

Response of the European Federation for Investment Law and Arbitration (EFILA) to Invitation to File Suggestions for ICSID Rules Amendments

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The European Federation for Investment Law and Arbitration (EFILA) is an independent Brussels-based think tank that serves as a platform for a merit-based discussion on all aspects of European and international investment law, including arbitration.

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EFILA welcomes the invitation to suggest ICSID rules amendments and proposes as follows:

- EFILA suggests shortening of the deadlines envisaged in the procedure for constituting the tribunal in the absence of previous agreement (Rule 2) to, e.g., 10-20-10 days, with the default process being able to be triggered immediately after the end of the 40-day period.
- EFILA suggests including a fee for making challenges of arbitrators in order to discourage challenges which are without merit and which may be made to unduly delay or obstruct the proceedings.
- EFILA suggests setting out the tasks of the administrative secretary in the Rules, or at least stating that the tasks of the administrative secretary should be fixed in consultation with the parties.
- EFILA suggests modification of Rule 13 (Sessions of the Tribunal) to state that the tribunal, after having consulted the parties, may hold hearings at any place it considers appropriate as we do not see any good reason for one party to be able to force everyone else on a case to travel to Washington DC for a hearing, in case another venue would be more convenient.
- EFILA notes that Rule 23 (Copies of Instruments) is outdated. We therefore suggest that after the tribunal is constituted, it should be free to determine how many hard copies (if any) it requires of given types of communications, as long as the ICSID Secretariat is always copied.
- EFILA notes that the current formulation of Rule 32(2) (The Oral Procedure) implies that either party can block the attendance of amici curiae and other members of public at a hearing. To improve public confidence in the system, we suggest modification that permits a tribunal to allow attendance of third parties after consulting the parties, in a

similar manner as the tribunal can allow amici to make submissions in writing after consulting the parties under Rule 37(2).

- EFILA suggests including the possibility for the tribunal to request that an amicus provide security for the parties' reasonable costs in commenting on the submission of the amicus as a condition for allowing the amicus to make a submission.
- EFILA notes that the current wording of Rule 38 (Closure of the Proceeding) is too lax to impose discipline on tribunals. To make proceedings shorter and more efficient, we suggest a rule specifying that the closure of the proceedings should take place within a certain amount (e.g. 90) of days of the last agreed submission by either party, or the end of the hearing, whichever is later.
- EFILA notes that some confusion is present among the legal community about whether provisional measures can be recommended to protect rights that are uncertain as they are the subject of the dispute. We suggest to clarify this by adding "including [alleged/hypothetical/potential] rights" or "including rights the existence of which is the subject of determination by the Tribunal" after "for the preservation of its rights" in the first sentence of Rule 39(1) (Provisional Measures).
- EFILA suggests making it clear, in line with rules of other institutions, that the first procedural meeting (First Session) may, where appropriate, be held by other means than a physical meeting in order to speed up the initial stages of the proceedings, in particular the filing of preliminary objections pursuant to Rule 41(5).
- Regarding Rule 48(4) (Rendering of the Award), EFILA notes that many important rulings of ICSID tribunals are not included in an award, but in a decision or order. We contend that where ICSID Secretariat is prevented from publishing such a decision or order due to lack of party consent, it should have the power to publish extracts, if it considers them important for the development of international law. We doubt that the word "promptly" is sufficient to encourage ICSID not to delay publication so we suggest setting down a specific deadline. In order not to overly burden the ICSID Secretariat, we also suggest replacing "shall" with "may, if such publication would, in the opinion of the Secretary-General, further the development of international law in relation to investments".
- EFILA notes that the current wording of Rule 50(1)(c)(iii) (The Application) implies that parties can seek annulment of an award without giving any indication as to the shortcomings in the process or the award on which it is based, simply by citing all or most of the grounds in Article 52(1) of the Convention. We suggest that a request for annulment should



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contain information concerning the reasons for which the award is subject to annulment pursuant to one of the annulment grounds.

- EFILA also notes that the current period in which an aggrieved party may seek an annulment of an award is too long and is used to delay the proceedings. To make proceedings shorter and more efficient, we suggest its reduction.
- EFILA notes that if the original tribunal cannot be reconstituted, having a new tribunal interpret an award issued by an earlier, different tribunal, is not an authentic interpretation and risks in fact amending the award. We therefore suggest eliminating Rule 51(3) (Interpretation or Revision: Further Procedure).
- EFILA suggests addressing the issue of concurrent proceedings.
