

January 15, 2019

VIA ELECTRONIC MAIL

Meg Kinnear, Esq.
Secretary-General
International Centre for Settlement of International Disputes
1818 H St, N.W.
MSN J2-200
Washington, DC 20433

Re: Comments to Proposed Amendments to ICSID Rules

Dear Ms. Kinnear:

We are pleased to provide comments on the proposed amendments to the ICSID rules published by the ICSID Secretariat on 2 August 2018.

The enclosed comments relate to:

1. Disclosure of Third-party Funding (Rule 21);
2. Participation of Non-disputing Treaty Party (Rule 49);
3. Security for Costs (Rule 51);
4. Method of Constituting the Tribunal (Rule 22); and
5. Draft Procedural Order No. 1.

The enclosed comments represent the opinions and suggestions of Gibson, Dunn & Crutcher only, and do not represent the opinions of our clients.

We remain at your disposal to further discuss these comments.

Sincerely,

Gibson, Dunn & Crutcher

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Comments on Proposed Changes to ICSID Rules & Regulations

1. Proposed Rule 21 – Disclosure of Third-party Funding

We note that the proposed rule is limited in scope to requiring disclosure only of the existence of third-party funding and the identity of the funder. However, the proposed definition of third-party funders is overly broad as it could capture a number of entities not intended by the rule. Given that the primary aim of the rule is to avoid conflicts, it is not clear why the definition of third-party funding would need to capture: a) law firms acting on contingency; b) shareholders that ordinarily fund a company through equity investments, but are not otherwise involved in the arbitration; or c) debt from banks or multinational institutions acquired in the normal course of a company's or State's operations. Yet, it is unclear whether the definition of "third party" captures all of these possibilities.

We therefore propose amending the definition as follows:

“Third-party funding’ is the provision of funds or material support solely for the pursuit or defense of a proceeding, by a natural or juridical person that is not a known participant in the proceedings (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. [...].”

2. Proposed Rule 49 – Participation of Non-disputing Treaty Party

We suggest eliminating this proposed rule as it appears to derogate from the principle already present in ICSID Arbitration Rule 37(2) and Proposed Rule 48, which recognize that tribunals have broad discretion on whether to admit non-disputing party submissions. This discretion ought to be reserved in Rule 49 as well.

The ICSID Working Paper rightly recognizes that a number of investment treaties allow non-disputing State parties to make submissions on the question of treaty interpretation or application. However, to the extent these treaties grant State parties the right to make submissions, those rights have been the result of careful negotiations between the parties to the investment treaties. There is no generally recognized rule that permits a non-disputing treaty party to make submissions in a dispute arising from the treaty. The ICSID Convention does not provide such a right and therefore the ICSID Arbitration Rules are not the appropriate forum to create one.

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Rather, the ICSID Arbitration Rules should preserve the tribunal's discretion in making these decisions. In other words, ICSID tribunals should be able to consider the same criteria that they are required to consider when assessing applications for submissions by any other non-disputing parties, based on which the tribunal "may" (not "shall") allow that person or entity to make a submission. Similarly, the tribunal should be allowed to impose limits on the submissions of non-disputing investment treaty parties to ensure that their participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party.

3. Proposed Rule 51 – Security for Costs

We note that creating a separate rule for security for costs may suggest that it is a new form of relief, separate from provisional measures. We further note that the ICSID Convention does not provide for an additional right to security for costs apart from Article 47 on provisional measures.¹ We therefore suggest clarifying that the tribunal may award security for costs as a provisional measure. Further, we suggest clarifying that an application for security for costs must meet the threshold requirements for provisional measures pursuant to the ICSID Convention and the ICSID Arbitration Rules.

Additionally, as the ICSID Working Paper notes, only one public decision has granted an application for security for costs.² In this case, the tribunal's decision was based on a finding that the claimant (a) had a proven history of non-compliance with costs awards; (b) had acknowledged that it lacked sufficient funds to pay a costs award; and (c) was funded by an unknown third party. In contrast to the exceptional circumstances present in this case, Proposed Rule 51(3) only requires the tribunal to consider "the party's ability to comply with an adverse decision on costs and any other relevant circumstances." Given the high threshold tribunals have otherwise applied, we suggest elaborating upon and adding additional factors that the tribunal must consider in making a decision on an application for security of costs.

Moreover, the ICSID Working Paper recognizes that tribunals have generally recognized that the mere existence of third-party funding is insufficient to award security for costs.³ Given that the proposed rules also include a separate provision on the disclosure of third-party

¹ ICSID Convention Art. 47, Mar. 18, 1965, 575 U.N.T.S. 159 ("Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.").

² *RSM v. St. Lucia*, ICSID ARB/12/10, Decision on St. Lucia's Request for Security for Costs, 13 August 2014.

³ ICSID Working Paper, para. 266.

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funding, to avoid any doubt we suggest adding language that clarifies that the mere existence of a third-party funder cannot by itself justify security for costs.⁴

4. Proposed Rule 22 – Method of Constituting the Tribunal

The proposed rule establishes a deadline for the parties to advise the ICSID Secretary-General of their agreement as to the number of arbitrators and the method of their appointment. While we express support for a deadline to advise the Secretary-General of the parties' agreement, we suggest a time limit of 30 days (or, at most, 45 days) rather than 60 days.

Article 38 of the ICSID Convention authorizes the Chairman of the Administrative Tribunal to appoint the remaining arbitrators 90 days after the notice of registration of the request for arbitration has been dispatched to the Secretary-General. The deadline of 60 days in Proposed Rule 22 could result in only 30 remaining days for the parties to actually appoint arbitrators and reach agreement on the presiding member of the tribunal before triggering the 90-day backstop in the Convention. In our experience, 30 days may not always be sufficient. We therefore propose a shorter time limit to advise the Secretary-General of agreement, thereby leaving more time for the parties to actually appoint the tribunal members.

5. Draft Procedural Order No. 1 – Page Limits

We suggest adding a section on page limits for the parties to consider in the Draft Procedural Order No. 1 template provided by ICSID. The stated goals of this rules amendment process include increasing the efficiency of the proceedings and reducing costs. A section on page limits would encourage parties to consider potentially shorter pleadings, which would help achieve these goals.

⁴ *South American Silver Limited Bolivia v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, paras. 59, 83; Working Paper para. 267 (“As a result, the mere fact of TPF, without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51.”).