

ICSID at Cross Roads: Thoughts and Recommendations for Improving the System

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ICSID Pending Cases

- 1996: 8 Cases
- 2001: 44 Cases
- 2006: 118
- 2011: 131

1. ICSID Panel of Arbitrators

Background:

- Each Contracting State may designate 4 members
- Renewable six-year terms
- May but need not be nationals
- Competence in the field of law of particular importance

ICSID Panel of Arbitrators Cont.

Problem:

- 353 Panel designees
- Chairman of ICSID Administrative Counsel must appoint from the Panel
- Repeat appointments of some 10% of Panel designees
- Many designations are not useful to the Centre

ICSID Panel of Arbitrators Cont.

Suggestion:

- Panel should be a better resource
- ICSID should initiate a high level campaign with member countries to improve Panel
- Consultations with national authorities
- Provide input on desired profile of ICSID arbitrators
- Recall that non-nationals may be appointed

2. Training

Background:

- ICSID offers no training or conferences dedicated to the application of its rules and discussion of ICSID jurisprudence as does for example the LCIA and the ICC

Training Cont.

Problem:

- No mechanism for introducing newly designated Panel members to the Centre and the international investment arbitration bar
- Other conference activity but no forum dedicated to ICSID training

Training Cont.

Suggestion:

- ICSID to organize workshops and training sessions
- ICSID:
 - jurisprudence
 - work of annulment committees
- Experienced arbitrators:
 - management of an ICSID case
 - procedural issues

3. Appointment of Arbitrators by ICSID

Background:

- Chairman of ICSID's Administrative Council must select arbitrators from the Panel when requested to make appointments of presiding arbitrators and annulment committee members
- Candidate ought to have confidence of both sides
- Arbitration Rules call for consultations with the parties on the appointment

Appointment of Arbitrators by ICSID Cont.

Problem:

- Limited number of Panel candidates available
- Number proposed by ICSID to parties limited to 3
- No meaningful consultations
- Appointments are made even when parties have serious reservations

Appointment of Arbitrators by ICSID Cont.

Suggestion:

- Work to obtain agreement of parties on appointments
- Expand list of proposed candidates to 10
- Ask each side to list candidates in order of preference

4. Explanatory Notes

Background:

- 1968 Arbitration Rules issued with a set of Explanatory Notes
- Helpful to the interpretation of ICSID's procedural rules
- Last reissuance: 1975

Explanatory Notes Cont.

Problem:

- Amendments to Rules in 1984, 2003, and 2006
- Many new procedural developments in light of growing case load
- All users, parties, arbitrators and counsel, as well as new ICSID staff, should have access to explanatory notes
- Difficult to access background to rules especially for “newcomers”

Explanatory Notes Cont.

Suggestion:

- Issuance of updated set of Explanatory Notes

5. Ethics Rules

Background:

- Unclear which ethics rules apply to counsel conduct in international arbitrations
- Issue under increasing focus due to greater transparency and calls for predictability

Ethics Rules Cont.

Problem:

- Counsel appearing before ICSID tribunal subject to different national ethics rules
- Counsel subject to more than one set of national ethics rules
- International arbitration rules have developed its own customs and practice
- Inconsistent ICSID decisions in cases requesting the removal of counsel
- Non-compliance can lead to cost awards

Ethics Rules Cont.

Suggestion:

- ICSID to articulate standards for counsel's conduct on the basis of clear rules of general application

6. ICSID Users' Committee

Background:

- ICSID's structure:
 - Administrative Counsel:
 - one representative of each Contracting State (Election of SG and DSG; adoption of budget; adoption of regulations and rules)
 - ICSID Secretary-General:
 - legal representative and principal legal officer of the Centre; registrar

ICSID Users' Committee Cont.

Background Cont.:

- ICSID has approximately 30 staff:
 - 9 counsel and senior counsel
 - 7 consultants
 - 15 administrative staff

ICSID Users' Committee Cont.

Problem:

- No board or court consisting of high profile arbitration specialists providing input
- Common among other arbitral institutions (e.g., LCIA, ICC, AAA, SCC, SIAC)
- Informal exchanges take place but are not transparent

ICSID Users' Committee Cont.

Suggestion:

- Establish an ICSID Users' Committee
- To include parties, counsel and arbitrators
- Bi-annual meetings; transparent feedback; involvement in specific projects

7. Mediation and Mediators

Background:

- A large portion of ICSID cases settle before award is rendered, 30-40%

Mediation and Mediators Cont.

Problem:

- Arbitrators have in the past been appointed to Panel of Conciliators
- Conciliation has only been used in 6 cases
- ICSID has no mechanism in place to assist parties seeking settlement

Mediation and Mediators Cont.

Suggestion:

- Appoint high level ADR experts to Panel of Conciliators
- Draw attention to the possibility of seeking mediation, either in combination with an arbitral proceeding, or as an alternative dispute settlement method

8. Case Surveys

Background:

- BITs generally offer investors a choice between different arbitration rules, ICSID, UNCITRAL, SCC, ICC
- PCA administers proceedings under the UNCITRAL Rules
- Growing number of disputes are submitted under rules other than ICSID

Case Surveys Cont.

Problem:

- Growing case load means less SG interaction with users
- User feedback is anecdotal
- No consistent mechanism to measure satisfaction
- No mechanism to solicit comments and suggestions

Case Surveys Cont.

Suggestion:

- Introduce case survey to be completed at the conclusion of each proceeding by parties, arbitrators and counsel
- Publish aggregated summary of evaluations in the ICSID Annual Report

9. Appointment of One or More Deputy Secretaries-General

Background:

- Deputy Secretaries-General served from 1999 - 2005 and 2007 - 2011
- Before that time, there was always management level staff supporting the Secretary-General
- Flat ICSID team structure announced in Summer 2011

Appointment of One or More Deputy Secretaries-General Cont.

Problem:

- Large case load
- Interaction in all administrative matters with the World Bank
- Significant span of control
- No staff at management level apart from S-G
- No provision for acting S-G if S-G is unavailable

Appointment of One or More Deputy Secretaries-General Cont.

Suggestions:

- Appointment of 2 Deputy Secretaries-General:
 - one responsible for case administration
 - one responsible for ICSID's relationship with the World Bank in administrative matters

10. ICSID and Compliance with Awards Rendered Under the Convention

Background:

- Article 53 of the ICSID Convention requires each party to “abide by and comply with the terms of the award”
- Failure to abide by and comply with the award by a Contracting State party to the dispute is a violation not only with its undertaking to arbitrate but also of an international treaty obligation

ICSID and Compliance with Awards Rendered Under the Convention Cont.

Problem:

- Non-compliance with ICSID awards has become more accentuated in the wake of Argentina's position on the requirements of the Convention

ICSID and Compliance with Awards Rendered Under the Convention Cont.

Suggestion:

- High profile campaign to draw attention to the situation
- Include list of outstanding awards in ICSID's Annual Report
- Include reference in ICSID's Annual Report to position taken by the World Bank

Conclusion

- ICSID is responsible for process not outcome
- But process is critical to legitimacy and respected outcomes
- 10 suggestions made to improve process as ICSID approaches its 50th Anniversary in 2016.