

Overview of Proposed Amendments to the ICSID Rules

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UNCITRAL WG III



Proposals for Amendment of
the ICSID Rules — Working Paper

Propositions d'amendement des
Règlements du CIRDI — Document de Travail

Propuesta de enmiendas a las
Reglas del CIADI — Documento de Trabajo

INTRODUCTION

- Amendments are proposed to each set of rules under the ICSID Convention and Additional Facility, plus new mediation rules
- No ICSID Convention change proposed at this time – must stay within Convention framework
- Goals:
 - Modernize, streamline, make more user friendly
 - Address new and systemic issues in ISDS
 - Reflect best practices

CONSULTATION PROCESS

- Explained in Working Paper of August 2, 2018 (on ICSID website)
- Written comments due by December 28, 2018
- ICSID will lead consultation process with the goal of building consensus among MS
- Will address comments received as far as possible and circulate revised draft to MS in 1st Quarter of 2019
- If MS' views on a particular topic diverge significantly, alternative proposals may be considered
- Further MS meeting in 2019 will consider revised draft provisions in-depth
- Target for vote in October 2019 (alternatively, October 2020)

IMPROVING TIME & COST EFFICIENCY

- All filing to be electronic (AR 3)
- Numerous rules specify exact (and reduced) time to take a procedural step
- Parties can agree to extend a time limit if it is not a mandatory time limit under Convention (AR 8 & 9)
- Tribunal must make best efforts to meet time limits; if Tribunal cannot meet the time due to special circumstances, it must advise parties of the reason for delay and anticipated length of delay

THIRD PARTY FUNDING – TPF (AR 21)

- TPF defined as:
 - provision of funds/material support;
 - for pursuit/defense of proceeding;
 - by a non-party;
 - to a party or its affiliate/legal representative
- Obligation for both parties to disclose existence of TPF and name of funder as early as possible after registration to prevent conflicts of interest
- AR 21 does not require disclosure of TPF agreement or its contents

DISQUALIFICATION OF ARBITRATOR (AR 29-30)

- Expanded arbitrator declaration (Sch. 2), including involvement in ISDS cases in any capacity
- Expedited time to request disqualification (20 days after knowledge of cause to disqualify) and to brief (19 days in total)
- No automatic suspension of proceedings, but either party may request reconsideration of decisions made while challenge pending if the challenge is upheld
- Decision by co-arbitrators under Convention Art. 58 will be made by Chairman if they are “equally divided” for any reason, or if subsequent challenge is filed while first challenge is pending

CONSOLIDATION AND COORDINATION (AR 38)

- Parties may consolidate multiple cases into one case (consolidation) or coordinate the presentation of multiple related cases (coordination) through written terms of reference filed with SG
- Mandatory consolidation not proposed, but AR 38BIS outlines design of mandatory consolidation for discussion, if needed

TRANSPARENCY – Awards, Decisions & Orders (AR 44-45; AR(AF) 54)

Awards in ICSID Convention Arbitrations

- Published with consent of parties
 - consent to publish deemed if no written objection within 60 days of dispatch
 - absent consent, Centre publishes excerpts - (90 day process for excerpting)

Decisions & Orders in ICSID Convention Arbitration; Awards, Decisions & Orders in AF Arbitration

- Published within 60 days with redactions agreed to by parties
- Disputes regarding redaction decided by Tribunal

TRANSPARENCY – Other Provisions

- **Documents other than Awards, orders & decisions (AR 46):** publish upon request with agreed upon redaction
- **Observation of Hearings (AR 47):** open unless either party objects
- **Non-disputing Party (NDP) Submission (AR 48):** added information requirements from NDP, potential to condition NDP participation on contribution to cost, and provide documents to NDP unless a party objects
- **Non-disputing Treaty Party Submission (AR 49):** as of right with respect to treaty interpretation or application

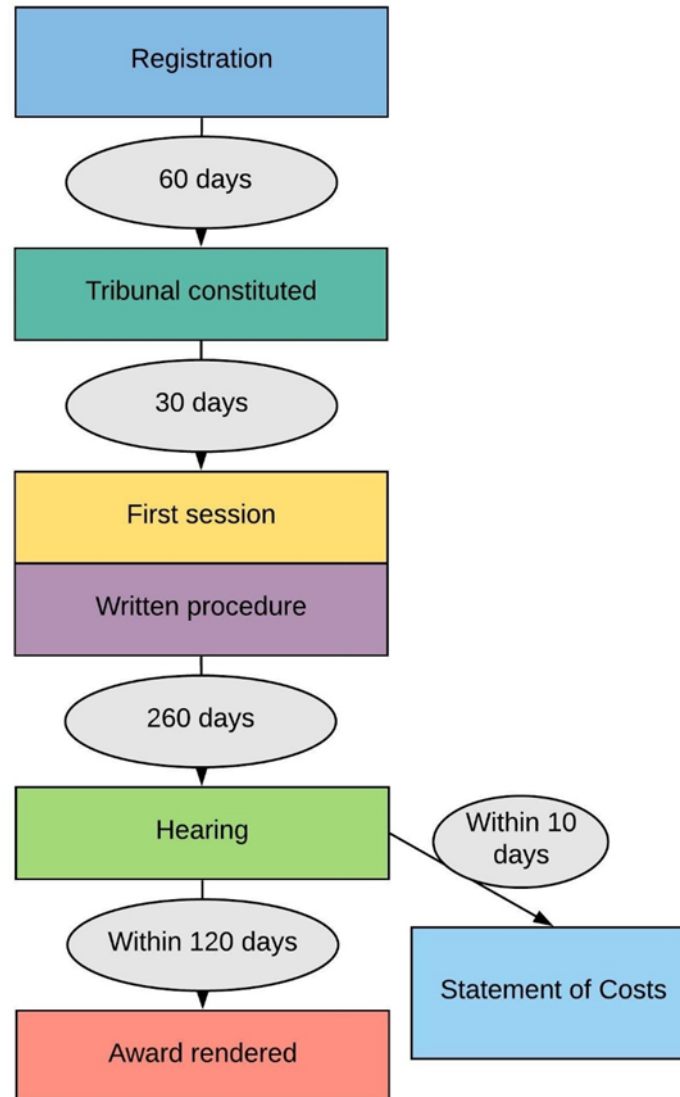
SECURITY FOR COSTS – SfC (AR 51)

- Either party can request SfC
- Rule recognizes the power to order security for costs
- Tribunal must consider:
 - other party’s ability to comply with an adverse decision on costs
 - any other relevant circumstances
- SfC granted in form of order
- Case may be suspended until security is provided, and may be discontinued if it is not provided within 90 days

AWARD & COSTS (AR 19; 59-61)

- Delete “closure” requirement
- Award must be issued in 60 days (Manifest lack of legal merit), 180 days (Bifurcated Preliminary Objections) and otherwise 240 days after last submission
- Must include reasoned decision on costs
- Costs Award still discretionary, but must consider:
 - outcome of proceedings
 - conduct of parties
 - complexity of issues
 - reasonableness of costs claimed

EXPEDITED ARBITRATION (AR 69-79), Sch. 9



ADDITIONAL FACILITY RULES – ARBITRATION & CONCILIATION

- Expanded scope:
 - Allow Regional Economic Integration Organization (REIO) as Party
 - Dispute can be between parties from non-ICSID Member States
 - Can apply to “legal disputes arising out of an investment”
- Eliminate approval of access

ADDITIONAL FACILITY RULES – FACT-FINDING AND MEDIATION RULES

- Updated rules for fact-finding
- New rules for mediation
- State/REIO and national of another State can agree to use fact-finding or mediation rules
- No nationality restrictions
- Apply to any dispute pertaining to an investment

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