

Kyiv Arbitration Days
September 14, 2018



SESSION 4

Amendment of ICSID's Rules and Regulations

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Enhanced transparency by publication

Proposed Arbitration Rule 44: Publication of Awards and Decisions on Annulment

- (1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.
- (2) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the date of dispatch of the document.
- (3) Absent consent of the parties referred to in paragraphs (1) or (2), the Centre shall publish excerpts of the legal reasoning in such documents (“excerpts”). The following procedure shall apply to publication of excerpts:
 - (a) the Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to publication of a document referred to in paragraph (1);
 - (b) the parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt; and
 - (c) the Centre shall publish excerpts within 30 days after receipt of the parties’ comments on the proposed excerpts, if any.

Proposed Arbitration Rule 45: Publication of Orders and Decisions

- (1) The Centre shall publish orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.
- (2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on the redactions, the Centre shall refer the order or decision to the Tribunal to determine any redactions, and shall publish the order or decision with the redactions approved by the Tribunal.

Reducing the Duration and Costs of Arbitration

Procedure for the Disqualification of Arbitrators



Timing of Proposal (Rule 29(1)-(2))

no later than
20 days after constitution
or
20 days after the challenging party first knew or
should have known of the facts

Response (Rule 29(2)(c))

Within 7 days after proposal

Arbitrator's Statement (Rule 29(2)(d))

Within 5 days after response

Parties' Final Submissions (Rule 29(2)(e))

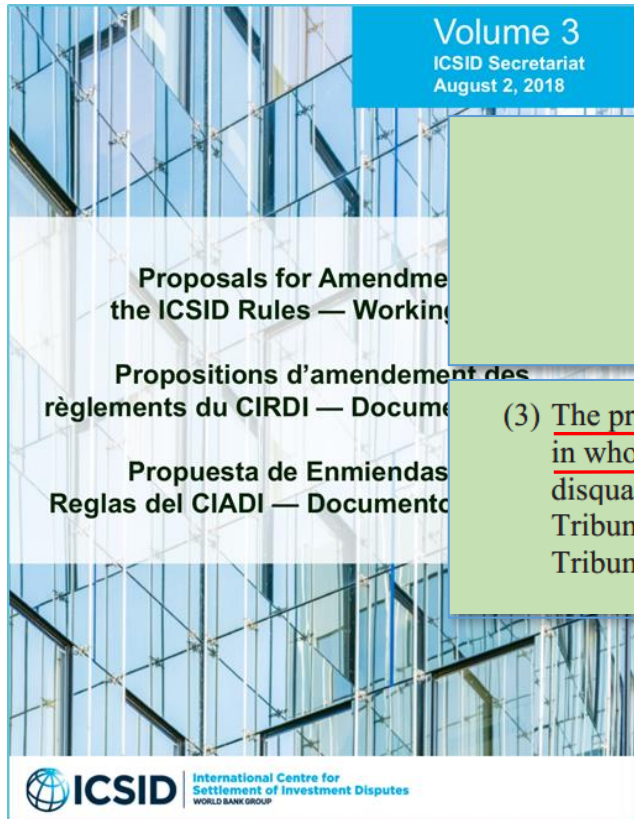
Within 7 days after arbitrator's statement

Decision (Rule 30(2))

Within 30 days after last submissions
or after
referral to Chairman if unchallenged arbitrators are
unable to decide

Proposals for Amendment of ICSID Rules – Working Paper, ¶160 (2 August 2018)

Procedure for the Disqualification of Arbitrators



Volume 3
ICSID Secretariat
August 2, 2018

Chapter IV
Disqualification of Arbitrators and Vacancies

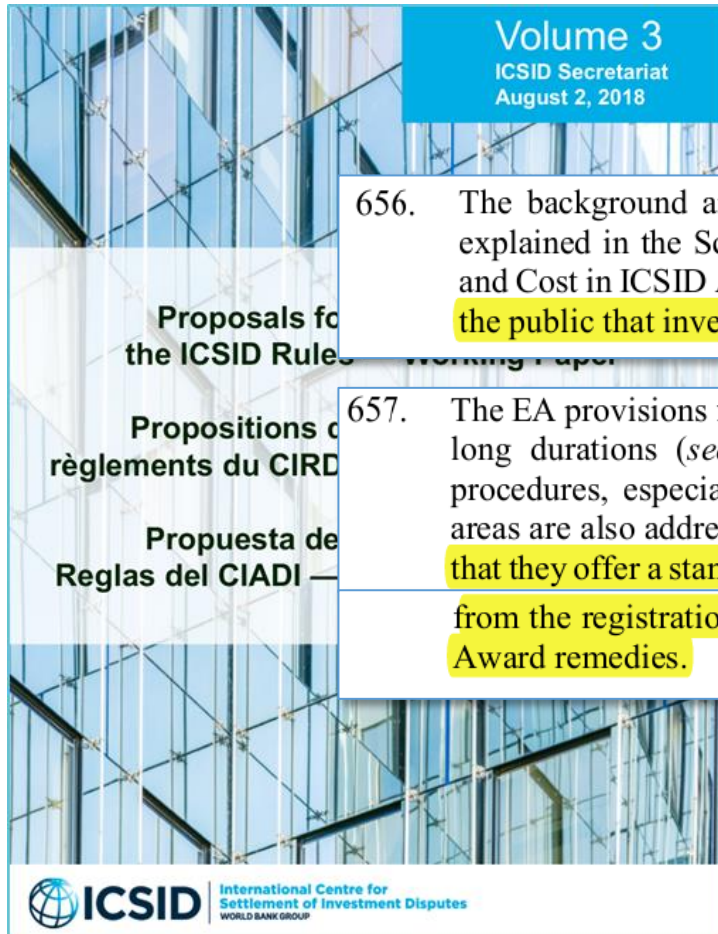
Rule 29
Proposal for Disqualification of Arbitrators

(3) The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued by the Tribunal while the proposal was pending, be reconsidered by the reconstituted Tribunal.

ICSID International Centre for Settlement of Investment Disputes
WORLD BANK GROUP

Proposals for Amendment of ICSID Rules – Working Paper, ¶155-156 (2 August 2018)

Expedited Arbitration



656. The background and reasons for adopting expedited arbitration (“EA”) provisions are explained in the Schedule concerning time and cost (see Schedule 9 – Addressing Time and Cost in ICSID Arbitration). EA addresses comments received from Member States and the public that investment arbitrations are too long and too costly.

657. The EA provisions focus on reducing the length of three main phases in an arbitration with long durations (*see* Schedule 9): (i) the establishment of the Tribunal; (ii) written procedures, especially interlocutory applications; and (iii) rendering the Award. These areas are also addressed in Chapters I-XI of the AR. However, the EA go a step further in that they offer a stand-alone expedited process, with clear deadlines on the time of a process from the registration of the Request for arbitration, to rendering the Award and any post-Award remedies.

Proposals for Amendment of ICSID Rules – Working Paper, ¶292 (2 August 2018)

Expedited Arbitration

Volume 3				
Day No. (Cumulative No. of Days)	Step in the Proceeding	No. of Days for Step	Rule Reference (Proposed Provision)	
Day 1	Registration			
Day 20	Agreement on EA	20 after registration	Rule 69(3)	
Day 30	Agreement on number of arbitrators and method	30 after registration	Rule 70(2)	
Day 50	Parties appoint Sole Arbitrator (SA)	20	Rule 71(a)	
Day 60	SA accepts appointment / constitution of Tribunal	10	Rule 71(b)	
Day 90	First session	30	Rule 74	
Day 150	Claimant(s)' memorial	60	Rule 75(1)(a)	
Day 210	Respondent(s)' counter-memorial	60	Rule 75(a)(b)	
Day 250	Claimant(s)' reply	40	Rule 75(1)(c)	
Day 290	Respondent(s)' rejoinder	40	Rule 75(1)(d)	
Day 350	Hearing (no. of days determined between SA and parties)	60	Rule 75(1)(e)	
Day 360 (+ no. of hearing days)	Parties' statements of costs	10	Rule 75(1)(f)	
Day 470	Award	120	Rule 75(1)(g)	



International Centre for
Settlement of Investment Disputes
WORLD BANK GROUP

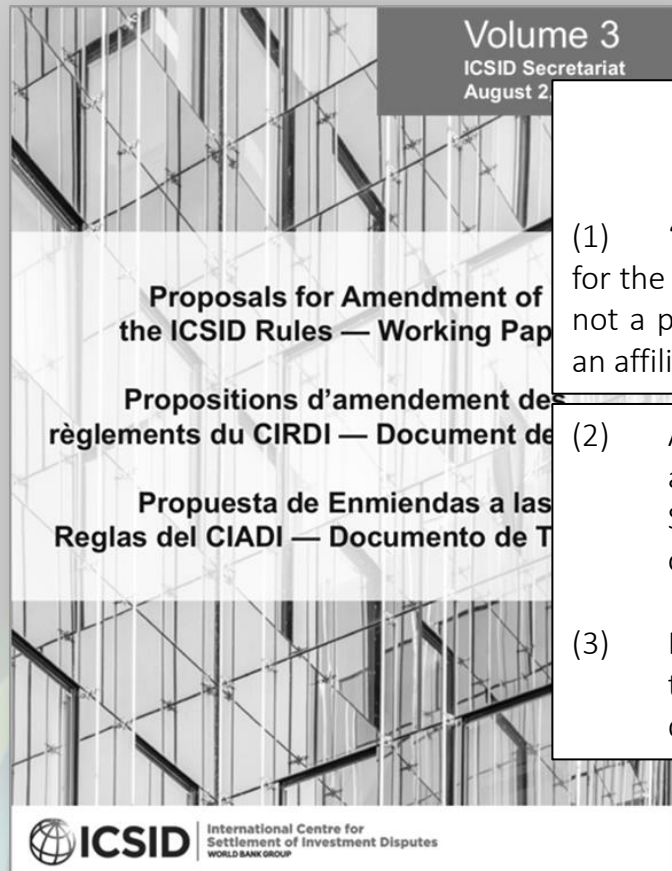
Proposals for Amendment of ICSID Rules – Working Paper, ¶¶293-294 (2 August 2018)



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Third-Party Funding and Security for Costs

Third-Party Funding

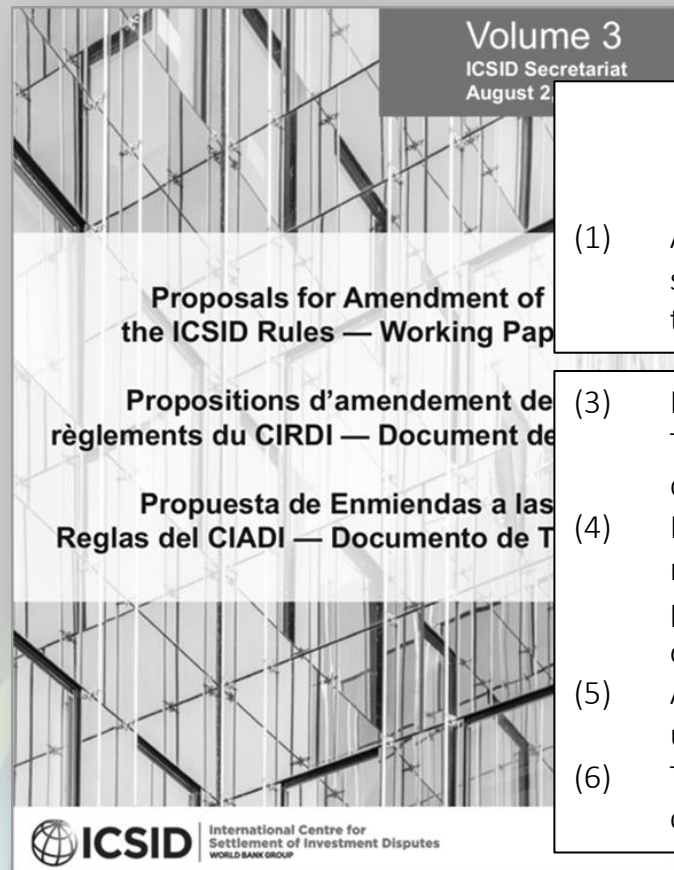


Rule 21

Disclosure of Third-Party Funding

- (1) “Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party
- (2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration
- (3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.

Security for Costs



Rule 51 Security for Costs

- (1) A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.
- (3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.
- (4) If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.
- (5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
- (6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request.

Non-disputing party and non-disputing treaty party participation

Proposed Arbitration Rule 48: Submission of Non-disputing Parties

- (1) Any person or entity that is not a disputing party (“non-disputing party”) may apply for permission to file a written submission in the proceeding.
- (2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:
 - (a) whether the submission would address a matter within the scope of the dispute;
 - (b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (c) whether the non-disputing party has a significant interest in the proceeding;
 - (d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and
 - (e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

Proposed Arbitration Rule 48: Submission of Non-disputing Parties (cont'd.)

- (3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on the conditions for filing such a submission, if any.
- (4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to:
 - (a) the format, length or scope of the submission;
 - (b) the date of filing; and
 - (c) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation.
- (5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.
- (6) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

Proposed Arbitration Rule 49: Participation of Non-disputing Treaty Party

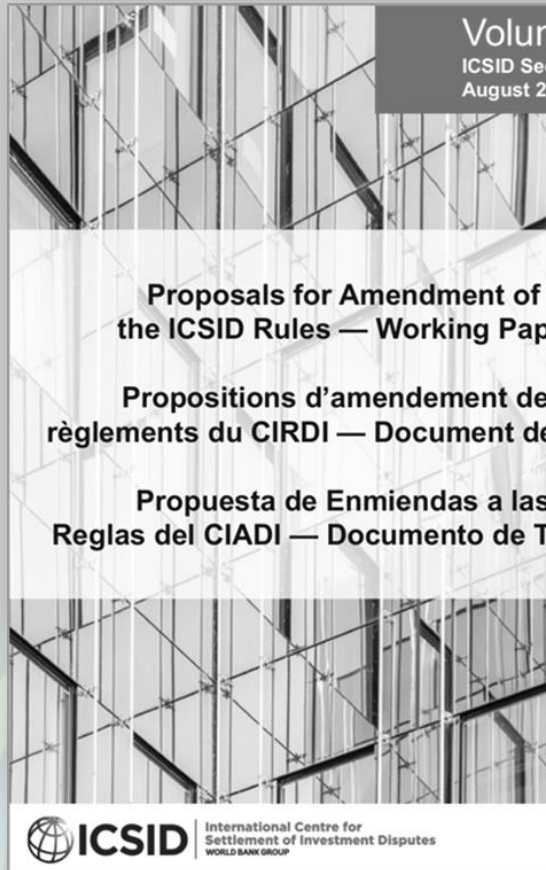
- (1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (“non-disputing Treaty Party”) to make a written submission on the application or interpretation of a treaty at issue in the dispute.
- (2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 48.
- (3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.



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Regional Economic Integration Organizations ("REIO")

REIOs



Draft Additional Facility Rules

Article 1 Definitions

- (4) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of those matters.

Article 2 Additional Facility Proceedings

- (1) The Secretariat of the Centre is authorized to administer the following proceedings between a State or an REIO on the one hand, and a national of another State on the other hand, which the parties consent in writing to submit to the Centre: (a) arbitration and conciliation proceedings for the settlement of legal disputes arising out of an investment if:
- (i) none of the parties to the dispute is a Contracting State, a Contracting REIO or a national of a Contracting State; or
 - (ii) either the State or the REIO party to the dispute, on the one hand or the State whose national is a party to the dispute, on the other hand, but not both, is a Contracting State or a Contracting REIO [...].
- (2) Reference to a State or an REIO includes a constituent subdivision of a State, or an agency of a State or an REIO. The State or REIO must approve the consent of the constituent subdivision or agency which is a party to the proceeding pursuant to Article 2(1), unless the State or the REIO concerned notifies the Centre that no such approval is required

