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Lecture

Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus

- 10th John E.C. Brierley Memorial Lecture -

Meg Kinnear

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A Word on John E.C. Brierley

Professor John E.C. Brierley held a B.A. from Bishop's University, a B.C.L. from McGill University, and a doctorate in law from the Université de Paris. He was appointed as a teaching fellow at the McGill University Faculty of Law in 1960. He later became assistant professor (1964), associate professor (1968) and full professor (1973). He taught Canadian and Quebec private law, focusing on civil law property, comparative law, and foundations of Canadian law. He also served as dean of the Faculty of Law from 1974 until 1984, and as the acting director of the Institute of Comparative Law, McGill University, in 1994. He was named the Sir William Macdonald Professor of Law in 1979 and was the Wainwright Professor of Civil Law from 1994 until 1999.

Professor Brierley was frequently invited as a speaker or a visiting professor to other law faculties, including the Université de Montréal, University of Toronto, Dalhousie University, and the Institut de droit comparé of the Université de Paris II. Following his retirement from McGill University in 2000, he was named Emeritus Wainwright Professor of Civil Law. He passed away in 2001.

Professor Brierley wrote and co-authored numerous articles and books in both English and French, destined for publication in Canada as well as internationally. Noteworthy, co-authored publications include "Quebec Civil Law: An Introduction to Quebec Private Law with Professor R.A. Macdonald et al. (1993), Civil Code 1866-1980 – An Historical and Critical Edition" with Professor P.-A. Crépeau (1981), "Private Law Dictionary and Bilingual Lexicons" with Professor R.P. Kouri et al. (1991), « Dictionnaire de droit privé et lexiques bilingues » with Professor P.-A. Crépeau et al. (1991) and "Major Legal Systems in the World Today. A Comparative Study of Law with Professor René David," contributing to the first (1968), second (1978), and third editions (1985). He was a prominent figure in the discipline of comparative law internationally and the leading Canadian expert on arbitration.

Professor Brierley received many awards for his accomplishments. In 1965, he obtained the Prix Robert Dennery from the Faculté de droit, Université de Paris, and one of his articles won first prize in the Concours de la Revue du Notariat in 1992. He was named trustee for the Fondation Jean-Charles Bonenfant by the Quebec National Assembly (1981-1988). He was also elected for a number of positions, namely as a member of the Board of Editors for the American Journal of Comparative Law (1989), associate member of the International Academy of Comparative Law (1991), member of the International Academy of Estates and Trusts Law, San Francisco (1992), and later member of its executive committee (1994-1999). He was elected a Fellow of the Royal Society of Canada (Academy I) in 1995.

This public lecture on international arbitration has been established to commemorate his life and work.

Un mot sur John E. C. Brierley

Le professeur John E.C. Brierley détenait un baccalauréat des arts de Bishop's University, une licence en droit de l'Université McGill, et un doctorat en droit de l'Université de Paris. En 1960, il fut nommé teaching fellow à la Faculté de droit de l'Université McGill. Il deviendra plus tard professeur adjoint (1964), professeur agrégé (1968) et professeur titulaire (1973). Il a enseigné le droit privé canadien et québécois, particulièrement le droit des biens, le droit comparé et les fondements du droit canadien. Il a aussi été doyen de la Faculté de droit de 1974 à 1984 et directeur intérimaire de l'Institut de droit comparé de l'Université McGill en 1994. Il fut nom- mé Sir William Macdonald Professor of Law en 1979; puis, de 1994 à 1999, il a été titulaire de la chaire Wainwright en droit civil.

Le professeur Brierley a souvent été invité à prononcer des conférences et à visiter des facultés comme professeur invité, notamment l'Université de Montréal, la University of Toronto, la Dalhousie University, et l'Institut de droit comparé de l'Université Paris II. Suite à sa retraite de l'Université McGill en 2000, il fut nommé titulaire émérite de la chaire Wainwright en droit civil. Il est décédé en 2001.

Le professeur Brierley est l'auteur ou le co-auteur d'un grand nombre d'ou- vrages et d'articles, tant en anglais qu'en français, destinés au public canadien et au public international. On remarquera, parmi les publications avec d'autres auteurs, « Quebec Civil Law: An Introduction to Quebec Private Law » avec le professeur R.A. Macdonald et al. (1993), « Code Civil 1866-1980 – Une édition historique et critique » avec le professeur P.-A. Crépeau (1981), « Private Law Dictionary and Bilingual Lexicons » avec le professeur R.P. Kouri et al. (1991), Dictionnaire de droit privé et lexiques bilingues avec le professeur P.-A. Crépeau et al. (1991), ainsi que Les grands systèmes de droit contemporains. Une approche comparative avec le professeur René David, en contribuant à la première (1968), la deuxième (1978), et la troisième édition (1985). Il fut une figure marquante de la discipline du droit comparé à travers le monde et l'expert incontesté de l'arbitrage au Canada.

De nombreuses institutions ont publiquement reconnu la contribution du professeur Brierley. En 1965, il a obtenu le Prix Robert Dennery de la Faculté de droit de l'Université de Paris, et l'un de ses articles lui a valu le premier prix du Concours de la Revue du Notariat en 1992. L'Assemblée nationale du Québec l'a nommé fiduciaire de la Fondation Jean-Charles Bonenfant (1981-1988). Il a été élu à plusieurs postes, notamment comme membre du conseil de rédaction de l'American Journal of Comparative Law (1989), membre associé de 1'Académie internationale de droit comparé (1991), membre de l'International Academy of Estates and Trusts Law, San Francisco (1992) et plus tard membre de son exécutif (1994- 1999). Il a été élu fellow de la Société Royale du Canada (Académie 1) en 1995.

Cette prestigieuse conférence sur l'arbitrage international fut instaurée pour commémorer sa vie et son œuvre.

Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus

Meg Kinnear*

In the 2019 John E.C. Brierley Memorial Lecture, Meg Kinnear reflects on the enduring qualities of the ICSID dispute resolution system, as well as how ICSID continues to evolve. She notes that the original purpose of the ICSID Convention was to encourage foreign investment by offering a way to resolve disputes that might arise between an investor and host state. This remains ICSID's core role, and it is one that is more relevant than ever before. At the same time, Ms. Kinnear comments on how the field of investor-state dispute settlement is developing. This is seen in the process underway to further modernize and streamline ICSID's rules of procedure for the resolution of international investment disputes. Ms. Kinnear explains the goals behind the rule amendment process and the key issues being addressed. She concludes by noting that—once adopted—the new rules will open yet another chapter of continuity and change in the ICSID system.

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Lors de la conférence commémorative John E.C. Brierley 2019, Meg Kinnear se penche sur les qualités durables du système de règlement des différends du CIRDI, ainsi que sur l'évolution du CIRDI. Elle note que l'objectif initial de la Convention CIRDI était d'encourager les investissements étrangers en offrant un moyen de résoudre les litiges pouvant survenir entre un investisseur et un État hôte. Ceci demeure le rôle central du CIRDI, qui est plus pertinent que jamais. Mme Kinnear commente aussi sur l'évolution du domaine du règlement des différends entre investisseurs et États. Cela se voit dans le processus en cours visant à moderniser et à rationaliser davantage les règles de procédure du CIRDI pour le règlement des différends internationaux en matière d'investissement. Mme Kinnear explique les objectifs qui sous-tendent le processus de modification des règles et les principaux problèmes abordés. Elle conclut en notant que, une fois adoptées, les nouvelles règles ouvriront un nouveau chapitre visant la continuité et le changement dans le système du CIRDI.

I. Prelude

Thank you, Professor Bjorklund, Professor Gélinas, Dean Leckey and colleagues. It is an honour for me to be here tonight.

I suspect that I am the first person to do this lecture who was a student at McGill Law School when John Brierley was the Dean. In those days, Dean Brierley would address the incoming class in this very room, on the first day of class, with the legendary words: "Look to your left, look to your right….one of those people will not be here by January." Of course, at least two people were looking at you at that very moment, so the speech had an indelible impact. In all honesty, I have to admit that I still get nervous when I enter this room, and I have to consciously remind myself that I did survive past January 1981.

I remain incredibly grateful to Dean Brierley and to my professors from that time. I recognize what a fine legal education I received and how it provided me with an amazing career that has taken me to places and provided opportunities—and challenges—that I never even knew existed on that first day in this room. So, it truly is a privilege to be here this evening.

II. Continuity in the ICSID System

Professor Gélinas has given me a broad, and slightly intimidating, title for this lecture: "Continuity and Change in the ICSID System: Challenges and Opportunities in Search of Consensus". I trust, therefore, that you will understand that my remarks will cover a broad range of topics. I would like to start by noting some of the elements of continuity.

By way of introduction, the International Centre for the Settlement of Investment Disputes (ICSID) is one of the five institutions that comprise the World Bank Group. Commentators often use the initials ICSID and ISDS, which stands for investor-State dispute settlement, interchangeably. While this is not technically correct, there is some logic to it. It reflects the extent to which ICSID, the institution, has framed ISDS, the legal discipline.

ICSID was the first arbitral institution—and it remains the only one—dedicated to this field. ICSID offers arbitration and conciliation rules tailored to the characteristics of cross-border disputes between foreign investors and host States. It also has a uniquely effective enforcement mechanism: an award of an ICSID tribunal is enforceable simply by filing

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that award in the courts of any of the 154 ICSID Member States.

Over the years ICSID has administered more than 70 percent of all known ISDS cases and set the precedents that have defined the field.

Established in 1966, ICSID was the inspiration of a Dutch lawyer named Aron Broches.[2] Broches had emigrated to the United States in 1933 to study law at Fordham University. In 1945, he returned to Holland for the first time after the Second World War to find that his parents, siblings and extended family had not survived the Holocaust. In addition, the assets of his family business, the Broches Cigarette Company, had been looted during the war. Broches therefore well understood the position of an investor whose assets have been taken by government action. Without a doubt, Broches' personal history led to his lifelong commitment to internationalism, and in 1946 he became a member of the Dutch delegation to the Bretton Woods Conference. That conference ultimately created two pillars of our modern international economic architecture—the International Monetary Fund and the World Bank.

Broches then joined the Legal Department of the newly formed World Bank, and over his career played a major role in the creation of the International Finance Corporation (IFC), which encourages private sector enterprise in less developed countries, the International Development Association (IDA), which provides loans and grants to the world's poorest nations, and ICSID, which, of course, offers dispute settlement between foreign investors and host States.

The original purpose of the *ICSID Convention* was to encourage private sector investment abroad by offering a way to resolve disputes that might arise in the course of the investment. At a macro level, this contributed to a climate of mutual confidence in which investors were willing to invest in other States and bring much needed jobs, know-how, technology, and other economic benefits. Unfortunately, this rationale is sometimes obscured in our modern-day debate on ISDS. Nonetheless, it remains one of the key rationales for the ICSID system, and it must be mentioned under the rubric of continuity. Encouraging private sector investment today is more relevant than ever before, when the need is so great, and when it is clear that public sector funding alone cannot meet all the needs of all people.

While the original intent of ICSID was to encourage private flows of investment, it has also played a significant role in the retention and expansion of existing foreign investment. In addition, ICSID underpins international investment obligations between States. ICSID helps make States accountable for the treaty and contractual promises they make to one another, which in turn prevents conduct that would otherwise breach these

1 For a detailed history of ICSID, see Antonio R Parra, *The History of ICSID,* 2nd ed (Oxford: Oxford University Press, 2017).

promises.

This role in dispute prevention is a relatively new response to concern about ISDS. In fact, States are increasingly managing ISDS risk by creating internal administrative mechanisms that pre-empt conflicts by identifying and addressing problems early, before they mature into arbitral disputes. Perhaps the best-known example is in Korea, where an ombudsman system provides a one-on-one service to foreign investors by investigating and resolving problems at an early stage—an investment 'doctor', so to speak.[3]

The World Bank has initiated a program called the Systemic Investment Response Mechanism with a similar goal.[4] It seeks to avoid disputes by designating a lead agency domestically, establishing an early alert system for potential disputes between foreign investors and the host State, and identifying problem-solving techniques such as third-party facilitation. Experience shows that success hinges on a sufficiently senior level of political decision-making to support early resolution, and to ensure a commitment to enforce negotiated resolutions. This shift to prevention and early resolution is important and reinforces the overall value of ICSID and ISDS.

Another element of continuity is that the ICSID system remains a procedural mechanism. It does not provide substantive obligations, and this is by design. In 1966, States could not reach a multilateral agreement on the substance of investment obligations, despite decades of efforts in Europe and North America to do so. And this is still the case—efforts to negotiate substantive multilateral obligations have not succeeded. This is reflected in the well-known negotiations at the OECD over a Multilateral Agreement on Investment, which concluded in 1998 without agreement on the text.[5]

As such, the disputes adjudicated in the ICSID system are those that arise under treaties and contracts negotiated by States. In other words, the substantive obligations at issue are very much defined and controlled by States, which is the essence of State sovereignty.

This may be seen as a strength or a weakness of the system, depending on your perspective. But it is an approach that is not likely to change soon. Indeed, the current multilateral reform discussions are very much based on procedural and architectural reform, rather than changes to substantive obligations.

In terms of continuity, it is also important to note that, from the beginning, there has been a clear commitment in the ICSID system

2 See Republic of Korea, Foreign Investment Ombudsman, "Foreign Investment Ombudsman: Home" online: <http://ombudsman.kotra.or.kr/eng/index.do>.

3 World Bank, "Good Regulatory Practice: A Multi-Year Program to Improve Regulatory Qualityin Developing Countries" (March 2015) World Bank Program Profile 1 at 2 online (pdf): <http://pubdocs.worldbank.org/en/574014568603095 04/Good-Regulatory-Practice-Program-Overview-03-15.pdf>.

4 OECD, "Multilateral Agreement on Investment" online: *OECD* <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>.

to balancing the interests of investors and of host States. In the current discussion on multilateral reform of ISDS, how to get that balance right is one of the overarching themes and challenges. This need for balance is especially important as ICSID amends its own procedural rules for ISDS—which I will discuss in a moment. We recognize that a set of rules that is perceived either as overly in favor of claimants or of respondents will become ineffective and irrelevant very quickly.

Finally, I wanted to note that we see significant continuity in the day-to-day trends of ISDS. For example, the number of new cases at ICSID is roughly stable at about 50 per year.[6] These cases come from all over the globe, but the leading regions are eastern Europe and Central Asia (26%), South America (22%), and sub-Saharan Africa (15%).[7] Cases have also clustered around a few countries, notably Argentina related its 1990s fiscal crisis (55 cases); Canada under the North American Free Trade Agreement (NAFTA) (35 cases); and, more recently, Spain in connection with changes to its renewable energy polices (around 40 cases).[8]

The outcome of cases has also been fairly steady over time. About 35% of cases are resolved before going to a final award; States continue to win slightly more than half of cases; and investors receive on average about 40% of what is claimed when they are successful.[9] We know that the bulk of cases are in the extractive sectors, such as oil, gas and mining, but of course all sectors have been the subject of disputes.[10] We have also seen that, increasingly, cases have concentrated under a few treaties, including the Energy Charter Treaty and NAFTA.[11]

Some would say that we are on the cusp of a big change with respect to the existence of ISDS, suggesting that the number of treaties with investment obligations or with ISDS has reduced significantly and will continue to decline—in turn leading to a decrease in use of ISDS mechanisms.

I recognize that this is especially top of mind in North America with the proposed United States-Mexico-Canada Agreement (USMCA), which would omit ISDS between Canada and the US after a legacy period, and would reduce ISDS significantly between Mexico and the US.

However, I do not share the conclusion that IIAs or ISDS are in decline. It is empirically true that fewer investment treaties have been concluded in the last 5-10 years. But it seems to me that simply stating this number is insufficient. Most of the treaty relationships which were entered

5 ICSID, 'The ICSID Caseload – Statistics" (2019) ICSID Issue 2019-2 at 7 online (pdf): <https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf>.
6 *Ibid* at 12.
7 *Ibid*.
8 United Nations Conference on Trade and Development, "International Investment Agreements Navigator" online: *UNCTAD* <https://investmentpolicy.unctad.org/investment-dispute-settlement>.
9 ICSID, "Caseload Statistics", *supra* note 5 at 12.
10 *Ibid* at 11.

into in the 1990s and 2000s remain in force today. Over 186 States currently have IIAs, and over 2600 IIAs are currently in effect, most of them bilateral investment treaties (BITs).[12]

It is more accurate to say that we are seeing a recalibration. For example, we have seen a lot of change in the form and substance of treaties: they have gone from short to long—from 5 to 50-page BITs, reflecting more specific definitions of obligations, more precise procedural requirements, and more pre-conditions to triggering a treaty claim.

IIAs are also increasingly regional, although bilateral treaties are still in the majority. They are also increasingly between different partners, and the traditional concept of North-South treaty partners—resulting in North-South litigation—has shifted. Today we see more North-North and South-South IIAs, as well as more claims involving investors from emerging and developing countries.

The trend is also toward investment obligations embedded in a full free trade agreement, rather than as a stand-alone BIT. And these obligations are frequently based on a model agreement that States use as a template for negotiation. In fact, over 60 countries have recently developed a model BIT, many of them with sustainable development aspects, and these may well inspire a new generation of IIAs.[13]

In short, with respect to investment treaties and ISDS, we are seeing a reaffirmation of the mechanism, with some updating to reflect the priorities of States.

This is reinforced by what I see on the ground. Last week, for example, at a conference in Xi'an, China, I heard representatives of the Chinese government note the importance of IIAs and ISDS and their commitment to the system. This is a message I hear from many other ICSID Member States. At the same time, we have heard a desire to change some aspects of the system. And that takes us to the 'change', 'challenge', 'opportunity', and, hopefully, 'consensus' part of the equation.

III. Change, Challenges and Opportunities

Let's start with change. In the past 2 years, two major multilateral initiatives have been established in the investment field.

The first is under the auspices of the United Nations Commission on International Trade Law (UNCITRAL). The second is at ICSID, in accordance with the provisions for amendment of the Centre's rules. While there are areas of overlap between the areas being addressed and the membership of each institution, they are distinct initiatives with their own objectives and

11 UNCTAD, "International Investment Agreements Navigator", *supra* note 8 online: <https://investmentpolicy.unctad.org/international-investment-agreements>.

12 *Ibid* at <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>.

time frames.

The UNCITRAL process is led by its Working Group III, which has gone through an extensive scoping mechanism and come up with a very broad set of objectives to address.[14] While a large list, it should be noted that Member States have clearly reiterated that the mandate of UNCITRAL is limited to procedural reform and should not address substantive standards. In addition, the EU has proposed an investment court model for resolving investment disputes, and China has recently endorsed an Appellate Body model. So, there are also some structural issues on the list for discussion.

For ICSID, obviously, many of the changes I have discussed earlier with respect to IIAs will be seen in the cases we receive, and our job is to ensure we remain fit for purpose.

We do so in several ways, but tonight I want to note two in particular: our arbitrator diversity initiative and our rules amendment process.

Diversity is a key demand of all participants in the process, and reflects on the very legitimacy of the system. At ICSID, we have made a strong effort to diversify the arbitrators that hear ICSID cases from three perspectives: diversity in regional origin, gender and new entrants. The latter refers to individuals appointed for the first time to an ICSID tribunal.

ICSID promotes diversity in several ways. The ICSID Panel of Arbitrators and Panel of Conciliators—which currently has 680 designees—is important for advancing diversity.[15] ICSID encourages its Member States to consider diversity when designating individuals to the Panels. ICSID is also often called upon to assist parties in identifying suitable candidates for tribunals. This is done through a ballot system, in which multiple candidates are proposed and the claimant and respondent identify candidates they would both support. We are mindful of geographic and gender diversity when developing the ballot. ICSID also looks for opportunities to raise the profile of up-and-coming individuals in the field, such as through its journal and events.

In terms of gender diversity, we have gone from 5 percent female arbitrators in 2010 to 25 percent in the last two years.[16] So, there has been

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13 UNGAOR, 52nd Sess, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018)" (6 November 2018) A/CN.9/964 at 4 ff, and see, generally, United Nations Commission on International Trade Law, "Working Group III: Investor-State Dispute Settlement Reform" online: *UNCITRAL* <https://uncitral.un.org/en/working_groups/3/investor-state>.

14 See Meg Kinnear, "Advancing diversity in international dispute settlement" *World Bank Blogs* (8 March 2019), online (blog): <https://blogs.worldbank.org/voices/advancing-diversity-international-dispute-settlement>, and see OECD, Investment Division, Directorate for Financial and Enterprise Affairs, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, OECD Compilation of Initial Comments Received, (Paris: OECD, March 2018) 1 at 8.

15 ICSID, "Caseload Statistics", *supra* note 5 at 30. For more statistics, see, generally, ICSID, "ICSID Annual Reports" online: *ICSID* <https://icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx>.

good progress, but there is a lot more distance to go. Initiatives like "The Pledge" for gender diversity and the new initiative with respect to African arbitrators called "The Promise" are helping to move this agenda forward.

It is important to note that ICSID only appoints about 20-25 percent of the arbitrators in cases, and so real change will also depend on parties making diverse selections. Understandably, parties may be concerned about appointing arbitrators they don't know for cases that can have such important ramifications for their clients. But progress is being made and must continue.

I would like to finish by reviewing the ICSID rule amendment process that is currently underway. As you would expect, this is a procedural reform, intended to update the existing ICSID rules and to propose some new rules.

ICSID launched the process in late 2016, beginning with a scoping exercise to see what topics stakeholders wanted to address. Since then we have published three working papers with proposed amendments, hosted two in-person consultation meetings with Member States, and organized literally hundreds of presentations and webinars with State officials and the public. This has been the most transparent amendment process in our history, with feedback encouraged from all interested States, individuals and organizations. The proposals and all input received on them are published on the ICSID website.[17]

It has also become the most comprehensive reform process in ICSID's history. Most of the procedural questions raised in the UNCITRAL reform have been addressed in the ICSID proposals. However, the structural issues, such as the possibility of an appellate mechanism or court system, have been left for the UNCITRAL process, where we are an active participant in the discussions. I should also note that the ICSID and UNCITRAL Secretariats are collaborating on a draft proposed Code of Conduct for arbitrators, which could ultimately be incorporated into the ICSID system in the form of arbitrator or conciliator declarations.

By its nature, the ICSID reform process is, and should be, a shorter discussion than the UNCITRAL discussion, which I take as a good thing. It means that concrete and pragmatic changes can be initiated in a relatively short time frame.

The goal of these amendments is to modernize the rules based on our experience, best practices, and user feedback.[18] We are updating

16 All materials related to the amendment process, including the working papers and comments from States and the public, are available at ICSID, "ICSID Rules and Regulations Amendment Process" online: *ICSID* <https://icsid.worldbank.org/en/Amendments>.

17 All rule amendment proposals described in this article are those published in ICSID: "Working Paper #3: Proposals for Amendment of the ICSID Rules" (August 2019) ICSID Working Paper #3 vol 1 online (pdf): <https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf>.

the language of the rules to make them gender neutral and address any translation inconsistencies. The provisions have also been slightly reordered to put them in a more user-friendly order that reflects the sequencing in a typical case.

A major goal has been to address concerns about time and cost, as well as a range of other topics raised in the reform discussions on ISDS. At the same time, all of this must be done in a way that respects the balance between investors and States or claimants and respondents in the process.

Our approach also included providing more options for ISDS mechanisms. As a result, the ICSID conciliation rules have been significantly modernized; we have proposed a stand-alone set of investment mediation rules; and we have proposed a stand-alone set of fact-finding rules. The latter have a very specific remit: to find a fact that is central to the resolution of a dispute.

As mentioned, decreasing the time and cost of arbitration is a goal—and one that many commentators have raised during the consultations. Frankly, it is also a difficult problem to solve. We studied where delay occurs and there is no one reason—each case is idiosyncratic. Interestingly, while everyone agrees in principle on decreasing the overall time of a case, it is hard to identify where this can be done. Indeed, during our consultations we have heard areas where parties feel they need more time, and the places for reducing time are not always evident. As a result, we proposed a multi-track approach. One is a general duty on arbitrators and parties to act in a time-effective way.[19] Another is to prescribe shorter time frames for a number of steps in the arbitration process; for example, it is proposed that a challenge to an arbitrator must be brought within 21 days of the relevant event that gives rise to the challenge coming to light.[20] We have also proposed case management conferences and—more generally—encouraged a more proactive role for arbitrators in case management.[21] Some feel this is contrary to the basic notion of arbitration as a party-driven process. But most commentators have welcomed this approach, having seen it work well in domestic courts and increasingly in commercial arbitration.

We have also set specific times for delivery of decisions, orders and awards. This includes the expectation that a final award would be rendered within 8 months of the final submissions.[22] In doing so, we wanted to set a timeline that reflected the actual task at hand—ICSID cases are often complex, so we felt this was a reasonable time frame. Compliance with these timelines will be tracked on the ICSID website, giving parties more information when they make decisions about party appointed arbitrators. We have also mandated electronic filing of all documents, which will be a time

18 *Ibid* at 32, "Arbitration Rule 2".
19 *Ibid* at 40, "Arbitration Rule 22".
20 *Ibid* at 45, "Arbitration Rule 32".
21 *Ibid* at 61, "Arbitration Rule 57".

and cost saver for parties.[23] And we have proposed voluntary consolidation or coordination of cases, trying to take advantage of efficiencies even when cases cannot formally be consolidated. Finally, we have developed an optional expedited arbitration process.[24] This is a process that parties can opt into—and if followed, would reduce the length of a case by roughly half.

Another topic we are addressing is third-party funding. We heard a wide range of views on third-party funding, from doing nothing to banning it outright. Clearly, finding consensus was going to be a challenge. The proposal made requires disclosure of the existence of third-party funding and the name of the funder at the earliest possible moment; an obligation that continues throughout the duration of a case.[25] This information would be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest. It is an approach that is consistent with the majority of treaties—of which there are few—that address the issue of third-party funding. The proposed rule does not require disclosure of the actual funding agreement, which many felt was unnecessary and risked interfering with confidential business information and solicitor-client privilege. However, if disclosure of further information or portions of the third-party funding agreement become relevant to an issue in dispute in a case, the tribunal has residual authority to order production of the funding agreement—as is currently the case.

Some comments suggested that third-party funding increases the likelihood of frivolous claims and wanted this addressed in the new rules. However, the ICSID rules have mechanisms in place to address frivolous claims, including the review of the request for arbitration by the Secretary-General before registration, the possibility for a respondent to obtain an early dismissal of a case due to manifest lack of legal merit, and costs awards. Therefore, it was felt that there was not a need to address frivolous claims arising from third-party funding as a separate category.

The proposed rules have expanded the requirements for arbitrator declarations, including the requirement to list all ISDS cases in which the arbitrator has been involved.[26] Arbitrators would also be required to complete a calendar indicating their availability. This is an effort to provide parties with more and better information at the start of the process.

You will note that the proposals do not purport to ban double hatting—that is, the practice of individuals serving as both counsel and arbitrators in ISDS cases—which is another controversial subject in ISDS.[27] There are real questions about whether to ban double hatting and, therefore, the proposal focusses on having the information needed to assess whether

22 *Ibid* at 33, "Arbitration Rule 4(2)".
23 *Ibid* at 73—8, 'Arbitration Rules 74-85.
24 *Ibid* at 37, "Arbitration Rule 14".
25 *Ibid* at 39, "Arbitration Rule 19".
26 *Ibid* at 299, para 68.

there is actually a justifiable doubt as to impartiality or independence of an arbitrator in the particular circumstances of the case.

The rules on awarding costs have been updated to add certain criteria arbitrators should consider when exercising their discretion in this area, including the outcome of the proceeding, party conduct, the complexity of the issues and the reasonableness of the claim for costs.[28] We have not added presumptions on costs or a cost-follows-the-event rule, on the basis that it is better to give tribunals discretion to consider a range of relevant factors when deciding how to allocate costs.

A new provision allowing security for costs is included in the proposed rules.[29] The proposal specifies conditions for ordering security for costs and it is not meant to be automatic. These conditions try to reflect the balance between investors and States, noting the ability and willingness to pay adverse costs, and also the impact of an order for security for costs on an investor's ability to pursue its case. The security for costs provision specifically notes that third-party funding may be evidence going to the relevant criteria, but in-and-of-itself is not a basis for ordering security for costs. Again, the idea is not to punish a party for having third-party funding. It is to keep the balance in the system.

Transparency is another difficult discussion, again because there is no real consensus among States or stakeholders on the correct level of transparency. It is important to understand that the ICSID provisions on transparency are basically a default provision. This is because most parties address transparency in their treaties, in which case these provisions apply to the proceeding. In addition, States desiring a very high level of transparency can do so by ratifying the Mauritius Convention. Nonetheless, my hope is that this is an area where we can reach consensus by recognizing the proposals to advance transparency—namely through increased publication of awards, decisions and orders—while also reflecting the positions of many governments that are not ready to have a fully open process. Whether you think this is correct or not, it is clearly an area where consensus will not be reached if everyone holds firmly to their own negotiating position.

The final change I would like to draw to your attention is the increased scope of the ICSID Additional Facility Rules.[30] These rules have traditionally been available where only one party is an ICSID Member State or a national of an ICSID Member State. The proposed Additional Facility Rule expands this significantly to give access in situations where neither party is an ICSID Member State or national of one. We think this is an important proposal, as it provides parties with a set of investment-specific

27 *Ibid* at 56—7, "Arbitration Rules 49-51".
28 *Ibid* at 57, "Arbitration Rule 52".
29 *Ibid* at 101, "Additional Facility Rules".

rules even if they are not members of ICSID.

The amended Additional Facility Rules would also broaden access to include regional economic integration organizations (REIOs), reflecting the new generation of treaties that are being negotiated by REIOs, such as the European Union.

IV. Seeking Consensus

And now to the final part of this speech: consensus.

In terms of the UNCITRAL process, I have no doubt there will be consensus on various items, but that this will take significantly more time than the ICSID amendment process. At ICSID, we are focused on obtaining consensus in the very near term. To pass the amended rules we need two-thirds of the membership to approve the rules regulating ICSID Convention proceedings, and fifty-percent to approve the Additional Facility, Fact-Finding and Mediation Rules.[31]

My sense from speaking to many Member States is that they feel we have gone in the right direction and that they will be able to support the proposed amendments. But, of course, this is to be determined. Next month we are holding our third consultation meeting with Member States, and I hope that over the next year we will hold a vote on the rules, and that they will be adopted, paving the way to begin implementing them in early 2021. In short, we will open yet another chapter of continuity and change in the ICSID system.

Thank you.

30 Article 6(1) of the *ICSID Convention* authorizes the ICSID Administrative Council to adopt administrative and financial regulations for the Centre, as well as rules of procedure for the institution and conduct of arbitration and conciliation proceedings. See *ICSID Convention, Regulations and Rules,* April 2006, ICSID/15 online (pdf): <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf>.