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POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION

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Contents

I. INTRODUCTION

1. The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or Convention).[1] This is a multilateral treaty that was opened for signature in 1965 and came into force the following year. To date, 140 countries have ratified the Convention to become Contracting States.[2] The Convention provides a system, administered by ICSID, for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. ICSID itself has a governing body, the Administrative Council, which is composed of one representative of each Contracting State, and a Secretariat, headed by a Secretary-General, responsible for the day-to-day activities of the Centre.

2. The provisions of the Convention are supplemented by various ICSID Regulations and Rules. These include the ICSID Arbitration Rules, which set forth procedures for the conduct of an arbitration proceeding, from the constitution of the arbitral tribunal to the preparation of its award. ICSID also has a set of Additional Facility Rules. They authorize the Secretariat of

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[1] The ICSID Convention, ICSID Regulations and Rules and Additional Facility Rules are available in booklet form from the Centre and posted on its website, www.worldbank.org/icsid.

[2] *See* List of Contracting States and Other Signatories of the Convention, www.worldbank.org/icsid.

ICSID to administer, among other types of proceedings between States and foreign nationals that fall outside the scope of the ICSID Convention, 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 a Contracting State of the Convention. Such proceedings are conducted in accordance with the Additional Facility Arbitration Rules.

3. The ICSID Convention may be amended only if all Contracting States ratify the amendment.[3] It is thus not surprising that the Convention has never been amended. Obtaining unanimous ratification for an amendment by the 140 Contracting States would at best be a very long process. By contrast, amendment of the ICSID and Additional Facility Arbitration Rules requires only a decision of the Administrative Council of ICSID.[4] Adoption of any new ICSID rules similarly would be done by decision of the Administrative Council.

4. The Administrative Council adopted definitive texts of the ICSID Regulations and Rules in 1967; the Additional Facility Rules were adopted in 1978. Amendments adopted in 1984 updated and streamlined the ICSID Regulations and Rules. In 2002, similar amendments were made to the Additional Facility Rules and a few further changes were made to the ICSID

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3 *See* ICSID Convention, Art. 66.

4 *See id.*, Art. 6.

Regulations and Rules. Up until the beginning of 2002, ICSID had registered 85 ICSID Convention cases and 10 Additional Facility cases; of these cases, three were conciliation proceedings and the rest arbitrations. Since then, the caseload of ICSID has grown dramatically, by another 73 arbitration proceedings.[5]

5. Continuing a trend that began in the late 1990s, almost all of the new cases have been initiated pursuant to the investor-to-State dispute-settlement provisions of investment treaties with consents to arbitration under the ICSID Convention or Additional Facility Rules. There are now over 1,500 bilateral investment treaties (BITs) containing such provisions as well as several multilateral treaties, which notably include the NAFTA and the Energy Charter Treaty. In many respects, parties to proceedings seem to have continued to regard the ICSID and Additional Facility Rules as adequately meeting their needs. However, in a number of areas, concerns have been raised and there have been proposals for change.

6. One area involves preliminary procedures, immediately following the registration of a request for arbitration. In an arbitration under the ICSID Convention, interim measures of protection are in principle only available from the arbitral tribunal. It has been suggested that consideration be given to addressing the situation where interim relief is urgently required at the outset

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[5] *See* Lists of Pending and Concluded Cases, www.worldbank.org/icsid.

of the proceeding, by introducing an expedited procedure for the preparation of submissions on the question so that they may be considered by the arbitral tribunal immediately after its constitution. As the power of ICSID to deny registration of a request for arbitration is closely circumscribed by the Convention, to cases where the request discloses a manifest lack of jurisdiction, it has also been proposed that there be a procedure for a party to seek from the tribunal, once it is constituted, the dismissal on an expedited basis of an unmeritorious claim. It has furthermore been asked whether ICSID could more rapidly publish awards issued under its auspices and whether ICSID arbitral proceedings could be made more accessible to third parties. In addition, some concern has been expressed about the adequacy of the disclosure requirements for ICSID arbitrators. Other suggestions that have been made include making mediation more readily available for investor-to-State disputes and more systematically assisting developing countries to build expertise in investor-to-State arbitration. A further, potentially most important, issue that has been raised is whether an appellate mechanism is desirable to ensure coherence and consistency in case law generated in ICSID and other investor-to-State arbitrations initiated under investment treaties.

7. Many of the above-mentioned issues can be addressed by appropriate provisions in new investment treaties, as a number of them already illustrate,

and in amendments of existing investment treaties. This paper examines how such efforts might be complemented by amendments of the ICSID and Additional Facility Arbitration Rules, and by other initiatives of the Centre. The purpose is to encourage discussion of such possible improvements and to invite any further suggestions for change.

II. PRELIMINARY PROCEDURES

8. Under the ICSID Convention, an arbitral tribunal may, if it considers that the circumstances so require, recommend any provisional measures that should be taken to preserve the respective rights of either party.[6] The ICSID Arbitration Rules make it clear that provisional measures may only be sought from national courts if this is provided for in the consent to arbitration of the parties.[7] Some investment treaties take advantage of this possibility and permit recourse to national courts for provisional measures. Such arrangements are, however, uncommon; parties seeking provisional measures must therefore normally await the constitution of the arbitral tribunal, even if the measures may be urgently required. In addition to the time needed to review and register a request for arbitration, four months or more may be required to constitute an arbitral tribunal. The tribunal, in turn, may only recommend provisional measures after each party has had the opportunity to

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6 *See* ICSID Convention, Art. 47.

7 *See* ICSID Arbitration Rule 39(5).

present its observations.[8] The problem might be addressed by a procedure for the expedited filing of a request for provisional measures and all of the observations of the parties on the request while the tribunal is being constituted so that it may upon its constitution consider and decide on the request within a brief time limit.[9] Such a procedure could be introduced by amendment of ICSID Arbitration Rule 39, on provisional measures.

9. If, on the basis of the information contained in a request for arbitration under the ICSID Convention, the dispute is manifestly outside the jurisdiction of the Centre, the Secretary-General of ICSID will refuse to register the request and the case will proceed no further.[10] The Secretary-General exercises a similar screening power with respect to requests for arbitration under the Additional Facility Rules. The screening power does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly lacking. In such cases, the request for arbitration must be registered and the parties invited to proceed to constitute the arbitral tribunal. Registration is, however, without prejudice to the powers and functions of the arbitral tribunal in regard to jurisdiction and the merits of the dispute. The

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8 *See id.*, Rule 39(4).

9 An alternative might be to introduce a pre-arbitral referee procedure along the lines of that of the International Chamber of Commerce Court of Arbitration. *See* www.iccwbo.org.

10 *See* ICSID Convention, Art. 36(3).

parties are reminded of this in the notice of registration of the request.[11] Once constituted, the tribunal may dismiss the claim on the merits or for lack of jurisdiction. As several cases have demonstrated, if the tribunal considers the claim to have been frivolous, it may also award costs to the respondent.

10. It might in this context be useful to make clear in the ICSID and Additional Facility Arbitration Rules, by provisions establishing a special procedure for the purpose, that the tribunal may at an early stage of the case be asked on an expedited basis to dismiss all or part of the claim. Such provisions could specify that a request for such a dismissal would be without prejudice to the further objections a party might make, if the request were denied. The provisions would be helpful in reassuring parties that consider the screening power of the Secretary-General to be too limited, especially insofar as it does not extend to the merits of the dispute. The provisions could be introduced by amending ICSID Arbitration Rule 41 and Article 45 of the Additional Facility Arbitration Rules, which deal with preliminary objections to jurisdiction.

III. PUBLICATION OF AWARDS AND ACCESS OF THIRD PARTIES

11. Through its conciliation and arbitration registers, ICSID publishes information on procedural developments in all of the cases pending before the

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[11] Pursuant to ICSID Institution Rule 7(e).

Centre.[12] Article 48(5) of the ICSID Convention provides that ICSID shall not publish an award without the consent of the parties. The Centre actively seeks, and usually obtains, the consent of the parties for such publication. It then posts the award on the website of ICSID and reprints it in the *ICSID Review – Foreign Investment Law Journal*. When both parties do not consent to the publication of the award by ICSID, one party commonly releases it for publication by such other sources as *International Legal Materials*, the *Journal du Droit International* or *ICSID Reports*. If the Centre does not have the required consent of both parties for publication of the full text of the award, and it is not published by another source, ICSID publishes (on its website and in the *ICSID Review – Foreign Investment Law Journal*) excerpts from the legal holdings of the award, pursuant to ICSID Arbitration Rule 48(4). In short, all ICSID arbitral awards, or at least their key legal holdings, are now published.

12. There nevertheless remains the question of the timeliness of publication, an important consideration when many cases involving similar issues are pending. It occasionally is not until several months have passed that ICSID receives the consent of both parties for it to publish an award. ICSID might in such cases promptly publish excerpts of the main holdings, while it awaits the consents for publication of the full text. Arbitration Rule

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[12] The registers are maintained pursuant to ICSID Administrative and Financial Regulation 23.

48(4) authorizes, but does not require, ICSID to publish excerpts from the awards. Their prompt publication would be facilitated by amending ICSID Arbitration Rule 48(4) (and the corresponding provision of the Additional Facility Arbitration Rules, Article 53(3)) to make it mandatory for ICSID to publish the extracts.

13. In two recent investor-to-State arbitrations governed by the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[13] a form of arbitration that is also often mentioned in investment treaties, the tribunals confirmed that they had broad authority to accept and consider submissions from third parties. Arbitrations under the ICSID and Additional Facility Arbitration Rules have not yielded similar precedents. There may well be cases where the process could be strengthened by submissions of third parties, not only civil society organizations but also for instance business groups or, in investment treaty arbitrations, the other States parties to the treaties concerned. It might therefore be useful to make clear that the tribunals have the authority to accept and consider submissions from third parties. This could be done by amendments of ICSID Arbitration Rule 34 and Article 41 of the Additional Facility Arbitration Rules, regarding evidence. The amendments could set out conditions for the submissions – for example, as to financial and other disclosures by aspiring friends of the court

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[13] For the UNCITRAL Arbitration Rules, see www.uncitral.org.

– or more flexibly leave such conditions for determination by the tribunals in each case.

14. The disputing parties, their counsel and other representatives, and witnesses and experts called upon to testify at hearings held by the tribunal, may attend the hearings. According to the ICSID and Additional Facility Arbitration Rules, the tribunal may allow other persons to attend the hearings only "with the consent of the parties."[14] The notes published with the first edition of the ICSID Regulations and Rules presented this provision in the ICSID Arbitration Rules as reflecting an implication in Article 48(5) of the ICSID Convention "that, as a matter of principle, arbitration proceedings should not be public."[15] However, as indicated earlier, Article 48(5) of the Convention prohibits ICSID from publishing an award without the consent of the parties. The notion that it connotes wider confidentiality or privacy obligations, beyond those of ICSID itself, is not supported by current arbitral practice.

15. Hearings open to the public have been consented to by the parties in two cases administered by ICSID. The Centre has successfully coped with the logistical challenges of hosting such hearings. Some new investment

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[14] ICSID Arbitration Rule 32(2); Additional Facility Arbitration Rules, Art. 39(2).

[15] Note C to ICSID Arbitration Rule 31 (now Rule 32) in ICSID Regulations and Rules, Doc. ICSID/4/Rev. 1(1968).

treaties provide for open hearings in all investor-to-State arbitrations under the treaties. It would seem unwise simply to substitute such a blanket provision for the existing provisions of the ICSID and Additional Facility Arbitration Rules. Not all cases under those rules are treaty arbitrations. On the other hand, the present provisions allow a party to veto any wider attendance at hearings that might be considered necessary or desirable not only by the other party but also by the tribunal. The provisions concerned, ICSID Arbitration Rule 32(2) and Article 39(2) of the Additional Facility Arbitration Rules, might be amended so that the consent of both parties would no longer be required for decisions of the tribunal to permit additional categories of persons to attend the hearings or even to open them to the public. Such amendments should require the tribunal, before making the decisions, to consider the views of the disputing parties, as well as those of the third parties concerned, and to consult with the Secretariat of ICSID on the administrative arrangements involved. The amendments should also make clear the authority of the tribunal to prescribe the conditions (for example, to protect proprietary information) of any wider attendance at the hearings.

IV. DISCLOSURE REQUIREMENTS FOR ARBITRATORS

16. Almost invariably, ICSID arbitral tribunals consist of three persons, one appointed by each party and a third (presiding) arbitrator appointed by agreement of the parties or by ICSID if there is no such agreement within a

certain time limit. All ICSID arbitrators must be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.[16] The requirement of reliability for independent judgment has been interpreted as encompassing impartiality as well as independence from the parties. At the outset of the proceedings, the arbitrators must sign declarations affirming that they know of no reason why they should not serve as arbitrators in the case, that they will judge fairly between the parties according to the applicable law, and that they will accept no unauthorized instruction or compensation.[17] Arbitrators are required to append to the declarations statements of any past or present professional, business or other relationships with the parties.[18] Once signed, the declarations are transmitted by ICSID to the parties.

17. With the large number of new cases, the disclosure requirements for ICSID arbitrators might usefully be expanded. Under the UNCITRAL Arbitration Rules, an arbitrator is required to disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.[19] The relevant ICSID provisions, ICSID Arbitration Rule 6(2) and Article 13(2) of the Additional Facility Arbitration

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16 *See* ICSID Convention, Arts. 14(1) and 40(2); Additional Facility Arbitration Rules, Art. 8.

17 *See* ICSID Arbitration Rule 6(2); Additional Facility Arbitration Rules, Art. 13(2).

18 *See id.*

19 *See* UNCITRAL Arbitration Rules, Art. 9.

Rules, could be amended similarly to require the arbitrator to disclose, not only any past or present relationships with the parties, but more generally any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment. This might in particular be helpful in addressing perceptions of issue conflicts among arbitrators. The ICSID provisions could also be amended to make it clear that the expanded disclosure requirement would apply throughout the entire proceeding and not just at its commencement. Consideration might, in addition, be given to the elaboration by ICSID of a code of conduct for arbitrators like codes elaborated in other intergovernmental settings.[20]

V. MEDIATION AND TRAINING

18. ICSID also provides facilities for the settlement of disputes by conciliation. The Centre now actively promotes conciliation as a relatively low-cost alternative to arbitration that may better preserve business relationships between the parties. On receipt of a request for arbitration, ICSID calls the attention of the parties to the conciliation alternative. Mediation may in some cases be a more effective means of reaching an amicable settlement than the comparatively formal conciliation procedures. In addition to promoting its conciliation facilities, ICSID has therefore begun

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[20] *See, e.g.*, WTO Rules of Conduct for the Dispute Settlement Understanding, www.wto.org.

to examine the possibility of helping to sponsor the establishment of a mediation service for investor-to-State disputes.

19. The ICSID Secretariat has over the years cooperated with such other organizations as the International Development Law Organization and the United Nations Conference on Trade and Development in training programs for officials of developing countries, on the arbitration of investment disputes. The ICSID Secretariat could consider ways of intensifying and further systematizing such training activities.

VI. AN ICSID APPEALS FACILITY?

20. As indicated in the introduction of this paper, interest has been shown in awards in investor-to-State cases under investment treaties being made subject to a mechanism for the appeal of the awards. There have already been concluded several treaties that envisage, in broad terms, the eventual creation of such a mechanism. Several more such treaties are being negotiated. By mid-2005, as many as 20 countries may have signed treaties with provisions on an appeal mechanism for awards rendered in investor-to-State arbitrations under the treaties. Most of these countries are also Contracting States of the ICSID Convention.

21. It was mentioned in the introduction of this paper that the appeal mechanism would be intended to foster coherence and consistency in the case

law emerging under investment treaties. Significant inconsistencies have not to date been a general feature of the jurisprudence of ICSID. It might also be argued that providing an appeal mechanism could fragment the ICSID arbitral regimes: ICSID arbitrations would in some instances be subject to the mechanism and in other cases remain free of the mechanism. Subjecting ICSID arbitral awards to an appeal mechanism might also detract from the finality of the awards and open opportunities for delays in their enforcement.

22. On the other hand, there clearly is scope for inconsistencies to develop in the case law, given the increased number of cases, as well as the fact that under many investment treaties disputes may be submitted to different, ICSID and non-ICSID, forms of arbitration. As to the question of fragmentation, it may be pointed out that there already are different forms of ICSID arbitration (ICSID Convention arbitration and Additional Facility Rules arbitration). With an appeal mechanism, ICSID would be extending a further dispute-settlement option to interested parties. For the cases where there is such interest, the mechanism might enhance the acceptability of investor-to-State arbitration.

23. In any event, as indicated above, a number of countries are committing themselves to an appeal mechanism. It would in this context seem to run counter to the objectives of coherence and consistency for different appeal mechanisms to be set up under each treaty concerned. Efficiency and

economy, as well as coherence and consistency, might best be served by ICSID offering a single appeal mechanism as an alternative to multiple mechanisms. It would be on this assumption that the Centre might pursue the creation of such an ICSID Appeals Facility at this stage. The possible features of an ICSID Appeals Facility are set out in the Annex of this paper. If, however, multiple appeal mechanisms are to be established, ICSID might best abstain from pursuing the creation of an Appeals Facility as it might otherwise only add to the number of appeal mechanisms.

ANNEX

POSSIBLE FEATURES OF AN ICSID APPEALS FACILITY

1. If ICSID undertakes the creation of a single Appeals Facility, as an alternative to multiple mechanisms under treaties providing for the appeal of awards made in investor-to-State arbitrations, the Facility might be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID. An investment or other treaty (including a treaty amending an earlier one) could then provide that awards, made in cases covered by the treaty, would be subject to review in accordance with the ICSID Appeals Facility Rules. The Facility would best be designed for use in conjunction with both forms of ICSID arbitration, UNCITRAL Rules arbitration and any other form of arbitration provided for in the investor-to-State dispute-settlement provisions of investment treaties.

2. According to Article 53(1) of the ICSID Convention, awards rendered pursuant to the Convention "shall not be subject to any appeal or to any other remedy except those provided for in this Convention." As explained earlier, amendment of the ICSID Convention requires the unanimous ratification of the Contracting States. The assumption, however, is that the submission of an ICSID Convention award to the Appeals Facility would in each case be based on the provisions of a treaty. In accordance with the general treaty law rules

reflected in Article 41 of the 1969 Vienna Convention of the Law of Treaties,[1] the treaty with the submission to the Appeals Facility might also modify the ICSID Convention to the extent required, as between the States parties to that treaty, provided that the modification was not prohibited by the ICSID Convention, did not affect the enjoyment of rights and performance of obligations of the other Contracting States under the ICSID Convention and was compatible with the overall object and purpose of the ICSID Convention.[2] The modification would have to be notified to the other Contracting States before the conclusion of the modifying treaty.[3]

3. As just explained, a treaty would appear to be required to make an arbitration under the ICSID Convention subject to the Appeals Facility. But the Appeals Facility could be incorporated into consents to other forms of arbitration, such as arbitration under the Additional Facility or UNCITRAL Rules, in investment laws and contracts as well as treaties. In any event, availability of the Appeals Facility would in all cases depend on the consent of the parties. Parties wishing instead to provide for arbitration without recourse under the Appeals Facility Rules would simply omit them from the consents to arbitration.

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[1] For the Vienna Convention on the Law of Treaties, see www.un.org/law/ilc/texts/treaties.htm.

[2] *See id.*, Art. 41(1)(b).

[3] *See id.*, Art. 41(2).

4. In keeping with their consensual nature, the Appeals Facility Rules would be flexible and subject to adjustment in the underlying consent instrument. The following paragraphs describe in further detail a possible set of ICSID Appeals Facility Rules, modeled, in many respects, after provisions of the ICSID Convention, Regulations and Rules.

5. Such a set of ICSID Appeals Facility Rules could provide for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. The terms of the Panel members would be staggered. Eight of the first 15 would serve for three years; all others would be elected for six-year terms. Each member would be from a different country. They would all have to be persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties.[4]

6. Under such Appeals Facility Rules, challenges of awards could be referred to an appeal tribunal constituted for each case by appointment by the Secretary-General of ICSID. Unless the disputing parties agreed otherwise, each appeal tribunal would have three members. Appointments of appeal

[4] These suggested requirements are based on those applicable to members of the WTO Appellate Body. *See* WTO Dispute Settlement Understanding, Art. 17(3), www.wto.org.

tribunal members would be made from the Panel after consultation with the parties as far as possible.[5]

7. An award could be challenged pursuant to the Appeals Facility Rules for a clear error of law or on any of the five grounds for annulment of an award set out in Article 52 of the ICSID Convention.[6] A further ground for challenging an award might consist in serious errors of fact; this ground would be narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal.

8. An ICSID arbitral tribunal renders just one award, the final award disposing of the case. Earlier decisions of the tribunal will be deemed part of the award and subject at that stage to annulment and other post-award

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[5] The approach, suggested in this and the preceding paragraph of the text, of appeal tribunals drawn from a limited Appeals Panel, might be compared to the system of subsidiary chambers familiar among international dispute-settlement bodies.

[6] These grounds are that the arbitral tribunal was not properly constituted; that it manifestly exceeded its powers; that one of its members was corrupt; that there was a serious departure from a fundamental rule of procedure; and that the award failed to state the reasons on which it was based. Under Article 52 of the ICSID Convention, either party may apply for annulment of an award on one or more of these grounds. An application to annul an award is referred to a three-member ad hoc committee appointed by ICSID from the Panel of Arbitrators of the Centre. The ad hoc committee has the authority to annul the award in whole or in part on any of the five specified grounds. Awards made pursuant to such other rules as the Additional Facility and UNCITRAL Rules are in general subject to the control of the courts at the place of arbitration. The law there may authorize the courts to set aside arbitral awards on the grounds of non-arbitrability of the dispute or conflict with public policy, as well as on grounds similar to those for annulment under Article 52 of the ICSID Convention.

remedies. In some other systems of arbitration, including arbitration under the UNCITRAL Rules, interim decisions of the tribunal may be made in the form of awards and possibly challenged immediately. To avoid discrepancies of coverage between ICSID and non-ICSID cases, the Appeals Facility Rules might either provide that challenges could in no case be made before the rendition of the final award or allow challenges in all cases in respect of interim awards and decisions. It might be best to allow such challenges subject to certain safeguards. These could include a procedure for a party to proceed with the challenge only with permission of a member of the Appeals Panel, chosen in advance by the Panel members to perform this function, and a provision making it clear that the arbitration would continue during the challenge proceeding.

9. Under the possible Appeals Facility Rules, an appeal tribunal might uphold, modify or reverse the award concerned. It could also annul it in whole or in part on any of the grounds borrowed from Article 52 of the ICSID Convention. With the exceptions mentioned in the next sentence, the award as upheld, modified or reversed by the appeal tribunal would be the final award binding on the parties. If an appeal tribunal annulled an award or decided on a modification or reversal resulting in an award that did not dispose of the dispute, either party could submit the case to a new arbitral tribunal to be constituted and operate under the same rules as the first arbitral

tribunal. The Appeals Facility Rules might, however, allow appeal tribunals in some such cases to order that the case instead be returned to the original arbitral tribunal.

10. As in the case of annulment proceedings under the ICSID Convention, the party requesting review of the award would, unless the appeal tribunal decided otherwise, be solely responsible for the advances to ICSID to meet the fees and expenses of the appeal tribunal members and other direct costs of the review proceeding, without prejudice to the power that the appeal tribunal would have to decide on the ultimate allocation of costs. The fees and expenses of the appeal tribunal members would be the same as those to which ICSID arbitrators are entitled.[7] The Appeals Facility Rules would also require the party requesting review of the award, unless the appeal tribunal decided otherwise, to provide a bank guarantee, approved by the appeal tribunal, for the amount of the award. This would be similar to the practice that has been developed of requiring applicants for annulment of an award in ICSID Convention cases to furnish such guarantees as a condition of the continued stay of enforcement of the award.

11. As in the case of the Additional Facility, access to the Appeals Facility would be subject to the approval of the Secretary-General of ICSID. Like the

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[7] *See* ICSID Administrative and Financial Regulation 14; ICSID Schedule of Fees, para. 3.

Additional Facility Rules, the Appeals Facility Rules would provide for the initiation of proceedings by request to the Secretary-General. The request would have to be made within a specified period after the rendition of the award.[8] After verifying that the request was timely and otherwise within the scope of the Appeals Facility Rules, the Secretary-General would register it and proceed to the constitution of the appeal tribunal.

12. The Secretariat of ICSID would provide to the subsequent proceedings all of the administrative services it gives to ICSID Convention and Additional Facility proceedings. To promote a speedy process, the Appeals Facility Rules might establish in advance time limits, from the date of registration of the request, for the filing of the written pleadings of the parties. The time limits would be subject to any necessary adjustment by the appeal tribunal. The Appeals Facility Rules would also establish a time limit for the appeal tribunal to render its decision. The time limit might be 120 days from the closure of the proceeding.[9] The Appeals Facility Rules could provide that in

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[8] As in the case of applications for annulment under the ICSID Convention, this might be 120 days after the rendition of the award except for requests based on corruption which could be made within 120 days after discovery of the corruption and in any event within three years. *See* ICSID Convention, Art. 52(2). The Appeals Facility Rules might specify a shorter period for requests for review in respect of errors of law or fact. The shorter period might be 60 days, the period specified for recourse to the WTO Appellate Body. *See* WTO Dispute Settlement Understanding, Art. 16(4).

[9] This is the basic period the ICSID Arbitration Rules allow arbitral tribunals to make their awards. *See* ICSID Arbitration Rule 46.

other respects the proceedings would be conducted, *mutatis mutandis*, in accordance with the ICSID Arbitration Rules.[10]

13. The Appeals Facility Rules could incorporate general undertakings by parties not to seek enforcement of an award pending its review and to comply promptly with the award to the extent it is upheld by the appeal tribunal. The Rules might also make clear that, while recourse to the Facility would supersede other rights to appeal or seek annulment of the award, such post-award remedies as rectification, supplementation and interpretation of the award would, at least in cases governed by the ICSID, Additional Facility and UNCITRAL Rules, remain to be sought from the original arbitral tribunal.[11]

14. The Additional Facility Rules of ICSID were initially adopted by the Administrative Council on a trial basis. Given the novelty of an Appeals Facility, the Administrative Council might be asked similarly to adopt a set of Appeals Facility Rules for an initial period of six years and then possibly modify them in the light of experience.

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[10] The expedited procedure for the dismissal of unmeritorious claims would thus be available for proceedings under the Appeals Facility Rules if the ICSID Arbitration Rules are amended as suggested in section II of this paper. The same point may be made with respect to the provisions regarding access of third parties suggested in section III.

[11] *See* ICSID Arbitration Rules 49-51; Additional Facility Arbitration Rules, Arts. 56-58; UNCITRAL Arbitration Rules, Arts. 35-37.