

Comments on the Proposed Amendments to ICSID Arbitration Rules

1. Proposed Rule 21: Disclosure of Third Party Funding

Proposal:

(1) “Third-party funding” is the agreement for the provision of funds or other material support ~~for the pursuit or defense of a proceeding, by~~ between a natural or juridical person that is not a party to the dispute (“third-party funder”), ~~to~~ and a party to the proceeding, an affiliate of that party, or a law firm representing that party to finance part or all of the cost of the pursuit or defense of a proceeding. Such funds or material support may be provided:

(a) through a donation or grant, ~~or~~

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

(c) for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled.

(2) The Tribunal has the power to examine the relevant parts of the third-party funding agreement in the context of the security for costs application against an alleged impecunious party.

~~[(3)]...~~

~~[(4)]...~~

Comment: We welcome a broad definition of “third-party funding” covering a wide range of funding models. The proposed amendment to the proposal defines third-party funding as an “agreement” between the third-party funder and a disputing party (or its legal representative). Furthermore, the added paragraph 2 highlights the importance that the terms of the funding agreement might have in the context of a request for security for costs. Paragraph 1(c) is intended to cover arrangements where the third-party funder is entitled to a share or a contingent payment from the proceeds or potential proceeds of the proceedings not addressed by paragraph (b).

2. Proposed Rule 29: Proposal for Disqualification of Arbitrators

Proposal:

[...]

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Tribunal and within 20 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 known of the facts on which the proposal is based;

(b) the party proposing the disqualification shall file a written submission, specifying the grounds on which it is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file any comments to the proposed disqualification and provide any supporting documents ~~its response and supporting documents~~ within seven days after receipt of the written submission;

- (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 written submissions referred to in paragraph (2)(c); 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 (2)(d).
- [...]

Comment: The proposed amendment to the proposed Rule is intended to clarify the role of the “other party” who is not proposing the disqualification of the arbitrator that has been challenged by a party in accordance to Article 57 of the Convention.

3. Proposed Rule 38: Consolidation or Coordination on Consent of Parties

Proposal:

- 1) Where two or more claims have been submitted separately to arbitration to the Centre and the claims have a question of law or fact in common, and arise out of the same events or circumstances, parties to the arbitrations ~~Parties to two or more pending arbitrations administered by the Centre~~ may request, by mutual agreement, agree to consolidate or coordinate these arbitrations.
- (2) The parties seeking the consolidation or coordination order as referred to in paragraph (1) shall provide the Secretary-General with written terms of reference, specifying the terms of consolidation or coordination to which they would consent.
- (3) The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties, unless it finds that the request is manifestly unfounded, if the consolidation or coordination requested would promote in the interest of a fair and efficient resolution of all or any claims asserted in the arbitrations.
- (4) Where applicable, and unless all the disputing parties otherwise agree, the Tribunal for the consolidated arbitration shall be comprised by three arbitrators and be established in accordance with Article 37(2)(b) of the Convention. If the Tribunal has not been constituted within [45] days after the Secretary-General receives a request made under paragraph (1), the Chairman shall appoint the arbitrators not yet appointed in accordance with Article 38 of the Convention.
- (5) A claimant that has submitted a claim to arbitration to the Centre and has not been named in the request made under paragraph (1) may make a written request to the tribunal that it be included in any consolidation or coordination order, and shall deliver a copy of its request to the Secretary-General. The request shall specify:
 - (a) the name and address of the claimant;
 - (b) the nature of the order sought; and
 - (c) the grounds on which the order is sought.
- (6) At the request of a disputing party, the consolidating Tribunal may take such measures as it sees fit in order to preserve the confidential or protected information of that disputing party in relation to other disputing parties. Those measures may include the submission of redacted versions of documents containing confidential or protected information to the other parties or arrangements to hold parts of the hearing in private.

Comment: The proposed Rule 38 covers consolidation or coordination by consent of the parties to the dispute. Amendments to paragraph 1 remark the fact that the request refers to pending claims that have a question of law or fact in common, and arise out of the same

events or circumstances. Paragraph 3 highlights the power of the Secretary-General to reject the request out of hand if it turns to be manifestly unfunded. The proposed paragraph 4 addresses the composition of the tribunal for the consolidated arbitration. Furthermore, paragraph 5 includes the presence of another claimant that has not been included in the request for consolidation or coordination of claims. This is in line with states' practice in modern investment treaties. Finally, paragraph 6 recognizes legitimate claims to preserve confidential information of one party in relation to other parties.

4. Proposed Rule 40: Tribunal Order to Produce Documents or Other Evidence

Proposal:

(1) The Tribunal shall decide any dispute arising out of a party's request for production of documents or other evidence. In doing so, it shall consider all relevant circumstances including the scope and timeliness of the request, the relevance of the documents and evidence requested, the time and burden of production and any objections raised by the other party.

(2) The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.

(3) The parties shall cooperate with the tribunal in the production of evidence. The Tribunal shall take formal note of the failure of a party to comply with its obligation under this paragraph and of any reasons given for such failure.

Comment: Paragraph 3 was deleted from the proposed Rule 40 (prior Rule 34(3)); however, it is a key element for persuading the parties to cooperate with the production of evidence in a more specific manner than the proposed Rule 11(4) regarding the Tribunal's and parties' general duties. Therefore, we suggest to keep the language.

5. Proposed Rule 49: Participation of Non-disputing Treaty Party

Proposal:

(1) The Tribunal shall permit, or, at the request of at least one of the disputing parties or on its own initiative, may invite, a Party to a treaty that is not a party to the dispute ("nondisputing Treaty Party") to make a written submission on the application or interpretation of a treaty at issue in the dispute. The Tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to this paragraph.

(2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 48. In determining whether to allow such submission, the Tribunal shall take into consideration the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

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

Comment: Amendments to paragraph 1 are intended to cover different circumstances in which one of the parties, or the tribunal under its own initiative, ascertains the need for having the interpretation by the non-disputing treaty parties (as author(s) of the treaty).

The second part of paragraph 1 is inspired in Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Furthermore, the proposed second phrase of paragraph 2 reaffirms the banning of diplomatic protection in accordance with Article 27 of the ICSID Convention.

6. Proposed Rule 51: Security for Costs

Proposal:

[...]

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances, including the existence of a third party funding pursuant to Rule 21. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

Comment: The proposal expressly refers to the existence of a third party funding as one of the elements to consider when providing security for costs. The second part of paragraph 3 is intended to protect the party that has been affected for an unfunded request for security for costs.