

Kluwer Arbitration Blog

ICSID Reform: Balancing the Scales?

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On January 20, 2022, ICSID submitted its amended rules to the Administrative Council for a vote, marking the end of the five-year-old process of modernizing the ICSID Rules. ICSID members are expected to cast a vote on the amended rules by March 21, 2022, and if approved, the rules will enter into force on July 1, 2022. The ICSID Convention Arbitration and Conciliation Rules and the Institution Rules require the approval of two-thirds of the Administrative Council for the rules to be amended. As we await the outcome of the voting procedure, this post provides an overview of the most noteworthy features of the amended rules.

General Comment

In general, the ICSID reform modernizes the rules and updates them to reflect contemporary approaches to arbitration procedures. For instance, all filings will be electronic unless there are special reasons to maintain paper filing under Arbitration Rule 4 (AR) and Additional Facility Arbitration Rule 5 (AFAR). Thus, with the help of technology, the amended rules would significantly reduce the footprint of ISDS proceedings while also facilitating the processing of documentation at the Center and thereby reducing the costs of proceedings. Similarly, to provide a more efficient service, the rules specify timelines for several phases of the proceedings for the first time, and in other cases, reduce the timing associated with particular phases. Awards, for example, will have to be rendered no later than 240 days after the last submission (AR58.1.C).

While the reform process does not entirely address all concerns and critiques of ISDS, the modernization process does result from an attempt to harmonize different and – sometimes – opposed views. Therefore, the reforms if adopted would reflect a fine balance, with procedures that are crafted to ensure that states' interests are safeguarded but also investors' interests are protected from the broad discretion (*i.e.*, *ius puniendi* and *right to regulate*) that states have over foreign direct investments within their borders. Below, this post highlights a few important changes to the ICSID rules which have managed to achieve this fine balance.

1. Greater Transparency in the Conduct and Outcome of Proceedings

In our [2021: Year in Review Post](#) focused on investment arbitration, we described how

transparency has been a significant issue since the consultative process started and outlined how amendments to the ICSID rules have tried to increase transparency through increased publication of awards, decisions, and orders. In this regard, the proposed wording of the new AR 62 and new AFAR 73 stipulate that absent a clear objection in 60 days, a party will be deemed to have consented to the publication of the award. Similarly, orders and decisions would be published according to the same parameters under AR 63 and AFAR 73.

A crucial and particularly novel aspect of the amended rules is the adoption of rules mandating disclosure of third-party funding (TPF). TPF disclosure was debated in different working papers, particularly WP4, WP5, and WP6 (covered [here](#) and [here](#)). Notably, AR14 defines the term “*third-party funding*” and determines that parties must disclose the names and addresses of entities and persons from which they are receiving funding directly or indirectly. In addition, if the funder is a juridical person, parties must also disclose who controls the funder. This obligation applies throughout the process, and if any information changes, the duty to disclose remains. Such TPF disclosure grants legitimacy and transparency to the arbitration proceedings and avoids award challenges in the enforcement phase since conflicts of interests will be clear from the first moment a party enters an arbitration proceeding.

2. Initial Procedures: Manifest Lack of Legal Merit, Bifurcation, Preliminary Objections, and Provisional Measures

One of the primary purposes of the reform was to provide clarity and enhanced procedural tools in investment proceedings. For this purpose, the amended rules introduce “*Special Procedures*” concerning: (i) applications for dismissal of claims for a manifest lack of legal merit (AR 41, AFAR 51); (ii) bifurcation of proceedings (AR42, AFAR 52), (iii) preliminary objections (AR43, AFAR 53) (iv) provisional measures (AR47, AFAR 57)

A party may claim *a manifest lack of legal merit* within 45 days of the constitution of the Tribunal as an initial objection to the claim. The Tribunal’s decision regarding this objection shall be rendered in a time frame of 60 days and is without prejudice to the right of a party to file a preliminary objection or to argue thereafter in the process that the claim lacks legal merit. Similarly, a party may request to *bifurcate* a proceeding at any time or as a preliminary objection within a 45-day time frame (AR 42, AR 44, AFAR 52, AFAR 54). The Tribunal shall be bound to issue a decision on a request for bifurcation within 30 days after the last submission of the request. Unlike the **2003 ICSID rules**, the amended rules limit the discretion of the Tribunal and establish mandatory terms for Tribunal’s decisions to deliver a faster resolution on bifurcation.

Finally, unlike the **2003 ICSID rules**, the preliminary objections procedure under the amended rules is more extensively developed. The amended rules would establish a 240-day deadline after the last submission of the proceeding for the Tribunal to rule on preliminary objections (AR45(d); AFAR 55(d)). Similarly, the amended rules provide for a provisional measures procedure, requiring the Tribunal to consider the urgency and necessity of the measures and the effect of the measures on each party before issuing them (AR57.3)

Overall, these procedures established by the amended rules aim to clarify uncertainty in certain terms and limit the – widely criticized – discretion previously exercised by tribunals in managing these procedures. In this vein, it is arguable that the amended rules seek to emulate the procedural

provisions of jurisdictional courts by prescribing fixed times and procedures.

3. Due Process Rights: Third-Party Participation, and Counterclaims

Due process rights of third parties in investment arbitration and counterclaims have been [heavily debated](#) in ISDS reform. As Kabir Duggal and Nicholas Diamond argue [here](#), the ICSID reform would increase opportunities for third-party participation. This includes by allowing submissions and participation of non-disputing parties (AR67, AR68), as well as by providing for the publication of awards, orders, and decisions.

In the case of counterclaims, the amended rules allow for “ancillary claims” (i.e., counterclaims), presuming implied consent to submission of counterclaims if: (1) they arise of the same subject matter of the dispute, and (2) the claim is within the scope of consent of the parties and jurisdiction of the Center (AR48). This proposed rule would initially be a critical win for states involved in ISDS since they would be able to reclaim their procedural rights to a fair defense and demand compensation from investors when, for instance, an investor has violated national or international norms regarding crucial matters such as human rights and environmental protection. However, the scope of consent and jurisdiction of ICSID would have to be [interpreted broadly](#) according to [articles 31 and 32 of the VCLT](#) to fit these types of counterclaims into future ISDS proceedings. Only practice will tell how efficient – and effective – the ancillary claims tool will be for states involved in ISDS.

4. Conflicts of Interest in Investor-State Arbitration

The amended rules and several working papers ([WP4](#), [WP5](#), and [WP6](#)) have stressed the importance of addressing conflicts of interest in ISDS. This is mainly to address concerns related to when counsel and arbitrators have similar backgrounds and act in both capacities of arbitrator and counsel (double hatting). The amended rules provide that a party may file for disqualification of an arbitrator within 21 days of the constitution of the Tribunal or from the day it should have known the ground for disqualification (AR22). Furthermore, while the disqualification process is pending, the arbitration proceedings will be suspended unless the parties agree otherwise (AR22.2). The arbitrator challenge procedure will be carried out in an expedited manner, and arbitrators who are not being challenged will decide on the matter within 30 days of the last written submission (AR23). Despite the enhanced conflicts of interest rules, these are nevertheless unlikely to address all the critics concerns of ISDS critics since – among others – they still leave the final decision on arbitrator challenge to the remaining tribunal members rather than referring this challenge to a neutral body.

5. Rules on Awarding Costs

Unlike the 2003 ICSID rules, the amended rules require tribunals to weigh in certain factors when allocating costs. This includes: (a) the outcome of the proceeding or any part of it; (b) the conduct of the parties during the proceeding; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed (AR 52.1). This substantively changes the current standard practice in ISDS,

where many tribunals have historically required the parties to bear their own costs (“[American Rule](#)”).

Furthermore, AR53 prescribes a new procedure that allows the Tribunal to provide security for costs. Accordingly, the Tribunal will weigh in the following factors when requesting security for costs from parties: (a) that party’s ability to comply with an adverse decision; (b) that party’s willingness to comply with an adverse decision; (c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and (d) the conduct of the parties. Providing security for costs addresses concerns regarding claimants using TPF to initiate unmeritorious claims and after halting investment proceedings for being unable to pay for costs.

6. Broader Access to the ICSID Additional Facility Rules

Another advance of the reform is to grant access to ICSID arbitration and conciliation through the [ICSID Additional Facility Rules](#) to parties where both the claimant and the respondent are not ICSID Contracting States or nationals of a Contracting State. This includes Regional Economic Integration Organizations (REIOs), such as the European Union, reflecting the current times, where [REIOs are the ones who currently negotiate IIAS](#) and multilateral investment treaties.

Conclusion

Closing this reflection, we return to pose the initial question on the title: Has the ICSID reform balanced the scales? While not entirely, the ICSID reform has managed to address most concerns of stakeholders in the ISDS reform process while maintaining the essence of the institution and giving every interested party a “right to be heard” in the most transparent and procedurally efficient way possible. Let us recall that ISDS, like every other institution of public international law, is a creature of diplomacy and consent. Rules can only do as much as parties agree and, while detractors may argue that the system must be entirely transformed, it is essential to not “throw the baby out with the bathwater.” The system in place works and must be adapted to reflect the changing times.

Similarly, it is also vital to recall why the institution was created in the first place: to alleviate the imbalance of power between states and investors and grant the latter an opportunity to protect their investments in host countries. Finally, ISDS has been a crucial component of foreign direct investment and international economic law, and [as argued by Anja Ipp](#), if adequately used, IIAs can support global goals. In fact, the ICSID reform has done precisely that: it has adapted ISDS and the ICSID Rules to the changing times to better support global economic governance.


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