

## **ICSID Rules Amendment Process**

### **Comments to the proposed amendments to the ICSID Rules** **submitted on behalf of the Hellenic Republic**

Hellenic Republic welcomes the current process to amend ICSID's rules and procedures and make the process increasingly time and cost effective.

In light of ICSID's working paper proposals for ICSID Rules Amendment (issue on August 2, 2018), please find below Hellenic Republic's comments on the Proposal for Amendment of the ICSID Rules. This, of course, is without prejudice to HR's right to make subsequent modifications to these proposals and to complement its proposals at a later stage, including by modifying or supplementing all, or any part, at any time.

Kindly consider them in addition to the official comments submitted on behalf of the European Union.

#### **I. Institution Rules**

**1. Rule 1 The Request**<< (2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute>>.

**Consider to set a limit to the maximum number of claimants with the same request. The same factual and legal basis should be required.**

#### **2. Rule 3 Recommended Additional Information**

<<It is recommended that the Request also contain :(a) an estimate of the amount of pecuniary compensation sought, if any;(b) a proposal concerning the number and method of appointment of arbitrators or conciliators;(c) the proposed procedural language(s);(d) any other procedural proposals; and(e) any procedural agreements reached by the parties>>.

Please find below our proposed modification: **Claimant in its request has to contain the grounds establishing the cause of the action and an unambiguous specification of the relief requested. Claimant must make a clear and unambiguous report of the facts which according to the substantive treaty or contract support the action, an exact description of the object in litigation and a certain relief.**

**3. Rule 6 Review and Registration of the Request**<< (2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal>>.

Please find below our proposed modification: (2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal. **The Secretary-General should promptly notify also the Union for a request against Union member-States.**

## **II. Arbitration Rules**

### *Chapter II Conduct of the Proceeding*

**4. Rule 2 Meaning of Party and Party Representation** Rule should include the obligation for a new representative to submit a power of attorney without delay or at the latest upon submission of documents.

**5. Rule 3 Method of Filing** <<(2) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the written submissions to which they relate, within the time limit fixed to file such written submissions.(3) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Tribunal may require a fuller extract or a complete version of the document.>>

Please find below our proposed modification: **All** supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the written submissions to which they relate, within the time limit fixed to file such written submissions.(3) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Tribunal may **of its own motion or at the request of a party** require a fuller extract or a complete version of the document.

### **Rule 8 – Time Limits Specified By The Convention and these Rules or Fixed by the Secretary-General**

**In the event that the counterparty does not agree, a unilateral extension of time should be provided for. The Tribunal should be authorized to decide upon on a justified request.**

**6. Rule 11 General Duties**<<(1) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.(2) The Tribunal shall consult with the parties prior to making an order or decision authorized by these

Rules to be made by a Tribunal on its own initiative. (3) The Tribunal and the parties shall conduct the proceeding in an expeditious and cost effective manner.(4) The parties shall cooperate in implementing the Tribunal's orders and decisions>>.

Rule 12 Orders, Decisions and Agreements<<(1) The Tribunal shall make the orders and decisions required for the conduct of the proceeding.(2) Orders and decisions may be taken by any appropriate means of communication and may be signed by the President on behalf of the Tribunal, unless the parties agree otherwise.(3) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it conforms with the Convention and the Administrative and Financial Regulations>>.

Rule 14 Case Management Conference <<With a view to expediting the proceeding, the Tribunal may convene a case management conference with the parties at any time to:(a) identify uncontested facts;(b) narrow the issues in dispute; and(c) address any other procedural or substantive issue related to the resolution of the dispute>>.

Consider: Tribunal to make a "List of the Questions to Be Resolved" (which will not repeat the claims and defenses of the parties, but will be limited to the very list of the issues which the Arbitral Tribunal deems to have to decide), the claims / assertions that need to be proved and require oral hearing. Tribunal shall determine the issues that require an expert opinion. Tribunal shall make Limitations on document production.

7.Rule 13Written Submissions and Observations<<(1) The parties shall file the following written submissions, with any supporting documents, within the time limits fixed by the Tribunal:..... (3) A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments, and the request for relief. A reply and rejoinder shall be limited to responding to the previous written submission.....>>.

Please find below our proposed modification: The parties shall file the following written submissions, with **all** supporting documents, within the time limits fixed by the Tribunal:..... (3) A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the

memorial, arguments, and the request for relief. A reply and rejoinder shall be limited to responding to the previous written submission. **The introduction of new facts or arguments that are not responsive to the previous pleading would need approval by the other party or the Tribunal.**

**To ensure that States have the adequate due process right to preview a claimant's case before a hearing and to respond to the allegations against them, and in light of the proposal to allow a Request for arbitration to be considered as the memorial (AR 13(2)), consider:**

**Making the submission of a reply and rejoinder the default procedure, with the option to limit submissions to a memorial and counter-memorial if the parties so agree or the Tribunal finds it necessary. Proposed Amended Arbitration Rule 13, as currently drafted, could result in a scenario whereby a respondent would attend a hearing having only previewed the claimant's arguments as set forth in the Request for arbitration.**

**8.Rule 16 Deliberations**<< (1) The deliberations of the Tribunal shall take place in private and remain confidential. (2) The Tribunal may deliberate at any place it considers convenient. (3) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise. (4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.

**To improve the efficiency of the proceedings and to determine early on uncontested facts and legal issues, consider:**

**Providing for mandatory deliberations following the first round of memorials. Such deliberations would facilitate the determination and settlement of uncontested claims, and would allow the parties to focus their attention on the most sensitive issues to be discussed later on, either in the second round of written submissions or at the hearing.**

**9.Rule 18 Decisions Taken by Majority Vote** <<The Tribunal shall take decisions by a majority of the votes of all its members. Abstention shall count as a negative vote>>.

Please find below our proposed modification: The Tribunal shall take decisions by a majority of the votes of all its members. **Tribunal members should deliberate and vote on all matters before the Tribunal.** The participation of all members of the Tribunal shall be required at the first session, hearings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.

**10. Rule 19 Payment of Advances and Costs of the Proceeding** (3) The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties. **However these costs should in no case exceed the arbitrators' fees.**

*Chapter III Constitution of the Tribunal*

**11. Rule 21 Disclosure of Third-party Funding** <<(1) “Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, 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:(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. (2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration. (3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.

Please find below our proposed modification: **A party shall file a written notice disclosing the whole TPF arrangement. Tribunal should have the power to examine the accuracy of the information communicated at each stage of the procedure. Tribunal should have the power to order the disclosure of the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.**

**The Tribunal should provide a signed declaration in the form published by the Centre, addressing matters including the arbitrator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.**

**Consider to define specific consequences of each violation.**

**Jurisdiction of the Centre will be judged on the basis of nationality of TPF?**

**It should be made clear whether a law firm whose “remuneration or reimbursement wholly or partially depend[s] on the outcome of the proceeding” is a third-party funder.**

12.Rule 23 – Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of The Convention & Rule 24 – Assistance of the Secretary-General with Appointment

It may be considered setting out a specified default procedure for appointing arbitrators.

Chapter IV Disqualification of Arbitrators and Vacancies

Chapter V Initial Procedures

13.Rule 34 First Session .....(4) Before the first session, the Tribunal shall circulate an agenda to the parties and invite their views on procedural matters, including:(a) the applicable arbitration rules;~~(b) the number of members required to constitute a quorum of the Tribunal;.....~~

14.Rule 35 Manifest Lack of Legal Merit<<..2) The following procedure shall apply:(a) a party shall file a written submission no later than 30 days after the constitution of the Tribunal, specifying the grounds on which the objection is based, and including a statement of the relevant facts, law and arguments, with any supporting documents; ...(4) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding >>.

Please find below our proposed modification: 2) The following procedure shall apply:(a) a party shall file a written submission no later than 60 days after the constitution of the Tribunal, specifying the grounds on which the objection is based, and including a statement of the relevant facts, law and arguments, with any supporting documents.

That's why Claimant in his request has to contain the grounds establishing the cause of the action and an unambiguous specification of the relief requested. Claimant must make a clear and unambiguous report of the facts which according to the substantive treaty or contract support the action, an exact description of the object in litigation and a certain relief.

(4) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect.

The rule should require the claimant to pay the respondent's legal and other costs if the objection succeeds, as a deterrent to frivolous claims.

**15.Rule 35 – Manifest Lack of Legal Merit**

Consider to extending the 30 days time period to at least 60 days and authorizing the tribunal to extend the time limit and clarifying the legal test required to successfully object to a claim.

**16.Rule 37 Bifurcation**

Mandatory stay of the procedure.

To ensure that respondents have adequate time to file requests for bifurcation, consider: Extending the period to file such a request to 60 days after the filing of the memorial on the merits if the request for bifurcation relates to a preliminary objection, and providing the Tribunal with the discretion to further lengthen this period if they deem that the circumstances of the case so require, or upon a reasoned request of the parties. The proposed 30-day deadline would allow respondents limited time to analyze the memorial on the merits in order to determine preliminary objections that may lend themselves to bifurcation, especially if the claimant deems its Request for arbitration to be its memorial pursuant to Proposed Amended Rule 13(2), and such Request is short and accompanied by little supporting evidence.

**Chapter VI Evidence**

**17.Rule 39 Evidence: General Principle**<<The Tribunal shall determine the admissibility and probative value of the evidence>>.

The Tribunal shall determine the claims / assertions that need to be proved. Each party should prove its own claims / assertions and the other party should be entitled to submit counter-evidence.

Arbitrators should not have any jurisdiction to interpret national consumer-related laws or fundamental rights, even when the interpretation of the treaty empowers them to interpret national law, or it is necessary to interpret national law in order to understand the treaty. In such cases recourse to the courts of appeal or the supreme court of the national judicial systems should be mandatory.

**18.Rule 45-46 Publication of Orders and Decisions**

A. To promote consistency in the publication of awards, orders, and decisions, consider: Harmonizing the various regimes of publication of arbitral awards and of other decisions and orders issued by Tribunals. Proposed Amended Arbitration Rule 45 provides for the publication of “orders” and “decisions” within 60 days after their issuance, with any redactions agreed to by the parties, but without requiring party consent. On the other hand, Proposed Amended Arbitration Rule 44 provides for

publication of awards only with party consent. This discrepancy opens the door to 3 inconsistent treatment of awards, decisions, and orders, whereby certain substantive decisions of Tribunals will be automatically published (such as decisions on preliminary objections and bifurcation), while others would escape public scrutiny. To avoid such inconsistency, consideration should be given to aligning the various regimes of publication of decisions, orders and awards.

B. It should be made clear that all published documents are treated in accordance with national laws, regulations and needs on confidentiality. Appropriate protection of confidential information should be ensured.

**20.**Rule 49 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 submission on the application or interpretation of a treaty at issue in the dispute>>.

Please find below our proposed modification: 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 submission on the application or interpretation of a treaty at issue in the dispute. **The supreme court of the national judicial systems should interpret national related laws or fundamental rights.**

#### *Chapter VIII Special Procedures*

**21.**Rule 52 Ancillary Claims<<(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counter-claim (“ancillary claim”)>>.

Please find below our proposed modification: Unless the parties agree otherwise, a party may **not** file an incidental or additional claim or a counter-claim (“ancillary claim”).

#### Rule 59 – Timing of the Award

**Consider to strengthen the Secretary-General’s role in overseeing compliance with the time limits.**

#### *Chapter IX Suspension and Discontinuance*

**22** Rule 58 Discontinuance for Failure to Pay Fail to make payments after **180 days of the notice** .

#### *Chapter X The Award*

#### **23.**Rule 62 Supplementary Decision and Rectification

..<<(2) A party requesting a supplementary decision on, or the rectification of, an Award

pursuant to Article 49(2) of the Convention shall file the request with the Secretary General within 45 days after the Award was rendered and pay the lodging fee published in the schedule of fees>>.

Please find below our proposed modification : A party requesting a supplementary decision on, or the rectification of, an Award pursuant to Article 49(2) of the Convention shall file the request with the Secretary General within 45 days after the Award was rendered. **No lodging fee is paid if relate to arithmetical errors in the Award or omissions in the operative part of the Award, and other inadvertent errors.**

*Chapter XI Interpretation, Revision and Annulment of the Award*

**24.Rule 68R Submission of Dispute after an Annulment**

**If the original Award was annulled there should be mandatory stay of enforcement.**

**25. It is important for the respondent State that certain time periods be extended. The seven-day period to file a response to a request for disqualification under AR 29 (AF 39) is not workable for a State. The thirty-day period to request bifurcation of preliminary objections in AR 37 (AF 47) is also very tight. Same for the thirty-day period in the request for summary dismissal.**

**III. Additional Facility Rules of Procedure for Arbitration Proceedings**

**Same remarks and comments as in the Arbitration Rules.**

In addition

**26.Rule 24 Seat of Arbitration** The seat of arbitration shall be agreed on by the parties or, absent agreement, shall be determined by the Tribunal having regard to the circumstances of the proceeding and after consulting the parties. **The place of proceedings should be fixed, according to the general rule of the respondent's jurisdiction or, in the alternative, the ICSID facilities closer to the respondent state.**