



COMMENTS BY THE ARGENTINE REPUBLIC ON PROPOSALS FOR AMENDMENT OF THE ICSID RULES IN WORKING PAPER # 3

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PROPOSED ADMINISTRATIVE AND FINANCIAL REGULATIONS

CHAPTER I: PROCEDURES OF THE ADMINISTRATIVE COUNCIL

Regulation 7: Voting

(1) Except as otherwise provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. At any meeting the Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but shall require a formal vote upon the request of any member. The written text of the motion shall be distributed to the members if a formal vote is required.

(2) No member of the Administrative Council may vote by proxy or by any method other than in person, but a member may designate a temporary alternate to cast its vote at any meeting at which the regular alternate is not present.

(3) Between Annual Meetings, the Chair may call a special meeting or request that the Administrative Council vote by correspondence on a motion. The Secretary- General shall transmit the request for a vote by correspondence to each member with the text of the motion to be voted upon. Votes shall be cast within ~~60~~⁴⁵ days after such transmission, unless a longer period is approved by the Chair. Upon expiry of the established period, the Secretary-General shall record the results and notify all members of the outcome. The motion shall be considered lost if the replies received do not include affirmative votes ~~those~~ of a majority of the members.

(4) If all Contracting States are not represented at a meeting of the Administrative Council and the votes necessary to adopt a proposed decision by a majority of two thirds of the members of the Council are not obtained, the Council, with the concurrence of the Chair, may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members shall be solicited in accordance with paragraph (3). Votes registered at the meeting may be changed by the member before the expiry of the voting period established pursuant to paragraph (3).

Commentary

Current Administrative and Financial Regulation 7(3) allows the Chair to call for a vote by correspondence only if the action to be voted on must be taken before the next Annual Meeting and it does not warrant calling a special meeting. Proposed Regulation 7(3) gives the Chair greater flexibility to request a written vote between meetings, even if the action can be postponed to the next Annual Meeting of the Council. In that case, member States should be given a longer period of at least 60 days to cast a written vote.

In addition, the safeguard that a written motion must be passed by a majority of member States and not simply by a majority of those voting should clarify that the replies received must include *affirmative* votes of a majority of the members.

CHAPTER III: FINANCIAL PROVISIONS

Regulation 14: Fees, Allowances and Charges



- (1) Each member of a Commission, Tribunal or Committee shall receive:
- (a) a fee for each hour of work performed in connection with the proceeding; and
 - ~~(b) when not travelling to attend a hearing, meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and~~
 - (be) when required to travel to attend a hearing or session held away from the member's place of residence:
 - (i) reimbursement of the cost of ground transportation between the points of departure and arrival;
 - (ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing or session is held; and
 - (iii) a *per diem* allowance for each day the member spends away from their place of residence.
- (2) The Secretary-General, with the approval of the Administrative Council~~Chair~~, shall determine and publish the amount of the fee and the *per diem* allowance referred to in paragraph (1)(a) and (be). Any request ~~by a member~~ for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made for justified reasons and approved by the parties before acceptance of the appointment to ~~the constitution of~~ the Commission, Tribunal or Committee ~~and shall justify the increase requested.~~
- (3) The Secretary-General, with the approval of the Administrative Council, shall determine and publish an annual administrative charge payable by the parties to the Centre.
- (4) All payments, including reimbursement of expenses, shall be made by the Centre to:
- (a) members of Commissions, Tribunals and Committees, and any assistants approved by the parties;
 - (b) witnesses and experts called by a Commission, Tribunal or Committee, who have not been represented by a party;
 - (c) service providers that the Centre engages for a proceeding; and
 - (d) the host of any hearing, meeting or session held outside an ICSID facility.
- (5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission, Tribunal or Committee, unless the parties have made sufficient payments to defray the costs of the proceeding.

Commentary

The fees and expenses of the members of a Commission, Tribunal or Committee to be covered should only include the fee for each hour of work performed in connection with the proceeding and, when required to travel to attend a hearing or session away from the member's place of residence, transportation expenses and a *per diem allowance*.

The amount of the hourly fee and the *per diem* allowance of the members of a Commission, Tribunal or Committee, and the annual administrative charge payable by the parties for the services of the Centre, should be determined by the Secretary-General, *with the approval of the Administrative Council*.



Any request for a higher amount of hourly fees or *per diem* allowances should be made through the Secretary-General for justified reasons and approved by the parties *before acceptance of the appointment* to the Commission, Tribunal or Committee.

Regulation 16: Consequences of Default in Payment

(1) The payments referred to in Regulation 15 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

(a) if the amounts requested are not paid in full within 120~~30~~ days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to, and in consultation with, the parties and ~~to~~ the Commission, Tribunal or Committee, if constituted; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may move the Commission, Tribunal or Committee to discontinue the proceeding, after giving notice to, and in consultation with, the parties, ~~and to~~ If the Commission, Tribunal or Committee has not yet been if-constituted, or there is a vacancy, the Secretary-General may discontinue the proceeding after consulting with the parties.

Commentary

The 30-day period for payment is impractical in light of the administrative process of many States. Reflecting this reality, a longer period of time of 120 days should be provided for.

The parties should always be consulted before the suspension or the discontinuance of a proceeding for lack of payment.

While it may be appropriate to allow the Secretary-General to suspend the proceeding for lack of payment, in order to discontinue the proceeding for lack of payment the Secretary-General should move the competent Tribunal, Commission or Committee to issue the relevant order, as provided for in current Administrative and Financial Regulation 14(3)(d).

Regulation 18: Fee for Lodging Requests

The party or parties (if a request is made jointly) wishing to institute an arbitration or conciliation proceeding, or requesting a supplementary decision, rectification, interpretation, revision or annulment of an Award, or resubmission of a dispute, shall pay the Centre a non-refundable lodging fee determined by the Secretary-General, with the approval of the Administrative Council, and published in the schedule of fees.

Commentary

The amount of the lodging fees should be determined by the Secretary-General, *with the approval of the Administrative Council*.



PROPOSED INSTITUTION RULES

Rule 2: Content of the Request

(1) The Request shall:

- (a) state whether it relates to an arbitration or conciliation proceeding;
- (b) be in English, French or Spanish;
- (c) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;
- (d) be signed by each requesting party or its representative and be dated;
- (e) attach proof of any representative's authority to act; and
- (f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) ~~With regard to the jurisdiction of the Centre, t~~The Request shall include:

- (a) a description of the investment, [evidence of the investor's ownership and control of the investment](#), a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising directly out of the investment;
- (b) with respect to each party's consent to submit the dispute to arbitration or conciliation under the Convention:
 - (i) the instrument(s) in which each party's consent is recorded;
 - (ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date;
 - (iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and
 - (iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;
- (c) if a party is a natural person:
 - (i) information concerning that person's nationality on both the date of consent and the date of the Request, together with supporting documents demonstrating such nationality; and
 - (ii) a statement that the person did not have the nationality of the Contracting State party to the dispute either on the date of consent or the date of the Request;
- (d) if a party is a juridical person:
 - (i) information concerning that party's nationality on the date of consent, together with supporting documents demonstrating such nationality;
 - (ii) [a description of the shareholding, corporate structure and ultimate beneficial owners of the party, together with supporting documents](#); and
 - (iii) if that party had the nationality of the Contracting State party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another Contracting State pursuant to Article 25(2)(b) of the Convention, together with supporting documents demonstrating such agreement;
- (e) if a party is a constituent subdivision or agency of a Contracting State:
 - (i) the State's designation to the Centre pursuant to Article 25(1) of the Convention; and
 - (ii) supporting documents demonstrating the State's approval of consent pursuant to Article 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.



Commentary

There is no need to have the introductory language in the chapeau of paragraph 2. The Request for Arbitration serves other purposes, and the information required to be contained in the Request need not be solely for the purposes of establishing the jurisdiction of the Centre. In addition, this language is not included in the current version of the Rules, and there is no benefit to its introduction here.

It is also important for the Request to include a description of the corporate structure of the investment and the investor. This information is relevant for the State to understand if it might have jurisdictional objections, and whether other objections may be made through an expedited procedure. Language is suggested in two spots. In paragraph (2)(a) to ensure that the relationship between the investment and investor is understood, and in paragraph (2)(d) to understand the ownership structure of the investor itself, where the investor is a juridical person.

PROPOSED ICSID ARBITRATION RULES

CHAPTER I: GENERAL PROVISIONS

Rule 9: Calculation of Time Limits

(1) References to time shall be determined based on the time at the seat of the Centre on the relevant date.

(2) Any time limit expressed as a period of time shall be calculated from the day after the date on which:

- (a) the Tribunal, or the Secretary-General if applicable, announces the period; or
- (b) the procedural step starting the period is taken.

(3) A time limit shall be satisfied if a procedural step is taken or a document is received by the Secretary-General on the relevant date, or, if the date falls on a [non-business day](#) ~~Saturday or Sunday~~, on the subsequent business day

Commentary

The reference to Saturday or Sunday should be broadened to include any non-business day.

Rule 10: Fixing Time Limits

The Tribunal, or the Secretary-General if applicable, shall fix time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by the Convention or these Rules, [in consultation with the parties](#).

Commentary

Time limits should be fixed in consultation with the parties.

Rule 11: Extension of Time Limits Applicable to Parties



(1) The time limits in Articles 49, 51 and 52 of the Convention cannot be extended. An application or request filed after the expiry of such time limits shall be disregarded.

(2) A time limit prescribed by the Convention or these Rules, other than those referred to in paragraph (1), may only be extended by agreement of the parties. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise.

(3) A time limit fixed by the Tribunal or the Secretary-General may be extended by agreement of the parties or the Tribunal, or Secretary-General if applicable, upon reasoned application by either party made prior to its expiry, [provided that the other party is given an opportunity to state its views](#). A procedural step taken or document received after the expiry of such time limit shall be disregarded unless the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet the time limit, [provided that both parties are given an opportunity to state their views](#).

(4) The Tribunal may delegate to the President the power to extend time limits referred to in paragraph (3).

[Commentary](#)

Both parties should be given an opportunity to state their views before the Tribunal or the Secretary-General, as applicable, concludes a delay is justified, as provided for in current Arbitration Rule 26(3).

Time limits should not be extended without giving both parties an opportunity to state their views.

CHAPTER II: CONSTITUTION OF THE TRIBUNAL

Rule 13: General Provisions Regarding the Constitution of the Tribunal

(1) The Tribunal shall be constituted without delay after [the notification of the registration of the Request for arbitration, with due regard to Section 2 of Chapter IV of the Convention](#).

(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 dispute as a conciliator, judge, mediator, or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

[Commentary](#)



The expressions “notification of the registration” and “with due regard to Section 2 of Chapter IV of the Convention” in current Arbitration Rule 1(1) should be retained.

Rule 14: ~~Notice of Third-party Funding~~

(1) A party shall file a written notice disclosing the name, address and, where applicable, shareholding, corporate structure and ultimate beneficial owners, of any non-party from which the party, its affiliate or its representative has received, directly or indirectly, funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”), and shall provide the terms and conditions of the third-party funding and any agreements and documents related to the third-party funding arrangement.

~~(2) A non-party referred to in paragraph (1) does not include a representative of a party.~~

~~(2)~~ (3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit the notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b), and to the Tribunal once it is constituted.

(5) The Tribunal shall verify that the third-party funding arrangement respects the following principles:

(a) the funded party must not have assigned its claim or the right to collect the result of its claim;

(b) retain its own independent counsel;

(b) the third-party funder must not cause, directly or indirectly, the funded party’s counsel to act in breach of their professional duties, nor take control of decisions to be made by counsel;

(c) the third-party funder must not seek to influence the funded party’s counsel to cede control or conduct of the dispute to the funder;

(d) the third-party funder shall be obliged to follow the same confidentiality rules that apply to all parties in the arbitration;

(e) the third-party funder must not be allowed to withdraw support during the proceeding, unless under circumstances clearly provided for in the contract or if the funded party has acted in breach of the financing agreement;

(f) the third-party funder must not be a disguised party or the real party in interest.

(6) The party benefiting from third-party funding and the third-party funding arrangement shall observe the obligations and principles provided for in paragraphs 2 to 4, under penalty of discontinuance of the proceeding.

(7) At the request of the State party to the dispute, the Tribunal shall order the other party benefiting from third-party funding to post security for costs, under penalty of discontinuance of the proceeding.

Commentary



The Argentine Republic is opposed to third-party funding. However, if a majority of two thirds of the members of the Administrative Council decides not to prohibit third-party funding, it should be strictly limited and penalties should be expressly provided for, as proposed above.

Proposed Rule 14 includes the obligation for a party to disclose that it has third-party funding and the name of the third-party funder. However, this provision is not sufficient to limit the negative impact third-party funding may have on the integrity of the arbitration proceeding, due process, the settlement of the dispute, and the object and purpose of the ICSID Convention. At a minimum, it is essential to include the obligation of the funded party to disclose the terms and conditions of the funding agreement.

There should also be legal consequences in case of non-compliance.

Rule 18: Appointment of Arbitrators by the Chair of the Administrative Council in Accordance with Article 38 of the Convention

(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chair appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.

(2) The Chair shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.

(3) The Chair shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint. [The Chair shall provide the parties with information about the candidates and the criteria for their selection.](#)

Commentary

When consulting with the parties before appointing an arbitrator, the Chair should provide the parties with information about the candidates and the criteria for their selection.

Rule 19: Acceptance of Appointment

(1) A party appointing an arbitrator shall notify the Secretary-General of the appointment and provide the appointee's name, nationality(ies) and contact information.

(2) The Secretary-General shall request an acceptance from the appointee as soon as the appointee is selected. The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

(3) Within 20 days after the receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and



(b) provide a signed declaration in the form published by the Centre, disclosing any past or present interest, relationship, connection or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of dependence or bias, and addressing ~~matters including~~ the arbitrator's ~~independence, impartiality,~~ availability and commitment to maintain the confidentiality of the proceedings.

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each arbitrator and provide the signed declaration.

(5) The Secretary-General shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.

(6) Each arbitrator shall have a continuing obligation throughout the proceedings to make reasonable efforts to become aware of any interest, relationship, connection or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of dependence or bias, notify any new professional, business or academic activities he or she intends to undertake, and promptly disclose any change of circumstances that may be relevant to the declaration referred to in paragraph (3)(b).

(7) Failure by an arbitrator to comply with the above duties shall constitute a manifest lack of the qualities required by paragraph (1) of Article 14 of the Convention in the terms of Article 57 of the Convention.

Commentary

The arbitrator's duties should include: investigation, notification and disclosure, as detailed in the above proposal.

For greater certainty, the type of information to be provided by an arbitrator should be included in the Arbitration Rules, as detailed in the above proposal, notwithstanding the text of the declaration form published by the Centre and the forthcoming Code of Ethics.

Determining the consequences in case of non-compliance is essential in order to not deprive the rule of all meaning. Therefore, it should be clarified that an arbitrator's failure to comply with the duties of investigation, notification and disclosure shall constitute a manifest lack of the qualities required by paragraph (1) of Article 14 of the Convention in the terms of Article 57 of the Convention.

CHAPTER III: DISQUALIFICATION OF ARBITRATORS AND VACANCIES

Rule 22: Proposal for Disqualification of Arbitrators

(1) A party may file a proposal to disqualify one or more arbitrators ("proposal") pursuant to Article 57 of the Convention, which does not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or



~~bias. in accordance with~~ The following procedure shall apply, unless the parties agree otherwise:

(a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of:

(i) the constitution of the Tribunal; or

(ii) the date on which the party proposing the disqualification first knew or first should have reasonably known of the facts on which the proposal is based;

(b) the proposal shall include the grounds on which it is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal, and may agree to the proposal without this implying accepting the validity of the grounds for the proposal, in which case a replacement arbitrator shall be appointed in accordance with the method by which the replaced arbitrator was appointed;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. ~~This statement shall be filed~~ within five days after receipt of the response referred to in paragraph (1)(d), and may also withdraw from his or her office without this implying accepting the validity of the grounds for the proposal, in which case his or her resignation shall be accepted and a replacement arbitrator shall be appointed in accordance with the method by which the replaced arbitrator was appointed; and

(e) the parties may file final written submissions on the proposal within seven days after expiry of the time limit referred to in paragraph (1)(d).

(3) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

Commentary

Current ICSID decisions on disqualification confirm that Article 57 of the Convention does not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias, as explained by the Chair in *Blue Bank v. Venezuela*¹ and reaffirmed in subsequent decisions on disqualification. This should be clarified in proposed Rule 22.

In this regard, an annulment committee has noted “the generally unsatisfactory nature of the process for dealing with challenges to arbitrators” and the difficulty in “formulating the appropriate test for deciding on disqualification in the absence of clear guidance in the Convention”, expressed its concern that “insufficient attention may be given to the question of the perception of lack of independence or impartiality”, and observed that “there may be a difference between commercial arbitration [...] and investment arbitration where there is much greater a degree of public interest in the process and outcomes.”²

¹ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposal to Disqualify a Majority of the Tribunal, 12 November 2013, ¶¶ 59-60.

² *Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAguas Servicios Integrales del Agua, S.A v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Argentina’s Application for Annulment, 14 December 2018, ¶¶ 171-172.



The parties should be allowed to agree to modify the procedure for a proposal for disqualification.

The time limit to make a proposal for disqualification should be calculated from the day after the constitution of the Tribunal or the date on which the party proposing the disqualification first knew or first should have *reasonably* known of the facts on which the proposal is based.

Proposed Rule 22 should allow for the possibility that the parties may agree to the proposal or that the arbitration to whom the proposal relates may decide to withdraw from his or her office, without this implying acceptance of the validity of the grounds for the proposal. This is similar to UNCITRAL Arbitration Rules.

Rule 26: Vacancy on the Tribunal

(1) The Secretary-General shall notify the parties of any vacancy on the Tribunal.

(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.

(3) A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Chair shall fill the following vacancies from the Panel of Arbitrators:

(a) a vacancy caused by the resignation of a party-appointed arbitrator without the consent of the other members of the Tribunal; or

(b) [at the request of either party](#), a vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. Any portion of a hearing shall be recommenced if the newly appointed arbitrator considers it necessary to decide a pending matter.

Commentary

Any appointments by the Chair under scenario (3)(b) should not happen automatically upon the expiry of 45 days after the notice of vacancy, but only if a party expressly requests that the vacancy be filled by the Chair, as provided for in current Arbitration Rule 11(2)(b).

CHAPTER IV: CONDUCT OF THE PROCEEDING

Rule 30: Written Submissions

(1) The parties shall file the following written submissions:

(a) a memorial by the requesting party;

(b) a counter-memorial by the other party;

and, unless the parties agree otherwise:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.



(2) A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments, and the request for relief. A reply and rejoinder shall be limited to responding to the previous written submission.

(3) A party may file unscheduled written submissions, observations or supporting documents only after obtaining leave of the Tribunal, unless the filing of such documents is provided for by the Convention or these Rules. The Tribunal may grant such leave upon a timely and reasoned application, provided that the other party is given an opportunity to state its views, if it finds such written submissions, observations or supporting documents are necessary in view of all relevant circumstances.

Commentary

Both parties should be given an opportunity to state their views before the Tribunal grants leave to file unscheduled submissions or documents.

CHAPTER V: EVIDENCE

Rule 37: Disputes Arising from Requests for Documents

(1) The Tribunal shall decide any dispute arising out of a party's objection to the other party's request for production of documents. In deciding the dispute, the Tribunal shall consider all relevant circumstances including without limitation:

(a) the burden of proof of the requesting party;

(b) the efforts made by the requesting party to obtain the requested evidence through its own means;

~~(c)~~ the scope and timeliness of the request;

~~(d)~~ the relevance and materiality of the documents requested;

~~(e)~~ the burden of production; and

~~(f)~~ the basis of the objection.

Commentary

It should be clarified that the list of circumstances to be considered by the Tribunal for the purposes of deciding a dispute on a request for production of documents and evidence is not exhaustive. Other relevant circumstances should be listed by way of illustration, as proposed above.

Rule 38: Witnesses and Experts

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness together with the written submission to which it relates. The statement shall identify the witness, contain the evidence of the witness and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.



(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Each witness shall make the following declaration before giving evidence:
“I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”

(7) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(8) Each expert shall make the following declaration before giving evidence:
“I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”

Commentary

It should be clarified that the written statement by a witness or an expert should be filed together with the party’s written submission to which it relates.

Rule 39: Tribunal-Appointed Experts

(1) Unless the parties agree otherwise, the Tribunal, upon a party’s request or, unless the parties disapprove, on its own initiative, may appoint one or more independent experts to report to it on specific matters within the scope of the dispute.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including without limitation on the background and qualifications of the expert, the terms of reference and fees of the expert, the candidates that are being considered and their budgets, and any other relevant information for the appointment of the expert. When deciding whether to appoint an expert and who should be selected for that position, the Tribunal shall endeavour not to unnecessarily increase the cost of the proceeding.

(3) Upon accepting an appointment by the Tribunal, an expert shall provide a signed declaration in the form published by the Center.

(4) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.

(5) The parties shall have the right to make written or oral submissions on the report of the Tribunal-appointed expert, as required.

(6) Either party may challenge the Tribunal-appointed expert for justified reasons.

~~(7)~~ Rule 38 shall apply, with necessary modifications, to the Tribunal-appointed expert.



Commentary

An expert may be appointed by the Tribunal upon a party's request or, unless the parties disapprove, on its own initiative.

The Tribunal should consult with the parties on any relevant information for the appointment of the expert, as proposed above.

The Tribunal should be mindful of costs when deciding whether it is necessary to appoint an expert and selecting the expert.

The parties should have the right to challenge the Tribunal-appointed expert for justified reasons.

Rule 40: Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, upon a party's request or, unless the parties disapprove, on its own initiative ~~or upon a party's request~~, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The ~~order~~-Tribunal shall consult with the parties on ~~define~~ the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.

Commentary

The Tribunal may order a visit or inquiry upon a party's request or, unless the parties disapprove, on its own initiative.

The Tribunal should consult with the parties on any relevant questions related to the visit or inquiry.

CHAPTER VI: SPECIAL PROCEDURES

Rule 42: Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").

(2) If a request for bifurcation relates to a preliminary objection, Rule 44 shall apply.

(3) The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 44, unless the parties agree otherwise:

(a) the request for bifurcation shall be filed as soon as possible;

(b) the request for bifurcation shall state the questions to be bifurcated;

(c) the proceeding shall be suspended until the Tribunal decides whether to bifurcate, unless the parties agree otherwise;

~~(d)~~ the Tribunal shall fix time limits for written or oral submissions on the request for bifurcation, as required; and



(e~~d~~) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the last written or oral submission on the request; and

(f~~e~~) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including [without limitation](#) whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and

(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

(5) If the Tribunal orders bifurcation pursuant to this Rule, it shall suspend the proceeding with respect to any questions to be addressed at a later phase, unless the parties agree otherwise or the Tribunal decides there are special circumstances that do not justify suspension.

(6) The Tribunal may at any time on its own initiative decide whether a question is to be addressed in a separate phase of the proceeding.

[Commentary](#)

The parties should be allowed to agree to modify the procedure for bifurcation.

The proceeding should be suspended pending a decision on bifurcation, unless the parties agree otherwise.

Since the Tribunal should consider all relevant circumstances when deciding whether to bifurcate, it should be clarified that the list of circumstances mentioned in paragraph 4 is non-exhaustive.

Rule 43: Preliminary Objections

(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal (“preliminary objection”).

(2) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.

(3) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits.

(4) If a party requests bifurcation of a preliminary objection, Rule 44 shall apply.

(5) If a party does not request bifurcation of a preliminary objection within the time limits referred to in Rule 44(1)(a) or the parties confirm that they will not request bifurcation, the objection shall be joined to the merits and the following procedure shall apply, [unless the parties agree otherwise](#):



- (a) the Tribunal shall fix time limits for written and oral submissions on the preliminary objection, as required;
- (b) the memorial on the preliminary objection shall be filed:
 - (i) by the date to file the counter-memorial on the merits;
 - (ii) by the date to file the next written submission after an ancillary claim, if the objection relates to the ancillary claim; or
 - (iii) as soon as possible after the facts on which the objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (5)(b)(i) and (ii);
- (c) the party filing the memorial on preliminary objections shall also file its countermemorial on the merits, or, if the objection relates to an ancillary claim, file its next written submission after the ancillary claim; and
- (d) the Tribunal shall render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).

(6) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.

Commentary

The parties should be allowed to agree to modify the procedure for preliminary objections.

Rule 44: Bifurcation of Preliminary Objections

(1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:

- (a) unless the parties agree otherwise, the request for bifurcation shall be filed:
 - (i) within 45 days after filing the memorial on the merits;
 - (ii) within 45 days after filing the written submission containing the ancillary claim, if the objection relates to the ancillary claim;or
 - (iii) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (1)(a)(i) and (ii);
- (b) the request for bifurcation shall state the preliminary objection to which it relates;
- (c) unless the parties agree otherwise, the proceeding on the merits shall be suspended until the Tribunal decides whether to bifurcate;
- (d) the Tribunal shall fix time limits for written and oral submissions on the request for bifurcation, as required; and
- (e) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the later of the last written or oral submission on the request.

(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including [without limitation](#) whether:

- (a) bifurcation would materially reduce the time and cost of the proceeding;
- (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
- (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.



(3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:

(a) suspend the proceeding on the merits, unless the parties agree otherwise, ~~or the Tribunal decides there are special circumstances that do not justify suspension;~~

(b) fix time limits for written and oral submissions on the preliminary objection, as required;

(c) render its decision or Award on the preliminary objection within 180 days after the later of the last written or oral submission, in accordance with Rule 57(1)(b); and

(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

(4) If the Tribunal decides to join the preliminary objection to the merits, it shall:

(a) fix time limits for written and oral submissions on the preliminary objection, as required;

(b) modify any time limits for written and oral submissions on the merits, as required; and

(c) render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).

Commentary

Since the Tribunal should consider all relevant circumstances when deciding whether to bifurcate, it should be clarified that the list of circumstances mentioned in paragraph 3 is non-exhaustive.

The Tribunal should not be allowed to decide that there are special circumstances that do not justify suspension of the proceeding on the merits pending a decision on preliminary objections, unless the parties agree otherwise.

Rule 46: Provisional Measures

(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:

(a) prevent action that is likely to cause current or imminent harm to the other party or prejudice to the arbitral process;

(b) prevent action which might aggravate or extend ~~maintain or restore the status quo pending determination of~~ the dispute; and

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply, unless the parties agree otherwise:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

(b) the party requesting the recommendation of a provisional measure shall satisfy the Tribunal that:

(i) harm not adequately reparable by an award of damages is likely to result if the measure is not recommended, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.



- (bc) the Tribunal shall fix time limits for written or oral submissions on the request;
(ed) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and
(de) the Tribunal shall issue its decision on the request within 30 days after the latest of:
(i) the constitution of the Tribunal;
(ii) the last written submission on the request; or
(iii) the last oral submission on the request.

(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances including:

- (a) whether the measures are urgent and necessary; and
(b) the effect that the measures may have on each party.

(4) The Tribunal may recommend provisional measures on its own initiative, after giving the parties an opportunity to make submissions. The Tribunal may also recommend provisional measures different from those requested by a party, after giving the parties an opportunity to present their observations on such measures.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request, after giving the parties an opportunity to make submissions.

(7) A party may request any judicial or other authority to order provisional measures if such recourse is available in the instrument recording the parties' consent to arbitration.

Commentary

It is more appropriate to provide for provisional measures to prevent action that might aggravate or extend the dispute, rather than to maintain the *status quo*.

The parties should be allowed to agree to modify the procedure for provisional measures.

The party requesting the recommendation of a provisional measure should satisfy the Tribunal that: harm not adequately reparable by an award of damages is likely to result if the measure is not recommended, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.

Both parties should be given an opportunity to present their observations before a Tribunal recommends provisional measures on its own initiative, recommends provisional measures different from those requested by a party, or modifies or revokes provisional measures.

Rule 48: Default



- (1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.
- (2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.
- (3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.
- (4) If the request in paragraph (2) relates to a failure to appear at a hearing, the Tribunal may:
 - (a) reschedule the hearing to a date within 60 days after the original date;
 - (b) proceed with the hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the hearing; or
 - (c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the hearing.
- (5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).
- (6) A party's default shall not be deemed an admission of the assertions made by the other party.
- (7) The Tribunal may invite the party that is not in default to file observations, produce evidence or make oral submissions.
- (8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine the jurisdiction of the Centre and its own competence and, if it is satisfied, verify that the submissions made are well-founded in fact and in law, before deciding the questions submitted to it and rendering an Award.

Commentary

As current Arbitration Rule 42(4), proposed Rule 48 should provide that in case of default the Tribunal must also verify that the submissions made are well-funded in fact and in law.

CHAPTER VII: COSTS

Rule 49: Costs of the Proceeding

The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:

- (a) the reasonable legal fees and expenses of the parties;
- (b) the fees and expenses of the Tribunal, Tribunal assistants approved by the parties and Tribunal-appointed experts; and
- (c) the administrative charges and direct costs of the Centre.



Commentary

Only reasonable legal fees and expenses of the parties should form part of the costs of the proceeding.

Rule 50: Statement of and Submission on Costs

The Tribunal shall request that each party file a statement of costs and a written submission on the allocation of costs, and that the Secretary-General submit an account of all amounts paid by each party to the Centre and of all costs incurred and payments made by the Centre for the proceeding, before allocating the costs of the proceeding between the parties. The statements of costs submitted by the parties and the account submitted by the Secretary-General shall be communicated to both parties. The Tribunal may request the parties and the Secretary-General to provide additional information concerning the costs of the proceeding, on its own initiative or the request of a party.

Commentary

Current Arbitration Rule 28 provides that the Secretary-General shall submit an account of costs and that the Tribunal may request the parties and the Secretary-General to provide additional information. It is necessary to maintain such provision. In addition, the statements of costs submitted by the parties and the account submitted by the Secretary-General should be communicated to both parties, so that they may examine the costs, ask the Tribunal to request additional information, and make observations, if any.

Rule 51: Decisions on Costs

(1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including, but not limited to:

- (a) ~~the outcome of any part of the proceeding or overall~~ the extent to which each claim, objection or defence has been successful, and the proportion in which the amount claimed is reflected in the compensation awarded to the claimant party, if any;
- (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;
- (c) the complexity of the issues; and
- (d) the reasonableness of the costs claimed.

(2) The Tribunal may make interim decisions on costs at any time.

(3) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award.

Commentary

It should be clarified that the list of circumstances to be considered by the Tribunal for the purposes of the allocation of costs is not exhaustive, but a list of minimum factors to be considered when deciding how to allocate costs.

In investment arbitration cases, it is usually misleading to look at the final outcome of the proceeding. Instead, the extent to which each claim, objection or defence has been



successful should be considered for the purposes of allocating costs, as well as the proportion in which the amount claimed is reflected in the compensation awarded to the claimant, if any, which may be significantly lower than the amount claimed.

Rule 52: Security for Costs

(1) Upon request of a State that is a party to the dispute, the Tribunal may order ~~any party~~ a disputing investor asserting a claim ~~or counterclaim~~ to provide security for costs.

(2) The following procedure shall apply, unless the parties agree otherwise:

(a) the request shall specify the circumstances that require security for costs;

(b) the Tribunal shall fix time limits for written or oral submissions on the request, as required;

(c) if a State party to the dispute requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(3) In determining whether to order a ~~party~~ disputing investor to provide security for costs, the Tribunal shall consider all relevant circumstances, including without limitation:

(a) the ~~disputing investor~~ at party's ability to comply with an adverse decision on costs;

(b) the ~~at disputing investor~~ party's willingness to comply with an adverse decision on costs;

(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim; ~~and~~

(d) the conduct of the parties; ~~and~~

(e) the existence of third-party funding.

~~(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.~~

~~(5)~~ The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.

~~(6)~~ If the disputing investor ~~a party~~ fails to comply with an order for security for costs within the time limit set by the Tribunal, the Tribunal ~~may~~ shall suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal ~~may~~ shall, after consulting with the parties, order the discontinuance of the proceeding.

~~(7)~~ A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.



(78) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request, after giving the parties an opportunity to make submissions.

Commentary

A State party to the dispute should be allowed to request the Tribunal to order the disputing investor to provide security for the costs.

The parties should be allowed to agree to modify the procedure for security for costs.

It should be clarified that the list of circumstances to be considered by the Tribunal to order a disputing investor to provide security for costs is not exhaustive and that those circumstances include the existence of third-party funding.

Suspension and discontinuance of the proceeding should be mandatory in case of failure by the disputing investor to comply with an order to provide security for costs.

Both parties should be given an opportunity to present their observations before a Tribunal modifies or revokes its order for security for costs.

CHAPTER X: PUBLICATION, ACCESS TO PROCEEDINGS AND NON-DISPUTING PARTY SUBMISSIONS

Rule 63: Publication of Documents Filed in the Proceeding

~~(1) Upon request of either party, t~~The Centre shall not publish any document filed by either party in the proceeding without the consent of both parties, ~~with redactions agreed to by the parties to by the parties and jointly notified to the Secretary General.~~

~~(2) Either party may refer any dispute regarding the publication or redaction of a document in paragraph (1) to the Tribunal for determination. The Centre shall publish the document in accordance with the determination of the Tribunal.~~

~~(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.~~

Commentary

Documents filed by either party must not be published, unless *both* parties give their consent.

Rule 64: Observation of Hearings

(1) The Tribunal shall ~~determine whether to~~only allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, ~~after consulting with the~~if both parties agree thereto.

(2) The Tribunal shall establish procedures to prevent the disclosure of any confidential or protected information to persons observing the hearings.



(3) The Centre shall publish recordings or transcripts of those portions of hearings that were available for observation by the public in accordance with paragraphs (1) and (2), unless either party objects.

Commentary

Persons who are not involved in the proceeding in some capacity should not be allowed to observe hearings unless *both* parties agree thereto.

Rule 65: Confidential or Protected Information

For the purposes of Rules 61-64, confidential or protected information is information which:

- (a) is protected from disclosure pursuant to the instrument of consent to arbitration;
- (b) is protected from disclosure pursuant to the applicable law, including, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information;
- (c) is protected from disclosure in accordance with the orders and decisions of the Tribunal;
- (d) is protected from disclosure by agreement of the parties;
- (e) constitutes confidential business information;
- (f) would impede law enforcement if disclosed to the public;
- (g) would prejudice the essential security interests of the State if disclosed to the public;
- (h) would aggravate the dispute between the parties if disclosed to the public; or
- (i) would undermine the integrity of the arbitral process if disclosed to the public.

Commentary

It is unclear whether the reference to “protected from disclosure pursuant to the applicable law” in paragraph (b) means the domestic law of the respondent state or if it means international law. This reference should be amended to clarify that it includes, in the case of the information of the respondent State, information that is protected under the law of the respondent State, and in the case of other information, information that is protected under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.

Rule 67: Participation of Non-disputing Treaty Party

(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (“non-disputing Treaty Party”) to make a written submission on the interpretation of the treaty at issue in the dispute and upon which consent to arbitration is based, unless such treaty provides for a joint interpretation mechanism.

(2) The Tribunal may impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or scope of the submission and the time limit to file the submission.

(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.

Commentary



If a majority of two thirds of the members of the Administrative Council considers that a special procedure for participation of non-disputing Treaty Parties should be provided for, different from the procedure in proposed Rule 66, such special procedure should be excluded in case the treaty at issue in the dispute provides for a joint interpretation mechanism. In such case, the non-disputing Treaty Party should use the treaty mechanism.

CHAPTER XI: INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

Rule 71: Procedure Applicable to Interpretation, Revision and Annulment

(1) Except as provided below, these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee.

(2) The procedural agreements and orders on matters addressed at the first session of the original Tribunal ~~shall~~ may continue to apply to an interpretation, revision or annulment proceeding, with necessary modifications, ~~unless if both the parties agree thereto or the Tribunal or Committee orders otherwise.~~

(3) In addition to the application, the written procedure shall consist of one round of written submissions in an interpretation or revision proceeding, and two rounds of written submissions in an annulment proceeding, unless the parties agree or the Tribunal or Committee orders otherwise.

(4) A hearing shall be held upon the request of either party, or if ordered by the Tribunal or Committee.

(5) The Tribunal or Committee shall issue its decision within 120 days after the later of the last written or oral submission on the application.

Commentary

The procedural agreements and orders on matters addressed at the first session of the original Tribunal should not apply to interpretation, revision or annulment proceedings unless *both* parties agree thereto.

Rule 72: Stay of Enforcement of the Award

(1) A party to an interpretation, revision or annulment proceeding may request a stay of enforcement of all or part of the Award at any time before the final decision on the application.

(2) If the stay is requested in the application for revision or annulment of an Award, enforcement shall be stayed provisionally until the Tribunal or Committee decides on the request.

(3) The following procedure shall apply, unless the parties agree otherwise:

(a) the request shall specify the circumstances that require the stay;

(b) the Tribunal or Committee shall fix time limits for written or oral submissions on the request, as required; and



~~(c) if a party files the request before the constitution of the Tribunal or Committee, the Secretary General shall fix time limits for written submissions on the request, so that the Tribunal or Committee may consider the request promptly upon its constitution; and~~
(c) the Tribunal or Committee shall issue its decision on the request within 30 days after the latest of:

- ~~(i) the constitution of the Tribunal or Committee;~~
- (ii) the last written submission on the request; or
- (iii) the last oral submission on the request.

~~(4) If a Tribunal or Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.~~

~~(5) A party must promptly disclose to the Tribunal or Committee any change in the circumstances upon which the enforcement was stayed.~~

(4) The Tribunal or Committee may at any time modify or terminate a stay of enforcement, ~~on its own initiative or~~ upon a party's request specifying the circumstances that require the modification or termination of the stay of enforcement, after giving the other party an opportunity to present observations.

(5) A stay of enforcement shall terminate on the date of dispatch of the decision on the application for interpretation, revision or annulment, or on the date of discontinuance of the proceeding, except that a Committee granting the partial annulment of an Award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request a new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay.

Commentary

The parties should be allowed to agree to modify the procedure for stay of enforcement of the Award.

Only the Tribunal or Committee should fix time limits for submissions on stay of enforcement, not the Secretary-General.

The 30 days to issue a decision on stay of enforcement should not be calculated from the constitution of the Tribunal or Committee, but from the last written submission on the request or the last oral submission on the request, whichever is later.

The ICSID Convention does not authorize the imposition of conditions for the stay, which may even prevent the application of Article 55 of the ICSID Convention. Upon analysing the preparatory works of the ICSID Convention, it is clear that the first draft of current Article 52(5) of the Convention provided for the possibility that an annulment committee might require the provision of a bond or similar measure for the purpose of maintaining the stay of enforcement of the award.³ However, the negotiators of the Convention specifically refused to confer these powers upon an annulment committee.⁴

³ HISTORY OF THE ICSID CONVENTION, vol. I, p. 238 (1968).

⁴ HISTORY OF THE ICSID CONVENTION, vol. II-2, p. 858 (1968).



Any information regarding any changes of circumstances upon which the enforcement was stayed should be provided in the context of a request to modify or terminate a stay of enforcement.

The Tribunal or Committee should only modify or terminate a stay of enforcement upon a party's request specifying the circumstances that require the modification or termination of the stay of enforcement, after giving the other party an opportunity to present observations.

The possibility that a Committee granting the partial annulment of an Award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request a new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay, as provided for in current Arbitration Rule 54(3), should be maintained in proposed Rule 72.

Rule 73: Resubmission of Dispute after an Annulment

(1) If a Committee annuls all or part of an Award, either party may file with the Secretary-General a request to resubmit the dispute to a new Tribunal, together with any supporting documents and pay the lodging fee published in the schedule of fees.

(2) The request shall:

- (a) identify the Award to which it relates;
- (b) be in an official language of the Centre;
- (c) be signed by each requesting party or its representative and be dated;
- (d) attach proof of any representative's authority to act; and
- (e) specify which aspect(s) of the dispute is resubmitted to the new Tribunal.

(3) Upon receipt of a request for resubmission and the lodging fee, the Secretary-General shall promptly:

- (a) transmit the request and the supporting documents to the other party;
- (b) register the request;
- (c) notify the parties of the registration; and
- (d) invite the parties to constitute a new Tribunal without delay, which shall have the same number of arbitrators, and be appointed by the same method as the original Tribunal, unless the parties agree otherwise.

(4) If the original Award was annulled in part, the new Tribunal shall reconsider the aspect(s) of the resubmitted dispute pertaining to the annulled portion of the Award. [It may, however, stay or continue to stay the enforcement of the unannulled portion of the Award until the date its own Award is rendered.](#)

(5) Except as otherwise provided in paragraphs (1)-(4), these Rules shall apply to the resubmission proceeding.

(6) The procedural agreements and orders on matters addressed at the first session of the original Tribunal ~~shall not~~ [may](#) apply to the resubmission proceeding, ~~unless the parties~~ [if both parties](#) agree ~~otherwise~~ [thereto](#).

[Commentary](#)



The possibility that the new Tribunal may stay or continue to stay the enforcement of the unannulled portion of the Award until the date its own Award is rendered, as provided for in current Arbitration Rule 55(3), should be maintained in proposed Rule 73(4).

The procedural agreements and orders on matters addressed at the first session of the original Tribunal should not apply to resubmission proceeding unless *both* parties agree thereto.

CHAPTER XII: EXPEDITED ARBITRATION

Rule 74: Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by jointly notifying the Secretary-General in writing of their consent. The parties may jointly amend the expedited arbitration rules of this Chapter, or, at the request of a party, the Tribunal may make necessary modifications to the expedited arbitration of this Chapter if the circumstances so require. At any time of the proceeding, the parties may agree to discontinue the use of the expedited arbitration rules of this Chapter, or, at the request of a party, the Tribunal may decide to discontinue of the use of the expedited arbitration rules of this Chapter if the circumstances so require.

(2) Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:

(a) Rules 15, 16, 18, 39, 40, 41, 42, 44 and 45 do not apply in an expedited arbitration; and

(b) Rules 19, 22, 29, 37, 43, 48, 57, 60 and 71, as modified by Rules 75-83, apply in an expedited arbitration.

(3) If the parties consent to expedited arbitration after the constitution of the Tribunal pursuant to Chapter II, Rules 75-77 shall not apply, and the expedited arbitration shall proceed subject to all members of the Tribunal confirming their availability pursuant to Rule 78(2). If any arbitrator fails to confirm availability before the expiry of the applicable time limit, the arbitration shall proceed in accordance with Chapters I-XI.

Commentary

The parties should be allowed to jointly amend the expedited arbitration rules and, at the request of a party, the Tribunal should be allowed to make necessary modifications to the expedited arbitration if the circumstances so require.

In addition, at any time of the proceeding, the parties should be allowed to agree to discontinue the use of the expedited arbitration rules and, at the request of a party, the Tribunal should be allowed to decide to discontinue of the use of the expedited arbitration rules if the circumstances so require.

Rule 75: Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration



(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 76 or a three-member Tribunal appointed pursuant to Rule 77.

(2) The parties shall jointly notify the Secretariat in writing of their election of a Sole Arbitrator or a three-member Tribunal within ~~3~~60 days after the date of the notice of consent referred to in Rule 74(1).

(3) If the parties do not notify the Secretariat of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of ~~a Sole Arbitrator~~three members to be appointed in accordance with Rule ~~77~~6.

(4) An appointment under Rules 76 or 77 shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the Convention.

Commentary

The parties should be given at least 60 days to jointly notify the Secretariat of their election of a Sole Arbitrator or a three-member Tribunal.

In order not to discourage the choice of expedited arbitration, the default rule should be reversed, so that in the absence of agreement, the Tribunal is composed of three members.

Rule 76: Appointment of Sole Arbitrator for Expedited Arbitration

(1) The parties shall jointly appoint the Sole Arbitrator within ~~2~~30 days after the notice referred to in Rule 75(2).

(2) The Secretary-General shall appoint the Sole Arbitrator if:

(a) the parties do not appoint the Sole Arbitrator within the time limit referred to in paragraph (1); or

(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator; ~~or~~

~~(c) the appointee declines the appointment or does not comply with Rule 78(1).~~

(3) The following procedure shall apply to an appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them by lot to be drawn; and

(d) if the selected candidate declines the appointment or does not comply with Rule 78(1), the Secretary-General shall select the next highest-ranked candidate.



Commentary

The parties should have the possibility to appoint another Sole Arbitrator if their original appointee declines the appointment or does not comply with Rule 78(1).

In paragraph (3)(c), when two or more candidates share the best ranking, it is not clear what criteria will be applied by the Secretary-General to select one of them. It is suggested that it be decided by lot to be drawn.

Rule 77: Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator (“co-arbitrator”) within 20 days after the notice referred to in Rule 75(2); and

(b) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of the acceptances from both co-arbitrators.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the applicable time limit referred to in paragraph (1); or

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal; ~~or~~

~~(c) an appointee declines the appointment or does not comply with Rule 78(1).~~

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators pursuant to paragraph (2): (a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed. The Secretary-General shall consult with the parties as far as possible and use best efforts to appoint the co-arbitrator(s) within 15 days after the relevant event in paragraph (2);

(b) within 10 day after the later of the date on which both co-arbitrators have accepted their appointments or the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(c) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the SecretaryGeneral within 10 days after receipt of the list;

(d) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them by lot to be drawn; and

(e) if the selected candidate declines the appointment or does not comply with Rule 78(1), the Secretary-General shall select the next highest-ranked candidate.

Commentary

A party should have the possibility to appoint another arbitrator if its original appointee declines the appointment or does not comply with Rule 78(1).



In paragraph (3)(d), when two or more candidates share the best ranking, it is not clear what criteria will be applied by the Secretary-General to select one of them. It is suggested that it be decided by lot to be drawn.

Rule 82: The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

~~The consent of the parties given pursuant to Rule 74 shall not apply to The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 60 within 30 days after the last written or oral submission on the request.~~

Commentary

The consent of the parties to expedited arbitration should only cover the original arbitration proceeding and should not extend to post-award remedies.

Rule 83: The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration

~~The consent of the parties given pursuant to Rule 74 shall not apply to interpretation, revision or annulment of an Award rendered in an expedited arbitration. (1) The following schedule for written submissions and the hearing shall apply to the procedure relating to an interpretation, revision or annulment of an Award rendered in an expedited arbitration:~~

~~(a) the applicant shall file a memorial on interpretation, revision or annulment within 30 days after the first session;~~

~~(b) the other party shall file a counter memorial on interpretation, revision or annulment within 30 days after the memorial;~~

~~(c) the memorial and counter memorial referred to in paragraph (1)(a) and (b) shall be no longer than 100 pages in length;~~

~~(d) a hearing shall be held within 45 days after the date for filing the counter memorial;~~

~~(e) the parties shall file statements of their costs and written submissions on costs within 5 days after the last day of the hearing referred to in paragraph (1)(d); and~~

~~(f) the Tribunal or Committee shall issue the decision on interpretation, revision or annulment as soon as possible, and in any event no later than 60 days after the hearing referred to in paragraph (1)(d).~~

~~(2) Any schedule for submissions other than those referred to in paragraph (1) shall run in parallel with the main schedule, unless the Tribunal or Committee determines that there are special circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal or Committee shall take into account the expedited nature of the process.~~

Commentary



The consent of the parties to expedited arbitration should only cover the original arbitration proceeding and should not extend to post-award remedies. Keeping this rule may discourage the use of expedited arbitration.