

# The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes

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## I. Introduction

The International Centre for Settlement of Investment Disputes (ICSID) is one of the five international organizations that make up the World Bank Group. Like the other organizations in the World Bank Group, ICSID was established by a multilateral treaty. In ICSID's case, this was the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, commonly called the ICSID Convention.<sup>1</sup> To date, 143 countries have signed and ratified the Convention to become Contracting States. The Convention offers them procedures for the conciliation and arbitration of investment disputes they may have with individuals or companies that qualify as nationals of other Contracting States. ICSID administers these procedures.

The governing body of ICSID is the Administrative Council, which consists of one representative of each Contracting State. Pursuant to Article 6(1)(a)-(c) of the Convention, the Council has adopted regulations and rules complementing the provisions of the Convention. These are generally referred to as the ICSID Regulations and Rules. They comprise:

- (i) the ICSID Administrative and Financial Regulations, which, in addition to dealing with such matters as meetings of the Administrative Council, regulate the details of the ICSID's administration of conciliation and arbitration proceedings;<sup>2</sup>

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1. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention], *printed in* International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, April 2006, *available at* [http://www.worldbank.org/icsid/basicdoc/CRR\\_English-final.pdf](http://www.worldbank.org/icsid/basicdoc/CRR_English-final.pdf) [hereinafter ICSID 2006 Regulations and Rules].

2. ICSID 2006 Regulations and Rules, *supra* note 1, Administrative and Financial Regulations, at 51.

- (ii) the ICSID Institution Rules, which set forth procedures for the initiation of conciliation and arbitration proceedings under the ICSID Convention;<sup>3</sup>
- (iii) the ICSID Arbitration Rules, which set forth procedures for the conduct of the various phases of an arbitration proceeding, including the constitution of the arbitral tribunal, the presentation by the parties of their case and the preparation of the arbitral award;<sup>4</sup> and
- (iv) the ICSID Conciliation Rules, which set forth similar procedures for the conduct of the conciliation proceedings.<sup>5</sup>

In addition to the ICSID Regulations and Rules, the Administrative Council has adopted a set of Additional Facility Rules.<sup>6</sup> Under the Additional Facility Rules, the ICSID Secretariat is authorized to administer certain types of proceedings between states and foreign nationals that fall outside the scope of the ICSID Convention. These include fact-finding proceedings, as well as conciliation and arbitration proceedings for the settlement of investment disputes where either the state party to the dispute or the home state of the foreign national is not an ICSID Convention Contracting State. As originally adopted, the Additional Facility Rules comprised:

- (i) the Additional Facility Rules proper (the other Additional Facility Rules being strictly speaking schedules to this main set of rules), setting forth the basic conditions of access to the Additional Facility;<sup>7</sup>
- (ii) the Additional Facility Administrative and Financial Rules, an abbreviated version of the ICSID Administrative and Financial Regulations;<sup>8</sup>
- (iii) the Additional Facility Conciliation Rules, the Additional Facility's counterpart of the ICSID Conciliation Rules;<sup>9</sup>
- (iv) the Additional Facility Arbitration Rules, the Additional Facility's counterpart of the ICSID Arbitration Rules;<sup>10</sup> and
- (v) the Additional Facility Fact-Finding Rules.<sup>11</sup>

In accordance with its Article 66(1), the ICSID Convention may only be amended by unanimous ratification of all Contracting States. Not surprisingly therefore, the Convention has never been amended. The ICSID Regulations and Rules, however, may be amended by a two-thirds majority vote of the Administrative Council; and the Additional Facility Rules may be amended by simple majority vote of the Council. Over the years, the ICSID Regulations and Rules and the Additional Facility Rules have been amended

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3. *Id.*, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), at 73.

4. *Id.*, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), at 99.

5. *Id.*, Rules of Procedure for Conciliation Proceedings (Conciliation Rules), at 81.

6. International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, April 2006, available at [http://www.worldbank.org/icsid/facility/AFR\\_English-final.pdf](http://www.worldbank.org/icsid/facility/AFR_English-final.pdf).

7. International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, September 1978, available at, <http://www.worldbank.org/icsid/facility-archive/facility.htm> [hereinafter ICSID 1978 Additional Facility Rules].

8. *Id.*, Administrative and Financial Rules, at 7.

9. *Id.*, Conciliation Rules, at 13.

10. *Id.*, Arbitration Rules, at 33.

11. *Id.*, Fact-Finding Rules, at 57.

several times by the Council on the proposal of the Secretariat. But as they have involved an accumulation of changes made during a span of some forty years, which amendments were introduced, when, and why, may be difficult to disentangle. Yet some of the amendments cannot be fully understood without knowledge of a previous amendment of the same provision. This article aims to provide an overall account of the development of the Regulations and Rules and of the amendments made to them in the course of ICSID's history.

## II. The Provisional ICSID Regulations and Rules

The ICSID Convention came into force in October 1966, and the Administrative Council held its Inaugural Meeting in February 1967. At that meeting, the Council adopted provisional versions of the ICSID Regulations and Rules. These provisional Regulations and Rules, of course, elaborated on provisions of the Convention. They also drew inspiration from the Statute and Rules of the World Court<sup>12</sup> and from the Permanent Court of Arbitration's 1962 Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State.<sup>13</sup> In accordance with the relevant resolution of the Council, these provisional Regulations and Rules were to remain in effect only until the end of 1967. The resolution required the ICSID Secretariat to prepare, in consultation with the Contracting States, definitive texts of the Regulations and Rules for adoption by the Council at its first annual meeting to be held in September 1967.

## III. The Definitive ICSID Regulations and Rules

At its first annual meeting, the Administrative Council adopted the definitive texts of the ICSID Regulations and Rules.<sup>14</sup> In comparison with the provisional texts, the definitive texts were more polished and better organized, but in substance closely similar to the provisional texts. A major difference lay in the fact that each provision of the definitive Institution, Conciliation, and Arbitration Rules was accompanied by notes explaining the provision in question and pointing to related provisions of the Convention and of other rules. Although it was not intended that they would somehow become part of the provisions themselves, the existence of the notes permitted some more direct and economical drafting of the provisions. The reliance of the drafter on this approach also meant that the reader could not always readily comprehend a provision without consulting the accompanying notes.

The definitive Regulations and Rules took effect at the beginning of 1968, immediately following the expiry of the provisional Regulations and Rules. They were published with their explanatory notes to elucidate for parties the provisions of the Institution, Conciliation, and Arbitration Rules.

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12. International Court of Justice, Rules of Court, April 1978, available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt\\_20050929.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20050929.htm).

13. Permanent Court of Arbitration: 1962 Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One Is a State, *printed in* H.P. LOWRY, *CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED: INTERNATIONAL COMMERCIAL LAW AND ARBITRATION* 261-80 (1991).

14. International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, January 1, 1968 (available in booklet form from the ICSID Secretariat) [hereinafter ICSID 1968 Regulations and Rules].

#### IV. Amendments Before 1984

In accordance with Article 4(2) of the ICSID Convention, the representative of a Contracting State on the Administrative Council is normally the governor of the World Bank for the country concerned. Article 5 of the Convention provides that the President of the World Bank shall be *ex officio* Chairman of the Administrative Council. Up until 1988, the annual meetings of the Administrative Council were held during the same week as, but separately from, the sessions of the annual meetings of the World Bank governors. To spare the President of the Bank from having to preside over the separate gathering of the Administrative Council each year, the ICSID Administrative and Financial Regulations were amended in 1970 by adding, in what is now Regulation 4, provisions allowing Council meetings to be chaired by a temporary presiding officer drawn on a rotation basis from among the members of the Council.<sup>15</sup> Administrative and Financial Regulation 6 (now Regulation 7) was at the same time amended to facilitate taking votes of Council members on certain proposals not adopted at a meeting because of insufficient attendance.

The Convention provides that ICSID shall maintain a Panel of Conciliators and a Panel of Arbitrators consisting of qualified persons "who are willing to serve thereon."<sup>16</sup> Each Contracting State may designate up to four persons to each Panel; the Chairman of the Administrative Council may designate up to ten persons to each Panel. All Panel members serve for renewable six-year terms. Administrative and Financial Regulation 21 originally included a provision requiring the ICSID Secretariat to check each year with each country that had designated persons to the Panels to ascertain whether the designees continued to be willing to serve. In implementing this provision, countries apparently saw themselves as being given the opportunity prematurely to withdraw designations to the Panels. The provision was consequently deleted from the Regulations by an amendment approved by the Administrative Council in 1973.

Finally, as originally adopted, what is now ICSID Administrative and Financial Regulation 14, provided that conciliators and arbitrators would ordinarily receive a specified fee per meeting day, a smaller specified fee per day of other work, and yet a smaller specified per diem subsistence allowance. By an amendment of the Regulations approved by the Administrative Council in 1975, the specified fee was increased uniformly (that is, to the same level) for meeting days and days of other work; instead of mentioning a specific amount, the maximum subsistence allowance was related to the allowance paid to Executive Directors of the World Bank; and the Secretary-General of the Centre was authorized to increase or decrease the specified fees with the approval of the Chairman of the Administrative Council, though not "more than once a year," to "take account of monetary changes and changes in the cost of living."<sup>17</sup> Until 1984, no other amendments were made to the ICSID Administrative and Financial Regulations, and the ICSID Institution, Conciliation and Arbitration Rules effective from the beginning of 1968 remained unchanged.

15. See *id.*; Administrative and Financial Regulations, *supra* note 2, at 10.

16. ICSID Convention, *supra* note 1, arts. 3 and 12.

17. See ICSID 1968 Regulations and Rules, *supra* note 14; Administrative and Financial Regulations, *supra* note 15, at 14.

## V. The Amendments of 1984

At its annual meeting in September 1984, the Administrative Council adopted, with immediate effect, further amendments of the ICSID Administrative and Financial Regulations and the first amendments of the ICSID Institution, Conciliation and Arbitration Rules.<sup>18</sup> By that time, ICSID had registered a total of twenty cases and had gained experience with the administration not only of conciliation and arbitration proceedings but also of the first proceeding for the annulment of an award rendered under the Convention.<sup>19</sup>

The amendments adopted in 1984 included three amendments to what became Administrative and Financial Regulation 14. The first was to delete from the regulation the amount of the standard fees of conciliators and arbitrators, which henceforth were to be determined from time to time by the Secretary-General with the approval of the Chairman of the Administrative Council. The Regulation provided for ICSID to make quarterly requests to parties for advances to defray the direct costs of a proceeding. The second change was to give ICSID the flexibility to make such requests at intervals of three to six months. Under the Regulation, parties to annulment, as well as arbitration proceedings, would ordinarily be asked to share equally in the payment of such advances pending the ultimate apportionment of costs by the tribunal or committee concerned. The third change made to the Regulation in 1984 was to provide that in annulment proceedings, the applicant for annulment would instead be solely responsible for making the necessary advance payments.

Other amendments of the Administrative and Financial Regulations included amending what became Regulation 16 to provide for a uniform fee for lodging requests rather than different fees depending on whether the request was one for conciliation or arbitration or for one of the post-award remedies. (As thus amended, Regulation 16 remained flexible enough to permit the reintroduction, twenty years later, of differentiated lodging fees in the separate ICSID Schedule of Fees.) Regulation 25 also no longer required that the secretary of the conciliation commission or arbitral tribunal attend all hearings of the body in question.

The principal amendments made in 1984 to the ICSID Arbitration Rules<sup>20</sup> were to introduce, in a new Rule 21, a provision for pre-hearing conferences that could be held to stipulate uncontested facts or discuss an amicable settlement; to provide explicitly, in a new Rule 39(5), that provisional measures could only be sought from national courts if the parties had so agreed; and to delete old Rule 37 requiring the secretary of the tribunal to keep minutes of hearings. Also deleted was the similar provision of the Conciliation Rules, old Rule 29, regarding minutes. In addition, bearing in mind that Article 48(5) of the Convention and Arbitration Rule 48(4) precluded ICSID from publishing a Convention award without the consent of the parties, Arbitration Rule 48(4) was qualified with a provision allowing the Centre to include in its publications excerpts of the legal reasoning of the tribunal.

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18. See International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, September 26, 1984, available at <http://www.worldbank.org/icsid/basicdoc-archive/9.htm> [hereinafter ICSID 1984 Regulations and Rules].

19. See *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon & Société Camerounaise des Engrais* (Award October 21, 1983 and Decision on Annulment May 3, 1985), 2 ICSID Rep. 4 (1994).

20. See ICSID 1984 Regulations and Rules, *supra* note 18, Arbitration Rules, at 66.

A number of further changes were made with a view to simplifying some provisions and updating or clarifying others. For example, what is now Arbitration Rule 22, regarding procedural languages, was simplified and shortened, as was Institution Rule 5, regarding the acknowledgement of requests for conciliation or arbitration. Arbitration Rule 6(2) was adjusted to reflect the by-then-current practice of requiring arbitrators to include, in their declarations under the rule, a statement of any past or present relationships with the parties. And Arbitration Rule 46 was clarified to make it explicit that the time limit for preparing an award also applied to any individual or dissenting opinion.

The ICSID Regulations and Rules as amended in 1984 were to be published without the explanatory notes that had accompanied the 1968 Regulations and Rules. A few of the other 1984 amendments involved adding text repeating or paraphrasing related articles of the Convention that would no longer be described in accompanying notes. In ICSID Arbitration Rule 50 regarding post-award remedies, for example, there was added text repeating the provisions of Article 52(1) of the Convention setting out the grounds for annulment of an award.

## VI. The Additional Facility Rules

At its 1978 Annual Meeting, the Administrative Council adopted, on the proposal of the Secretariat, the Additional Facility Rules of the Centre.<sup>21</sup> Naturally, the Additional Facility Rules resembled the ICSID Regulations and Rules. They were also influenced by the 1976 Arbitration Rules of the United Nations Commission on International Trade Law, or UNCITRAL.<sup>22</sup> For example, like Article 26 of the UNCITRAL Arbitration Rules, Article 47 (now Article 46) of the Additional Facility Arbitration Rules provided that recourse to national courts for provisional measures would not be deemed incompatible with the arbitration agreement.

The Additional Facility was introduced cautiously: In adopting the Additional Facility Rules in 1978, the Administrative Council resolved that it would after five years—that is, in 1983—review the operation of the Additional Facility to decide whether to continue the Additional Facility or to terminate it for the future. In 1983, the Council decided to postpone a decision on the issue until the 1984 Annual Meeting. At that meeting, the Council agreed with a recommendation of the Secretariat to continue the Additional Facility indefinitely.

## VII. The Amendments of 2003

It was mentioned earlier that by September 1984 ICSID had registered a total of twenty cases. The caseload of the Centre had thus been growing at a rate of only one or two new cases a year. Almost all of the cases had been brought to the Centre on the basis of consents to arbitration recorded in the traditional manner, in the dispute-settlement provisions of an investment contract between the parties. It was coincidentally in 1984, the same year as that of the first amendments of the ICSID Arbitration Rules, that ICSID registered the first arbitration case brought to it by an investor relying, for the consent of the host

21. ICSID 1978 Additional Facility Rules, *supra* note 7.

22. United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules, 15 I.L.M. 701 (1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

State, on a provision of the investment law of the State.<sup>23</sup> Three years later, in 1987, the Centre registered the first case submitted to arbitration under the ICSID Convention on the basis of a similar provision in a bilateral investment treaty, or BIT.<sup>24</sup>

From the late 1980s and through the 1990s, the pace of BIT-making increased enormously. Another approximately 1,500 such treaties were concluded, bringing the total to well over 2,000 treaties involving some 170 countries. Also during the 1990s, several multilateral trade and investment treaties were concluded. The North American Free Trade Agreement<sup>25</sup> (NAFTA) and the Energy Charter Treaty<sup>26</sup> (ECT) are among the best known of these multilateral treaties. They, and the overwhelming majority of the BITs, all have provisions setting forth the consent of each State to submit to arbitration under the ICSID Convention disputes with investors from the other State or States involved. In the NAFTA, ECT, and many of the BITs, the provisions also set forth the consent of the States to arbitration under the Additional Facility Rules.

The proliferation of investment treaties with these references to arbitration under the ICSID Convention and Additional Facility began after the mid-1990s to transform the caseload of ICSID. The previous annual growth rate of the caseload became the monthly rate: ICSID, in other words, started to register arbitration cases at the rate of one or two a month. The new cases included not only cases brought under the ICSID Convention but also the first initiated under the Additional Facility Rules.<sup>27</sup> With the rapidly accumulating experience, the ICSID Secretariat decided in 1999 to review the Regulations and Rules to see if there were improvements that could usefully be introduced at that stage.

The review led to proposed amendments that were approved by the Administrative Council at its 2002 Annual Meeting and came into force at the beginning of 2003.<sup>28</sup> The amendments were intended to clarify and update some provisions, to make certain others more flexible, and to streamline the Additional Facility Rules and align them more closely with the ICSID Rules.

Thus, there was added to Administrative and Financial Regulation 25 a provision briefly making it clear that, in the absence of contrary agreement by the parties, the secretary of the conciliation commission or arbitral tribunal concerned would be expected to keep summary minutes of hearings. This reflected the practice of ICSID since its inception and restored to the system a specific default provision on records of hearings missing since the deletion in 1984 of the elaborate provisions on minutes in the ICSID Arbitration and Conciliation Rules.

Two main amendments were made to the Institution Rules. The first was to codify, in Institution Rule 2, the practice of the Secretariat of requiring corporate claimants to submit with their requests for arbitration evidence that they had taken necessary internal steps to authorize the request. This practice had developed after two cases registered in 1992

23. *S. Pac. Props. (Middle East) Ltd. v. Arab Republic of Egypt* (Registered August 28, 1984), 3 ICSID Rep. 46 (1995).

24. *Asian Agric. Prods. Ltd. v. Democratic Socialist Republic of Sri Lanka* (Registered July 20, 1987), 4 ICSID Rep. 246 (1997).

25. North American Free Trade Agreement, Dec. 8, 1993, 32 I.L.M. 289.

26. Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360.

27. *Metalclad Corp. v. United Mexican States* (Registered Jan. 13, 1997), 5 ICSID Rep. 209 (2002).

28. International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules, January 2003, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc-2003.htm> [hereinafter ICSID 2003 Regulations and Rules].

revealed the need for it.<sup>29</sup> The second main amendment of the Institution Rules was to add, in Rule 7, the requirement that notices of registration of requests for conciliation or arbitration remind the parties that registration of the request was without prejudice to the powers and functions of the conciliators or arbitrators in regard to jurisdiction or the merits. This again was an amendment codifying the previous practice of the Secretariat.

Amendments were made to five of the ICSID Arbitration Rules.<sup>30</sup> The first was to clarify the provision on the nationality of arbitrators, Arbitration Rule 1(3), without changing its substance. The provision had proven to be confusing to parties, particularly without the explanatory notes that had been dropped in 1984. The amended provision made it clear that, in the typical case of a three-member tribunal, a party could appoint a co-national as an arbitrator only with the agreement of the other party. Arbitration Rules 4 and 9 imposed relatively short (thirty-day), rigid time limits on the appointment and disqualification of arbitrators by the Chairman of the Administrative Council. Arbitration Rule 46 imposed a relatively short (sixty-day) time limit (extendable only once, for a further thirty days) for the preparation of the arbitral award. With the growing volume and complexity of the cases, these time limits had become increasingly burdensome. The amendments made the time limits in Arbitration Rules 4 and 9 hortatory (on the model of what is now Article 10(2) of the Additional Facility Arbitration Rules) and doubled the time limit in Arbitration Rule 46. The fifth and final amendment of the Arbitration Rules was to increase from thirty to forty-five days the period after which the Chairman of the Administrative Council might be called upon under Arbitration Rule 11 to fill vacant positions on tribunals.

Four amendments were made to the ICSID Conciliation Rules.<sup>31</sup> These were to introduce to the Conciliation Rules essentially the same changes regarding time limits as were made to the ICSID Arbitration Rules.

The great majority of the amendments of 2003, however, were aimed at the Additional Facility Rules.<sup>32</sup> They included two main amendments of the Additional Facility Rules proper. The first was to delete the last sentence of Article 4(6), which characterized the Secretariat's approval of access to the Additional Facility as a conclusive determination that the contemplated proceedings would be within the scope of the Additional Facility Rules. The sentence had too frequently been misunderstood as implying that the approval of access ruled out objections to jurisdiction. The second main amendment of the Additional Facility Rules proper was to allow, in Article 5, for doing away entirely with the Additional Facility Administrative and Financial Rules and instead applying the relevant provisions of the ICSID Administrative and Financial Regulations to Additional Facility proceedings. This was intended to give Additional Facility proceedings a more complete administrative and financial framework than the abbreviated one provided by the Additional Facility Administrative and Financial Rules. By more fully integrating Additional Facility cases into ICSID's regular administrative structure, the change was

29. *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corp.* (Award of April 5, 1994), 5 ICSID 3 (2002); *Vacuum Salt Prods. Ltd. v. Republic of Ghana* (Award of February 16, 1994), 4 ICSID Rep. 329 (1997).

30. ICSID 2003 Regulations and Rules, *supra* note 28, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), at 99.

31. *Id.*, Rules of Procedure for Conciliation Proceedings (Conciliation Rules), at 81.

32. International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, January 2003, available at <http://www.worldbank.org/icsid/facility/facility-2003.htm>.



in keeping with the indefinite continuation of the Additional Facility approved in 1984. It also resulted in significant streamlining of the Additional Facility Conciliation and Arbitration Rules by permitting the deletion from them of provisions that merely reproduced parts of the ICSID Administrative and Financial Regulations. This change was furthermore meant to simplify the work of the ICSID Secretariat in the administration of Convention and Additional Facility proceedings, by making that work subject to the same set of rules.

Amendments were made to about fifty provisions of the Additional Facility Conciliation, Arbitration and Fact-Finding Rules. Many of these, however, were meant only to eliminate certain differences in terminology between the various Additional Facility Rules and the ICSID Convention and Rules. For example, the instrument by which Convention proceedings are instituted is called a request. Like the UNCITRAL Arbitration Rules,<sup>33</sup> the Additional Facility Conciliation and Arbitration Rules called the equivalent instrument a notice; the requesting party and other party of ICSID Convention proceedings were renamed the Claimant and Respondent in the Additional Facility Arbitration Rules; and the ICSID Convention's notice of registration became, in the Additional Facility Conciliation and Arbitration Rules, a certificate of registration. The Secretariat's documentation for the cases had to reflect these unnecessary differences in terminology. By some twenty amendments, the terminology of the Additional Facility Rules was brought in line with the terminology employed in the ICSID Convention and Rules.

About fifteen of the changes to the Additional Facility Conciliation, Arbitration and Fact-Finding Rules were to reflect the substitution, mentioned earlier, of the Additional Facility Administrative and Financial Rules by the relevant provisions of the ICSID Administrative and Financial Regulations. Thus, for example, most of the general provisions on time limits in the Additional Facility Conciliation and Arbitration Rules were deleted, as they largely repeated provisions of ICSID Administrative and Financial Regulation 29.

Ten more of the amendments were to bring to the Additional Facility Rules changes made to the ICSID Rules in 1984. Thus, for example, a new Article 29 on pre-hearing conferences, based on the rule on the subject added to the ICSID Arbitration Rules in 1984, was added to the Additional Facility Arbitration Rules. Simplifications made in 1984 to the ICSID Rules were also made to the Additional Facility Rules. The provision on procedural languages in the Additional Facility Arbitration Rules (now Article 30 of those rules), for instance, was simplified in the way that the corresponding provision of the ICSID Arbitration Rules was simplified in 1984.

A final group of amendments of the Additional Facility Rules eliminated certain further, pre-1984, differences between them and the ICSID Rules. These included unnecessary differences between the article on preliminary objections in the Additional Facility Arbitration Rules, Article 45, and the corresponding rule of the ICSID Arbitration Rules, Rule 41. Another update consisted of deleting an article (old Article 7) of the Additional Facility Fact-Finding Rules referring to United Nations and GATT<sup>34</sup> lists of experts that were no longer maintained and had been superseded.

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33. UNCITRAL Arbitration Rules, *supra* note 22.

34. General Agreement on Tariffs and Trade, 33 I.L.M. 1153 (1994).

### VIII. The Amendments of 2006

Since 2001, the caseload of ICSID has continued to grow dramatically. Indeed, the rate of increase has more than doubled, to over twenty-five new cases annually. The total number of cases registered has now surpassed 200. With the deluge of new cases, there came new criticisms of process, calls for greater efficiency and transparency—the latter particularly in view of the public importance of issues at stake in many of the new cases. A response of the ICSID Secretariat was in several additional amendments proposed by it for the ICSID Regulations and Rules and Additional Facility Rules. After consultations extending from October 2004 to February 2006, the amendments were adopted by correspondence vote by the Administrative Council with effect from April 2006.

In accordance with Article 36 of the ICSID Convention, the power of the Secretariat to refuse registration of arbitration requests is limited to those that disclose a manifest lack of jurisdiction. The Secretariat is powerless to prevent the initiation of proceedings that clear this jurisdictional threshold, but are frivolous as to the merits. This had been a source of recurring complaints from some respondent governments. One of the amendments to the ICSID Arbitration Rules made in 2006 was to introduce a procedure, in Rule 41, for the early dismissal by arbitral tribunals of patently unmeritorious claims. A related change of Rule 41 was to make discretionary, rather than automatic, the suspension of the proceeding on the merits upon the formal raising of an objection to jurisdiction.

In 1984, ICSID Arbitration Rule 39 was amended to make it clear that parties to ICSID Convention arbitration proceedings could not, unless they agreed otherwise, seek provisional measures from national courts. Parties could apply to their arbitral tribunal for provisional measures—but they might have to wait four or more months following registration of the arbitration request for the tribunal to be constituted. A new amendment of Arbitration Rule 39 was intended to help remedy this shortcoming by allowing for the early filing of a request for provisional measures, and of all the parties' observations on it, so that the tribunal might consider the request promptly on its constitution.

In ICSID Convention arbitration proceedings initiated against Argentina with regard to water services concessions, the arbitral tribunal in 2005 affirmed its power to accept and consider written submissions from interested third parties.<sup>35</sup> An amendment of Arbitration Rule 37 codified this power of tribunals to allow such friend-of-the-court submissions to be filed.

In the consultations on the new amendments, there was controversy over the possibility of relaxing a provision of ICSID Arbitration Rule 32 requiring agreement of the disputing parties for any third-party attendance at or observation of hearings. The ICSID Secretariat initially suggested giving tribunals an authority in this regard similar to the one they would have with regard to written submissions of third parties. In the end, the amended rule provided that third-party attendance at or observation of hearings might be authorized by a tribunal only if there were no objections from a disputing party. This was, however, a moderation of the previous provision requiring affirmative agreement for any opening of hearings to third parties.

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35. *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, Order in Response to a Petition for Participation as Amicus Curiae, available at <http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf>; and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, available at <http://www.worldbank.org/icsid/cases/pdf/ARB0319-AC-en.pdf>.

Another amendment, which by contrast was quite uncontroversial, was to clarify in Arbitration Rule 6(2) that arbitrators had, on appointment and subsequently, to disclose not only any past or present relationships with the parties, but also any other circumstance that might cause their reliability for independent judgment to be questioned by a party. In regard to the terms of service of arbitrators, a new amendment of ICSID Administrative and Financial Regulation 14 also made it clear that any request for rates of remuneration higher than the standard fee should be made through the Secretariat rather than directly to the parties.

A final amendment of the ICSID Arbitration Rules involved an adjustment of Rule 48 to make mandatory the publication by the ICSID Secretariat of excerpts of the legal reasoning in awards rendered by ICSID tribunals. The authority to publish such excerpts was introduced by one of the amendments of 1984.

The new amendments of the ICSID Arbitration Rules were also made to all of the corresponding provisions of the Additional Facility Arbitration Rules, except for the provision on provisional measures. The exception is explained by the difference between the ICSID Arbitration Rules and the Additional Facility Arbitration Rules in regard to court-ordered provisional measures. As indicated earlier, under Article 46 of the Additional Facility Arbitration Rules, in contrast to the position under ICSID Arbitration Rule 39, it is not deemed inconsistent with the arbitration agreement for a party to seek such measures.

## IX. Conclusion

For the most part, the provisions of the ICSID Administrative and Financial Regulations that are directly applicable to individual proceedings concern the functions of the Secretariat in the administration of the proceedings. The provisions of the ICSID Institution Rules, which concern the screening by the Secretariat of requests for conciliation and arbitration under the Convention, are similarly institutional in nature. It is thus appropriate that the parties cannot by agreement depart from the Administrative and Financial Regulations or the Institution Rules, both of which apply to all cases brought under the Convention, even if they have been amended since the date of the parties' consent to conciliation or arbitration.

The ICSID Conciliation and Arbitration Rules are, by contrast, largely devoted to the constitution by the parties of their conciliation commission, or arbitral tribunal, and to the presentation by the parties of their case. In recognition of their ownership of the process, Articles 33 and 44 of the Convention give the parties considerable scope to agree on modifications of the provisions of the Conciliation and Arbitration Rules. To protect the parties against amendments that they might not welcome, Articles 33 and 44 of the Convention also provide that the applicable Conciliation or Arbitration Rules shall, unless the parties otherwise agree, be those in force on the date of the parties' consent to conciliation or arbitration. The situation is different with regard to amendments of the Additional Facility Conciliation Rules and Arbitration Rules. Article 1 of the Additional Facility Conciliation Rules and Article 1 of the Additional Facility Arbitration Rules provide that where the parties to a dispute have agreed that it shall be referred to Additional Facility conciliation or arbitration, the dispute shall be settled in accordance with the respective rules. Since the references to the rules in these provisions are unqualified, they should presumably be understood as referring to the rules as they exist from time to time. As a result, the applicable Additional Facility Conciliation or Arbitration Rules will, unless the

parties otherwise agree, be those in force on the date of the initiation of the conciliation or arbitration proceeding, even if the rules have been amended since the parties' consent to conciliation or arbitration.

As explained earlier, most of the much-expanded caseload of ICSID has since the mid-1990s been composed of cases brought to the Centre under investment treaties containing consents on the part of the States concerned to ICSID Convention or Additional Facility Rules arbitration. This trend seems certain to continue, given the very large and still growing number of treaties with such consents. In the ICSID Convention cases brought under such treaties, the protection referred to in the preceding paragraph will, in general, be unavailable in respect of amendments of the ICSID Arbitration Rules. ICSID Institution Rule 2 provides that when the parties give their consent to arbitration on different dates, the date of consent will be the date on which the second party acts. Thus, for the purpose of determining the applicable version of the ICSID Arbitration Rules, the date of the consent of the parties in the investment treaty cases will normally be the date of the investor's consent, which will ordinarily be given on or immediately before submitting the case to the Centre. In other words, ICSID Convention arbitration proceedings initiated under investment treaties after the adoption of amendments of the ICSID Arbitration Rules are, in general, subject to the rules as amended, irrespective of the dates of the investment treaties concerned. For the different reason given in the preceding paragraph, it would appear that amendments of the Additional Facility Rules and Additional Facility Arbitration Rules will in principle also apply to all Additional Facility arbitrations commenced under investment treaties after the adoption of the amendments concerned. There would be different outcomes if the investment treaties provided for the application of the ICSID or Additional Facility Rules in force on the dates of the treaties. But none of the treaties, not even the newer, more elaborate ones, seem to have such provisions. In addition, although parties cannot, on the basis of the dates of their consents, claim exemptions from amendments of the ICSID Administrative and Financial Regulations and ICSID Institution Rules, they may be presumed to have given those numerous consents on the basis that the framework provided by those regulations and rules would remain more or less the same.

In considering changes to their rules, arbitration institutions, especially institutions as successful as ICSID, must weigh the need for stability against calls for change and modernization. The points outlined above argue strongly, in the special case of ICSID, for circumspection with regard to change. In addition, there is for ICSID the overriding requirement to maintain consistency with the Convention, which, as explained earlier, is extremely difficult to amend. Yet, as this article has tried to show, ICSID has since its establishment forty years ago, managed within such constraints to adapt its Regulations and Rules to respond to many changing demands on the institution.