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# The 2006 Procedural and Transparency-Related Amendments to ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns

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# The 2006 procedural and transparency-related amendments to the ICSID Arbitration Rules: model intentions, moderate proposals, and modest returns

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## ABSTRACT

In 2006 the Administrative Council of the International Centre for the Settlement of Investment Disputes (ICSID) amended a number of the ICSID's Regulations and Rules. Because amendment of the ICSID Convention itself requires unanimous ratification by the state parties to the Convention, formal changes in the ICSID regime have historically taken place through amendments to the ICSID's Regulations and Rules. This is because changes to the Regulations and Rules require only a vote either of a simple majority or two-thirds of the Council. Such Council action is thus the primary – and indeed, historically speaking, the exclusive – mechanism through which ICSID practice, as reflected in its Regulations and Rules, might be occasionally updated and modernized to reflect new realties on the ground (such as ICSID's exploding caseload) and the changing sensibilities of ICSID's end users – the state Parties to the Convention and the foreign investors who jointly elect to consent to ICSID arbitration rather than to arbitration before other institutions, such as the International Chamber of Commerce (ICC), or under other rules, such as the UNCITRAL Arbitration Rules.

In this chapter we review and critically evaluate those 2006 amendments to the ICSID Arbitration Rules that most directly impact the parties as opposed to the arbitrators (2006 Amendments). In Section A we analyze two procedural amendments. In particular, we look at changes to rule 41, which now allows for a "preliminary objection" to claims that "are manifestly without legal merit," and at changes to rule 39 that deal with "provisional measures." In Section B we analyze three amendments aimed at increasing the transparency of ICSID proceedings and at providing non-parties opportunities to influence tribunal decisions. We focus there on rule 32, governing the opening of hearings to the public; rule 37, which now provides for the possibility of submissions by "non-disputing parties" – for example, by "friends of the court," or "amici"; and rule 48, which governs publication of awards.

Our essential theme is that the 2006 Amendments are, at their core, modest, incremental and conservative. Our formal analysis and our examination of how the amended rules have been applied in practice suggest that the amendments are unlikely to greatly change ICSID practice. This is not necessarily a bad thing. An underlying current in ICSID commentary is the supposed need to make ICSID proceedings more like domestic litigation, with a correspondingly greater

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emphasis on using procedure to arrive at the better (or perhaps a more "correct") law-based resolution of competing claims from an adversarial perspective rather than on the mutually acceptable *settlement* of disputes. While any individual amendment, or at least its intended consequence, may be attractive in theory, the reflexive modeling of ICSID procedure after domestic litigation may yet impair the institution. As we note in the concluding section of the chapter, ICSID is not the only mechanism by which investor-state disputes might be settled or resolved, and if its process becomes too much like domestic litigation – overburdened by undesirable procedural hoops and hurdles, or perhaps even procedurally tilted in favor of state-respondents – there is a risk that investors will exercise more frequently their various outside options, electing to sue host countries not before ICSID, but before alternative institutions, like the ICC, or through ad hoc proceedings.

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