

## Republic of Panama Comments on Proposed ICSID Rules Amendments

1. **Introduction.** Panama submits these comments on proposed amendments to the ICSID Rules as a follow up to its participation in the September 26-27, 2018 Consultation with Member States. Panama congratulates the Secretariat on its proposed rule for Security for Costs (AR 51). Panama writes to offer comments that it believes will strengthen the proposed rule. It also wishes to comment on the related rules on Payment of Advances and Costs of the Proceeding (AR 19), Disclosure of Third Party Funding (AR 21), and Manifest Lack of Legal Merit (AR 35). Panama reserves the right to comment further on these and any other proposed amendments as the Rules Amendment process unfolds.
2. **Security for Costs (AR 51).** Panama believes the Secretariat's proposed rule to formalize the availability of security for costs is an important step to preserve the legitimacy of ICSID in Member States. As the Secretariat's survey of compliance with cost awards shows, in 35% of the cases reported, Member States awarded costs never succeeded in collecting their full award.<sup>1</sup> These cost awards can easily run into the millions of dollars.<sup>2</sup> For the Member States unable to recover costs awarded to them in one or more cases, it is difficult to justify participating in a system in which taxpayers must bear the burden of arbitrating a claim notwithstanding a favorable costs award. Formalizing a procedure to enhance the probability that Member States will recover cost awards in their favor will strengthen ICSID as an institution.
3. To the end of reinforcing the proposed rule, Panama offers the following comments:
  - a. Panama welcomes the Secretariat's decision to create a separate rule giving Tribunals the power to order that parties provide security for costs. Panama considers the adoption of a separate procedural rule addressing security for costs appropriate given the authority of Tribunals to order costs stemming from Article 61(2) of the Convention and from their inherent powers under Article 44 of the ICSID Convention,<sup>3</sup>
  - b. We suggest that ICSID make clear that the source of authority for the proposed rule is the Tribunal's inherent power to manage the arbitration under Article 44.<sup>4</sup> Panama proposes, further, that the rule or its commentary explicitly state that the "exceptional circumstances" and "urgency" standards from the provisional

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<sup>1</sup> *Survey for ICSID Member States on Compliance With ICSID Awards* at 3-4,

<https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf>.

<sup>2</sup> As Panama noted in a 2016 memorandum to the Secretary-General of ICSID, a 2012 study of cost awards found that the average costs of a party are approximately U.S. \$4.5 million per case, and average ICSID tribunal costs are approximately U.S. \$770,000. Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9(2) *Global Arbitration Review* (March 24, 2014), <http://globalarbitrationreview.com/article/1033259/counting-the-costs-of-investment-treaty-arbitration>.

<sup>3</sup> *See Commerce Group Corporation and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Decision on El Salvador's Application for Security for Costs (Sept. 20, 2012), ¶¶40-45.

<sup>4</sup> Article 44 of the ICSID Convention provides that "if any question of procedure arises which is not covered by this Section or the [ICSID] Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

measures context do not apply<sup>5</sup> and that the application standard is as stated in this proposed rule, namely “ability to comply with an adverse decision on costs and any other relevant circumstances. Adding this clarifying language will avoid the misapprehension that the Tribunal’s power to award security for costs stems from and incorporates the standards of Article 47.<sup>6</sup>

c. Panama further applauds the Secretariat’s inclusion of the following provisions:

- (i) Language that allows Tribunals to “order” security for costs;
- (ii) The 30-day time limit for Tribunals to order security of costs after a request;
- (iii) The provision empowering Tribunals to stay proceedings if a claimant ignores its order to pay security, and
- (iv) The provision for the discontinuation of proceedings after 90 days.

Panama considers that these provisions are appropriate given the demonstrated problems associated with non-payment of costs to Member States. Panama wholeheartedly supports the inclusion of these provisions in the final rule.

d. Panama agrees with Indonesia that it is unnecessary to apply the security for costs rule to Member States.<sup>7</sup> Historically, Member States do comply with arbitral awards,<sup>8</sup> whether by payment or settlement.<sup>9</sup> Article 55 of the ICSID Convention, which preserves the immunity of sovereign assets from execution in accordance with national law, records a fundamental compromise reached by the Member States when negotiating the Convention: in exchange for allowing claimants to bring arbitral claims against sovereigns, sovereigns retain a measure of immunity from execution. Allowing claimants to request security for costs would alter the basic bargain of the Convention without the sanction of Member States. Therefore, Panama joins in Indonesia’s proposal to limit the rule to requests by Member States for security for costs.

e. Panama suggests that the rule should expressly ask Tribunal members to evaluate third-party funding as a factor in requiring security for costs. There is an

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<sup>5</sup> *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia’s Request for Security of Costs (Aug. 13, 2014), ¶¶48-50. See also AR 50 (“Provisional Measures”) (codifying the ability of tribunals to take provisional measures to conduct the arbitration).

<sup>6</sup> See ICSID Convention art. 47.

<sup>7</sup> See *Indonesia’s Position Paper for ICSID Rules Amendment* at 1 (Sept. 28, 2018), [https://icsid.worldbank.org/en/Documents/Indonesia\\_26.9.2018.pdf](https://icsid.worldbank.org/en/Documents/Indonesia_26.9.2018.pdf).

<sup>8</sup> The Secretariat’s survey of compliance with cost awards shows that of the 41 awards against Member States reported in the survey, States had complied with 35 of them, for a compliance rate of 85%. See *Survey for ICSID Member States on Compliance With ICSID Awards* at 4, <https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf>.

<sup>9</sup> See e.g., Alexandra Stevenson, *After Fourteen Years at Odds, Argentina Aims to Settle Debt with Hedge Funds*, N.Y. Times (Feb. 2, 2016), <https://www.nytimes.com/2016/02/03/business/dealbook/after-15-years-at-odds-argentina-aims-to-settle-debt-with-hedge-funds.html>.

emerging recognition in the ICSID context that third-party funding for an arbitration is one indicium of a claimant's inability to pay an adverse costs award.<sup>10</sup> Panama proposes that AR 51(3) be amended to state: "In determining whether to order a party to provide security for costs, the Tribunal shall consider whether there are reasonable grounds to believe that a party will not be able to comply with an adverse decision on costs and any other relevant circumstances, including whether the party has received third party funding and the terms thereof."

#### 4. Third-Party Funding (AR 21).

- a. Panama suggests that the proposed rule be altered to provide that, where a claimant has a third party funder, the Tribunal may require the claimant to disclose whether the funder has assumed responsibility for future costs awards and to take the situation into account when deciding whether to order security for costs. Panama considers that third party funders should fully internalize the costs of funding arbitration if they seek to reap the financial benefits of funding successful claims.<sup>11</sup> This proposed change to AR 21 should ensure that the market for third-party funding is efficient and that the availability of third-party funding does not spur frivolous arbitration that wastes time and money.

Panama therefore proposes that an additional paragraph be added to AR 21 that states: "Where the party to an arbitration has a third-party funder, the Tribunal has the authority to order the party to disclose whether the funder has assumed responsibility for adverse cost awards, and may consider the scope of the third-party funder's responsibilities in its decision whether to order security for costs."

- b. Panama further proposes that AR 21 be modified in the following ways:
  - (i) That the reference to funding by "a law firm" in paragraph 1 be amended to state "a law firm, counsel, or other advisor representing that party."
  - (ii) That the language of paragraph 1 be changed to clarify that the list in 1(a) and 1(b) is inclusive of other potential third party funding structures, rather than an exclusive list. Panama suggests that AR 21 be modified to allow a party to request that a Tribunal require the counterparty to (1) disclose any entity that falls within the Rule's definition of a "third-party

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<sup>10</sup> See *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Assenting Reasons of Gavan Griffith (Aug. 13, 2014), ¶¶10-16; see also *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision on Security for Costs (June 20, 2018) ¶¶197-99 (noting that the existence of a third-party financing agreement is relevant to awarding security for costs, in opinion ultimately finding award of costs appropriate under both ICSID and UNCITRAL rules).

<sup>11</sup> Arbitrators have identified internalization of costs as an important policy concern. See *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Assenting Reasons of Gavan Griffith (Aug. 13, 2014), ¶14 ("[T]he integrity of the BIT regimes is apt to be recalibrated in the case of a third party funder, related or unrelated, to mandate that its real exposure to costs orders which may go one way to it on success should flow the other direction on failure.").

funder” or (2) show cause why its funding arrangement does not fall within the disclosure requirement.

#### **5. Payment of Advances and Costs of the Proceedings (AR 19).**

- a. Proposed AR 19 as drafted currently gives Tribunals power to require that parties advance costs, but it does not set guidelines for Tribunals to consider when evaluating the amount and “the portion of the advances payable by each party.” Panama proposes including language in the commentary to AR 19(1) that states: “In considering whether to require one or more parties to pay costs in advance, and in setting the magnitude of that advance and the proportion of the advance that each party shall pay, the Tribunal shall consider, among other relevant factors:
- (i) The claimant’s organization (*e.g.*, as a special purpose vehicle) and ability to pay costs;
  - (ii) Whether the party has previously failed to pay the costs of an arbitration;
  - (iii) Whether the party has a history of acting in bad faith during the course of an arbitration;
  - (iv) Whether the party’s case is being financed by a third-party funder, and whether that third-party funder has assumed responsibility for adverse cost awards; and
  - (v) Whether the party has a history of filing successive and iterative claims with a purpose to prolong the arbitration, thereby inflating costs.”
- b. Panama suggests a hard rule for cost allocation where a case is dismissed for manifest lack of legal merit under Rule 35. Panama supports adding language to Rule 35(3) that states: “Where a claim is dismissed under Rule 35, all costs of the proceeding shall be allocated to the claimant.”

#### **6. Manifest Lack of Legal Merit (AR 35)**

- a. Based on Panama’s experience with judgment-proof claimants,<sup>12</sup> Panama strongly urges the Secretariat to link the running of the time period for submitting objections based on a lack of manifest legal merit to the payment of a claimant’s initial deposit rather than the constitution of the Tribunal. Panama suggests that an

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<sup>12</sup> In *Transglobal Green Energy LLC v. Panama*, ICSID Case No. ARB/13/28, Panama waited to see if a judgment-proof claimant would post its deposit and, when it finally did after a six month delay, submitted its initial objections within 30 days and before the initial sitting of the Tribunal. In that case, Panama was told that its objections were untimely because they had not been filed within 30 days of the constitution of the Tribunal, despite the lengthy delay by the claimants. See Decision on the Admissibility of Respondent’s Preliminary Objection to the Jurisdiction of the Tribunal (Mar. 17, 2015), ¶¶29, 38(1).

arbitration should not proceed if a claimant is unable or unwilling to post its initial deposit and that it is uneconomic to require a respondent to incur the expense of drafting its AR 35 objections until the claimant makes its initial deposit. Panama is aware that the purpose of Arbitration Rule 41(5), the predecessor to AR 35, as explained by ICSID's Working Paper Suggested Changes to the ICSID Rules and Regulations is to permit a Tribunal "at an early stage of the proceeding to be asked on an expedited basis to dismiss all or part of the claim on the merits." Counting from the deposit of claimant's advance will still be early in the proceedings and will hardly lengthen proceedings already lengthened by a claimant's own behavior.

- b. Under Panama's proposal, objections for lack of manifest legal merit would be due "no later than 30 days after the Claimant posts its initial deposit under Rule 19," rather than "no later than 30 days after the constitution of the Tribunal," as AR 35(2)(a) currently provides.