

Comments on the Proposed Amendments to the ICSID Rules Submitted by China

China welcomes the initiative of the ICSID to amend the ICSID Rules and solicit opinions from the public. China hereby proposes the following comments on the draft ICSID Rules amendments, without prejudice to its right to further revise, supplement or withdraw such comments, or to provide additional comments in the course of such amendments.

Unless otherwise noted, all rules referenced in the comments are those rules stipulated in the ICSID Arbitration Rules or Conciliation Rules.

I. Comments and Proposals for the ICSID Arbitration Rules (AR)

1. On Treaty interpretation

To avoid erroneous or manifestly inappropriate interpretation of treaties, which may affect the correctness and predictability of rules of treaties, China suggests that the AR add a requirement that the rules as codified in Article 31 and 32 of the Vienna Convention on the Law of Treaties shall be adopted by the tribunal in treaty interpretation.

2. On the issue of conflict of interest of arbitrators

Given that the issue possible conflict of interests has been a common concern of many members, China proposes that party representatives who have made manifestly inappropriate interpretation of legal issues or claims in an investment dispute shall not be appointed as arbitrator in other investment disputes involving the same respondent and the same legal issues or claims as in the previous dispute.

3. On Request for Arbitration and written submissions

1) China noticed that Rule 13(1) allows for only one round of written submissions by the Parties, unless they agree otherwise.

Considering that investment disputes may involve complex facts and legal disputes, and more importantly, some generally applicable government measures relating to public interests, China believes it is necessary to provide

adequate procedural rights for disputing parties. It is therefore suggested that the parties shall be allowed to provide two rounds of written submissions; or if the parties so agree, they may choose to file only one round of written submissions.

2) China noticed that Rule 13(2) stipulates that the requesting party may elect to have the Request for Arbitration considered as the memorial, and does not agree with such proposal. It will not promote a fair and efficient resolution of the Parties' dispute. Since the formal requirements on a Request for Arbitration under Article 36 of the Convention are less stringent than the requirements on the contents of the memorial, the unconditional right to treat the Request for Arbitration as the memorial may be used by the requesting party to deliberately "hold-back" and not disclose all necessary information of the facts, law and arguments relied upon, forcing the respondent to submit its counter-memorial without the knowledge of the full picture of a pleaded case. This would turn the second round of submissions into the real memorial and counter-memorial, which is neither efficient, nor fair to the respondent state.

China therefore suggests that the Request for Arbitration be separated from the first memorial.

3) China noticed that the amendment does not clearly define the scope of claims as in the Request for Arbitration, the Memorial and the Reply.

Considering that new claims raised in the Memorial and the Reply will impose an undue and unfair burden to the respondent, China proposes that claimant shall set out its request for relief in full, including its claims, legal basis thereof and relief sought, in the Request for Arbitration. Claims not raised in the Request for Arbitration shall not be allowed in the Memorial and the Reply, and the tribunal shall not have jurisdiction over such claims.

4. On parallel proceedings.

Many BITs include "Forks in the Road" clause, and the claimant is likely to have already submitted the investment disputes to other forums, including commencing domestic judicial or administrative proceedings, or other dispute settlement procedures. As such, China believes that requiring the claimant to notify to the tribunal such proceedings will greatly reduce the burdens of both parties and the tribunal, and improve the efficiency of the arbitration.

China therefore proposes that a provision be added in Rule 13 that the claimant shall disclose any administrative, judicial, arbitration proceedings or other dispute settlement proceedings if they concern the same disputed matter. Such disclosure shall be notified to the Secretariat and the respondent upon registration of the Request for Arbitration, or if such other proceedings are initiated after registration of the Request for arbitration, notified to the Secretariat, the respondent and the tribunal (if applicable) within 15 days from the date on which the other proceedings are initiated.

5. On request for bifurcation.

Given the fact that the respondent would often raise request for bifurcation, especially based on personal jurisdiction objections or temporal jurisdiction objections, addressing such objections as a preliminary issue would greatly increase the efficiency of arbitration.

China therefore proposes that with regard to Rule 36(3) and 37(4), the tribunal shall be encouraged to allow for bifurcation in principle, unless the jurisdiction objections relied upon for the request for bifurcation are manifestly unfounded or closely linked to the merits of the case. In particular, when the respondent raises personal jurisdiction objections or temporal jurisdiction objections and requests for bifurcation, such bifurcation shall be allowed by the tribunal.

6. On third party funding.

1) According to Rule 19(2), the costs of the proceeding include the legal fees and expenses of the parties, but it does not clarify whether such fees and expenses would include those obtained by a party from the third party funder.

China therefore proposes that it shall be clarified that such fees and expenses do not include those obtained by a party from the third party funder, so that the party receiving the funding support may not be awarded compensation for the fees and expenses covered by the funding.

2) On disclosure of third party funding.

Considering the potential influence of third party funding on the fairness of arbitration, China proposes to increase transparency of third party funding, and the consequences for failure of disclosure shall be clarified so as to ensure compliance:

First, the party receiving the funding shall have a continuing obligation to disclose any changes to the funding, including after the tribunal is constituted or its members are replaced (if any) , so that the party shall discuss with the funder to disclose the relationship between the funder and the members of the tribunal (if any).

Second, to avoid potential conflict of interests between arbitrator and the funder due to third party funding, apart from those information as required in Rule 21(2), other information of the funder shall also be disclosed, such as the contents of the funding contract or arrangement, nationality and equity structure of the funder, whether there is an affiliation or other relation between the funder and the party receiving the funding, the ultimate controlling entity or person of the funder and its interest with regard to the outcome of the arbitration, etc.

Third, the party receiving the funding may not refuse to disclose the above mentioned information on the excuse that such information are business confidential information.

Fourth, legal consequence for failure of disclosure shall also be clarified. For instance, failure of disclosure may result in suspension of the proceeding, or the party receiving the funding shall bear the amount of cost of proceeding equal to the funding it has received, or other appropriate amount.

3) The current definition of third party fund as in rule 21(1) is still relatively vague, which may be circumvented so that the effectiveness of such requirement is affected. China therefore proposes the definition as follows:

“Third Party funding” means any funding, including financial and other material support, provided by a natural or juridical person who is not a disputing party but who enters into a funding arrangement in order to bear directly or indirectly part or all of the cost of the proceedings in return for a premium or in exchange for reimbursement wholly or partially dependent on the outcome of the dispute or in the form of a donation or grant.

7. Protection of Confidential Information

As the investment disputes may involve information of national secrets relating to government measures under dispute, the disclosure of which the respondent considers contrary to its essential security. Such information shall be protected

from disclosure.

China therefore proposes to add the following rule: The respondent shall not be required to disclose information involving national secrets, the disclosure of which the respondent considers contrary to its essential security. The tribunal may not draw adverse inference based on the fact that such information is not disclosed by the respondent.

8. On consolidation.

China noticed that Rule 38BIS of the Working Paper-Consolidation by Order stipulates mandatory consolidation. China proposes that consolidation shall be based on the parties' consent, given the fact that disputes involving multiple parties may give rise to complex facts and legal issues (such as standing of the claimants based on different treaties or the different procedural requirements in multiple treaties). China therefore believes it more appropriate to have a non-binding guidance.

II. Comments and Proposals for the ICSID Conciliation Rules (CR)

Rule 28 stipulates that each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views. Considering the fact that the respondent is often at a disadvantaged position for lack of information of the disputed issue at the initial stage of the proceeding, it will be difficult for the respondent to submit such statement simultaneously with the claimant.

China therefore proposes that the respondent is allowed to submit such statement a certain period after it receives the submission by the claimant.