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The ICSID Reforms and Working Paper 4: Push or Pull?

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Last month, ICSID published a further Working Paper (WP4) linked to its ongoing reform process, by which it is considering a series of amendments to the ICSID and ICSID Additional Facility Rules. The Working Paper is the fourth in a series of working papers, preceded by Working Papers 1 (August 2018), 2 (March 2019), and 3 (August 2019). The reform process has also encompassed a series of consultations conducted by ICSID with States and other stakeholders about proposed and possible amendments. Naturally, the consultation process has yielded numerous proposals and even more debate. ICSID has released a helpful backgrounder setting out key reforms proposed in the process, and IAReporter has synthesised some of the main modifications made in WP4. This post will therefore not provide an exhaustive account of WP4, but will instead highlight three particularly interesting developments incorporated into WP4. The post offers an overview of these key developments in order to raise the question for readers as to whether this (potentially final) working paper pushes reforms forward in a progressive direction, or instead pulls back the proposals towards more moderate amendments.

Mandatory Disclosure of Third-Party Funding Arrangements

The ICSID amendment process is likely to result in significant changes concerning when parties to ICSID arbitrations must disclose third-party funding arrangements. This was a reform option canvassed very early in the reform process, and framed as a response to the increasing conflict of interest issues that third-party funding arrangements have raised for arbitrators. ICSID noted in WP3 that stakeholder consultations had given rise to 'two categories of comment' on third-party funding arrangements, with one group of stakeholders proposing the prohibition of third-party funding entirely, and another proposing greater disclosure of information about third-party funding in individual cases. The ICSID reform process has opted for the latter type of reform. Rather than prohibiting third-party funding arrangements outright, ICSID has instead proposed rules to provide for the mandatory disclosure of third-party funding arrangements.

Such amendments follow rising concern – raised by stakeholders as well as parties in ICSID cases – about the impact of third-party funding arrangements on arbitral proceedings. This includes concerns about the risk that any non-disclosure of such arrangements might mask potential conflicts of interest for arbitrators or others involved in an arbitral proceeding, as well as more practical issues related to the potential inability of a funded claimant to satisfy costs awards should it prove unsuccessful in the proceedings. The amendments appear to balance such concerns against

the potentially desirable role of third-party funding in investment arbitration. The non-prohibition of third-party funding might, for example, open greater space for ICSID arbitration claims to be filed by small investors, or for claimants to make claims concerning human rights, environmental, or other public interest issues, which may otherwise not be feasible without third-party funding.

WP4 retains the definition of third-party funding developed in previous iterations of the proposed rules. For the purposes of the rules, third-party funding is defined as situations in which a party 'has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding'. WP4 modifies the matters that must be disclosed and clarifies the circumstances in which disclosures must be made, by changing Proposed Arbitration Rule 14 to oblige parties to disclose:

- the address (not just the name) of any third-party funder;
- funding received by a party either directly or indirectly (rather than in circumstances where funding is received by the 'party, its affiliate or its representative'); and
- third-party funding received for the 'proceedings' rather than for 'the dispute'.

The first and second changes broaden the disclosure obligation, by requiring parties in receipt of third-party funding to disclose more details about their funder and to make such disclosures in a broader range of circumstances. The third change narrows the obligation, by separating funding received to pursue ICSID proceedings from that received to pursue non-ICSID proceedings related to the parties' dispute.

The proposed amendments also address the importance of third-party funding arrangements to decisions on security for costs. Originally, the revised rules on security for costs recognised the capacity for ICSID tribunals to make such orders, directing them to consider the relevant party's capacity to comply with an adverse decision on costs, alongside 'any other relevant circumstances'. Proposed Arbitration Rule 53 has been amended in WP4 to encourage tribunals to consider, as part of these circumstances, any third-party funding arrangement. The revised rule notes, nonetheless, that such third-party funding 'is not by itself sufficient to justify an order for security for costs'. Whilst the language of the rule on security for costs has been changed in WP4, its overall function remains the same. The slight change in emphasis indicates that the tribunal now 'shall' consider all evidence as opposed to having some discretion to do so ('may consider', in WP3). In practice, this may mean that a tribunal cannot exclude evidence of third-party funding as irrelevant to its decision on security for costs, but the wording of the provision nonetheless retains arbitral discretion to weigh exactly what influence such arrangements will have to these decisions.

Disclosures of Corporate Structures

The ICSID reform process also introduces amendments to the process, and requirements, governing the submission by claimants of their request for arbitration. In WP3, the ICSID Secretariat noted that some States had requested that the rules governing requests for arbitration be amended to require 'disclosure of the financial status of a requesting party and the corporate structure of a requesting party that is a legal entity'. The ICSID Secretariat adopted the view that such information – to the extent it was relevant – could be provided as part of the claimant's provision of information under Institution Rule 2 (requiring the request for arbitration to provide 'a description of the investment, a summary of the relevant facts and claims, the request for relief,

including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising directly out of the investment'). States appear to have pursued their requests for such disclosures to be specifically required under Institution Rule 2, with the ICSID Secretariat noting in WP4 that 'IR 2 is not revised to require these disclosures, because they have no bearing on the registration decision'. Nevertheless, Institution Rule 3 *has* been amended in WP4 to provide a recommendation that the request for arbitration 'include the names of the persons and entities that own or control a requesting party which is a juridical person'. Juridical claimants initiating ICSID proceedings are thus now encouraged to make disclosures regarding their corporate structure. The ICSID Secretariat notes that this amendment is designed to 'assist the parties and any appointing authorities in, *inter alia*, identifying Tribunal or Commission candidates who are free from conflicts of interest'.

Transparency of Arbitral Documents, Hearings, and Deliberations

Working Paper 4 also incorporates additional proposed reforms to ICSID's transparency regime. Reforms to enhance transparency were canvassed by the ICSID Secretariat at the start of the reform process. The capacity for the amendments to introduce broad changes to the transparency regime applicable in ICSID arbitrations is somewhat constrained, given that the ICSID Convention (which is not being amended) requires both disputing parties to consent to the publication of awards. ICSID has attempted to introduce a work-around this limitation by using a "deemed consent" clause to provide that awards will be published if neither party objects to such publication within 60 days of the award having been rendered. Should a party object to such publication, the amendments will retain the present *status quo*, according to which excerpts of the award will be published by the ICSID Secretariat. These proposed amendments are retained in WP4 (as Proposed Arbitration Rule 63).

WP4 also amends the proposed rule regulating the publication of documents filed in the proceeding. In WP3, this rule had provided that '[u]pon request of either party, the Centre shall publish any document filed in the proceeding', save that, where a party disagreed with such request, it could 'refer any dispute regarding the publication or redaction of [such] a document…to the Tribunal for determination'. WP4 amends the rule governing such publication to clarify the process for making – and granting – requests for publication of such documents. This revised rule now requires both parties to consent to publication or, absent such consent, allows the tribunal to determine whether publication is permitted. WP4 also specifies that this process will not apply to permit publication of 'supporting documents'.

WP4 also considerably alters the transparency framework applicable to hearings. Proposed rules in WP3 provided the tribunal with power to 'determine whether to allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, after consulting with the parties'. WP4 extends the scope for open hearings in ICSID arbitrations, creating an opt-out regime by providing that: 'The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, unless either party objects.'

WP4 also clarifies who may attend the tribunal's deliberations. WP4 opens scope for the Tribunal to admit non-members into its deliberations, providing that it may be assisted 'by the Secretary of

the Tribunal at its deliberations'. The attendance of other persons is also contemplated in WP4, but made subject to notification of the parties ('[n]o other person shall assist the Tribunal at its deliberations, unless the Tribunal decides otherwise and notifies the parties').

Concluding Remarks

Working Paper 4 is potentially the last in the series of working papers produced by the ICSID Secretariat to guide the rules amendment process. The ICSID Secretariat has now asked Member States for their views as to whether a further consultation on the proposed amendments is required, or whether the rules are ready to be put to a vote. Either way, the ICSID Secretariat has noted that its goal is to put the amended rules to vote in the second half of 2020, for implementation in early 2021. The ICSID working papers span a variety of issues, including about transparency and conflicts of interest in investor-State arbitration, which are often subject to political concerns and diverging policy objectives. In navigating this push and pull, the ICSID Secretariat's WP4 attempts to strike a balance and to propose amendments to enhance the fundamental elements of arbitration without undercutting the overall legitimacy and workability of this form of dispute settlement. The ICSID Secretariat has managed a potentially contentious process transparently and efficiently, placing it in a position to now propose a vote by Member States on the proposed amendments. It is likely that in the coming months the proposed amendments will continue to firm up and form a focal point for ongoing debate in both the ICSID and broader ISDS reform contexts.

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