Arnold & Porter

BY EMAIL

Meg Kinnear, Esq.
Secretary-General
International Centre for Settlement of
Investment Disputes
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433
U.S.A.

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Re: Suggestions of Arnold & Porter Partners for the Amendment of the ICSID Rules and Regulations

Dear Ms. Kinnear:

The undersigned partners of Arnold & Porter Kaye Scholer LLP ("**Arnold & Porter**") have the honor of writing to you in response to the invitation from the International Centre for Settlement of Investment Disputes ("**ICSID**") for suggestions concerning the possible amendment of ICSID's Rules and Regulations. As international arbitration partners at an international law firm with significant experience in investor-State arbitrations under the ICSID Convention and the ICSID Additional Facility Rules, on behalf of both claimants and respondent States, we hereby offer certain suggestions in connection with possible amendments to the ICSID Rules and Regulations.

We clarify that the suggestions presented in this letter represent the views of the undersigned partners and should not be attributed to any past, present, or future client of Arnold & Porter. The suggestions are designed to contribute to the objectives of the rule amendment process set out by ICSID,[1] namely to modernize the rules based on case experience, to increase time and cost efficiency of ICSID arbitration, and to make ICSID proceedings less paper-intensive.

[1] ICSID, "The ICSID Rules Amendment Process," April 2017, https://icsid.worldbank.org/en/Documents/about/ICSID%20Rules%20Amendment%20Process-ENG.pdf.

1. Tribunal's written questions

To contribute to the efficiency of the proceedings, and to encourage the parties to an arbitration to focus mainly on the issues that are truly relevant, consider introducing a requirement that the tribunal present to the parties, preferably after the first round of written pleadings, a written list of questions for the parties to address in their subsequent pleadings and/or at the hearing.

2. Summary procedure

To avoid a situation in which the parties go through a lengthy arbitral proceeding, only for the case to be decided on the basis of a discrete issue, such that the full pleading of all other issues was ultimately rendered unnecessary and wasteful, consider expressly authorizing the tribunal to instruct the parties, either *sua sponte* or following a party's application, to brief specific jurisdictional, admissibility, and/or merits issues, where the tribunal has reason to believe that the case potentially could be decided on the basis of such issues. Preferably, such a "summary procedure" would take place after the first round of pleadings in the context of either the jurisdictional and/or the merits phase, as the case may be.

The introduction of the summary procedure could be implemented by amending Rule 41 of the ICSID Arbitration Rules ("**Arbitration Rules**").

We note that similar procedures are available in arbitration proceedings conducted in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 39) and the Investment Arbitration Rules of the Singapore International Arbitration Centre (Article 26).

3. Procedure for deciding on a proposal to disqualify an arbitrator

To address a frequently-voiced criticism of the current procedure for seeking the disqualification of an arbitrator, which calls upon the other members of the tribunal to decide on any proposal to disqualify a fellow arbitrator, consider introducing a requirement that, before taking a decision on such proposal, the other members of the tribunal should seek the opinion of the Chairman of the Administrative Counsel. The expectation would be that the members of the tribunal would base their decision concerning the disqualification request on the opinion of the Chairman of the

Administrative Counsel. Reliance on the decision of the Chairman would help the other members of the tribunal avoid a perception of bias or deference in favor of their fellow arbitrator.

This proposal could be implemented as an amendment to the Arbitration Rules and be consistent with Article 58 of the ICSID Convention, which calls upon the other members of the tribunal to decide any proposal for the disqualification of an arbitrator.

4. Consequences of a proposal to disqualify an arbitrator

To limit the scope for abusive use of proposals to disqualify an arbitrator and avoid the unnecessary delay that ensues from the automatic suspension of the proceedings while the proposal is being decided, consider:

- subject to implementation of the suggestion in point 3 above, explicitly authorizing the other members of the tribunal to decide immediately on the proposal to disqualify, thus lifting the automatic suspension of the proceedings where the challenge is dismissed, with the full reasoned decision to follow later;

- amending Rule 9(6) of the Arbitration Rules to provide that, following the submission by a party of a proposal to disqualify an arbitrator, the members of the tribunal who are not subject to the challenge shall enjoy the discretion to decide that the automatic suspension of the proceedings would be inappropriate under the circumstances;

- introducing the presumption that, where a proposal to disqualify an arbitrator is unsuccessful, the costs associated with the process of deciding the proposal and any associated procedural complications should be borne by the party that made the proposal.

5. Applicability of Arbitration Rules in annulment proceedings

There is some tension between Article 52(4) of the ICSID Convention and Rule 53 of the Arbitration Rules: whereas the former states that only certain ICSID Convention provisions apply (*mutatis mutandis*) in the context of an annulment proceeding, the latter appears to state that all provisions of the Arbitration Rules apply (*mutatis mutandis*) in an annulment proceeding. To avoid any confusion, the Centre should consider clarifying

which provisions of the Arbitration Rules apply in the context of an annulment proceeding.

6. Applicability of Arbitration Rules in supplementation or rectification proceedings

The Centre also should consider clarifying which provisions of the Arbitration Rules (if any), apart from Rule 49 (Supplementary Decisions and Rectification), apply in a supplementation or rectification proceeding.

7. The power of the Chairman of the Administrative Council to make a recommendation on the allocation of costs

Consider introducing an arbitration rule that vests in the Chairman of the Administrative Council the authority to make a recommendation to the arbitral tribunal on how the costs of the proceedings should be allocated between the parties with respect to any portion of the proceedings that involved the Chairman or the ICSID Secretariat (e.g., actions prior to the constitution of the tribunal, and proposals to disqualify one or more members of a tribunal).

8. Time limits for closure of the proceedings and issuance of the award

To increase efficiency and celerity in the conclusion of proceedings, consider:

- amending Rule 38 of the Arbitration Rules so as to require that the proceedings be declared closed within a specific time period from the end of the final hearing or the filing of the last post-hearing written submissions;

- amending the Arbitration Rules and Regulation 14 of the ICSID Administrative and Financial Regulations so as to authorize the Secretary-General to reduce the fees of the arbitrators where, contrary to Rule 46 of the Arbitration Rules, an award has not been drawn up and signed within the specified period of time after closure of the proceedings;

- amending the Arbitration Rules so as to require, where the proceedings have been bifurcated to hear preliminary or jurisdictional objections in a separate phase, that

the tribunal issue its ruling within a specific time period from the end of the hearing or final written submissions on the preliminary or jurisdictional objections.

9. Statement of arbitrators' fees

To provide the parties with greater transparency as to the progress of the proceedings, consider requiring that every three months:

- the Secretariat provide the parties with a statement of costs, including an up-to-date statement of the individual arbitrators' fees (but without identifying the arbitrators by name);

- where the tribunal is in the phase of deliberations (e.g., following a hearing on jurisdiction and/or merits), the tribunal periodically provide the parties with information about the status of its deliberations and the date on which it expects to issue the decision or award.

10. The "costs follow the event" principle

Consider adopting a rule that embodies the general principle that "costs follow the event" (that is, that the costs of the arbitration should be borne by the unsuccessful party or parties), unless the tribunal decides that, in light of the parties' respective conduct or other relevant circumstances, costs should be apportioned on a different basis.

We note that similar provisions can be found in the 1976 UNCITRAL Arbitration Rules (Article 40(1)), the 2010 UNCITRAL Arbitration Rules (Article 42), and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 50).

11. Disclosure of persons with financial interest in the outcome of the proceedings

To limit the scope for conflicts of interests, increase transparency, and provide each party with confidence in the other party's ability to cover a potential adverse award of costs, consider requiring the parties to disclose the identity of all natural and legal persons with a direct financial interest in the outcome of the proceedings, including the ultimate

beneficial owners of any non-public companies involved in the proceedings, and the identity of third-party funders, if applicable.[2]

12. Scope of document production

To reduce costs and improve the efficiency of the proceedings, consider introducing a rule that expressly confirms the principle that, as a general matter, document production in ICSID arbitrations should be narrow in scope. Such a rule could be relied upon by parties and arbitral tribunals in erring on the side of restrictiveness in their interpretation of document production issues.

13. Principle of procedural efficiency

To encourage time and cost efficiency, consider introducing a rule expressly adopting the general principle that the tribunal and the parties shall act in an efficient and expeditious manner. We note that a provision to that effect appears in the 2010 UNCITRAL Arbitration Rules (Article 17(1)).

14. Burden of proof; number and order of written pleadings on jurisdiction

To provide greater clarity and obviate a debate that frequently arises in ICSID arbitral proceedings, consider:

- specifying that the claimant bears the burden of proof in establishing a case on both jurisdiction and merits;

[2] For these purposes, ICSID could adopt a definition of "third-party funders" that is similar to that which appears in the IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 6, namely: "Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration."

- specifying that the respondent bears the burden of proving any affirmative defenses that it raises, including when such defenses are raised as preliminary objections;

- amending Rule 31 of the Arbitration Rules to clarify that, unless the parties agree otherwise and except in special circumstances,[3] in a non-bifurcated proceeding each party will address jurisdictional issues in no more than two sets of written pleadings (including the claimant's memorial).

Similarly to the first two suggestions listed above, we note that Article 27 of the 2010 UNCITRAL Arbitration Rules clarifies which party bears the burden of proof.[4]

15. Security for costs

Consider expressly authorizing the tribunal to require a party to provide security for costs, where the other party has established that there are facts or circumstances that suggest that the party that is the subject of the request for security for costs might not comply with an adverse award of costs.

16. Tribunal assistants

To limit the scope for conflicts of interests, consider:

- amending Rule 5 of the Arbitration Rules to require each arbitrator to declare, at the time of accepting his or her appointment, whether he or she intends to use the services of an assistant and, if so, to disclose the proposed identity and proposed method and amount of remuneration of the assistant;

- amending Rule 5 of the Arbitration Rules to provide each party with the right to object to an arbitrator's use of an assistant, to an arbitrator's choice of an assistant, or to the proposed method and/or amount of remuneration of an assistant;

[3] For example, if there has already been a Rule 41(5) or other summary proceeding.

[4] Article 27(1) of the 2010 UNCITRAL Arbitration Rules provides that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence."

- introducing a rule defining the permitted scope of an assistant's responsibilities, including the principle that an arbitrator may not delegate, either formally or informally, any decision-making authority to an assistant; and

- amending Rule 6 of the Arbitration Rules to require that assistants to an arbitrator or to the tribunal sign a declaration of independence and confidentiality.

17. Stay of enforcement of the award

Several *ad hoc* annulment committees have recognized that for the provisional stay of enforcement under Rule 54(2) of the Arbitration Rules to continue, the applicant must demonstrate that circumstances exist that require or would justify the continuation of the provisional stay of enforcement of the award.[5] To enshrine this prevailing view in the Arbitration Rules, consider amending Rule 54 to clarify that the provisional stay shall be automatically terminated unless a party can demonstrate that circumstances exist that require that the provisional stay of enforcement of the award be continued.

18. Electronic filings

To modernize the Arbitration Rules, increase cost efficiency, and make the ICSID arbitration procedure less paper-intensive, consider:

- specifying that a document submitted only in electronic form can qualify as an "original" for purposes of the Administrative and Financial Regulations and the Arbitration Rules;

[5] *See,* e.g., *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Stay of Enforcement of the Award, 4 April 2016, paragraph 94: "The ad hoc Committee, therefore, based on the preceding statements and the relevant provisions of ICSID regime governing stays of enforcement, finds that it is for the party seeking the continuation of the stay to show that such circumstances exist, and thus, that the stay of enforcement of the Award should be continued. The Applicant bears the burden of proof that there are circumstances in the instant case that, in the discretion of this ad hoc Committee, require the continuation of the stay of enforcement"; and *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Stay of Enforcement of the Award, 31 August 2017, paragraph 75: "This rule is clear in that the party that requests the stay carries the burden of proof of the circumstances that would justify the stay or its continuation. […] Hence, it is for Ecuador, as requesting party, to prove that circumstances exist that require the stay to be continued."

- specifying that an electronic signature can satisfy the signature requirement in Rule 23 of the Arbitration Rules;

- amending Rule 23 of the Arbitration Rules to provide that, as a general rule, all the documents listed in Rule 23 (namely, "every request, pleading, application, written observation, supporting documentation, if any, or other instrument") shall be filed in electronic form only;

- allowing the tribunal and parties to agree on the logistical arrangements for the printing and delivery of any of the documents listed in Rule 23 of the Arbitration Rules, to the extent that the Centre, members of the tribunal and/or the parties require hard copies of such documents.

* * *

We appreciate the opportunity to offer our suggestions as part of the ICSID rule amendment process. We would be pleased to participate in any subsequent consultation process, following the publication by the Secretariat of the draft amendments.[6]

Sincerely,

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[6] *See* ICSID, "Invitation to File Suggestions for Rule Amendments," 25 January 2017.