

December 28, 2018

The Secretary-General
ICSID – The World Bank Group
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By email: icsidrulcamentment@worldbank.org

Dear Secretary-General,

Comments on the Proposed New ICSID Arbitration Rules 2018

1.1 We congratulate the Secretariat on the redraft of the ICSID Convention Arbitration Rules (“**the Rules**”), which we consider balance the interests of all users of arbitration under the ICSID Convention. We applaud ICSID for its effort to make the rules more user-friendly and to make the process more effective and cost-efficient, including the provisions for expedited arbitration, which we will not address in detail. Our observations on the Rules are set out below. Our comments also apply to the equivalent rule (if any) in the redraft of the ICSID Additional Facility Arbitration Rules.

2. Rule 3 – Method of Filing

2.1 We agree with the Rules’ establishment of electronic filing as the method of filing.

3. Rule 8 – Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General

3.1 We agree with the approach reflected in paragraph (3) to time limits, imposing a good-faith obligation on the Tribunal to meet established limits. We agree with ICSID that the complexity of investor-State disputes makes it

inappropriate to penalize Tribunals for failing to meet time limits. The good-faith obligation appears to us to strike the right balance.

4. Rule 13 – Written Submissions and Observations

4.1 We agree with the approach reflected in paragraph (2) that would allow the claimant to have its request for arbitration treated as a memorial.

5. Rule 19 – Payment of Advances and Costs of the Proceeding

5.1 In our view, requiring reasoned cost decisions (paragraph (6)), while lengthening decisions and awards, and likely increasing the time and costs of proceedings, will provide significant benefits and therefore should be retained. We also agree with the approach reflected in paragraph (4) of providing factors to be considered in allocating costs. It is essential in our view that the Tribunal retains discretion to consider factors other than those enumerated, and our support for the inclusion of specific factors in paragraph (4) is in the context of a broader “all relevant circumstances” mandate.

6. Rule 21 – Disclosure of Third-Party Funding

6.1 Parties’ legal fees in some investment treaty arbitration claims have been funded by way of a contingency fee, i.e. counsel is entitled to a percentage of the damages awarded (in the case of the claimant’s counsel) or damages avoided (in the case of the respondent’s counsel). In part, Rule 21 states, “‘Third-party funding’ is the provision of funds or other material support ... by a natural or juridical person that is not a party to the dispute (‘third-party funder’), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided ... (b) ... in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding” (emphasis added).

6.2 We understand from ICSID’s Working Paper and presentations on the Rules that it is intended that Rule 21 will capture contingency fees, and that the purpose of requiring their disclosure is to avoid conflicts of interest. However,

some law firms and their clients may not consider themselves to be third-party funders, and may take the view that no conflict of interest could arise merely because they are working pursuant to a contingency fee. Therefore, they may (wrongly) conclude that Rule 21 is not intended to cover contingency fees.

6.3 Whether or not Rule 21 applies to contingency fees will turn in part on whether the parties' counsel are a "party" for the purpose of Rule 21. If they are a party, their contingency fees will not be caught by Rule 21. The definition of "party" in Rule 2 states it "may include, where the context so admits ... (b) an authorized representative of a party". Therefore, the term "party" in Rule 21 may include the parties' counsel "where the context so admits". The phrase "where the context so admits" is ambiguous.

6.4 We foresee that in the context of Rule 21, counsel and their clients may take the position that the parties' counsel are a "party". Therefore, they will conclude that the "material support" that is provided by the parties' counsel by way of contingency fees is not being provided by a "person that is not a party to the dispute", and in those circumstances the contingency fees do not need to be disclosed.

6.5 In order to address this issue, ICSID may wish to expressly state in Rule 21 that the parties' counsel are not a "party" for the purpose of Rule 21, and therefore make it clearer that contingency fees must be disclosed pursuant to Rule 21.

7. Rule 29 – Proposal for Disqualification of Arbitrators

7.1 We consider that three aspects of Rule 29 should be considered.

7.2 First, it could be made clearer that the proposal for disqualification referred to in Rule 29(2)(a) must include the written submission referred to in Rule 29(2)(b), and we understand that is the intention. In other words, the party proposing disqualification cannot merely make a bare request; when making the disqualification proposal it must also provide its "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”.

7.3 Second, applications for disqualification are, in some instances, complex, especially if the conduct undertaken by the arbitrator whose disqualification is proposed is not well known to the parties. A recent example of this was when the independence and impartiality of an arbitrator was challenged because he headed an international organization during the course of the arbitration proceedings which allegedly touched on the party concerned and the subject matter of the arbitration. Therefore, although we agree that time limits for the parties’ submissions in regard to disqualification should be imposed by Rule 29, we consider that there should be equality between the parties. Therefore, the respondent party should also have twenty days to file its response and supporting documents after receipt of the applicant’s written submission, as opposed to the seven days proposed under Rule 29(2)(c). Alternatively, each party should have fourteen days to file their respective submissions.

7.4 Third, we note that Rule 29(3) provides that, if the proposal to disqualify an arbitrator results in a disqualification, “either party may request that any order or decision issued by the Tribunal while the proposal was pending, be reconsidered by the reconstituted Tribunal”. We foresee that the facts leading to a disqualification may be such that it would call into question all of the Tribunal’s prior orders or decisions, not just those issued during the period that a proposal to disqualify was pending. Therefore, we consider that it would be appropriate to amend Rule 29(3) so that either party may request that *all* orders or decisions issued by the Tribunal prior to the disqualification be reconsidered by the reconstituted tribunal.

8. Rule 33 – Vacancy on the Tribunal

8.1 We note that pursuant to Rule 29(3), while an application for the disqualification of a member of the Tribunal is pending, the proceeding shall

continue unless the parties agree otherwise. However, under Rule 33(2) when there is a vacancy on the Tribunal the proceeding is suspended from the date of notice of the vacancy until the vacancy is filled. For the reasons stated below in regard to our observations on Rule 50 (provisional measures), we foresee this as problematic in regard to a request for provisional measures that is made and needed during a period of a vacancy on the Tribunal. Therefore, we suggest that there is an express provision in Rule 33 which provides that when there is a vacancy the proceedings are not suspended for the purpose of an application for provisional measures (we do not consider that Articles 37 and 56 to 58 of the Convention prevent such a provision). We note that pursuant to Rule 50(6), when the vacancy is filled the reconstituted Tribunal could modify or revoke the provisional measures on its own initiative or upon a party's request, thereby allaying any concerns that may arise in regard to provisional measures ordered by a truncated tribunal.

9. Rule 38 – Consolidation or Coordination on Consent of Parties

9.1 First, we support the inclusion of a coordination provision as well as a consolidation option. We also agree with ICSID that mandatory consolidation is not desirable. While some may argue that such consolidation promotes efficiency and consistency, we believe that reliance on party consent is a better approach. It is not only States that may object to consolidation but claimants whose interests are significantly different. Smaller claimants may, for instance, fear that their case will be given short shrift by a consolidated tribunal in favor of the claims of larger claimants. Moreover, mandatory consolidation that turns on the type of criteria identified in Rule 38BIS sets a relatively low bar and can result in parties with significantly different interests and circumstances being forced into a joint proceeding. While we are therefore not in favor of mandatory consolidation, we would, however, support provisions that encourage parties involved in cases arising out of the same circumstances to explore coordination or even, depending on the degree of convergence, consolidation.

10. Rules 44-45 – Publication of Awards, Decisions on Annulment, Orders and Decisions

10.1 We support the deemed consent approach reflected in Rule 44(2), recognizing the constraints imposed by the ICSID Convention, as well as the approach reflected in Rule 45.

11. Rules 48-49 – Submission of Non-Disputing Parties and Participation of Non-Disputing Treaty Party

11.1 We agree with the proposed new criteria for non-disputing party submissions found in Rule 48(2)(d)-(e). We also support Rules 48(4)(c), 48(5) and 49.

12. Rule 50 – Provisional Measures

12.1 Provisional measures have heightened importance where there is an ongoing relationship between the parties or there is close proximity between them, for example when the investor is still *in situ*. They become crucial where there is a risk to life and limb. In such instances, the need for an urgent order (interim or otherwise) is even more acute. Therefore, it would be useful for Rule 50 to expressly provide that the Tribunal can (as some have done in the past) issue an interim order prior to the respondent filing its observations on the application for provisional measures. Rule 50(2)(d) (timetable for issuing a decision on provisional measures) is ambiguous as to whether or not this is possible. Although Rule 50(4) (provisional measures on the Tribunal’s own initiative) arguably provides the power to make an interim order, even in that situation, Rule 11(2) requires the Tribunal to “consult with the parties” prior to making such an order, thereby delaying the issue of an interim order. In the circumstances, the Tribunal’s power to issue an interim order should be clarified by way of an express provision providing that an interim order can be recommended pending a decision on provisional measures.

12.2 To prevent abusive requests for provisional measures (including an interim order), Article 50 could be amended to provide that a party applying for

provisional measures must provide full and frank disclosure, including possible factual arguments as to why the order should not be granted.

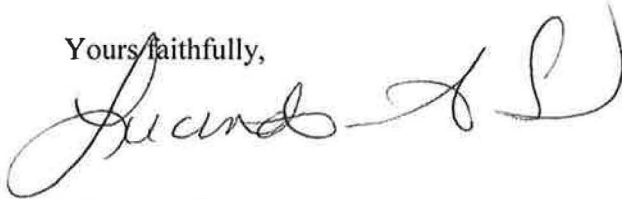
- 12.3 In addition, given the importance and urgency of provisional measures, and the fact that in practice the President of the Tribunal is usually the person dealing with such applications, we consider that it would be worthwhile to recreate Rule 17 of the ICSID Arbitration Rules of 10 April 2006. Rule 17 of those Rules provides that if the President of the Tribunal is unable to act, his or her “functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their appointment to the Tribunal”.

13. Sanctions for Breaching Orders, Decisions and the Award

- 13.1 Pursuant to Rule 51(4), if a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided, and if the proceedings are suspended for more than ninety days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding. However, under Rule 11(4), the parties are merely required to “cooperate in implementing the Tribunal’s orders and decisions”, but there are no sanctions for not cooperating, (although it is noted that pursuant to Rule 19(4), when “determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including ... (b) the parties’ conduct during the proceeding ...”).
- 13.2 It is not apparent to us as to why breaching an order for security for costs is given such elevated status. In particular, if other orders, decisions and the Award are not complied with (the latter in the context of an annulment proceeding where there is no stay on enforcement), there is no specific provision in the Rules for the suspension or discontinuance of the proceeding or other sanction beyond costs. Therefore, we consider that consideration should be given to providing for some form of sanction beyond costs when these other types of decisions, orders and Awards are breached, always ensuring that the sanction does not penalize the innocent party.

We appreciate the opportunity to comment on the proposed Rules, and would be pleased to participate in any further consultations or elaborate upon our suggestions if useful to the Secretariat as it finalizes the draft amendments.

Yours faithfully,



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