An Update on the Reform of ICSID's Arbitration Rules

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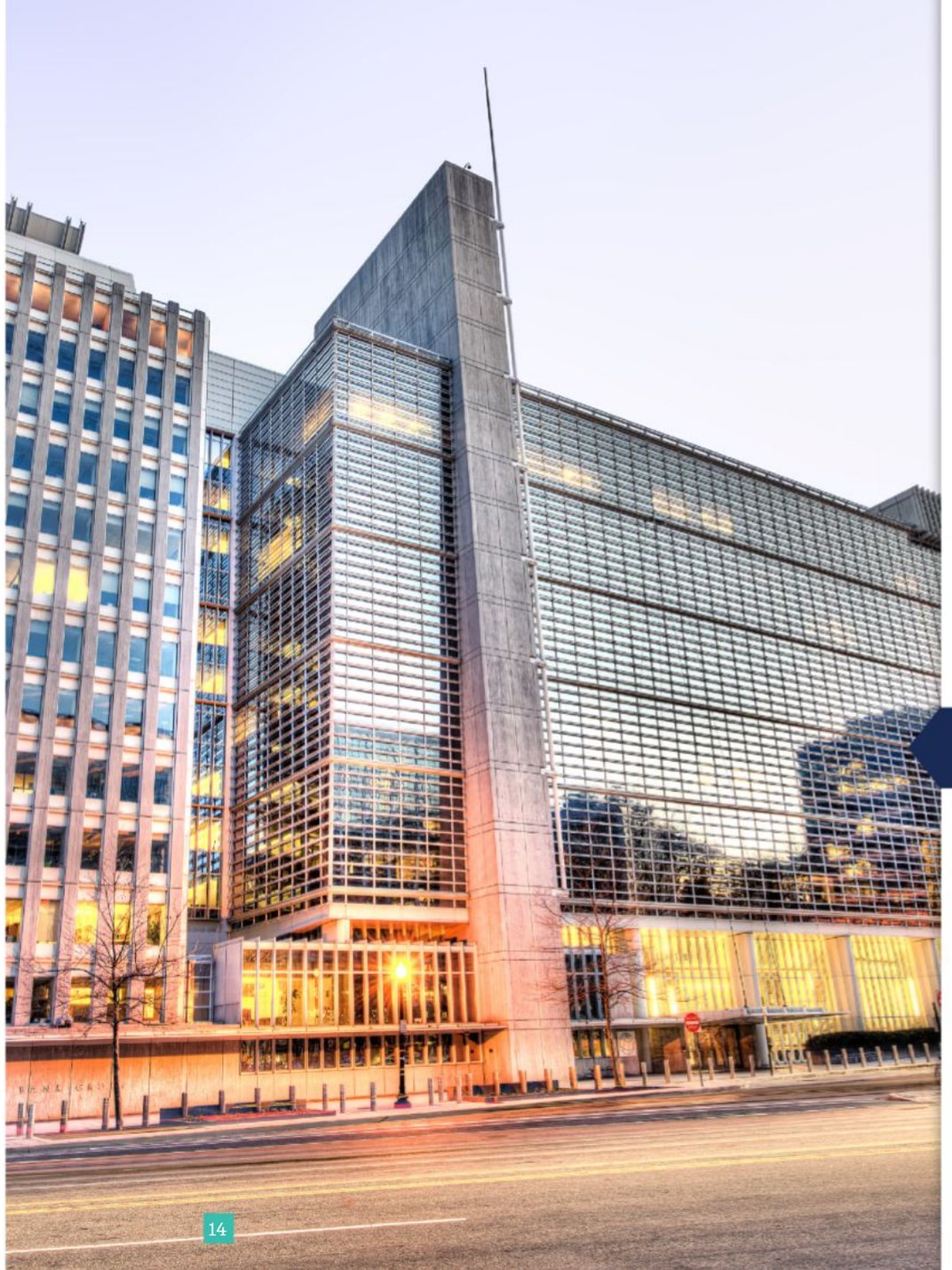
When discussing international investment arbitration ('IIA'), the International Centre for the Settlement of Investment Disputes (the 'Centre' better known by its acronym 'ICSID') springs to the top of your mind as a synonym to IIA itself. This testifies to the relevance of ICSID as an institution in this field. As IIA evolves in response to concerns raised by stakeholders, the ICSID Secretariat ('Secretariat') has seen fit to modernise the Centre's regulations as part of the current wave of change in IIA (the 'Reform Project').

The Rationale Behind the Reform Project

ICSID aims to offer '*States and investors* […] *a range of modern dispute settlement options available to resolve their disputes.*' Four core objectives inform ICSID's proposed reforms: (i) to modernise ICSID's procedure, in light of new concerns arising in IIA; (ii) to simplify the rules by '*streamlin*[ing] *language, re-order*[ing] *provisions and adopt*[ing] *gender-neutral language*', including seeking to solve language discrepancies between the three official versions of the rules; (iii) to reduce time and cost of the proceedings,



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a growing concern not only in IIA but in international arbitration generally; and (iv) to 'go green,' reducing the use of paper and the corresponding environmental burden. ICSID also states that 'all amendments must maintain the procedural equilibrium between disputing parties.'

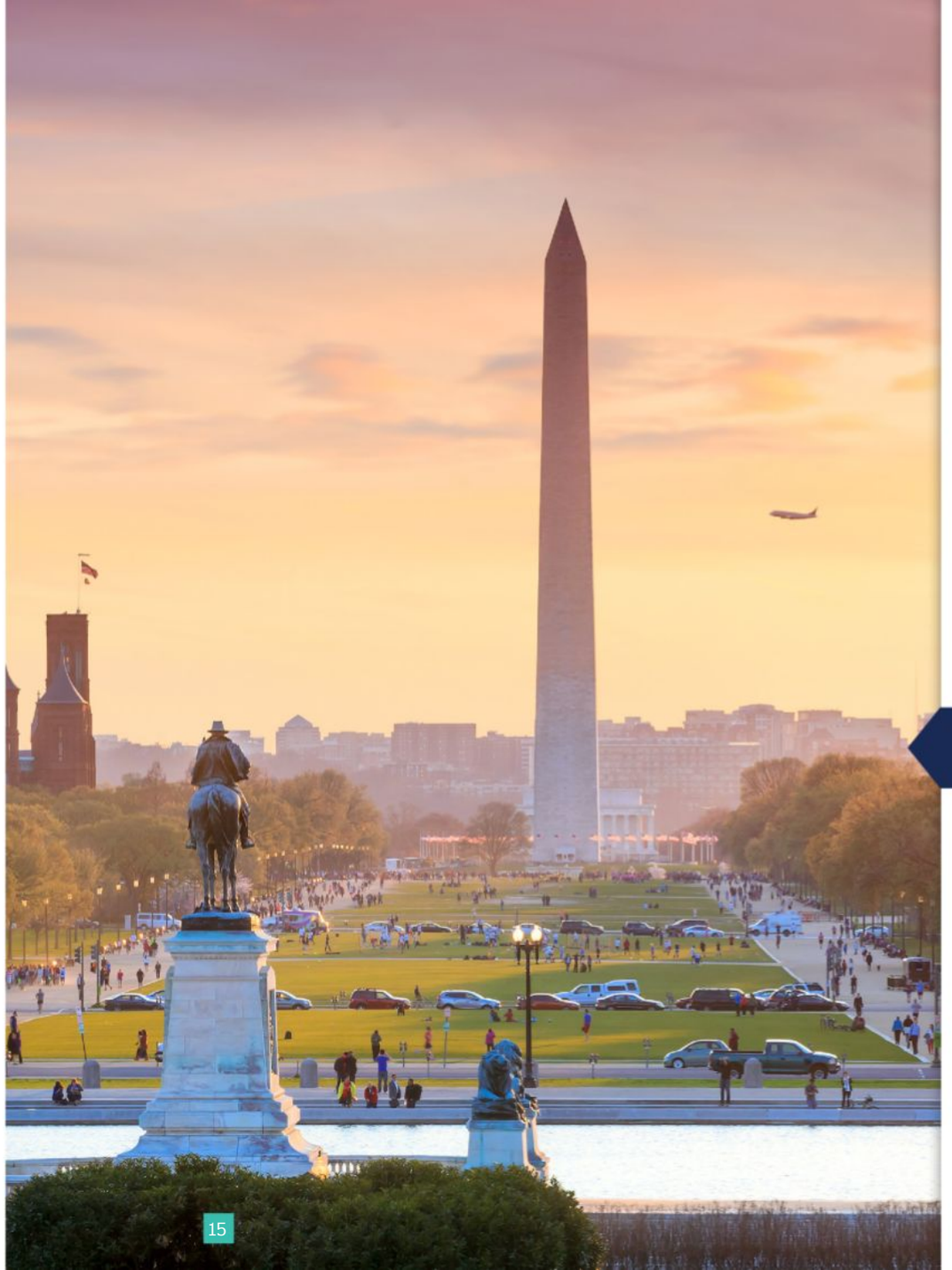
The Reform Project Does not Affect the ICSID Convention

Even though there have been calls for reforming the ICSID Convention, which acts as the 'constitution' of the Centre and accordingly has several rules on how an arbitration is to be conducted, this is not part of the current Reform Project. As an international treaty, any reform to the ICSID Convention implies a lengthy treaty-amendment process that may only be adopted by the unanimous vote of all 154 contracting states. This path is not currently on the table.

What Has Occurred so Far

The Reform Project was launched in October 2016 by requesting member states to submit their areas of concern and proposals for reform. This was followed by an invitation to the public to follow suit in January 2017. In the summer of 2018, ICSID published its proposal for reform of the (i) Administrative and Financial Regulations; (ii) Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (commonly known as 'Institution Rules'); (iii) Rules of Procedure for Conciliation Proceedings (commonly known as 'Conciliation Rules'); (iv) Rules of Procedure for Arbitration Proceedings (commonly known as 'Arbitration Rules'); and (v) Additional Facility Rules along with its Administrative and Financial Provisions as well as its Arbitration, Conciliation, Fact-Finding and Mediation Rules. This is arguably the most comprehensive reform effort ever endeavoured by an international arbitral institution.

The first draft of proposals was open for commentary until December 2018. In March 2019, the Centre published an updated set of proposals responding to the comments received from states and the public. Some noteworthy proposals for change in the initial proposal were: (i) paperless filings; (ii) fixed time limits on tribunals; (iii) the requirement to disclose third-party funding; (iv) greater disclosure requirements for arbitrators including their availability for hearings and the arbitrator's relationships with the parties, their representatives and experts; (v) an obligation to have case management conferences to identify uncontested facts and narrow down issues in dispute; (vi) addition of specific



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rules on security for costs; and (vii) a new Expedited Arbitration Procedure that is expected to significantly reduce the average time of an ICSID arbitration to 510 days in the best-case scenario. Taking into account the support they have received, it can be expected that the final outcome will reflect these changes.

While some of the proposals presented by the Secretariat in 2018 were a welcome development, others were not well received by states. For instance: (i) allowing the request for arbitration to be used as claimant's memorial; (ii) not suspending proceedings when an arbitrator is challenged; (iii) allowing tribunals to set a participation fee of sorts for *amicus curiae*; or (iv) default publicity of awards. These proposals were thus discarded in the 2019 version of the proposal, and should not be reflected in any final version.

However, it is unlikely that the 2019 version of the proposal will be adopted as presented by ICSID. At least three issues may give rise to further discussions: security for costs, third-party funding, and cost allocation. The 2019 version has modified proposed rules on security for costs to include the possibility of ordering the posting of a security for costs to both the claimant and the respondent (when the latter presents a counterclaim), the previous version only contemplated security for costs for a claimant. Furthermore, while some states have been pushing for increased regulation of third-party funding as well as the adoption of a clear standard in cost allocation, especially in respect of defeated parties, the current version of the proposal has not followed suit. Hence, it is likely that these issues will be the focus of debate throughout 2019.

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Steps Ahead

Last April, ICSID held a meeting of state delegates to discuss the current version of the proposal. It has also set a deadline for the receipt of comments by June 2019 in order to have a finalised version circulated by the summer of 2019. This will allow the amendments to be voted in October 2019, or else to have the proposal approved by 2020 in any case.

This reform process is gigantic and has a wide effect over several of the rules and regulations that govern the Centre and the dispute settlement procedures it offers. This process takes place as more attention is drawn into IIA in domestic politics and calls for reform appear from countless groups and individuals all around the world. In response, ICSID strives to have a modernised set of rules while keeping an appropriate balance between investors and states. For this reason, is it likely that in order to achieve acceptance from member states, this reform process will turn out to be less radical than expected by some. Still, it is undeniable that ICSID will not escape untouched by the ongoing wave of change in IIA. Once the waters have receded, a new landscape of ICSID arbitration will be revealed. Hopefully, it is one that leads to strengthened confidence in IIA as a dispute resolution mechanism.