Written comments by Argentina on Section A of Draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.244)

I. On Draft provision 1 (Evidence):

Comments:

Argentina considers that, as stated in draft provision 1, the burden of proving the facts on which the memorial or the counter memorial are based should be borne by each party in a dispute, and that the tribunal should have the power to issue an award on the basis of the evidence available. However, we also consider it necessary for the provision to specify that the tribunal has the power to apply a "negative inference" or "adverse inference" in cases where there is a lack of evidence and there is no justification for the failure in providing the requested evidence, the justification is insufficient or the failure to present evidence is directly related to what is being alleged. This inference may lead to a dismissal of the claim made by the party that could not prove its claim or to releasing the opposing party from the burden of proving the unproven claim.

Rule 34(3) of the 2006 ICSID Arbitration Rules allowed tribunals to "take formal notice" of a party's failure to produce evidence, which could give rise to an adverse inference. The tribunal in the ICSID case OPIC Karinum Corporation v. Venezuela applied the negative inference when Respondent's explanations for the failure to produce documents were found "less than fully persuasive." The tribunal in NAFTA Feldman v. Mexico Case applied the negative inference because the Respondent had failed to produce evidence directly related to its claim and because the Respondent never explained why that evidence was not produced.

Regarding paragraph 2 of provision 1, Argentina would like to know whether the tribunal can request evidence even after the proceedings are closed.

In the case of paragraph 5, we would consider it appropriate that this should be without prejudice of the will of the parties, that is, the will of each party to wish to call a witness or expert offered by the other party to testify.

Given the aforementioned comments, we would suggest some modifications of the text of Draft Provision 1.

Suggested modifications for Draft Provision 1 (Highlighted in bold):

Draft Provision 1: Evidence

1. Each disputing party shall have the burden of proving the facts relied on to support its claim or defence.

2. At any time during the proceeding, the Tribunal may require the disputing parties to produce documents, exhibits or other evidence within such a period of time as the Tribunal shall determine.

3. The Tribunal may reject any request, unless made by all disputing parties, to establish a procedure whereby each party can request ***~~another~~*** ***the other*** *party to produce documents. In considering such requests for production of documents, the Tribunal shall consider all relevant circumstances, including:*

(a) The scope and timeliness of the request;

(b) The admissibility, relevance, materiality and weight of the documents requested;

(c) The burden of production; and

(d) The basis of any objection by the other party.

4. If a disputing party, duly invited by the Tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it, without prejudice to the possibility. ***The Tribunal shall take formal note of the failure of a party to produce documents, exhibits or other evidence it was invited to submit, and of any reasons given for such failure, and may make negative inferences against the party that does not cooperate.***

5. Unless otherwise directed by the Tribunal ***in consultation with the parties****, statements by witnesses, including expert witnesses, shall be presented in writing, and signed by them. The Tribunal may decide which witnesses, including expert witnesses, shall testify before the Tribunal if hearings are held.*

6. The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence offered.

7. The Tribunal may, at the request of a disputing party or on its own initiative, exclude from evidence or production any document, exhibits or evidence obtained illegally or based on the following reasons: […]

8 The Tribunal may order a visit to any place connected with the dispute, at the request of a disputing party or on its own initiative and may conduct inquiries there as appropriate.

II. On Draft provision 2 (Bifurcation):

Comments:

Argentina believes it would be useful if some kind of addition to this provision could be made for the scenario in which a litigating party that requested the bifurcation of the procedures makes a reservation to raise a preliminary objection together with the merits of the dispute. There have been cases in which arbitration tribunals have used this type of

reservations of rights to impose a reinforced standard for the analysis of the degree of relevance of the preliminary objections in respect of which the bifurcation was requested.

We understand that, if an instance were generated for the resolution of jurisdictional objections of law or for objections that can be dealt with in a short period of time, this would allow for savings in time and would contribute to the efficiency of the procedures.

Argentina agrees with the importance of clarifying in the provision the type of circumstances that the tribunal should consider when deciding whether or not to bifurcate a proceeding, as is the case with Rule 44 of the 2022 ICSID Arbitration Rules.

It is common to see tribunals decide that bifurcating involves more time than not bifurcating, which is self-evident, and does not necessarily mean that bifurcations should not be admitted. The emphasis should be, we believe, on ensuring that such delays are not disproportionate. We propose changes in the text in order to make that clear.

We also suggest that it be clarified that the tribunal may order bifurcation only with respect to some grounds.

Suggested modifications for Draft Provision 2 (Highlighted in bold):

Draft Provision 2: Bifurcation

1. A disputing party may request that an issue, including a plea that the Tribunal does not have jurisdiction, be addressed in a separate phase of the proceeding ("request for bifurcation"). ***Such a request does not affect the right of such party to present other preliminary objections, at the latest at the time of filing the counter-memorial.***

2. The request for bifurcation shall be made as soon as possible and shall state the issue to be bifurcated. The Tribunal shall fix the period of time within which submissions on the request for bifurcation shall be made by the disputing parties.

3. When determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) Bifurcation ***~~would materially reduce~~*** ***does not entail a disproportioned extension of*** *the time and cost of the proceeding,* ***taking into account that whenever there is a bifurcation and preliminary exceptions are rejected, the time and cost of the proceeding will be higher than if there had been no bifurcation.***

(b) Determination of the issues to be bifurcated would dispose of all or a substantial portion of the claim; and

(c) The issues to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

4. The Tribunal shall decide on the request for bifurcation within [30] days after the last submission on the request and shall fix any period of time necessary for the further conduct of the proceeding.

5. If the Tribunal orders bifurcation, it shall suspend the proceeding with respect to any issues to be addressed at a later phase, unless the disputing parties agree otherwise. ***The tribunal may order bifurcation only with respect to some of the preliminary objections.***

6. The Tribunal may at any time on its own initiative decide whether an issue should be addressed in a separate phase of the proceeding.

III. On draft provision 4 (Manifest lack of legal merit/early dismissal):

Comments:

Draft provision 4, paragraph 2, reads: "*A disputing party shall make the objection as soon as possible after the constitution of the Tribunal and no later than [45] days after its constitution. The Tribunal may admit a later objection if it considers the delay justified*". We were wondering what would happen if the time established to respond to the claim was longer than 45 days. In those cases, would it be justified for a party to present an objection for manifest lack of legal merit *after* those 45 days?

IV. On draft provision 5 (Security for costs):

Comments:

Argentina considers it is very important to state that one of the circumstances that the tribunal must consider when ordering a disputing party to provide security for costs is whether there is third-party financing (paragraph (e) of paragraph 4), as is the case with Rule 53 (4) of the 2022 ICSID Arbitration Rules.

We also believe that this provision should be aimed at requiring security for costs from the private party in the dispute. We shall bear in mind that, in case of States, it may take more or less time to collect the costs, but a State will almost certainly not disappear –at least not without leaving a successor State–, which makes it unnecessary to request security for costs in the case of States.

V. On draft provision 9 (Allocation of costs):

Comments:

Argentina considers that it would be useful to state in this provision that, when allocating costs between the parties and when examining their reasonableness, the tribunal should consider the differences or gaps between the expenses and costs submitted by each party in order to avoid the overestimation of expenses or the inclusion of superfluous expenses.

Regarding this point, we believe it is relevant to share our concern about what we perceive as disproportionate increases in the cost of expert reports.

Suggested modifications for Draft Provision 9 (Highlighted in bold):

Draft Provision 9: Allocation of costs

1. The costs of the proceeding shall in principle be borne by the unsuccessful disputing party.

2. However, the Tribunal may allocate the costs between the disputing parties, if it determines the allocation to be reasonable taking into account all relevant circumstances of the case, including:

(a) The outcome of the proceeding or any parts thereof, ***taking into account which claims were upheld and dismissed at the jurisdiction, merits and quantum stages;***

(b) The conduct of the disputing parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner in accordance with the applicable rules and complied with the orders and decisions of the Tribunal;

(c) The complexity of the issues;

(d) The reasonableness of the costs claimed by the disputing parties;

(e) The existence of third-party funding; ***~~and~~***

*(f) The amount of monetary damages/compensation claimed by the claimant in proportion to the amount awarded by the Tribunal****~~.~~*****; and**

g) the proportional relation between the costs of the parties.

2bis. When allocating costs between the parties and when examining their reasonableness, the tribunal shall consider the differences or gaps between the expenses and costs submitted by each party.

3. Unless otherwise determined by the Tribunal, expenses incurred by a disputing party related to or arising from third-party funding shall not be included in the costs of the proceeding.

4. Paragraphs 1 to 3 apply to any costs arising from a request by a disputing party that a claim is manifestly without legal merit pursuant to Draft Provision 4.

5. The Tribunal may, at the request of a disputing party or on its own initiative, make an interim decision on costs at any time.

6. The Tribunal shall ensure that all decisions on costs are reasoned and form part of the award.

VI. On draft provision 12 (Third-party funding):

Comments:

On its Forty-ninth session, held in Vienna between 23 September and 27 September 2024, UNCITRAL Working Group III agreed that, with regard to the draft provisions in section A (draft provisions 1 to 9), draft provision 11 and draft provisions 12 (paragraphs 1 to 5 and 7), delegations could submit written comments.

Concerning provision 12, while our position is that no third-party funding should be allowed, we agree with the general wording of the provision regarding third-party funding, although we believe that the provision should make it clearer that if there is third-party funding, this should be disclosed as soon as possible and not at a particular procedural stage. In fact, it should be disclosed at the start of the process and there should be an ongoing verification of the contributor.

Noting that in some cases the financing comes from the firm representing the plaintiff, we consider it important to make it clear that it is necessary to know whether it is the plaintiff who is financing the arbitration with his own funds or through third parties. Knowing this information is relevant, for example, in discussions on security for costs.

In the case of paragraph 2(a), we suggest that in case the third party providing financing is a legal entity, the notification should include the names of the persons and entities that own and control that legal entity, as is the case under Rule 14 of the 2022 ICSID Arbitration Rules.

Regarding (b) of paragraph 6, we would like to clarify how the amount received by the third party will be estimated to be reasonable or proportionate.

Suggested modifications for Draft Provision 12 (Highlighted in bold):

Draft Provision 12: Third-party funding

1. "Third-party funding" means the provision of any direct or indirect funding to a disputing party by a natural or legal person that is not a party to the proceeding but enters into an agreement to provide, or otherwise provides, funding ("third –party funder") for a proceeding, ***including the firm that represents the claimant,*** *either through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding.*

2. A disputing party in receipt of third-party funding shall disclose to the Tribunal and the other disputing party the following information:

(a) The name and address of the third-party funder ***and, in case it is a legal entity, the name(s) of the person(s) who own or control that legal entity;*** *and*

(b) The name and address of the beneficial owner of the third-party funder and any natural or legal person with decision-making authority for or on behalf of the third-party funder in relation to the proceeding.

Any changes in relation to third-party funding must be reported to the court and the other litigating party immediately.

3. In addition, the Tribunal may require the funded party to disclose:

(a) Information regarding the funding agreement and the terms thereof;

(b) Whether the third-party funder agrees to cover any adverse cost award;

(c) Any right of the third-party funder to control or influence the management of the claim or the proceeding or to terminate the funding agreement;

(d) Any agreement between the third-party funder and the legal representative of the disputing party; and

(e) Any other information deemed necessary by the Tribunal.

4. The disputing party shall disclose the information listed in paragraph 2 when submitting its statement of claim, or if the funding agreement is entered into after the submission of the statement of claim, immediately thereafter. The disputing party shall disclose the information required by the Tribunal in accordance with paragraph 3 as promptly as possible.

5. If there is any new information or any change in the information disclosed in accordance with paragraphs 2 and 3, the disputing party shall disclose such information to the Tribunal and the other disputing party as promptly as possible.

(...)

7. If the disputing party fails to comply with the disclosure obligations in paragraphs 2 to 5, the Tribunal may:

(a) Suspend or terminate the proceeding in accordance with Draft Provisions 6 or 7;

(b) Order security for costs in accordance with Draft Provision 5; or

(c) Take this fact into account when allocating costs in accordance with Draft Provision 9.