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Commentary on ICSID's New Rule Proposals by Cherie Blair CBE QC and Sophia Louw

Introduction

In August this year, the International Centre for Settlement of Investment Disputes (“**ICSID**”) published a new set of proposals that would see amendments and simplifications to its Rules. The proposed amendments were anticipated for a while, with a number of practitioners suggesting topics and potential rule amendments between 2016 and 2018.

Below, we consider three of these proposals in more detail. Within the investor-State arbitration framework, transparency, security for costs and disqualification of arbitrators are contentious matters and have received considerable attention over the past few years. As such, ICSID's engagement with these topics indicates a positive step for the development and legitimacy of Investment Arbitration.

Transparency

The transparency regime has been a topic of discussion since the advent of investor-State arbitration. Historically arbitration has been confidential, but in recent years there has been a global trend in favour of adopting transparency specifically in investor-State arbitration. The very presence of a State in contentious proceedings raises a public interest that is not, arguably, present in traditional commercial arbitrations. The potentially harmful impact of an award of damages against a State as well as the potential allegations of government misconduct justify why investor-State arbitration proceedings are subject to particular public scrutiny.

At its core, a conflict exists between a private party's desire to keep their sensitive business information confidential, and the demands of civil society to have an open dispute settlement process. The UNCITRAL Transparency Rules and the Mauritius Convention on Transparency were created in direct response to these concerns, recognising that legitimate public interest exists in the conduct of investor-State arbitrations.

In 2006, ICSID addressed the concern for more transparency and introduced transparency-enhancing procedures such as Arbitration Rule 44, which currently allows for the publication of Convention Awards with consent of the parties. In addition, parties can agree to use the UNCITRAL Transparency Rules. This allows for a greater degree of transparency than required by the ICSID Convention and Arbitration Rules.

ICSID's proposed new Arbitration Rule 44 extends transparency even further, deeming that parties have consented to the publication of the award if, after 60 days of the award being rendered, a party does not object in writing to it being published. If a party does object, ICSID will only publish legal excerpts of the award.

If adopted, the new rule will allow for increased public participation and oversight during the arbitration. This is the start, but certainly not the end, of a process to increase public confidence in the arbitration process and bring a new sense of accountability to host-States and investors alike.

Security for costs

Currently, security for costs is a category of provisional measures regulated by Article 47 of the ICSID Convention and Arbitration Rule 39(1). While neither Article 47 nor Rule 39(1) specify the type of provisional measure a tribunal may recommend, it is accepted that ordering security for costs falls within a tribunal's power.[1]

The purpose of security for costs is to protect States from bearing the legal costs of an unmeritorious claim by an impecunious claimant. The current regime is limited by the need for the State to prove that it has a right to preserve; security for costs is urgent to protect that right; and that exceptional circumstances justify the award. In reality, security for costs has only been awarded once by an ICSID tribunal, namely in *RSM Production Corporation v. St Lucia*. This is a surprising statistic considering how many of the world's poorest countries are party to ICSID proceedings, and would benefit from security for costs being granted against vexatious claims.

ICSID's proposed new Arbitration Rule 51 is therefore a welcome step forward. The Rule will allow a Tribunal to order security for costs by considering the relevant party's ability to comply with an adverse decision on costs and any "other relevant circumstances". If a party fails to comply with such an order, the Tribunal may suspend the proceeding for up to 90 days, and thereafter, discontinue the proceedings altogether.

While the scope of the proposed new rule will be developed by case law, the inclusion of security for costs as a self-standing provision is a welcomed development in an area of law inhibited by inconsistency.[2] ICSID is in good company: the LCIA (Arbitration Rule 25.2), SIAC (Rule 27(j)) and HKIAC (Article 24) Rules expressly authorise tribunals to order security for costs where the other party has established that there are facts or circumstances that suggest that the party may not be able to comply with a cost award against it.

Challenges of arbitrators

Over the past two decades there has been proliferation of challenges to arbitrators in both institutional and *ad hoc* proceedings. The trend has been particularly present in ICSID arbitrations where there have been more than 40 challenges lodged against arbitrators over the past three decades. The challenges often centre on professional and personal relationships of arbitrators[3] and have been used as opportunistic litigation tactics in order to delay proceedings.

A party may challenge an arbitrator's appointment on the basis of a "manifest lack" of the qualities set out in Article 14(1), namely "high moral character and recognised in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment". Article 14(1) is supported by Conciliation Rule 6(2) that contains a declaration placing, *inter alia*, a continuous obligation on arbitrators to disclose their "past and present professional, business and other relationships with the parties and any other circumstance that might cause (my) reliability for independent judgment to be questioned by a party".

The standard for challenging arbitrators is found in the ICSID Convention itself (Articles 57 and 58). A "manifest lack" of the qualities listed in Article 14(1) is required. Tribunals have interpreted this standard as "relatively high", requiring more than simply an "appearance" of a lack of impartiality or independence.[4] This contrasts with the LCIA (Article 10) and UNCITRAL (Article 9) which require only the presence of "justifiable doubts" as to an arbitrator's impartiality or independence.

Furthermore, Article 58 leaves the decision of the disqualification in the hands of the arbitrator's co-arbitrators – a process that has been criticised for being unreasonable given the reluctance of arbitrators to allow a challenge to succeed in the event that it increases their chances of being challenged in the future. Therefore, in the absence of a voluntary resignation, the high standard makes the chance for successful disqualification low. Indeed, some parties have circumvented this procedure by relying on the Permanent Court of Arbitration to disqualify an arbitrator.[5]

The new Rules propose substantive changes to the procedure for disqualifying an arbitrator, taking the decision-making power away from the co-arbitrators (if they so choose) as well as introducing an expedited schedule for resolving the challenge.

A new Rule 29 introduces a specific time limit of 20 days for filing a disqualification motion after the basis for the challenge arises, replacing the former requirement that it be filed "promptly". An expedited schedule for parties filing a challenge that would see a decision on the challenge rendered within two months. Furthermore, instead of suspending the proceedings, the proceedings are to continue with the challenged arbitrator, unless the parties agree otherwise. If the arbitrator is disqualified, either party may request that any decision made while the challenge was pending be reconsidered by the newly constituted Tribunal. A new Rule 30 will allow the co-arbitrators to send the challenge to the Chair of the Administrative Council if they are unable to decide. In practice, the Chair's decision may be informed by the Secretary General's opinion.

While the manifest lack of required qualities in an arbitrator remains the threshold for challenging an arbitrator, the proposed amendments will improve the efficiency and fairness in the conduct of the

proceedings. By allowing the co-arbitrators to refer the challenge to the Chairman, the chance of success is higher and “depoliticises” the challenge.

Conclusion

One of the reasons why arbitration has prospered over other forms of dispute resolution is its flexibility. The ecosystem in which international disputes are resolved has to develop and grow in order to stay relevant. The proposals from ICSID are positive steps toward reflecting changing societal attitudes to investor-state arbitration. We look forward to participating in proceedings that embrace reform, improvement and invention.

[1] See for example *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 dated 12 April 2017; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, Tribunal's Decision on Respondent's Application for Security for Costs dated 14 October 2010 and *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated 28 October 1999.

[2] See *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Procedural Order No. 3 dated 12 April 2017.

[3] See *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal dated 22 October 2007; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8; and *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Request for the Disqualification for President Pierre Tercier and Arbitrator Albert Jan van den Berg dated 15 September 2011.

[4] See *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands dated 5 May 2011.

[5] See *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Claimant's Application for Dismissal of Respondent's Counterclaims dated 18 August 2017.

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