COMMENTS BY THE ARGENTINE REPUBLIC ON PROPOSALS FOR AMENDMENT OF THE ICSID RULES IN WORKING PAPER # 4[1]

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[1] This submission is made without prejudice to the comments duly made by the Argentine Republic on Working Papers #1 and #3.

PROPOSED ADMINISTRATIVE AND FINANCIAL REGULATIONS

Regulation 16: Consequences of Default in Payment

[…]

(2) The following procedure shall apply in the event of non-payment:
(a) if the amounts requested are not paid in full within ~~30~~ 120 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).

PROPOSED INSTITUTION RULES

Rule 2: Contents of the Request

[…]

(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;
[…]
(d) if a party is a juridical person:
(i) information concerning and supporting documents demonstrating that party's nationality on the date of consent;

(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 concerning and supporting documents demonstrating 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;

[…]

Commentary

In accordance with Article 36 of the ICSID Convention, the Request for Arbitration does not only serve the purpose of allowing the Secretary-General to fulfil his or her duties under paragraph (3) of that Article, which is why copy of the Request is required to be sent to the other party as provided for in paragraph (1) of said Article. Therefore, the language "With regard to the jurisdiction of the Centre", which is not included in the Institution Rules currently in force, should be deleted in draft Institution Rule 2.

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 jurisdictional purposes. 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. This is also relevant for the purposes of the last case in proposed Institution Rule 2(2)(d).

PROPOSED ICSID ARBITRATION RULES

CHAPTER II: ESTABLISHMENT OF THE TRIBUNAL

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

(1) A party shall file a written notice disclosing the name, ~~and~~ address and, where applicable, shareholding, corporate structure and ultimate beneficial owners, of any non-party from which the party, directly or indirectly, has received 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 proceeding ("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 / disclose the nature of the 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.

(3~~4~~) The Secretary-General shall transmit the notice of third-party funding and any notification of changes to the information in 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.

(45) The Tribunal may order disclosure of further information regarding the funding agreement and the non-party providing funding pursuant to Rule 36(3) if it deems it necessary at any stage of the proceeding.

(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) the funded party must retain its own independent counsel;
(c) 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;
(d) 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;
(e) the third-party funder shall be obliged to follow the same confidentiality rules that apply to all parties in the arbitration;
(f) 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;
(g) 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 5. In case of failure to comply with such obligations and principles, the Tribunal shall [suspend/discontinue the proceeding / take such failure into account in its decision on costs].

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 Arbitration Rule 14 includes the obligation for a party to disclose that it has third-party funding and the name and address 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, or at least the nature of the funding arrangement.

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

Rule 19: Acceptance of Appointment

[…]

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

[…]

(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, and promptly disclose any new professional, business or academic activities he or she intends to undertake, and any change of circumstances that may be relevant to the declaration referred to in paragraph (3)(b).

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 in the form published by the Centre and the proposed Code of Conduct. The minimum content of the Declaration should be provided for in the Arbitration Rules. In addition, it is still unclear how the Code of Conduct will be implemented.

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 t~~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;

[…]

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*[2] and reaffirmed in subsequent decisions on disqualification. This should be clarified in proposed Arbitration 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."[3]

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.

Chapter V: Evidence

Rule 37: Disputes Arising from Requests for Production of Documents

In deciding a dispute arising out of a party's objection to the other party's request for production of documents, the Tribunal shall consider all relevant circumstances including without limitation:
(a) the allocation of the burden of proof with respect to the issue related to the documents requested;
(b) the efforts the requesting party could have reasonably made to obtain the requested evidence through its own means;
(ca) the scope and timeliness of the request;
(bd) the relevance and materiality of the documents requested;
(ec) the burden of production; and
(fd) 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.

[2] *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.
[3] *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.

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.

[…]

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. Written witness statements should not be filed by a party after it has made its relevant written submission, unless both parties agree otherwise.

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 the budgets, and any other relevant information for the appointment of the expert. When deciding whether to appoint and expert and who should be selected for that position, the Tribunal shall endeavour not to unnecessarily increase the cost of the proceeding.

[…]

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

(7~~6~~) 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.

CHAPTER VI: SPECIAL PROCEDURES

Rule 42: Bifurcation

[…]

(3) The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 44:
(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~~c~~) the Tribunal shall fix time limits for written or oral submissions on the request for bifurcation, as required;
(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.

[…]

Commentary

The proceeding should be suspended pending a decision on bifurcation, unless the parties agree otherwise. The suspension enables the Tribunal to deal with the request for bifurcation without the risk of exceeding the time limit for a subsequent filing. It also means that the cost of preparing such filing could potentially be avoided, if the proceeding is bifurcated and the case is dismissed based on the question addressed in a separated phase of the proceeding.

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. Although it has been clarified that the chapeau suggests the circumstances are not exhaustive,[4] it would be convenient to make it clear in the proposed rule with language such as "without limitation".

Rule 44: Preliminary Objections with a Request for bifurcation

[…]

(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;

[4] WP # 3, ¶ 110.

(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 that 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 58(1)(b); and
(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

[…]

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.[5] Although it has been clarified that the language "all relevant circumstances, including…" indicates that the circumstances listed are not exhaustive,[6] it would be convenient to make it clear in the proposed rule with language such as "without limitation".

If the Tribunal decides to address the preliminary objections in a separate phase of the proceeding, the proceeding on the merits should be suspended pending a decision on preliminary objections. If the Tribunal considers there are special circumstances that do not justify suspension, then it should join the objections to the merits.

Rule 47: Provisional Measures

[…]

(2) The following procedure shall apply:
(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

[5] *See MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order Nº 2 Decision on Bifurcation, 21 December 2018, ¶ 7 ("Reference is made to ICSID's Commentary on its Arbitration Rules, which considers relevant considerations to include (1) the merits of the objection; (2) whether bifurcation would materially reduce time and costs; and (3) whether jurisdiction and merits are so intertwined as to make bifurcation impractical. **These considerations are not exhaustive**.") (emphasis added).
[6] WP # 4, ¶ 97.

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.

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

(~~c~~d) 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

(~~d~~e) 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.

[…]

(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.

[…]

Commentary

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. Although it has been clarified that "irreparable harm" and "harm not adequately reparable by an award on damages" are part of the analysis of necessity,[7] it would be convenient to make it clear in the proposed rule with specific language addressing this issue.

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.

[7] WP # 4, ¶ 103.

Rule 49: Default

[…]

(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 Arbitration Rule 48 should provide that in case of default the Tribunal must also verify that the submissions made are well-funded in fact an in law.

CHAPTER VII: COSTS

Rule 50: 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. Although it has been clarified that the reasonableness of the costs is assessed by the Tribunal,[8] it would be convenient to make it clear in the proposed rule with specific language addressing this issue.

Rule 51: 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 at 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

[8] WP # 2, ¶ 333.

the costs, ask the Tribunal to request additional information, and make observations, if any.

Rule 52: 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 part of it~~ 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 and complied with these Rules and orders and decisions of the Tribunal;
(c) the complexity of the issues; and
(d) the reasonableness of the costs claimed.

(2) ~~The Tribunal shall award the party prevailing on an objection made pursuant to Rule 41 its costs of submitting or opposing the objection, unless the circumstances justify a different allocation of costs in accordance with paragraph (1).~~ In exercising its discretion under paragraph 1 in a case where it has found a claim to be manifestly without legal merit pursuant to Rule 41, the Tribunal shall award all of the costs related to the claims dismissed under Rule 41 to the party which made the objection, unless the Tribunal determines that there are special circumstances which justify a different allocation of costs.

[…]

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. Although it has been clarified that the language proposed in proposed Arbitration Rule 52(1)(a) "includes the outcome of discrete claims and defences and could also involve an assessment of the relative success of the parties with regard to *e.g.* the compensation awarded,"[9] it would be convenient to make it clear in the proposed rule with specific language addressing this issue.

In relation to paragraph 2, a different language is hereby suggested. The threshold to succeed on an objection that a claim is manifestly without legal merit is extremely high. In the face of such a high standard, imposing a presumption of costs if an objection is unsuccessful may limit the rules' effectiveness as a procedure to limit frivolous or unmeritorious claims. A claim could be without merit, and ultimately dismissed, even

[9] WP # 4, ¶ 107.

though the Tribunal might have found early on that it was not "manifestly" without merit. As a result, such a provision could have the effect of deterring meritorious objections under Rule 41. On the other hand, given the high standard, it makes sense to impose a presumption if a claim is determined by a Tribunal to be, in fact, manifestly without legal merit. If a party objecting can meet the high standard to get a claim dismissed, then this is the sort of frivolous claim that should never have been brought, and costs must be presumed to be appropriate.

Rule 53: Security for Costs

[…]

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including without limitation:
(a) that party's ability to comply with an adverse decision on costs;
(b) that 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;
(d) the conduct of the parties; and
(e) the existence of third-party funding.

Alternative to the above:
(4) The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3). including ~~T~~the existence of third-party funding ~~may form part of such evidence but is not by itself sufficient to justify an order for security for costs~~.

[…]

Commentary

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. Proposed language in WP # 4 does not adequately reflect that third-party funding should be a circumstance for the Tribunal to consider in determining whether to order a party to provide security for costs.

Alternatively, it should be clarified that the Tribunal shall consider all evidence relating to adduced in relation to the circumstances in paragraph (3), including the existence of third-party funding, without the qualification that this is not by itself sufficient to justify an order for security for costs, as this will depend on the circumstances of each case.

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

Rule 68: 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 ~~or oral~~ 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. The Tribunal may, after

consulting with the parties, invite a non-disputing Treaty Party to make such a submission.

[…]

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 Arbitration Rule 67, 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.

The submission of a non-disputing Treaty Party should only be done in writing.

CHAPTER XI: INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

Rule 72: Procedure Applicable to Interpretation, Revision and Annulment

[…]

(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~~.

[…]

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. Interpretation, revision and annulment proceedings are not the same as the original arbitration proceeding, and procedural agreements applicable to the latter may not be appropriate for the former.

Rule 73: Stay of Enforcement of the Award

[…]

(3) The following procedure shall apply:
(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~~d~~) 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;~~
(~~i~~i) the last written submission on the request; or

(~~i~~ii) 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~~6) 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.

[…]

Commentary

Only the Tribunal or Committee has authority to decide on a request for stay of enforcement of the award pending a decision on interpretation, revision or annulment. If the applicant for revision for revision or annulment requests a stay of enforcement in the application, enforcement shall be stayed provisionally until the Tribunal or Committee rules on such request, pursuant to Articles 51 and 52 of the ICSID Convention. Therefore, it is for the Tribunal or Committee to fix time limits for submissions on stay of enforcement, not the Secretary-General. Consequently, 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.[10] However, the negotiators of the Convention specifically refused to confer these powers upon an annulment committee.[11] Annulment committees have considered that conditioning a stay of enforcement of an award on the provision of security would be contrary to the ICSID Convention.[12]

[10] HISTORY OF THE ICSID CONVENTION, vol. I, p. 238 (1968).
[11] HISTORY OF THE ICSID CONVENTION, vol. II-2, p. 856 (1968); *see also Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Republic of Guatemala's Request for the Continuation of the Stay of Enforcement of the Award, 19 December 2014, ¶¶ 2(g), 30-36.
[12] *See, e.g., Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶¶ 33-35; *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010, ¶ 34; *El Paso Energy International Company v. the Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Argentina's Request for Stay of Enforcement of the Award, 14 November 2012, ¶¶ 55-60; *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Respondent Request for a Continued Stay of Enforcement of the Award, 18 October 2018, ¶ 51.

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.

Rule 74: Resubmission of Dispute after an Annulment

[…]

(4) If the original Award was annulled in part, the new Tribunal shall not reconsider any portion of the Award that was not annulled. It may, however, stay the enforcement of the unannulled portion of the Award until the date its own Award is rendered.

[…]

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 Arbitration Rule 74(4).

CHAPTER XII: EXPEDITED ARBITRATION[13]

Rule 75: 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, in accordance with Arbitration Rule 1(2) and, upon the request of a party, the Tribunal may make necessary modifications to the expedited arbitration of this Chapter if the circumstances so require.

[…]

Commentary

It should be made clear that the parties are be allowed to jointly amend the expedited arbitration rules, in accordance with Arbitration Rule 1(2), and, at the request of a party,

[13] Please see the comments of the Argentine Republic on Working Paper #3 for further details on its position regarding expedited arbitration, *available at* https://icsid.worldbank.org/en/amendments/Documents/State%20Input/WP%203%20Comments%20-%20Argentina_DD.pdf.

the Tribunal should be allowed to make necessary modifications to the expedited arbitration if the circumstances so require.

Rule 83: The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

The consent of the parties given pursuant to Rule 75 shall not apply to a supplementary decision or rectification. The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 61 within 30 days after the last written or oral submission on the request if the parties to the arbitration consent to expedite the supplementary or rectification proceedings.

Commentary

The consent of the parties to expedited arbitration should only cover the original arbitration proceeding and should not extend to post-award remedies, unless the parties to the arbitration consent to expedite the post-award remedies proceedings. While expedited rules should be available for post-award remedies, it should not be assumed that the parties wish to expedite the full case by consenting to expedited arbitration in the original arbitration proceeding.

Rule 84: The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration

(1) The consent of the parties given pursuant to Rule 75 shall not apply to interpretation, revision or annulment of an Award rendered in an expedited arbitration. 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, if the parties to the arbitration consent to expedite the interpretation, revision or annulment proceedings:

[…]

Commentary

The consent of the parties to expedited arbitration should only cover the original arbitration proceeding and should not extend to post-award remedies, unless the parties to the arbitration consent to expedite the post-award remedies proceedings. While expedited rules should be available for post-award remedies, it should not be assumed that the parties wish to expedite the full case by consenting to expedited arbitration in the original arbitration proceeding.