15 APRIL 2020

Comments of Republic of Panama on ICSID Secretariat Working Paper 4

The Republic of Panama ("**Panama**") would like to reiterate its previous expressions of gratitude for all of the hard work that the Secretariat has put into the process of amending the ICSID Arbitration Rules. The current draft contains many improvements upon the 2006 Rules.

Although there is still work to be done, Panama is eager to have these improvements come into effect. Accordingly, while Panama maintains the positions that it has previously expressed, it has chosen to limit its comments in this round to the following two.

Rule 53: Security for Costs

Panama is pleased that the Secretariat has decided to create a rule that expressly addresses the issue of security for costs. Nevertheless, Panama is concerned about one aspect of the current draft: specifically, Paragraph 2(a), which states that "the request shall specify the circumstances that require security for costs."

In WP4, the Secretariat advised that the word "require" was chosen in order to maintain "consisten[cy] with the drafting of other rules (Provisional Measures and Stay of Enforcement of the Award) and reflects the appropriate standard for security for costs."[1] However, the entire purpose of creating a standalone rule was to correct the misimpression that applications for "security for costs" come within the ambit of provisional measures. Given that the tribunal's authority to grant security for costs derives from Articles 61(2) and 44 of the ICSID Convention[2] — and not from Article 47 thereof —it does not seem appropriate to link the new rule back to "provisional measures." Considering the effort that the Secretariat had made to frame the rest of the rule in neutral terms, Panama reiterates its proposal to revise Paragraph 2(a) to state: "the circumstances that *justify* security for costs."

Rule 30: Written Submissions

As Panama has previously explained, Paragraph 1 of this Rule contains a textual loophole that creates an unjustifiable disparity. The current draft reads as follows:

> "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.

In certain past cases, tribunals have cited the current analogue of this Rule as the basis for authorizing the claimant to submit a "rejoinder on jurisdiction" — that is, a fourth submission on jurisdiction,[3] compared to the two that a respondent may file.[4] This disparity is not appropriate.

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[1] WP4, ¶ 111.

[2] *See, e.g., Commerce Group Corporation and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (Decision on El Salvador's Application for Security for Costs, 20 September 2012), ¶¶ 40–45 (Gaillard, Pryles, Schreuer).

[3] Request for Arbitration, Memorial, Reply, Rejoinder on Jurisdiction.

[4] Counter-Memorial, Rejoinder on Jurisdiction.

In WP4, the Secretariat opines that "the current drafting preserves the equal opportunity of the parties to ***respond*** to a written submission such as a memorial on preliminary objections or on a counterclaim."[5] However, there is no such thing as an "equal" right to "respond." To be sure, both parties must have an equal opportunity to *argue*. But, as the parties are differently situated, so, too, is their presentation of arguments. The claimant, by definition, makes claims, and the respondent, by definition, responds. The "claimant" plainly is not entitled to the same number of "responses" as the respondent. If such were the case, the sequence would be:

- memorial by the claimant,
- counter-memorial by the respondent (*i.e.*, respondent's first response)
- reply by the claimant (*i.e.*, claimant's first response)
- rejoinder by the respondent (*i.e.*, respondent's second response)
- sur-rejoinder by the claimant (*i.e.*, claimant's second response)

However, the Rules have never adopted the above sequence, which (1) would offer the claimant more pleadings than the respondent, (2) would offer the claimant the first *and* last word in every case, (3) would ignore the distinction between the claimant and the respondent, and (4) would deny the respondent the final chance to "respond."
Panama is not requesting a fundamental change to the Rule; rather, it is attempting to preserve its plain meaning and spirit. To protect parity, and give proper effect to each party's role in the case, Panama proposes the following revision:

"The Parties shall file the following written submissions: (a) a memorial by the claimant; (b) a counter-memorial by the respondent; and, unless the parties agree otherwise: (c) a reply by the claimant; and (d) a rejoinder by the respondent."

[5] WP4, ¶ 81 (emphasis added).