To: ICSID
From: The Honorable Charles N. Brower•
Date: 16 December 2018
Re: Comments on ICSID's proposed amendments to its chapter on the Constitution of the Tribunal

Table of Contents

• Comments were prepared with the assistance of Devin Bray, Sebastian Beckerle, Angela Ting, Maleeha Khan, and Jason Czerwiec.

Chapter III: Constitution of the Tribunal

Rule 20

Rule 20
General Provisions Regarding the Constitution of the Tribunal

(1) The parties shall constitute a Tribunal without delay after registration of the Request for arbitration.

(2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.

(3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party.

(4) A person previously involved in the resolution of the parties' dispute as a judge, mediator, conciliator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

Rule 20 (2-3)

1. Arbitrator Nationality

→ Rule 20 (2) and (3) in combination allow the President to be someone having the nationality of either the State Party or of the State whose national is the Claimant, while excluding both party-appointed arbitrators from having either such nationality (also a sole arbitrator) absent agreement of the parties. In other words, while it may be unlikely that the parties, the arbitrators or the appointing authority (e.g. ICSID) would appoint an arbitrator who is a national of one of the parties, the possibility of doing so should be eliminated.

Rule 21

Rule 21
Disclosure of Third-party Funding

(1) "Third-party funding" is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute ("third-party funder"), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:

(a) through a donation or grant; or

(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.

(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.

(3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.

Rule 21 (1-2)

→ Reword Rule 21(1) following "proceeding," as follows: "by a natural or juridical person or persons, none of which is a party to the dispute ("third-party funder"), to [then continue as at present, except changing "material" to "financial" – see below]. Accordingly, in Rule 21(2) "funder" should be changed to "funder or funders." The plural ensures coverage of all possibilities, including "crowdfunding" of a party.

Rule 21 (1)

1. The term "material"

→ The term "material" is too vague (imprecise). For example, a fact witness or expert could be characterized as a TPF under Rule 21(1)(a) and parties would therefore have a mandatory obligation to disclose them as TPFs (and potentially at a much earlier stage than with their pleadings). From Rule 21(1) delete "material" and substitute "financial" in both places, as it is financial support in its various forms that is targeted.

2. Potential TPF

→ There is nothing *per se* "evil" about third-party funding. Any such disclosure by a party, however, is likely to open to the non-disclosing party the "evil" possibility of misusing the information it receives for the purpose of delay and harassment through requesting ever more detailed information regarding the funding. The only point of any such disclosure is to preclude any conflict of interest of any of the arbitrators. Whatever a party and a funder agree between themselves is of no interest for any other purpose, other than (some argue, but see below) in respect of security for costs. Therefore, a disclosure for the purpose of precluding conflicts of interest on the part of the arbitrators would best be sought from the arbitrators, who should be required to disclose any relationship to a third-party funder, whether as shareholder, director, officer or user, including use by anyone with whom his or her business is associated, e.g., his or her law firm, and to identify the funder(s). Thereafter the parties should be required either to disclose any resulting conflict or to certify that there is none. That information is not intrusive in respect of the arbitrating parties and law firms can adjust their conflicts systems to accommodate this. Thus, only upon such a disclosure by an arbitrator would it be up to a party to disclose a potential conflict of that arbitrator to the adverse party, the arbitrator and the tribunal.

→ I see no legitimate relationship of TPF to issues of security for costs. Such applications should be treated as they presently are litigated. Assuming my proposal above were adopted, the only role of TPF in requests for security for costs would be that a funded party of which security for costs is sought would be free, if that were the case, to assert that it has a TPF which is obligated under their agreement to pay any costs awarded against that party.

Rule 22

Rule 22 Method of Constituting the Tribunal
(1) The number of arbitrators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party. (2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.

Rule 22(2)

→ The 60-day deadline is perhaps a bit much and 45 days would be better.

Schedule 2: Arbitrator Declaration Form

SCHEDULE 2: ARBITRATOR DECLARATION

Case Name and No.: [redacted]

Arbitrator name: [redacted]

Arbitrator nationality(ies): [redacted]

I accept my appointment as arbitrator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Tribunal constituted by the International Centre for Settlement of Investment Disputes ("the Centre") in this proceeding.

2. I am impartial and independent of the parties, and shall judge fairly, according to the applicable law.

3. I shall not accept any instruction or compensation with regard to the arbitration from any source except as provided in the ICSID [Convention/ Additional Facility Rules and Regulations].

4. I understand that I am required to disclose:

   a. my professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. counsel for the parties;
      iii. other members of the Tribunal (presently known); and
      iv. any third-party funder disclosed pursuant to [Rule 21(2) of the Arbitration Rules/ Rule 32(2) of the (Additional Facility) Arbitration Rules].
   b. investor-State cases in which I have been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert; and
   c. other circumstances that might reasonably cause my independence or impartiality to be questioned.

   [Select one]:

   ☐ A statement is attached.

   ☐ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this arbitration, as well as the contents of any Award made by the Tribunal.
7. I will not engage in any unilateral communication concerning this arbitration with a party or their counsel.
8. I have sufficient availability to perform my duties as arbitrator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules.
9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this arbitration.
10. I will adhere to the Memorandum of Fees and Expenses published by the Centre.
11. I attach my current curriculum vitae.

Signed [form to allow electronic signature] 

Date 

Schedule 2: Arbitrator Declaration Form

Clause 4(a)

→ **Clauses 2/4** – reference is made to "independence", "impartiality", or "judge fairly" but the ICSID Convention, Article 14 designates the standard to include the ability to "exercise independent judgment" and "high moral character". Similar language should be added.

→ **Clause 4(a)** – Disclosure of relationships is unqualified (i.e., by "independence and impartiality" or "independent judgment")

→ **Clause 4(a)(ii)** – Record-keeping practice of arbitrators to record all counsel who have worked on a case to which the arbitrator has been appointed and as formulated in a relationship while acting in other roles. Without qualification (e.g., to "independence and impartiality"), the disclosure requirement remains broadly stated.

→ **Clause 4(a)(iv)** – Propose rewording in accordance with my suggestion above that arbitrators must disclose their relationships with TPFs. Disagree that parties must be required to disclose TPF (see discussion above).

Clause 4(b)

→ **Clause 4(b)** – Add qualifying language (e.g., independence and impartiality).

→ **Clause 4(b) –** The disclosure requirement could be more inclusive and not limited to "investor-State cases".

→ **Clause 4(b)** – possibly qualify "Non-confidential investor-State cases".

→ Relationship between **Clause 4(b)** – language "I have been" and **Clause 5** "continuing obligation to disclose", which does link disclosure to "independence and impartiality", creates a double standard of disclosing up-front all other investor-State cases and on a continuing basis only those that "might cause" the arbitrator's independence or impartiality to be questioned. All disclosure requirements should be made in reference to same qualifying language (i.e., independence and impartiality).

Clauses 5, 8 and 9

→ Guidelines on communicating changes and new commitments that affect an arbitrator's availability could be dealt with elsewhere, such as in a code of conduct for arbitrators.

Further comment on Schedule 2: While the standards might not change, the proposed disclosure requirements will unquestionably lead to higher costs and possibly greater delays in the proceedings. One of the greatest expenses in time in investor-State dispute settlement is the arbitrator challenge.[1] The delay associated with the extra rounds of pleadings and then, possibly, researching and vetting a new candidate increase legal costs. To date, zero ICISD awards have been annulled because an arbitrator was found partial or biased and ad hoc Committees have rejected all known attempts to annul awards based on allegations that one or more of the arbitrators lacked independence or impartiality.[2] The proposed disclosure obligations go well beyond even the green-listed items of the IBA Guidelines on Conflict of Interest in International Arbitration.[3] Compelling arbitrators to disclose beyond what they themselves identify as relevant to their independence or impartiality weakens the trust in their abilities to pass independent judgment. The better option is to qualify each disclosure requirement in Clause 4 with the language "impartiality and independence". Transparency can be achieved in other ways, such as the development of a set of best practices or code of conduct for arbitrators.

[1] Jeffery Commission and Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT LAW (2018), Appendix 3A. Of the ninety-three ICSID disqualification proposals between 1982 to 2017 that reached a final decision, Appendix 3A records the length of ninety-one. The mean length is 88 days. Thirty-eight of the ninety-one cases, or 42%, took longer than 88 days.

[2] *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment (22 May 2013), ¶¶ 175-81; *Victor Pey Casado and Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 December 2012), ¶ 337; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (10 August 2010), ¶¶ 231-38; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Annulment Decision (5 February 2016), ¶¶107-75; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina Republic (II)*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment (5 May 2017), ¶¶128-33; *Azurix Corp. v. Argentina Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 September 2009), ¶¶286-92.

[3] IBA Guidelines on the Conflict of Interest in International Arbitration (2014).