

**DEVELOPMENTS ON DISCUSSIONS FOR THE
IMPROVEMENT OF THE FRAMEWORK FOR ICSID ARBITRATION AND THE
PARTICIPATION OF DEVELOPING COUNTRIES**

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I. INTRODUCTION

1. The International Centre for settlement of Investment Disputes (ICSID) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) that entered into force on October 14, 1966. ICSID provides facilities and assists in the initiation and conduct of conciliation and arbitration proceedings. The expenses of the ICSID Secretariat are financed out of the budget of the World Bank. However, the costs of each arbitral proceedings are borne by the parties involved.

2. ICSID has an Administrative Council, a Secretariat and Panel of Conciliators and Arbitrators. The Administrative Council consists of one representative of each Contracting State. The President of the World Bank is the Chairman of the Administrative Council. Unless a Contracting State makes a contrary designation, its Governor for the Bank sits ex officio on ICSID's Administrative Council. Annual meetings of the Council are held in conjunction with the joint World Bank/International Monetary Fund annual meetings. The Panel of Conciliators and the Panel of Arbitrators consists of conciliators and arbitrators designated by each Contracting State who shall serve for renewable periods of six years. The Chairman of the ICSID also may designate ten persons to each Panel from different nationalities. The ICSID Secretariat consists of a Secretary-General and one or more Deputy Secretaries-General and the staff. The Secretary-General and the Deputy Secretary-General are elected by the Administrative Council, upon the nomination by the Chairman.

3. The jurisdiction of ICSID arbitration tribunals extends to (1) any legal dispute (2) arising directly out of an investment, (3) between a Contracting State (or any constituent subdivision or agency of a Contracting State that has been designated to ICSID by that State) and (4) a national of another Contracting State, (5) which the parties to the dispute consent in writing to submit to the Centre. Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in their respective investment laws and in Bilateral Investment Treaties (BITS).

4. Moreover, all Contracting States, whether or not parties to the dispute, are required to recognize awards rendered pursuant to the ICSID Convention as binding and to enforce the pecuniary obligations imposed thereby. Such awards are not subject to any appeal or to any other remedy except those which, like the remedy of annulment, are provided for in the ICSID Convention itself. With the influx of cases based on general consents of the Contracting States in the laws and treaties, only a minority of the proceedings before the Centre today concern disputes exclusively over the performance of investment contracts concluded by the State. The cases now more

typically concern claims over such events as civil strife in the State, alleged expropriation or denials of justice by it, and actions of its political subdivisions

5. The framework of ICSID conciliation and arbitration proceedings are governed by the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules), the Administrative and Financial Regulations, the Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) and the Rules of Procedure for Arbitration Proceedings (the Arbitration Rules), as amended effective January 1, 2003, adopted by the Administrative Council of ICSID pursuant to Article 6(1)(c) of the ICSID Convention.

6. Besides providing facilities for conciliation and arbitration under the ICSID Convention, the ICSID has an Additional Facility Rules authorizing the ICSID Secretariat to administer conciliation and arbitration proceedings where one of the parties is not a Contracting States or a national of such a State. The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the ICSID Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts."

7. The Secretary-General of ICSID can act as the appointing authority of arbitrators for *ad hoc* (i.e., non-institutional) arbitration proceedings. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules), which are specially designed for *ad hoc* proceedings.

8. The ICSID Secretariat has been active in providing advice on arbitration and investment law which included reviewing and commenting on draft investment and arbitration laws and draft arbitration provisions of investment contracts, at the request of governments and foreign investors. The advisory activities of the Secretariat, however, are not explicitly provided by the ICSID Convention.

9. A discussion paper for the 'Possible Improvement of the Framework for ICSID Arbitration' was circulated on 22 October 2004 by the ICSID Secretariat to encourage discussion and to invite any further suggestions for change.¹ The discussion paper covers subject matters of great importance for developing countries with implications for institutional, procedural, legal and financial aspects of the investor-to-state arbitration under ICSID Convention and with further implications for general standards of international dispute settlement mechanisms. The scope of the discussion for the improvement of the framework of the ICSID arbitration covers the following issues that demand sufficient consideration and participation by developing countries:

- a) A procedure for expedited filing of a request for provisional measures with the Secretary-General of ICSID, pending the constitution of the arbitration tribunal;

¹ICSID, Possible Improvement of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper, 22 October 2004, available at <http://www.worldbank.org/icsid/improve-arb.pdf>, last visited on 13 January 2005 (hereinafter ICSID Discussion Paper).

- b) A special procedure to enable a tribunal at an early stage of the proceeding to dismiss all or part of a claim expeditiously for lack of jurisdiction;
- c) Mandatory rule for ICSID to publish extracts of a case;
- d) Authority to accept and consider submissions, by an ICSID tribunal, from civil society organizations, business groups, or in investment treaty arbitration, the other state concerned;
- e) The possibility of wider attendance of the hearings of arbitration tribunals without the requirement for the consent of the parties;
- f) The expansion of the applicability of disclosure requirements throughout the arbitral proceedings, as well the elaboration of a code of conduct for arbitrators;
- g) The possibility of helping to sponsor the establishment of a mediation service for investor-to-state disputes;
- h) Considering ways of intensifying and further systematising training activities for developing country officials;
- i) An ICSID appeal facility to enhance the acceptability of investor-to-state arbitration, based on the grounds of clear error of law, grounds for annulment of an award, and serious errors of fact, that involve several additional rules regarding procedure, enforcement and payment of additional fees.

10. Each element of the discussion for the improvement of the ICSID arbitration, the financial implications for developing countries, and the manner of their adoption (including the opportunity for adequate participation in the process) could generate immense concern among developing countries. It is noted that developing countries' participation in conferences and forums involving discussion on improvement of the legal framework of ICSID arbitration has been minimal. However, comments and further suggestions on the discussion paper that included the proposal for improvements were invited to be sent to the ICSID Secretariat by 15 December 2004.

11. In light of the above this analytical evaluates the initiative and the need for the proposed improvement, examines the power and function of the ICSID Secretariat and the political aspect of the initiative and examines the process of discussion for the improvement of the framework of ICSID arbitration and the participation of developing countries.

II. THE PROCESS OF THE DISCUSSION ON THE IMPROVEMENT OF THE ICSID ARBITRATION AND THE ROLES OF THE SECRETARIAT

II.1. The Powers and Functions of the ICSID Secretariat

12. The first important issue that must be addressed relates to the powers and functions of the ICSID Secretariat in initiating legislative proposals, or taking part in political functions that involves the initiation, negotiation, adoption and further acts in relation to treaties, rules of procedures or decisions and their amendments. The ICSID Secretariat has circulated on October 22, 2004 a discussion paper on its own initiative for the possible improvement of the framework of the ICSID arbitration. The discussion paper proposes for the consideration of possible changes on procedural and institutional aspects of the ICSID arbitration that directly modify the provisions of the ICSID Convention.

13. The ICSID Convention provides under article 10(2) that “the offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function.” Furthermore, Article 11 clearly provides for what is the common functions of secretariats of international organisations that include the function for the office of ICSID Secretariat to act as the legal representative and the principal officer, and to be responsible to administer the office, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council.

14. The functions of the Secretary-General of the ICSID directly related to the arbitration process are to act as registrar, to authenticate arbitral awards rendered pursuant to the ICSID Convention, and to certify copies.² The depository functions related to the Convention are assigned to the Secretariat of the International Bank for Reconstruction and Development.³ The Administrative and Financial Regulation provided, under Regulation 20, for regulatory depository functions of the ICSID Secretariat in keeping list and communication to other states of the relevant instruments of accession, ratification, denunciation and other acts of States. In addition, the Regulations appoint the Secretary-General as Secretary of the Administrative Council, which consists of one representative of each Member States.⁴

15. The ICSID Convention clearly allocates the power to initiate proposals that amend the provisions of the Convention to Contracting States alone. Article 65 of the Convention provides that any Contracting State may propose amendment of the Convention. It further provides that the role of the Secretary-General is to transmit the proposal to all members of the Administrative Council. Then it is up to the

² ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>, last visited on 13 January 2005 (herein after ICSID Convention (1965), Article 11.

³ *ibid*, Article 73-75.

⁴ ICSID, The Administrative and Financial Regulations of ICSID, adopted by the Administrative Council of the Centre pursuant to Article 6(1) (a) of the ICSID Convention, available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>, last visited on 13 January 2005 (hereinafter the ICSID Regulation), Regulation 5.

Administrative Council to decide by a majority of two-thirds of its members, on the proposal, upon which the proposed amendment can be circulated to all Contracting States for ratification, acceptance or approval.

16. The Administrative Council is empowered to adopt amendments initiated by Contracting States, to adopt rules of procedures for conciliation and arbitration, and adopt annual budget. In this sense, even the Administrative Council, acting collectively cannot initiate proposals that amend the provisions of the ICSID Convention. It is important to note at this point that the ICSID Convention does not provide for any other procedure, except for amendment, so as to include any proposals with the objective of modifying, adding provisions or paragraphs, correcting errors in the text of the convention etc. The power to initiate such legal process under the ICSID Convention rests with the political (sovereign) power of the Contracting States.

17. The political nature of the ICSID Secretariat's initiative and publication of discussion paper for the possible improvement of the framework of the ICSID arbitration can be explained further by experiences in other international organisations. Though, there are no experiences where the Secretariat of an international organisation participated in the political aspects of international treaties as a matter of legal function, a practical experience on the exercise of political power on the law making process by the organs of international organisation, other than the Secretariat, had occurred in the International Labour Organisation (ILO). In 1997, Article 19 of the Constitution of the ILO was amended to enable the Governing Body of ILO to make recommendation for abrogation or withdrawal of obsolete conventions and recommendations administered by ILO and to enable the International Labour Conference to decide on the recommendation by majority vote.⁵ Such amendment of the Constitution of the ILO was required because of the number of conventions, recommendations, regulations, Standing Orders that the organisation administer and that without such procedure, abrogation or withdrawal of obsolete instruments by each member state was proved impractical.

18. The important point here is that for an organ of an international organisation to initiate proposals for legal actions collectively, it must be allocated appropriate power by the establishing convention. This is not even about the power of the secretariat, rather about the powers of organs that consist of member states. The Director-General of the International Labour Office is not provided with any of the powers by the amendment of the ILO Constitution, whereby its role is limited to administrative functions.

19. The most common function of secretariats of an organisation that may affect the provisions of international treaties is when the secretariat acting as secretary of meeting of the member states is requested by an explicit decision to prepare a background study, report, recommendations and draft texts of a treaty or amendments.⁶ In which case the secretariat of an international organisation performing its administrative function could involve itself in political matters with defined parameters, scope, policy considerations and mandate. The Africa Union had,

⁵ ILO, Instrument for the Amendment of the Constitution of the International Labour Organisation, 1997, available at <http://www.ilo.org/public/english/bureau/leg/amend/1997.htm> , last visited on 13 January 2005, Article 1.

⁶ *Ibid*, note 4.

for example, authorised its Secretariat to prepare a study and to make recommendations with regard to the treaties of its predecessor, namely the Organisation of African Unity, for further action on whether the treaties need to be reviewed, amended or abrogated.⁷

20. In the absence of any explicit decision, by the Administrative Council or the Contracting States of the ICSID Convention, requesting the ICSID Secretariat to study and recommend possible improvements of the framework for ICSID arbitration, the ICSID Secretariat can be considered appropriately as taking political role. To initiate legislative proposals, to play a political role in initiating discussion and negotiation in relation to amendments, review or any other process with respect to the ICSID Convention is incompatible with the office of the ICSID Secretariat. It is the Contracting States that have negotiated, signed and ratified or acceded to the ICSID Convention, who have the power to initiate or authorise the initiation of any improvement of the framework.

21. The 37th Annual meeting of the Administrative council adopted resolutions on the budget and report of the ICSID Secretariat and elected the new Secretary-General, Mr. Roberto Dañino. There was no resolution requesting the ICSID Secretariat to initiate a study for the improvement of the framework of Arbitration, to prepare and disseminate a discussion paper as well as to gather public feedback.

22. In this regard it could be argued that the ICSID Secretariat's initiative and elements of the discussion paper would ultimately be submitted for approval by the Contracting States. This argument is improper since it claims that the States have a duty to consider whatever the Secretariat prepared on its own motion. In addition it is inappropriate and political to take initiative on subject matter States did not express their desire to consider.

II.2 Procedure for the Adoption of the Proposed Improvements for the Framework of the ICSID Arbitration

23. The discussion paper further engaged in political exercise by proposing improvements for the framework of ICSID arbitration, but following procedures different from those contained in the ICSID Convention. The discussion paper reflects unacceptable attitude towards amendment procedures established under the Convention that provide adequate consideration to the constitutional process of states for ratification.⁸ It is indicated that obtaining the unanimous ratification for an amendment by the all Contracting States would be at least a long process. By contrast amendment of the ICSID Arbitration and Conciliation Rules as well as Additional Facility Rules requires only a decision of the Administrative Council of the ICSID.⁹

24. The discussion paper recognises that the proposals directly and indirectly amend the ICSID Convention by modifying the provisions, supplementing or adding

⁷ AU, Decision on the Status of AU/OAU Treaties, EX/CL/Dec.128(V), the Fifth Ordinary Session of the Executive Council, 30 June-3 July 2004, available at <http://www.africa-union.org/AU%20summit%202004/excl/Decisions%20Rev.pdf>, last visited on 13 January 2005.

⁸ ICSID Discussion Paper, pp.3-4, Annex p.1.

⁹ *Ibid*, page 2.

new elements. Proposals involving the possibility of wider attendance of the hearings of arbitration tribunals to be provided by the decision of the tribunal itself without the requirement for the consent of the States and appellate facility are at the heart of the political and legal dimension of the Convention that was negotiated carefully and ratified through the constitutional process of each States.

25. The discussion paper repeatedly suggested utilising procedures of adoption and amendments of the Arbitration and Conciliation Rules and The Administrative and Financial Regulations by the Administrative Council. In which case, the proposed improvements of the framework of the ICSID arbitration could be adopted through collective decision making by the Administrative Council as in any other rules of procedure. The Annex of the discussion paper also provides for a single appellate facility that operates under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID.

26. The discussion paper further outlined the provisions of the Vienna Convention on the Law of Treaties providing interpretation of bilateral and other treaties signed among Contracting States that provide for appellate facility as amending the ICSID Convention. This interpretation implies that the provisions of the BITs could amend other aspects of the ICSID Convention. The discussion paper emphasising on the voluntary nature of the consent to the appellate facility, provided utilising the single Appellate Facility for all other non-ICSID arbitration based on a treaty.

27. Consequently significant part of the discussion paper is devoted to developing arguments to avoid the amendment procedures of the ICSID Convention. The amendment procedures are understood as lengthy. The discussion paper circumvents this process, even though the proposed improvements through the amendment of the ICSID Arbitration Rules significantly impact the ICSID Convention.

28. Hence, developing countries should carefully consider that any further work in this regard do not undermine the procedures established under the ICSID Convention. Amendments of the ICSID Convention should enter into effect through the same procedure established under Article 65 of the Convention, i.e., adoption by the majority of the States and ratification by all Contracting States. Proposals for improving the framework of the ICSID arbitration with the implication of amending the Convention should always take place via the amendment procedure established under the Convention itself and not for new creative methods.

II.3. Process for the Consideration of Improvements and the Participation of Developing Countries

29. The majority of Contracting States to the ICSID Convention are developing countries. In this regard it is necessary for the ICSID Secretariat to adequately consult with developing country members. Though the ICSID Secretariat lacks the proper authority to initiate discussion to improve the framework of the ICSID arbitration, it has done so. Accordingly all aspect of the process and the particulars of the proposed improvements should be submitted for a decision by Contracting States on whether they should be continued, and for policy guidance. Full consultation and effective participation of developing countries is necessary from the initial stage of the process.

The particulars of the proposal and the policy guidelines and objectives to be achieved should also primarily be initiated by the Contracting States.

30. Considering the problem developing countries face in the international law making process arising from financial incapacity and lack of human expertise, any process should provide adequate mechanism for the reflection of the view of developing countries. The time frame provided for submission of comments and further suggestions, in this regard, was too short for developing countries that have not adequately participated in the consultations pending the preparation of the discussion paper.¹⁰ There were virtually no discussions and forums attended by developing countries to express their interest and suggestions with regard to the ICSID framework of arbitration.

31. The discussion paper took up new elements in investment dispute settlement mechanism contained in the U.S. Model BIT of 2004 and recent Free Trade Agreements concluded by the U.S. Though the discussion paper does not specify who was consulted and where and when the need for improvement was expressed, its elements (such as procedure for expedited filling of a request for provisional measures, consideration of submissions, by an ICSID tribunal, from civil society organizations, business groups and the home-state, possibility of wider attendance of the hearings of arbitration tribunals and an ICSID appeal facility to enhance the acceptability of investor-to-state arbitration) suggest that the proposal reflect the concerns of investors and developed countries. The inadequate attention given to the issue of technical assistance can also demonstrates that the concerns of developing countries are placed aside of the on-going discussion.

32. A process that does not involve all concerned parties cannot achieve fair and balanced, as well as efficient system. Though the framework of the ICSID arbitration is established to enable investors to bring claims against host states, Contracting States of the ICSID Convention remain the parties with rights and obligations under the Convention. Consultation for the improvement of the framework should primarily be made with Contracting States. The initial stages of discussion are important in shaping the direction, the scope and objectives of the outcome. Hence the Secretariat should strive to reach the developing countries as a matter of priority.

¹⁰ The ICSID Secretariat and some of the developed countries had attended an important discussion, on the appeal facility in London organised by the British Institute of International and Comparative Law's Investment Treaty Forum. Subsequent meetings are also organised for follow up. See ICSID, Annual Report, 2004, available at http://www.worldbank.org/icsid/pubs/1998ar/2004_icsid_ar_en.pdf, p. British Institute of International and Comparative Law, Second Conference, Appeals and Challenges to Investment Treaty Awards: Is it time for an International Appellate System, 7 May 2004 <http://www.biiicl.org/index.asp?contentid=434>, last visited on 13 January 2005.

III. COMMENTARY ON THE DISCUSSION PAPER FOR THE IMPROVEMENT OF THE FRAMEWORK OF ICSID ARBITRATION

III.1. Discussions on Transparency Issues

III.1.1. Authority to 'Accept' and 'Consider' Submissions from Third Parties

33. The discussion paper proposes the possibility of conferring authority on an ICSID tribunal to accept and consider submissions, from civil society organizations, business groups, or in investment treaty arbitration, the other state parties concerned. It is argued that such third party intervention would strengthen the process. The necessity for this proposal is indicated as arising from the availability of two investor-to-state arbitration governed by the UNCITRAL Arbitration Rules that confirmed broad authority to tribunals to accept and consider submissions from third parties.¹¹

34. The discussion paper noted that arbitrations under the ICSID have not yielded precedents similar to those reflected in the North-American Free Trade Area (NAFTA) disputes resolved by reference to UNCITRAL Arbitration Rules. Hence it is noted that it might be useful to make clear that the ICSID tribunals have authority to accept and consider submissions from third parties.¹² It is not quite appropriate for ICSID Secretariat to make case for the introduction of such a complex concept that has not been confirmed by ICSID tribunals. The fact that the UNCITRAL tribunals decided for broader authority to accept third party submissions are irrelevant for arbitration under the ICSID framework. In this regard Article 43 of the ICSID Convention authorise the tribunals to call upon the parties to produce documents and other evidences.

35. In both the Methanex Corporation and the U.S and the United Parcel Service of America and the Government of Canada arbitration proceedings, the tribunals concluded that they had the power to accept submissions from *amicus curiae* as a matter of jurisdiction in an arbitration governed by the UNCITRAL Rules. However, considering the matter to be premature, the tribunals declined to articulate detailed criteria. Neither tribunal had actually considered submissions. Furthermore, both held that circumstances in which the submissions are accepted must be developed through consultation with the parties. As a result, these decisions are not well articulated and comprehensive enough to provide guidance for ICSID arbitration.¹³

36. The discussion paper proposed the introduction of rules on third party submissions by the amendment of Rule 34 of the ICSID Arbitration Rules and Article 41 of the ICSID Additional Facility Arbitration Rules. The amendments are proposed

¹¹ ICSID Discussion Paper, p.9.

¹² *Ibid.*

¹³ *Methanex Corporation v. United States of America*, decision on petitions from third persons to act as *amici curiae* dated 15 January 2001, United Parcel Service of America and the Government of Canada, available at [http://www.appletonlaw.com/cases/UPS_%20Decision_on_Petitions_\(Amici%20Curiae\)_Oct17-01.pdf](http://www.appletonlaw.com/cases/UPS_%20Decision_on_Petitions_(Amici%20Curiae)_Oct17-01.pdf), last visited on 13 January 2005, p.70.

to set out conditions for submissions or more flexibly leave the condition for determination by the tribunal in each case.¹⁴ The discussion paper fails to address the impact of the introduction of procedural rules so alien to Article 43 of the ICSID Convention. In effect the ICSID Arbitration and Conciliation Rules will have more legal force than the Convention.

37. Submissions by third parties should not be considered merely as the subject of procedural rules. The participation of NGOs and any other civil society groups is driven by issues they advocate. The so-called ‘business groups’ also ambiguously indicate the possibility of associations and organisations of the business community to make submissions to the tribunal. Unlike the NGOs, business groups are more associated with the interest of the investor. The provision of authority to receive the submissions from other state parties concerned would also be detrimental to the defence of the respondent host-state. Authority to accept *amicus curiae* will impact the substantive proceedings of arbitration for the following reasons:

- a) **Absence of amicus submissions in the civil law legal system:** Contracting States to the Convention that do not have *amicus* brief procedure under their domestic laws will be forced to accept a procedure not-stipulated in the ICSID Convention. Mexico has made under the NAFTA tribunal the argument that permitting submissions would result in favouring the court process of U.S. and Canada over Mexico because Mexican law does not provide for *amicus* submissions.¹⁵
- b) **Inequality of parties:** an *amicus* submission would influence the decision making process of the arbitral tribunal in favour of one or the other of the parties. In *British Steel Case* at the WTO two U.S. industry groups filed briefs separately from the U.S Government submission.¹⁶ Permitting *amicus* submissions effectively disadvantages developing countries because the civil society and industrial organisations in the developed countries are more experienced, better organised and equipped as well as better funded. Furthermore, from the developing country’s perspective additional submission by the home-state would add to the prevailing inequality in finance and capacity.
- c) **Undue Prejudice:** the question of whether the submissions could be received in such a way as to avoid over-burdening (and therefore prejudicing) either party to the dispute was one of the considerations of the NAFTA tribunals.¹⁷ This condition cannot guarantee that submissions will be rejected whenever they are found to create inequalities. Tribunals have made it clear that it is not mere inequality that stops them from accepting submissions; rather it is because submission may **over**-burden either of the parties. The decisions of the tribunals are more relevant to burden created on the other party in terms of time and fees of lawyers. They did not address undue prejudice with regard to the substantive claim and defence, or whether

¹⁴ ICSID Discussion Paper, p.9.

¹⁵ Methanex, see not above at 13, p.23.

¹⁶ United States-Importation of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, WT/DS138/AB/R, available at http://www.wto.org/english/tratop_e/dispu_e/2340d.pdf, para. 36.

¹⁷ Methanex, see not above at 13, p.27.

a tribunal would always be able to identify which submissions are unduly prejudicial to either of the parties in advance.

- d) **Broadening the Scope of the Dispute:** amicus submissions may also unduly broaden the scope of the dispute between the parties. All submissions will add to the argument to which each party must respond.
- e) **Burden and delay of the whole proceeding:** the recent case of *Aguas Del Tunari v. Bolivia* (ICSID Case No. ARB/02/3) that involved a dispute regarding the privatisation of water services demonstrates this well. Over 300 interested parties petitioned the tribunal to be allowed to intervene in and attend the hearing, as well as to be allowed to receive full public disclosure of all evidence and pleadings. One can see that allowing amicus brief submission may end up in attracting several submissions and ultimately delaying the process.

38. The major difference between the discussion paper and the decisions of the NAFTA tribunals is that the former did not only propose that the tribunals should ‘accept’ submission but also ‘consider’ such submission. Unlike the decisions of NAFTA tribunals, the discussion paper sought to establish a rule that clearly provides for the power of the tribunals to ‘accept’ and ‘consider’ submissions in a manner that is mandatory than discretionary power of tribunals.

39. In conclusion it is inappropriate to initiate the consideration for amicus briefs to direct the conduct of ICSID arbitration tribunals in this regard and to attempt to introduce such improvements via the amendment of procedural rules. The introduction of the amicus submissions generally disadvantage the developing countries with limited resources and cause undue burden and cost on the proceeding. It is imperative for developing countries to critically examine the development of such rules to arbitration under the ICSID framework.

III.1.2. Public Participation in the Proceedings of the Arbitration

40. The discussion paper considered the possibility of wider attendance of the hearings of arbitration tribunals to be provided by the decision of the tribunal itself without the requirement for the consent of the parties. Article 48(5) of the ICSID Convention, Rule 32 (2) of the ICSID Arbitration Rules and Article 39(2) of the ICSID Additional Facility Rules provides that the tribunal may allow other person (other than the parties, their counsel and other representatives) to attend the hearing only with the consent of the parties. The discussion paper called for wider participation without the consent of the parties. It makes this proposal without any policy guideline from the Contracting States.¹⁸ It also asserted that the notion connotes wider confidentiality or privacy obligations, beyond those of ICSID itself and is not supported by current arbitration practices.

¹⁸ ICSID Discussion Paper., p.10.

41. The policies of the ICSID Convention should not be understood in terms of secrecy from the public.¹⁹ The basic policy is that arbitration hearings could be public only when the parties consent to it, since arbitration is a private dispute resolution process. An important aspect of ICSID arbitration is that in addition to ratifying the ICSID Convention, the parties ‘consent’ to arbitrate, investment contracts or BITs that remains the basis for exercise of jurisdiction.²⁰ The consensual basis of the dispute remains the important feature of the ICSID framework of arbitration. It is not quite appropriate to undermine the paramount importance of the consent of the parties and the private nature of the dispute by amendment to Arbitration Rules.

42. The benefit and cost of public hearing depends on the particulars of the case and the interest of each of the parties. Since the consent of the each of the parties (the State and the Investor) is equally important, a recognition and respect to the private nature of the dispute require the consent of both parties. The major implication of access to public hearing by the decision of the tribunal involves costs and disadvantage to the interested parties in support of developing countries. The ICSID Secretariat has indicated in the discussion paper that it was able to cope with the logistical challenges of hosting such hearing.

43. An important element of such procedure is that public hearing should not cause any additional cost on the parties, especially on a developing country involved in investment disputes. Furthermore, the public hearing will largely benefit the better equipped interest groups of developed countries that are better funded than interest groups of developing countries. The evidence and the strategy of litigation will also be exposed for examination and criticism that may trigger public pressure on the arbitral proceeding. Possible beneficiaries of such hearing, including students and academicians, from developing countries will be marginalised. Obviously the developing countries with limited outreach and access to media would be disadvantaged. Last, but not least, the defence of developing countries during arbitral proceedings may also affect the promotion of investment.

44. As a result developing countries should closely examine the pros and cons of public hearing considering the limitations of their constituency to attend such hearings, the exposure of the proceedings for media and other public discussion that may affect the decision of the tribunals and the image of the country.

III.1.3. Mandatory Rule for ICSID to Publish Extracts of a Case

45. A mandatory rule for ICSID to publish extracts of a case pending the consent of the parties is proposed to be incorporated through the amendment to article 48(4) of the Rules. Publication of all awards on a prompt and full basis will serve to increase the transparency and advance the jurisprudence of ICSID, and thus aid parties in evaluating the merits of their case. Such stipulations, however, remain in the realm of consent of the parties. As was noted by a practitioner ‘*Access to many of the decisions*

¹⁹ Commentaries on the discussion paper emphasized on the secrecy from the public by the governments and investors, available at http://www.iisd.org/pdf/2004/investment_icsid_response.pdf, p.9, last visited on 13 January 2004

²⁰ ICSID Convention (1965), Article 25-27.

*is through a network of law firms active in this area: whilst it benefits the members of that "magic circle" it is not right that those firms should have a wider array of jurisprudence with which to fight their case. Access should be equal to all - whether the sole practitioner in middle America (who have been active in these cases) or the international law firm in Paris or Washington.*²¹

46. The ICSID Secretariat may not receive consent for publication for reasons of paramount importance, either from the investor or the State. Publication of extracts of the case may still be prejudicial to the interest of the parties. Adequate respect to the consent of the parties demands that the ICSID Secretariat should not disclose the particulars of the case. As a result the proposal should be modified to balance the need for prompt publication and the interest of the parties. In which case publication of extracts pending consent to publication could be mandatory to the ICSID Secretariat, unless and otherwise parties objected to such publication within specific period of time.

III.2. Proposed Improvements with respect to Institutional Issues and Technical Assistance

III.2.1. Disclosure Requirement and Rules of Conduct of the Arbitrators

47. The expansion of the applicability of disclosure requirements throughout the proceeding of the arbitration, as well the elaboration of a code of conduct for arbitrators like the WTO Rules of Conduct for the Dispute Settlement Understanding is an appropriate undertaking that the ICSID Secretariat can develop upon the request of the Administrative Council.²²

III.2.2 Technical Assistance

48. One of the most important activities of the ICSID Secretariat regarding its role in capacity building for developing countries relates to the training of officials. The discussion paper, unlike the proposals for amendment, did not adequately assess the particular needs of developing countries, the scope and focus of the training and the financial implications of disputes for developing countries. All the ICSID Secretariat stated is that it could consider ways of intensifying and further systematising training activities in collaboration with UNCTAD and International development Law Organisation.²³

21 Blackaby, Nigel (2003) "Public Interest and Investment Treaty Arbitration" *Oil, Gas and Energy Law Intelligence*, Volume I, issue # 02, available at http://www.gasandoil.com/ogel/samples/freearticles/article_56.htm.

²² ICSID, Discussion Paper (2004), p.11.

²³ *Ibid*, page 14.

49. The preamble of the ICSID Convention stated the need for international cooperation for economic development, and the role of private international investment therein. Under Article 1 (2) of the ICSID Convention the purpose of the Centre is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention. Hence, the major contribution that the ICSID can provide in terms of technical assistance to developing countries lies in:

- improving their capacity to use the facility that the Centre provides whenever necessary, and
- building expertise

50. The ICSID Secretariat should provide adequate consideration to what are the most important needs of developing countries, i.e., capacity building. In as much as the cost of dispute resolution under the ICSID mechanism remains too high, the developing countries will be disadvantaged when utilising the ICSID facilities. The technical assistance, therefore, should aim at enabling the developing countries to participate effectively in the proceedings of the dispute. The ICSID Secretariat should consider establishment of a fund and development of criteria to benefit from the fund that contribute to part of the cost of the developing country to the use of the facility of the Centre depending on the particular situation of the country and without unduly affecting the position of the claimant. This fund could be utilised in all circumstances where the developing country is disadvantaged. The Secretariat should also consider assisting arbitration centres and facilities, law firms and law schools in developing countries.

III.2.3. Establishment of Mediation Service for Investor-to- State Disputes

51. The discussion paper also point out the possibility of establishment of mediation service for investor-to-sate disputes. Mediation, unlike conciliation, is not stipulated in the ICSID Convention. Though, the availability of such facility could be beneficial in early settlement of disputes, the ICSID Secretariat should proceed with the initiative only with the clear policy guideline from the Administrative Council.²⁴

²⁴ *Ibid*, page 13.

III.3. Proposal for an ICSID Appeal Facility

III.3.1 Examining the Need for Appeal Facility under ICSID Framework

52. An ICSID appeal facility to enhance the acceptability of investor-to-state arbitration, based on the grounds of clear error of law, grounds for annulment of an award, and serious errors of fact, that involve several additional rules regarding procedure, enforcement, payment of additional fees and others is proposed in the discussion paper.²⁵

53. A well developed appeal system in international dispute settlement mechanism is available only under the Dispute Settlement Mechanism of the WTO. The important feature of the WTO Standing Appellate body signifies a mechanism employed under a system that is accessible to states that does not rely on domestic courts for its execution. Additionally it does not rely heavily on procedural and substantive elements of contracts or other agreements among the parties negotiated outside the WTO, procedural rules developed by organisations other than WTO, and substantive rules other than the rules of the WTO.

54. Arbitral proceedings under the ICSID framework, however, involve parties other than states, namely investors. Awards of ICSID arbitration are implemented through execution procedures of domestic courts.²⁶ The arbitration under ICSID framework relies principally on substantive laws developed outside its framework including laws designated by the parties, customary international laws, bilateral agreements, state contracts and the laws of the state where the dispute took place. The ICSID framework is also supplemented and reinforced by procedural rules regarding the establishment and the proceedings of the arbitration tribunal as agreed and designated by the parties.

55. With regard to the experience of review under ICSID, a quasi-appeal "annulment committee" can be set up under Article 52 of the ICSID Convention. It is a sensitive procedure for *ad-hoc* annulment committees to quash the earlier tribunal's award. The problem is compounded as the earlier tribunal - with its manifest reluctance to get engaged in the substance of the dispute - will now have to re-convene. In a normal appeal procedure before state courts, the original judges will often - for reasons of objectivity and impartiality - be no longer competent to hear a case that was appealed on a higher level. But this is not the case under the ICSID Arbitration Rules.

56. The discussion paper has made the projection that by mid-2005 as many as 20 countries may have signed treaties with provisions on an appeal mechanisms for awards rendered in investor-to-state arbitrations under the treaties. However, this does not signify the need for an appeal mechanism by the community of states. The basic assumption made by the ICSID Secretariat is that the development of several appellate mechanisms in treaties gives rise to the need for efficiency and economy, as

²⁵ *Ibid*, p.14, Annex.

²⁶ ICSID Convention (1965), Article 54.

well as coherence and consistency through a single appeal mechanism under ICSID as an alternative to multiple mechanisms.²⁷

57. Since the number of treaties providing for appellate facilities, as reflected in the projection of the ICSID is very limited, it can be said that the need for efficiency and consistency is not evident. As a result, the proposal of the Centre cannot be understood as a response to a ripe and apparent demand for consolidating multiple appellate mechanisms. Rather it is a response to policy developments of some of the developed countries in their recent agreements.²⁸ The U.S. Model BIT of 2004 in this regard provided that:

“10. If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to agree that such appellate body will review awards rendered under Article 34 of this Section in arbitrations commenced after the multilateral agreement enters into force as between the Parties.”²⁹

“Within three years after the date of entry into force of the Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism”³⁰

58. These provisions are incorporated in the most recent BIT of the U.S. with Uruguay³¹ and recent Free Trade Agreements, including FTA with Chile. The Trade Promotion Act of the U.S. under Section 2102(b)(3)(G)(iv) also instructs U.S. negotiators to “[seek] to improve mechanisms used to resolve disputes between an investor and a government through . . . [the] establishment of a single appellate body to review decisions in investor-to-government disputes and thereby provide coherence to the interpretations of investment provisions in trade agreements.” The United States aims at changing the dispute settlement procedures in each of its bilateral and multilateral instruments and concentrated effort to make changes in the UNCITRAL Arbitration Rules and the ICSID.³² Members of the lobby group representing labour and environment were pushing for the Model BIT to include an appellate mechanism, rather than indicating that the parties intend to consider such mechanism, whereas the

²⁷ ICSID, Discussion Paper (2004), pages 14-15.

²⁸ In a side letter signed by both parties, the United States and Singapore agree that “within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 15.25 in arbitrations commenced after they establish the appellate body or similar mechanism [25].”

²⁹ USTR, Model Bilateral Investment Treaty of the United States, Article 8.3 (b) (ii), available at http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf, Article 28.10.

³⁰ *Ibid*, Annex D.

³¹ USTR, U.S.-Uruguay BIT, available at http://www.ustr.gov/assets/World_Regions/Americas/South_America/asset_upload_file583_6728.pdf.

³² Audley, John (2003), Evaluating Environmental Issues in the U.S.-Singapore FTA,” *Issue Brief*, Carnegie Endowment, available at <http://www.ceip.org/files/publications/Audley-Singapore.asp>, the Report of the House of Representatives, 107Congress, Trade Act of 2002, available at http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp107&r_n=hr624.107&sel=TOC_655855&.

company representatives opposed to such recommendation and emphasised that negotiation for appellate facility should not delay the negotiation of future BITs.³³

59. The issue was a subject of discussion under the failed Multilateral Agreement on Investment (MAI) of the Organisation for Economic Development (OECD) where it was proposed for the establishment of an appeal mechanism in the MAI for both state-to-state and investor-to-state dispute settlement with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal on a point of law. However, concerns were expressed about the delays and costs an appeal might add to dispute settlement, particularly the traditional forms of investor-to-state arbitration, and its departure from the philosophy of fast, inexpensive and final one step arbitration. No agreement was reached at the end to include such facility.³⁴

60. As a result it is arguable that the ICSID pre-empted the stage of development in international negotiations backing the need for appellate facility. It seems to have promoted the policy development in certain parties through its office and outreach, without consideration of the pros and cons of such facility for the ICSID framework and Contracting States of the Convention in general.

III.3.2 Objectives of the Appeal Facility

61. The two major objectives of an ICSID Appeal Facility assessed from the discussion paper include:

- centralising efforts of different parties through bilateral treaties to make appellate mechanisms available for investor-to-state awards made both under the ICSID and outside ICSID framework of arbitration,
- to promote for the development of consistency 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.

62. The stated objectives of the an ICSID Appeal Facility are indeed important and assist the development of international law in investment disputes for the benefit of all States and investors. The problem, however, is that the objectives do not seem attainable, given the present legal framework. Article 53(1) of the ICSID Convention provides that awards pursuant to the Convention shall not be subject to any appeal or to any other remedy except those provided for in the Convention. The article also excludes any appeal against an ICSID award to the International Court of Justice.³⁵ The ICSID Additional Facility Rules, however, do not contain provisions for the outright exclusion of appeal, and hence the awards could be subject to the appellate mechanism provided under the place of arbitration.

³³ Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty, presented to the Advisory Committee on International Economic Policy, available at http://ciel.org/Publications/BIT_Subcmte_Jan3004.pdf, see also letter from groups NGOs at http://ciel.org/Publications/BIT_Comments_Jan1604.pdf.

³⁴ OECD, Selected Issues On Dispute settlement, Note by the Chairman, Negotiating Group on the Multilateral Agreement on Investment (MAI), Unclassified, DAF/MAI(98)12, available at <http://www1.oecd.org/daf/mai/pdf/ng/ng9812e.pdf>, p. 5.

³⁵ Schreuer, C., *The ICSID Convention: A Commentary* (2001).

63. The establishment of an ICSID appellate facility based on a treaty provision may suffer from fragmentation and run counter to the provisions of the ICSID Convention. In the absence of amendment to the ICSID Convention, a facility based on treaty provision of parties would not guarantee efficiency. The finality and binding nature of the ICSID arbitration awards under Article 53 of the ICSID Convention already has excluded the doctrine of binding precedents for subsequent case.³⁶ In fact the experiences obtained in the cases of ICSID arbitration demonstrate that the awards are inconsistent and tribunals are inclined to disregard precedents. For, example the ICSID tribunal in *SGS v. Philippines* stated that:

“As will become clear, the present tribunal does not in all respect agree with the conclusions reached by the *SGS v. Pakistan* on the issues of interpretation of arguably similar language in the *Swiss-Philippines BIT*”³⁷

64. As a result, it would be a difficult, if not impossible for the proposed appellate facility to guarantee consistency in arbitration awards, since the ICSID Appeal Facility is proposed to be organised as a facility without amending the ICSID Convention. The detailed analysis of the discussion paper may reveal objectives deeper than those related to development of case law. The discussion paper has pointed out the benefit of facility as promoting the acceptability of Investor-to-State Dispute settlement mechanism (which obviously mean as opposed to State-to-State Investment Dispute Settlement under different forms outside the ICSID framework).

III.3.3. Benefits and Costs of a Single ICSID Appeal Facility

65. A developing country may have an opportunity to appeal an award based on a point of law and legal interpretation developed by the tribunal (otherwise described as clear error of law’ in the discussion paper) or serious errors of fact or for lack of jurisdiction. Under the current ICSID arbitration a challenge for annulment is available only on procedural grounds (that the arbitral tribunal was not properly constituted, that it manifestly exceeded its power, that one of its members was corrupt, that there was a serious departure from a fundamental rule of procedure, and no reason was given as to the ground of the award). Under the proposed appeal facility, an award can be challenged for the same procedural grounds plus on the ground of clear error of law and serious errors of facts. As a result, if the appeal facility is designed suitably, in particular, through the amendment of the Convention to avoid inconsistency and fragmentation within the framework itself, the investor-to-state dispute settlement can be improved further.

66. Though the proposed facility will allow states to appeal an award rendered in favour of an investor or vice versa, the major implications of the appellate facility in

³⁶ UNCTAD, *Binding Force and Enforcement*, International Centre for Settlement of Investment Disputes, *Dispute Settlement*, New York and Geneva, 2003, available at http://www.unctad.org/en/docs/edmmisc232add8_en.pdf, p.11.

³⁷ ICSID, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, 2004, Washington, case No. ARB/02/6, para. 97.

an attempt to improve the acceptability of Investor-to-State Dispute settlement mechanism involve:

- effect on the use of and availability of adequate opportunities for annulment through the *ad hoc* committee under ICSID framework,
- additional cost to cover the proceedings of the appeal, and
- increased acceptability of Investor-to-State dispute settlement as opposed to state-to-state dispute Settlement mechanism

67. The effect of the appeal facility on annulment procedures by the use of the quasi-appeal facility under Article 52 of the Convention is not articulated in the discussion paper. It can be understood that the introduction of an appeal facility will ultimately amend article 52 of the ICSID Convention.

68. A particular challenge, for developing countries, of the appeal facility is the cost of such a proceeding. The discussion paper does not examine the possibility of covering the cost of the facility from the budget of the ICSID. It is stated that 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. Arbitration has already developed to be the most expensive dispute settlement mechanism. A developing country would be deterred from using the facility and on the other hand to remain burdened where an appeal is lodged against the award in favour of the state. The expense of the Appellate Body of WTO is born by the organisation itself. The parties, as a result bear only their own costs. As a result appropriate consideration should be given to develop for a budget-based arrangement to cover the costs of the appeal facility and to provide a fund for cost sharing to assist the developing country exposed to high expenses as a result of appeal.

69. In conclusion the general concept of developing an appeal system available for any investor-to-state arbitration award should be set in a manner that is methodical, with full integration under the Convention, full recognition of the consent of the parties, and with a funding mechanism, including contributions from capital exporting countries, the use of regular budget and cost-sharing mechanism.

70. The procedures recommended in the discussion paper regarding the establishment of the facility, the selection and appointment of arbitrators, the terms and the functions of the arbitrators are simply subject matters of establishing instruments, viz., the Convention. Even the establishment of the office of the ICSID Secretariat and the Administrative Council, their roles and functions and the procedure of appointment and terms of the Secretary-General and the deputy are stipulated in the ICSID Convention.

III.4. Proposed Improvements focused on Procedural Issues

III.4.1. Facilitated Procedure for Provisional Measures

71. Unlike international commercial arbitration practices where provisional measures can be sought largely from national courts, the ICSID Convention provides that after the establishment of the tribunal, provisional measures can be recommended when the tribunal considers that the circumstances so require.³⁸ The parties can also agree that such provisional measure may not be ordered by an arbitral tribunal.³⁹ The ICSID Arbitration Rules provide that provisional measures could be requested at any time during the proceeding and the tribunal shall only give recommendation after giving each party an opportunity of presenting its observation.⁴⁰ The discussion paper, however, proposes procedure for expedited filling of a request for provisional measures with the Secretary-General of ICSID, before the establishment of the arbitration tribunal. This pre-establishment procedure confers additional power on the Secretary General that is judicial than administrative. The Secretary-General will have power to accept applications for interim measures, to request for observations of the other parties indicated in the application as well as to decide on the jurisdiction of the Centre on the application.

72. This proposal fails to consider the rule that provides adequate alternative mechanism for parties to stipulate in their agreement to provide for procedure of requesting any judicial or other authority to order provisional measures, prior to the institution to the establishment of the tribunal for the preservation of their respective rights and interest.⁴¹ The proposal in the discussion paper, then, cover cases where parties do not stipulate in their agreement for provisional measure before the institution of the tribunal to be requested from judicial or other authority of the State where such measure are sought, in which case, the parties should be understood as reserving the whole process of request for provisional measure only after the establishment of the tribunal. In such situation the rules should not intervene in the consent of the parties not to seek provisional measures before the establishment of the tribunal and attempt to facilitate the filing of provisional measures before the establishment of the tribunal. That is exactly what the discussion paper aim at.

73. Provisional measures usually involve recommendation for suspensions or staying of or requiring the fulfilment of certain acts on the part of the respondent (usually the state). In as much as interim measures preserve rights, the procedures could also be abused to influence the acts of state. As a result the ICSID Convention has restricted provisional measures to be instituted after the establishment of tribunals. In particular the states should not be required to reply before an arbitration tribunal is established. The ICSID Secretariat would effectively be involved in adjudicatory activities when it accepts filing for a tribunal that is not established and request for reply by the respondent and then decide on jurisdiction.

³⁸ ICSID Convention, Article 47.

³⁹ *Ibid.*

⁴⁰ ICSID, Arbitration Rule 39.

⁴¹ ICSID, Arbitration Rule 39(5).

74. The Secretary-General is given limited power of judicial nature that involve only the power to refuse registration of a request for conciliation or arbitration proceedings to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant it is found that the dispute is manifestly outside the jurisdiction of the ICSID (Article 28(3) and 36(3) of the Convention).⁴² No power is provided for the ICSID Secretariat under the ICSID Convention to transmit filings and to request for observation on any substantive or procedural issues. As a result the present proposal goes beyond what is provided under the ICSID Convention as functions and roles of the Secretariat. Moreover, the proposal affects the autonomy of parties to prevent request for provisional measures before the establishment of the tribunal.

III.4.2 A Special Procedure to Dismiss All or Part of a Claim at an Early Stage of the Proceeding

75. A special procedure for an early stage of consideration of request for dismissal of all or part of a claim by the tribunal expeditiously for lack for jurisdiction is recommended by the discussion paper. It is quite appropriate for the ICSID Arbitration Rules to provide further protection where the ICSID Secretary-General was unable to decide on lack of jurisdiction. The consideration of objection to jurisdiction at the earliest stage of the arbitral hearing supplements and alleviates the limitations of the Secretary-General to decide on claims that manifestly lacks jurisdiction.

76. It is, however, vital to ascertain that such procedure is limited to the lack of jurisdiction which should be manifestly clear for part or the entire claim and should be considered at the beginning of the hearing. Such procedures can be developed as summary procedures in terms of 'Objection' for the consideration of the claim. In case the objection is rejected under the 'special/summary procedure' the tribunal, however, should still be empowered to entertain detailed challenge to jurisdiction under the Rules. Furthermore, proposal for special/summary procedure for objection to jurisdiction at the earliest stage of arbitration should also be further considered in line with the proposed grounds of appeal. The parties should have the opportunity to appeal on jurisdictional awards before the tribunals rendered the final award. Such procedure would promote efficiency on a system that does not rely on domestic courts for its recognition and enforcement.

⁴² ICSID (1965) Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, paragraph 20, available at <http://www.worldbank.org/icsid/basicdoc/partB-section04.htm#03>, last visited on 13 January 2005.

IV. CONCLUSION

77. The recent discussion for the improvement of the framework of the ICSID arbitration under the discussion paper circulated on 22 October 2004 by the ICSID Secretariat can be considered as the first major initiative that went beyond the rules of procedures to impinge on the ICSID Convention. The time and effort devoted by ICSID Secretariat is noticeable from the range of issues discussed and the details of the recommendation and the manner of adoption of the recommendation. The manner in which such initiative was taken by the ICSID Secretariat, however, involved serious legislative exercise or taking part in political functions that concern the initiation, negotiation, adoption and further acts in relation to treaties, rules of procedures or decisions and their amendments, in the absence of any request from the Administrative Council or one or more of the Contracting States. The consultation with and the participation of the majority of the Contracting States of the ICSID Convention, developing countries, in the process up to the preparation of the discussion paper and beyond remains serious concern.

78. The two major implications of the substantive parts of the discussion paper are that the recommendations:

- a) Directly or indirectly modify, supplement or add to (amend) the 1965 Convention establishing the ICSID by proposing, among others:
 - Adoption of changes to the ICSID Convention through modification of rules and other creative methods that avoid using the amendment provision of the Convention,
 - Establishment of a single ICSID appeal facility that undermine the finality of awards,
- b) Enormously affect the consent of parties by proposing, among others:
 - Expedited filling of a request for provisional measures before the establishment of the tribunal,
 - A mandatory rule for ICSID to publish extracts of a case,
 - Authority to accept and consider submissions, by an ICSID tribunal without the consent of the parties,
 - Possibility of wider attendance of the hearings of arbitration tribunals without the consent of the parties,

79. The implications for the Convention and for the consensual nature of arbitration under the ICSID framework are enormous. Such recommendations could, therefore, benefit from a wider discussion for the amendment of the Convention than any creative method that avoids such procedure. The discussion paper did not follow the approach for wider discussion upon the decision of the Administrative Council on the possible improvement of the ICSID framework of arbitration that involved the majority of the Contracting States (developing countries) in order to ensure the expedited and wider acceptance and eventual ratification of amendments on what the parties deemed necessary.

80. The preliminary comments and analysis on the particular elements of the discussion paper from the perspective of developing countries demonstrates that:

- a) There are no satisfactory procedural safeguards for an ICSID tribunal that accept and consider submission from third parties to prevent such submissions from over-burdening or prejudicing the claim or defence of parties to the dispute, placing inadequately financed developing countries in unequal position, increasing the cost of the proceeding, broadening the dispute and ultimately delaying the process to the disadvantage of the developing country in a dispute;
- b) A rule that allow a tribunal to authorise for attendance of a hearing by third parties without the consent of the parties run counter to and undermine the consensual and private nature of the dispute, with implication for cost and prejudice, undermining the confidentiality of submissions, and do not guarantee the attendance of interest groups and constituencies of developing countries that are far from the place of arbitration;
- c) Technical assistance for developing countries should be primarily designed by the ICSID Secretariat in improving their capacity to use the facility that the Centre provides whenever necessary, and to build expertise, and should involve the establishment of a fund and a budget that can supplement or reduce the cost for arbitration, especially costs related to the use of the ICSID facility itself,
- d) An ICSID appeal facility based on the grounds of clear error of law, grounds for annulment of an award, and serious errors of fact should be established only when it is designed as integral part of the ICSID Convention through amendment and in a manner that ensures there would be no significant cost implications for developing country. Recommendations regarding composition of the appeal facility, appointment of arbitrators, durations and terms of services should be left for amendment of the Convention and not to the rules;
- e) Pre-arbitral procedures that involve filing of application for provisional measures, request for reply by the respondent and dismissal of such application for lack of jurisdiction by the ICSID Secretariat should not be allowed since such procedure would unduly empower the ICSID Secretariat with adjudicator functions and involve it in the proceeding of the dispute that would eventually be submitted to the tribunal once established. This will undermine the consent of the parties where they do not provide for any procedure for filing provisional measures before the establishment of the tribunal and pre-empt the establishment of the tribunal.

81. The primary focus of developing countries should be the promotion of effective participation and consultation on the process of discussion for the possible improvement of the framework of ICSID arbitration. The ICSID Secretariat should organise forums that promote transparency and efficient assessment of the interest of Contracting States. In particular, the Secretariat should be able to reach developing countries as its primary task. Emphasis should also be made on the manner through which the proposed improvements are suggested to be adopted. The Secretariat should

not be discouraged by the amendment procedures of the ICSID Convention. Amendments that reflect the concerns of all Contracting States would ultimately receive wider acceptance and prevent fragmentation of the framework of ICSID arbitration. It is where the improvements reflect the interest of limited number of Contracting States that amendment of the Convention would not receive wider acceptance.

82. Developing countries should also strive for policy coordination within their respective government bodies and missions abroad. Coordination among developing countries' missions would also help to follow up and influence the discussion for the possible improvement of the ICSID arbitration framework.

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