environment or public health, or even to stop a corporation’s harmful behavior.

Companies also use arbitration to insulate themselves from the risks of doing business...The trade agreements that set the rules should direct arbitration panels to take a much broader view—to consider not just corporate interests but the needs of governments and citizens. The panels should also be required to invite a wider range of views. Because their decisions have great public impact, arbitration panels owe the public a hearing.”<sup>1</sup> Whether one agrees or disagrees with all or some of these views, it is in the face of such criticism that ICSID recently amended its Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration Rules”), its Arbitration (Additional Facility) Rules (“Additional Facility Arbitration Rules”),<sup>2</sup> as well as its Administrative and Financial Regulations.<sup>3</sup> The changes came into effect on April 10, 2006 and govern ICSID arbitrations where the consent to arbitration is given on or after that date, unless the parties agree otherwise.<sup>4</sup> This article discusses the amendments and their effect on arbitration proceedings conducted under the new rules.

## The amendments

The amendments made to ICSID’s rules and regulations address (1) the ability of non-parties to intervene in arbitration proceedings and attend hearings; (2) the public disclosure of ICSID awards; (3) the independence of arbitrators and

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the fees arbitrators can charge; and (4) the ability to use fast-track procedures to obtain interim relief and have groundless claims dismissed.

### Ability of non-parties to intervene and attend hearings

There has been a longstanding debate as to whether non-parties with an interest in an investment dispute should be allowed to make amicus curiae submissions in arbitrations held under the auspices of ICSID. Amicus curiae or “friend of the court” means a “person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter”.<sup>5</sup> Amicus curiae submissions are accepted in certain circumstances by the national courts in some jurisdictions (e.g. the United States, England, Canada, and Australia), and are made by non-parties such as public interest groups, the media, legal associations, or states where the dispute at issue concerns a larger part of society than the persons or entities technically party to the proceedings.

New r.37 of the ICSID Arbitration Rules<sup>6</sup> incorporates amicus curiae practice into ICSID arbitration, subject to certain conditions. It is up to the tribunal to decide whether to allow an amicus curiae submission, and, while they must be consulted, the parties do not have a veto right. In determining whether to allow an amicus curiae submission, the tribunal must consider, among other things: (1) whether the submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight different from that of the parties; (2) whether the submission would address a matter within the scope of the dispute; and (3) whether the proposed amicus curiae has a significant interest in the proceeding. In addition, the tribunal must ensure that the amicus curiae submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to comment on the submission.

This new practice thus allows non-parties with an interest in an ICSID arbitration an opportunity to inform the tribunal of their position and the impact of the tribunal’s ruling on non-parties.

With respect to attendance by non-parties at ICSID arbitration hearings, r.32 of the 2003 ICSID Arbitration Rules gave the tribunal the authority to allow non-parties to attend the arbitration hearings in an ICSID arbitration, but only with the consent of the parties. During the drafting process of the recent amendments, it was proposed that the tribunal be given the right to open the hearings over the objection of the parties, with only consultation of the parties being required. Instead of going as far as what was proposed, new r.32 of the ICSID Arbitration Rules provides that “[u]nless either party objects” the tribunal, after consultation with ICSID’s Secretary-General, may allow non-parties to attend or observe all or part of the arbitration hearings. While explicit consent of the parties is no longer necessary, each party retains a veto right by way of objection to non-parties being allowed to attend.<sup>7</sup>

### Public disclosure of awards

The 2003 version of r.48 provided that “[t]he Centre *may*...include in its publications excerpts of the legal *rules applied* by the Tribunal” (emphasis added). Rule 48 of the ICSID Arbitration Rules has been amended so that “[t]he Centre *shall*...promptly include in its publications excerpts of the legal *reasoning* of the Tribunal”<sup>8</sup> (emphasis added).

This amendment thus makes publication of ICSID awards mandatory and expands publication from excerpts of the legal rules applied by the tribunal to excerpts of the legal *reasoning* of the tribunal. This expanded publication makes ICSID awards, and the reasoning underlying the outcome, more accessible to the public. It also ensures the existence of a body of case law that can be drawn upon to attempt to persuade an ICSID tribunal to reason in a manner consistent with reasoning by other ICSID tribunals. While the decision of one ICSID tribunal is not binding on another, such decisions can be used as persuasive authority and guidance as to how another tribunal has dealt with the same or a similar issue.

### Independence of arbitrators and the fees arbitrators can charge

Rule 6 of the current and former ICSID Arbitration Rules requires each arbitrator, before or at the first

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session of the tribunal, to sign a declaration of independence. However, the 2003 ICSID Arbitration Rules required that arbitrators disclose only their “past and present professional, business and other relationships” with the parties. The 2006 version of r.6 contains two additional requirements.<sup>9</sup>

First, the arbitrators are now also required to disclose “any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party”. This broad subjective test is similar to the one found in international commercial arbitration rules.<sup>10</sup> Secondly, r.6 of the ICSID Arbitration Rules now explicitly provides that the obligation to disclose relationships or circumstances which might affect the arbitrators’ independence or impartiality is a continuing one and that the arbitrators must promptly notify ICSID of any such relationship or circumstance that arises during the course of the arbitration.

Regulation 14 of the Administrative and Financial Regulations, which supplement the ICSID Arbitration Rules and the Additional Facility Arbitration Rules,<sup>11</sup> provides that each arbitrator on the tribunal shall receive, among other things, a per diem fee for each day on which he or she participates in meetings of the tribunal, and a per diem fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings. The amount of these per diem fees is set, from time to time, by the ICSID Secretary-General, with the approval of the Chairman of ICSID’s Administrative Council (i.e. the President of the World Bank).<sup>12</sup> The per diem fee is currently \$3,000.<sup>13</sup>

The 2003 Administrative and Financial Regulations did not specifically provide for the possibility of higher fees; however, in practice, tribunals constituted under the auspices of ICSID sometimes requested the parties to agree to higher fees. This practice was perceived by some parties to put undue pressure on them to accept to pay such higher fees.

In response to this concern, reg.14 now specifically provides that a request by a tribunal for higher fees must be made through the Secretary-General rather than directly to the parties. A proposal that such requests occur only “in exceptional circumstances” was not adopted.

## Fast-track procedures for interim relief and dismissing groundless claims

Rule 39 of the ICSID Arbitration Rules now allows a party to request provisional measures “after the institution of the proceedings,” whereas the 2003 version of r.39 allowed such a request only “during the proceedings”.<sup>14</sup> The difference is that, under the new version of the ICSID Arbitration Rules, a party may file a request for provisional measures even before the tribunal is constituted. While it is still the tribunal that decides on such a request, and such a request will still be treated only once the tribunal has been constituted, the new rule allows ICSID’s Secretary-General to fix a briefing schedule. Accordingly, a request for provisional measures can be fully briefed while the tribunal is being constituted and can be considered by the tribunal promptly upon its constitution. Rule 41 of the ICSID Arbitration Rules has also been amended to allow for a preliminary objection that a claim is “manifestly without legal merit” (see r.41(5) and (6) of the ICSID Arbitration Rules).<sup>15</sup> Therefore it is now possible to use a fast-track procedure to seek the dismissal of claims that, on their face, are without legal merit. New r.41(5) provides that “[u]nless the parties have agreed to another expedited procedure for making preliminary objections”, a preliminary objection that a claim is manifestly without legal merit must be made no later than 30 days after the constitution of the tribunal and in any event before the first session of the tribunal. The party making the objection must specify as precisely as possible the basis for the objection, and the other parties must be given an opportunity to comment. The tribunal must notify the parties of its decision on the objection at its first session or promptly thereafter. Of course, the new preliminary objection does not prevent a party from also filing an objection on the basis of lack of jurisdiction or from objecting, in the course of the proceedings, that a claim lacks legal merit.

New r.41(6) provides that a decision by the tribunal that *all* claims are manifestly without legal merit must be rendered in an award. In other words, a decision by the tribunal that only part of the claims are manifestly without legal merit is not required to be rendered by way of an award. This is relevant as an award is subject to immediate enforcement and/or annulment proceedings.

### Conclusion

These changes to ICSID's rules and regulations were made following an extensive and long consultation process. They arise from a desire to improve and streamline the ICSID arbitration process in the face of criticism such as that found in the above-quoted editorial from *The New York Times*. The amendments demonstrate an effort to improve confidence in the ICSID arbitration process and to make it less private and confidential. Nonetheless, some are disappointed that the amendments do not go as far as the original proposals that were discussed.<sup>16</sup> One significant change that was discussed but was not adopted in the final amendments was the creation of an appeal facility within ICSID with the authority to review awards. This proposal was generally perceived as premature. As a result, the annulment procedure found in r.52 of the ICSID Arbitration Rules and Art.52 of the ICSID Convention remains the only recourse against an award rendered under the ICSID Arbitration Rules.<sup>17</sup>

Some would say that not adding an appeal facility is a positive development because this maintains the quite limited grounds on which an ICSID award can be annulled, and one of the main selling features of ICSID arbitration as compared to ordinary international commercial arbitration is that an ICSID award is

by virtue of the Art.54 of the ICSID Convention recognised as binding and enforceable as if it were a final judgment or (e) that the award has failed to state the reasons on which it is based. Annulment requests are dealt with by an ad hoc committee of three persons appointed by the Chairman of ICSID's Administrative Council (in other words, the President of the World Bank—see Art.5 of the ICSID Convention) from ICSID's Panel of Arbitrators. of a court in each contracting state and does not have to be recognised and enforced by national courts. In any event, whether one is satisfied or not with the amendments, it will be interesting to see how they are applied and what impact they have on the evolution of ICSID arbitration and its place in international arbitration generally.

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1 "The Secret Trade Courts", *New York Times*, September 27, 2004, p.26, col.1.  
2 The ICSID Arbitration Rules govern arbitration of investment disputes between contracting states and nationals of other contracting states, that is, disputes which fall within the scope of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The Additional Facility Arbitration Rules are Sch.C to the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes ("Additional Facility Rules") and cover arbitration administered by the ICSID Secretariat falling outside the scope of the ICSID Convention. The Additional Facility Arbitration Rules apply where the parties have agreed that the dispute shall be referred to arbitration under those Rules, and the dispute is an investment dispute between parties one of which is not a contracting state or a national of a contracting state, or at least one of the parties is a contracting state or a national of a contracting state but the dispute does not arise directly out of an investment (provided that the underlying transaction is not an ordinary commercial transaction).  
3 See [www.worldbank.org](http://www.worldbank.org) for the new version of these rules and regulations.  
4 See Art.44 of the ICSID Convention. See also ICSID's press release dated April 5, 2006 at [www.worldbank.org](http://www.worldbank.org).  
5 As defined in *Black's Law Dictionary* (8th edn, Thomson West, 2004), p.93.  
6 The Additional Facility Arbitration Rules have not been amended in this regard.  
7 The corresponding Art.39 of the Additional Facility Arbitration Rules has been amended in the same way.

8 The corresponding Art.53 of the Additional Facility Arbitration Rules has also been amended in the same way.  
9 The corresponding Art.13 of the Additional Facility Arbitration Rules has been amended in the same way.  
10 For example, Art.7.2 of the Rules of Arbitration of the International Chamber of Commerce ("ICC") provides that a prospective arbitrator shall disclose in writing to the ICC Secretariat "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties".  
11 Additional Facility Rules, Art.5, provides that reg.14 of the Administrative and Financial Regulations applies *mutatis mutandis* in respect of arbitration proceedings under the Additional Facility Arbitration Rules.  
12 Art.5 of the ICSID Convention.  
13 Memorandum on the Fees and Expenses of ICSID Arbitrators, dated July 6, 2005.  
14 The corresponding Art.46 of the Additional Facility Arbitration Rules has not been amended and continues to provide that a request for provisional measures may be made "at any time during the proceeding".  
15 The corresponding Art.45(6) and (7) of the Additional Facility Arbitration Rules has been amended in the same way.  
16 See for example, "'Watered-down' changes to ICSID investment arbitration," [www.brettonwoodsproject.org](http://www.brettonwoodsproject.org).  
17 Convention, Art.52, provides that either party may request annulment of an award by an application in writing to the Secretary-General of ICSID on one or more of the following grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure;