Celebrating the Semicentennial: New Proposed Changes to the ICSID Arbitration Rules

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In October 2016, the ICSID advised the Member States of the ICSID Convention that it was beginning the fourth amendment process since the enactment of the definitive ICSID Arbitration Rules in 1967. The first amendment to the Rules took place in 1984 and mainly referred to the possibility to resort to national courts for provisional measures, if so agreed by the parties in the instrument recording their consent, and to the publication of excerpts of ICSID arbitral awards (concerning the 'legal rules applied by the Tribunal'). The amendments of 2003 reflected the practice of the Secretariat since the enactment of the 1984 Rules, such as the requirement for juridical person to state 'that it has taken all necessary internal actions to authorize the request'. The 2006 Rules considered a broader amendment process by tackling the provisional measures, the preliminary objections, the transparency rules, the establishment of an appeals panel, the independence of arbitrators etc. While some of the suggested amendments did not make it into the final draft of the 2006 Rules, they nevertheless generated a constructive debate in the arbitration community (see, for example, the appeals mechanism). (See Crina Baltag, *The ICSID Convention: A Successful Story – The Origins and History of the ICSID* in Crina Baltag (ed.), ICSID Convention After 50 Years: Unsettled Issues, 2017, Wolters Kluwer)

The current amendment process is intended 'to modernize the rules based on case

experience'. The ultimate goal, as suggested by the ICSID Secretariat is to 'make the process increasingly time and cost effective while maintaining due process and a balance between investors and States'. The Secretariat highlighted the areas where the amendments could be considered and background papers would be prepared for this purpose: appointment of arbitrators, including a code of conduct for them and the challenges to arbitrators; third party funding; consolidation; preliminary objections and first session; witnesses; experts and other evidence; discontinuance of a case; awards and dissenting opinions; security for costs and security for stay of enforcement of awards ordered by the ad hoc committee; allocation of costs; annulment; publication of decisions and orders (compared to the current provisions referring to awards); as well as the modernization of the means of communication (apparently with a view of making the procedure 'less paper-intensive and more environmentally friendly').

While the future of the ISDS is constantly challenged, it is perfectly legitimate and opportune for the ICSID to listen to its users and implement the developments of the ISDS practice after more than 600 arbitration cases. No doubt, the ICSID and the ICSID Convention shaped the international law and contributed to the establishment of an investment law. In the prophetic words of Aron Broches, the central figure behind the creation of the ICSID, '[t]he wide interest shown by actual and potential investors, as well as by official development authorities and other governmental agencies, testifies to the potential usefulness of the Convention and of the Centre. This gives reason for confidence that in the coming years this potential will be realized and the new institution will come to play a significant role in furthering the availability of private international investment for economic development.' It is essential to remember that the provisions of the ICSID Convention are, fundamentally, the result of a compromise essential for the existence of the ICSID Convention itself. To this extent, as highlighted by the Secretariat, the amendment of the ICSID Convention is not contemplated at this stage (and, arguably, it would be quite difficult to achieve). But, when it comes to the ICSID Rules, there is more flexibility. Several topics addressed by the ICSID Rules and indicated by the Secretariat do need to be updated in accordance with the latest developments of international law and with the innovations of the means of communication (see third party funding, transparency, etc.). Other amendments reflect the practice of the Secretariat and are necessary in order to maintain the due process requirement and ensure the legitimacy of the arbitration process. For instance, the standard of challenges to arbitrators in an over-globalized world and

which until recently was seen as notoriously high under the ICSID Rules or the procedure for appointment of arbitrators, which could see an arbitral tribunal being appointed in an average of seven months, despite several time limitations under the Rules. (See in general, Daniel Kalderimis, *The Future of the ICSID Convention: Bigger, Better, Faster?* in Crina Baltag (ed.), ICSID Convention After 50 Years: Unsettled Issues, 2017, Wolters Kluwer) Other areas discussed in previous amendment processes, such as the annulment system, would probably be reassessed based on the lessons learned (and probably not sufficient at the time when first addressed) and on the developments of international law.

The background papers reflecting the proposed changes to the ICSID Rules should be available by early 2018 and the ICSID Secretariat would probably make them available to the public for consultations and discussions. In the meantime, any additional preliminary suggestions concerning potential rule amendments can be sent to **icsidideas@worldbank.org**.