

23 May 2019

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1225 CONNECTICUT AVENUE, NW, 3RD FLOOR
WASHINGTON, DC 20036
UNITED STATES OF AMERICA

RE: PROPOSAL FOR AMENDMENT OF ARBITRATION RULE 40 (ANCILLARY CLAIMS)

Dear Madams, Sirs:

In the ongoing exercise of revision of the Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), we respectfully submit the following proposal for amendment of Arbitration Rule 40 (Ancillary Claims).

The purpose of the proposed amendment is to achieve the simple procedural accommodation of all ancillary claims that are within the jurisdiction of the Centre, thus realizing systemic advantages in keeping with the object and purpose of the Convention. In this manner, further classes of claims may be submitted to the Tribunal, enabling a more global resolution of disputes arising from international investments to the benefit of all stakeholders.

Article 46 of the Convention recognizes “incidental or additional claims or counterclaims” in ICSID arbitration, providing in full as follows:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.¹

Article 46 is situated within the Convention’s Chapter IV, Section 3 (Powers and Functions of the Tribunal) and not Chapter II (Jurisdiction of the Centre). To determine jurisdiction over any claim, reference must be had to Article 25, which sets forth the outer bound of the Centre’s jurisdiction by reference to “any legal dispute arising directly out of an investment.”²

To date, Arbitration Rule 40 has not been crafted to coincide with that outer bound. This remains true in the text of the proposed amendments, as currently under consideration:

Rule 52 45
Ancillary Claims

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”) arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented no later than ~~the date to file in~~ the reply, and a counterclaim shall be presented no later than ~~the date to file in~~ the counter-memorial, unless the Tribunal decides otherwise.

ICSID Working Paper # 2, Volume 1, March 2019, p. 216

¹ ICSID Convention, Art. 46.

² ICSID Convention, Art. 25(1). See also Jose Daniel Amado, Jackson Shaw Kern & Martin Doe Rodriguez, *Arbitrating the Conduct of International Investors* (2018) 72-76.

As is seen, Arbitration Rule 40 has employed the language of Article 46, and allows only for the filing of a narrower scope of ancillary claims “arising directly out of the subject-matter of the dispute” giving rise to the primary claim.³ At present, there is a unity as between those ancillary claims which *may* be presented by a party and those which *shall* be determined by the Tribunal (if so presented).

The formulation of the Convention does not require this result. As is seen, the plain language of Article 46 serves only to mandate that the Tribunal is obliged to determine certain specified ancillary claims. It does not foreclose a Tribunal from considering and determining other categories of the same. Under the Convention, a Tribunal may determine any claim (including any ancillary claim) to the fullest extent permitted by the objective requirements of jurisdiction, namely those set out at Article 25.⁴

This result may be reached by simple amendment of Arbitration Rule 40. Arbitration Rule 40(1) may be altered for its text to read as follows, in order to embrace the broader language of Article 25 and allow for the presentation of a wider scope of ancillary claims:

Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”) arising directly out of ~~the subject-matter of the dispute~~ **an investment**, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.⁵

Such provision will serve to mitigate against the eventuality of parallel proceedings in diverse *fora* that are counter to the objectives of the Convention. If any given ancillary claim is within Article 25, then the putative claimant may *ipso facto* constitute another Tribunal for its adjudication (and may in fact be required to do so, “to the exclusion of any other remedy”).⁶ It is a superior approach to simply accommodate the ancillary claim in a single proceeding, which may be done without contravening the

³ ICSID Arbitration Rule 40(1). It has been suggested that Arbitration Rule 40 is inspired by the procedural rules of the International Court of Justice, which provide in their present form that “[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.” Rules of Court of the International Court of Justice, Art. 80(1); see, e.g., *Antoine Goetz & Consorts and SA Affinage des Metaux v. Burundi*, ICSID Case No. ARB/01/2, Award dated 21 June 2012, at para. 273. Such does nothing to alter the fact that Rule 40 may be amended from its current form so long as it is not rendered to contravene the Convention.

⁴ While it is Article 25 that establishes the jurisdiction of the Centre, it has been suggested by some that Article 46 imposes an admissibility requirement upon the Tribunal. The suggestion may be traced to an explanatory note that accompanied Arbitration Rule 40 within the 1968 Arbitration Rules which, referencing Article 46, stated that “[t]o be admissible [ancillary] claims must arise ‘directly’ out of the ‘subject-matter of the dispute.’” ICSID Regulations and Rules, in effect on January 1, 1968, Note B.(a) to Arbitration Rule 40. Article 46 is not formulated in the manner of an admissibility rule. Rather, it flows in the direction opposite, mandating that the Tribunal “shall” determine certain ancillary claims, while offering no negative prescription whatsoever as to what the Tribunal shall *not* do. Professor Schreuer’s suggestion that “[t]he ancillary claim must be closely related to the primary claim” appears to be grounded in this explanatory note; see C. Schreuer, L. Malintoppi, A. Reinisch & A. Sinclair, *The ICSID Convention: A Commentary*, 2nd edn (2009), at 751. The note is expressly stated not to be a part of the Arbitration Rules, much less the Convention. See ICSID Regulations and Rules, in effect on January 1, 1968, at 3 (stating that the explanatory notes prepared by the Secretariat “do not constitute part of the Rules and have no legal force”).

⁵ If wished, a new sub-rule might be considered to further clarify the application of Article 46. If the Tribunal may hear ancillary claims outside of those arising “out of the subject-matter of the dispute” (but still arising “out of an investment”), by implication, the Tribunal may also decline to do so. Thus, under application of the instruments, the Tribunal might still decline, in its discretion, to determine such an ancillary claim on grounds of, for example, procedural economy or efficiency. It is urged that the Tribunal should not do so. Such would be counter to the fundamental objective of the Convention to ensure the broadest possible resolution of investment disputes without need of resort to other remedies.

⁶ ICSID Convention, Art. 26.

Convention.

In sum, there is no sound reason of law or policy to exclude from the Tribunal's consideration any ancillary claim that falls within the scope of Article 25, as the Arbitration Rules to date have done. Other rules commonly used in investor-State arbitration do not impose any similar limitation,⁷ nor do the arbitration rules of ICSID's own Additional Facility.⁸ It is thus preferable that the Arbitration Rules be written to effect the procedural accommodation of ancillary claims to the fullest extent permitted under the Convention.

With kind regards,

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Jackson Shaw Kern
Washington, DC and Addis Ababa, Ethiopia

Martin Doe Rodriguez
The Hague, Netherlands

⁷ The proposed amendment would, for example, bring the Arbitration Rules into line with those of the United Nations Commission on International Trade Law. See, e.g., *Revision of the UNCITRAL Arbitration Rules*, a Report by Jan Paulsson & Georgios Petrochilos, paras. 172-176, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arbrules_report.pdf; see also Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006), paras. 93-96, available at <https://undocs.org/en/A/CN.9/614>; Report of the Working Group on Arbitration and Conciliation on the work of its forty-sixth session (New York, 5-9 February 2007), paras. 157-159, available at <https://undocs.org/en/A/CN.9/619>; Report of Working Group II (Arbitration and Conciliation) on the work of its fiftieth session (New York, 9-13 February 2009), paras. 27-32, available at <https://undocs.org/en/A/CN.9/669>; and Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, Note by the Secretariat, para. 12, available at <https://undocs.org/en/A/CN.9/WG.II/WP.154/Add.1>. In a 2004 decision in the case of *Saluka Investments BV v. The Czech Republic*, the Tribunal observed a narrow restriction under the applicable 1976 UNCITRAL Arbitration Rules which required that any counterclaim must arise out of the "same contract." *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, dated 7 May 2004, para. 76 (citing the 1976 UNCITRAL Arbitration Rules, Art. 19.3). This finding is now outdated, as it precedes amendments that were effected to the UNCITRAL Arbitration Rules in order to allow for a broader scope of counterclaims, to the extent of the Tribunal's jurisdiction. See the 2010 and 2013 UNCITRAL Arbitration Rules, at Art. 21(3) ("[i]n its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off *provided that the arbitral tribunal has jurisdiction over it*") (emphasis added).

⁸ See ICSID Arbitration (Additional Facility) Rules, at Art. 47(1) (Ancillary Claims) ("Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties").