Current Issues & Stocktaking

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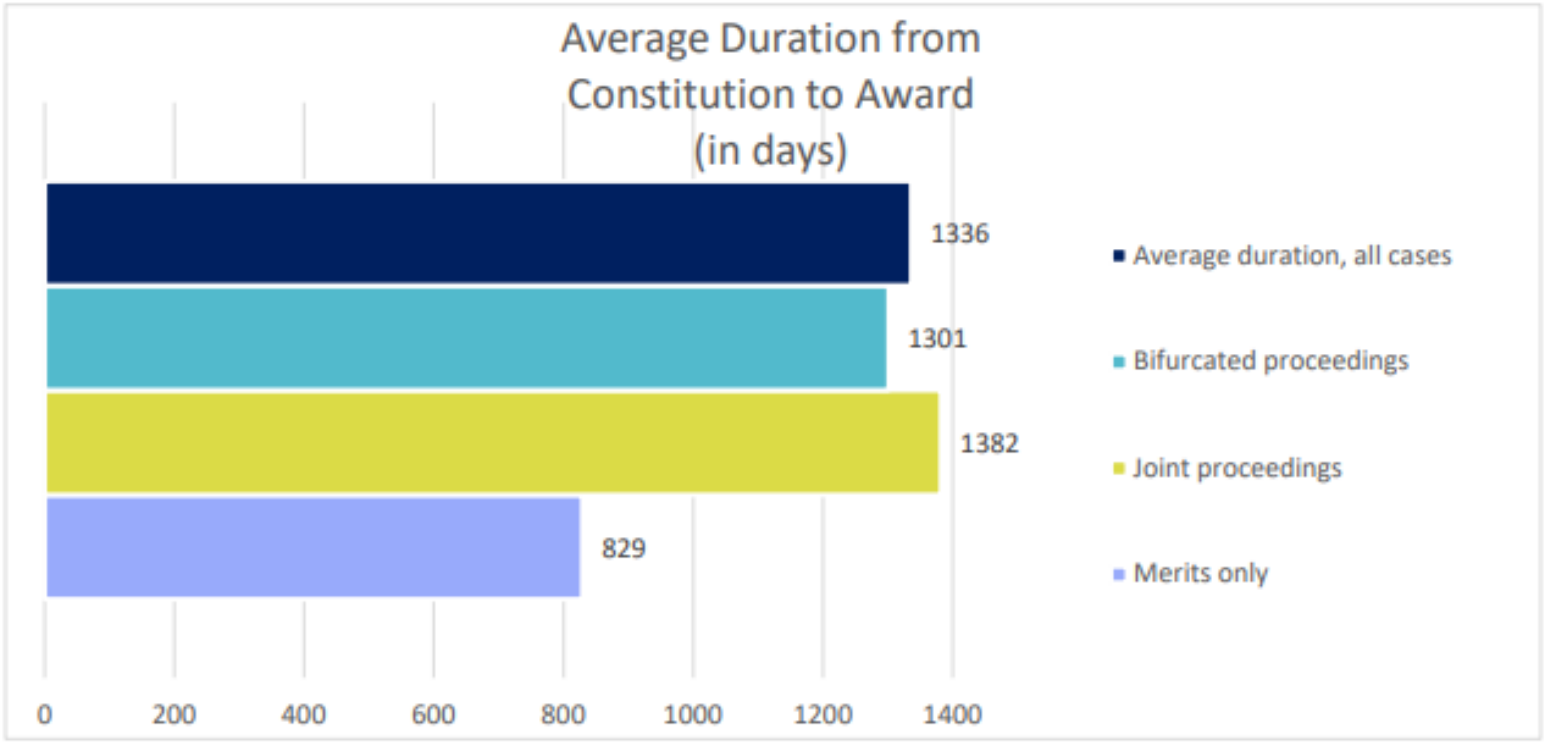
Treaty Mechanisms for State Party Interpretation

- Joint Committee of Signatory States (CAPTPP Art. 27)
- Non-disputing party submissions (CAPTPP Art. 9.23(2))
- Non-disputing party submissions (CAPTPP Art. 9.23(3))
- Interpretation-Specific (CAPTPP Art. 9.26; 29.4)
- Annexes – “Shared Understanding” (CAPTPP Annex 9-A, B)
- Note of Interpretation (CAPTPP Art. 9.25(3))

CRITICISMS OF THE CURRENT ISDS REGIME

Duration



Annex 1 – Schedule 9 of WP # 1
Annex 2 – Allen & Overy (14 Dec 2017)

Reducing Duration & Costs of Cases

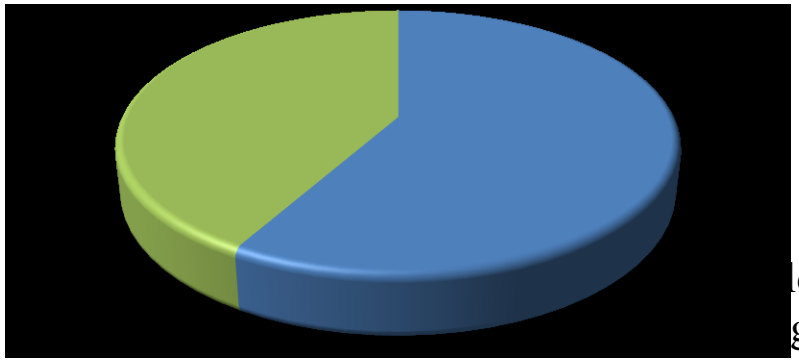
- 3 main areas:
  1. appointment of Tribunal
  2. written process
  3. rendering award
- Role of the Institution
- Role of Parties
- ICSID Rules Proposals

Independence & Impartiality – Double-hatting

"We also need to address the deplorable practice of the same individual sitting as arbitrator in one case and acting as counsel in another, giving rise to situations in which you might find yourself deliberating with your fellow arbitrators in the knowledge that one or more of them is actually litigating the very point that you are seeking to write an award on. That is unacceptable."

Philippe Sands QC

Prevalence of double hatting



Research by Langford, Behn and Lie (2017):

- 47% of cases involved at least one arbitrator simultaneously acting as legal counsel.
- 190 cases where the arbitrator and legal counsel were both double hatting.
- Counsel-only double-hatting was at 11%, or in 118 cases.

Annex 3 - Malcolm Langford, Daniel Behn and Runar Hilleren Lie (2017)

Double hatting in investment treaty arbitration: weighing the arguments

Arguments against double hatting

- Due process of law issue if counsel is able to rely on a point decided while sitting as an arbitrator in another case.
- Retains an element of continuous collegiality where this small group of private law individuals decide on public law measures taken by the State.
- Creates an appearance of the lack of impartiality.

Arguments against prohibiting double hatting

- Preventing the small group of qualified persons from sitting as arbitrator and counsel could undermine the system of international adjudication.
- Emerging as an arbitrator requires having previously acted as counsel.
- There is no guarantee of future arbitrator appointments, thus increasing the opportunity cost of refusing counsel work.
- There is an endogenous systemic correction which is evident in the declining number of double hatting cases.

International Court of Justice

"As a result, Members of the Court have come to the decision, last month, that they will not normally accept to participate in international arbitration. ***In particular, they will not participate in investor-State arbitration or in commercial arbitration.*** […] Prior authorization must have been granted, for that purpose, in accordance with the mechanism put in place by the Court. Members of the Court, will, however, decline to be appointed as arbitrators by a State that is a party in a case pending before the Court, even if there is no substantial interference between that case and the case submitted to arbitration. This is essential to place beyond reproach the impartiality and independence of Judges in the exercise of their judicial functions."

Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the ICJ, delivered on 25 October 2018

Questions to consider

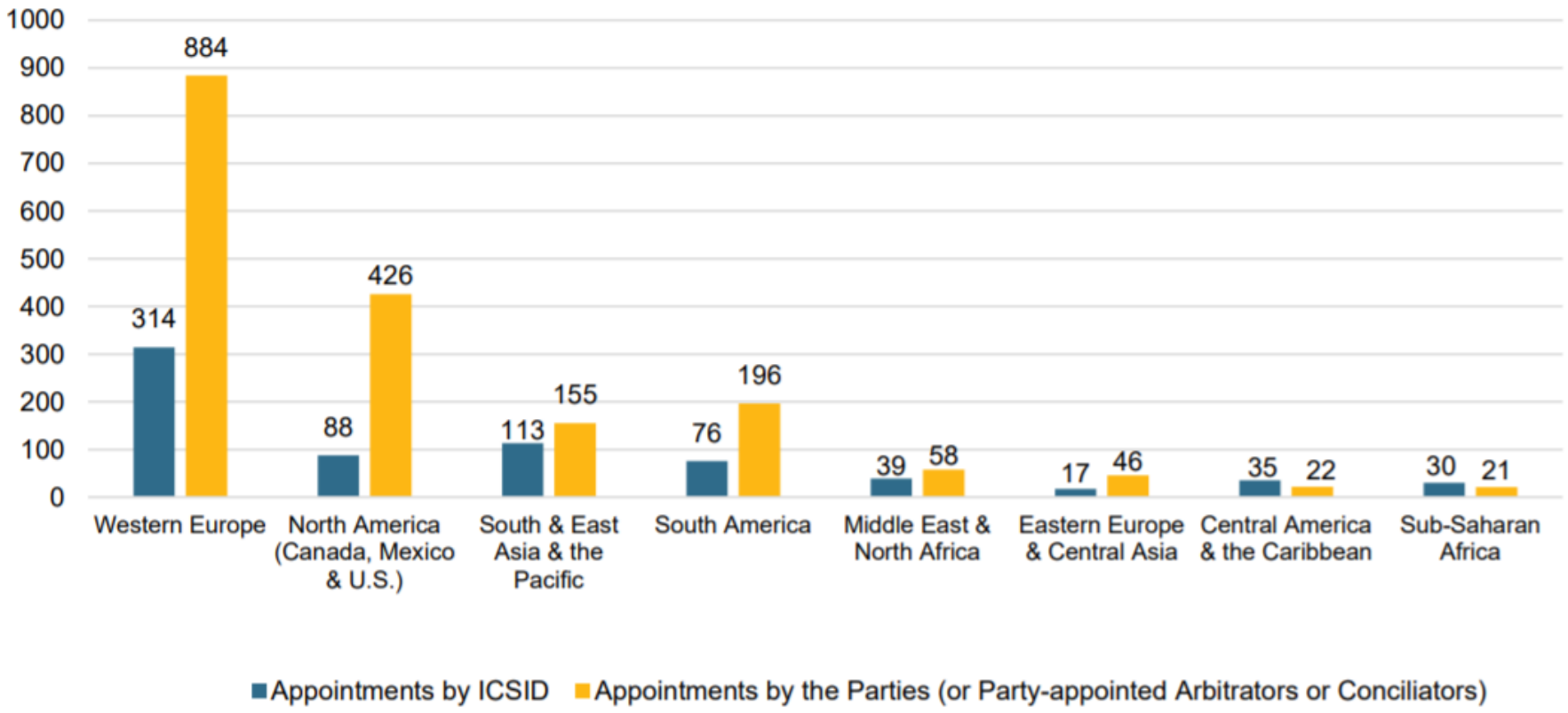
1. Has double hatting resulted in a legitimacy crisis?

2. Should a certain type of double hatting be permissible? For instance, transitioning counsel receiving their first few appointments as arbitrator?

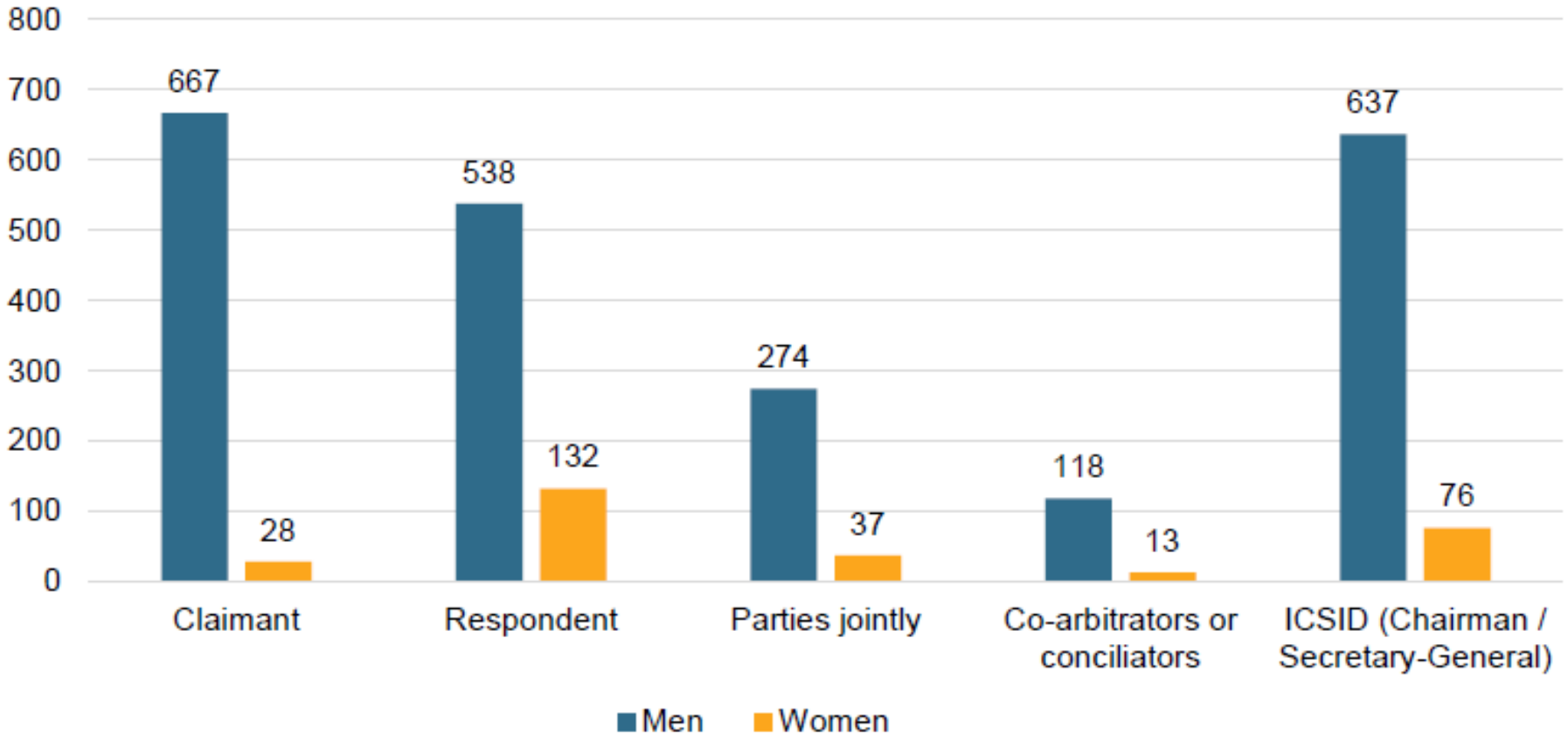
3. Should institutional appointments replace party-appointed arbitrators?

4. Should the reform focus on treaty drafting, arbitral rules or soft law instruments, or all of the foregoing to curb double hatting?

Diversity of Arbitrators



Diversity – Female Arbitrators at ICSID



THIRD-PARTY FUNDING IN INVESTMENT TREATY ARBITRATION

Third Party Funding (TPF) - Table of Contents

- What is TPF?
- TPF practice worldwide
- Disclosure and Conflicts of Interest
- Costs and Security for Costs Orders
- Privilege
- Exclusivity
- Prospects of Negotiated Settlement

Annex 4 – "Third-Party Funding in Investment Treaty Arbitration" [in Katia-Yannaca Small, pp. 698-723]

What is Third Party Funding (TPF)?

- A third party funds a claim, e.g. in litigation or arbitration
  - If claimant loses, TPF receives nothing
  - If claimant wins, TPF entitled to share of recovered damages
- Rapidly growing market estimated at US$10bn

- TPF for respondent is rare
  - *RSM Production Corporation v. Grenada*
  - *Philip Morris v. Uruguay*

TPF practice worldwide – common law jurisdictions

TPF limitations under the doctrines of "champerty and maintenance"

- Doctrines originating in England & Wales – effectively abolished in the 1900s, but possible post-Brexit impact?
- US: TPF permitted in most states and on federal level
- Ireland: Supreme Court in 2007 reconfirmed TPF illegality for litigation, but acknowledging that different standards may be appropriate for international arbitration (IA) and for investment structuring through SPVs

TPF practice worldwide – civil law jurisdictions

TPF generally allowed, although with limitations

- E.g. in Germany, Austria, and France
- Limitations:
  - Professional ethics rules prohibiting funding by lawyers (contingency fees)
  - Prohibition of enforcement by TPF

New TPF regulatory frameworks

States actively promoting TPF through new legislation

- Singapore: Since March 2017, champerty and maintenance doctrines abolished for TPF in IA/mediation if TPF meets certain criteria
- Hong Kong: Since June 2017, TPF lawful for IA

Conflict of Interest

- Various factors could give rise to potential conflict of interest
  - A number of leading arbitrators have taken positions within, or *ad hoc* consultant roles with, some funders
  - The relationship between funders and a small group of law firms, and related links among elite law firms and some arbitrators
- Necessity of disclosure now generally recognized
  - Such conflict of interest would diminish the integrity of ISDS
  - Parties often voluntarily disclose the existence of TPF if requested, and various attempts have been made to define TPF for disclosure
  - ICSID tribunals have also ordered disclosure of TPF (e.g., *Muhammet Çap v. Turkmenistan*, Procedural Order No. 3 of 12 June 2015)

Costs and Security for Costs Orders

Cost allocation under various arbitral laws and rules

- Costs follow the event principle
  - ss. 61, 63 English Arbitration Act 1996
  - s. 1057 German Code of Civil Proceedings
  - Art. 42 UNCITRAL Rules 2013
  - s. 33(3) DIS Rules 2018
  - Art. 80 JCAA Commercial Arbitration Rules 2019
- General tribunal's discretion
  - Art. 61(2) ICSID Convention

Allocation of costs – differing approaches on TPF costs

- *Essar v. Norscot* (2016)
  - Funding fee = "other costs" under s. 59(1)(c) Arbitration Act 1996
  - ICC Tribunal's wide discretion and relevant criteria
    - Claimant's impecuniosity and/or respondent's bad conduct
- Other criteria?
  - Limitation of tribunal's power to award TPF costs under applicable rules?
  - Limitation of tribunal's power to impecuniosity and bad conduct?
  - Must awarded TPF costs be reasonable?
  - Mandatory disclosure of TPF costs at early stage?
  - Adverse cost orders against TPF?

Security for costs and relationship to TPF

- Historically, high threshold for security for costs order
  - "extreme circumstances" such as abuse or serious misconduct (*San Sebastian Gold Mines Inc v. El Salvador*)
- TPF alone does not justify security for costs
  - History of non-compliance with cost awards (*RSM v. St Lucia*)
- So far, arbitral practice treats *RSM* as an exception
  - E.g., *Eurogas v. Slovakia*, *South American Silver v. Bolivia*
  - ICSID proposed Rule 52(4)
  - "Exceptional circumstances" may arise if TPF excludes liability for adverse costs (*García Armas v. Venezuela*)

Privilege and Confidentiality

- Potential waiver of privilege
  - Sharing documents created by a prospective funded party's counsel with funder during the case assessment and monitoring will invariably involve sending privileged documents and legal advice
  - Whether or not this would constitute a waiver of privilege will depend on the rules of privilege in the relevant jurisdiction
  - Precautionary steps to protect privilege include reviewing the applicable privilege rules and entering into a NDA with a funder or agreeing that any documents are sent to the funder on a restricted waiver basis
- Potential breach of confidentiality
  - A funder will need to be provided with confidential information as early as the "preliminary chat" stage
  - It is therefore sensible to enter into a NDA at this early stage

Exclusivity

- Exclusivity with respect to TPF
  - Some funders require an exclusivity agreement at the beginning of a case assessment, usually just before the funder is about to incur significant costs in reviewing the case
  - Such an agreement provides that the prospective funded party must not present the case to other funders for a specified period of time
- Potential issues arising out of exclusivity
  - Although understandable from the funder's point of view, it could be disadvantageous as it would prevent other funders from looking at a case, and there is no guarantee that the particular funder will decide to fund after the due diligence process

Third Party Funding – Prospects of Settlement

- Concerns about difficulties in reaching settlement
  - Some States fear that TPF promotes frivolous claims and is inapt for dispute settlement
- Does TPF actually enable frivolous claims?
  - Third party funders have economic interests so only fund meritorious claims
  - Third party funders engage rigorous due diligence to avoid funding frivolous cases and execute funding agreements typically including provisions about how settlement are to be managed
  - The arbitral institutions, e.g., ICSID, create effective mechanisms to address frivolous claims, including screening and a motion to dismiss based on manifest lack of jurisdiction or legal merit

Third Party Funding – ICSID TPF Proposal

Rule 14

Notice of Third-party Funding

(1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative 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 dispute ("third-party funding").

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit the notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).

(WP # 3, Volume I (August 16, 2019))

MANAGING INVESTMENT TREATY ARBITRATIONS

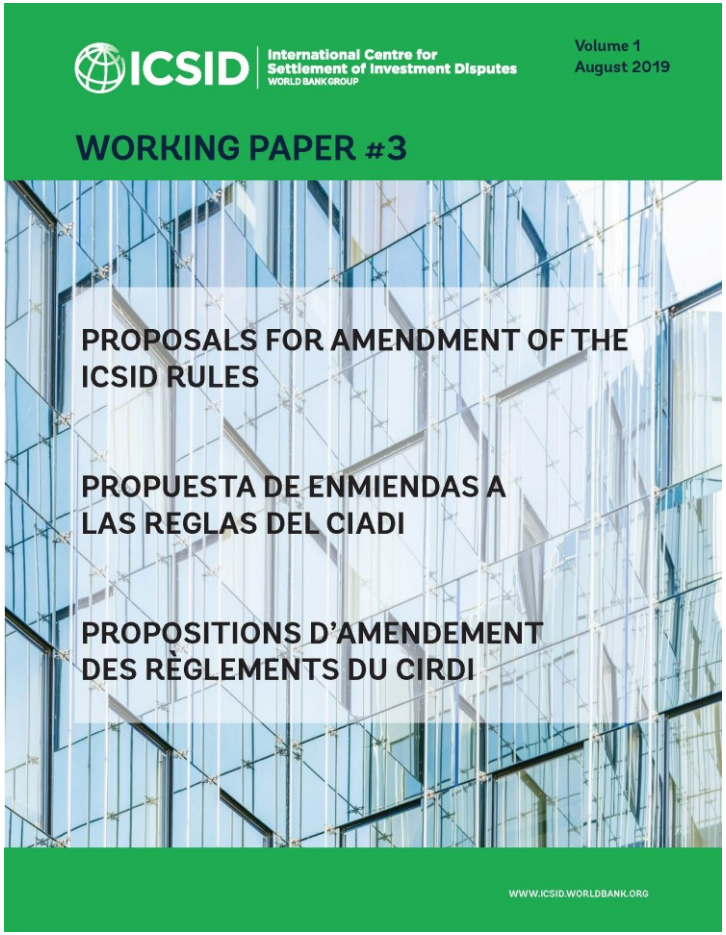
Managing Investment Treaty Arbitrations

- Legal team
- Client team
- Media strategy
- Budget
- Settlement & ADR Options

Annex 5 – Practice Notes for Respondents in ICSID Arbitration
Annex 6 – Use of the Media by counsel in ISDS – [Kinnear/Diop – ICCA]
Annex 7 – Sharpe, The Agent's Indispensable Role in International Investment Arbitration – ICSID Review

ISDS: STOCKTAKING OF TREATIES, TRENDS AND REFORM PROPOSALS

Overview of Proposed Amendments to ICSID Arbitration Rules - Working Paper # 3



Annex 8 – Proposals for Amendments of the ICSID Rules, WP # 3, Volume 1 (August 16, 2019)

Background

- Amendment process launched in October 2016: 4th and most comprehensive amendment
- Preliminary comments received from States and the public
- WP # 1 published in August 2018, and 1st consultation meeting with States in September 2018
- WP # 2 published in March 2019, and 2nd consultation meeting with States in April 2019
- WP # 3 published in August 2019 and third consultation meeting with States in November 2019

Current Status

- WP # 3 released on August 16, 2019
- Consultation with States on WP # 3 to be held in Washington on Nov. 11-15, 2019

→ Should be final or penultimate consultation

→ Goal is to vote on the proposals in mid/late 2020

Steps to Adoption – Resolutions for Voting

	RESOLUTION	VOTES REQUIRED (154 MEMBERS)
1.	**ICSID Convention Rule Amendment** (IR; AFR; AR; CR)	2/3 of Members (103/154) • Art. 6 Convention
2.	**ICSID Additional Facility Amendment** (AF Rules; (AF) AFR; (AF) AR; (AF) CR))	Majority (50%) vote if quorum exists (77/154) • Art. 7(2) Convention
3.	**Fact-Finding Rules** (FFR; Annex A-(FFR) AFR; Annex B-FFR Declaration)	Majority (50%) vote if quorum exists (77/154) • Art. 7(2) Convention
4.	**Mediation Rules** (MR; Annex A-(MR) AFR; Annex B-MR Declaration)	Majority (50%) vote if quorum exists (77/154) • Art. 7(2) Convention

General Approach

- Modernize Rules based on experience, best practice and feedback from facility users
- User friendly language: modernize, simplify, make gender neutral, remove ENG/FR/SP inconsistencies
- User friendly structure: re-order provisions and include all rules related to procedure in AR
- Reduce time and cost; Go Green
- Address procedural issues in reform discussion
- Maintain procedural balance between investors and States to ensure proceedings are fair and effective for all

Provide More Options for Dispute Settlement

- Updated arbitration and conciliation rules
- Revised Additional Facility Rules:
  - cases can be between parties that are all non-ICSID Contracting States or nationals of such States, or if only 1 party is a Contracting State
  - a Regional Economic Integration Organization (REIO) can be a party
- New Mediation Rules complement bilateral and multilateral treaties providing for mediation – available between any parties in dispute "relating to" an investment
- Revised Fact-Finding Rules are simplified and broadly available
- ICSID will continue to offer administration of UNCITRAL and *ad hoc* cases

Time & Cost – Multi-track Approach

- General duty of expedition on parties & arbitrators
- Prescribed & shorter times for many steps
- Case management conferences and pro-active case management
- Tracking delivery of decisions & awards on webpage and postponing arbitrator payment if late
- Electronic filing
- Option of expedited arbitration

Case Management – AR 31

- Emphasis on pro-active case management by Tribunal
- Includes case management conferences (CMC) to identify uncontested facts, clarify and narrow issues or address any other matter – to be held throughout proceeding

Third Party Funding – AR 14

- Proposed mandatory and continuing disclosure provision for all parties with respect to existence of TPF and name of funder
- Further disclosure is possible under general provisions on evidence (AR 36-40) if it is relevant to an issue in case
- Failure to disclose would be addressed under general provisions on costs (AR 49-51)
- New provision on Security for Costs (AR 52) notes that existence of TPF may be evidence relevant to a factor considered in ordering SfC, but the mere existence of TPF is insufficient for SfC

Third-Party Funding – AR 14

Rule 14
Notice of Third-Party Funding

1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative 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 dispute ("third-party funding").

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4) The Secretary-General shall transmit the notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).

Arbitrator Acceptance and Declaration – AR 19

- Arbitrators must accept their appointment and submit an expanded declaration form within 20 days (AR 19)
- Declaration addresses the arbitrator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings
  - Must disclose professional relationships within the past 5 years with parties, counsel, members of Tribunal and funder
  - Must list other investor-State cases in which arbitrator is involved in any capacity
  - Any other circumstances going to independence or impartiality
- Arbitrator must confirm sufficient availability through a calendar
- Double-hatting is not regulated under proposed Rules

NEW: Tribunal-appointed Expert – AR 39

- Unless the parties agree otherwise, the Tribunal may appoint an expert after consulting the parties on the terms of reference for the expert (AR 39)
- New declaration for Tribunal-appointed expert (Schedule 4) to address:
  - Impartiality & independence
  - Significant relationships with parties, counsel, tribunal, or funders
  - Past involvement in investment cases
  - Other circumstances going to their independence and impartiality

Manifest Lack of Legal Merit – AR 41

- Now a self-standing provision
- Rule clarifies that this objection may also relate to the jurisdiction of the Centre or the competence of the Tribunal
- Sets out the procedure for dealing with the objection, including time limit of 45 days from constitution of Tribunal to file the objection and 60 days from last submission to issue the decision
- Can file before Tribunal constitution so briefing is ready for Tribunal (AR 41(2)(d))

NEW: Bifurcation – AR 42

- Rule addresses request for bifurcation of steps other than preliminary objections
  - e.g.: bifurcating liability and damages
- The Tribunal must issue its decision on the request within 30 days after the last submission
- Factors to be considered by the Tribunal are whether bifurcation would:
  - materially reduce the time and cost of the proceeding;
  - dispose of all or a substantial part of the dispute;
  - or is impractical because relevant questions are too intertwined

Preliminary Objections – AR 43

- Intent to file preliminary objection must be notified as soon as possible
- A party may request bifurcation of preliminary objection in accordance with AR 44
- If bifurcation has not been granted or is not requested in time, the party filing the preliminary objection must also file the counter-memorial within the time limit fixed by the Tribunal
- Preliminary objection must be decided within 240 days if no bifurcation

NEW: Bifurcation of Preliminary Objections – AR 44

- File request to bifurcate within 45 days of relevant pleading
- Proceeding suspended unless parties agree otherwise
- Decide request in 30 days
- Same test as for bifurcation of other objections
- Render decision within 180 days if bifurcated and 240 days if not bifurcated

NEW: Consolidation or Coordination – AR 45

- Rule addresses voluntary consolidation or coordination of cases administered by ICSID when both parties consent
- Consolidation = One case, one Award – must be ICSID Convention cases against same State
- Coordination = Two or more related cases administered by ICSID, conducted jointly – could be same Tribunal, common pleadings, same expert witness… results in separate Awards

NEW: Costs of the Proceeding – AR 49-51

- Tribunal has discretion under Art. 61 of the Convention on whether and how to allocate the costs, BUT:
- Rule provides guidance on the circumstances that must be considered:
  - Outcome of the proceeding or any part of it
  - the parties' conduct
  - the complexity of the issues
  - the reasonableness of the costs claimed
- The Tribunal may make interim decisions on costs
- All costs decisions must be reasoned

NEW: Security for Costs (SfC) – AR 52

- Rule acknowledges the Tribunal's power to issue an order of security for costs – codifies existing practice
- Tribunal must take into account all relevant circumstances including the party's ability and willingness to comply with an adverse decision on costs, the impact of SfC on a party's ability to pursue its case, and the conduct of the parties
- TPF may be advanced as evidence related to these factors but TPF alone is not enough to grant SfC
- Can suspend and discontinue case if fail to comply with terms of SfC order

NEW: Timing and Contents of the Award – AR 57-58

- Rule on closure of proceeding is eliminated (including 120-day time limit to dispatch the award after closure)
- Proposed Rule provides that the Tribunal must render the award as soon as possible and no later than:
  - 60 days after the last submission for an objection on MLLM
  - 180 days after the last submission if it deals with a preliminary objection that has been bifurcated from the merits
  - 240 days after the last submission on all other matters
- Must include reasoned decision on all questions, including costs

NEW: Publication of Documents – AR 61

- Convention Awards: need party consent – Centre published extracts if no consent (AR 61)
- Orders or Decisions: publish with agreed redaction and refer disputed redaction to Tribunal (AR 62)
- Other Documents: publish with agreed redaction and refer disputes regarding disputed publication or disputed redaction to Tribunal (AR 63)

    - Subject to non-publication of confidential or protected information, defined in AR 65

Observation of Hearings – AR 64

- Tribunal decides on public access to hearings after consulting parties
- Must establish procedures to protect confidential or protected information, as in current practice
- Recordings and transcripts of public portion will also be published unless either party objects

Confidential or Protected Information – AR 65

Rule 65
Confidential or Protected Information

For the purposes of Rules 61-64, confidential or protected information is information which:

1) is protected from disclosure pursuant to the instrument of consent to arbitration;
2) is protected from disclosure pursuant to the applicable law;
3) is protected from disclosure in accordance with the orders and decisions of the Tribunal;
4) is protected from disclosure by agreement of the parties;
5) constitutes confidential business information;
6) would impede law enforcement if disclosed to the public;
7) would prejudice the essential security interests of the State if disclosed to the public;
8) would aggravate the dispute between the parties if disclosed to the public; or
9) would undermine the integrity of the arbitral process if disclosed to the public.

Submission of Non-disputing Parties – AR 66

- Rule provides further detail on the procedure to allow NDP participation, reflecting current practice
- The Tribunal may impose conditions, including:
  - the format, length or scope of the submission;
  - the date of filing
- The Tribunal may only provide the NDP with access to case documents if neither party objects

NEW: Participation of Non-disputing Treaty Party – AR 67

- Only applies in investment treaty cases
- Rule gives a right to the State that is not a party to the dispute to make a written submission on the interpretation of the treaty upon which consent is based
- If the State wishes to file a submission addressing other legal or factual issues, it must apply to do so under AR 66 (NDP submission)

NEW: Expedited Arbitration – AR 74-85

- New chapter for optional expedited arbitration (EA)
- Can opt into the EA at any time
- May select Sole Arbitrator or three-person Tribunal
- No bifurcation: all matters are addressed jointly
- Can reduce time by about 50%
- Can opt out consensually or upon order of Tribunal if justified

Conciliation – General

- Updated rules – greater flexibility
- Mandate is to clarify issues and assist parties in reaching a mutually acceptable resolution (CR 24)
- Confidential unless parties agree otherwise, publication is pursuant to AFR 26, the information is independently available or disclosure is required by law (CR 9)
- No collateral use of information gained through conciliation (CR 10)
- TPF disclosure applies to conciliation (CR 12)

Additional Facility Rules

- Broader scope
  - For "disputes arising out of an investment between a State/REIO and a national of another State"
  - Apply if no party or only 1 party is from an ICSID Contracting State
  - REIO can be a party
  - Dual national can invoke AF if authorized under instrument of consent
  - Direct filing – no need for consent to access AF

Fact-Finding Rules

- Apply to any fact-finding relating to an investment and involving a State or REIO, with written consent of both parties (FFR 2)
- Commenced by joint request of parties (FFR 4-5)
- Parties select sole or uneven number of fact-finders (FFR 8)

Availability of Mediation – MR 1-3

- Can administer mediation relating to an investment involving a State or REIO, with written consent of both parties (MR 2)
- Consent can be based on
  - Prior party agreement (e.g.: treaty or contract (MR 4))
  - Acceptance of offer to mediate pursuant to MR (MR 5)

Confidentiality of Mediation – MR 9-10

- Documents and information obtained during mediation are confidential unless
  - Parties agree otherwise
  - Information or document is independently available
  - Disclosure is required by law
- Fact of mediation is not confidential
- No collateral use of information in other proceedings

Mediators – MR 11-16

- Must be impartial and independent
- Parties can agree on particular qualifications
- Sole or co-mediators appointed by parties or S-G upon request
- Sign mediator declaration (Schedule 8)
- Assists parties in reaching a mutually acceptable resolution but cannot impose a settlement (MR 16)

Conduct of Mediation – MR 18-20

- Parties file initial statement on issues and process before first session
- First session within 30 days of mediator accepting appointment
- Must identify person authorized to settle for each party and describe settlement implementation process
- Mediator can communicate jointly or separately with parties
- Mediator can request information and submissions from parties
- Mediator can only make recommendations if parties agree

Next Steps in Amendment Process

- Full proposals in WP # 3, available at: https://icsid.worldbank.org/en/Amendments
- Consultation with States on Nov. 11-15, 2019
- Vote on amendments expected in 2020 (require approval of two-thirds of ICSID Member States for Convention rules and 50% of votes for other rules)

Anne Joubin-Bret
UNCITRAL Working Group III
Video (30 min)

Code of Conduct

- Joint work of ICSID & UNCITRAL Secretariats on-going
- May raise key issues including double-hatting, issue conflict and repeat appointment

UNCTAD'S ROADMAP FOR IIA REFORM