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Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration"

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December 2004

Published by the International Institute for Sustainable Development

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December 15, 2004

Mr. Antonio Parra
Deputy Secretary General
International Centre for Settlement of Investment Disputes
World Bank
1818 H St NW
Washington, DC 20433
U.S.A.

Dear Antonio,

Attached please find the comments from the International Institute for Sustainable Development, Investment and Sustainable Development Team, on the discussion paper entitled "Possible Improvements of the Framework for ICSID Arbitration."

These comments reflect the collected input from Aaron Cosbey, Luke Peterson, Konrad von Moltke and myself. If you have any questions, please do not hesitate to contact me at your convenience.

Please note that IISD will make these comments available to the public at the same time they are transmitted to you. We believe this is in keeping with the important public process you have initiated.

Warmest regards,

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1. Introduction

These comments respond to the International Centre for Settlement of Investment Disputes (ICSID) discussion paper, "Possible Improvements of the Framework for ICSID Arbitration," released for public comment on October 22, 2004.

The International Institute for Sustainable Development (IISD) believes it is important to acknowledge the precedent-setting nature of the process upon which ICSID has embarked. Irrespective of the positions taken by us or by others on the proposals found in the paper, we strongly believe that the simple act of seeking public input into the international investor-state arbitration process marks an important and welcome shift in policy-making in this area.

The application of the principles of public access, stakeholder dialogue and transparency by ICSID is a welcome departure from the historic secrecy surrounding the development of all aspects of the international investment law regime. ICSID and its officials are to be congratulated, without reservation, for taking this step. We look forward to the Centre following this process into the next stage of detailed proposals.

IISD expects there will be a wide variety of views submitted in response to the discussion paper. In keeping with the spirit demonstrated by ICSID, we have made our comments public at the same time they have been submitted to ICSID. We hope others will make their comments public as well.

This response begins with a short note on the limits of the ICSID paper and of these comments. This is followed by a context-setting section where we note the key principles and objectives IISD believes are at stake, and hence should be reflected in the resolution of the issues raised. Subsequently, we turn to each of the issues raised in the discussion paper.

2. Limitations on the Issues and Comments

The issues raised by ICSID are procedural or institutional in nature, as opposed to substantive. This is, of course, consistent with ICSID's mandate; it does not design the substantive obligations, nor does it have a direct say in their interpretation. (We say "direct" here because some of ICSID's procedural roles can have an impact on the interpretations.)

The comments below are thus made with the awareness that, while the dispute settlement process is playing an increasingly important role in setting out the scope of the obligations included in international investment agreements, the latter are not the direct subject of review for this paper. That said, we wish to make it clear that the participation in a discussion on the procedural and institutional elements of dispute settlement do not constitute approval of or support for the current evolution (or *revolution* in some respects) in the interpretation and application of these obligations. Our broader concerns are set out

elsewhere, and need not be repeated here.[1] It suffices to say here that improving the defects in the current investor-state process will help address some concerns, but such improvements cannot in themselves fix the wide range of problems arising from the substantive obligations and from the structure of the treaties that create them.

The ICSID paper also seeks to distinguish between the types of rules or issues addressable by changes in the Arbitration Rules and those that require amendment of the ICSID Convention. While we understand the pragmatic reasons behind this, and fully accept the good faith behind this entire project, we reject the limitations this generates on the proposals, which relate only to what can be done in the Rules. Doing what is right for the future should not be constrained by the limitations contained in past agreements. If a change is principled and appropriate, it should be sought regardless of the difficulties.

One reason IISD rejects an approach based on such initial compromises is that we believe it is time for the investor-state process to mature and be based on democratic principles that must be reflected in the emerging role of international law in this area. The observation that "(i)nvestment has overtaken trade in global economic importance, but so far investment has failed to inspire the creation of mature legal institutions"[2] is fundamentally correct. Changes to the dispute settlement process must, we believe, be seen in the context of a developing international law regime rather than simply as a tinkering with the arbitration procedures. Simply put, this cannot be achieved by giving the limitations of yesteryear primacy over the needs of tomorrow.

The ICSID paper raises a number of issues that might, if changes are made, motivate investors to choose fora that are less transparent or less responsive to basic democratic principles. This is the risk of being a front-runner in this field. At the same time, it is governments alone that sign the international investment agreements. They have the power to amend them and either exclude systems that are not as responsive as ICSID should be to these basic principles, or ensure that they are reformed in an equivalent manner. In short, this is not just an ICSID issue, but one of critical relevance to all governments involved in this area. It is up to them to ensure that positive changes under the ICSID Rules do not lead to the increased use of other systems to avoid these changes. Consistent and complementary changes should be considered for all arbitral rules used for investor-state arbitrations in order to ensure this does not happen.

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[1] See Aaron Cosbey, Howard Mann, Luke Peterson, Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, IISD, 2004, available at http://www.iisd.org/publications/publication.asp?pno=627

[2] Michael Goldhaber, "Wanted, A World Investment Court," *American Lawyer – Focus Europe – Summer*, 2004. Also at http://www.transnational-dispute-management.com/members/search/welcome.html?search_archive=0

3. The Broader Underpinnings for IISD's Comments

The views on the specific issues expressed in Section 4 below are guided by certain overriding principles and goals. IISD believes that it is important in the context of redesigning key elements of the dispute settlement system to express those principles that should underlie the system as a whole, and the goals it is meant to achieve. It is not, in our view, sufficient to say one has quietly analyzed and considered such higher level issues; they should be made clear so that others can fully understand where the proposals, and comments on proposals, are rooted.

3.1 Principles

IISD proposes the following critical principles for any sound dispute settlement system in this field. In doing so, we are fully aware that they will tend to diminish the differences between arbitration and judicial proceedings. This is deliberate. The arbitration system in the investor-state context has, quite simply, outlived its original rationale. The primary reason for this is clear: the cases coming before it too often bear no resemblance to traditional commercial or private disputes that arbitration systems are essentially designed to address. Rather, more often than not, they engage key issues of public policy and the balancing of private and public welfare issues.[3] As a result, it is time to reconsider the basic appropriateness of arbitration models. IISD's suggested principles point strongly to a more judicial approach to dispute settlement.

IISD proposes five basic principles:

- ***Legitimacy***

The mere fact that a process is legally constituted or based on the practices of previous decades does not make it legitimate. Legitimacy is, rather, a standard based on good governance and the best practices of democratic institutions of today, not the practices of prior decades. We believe that the legitimate demands of improved democratic institutions and good governance at the international level must be met in the dispute settlement system of international investment law. Its relevance to development, and to sustainable development, demand no less.

- ***Independence***

A key requirement of a legitimate dispute settlement system in any democratic context is that it must be fully and functionally independent of external pressures and relationships. Conflict

[3] This public welfare dimension is clearly noted, for example, in the decision of the Methanex tribunal on their jurisdiction to receive *amicus* submissions. Para. 49 of *Methanex Corp. v. United States of America, Decision of the Tribunal on Petitions of Third Persons to Intervene as Amicus Curiae,* January 15, 2001.

of interest is not simply a matter of declarations by arbitrators, but of ensuring that independence is met and appears to be met at every operating level of the system.

- ***Impartiality***

The impartiality of the process is closely related to its independence. Independence is both a principle in itself and a means to an end here: that end is the most impartial view of the law that can be achieved.

- ***Accountability***

Accountability requires the institutional capacity to review and respond to the evolution of the law that dispute settlement processes inevitably produce. This is not a process of micromanaging disputes, but of ensuring appropriate responsiveness to the intentions of the parties. The interpretive statement option available to the North American Free Trade Agreement (NAFTA) and other Free Trade Commissions is one example of accountability mechanisms at play. The use of meetings or conferences of the parties to review the evolution of a regime is another. In addition, the proposals must not insulate ICSID from public or governmental scrutiny and accountability, or insulate the investment law regime itself.

- ***Transparency***

Transparency in any legal regime, including its dispute settlement system, is fundamental to democratic governance today. As a bottom-line principle, this is beyond dispute. As but one example of the need for transparency, we note that the discussion paper states at paragraph 5 that almost all of the new treaty-based investor-state cases in recent years have been initiated under the ICSID Convention or ICSID Additional Facility processes. A recent report by the United Nations Conference on Trade and Development (UNCTAD), however, suggests that as many as one third of the known arbitrations have been outside this system, or over 50 of 160 known cases.[4] What remains unknown is the full number of cases actually initiated to date, as many remain shrouded in secrecy even after decisions are reached. This fact alone makes the ICSID claim in paragraph 5 unsupportable. That one cannot say for sure how many cases have been initiated to date should be understood as a stinging indictment of the failure of the broader investor-state arbitration system (encompassing various non-ICSID rules of arbitration) to meet even the most basic of good governance principles: transparency.

The ICSID discussion paper raises a number of issues from a technical, or operational, perspective. However, it grounds none of the suggested responses in any declared set of

[4] UNCTAD, *International Investment Disputes on the Rise*, Occasional Note, Nov.29, 2004, available online at: http://www.unctad.org/sections/dite/iia/docs/webiteiit20042_en.pdf

principles. IISD believes this is a serious flaw in the paper. The underlying principles, if there are any, should be expressly stated.

3.2 Goals

The goals of a dispute settlement system may vary, depending on the nature of the disputes, the nature of the parties, and the political and economic context of the legal regime being applied. Private contract dispute settlement may have a number of goals that are quite different, therefore, than the settlement of disputes arising from the policy and legal activities of governments.

IISD proposes the following key goals for the investor-state system:

- ***Consistency***

The ICSID paper refers several times to the goal of consistency between decisions. We agree this is a critical goal. Whatever position one takes on the consistency of today's judgments, consistency in the applicable rules and obligations is a necessary goal. Of course, every case will call for a specific application of the law to its particular facts, but that does not reduce the need for consistency in the rules and principles being applied.

- ***Predictability***

Consistency breeds predictability, itself an important goal for investors, governments and other stakeholders. This goal in itself requires the recognition that decisions in one case should be relevant to decisions in other cases. The mantra of one case not being binding on any other, each one being an individual, one-off, ad-hoc process, has no place in a legal system that passes judgment on a vast range of government measures affecting international investments. It is the antithesis of predictability and consistency. An appeal process, in particular, must play a key part in supporting predictable decisions. This has now taken root in the World Trade Organization (WTO) Appellate process, and should be seen as necessary in the present context as well.

- ***Sensitivity to legitimate government interests, balance of interests***

While the cases to date do not deny that governments have legitimate interests, these are often placed, indeed expressly placed in some cases, at a lower level than the legitimate interests of foreign investors. IISD does not argue with the proposition that investors have legitimate interests or expectations. It does have grave concerns as to how well these are balanced with the interests and expectations of governments and other stakeholders in relation to an investment. A reformed dispute settlement system can enhance how this balance is achieved today, though it cannot alter the substantive obligations that are the basis of the disputes, and the one-dimensional focus of these obligations on investor rights. As

already noted, changes to the arbitration process will not be a cure-all for what ails the international investment law regime.

- ***Expeditious decision-making***

All disputes should be settled as quickly and economically as possible. At the same time, speed should not prevail over all other aspects of the system. It is a legitimate goal, and one that argues against frivolous procedures being developed.

- ***Finality***

Finality is a proper goal of any dispute settlement system. Host states, for example, should not be subject to multiple proceedings on the same set of facts from investors, minority investors, investments, under different arbitration agreements, or under domestic and international law. Finality is required to overcome the growing procedural anarchy that a number of recent decisions on jurisdiction and process have induced.

4. The Issues

4.1 Provisional measures

This is not an issue on which IISD has a major concern. Should new provisions be adopted, we would hope they would be equally available to both sides, and would include a provision to factor in the public interest in circumstances where this is warranted. For example, an investor's case based on an air pollution measure could lead to significant public health interests that militate against an application for provisional measures by an investor seeking to prevent its enforcement. This type of public interest should be expressly recognized as a legitimate issue for consideration.

4.2 Expedited dismissal

IISD has no specific comments on this issue.

4.3 Publication of awards

This issue bears an obvious relationship to the principles enunciated above. Indeed it is fundamental to them.

The discussion paper actually raises three related issues: timeliness, accessibility and completeness. This is one example of an area where the proposals are defined by the current limits of the Convention as opposed to the Rules, and inappropriately so in our view. The deficiencies of the current system are highlighted by the reality that there is some informal

exchange of arbitral decisions among the practicing international arbitration bar, while others are often deprived of access to the decisions.

IISD believes that only the prompt, complete and accessible publication of all awards, interim and final, meets the basic principles of transparency. Indeed, this is now enshrined in several new U.S. free trade agreements including those with Central America and the Dominican Republic, Chile and Singapore.[5] No other legal dispute settlement system under public international law besides the investor-state process either prevents the publication of its determinations or relies in whole or in part on the publication of selected portions of a decision. Looking forward, it is not acceptable for ICSID (or any other system it may be added) to continue to rely upon anything less than full, prompt and accessible publication of all decisions.

The full publication in Web-accessible versions of all key litigation documents should also be required. Several new agreements have moved in this direction, and NAFTA has evolved to promote such practice, with all three NAFTA parties now maintaining extensive Chapter 11 Web sites. While not all new agreements have adopted this principle, it should be evident by now that applying basic rules of transparency to international arbitrations will be the predominant direction. ICSID, as a leading arbitration body, should be at the front end of meeting this call. Falling back on the distinction between the Rules and the Convention is not a valid reason for not doing so.

4.4 Participation of third parties, amicus curiae

To establish the technical parameters of this issue, we understand it to mean a reference not to third parties to the arbitration *per se*, but the participation of third persons–"parties"–as *amicus curiae.*

IISD in fact initiated the precedent-setting "petition" process for *amicus* standing in the *Methanex v. United States* case under NAFTA's Chapter 11 in August 2000, and was subsequently one of two submitters of an *amicus* brief in the hearing on the merits in that case. We agree with the ICSID paper that the decision in that case and in others now make it clear that such *amicus* briefs are fully consistent with extant rules of procedure under United Nations Commission on International Trade Law (UNCITRAL) or ICSID. Still, making this clear in a specific rule would be of value.

As to conditions for such participation, IISD suggests these should be tests that inform a tribunal as to the reasons why a submission is being offered, and what it seeks to accomplish. *The NAFTA Statement on Amicus Briefs* is a useful starting point in this regard,[6] and is

[5] See for example the U.S., Central America and Dominican Republic Free Trade Agreement, Article 10.21; U.S.-Chile FTA, Article 10.20; and U.S.-Singapore FTA, Article 15.20

[6] Statement of the Free Trade Commission on non-disputing party participation, October 7, 2003, at http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf

replicated in its essence in the subsequent U.S. Free Trade Agreements with Singapore, Chile, Morocco and now Central America and the Dominican Republic.

Beyond this, it is important for Tribunals and parties to understand that *amicus* participation is not in opposition to good practice or to the arbitration process. Rather, it can be a productive and useful part of promoting the transparency and legitimacy of any international process today. Transparency is also, of course, a prerequisite for the *amicus* process: one has to know of an arbitration to be able to consider seeking *amicus* status.

Some fear that allowing *amicus* participation may overwhelm the role or resources of the litigating parties, or distort the process due to overwhelming (but one-sided) third party submissions. In practice, IISD knows this concern to be unfounded. In both the WTO, where *amicus* submissions are now permitted, and in the investor-state process, no instance of an overwhelming number of submissions is known. In fact, potential *amici* will always tend to act responsibly in the face of a responsible and responsive process, and will seek among themselves to avoid undue duplication. In addition, the suggestion that the Tribunal ultimately controls its procedure is apt, and acts as a block against potential distortions to which the process may theoretically lead.

4.5 Open hearings

Like access to documents, decisions and third party submissions, the opening of investor-state arbitrations to the public is another area where the call of democratic process has taken root in the investor-state process today. The trend is as undeniable as it is unstoppable. Open proceedings are now an expectation under the NAFTA, at least for cases involving Canada and the United States.[7] They are similarly included as part of the process under other new U.S. investment and FTA agreements.

Representatives of IISD attended the public hearings on the merits of the *Methanex v. United States* case. The efforts of the Secretariat and litigating parties in that case, the first to be open at a hearing on the merits, should be acknowledged.

The experience in that arbitration, which is highly controversial and one of the best known of all ongoing international arbitrations, is instructive. On the first day, about 30 people were in attendance for half a day. These were predominantly university students on a summer semester. The use of this opportunity to expose students to international proceedings is, in itself, a reason to hold open proceedings. After day one, the attendance decreased to three–five observers. Security staff effectively disappeared by the end of the first day. Neither ICSID nor the parties knew precisely what to anticipate for this occasion, which led to an overabundance of caution and high levels of reliance on remote broadcast technologies.

[7] http://www.dfait-maeci.gc.ca/nafta-alena/open-hearing-en.asp

That experience, and a related opening of a hearing on jurisdiction, show that there is no need to fear an open hearing. Observers will generally act with proper decorum, and in the rare instances where problems arise, the panel has resources to deal with them, with the exclusion of observers being the ultimate sanction. There is no need, in reality, for remote sites and broadcasting equipment. Observers can be asked to leave a room for any discussion of confidential business information. And, where specific legal issues the Tribunal decides are appropriately kept *in camera* arise, code words to describe them can be developed just as they were to allow the lawyers in the Methanex hearing to make reference to an issue without disclosing its content or having to start and stop the broadcast.

Some might suggest that small numbers obviate the need for open hearings. IISD believes the numbers are not the key point: the opportunity to be present and witness the hearings, and to hold parties to account for their positions, is what counts. Citizens, media or interested groups may lack the time or resources to attend all hearings—just as they do in many domestic court contexts—but the availability of this option is crucial. Indeed, in the case of the Methanex arbitration, the submission of an (unaccepted) post-hearing brief by all the *amici* acting together following the hearings is one example where attendance at open hearings was indispensable.[8] The U.S. position on a specific issue was revealed in a way that would have been impossible without the open hearings.

The discussion paper suggests there may not be a basis for a blanket approach to all ICSID cases, as some may be contract- rather than treaty-based. To the extent that an investor-state hearing may involve public policy or welfare issues, IISD rejects such a distinction. Challenging contract issues in investor-sate arbitrations as breaches of a state's international obligations inherently raises such public welfare issues, as all cases of the application of these agreements inherently do. The issue should be guided by the principle of transparency and not allow public access to be avoided by an investor basing its claim on a contract as opposed to a treaty. Governments may need to review other treaty provisions, as well as work to ensure contract provisions, do not lead to an evasion of good governance principles for all investor-state cases.

Finally, we see little merit in the idea of allowing "additional categories" of persons to attend as opposed to opening a hearing, as suggested in paragraph 15. There is no need for half measures here, and no principled justification for them in our view. Nor is there a need to "consult" with ICSID Secretariat officials on logistic arrangements prior to taking a decision. ICSID officials carry out the requirements of the procedures and the Tribunals, but should not insert themselves as arbiters of what can or should be done. Certainly, how access is made effective will require Secretariat support, but this should not be a barrier to participation as a matter of principle or practice.

[8] The post hearing submission is available at http://www.iisd.org/publications/publication.asp?pno=641

IISD does not dispute the desirability of having a residual capacity of a Tribunal to hold part of a hearing in camera if necessary. But this should be by way of limited exception to be justified against the presumption of an open hearing.

4.6 Conflict of interest/disclosure requirements

Section IV of the discussion paper is entitled "Disclosure Requirements for Arbitrators." IISD submits that this is the wrong issue statement, and in fact confuses means and ends. The end goal is avoiding conflicts of interest. The means used for this purpose today is through disclosure requirements for arbitrators. IISD believes that this means is no longer sufficient to achieve the appropriate ends, and that both the ends and means need to be more thoroughly considered.

The ICSID paper suggests disclosure by any arbitrator be expanded from any relationship to the parties to "any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment." This would be an improvement, but it is not sufficient.

Arbitrations today raise a wide range of issues of public versus private welfare. To ensure this type of situation does not create a conflict of interest for judges in all democratic countries, no practicing lawyer is permitted to be a member of the judiciary as well. It is one or the other only. The reason is very simple: conflict of interest includes both actual bias and the avoidance of any appearance of bias. Lawyers or their partners cannot sit as a judge one day and as an advocate on a similar issue another day. Judges cannot create decisions that might in some way aid their partners in another case or a firm client in a future potential situation. Yet, this is precisely what happens today in the international arbitration bar. This is not, and can never be, the hallmark of a mature legal system. Indeed, it is the antithesis of one. It must be ended.

The appointment of arbitrators must therefore be revisited *ab initio*. IISD believes that practicing lawyers who either themselves act as counsel in cases or have partners who do by definition have a conflict of interest (actual or perceived) that is inimical to their participation as arbitrators. Nor is the selection process of continued appropriateness: it is well understood today that parties to arbitrations choose arbitrators because of their understood leanings. This is not a circumstance of justice being blind.

Thus, IISD believes that the appropriate route forward is to have rosters of arbitrators who do not have either an actual or perceived conflict of interest, as described above. The legitimacy of the process today depends not just on disclosure documents, but an actual separation between the advocacy and judicial functions, especially when the balance between public and private interests is in dispute. We can no longer apply a lesser standard to international dispute settlement in this regard than we do to domestic dispute settlement. Indeed, the very fact that arbitrators can rule on domestic legal issues, and often do, shows the need to move to a system that reflects the same judicial distance from the practice of law required of domestic judges making rulings on these matters.

IISD recognizes that this would be a very significant departure from current practice. It may be disruptive to some practices. We believe the demands of independence of the judicial function require it take place. The revision of disclosure requirements alone will not accomplish this goal. A clear statement of the scope of possible conflict circumstances requiring disclosure is also needed. A code of conduct that is appropriately expansive may also assist in this regard.

4.7 Mediation

IISD agrees that more mediation would be a good thing. We have no further comments on this, except to note that equality in a mediation processes requires equally well informed parties.

4.8 Training

Training can play an important role in assisting states in the negotiation of agreements as well as in the defense of claims and in responding to potential claims. However, for training programs to accomplish these ends they must be sufficiently extensive and balanced, and the content must be objective and neutral. Public scrutiny of training material can help ensure this is accomplished.

4.9 Appellate mechanism

The ICSID discussion paper notes that one of the motivating factors for the discussion of an appeal procedure is that several recent international investment agreements have proposed such a mechanism. This raises the risk that ICSID or any other body might proceed quickly in order to be the first to do so, rather than to be principled in doing so. We urge all parties to all agreements to ensure this risk does not materialize.

The ICSID paper also raises the possibility of multiple appeal procedures. ICSID states that it would not allow itself to participate in such a multiplication of processes. IISD believes this is wise. The value of an appeals process would be almost entirely destroyed if it was not designed to meet the principles outlined above, and achieve the goals similarly set out above. IISD hopes that states will work in a cooperative manner rather than a first-past-the post-race in this area.

Whether ICSID should be the forum to house an appellate process depends, in our view, on its willingness to change its institutional structure. This is a difficult subject to address, yet, one cannot avoid the discussion. One can say, however, that the discussion should not reflect negatively on the performance of Secretariat officials, but simply speaks to a need to consider a broader systemic issue.

ICSID is not, today, an independent organization. It is a part of the World Bank Group. It is financially and structurally dependant upon the Bank. The President of the World Bank chairs its Administrative Council. The Legal Vice President of the Bank is also Secretary General of ICSID. At the same time, the Bank routinely expresses specific positions regarding the values of investment agreements, and the interpretation of specific provisions and obligations and goals, and the role of the investor-state process. All of this means that the independence of ICSID as currently constituted is, from a conflict of interest perspective, undeniably compromised.

In addition, it is entirely possible that other parts of the World Bank Group may have a financial stake in a project brought to arbitration or in another project in similar circumstances facing related challenges as the circumstances generating a dispute. Again, this presents the potential for an actual or reasonably apprehended conflict of interest.

Thus, a prerequisite for ICSID operating an appellate facility is its divestiture by the World Bank and re-establishment as a single, independent body with individualized governmental control entirely outside the existing World Bank voting system. While the linkage to the Bank may have been necessary at the beginning of the process, it is not demonstrably necessary now. The linkage to the Vice Presidency of the World Bank is particularly unnecessary.

Of course, the above is equally true for the current role of ICSID in terms of arbitration panels, and most pronouncedly in relation to the annulment panels. An independent organization could house both the leading arbitration panel process and the single appellate process. This would create some additional governance and financing needs, beyond those that could be recovered by arbitration and appeal fees. However, given the vital role of foreign investment in the global economy today, and its critical role in the pursuit of development and sustainable development, this cost is one worth bearing.

A further preliminary note: developing an appellate process must lead to demonstrable improvements in the current situation of unequal review processes, unrealistic review standards, non-transparent appointments to annulment tribunals, and the checkerboard of transparent and non-transparent proceedings and documents. Simply having an appeal process is not a valid objective; the end goal must be a better process than what we have now.

Annex 1 to the ICSID discussion paper raises several specific issues. These are addressed in turn below.

4.9.1 The approach of Administrative Council Rules

Paragraphs 1 to 4 of Annex 1 describe an essentially optional process under a new set of Appeal Facility Rules that would be adopted by the Administrative Council. IISD understands the expediency of this approach, but rejects its efficacy. Indeed, it seems to belie

the very goal of consistency and a single appeal process. In addition, it essentially shirks the responsibility of ICSID Convention Parties to address this issue by referring it back to bilateral or regional treaty negotiations and private parties who can potentially accept or reject the appellate process on a treaty-by-treaty or even case-by-case basis. Again, this reflects a situation of the existing decision-making rules acting as a significant constraint of the potential scope of amendments for the future of this vital area of international law. It is no longer an appropriate approach.

The issue of exclusions from the appeals process raised in paragraph 4 requires an additional comment: IISD fails to see how the goals of consistent and predictable results can be achieved without consistent and predictable processes. It appears that the suggestions remain underpinned by the conception of arbitration as a flexible process in the hands of the parties that reflects its commercial origins. As already explained, IISD does not believe this is the appropriate approach to dispute settlement in this area as the regime builds for a mature future.

4.9.2 Appointment of Appellate Body

The number of 15 appointees may be appropriate, though it does seem to be high for a starting position. One immediate reason for this difference in view is the nature of the body: IISD believes that the model used in the WTO Appellate Body, of appointments being essentially full time positions, is the correct model. As already explained, we believe it would be completely inappropriate for members of the body to hold practicing legal positions[9] while participating as members of this body.

The idea of staggered terms is appropriate. The qualifications should, in our view establish that a recognized competence in international law is an appropriate prerequisite, not just in international investment law. One critical attribute of the WTO Appellate Body was that it reached out beyond the closed community of international trade lawyers and practitioners to others with a broader base of expertise. IISD believes this has been critical to much of the WTO success in this area, and that this approach should also be applied in the investment field.

For reasons already explained, IISD does not believe it is appropriate for the Secretary General of ICSID, as currently constituted, to have anything to do with the appointment of the appellate judges. We understand this would essentially replicate its role now on the annulment panels. We reject this role also as being in clear conflict of interest as well as lacking the required independence for such a process. The appointment process should be managed by all participating states in an independent dispute settlement centre to ensure an

[9] There may be limited exceptions to this, for example academics might continue to teach (subject to other rules on conflict generally applicable in that context already) or members might, time permitting, also have other neutral arbitrator positions. The primary point here is to recognize the very limited additional work an appeals body member might be able to engage in based on our previous submissions of an appropriate view of conflict of interest in this field.

appropriate balance geographically, legally and in experience. The prerequisites for ICSID to fulfill this role have already been discussed.

The same holds in relation to paragraph 6, and the appointment of appellate judges for each case. This must be managed in a clearly independent manner. A rotation system, lots or some similar process should be used, subject to the possible exclusion of nationals of the litigating parties and any conflict of interest on the part of a selected judge. The combination of paragraphs 5 and 6 in this proposal reflect, in our view, an inordinate concentration of power in the hands of the Secretary General in any circumstance.

4.9.3 Standard and scope of review

The standard and scope of review is a critical issue for any appeals process. The ICSID proposal appears fairly well developed. Only a few brief comments are made here.

First, IISD believes that the standard for error of law should be just that, no qualifier, such as "clear" or "serious" is needed. An alleged error should be reviewable.

Second, for the review of facts, a higher standard may be warranted. If an error can be shown that might lead to a reversal of the decision, in other words a material or significant error of fact, this should be reviewable.

Third, in the text of footnote 6, the issue of a corrupt arbitrator is raised. IISD believes that this standard is too high. A decision taken by a panel where an arbitrator is in conflict of interest, as defined previously in this comment, should be reviewable as well.

These standards should be understood to broaden the current basis for an annulment panel or a judicial review process. That is the intention of IISD in making these suggestions.

4.9.4 Appeal of interim awards

IISD takes no position on this issue.

4.9.5 Results of appeal process

The results of an appeal process are important. Must an appeal body return a case if it believes the findings are wrong, or may it substitute another result?

IISD believes that an appeal body should have the capacity, and should anticipate making a decision that will dispose of the case with finality. It may uphold, modify or reverse a decision. The only exception that should be foreseen is one where the appellate body reverses a finding of law or fact, and determines it then does not have a sufficient factual record before it to reach a final determination on the matter. Here, a return to the original Tribunal may be warranted.

A major goal of the process is finality. This should be the presumption applied to this issue.

4.9.6 Costs and funding

There should be no presumption that the full costs of a properly constituted, independent appellate process can be recovered from the costs for the appeals themselves. They can go a significant way toward this end, but additional funds will also be needed. With this in mind, ISID has no issue with the proposal for the costs to the parties to parallel the current costs system.

4.9.7 Additional powers of Secretary General

Paragraph 11 suggests that the Secretary General have a form of gatekeeper function for the appeals process similar to that now exercised in relation to the panel process at ICSID. IISD has already stated its view that such a role is inappropriate. Expanding it for the appeals process is even more so for the reasons already stated. In addition, assuming here for the sake of argument that an independent process is established, we believe the right of appeal should come with the agreement to arbitrate. The process should be, in that sense, a single continuing process of the arbitration, not a process with a submission to jurisdiction to a panel and a separate submission to jurisdiction to an appellate body. Thus, the agreement to arbitrate should comprise the agreement to accept the appeal process. Otherwise, the goals of consistency and predictability, in process or substance, will remain elusive. Thus, there would be no similar function to exercise under that conception. The remaining suggested powers for the Secretary General in paragraph 11 have already been discussed and considered as inappropriate in previous sections.

4.9.8 Time period for appeals

Paragraph 11 suggests a time period for filing an appeal of 120 days. We believe 60 days is sufficient, subject to a longer period if the issue is the discovery of a corrupt or conflicted arbitrator. Time should then be measured from the time of discovery of these specific facts.

4.9.9 Conduct of process

Paragraph 12 of the ICSID proposal suggests that the conduct of the appeal should use the same rules as the conduct of the arbitration. IISD believes this would be appropriate if the arbitration is conducted in a fully transparent and accessible manner. We have described these elements *in extenso* above.

4.9.10 Role of Secretariat

Paragraph 12 suggests that the Secretariat of ICSID also be the Secretariat of the appeals process. IISD believes this is inappropriate. Secretariats play an important role as the repository of the history of many processes, and as an ongoing corporate memory. Having the same people service the initial proceedings and the appeals risks, by simple force of personal interaction and both formal and informal discussions of the people involved, tilting the conduct of an appeal away from a direction it may otherwise have taken. There is no suggestion of nefarious activity even remotely implied here, simply the weight of normal human interaction. While one independent institution may house both the panel and the appeal process, there is, we believe, a need to separate the Secretariat services for each. The WTO model for appeals is instructive in this context.

4.9.11 Review of appeals process

IISD fully supports the idea of a review period for the operation of the appeals process. Five or six years should be a sufficient period for this in the first instance. Subsequent reviews every five years should also be conducted.

5. A Final Note

IISD understands that addressing the process issues in dispute settlement will not in itself fix the defects found in the current international investment regime. In the next few weeks, IISD will be tabling a fuller proposal in this respect, one which we believe will address the broader role of international investment law and the international investment regime in today's sustainable development context. This document will be available for public comment through IISD's investment Web site at http://www.iisd.org/investment.

However, IISD does believe that the public process initiated by ICSID is clearly the appropriate method for moving forward on a number of important issues of process, and we applaud the Secretariat of ICSID for its foresight and courage in undertaking it.