

EIGHTEENTH COMMISSION

Equality of Parties before International Investment Tribunals

Rapporteur: Mr Campbell McLachlan

RESOLUTION

The Institute of International Law,

Considering that the principle of equality of the parties is a fundamental element of the rule of law that ensures a fair system of adjudication and as such is a general principle of law applicable to the procedure of international courts and tribunals, as reflected in their jurisprudence,

Observing that the equality of the parties is also a fundamental human right recognised by Article 10 of the Universal Declaration of Human Rights of 1948 and Article 14(1) of the International Covenant on Civil and Political Rights of 1966,

Recalling that the Eighteenth Commission, in its Report to the Tokyo Session in 2013, had reserved for further consideration the principles applicable to the procedure of investment arbitration,

Acknowledging the contribution made by the United Nations Commission on International Trade Law ('UNCITRAL') and by the International Bar Association ('IBA') to the elaboration of important aspects of the principle of equality of the parties in its application to international arbitration generally,

Mindful that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ('ICSID Convention') provides a framework for the resolution of investment disputes that has to date been widely adopted by States and that the International Centre for the Settlement of Investment Disputes ('ICSID') is currently conducting a review of its Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules'),

Recognising that States resolved at the Fiftieth Session of UNCITRAL in 2017 to take up the topic of reform of investor-State dispute settlement, including consideration of the possibility of the establishment of a permanent International Tribunal for Investments, and that the application of the principle of the equality of the parties is one of the matters under consideration in that context,

Resolving that the application of the equality principle requires specific consideration in light of the particular characteristics of international investment disputes, in which the tribunal has before it two parties of a different juridical character: a private investor and a State, whose function it is to represent the public interest,

Determining that its consideration of this question should consider the position of both kinds of arbitral tribunals, whether are appointed *ad hoc* to decide a particular case ('arbitral tribunal') or any standing tribunal that is constituted now or in the future to decide investment disputes ('permanent tribunal'),

Adopts the following Resolution:

PART ONE
APPLICATION TO THE ESTABLISHMENT OF THE TRIBUNAL

CHAPTER I
FORUM

Article 1

Legal character

- (1) The extent to which a dispute between the national of one State ('the investor') and another State ('the State') in respect of an investment may be submitted to the jurisdiction of an international investment tribunal ('the tribunal') results from the scope of the parties' consent. Submission of such a dispute to the tribunal engages the principle of the equality of the parties.

- (2) Such a forum is designed to secure equality between the parties in circumstances where the State has the sovereign power to enforce its own law and adjudicate its claims against investors for breach of its laws before its own courts.

Article 2

Access

- (1) Both the State and the investor are equally entitled to submit a claim in relation to an investment to a tribunal, subject to the terms of the instrument of consent, interpreted in accordance with the principle of the equality of the parties.
- (2) No State is obliged to submit its claim against an investor to a tribunal, unless it gives its consent and elects to do so. Otherwise, a State remains entitled to use the rights and remedies provided by its own national legal system in order to pursue such a claim before its own courts.
- (3) The limitation of access to the investor of another State bears a direct relationship to the object of investment treaties, which is to promote and protect foreign investment and the rights of foreign nationals, while also respecting the State's sovereign right to regulate investment activities within its jurisdiction in the public interest. It does not infringe the principle of equality of access. Such protection is equally available to the investors of each State when they make an investment within the scope of the treaty protections by investing in the territory of the other State.

CHAPTER 2

TRIBUNAL

Article 3

Impartiality

- (1) The impartiality of all members of a tribunal is an indispensable prerequisite to the equality of the parties.

- (2) The substantive standards applicable to the determination of any question relating to the impartiality of a member of an arbitral tribunal should be uniform and transparent.
- (3) The IBA Guidelines on Conflicts of Interest in International Arbitration 2014 provide a useful framework of substantive rules within which to analyse questions that may arise as to the impartiality of a member of an arbitral tribunal constituted to decide an investment dispute.
- (4) Challenges to the impartiality of a member of an arbitral tribunal should be determined by an independent third party decision-maker external to the tribunal.
- (5) As a consequence States parties to the ICSID Convention are encouraged to amend Article 58 so as to refer the determination of challenge applications to an independent third party decision-maker in all cases.

Article 4

Composition

- (1) The composition of a tribunal shall be determined through a process of appointment that ensures that the parties to any dispute heard by that tribunal are treated with equality.
- (2) This is so whether the tribunal is constituted as an arbitral tribunal or is established as a permanent tribunal. The composition of both kinds of tribunal must respect the equality of the parties; but the different legal character of arbitration and a permanent judicial body dictate a different application of the principle in each case:
 - (a) The resolution of investment disputes by an arbitral tribunal composed of members appointed equally by the parties, with the president appointed by agreement (or, failing agreement, designated by an appointing authority) respects the principle of the equality of the parties, provided also that each member meets the same requirements of impartiality.

- (b) In the case of a permanent tribunal, the principle of the equality of the parties does not require that each party retain the ability to appoint a judge. The overriding consideration is the independence and impartiality of the members of the tribunal.
- (3) A permanent tribunal of universal scope should comprise a body of independent judges of recognized competence in international law that equitably represents the principal legal systems of the world, elected through a transparent process.
- (4) In the resolution of a specific dispute within the framework of a permanent tribunal, in order to respect the equality principle the rules governing the composition of a Bench or Chamber should either:
 - (a) Exclude judges having the nationality of either the State party to the dispute or of the home State of the foreign investor; *or*,
 - (b) Ensure that both such States have an equal opportunity to appoint a judge, if necessary by making provision for the appointment of a judge *ad hoc*.

PART TWO

APPLICATION TO THE PROCEDURE OF THE TRIBUNAL

CHAPTER I

PARTIES

Article 5

Multiple claimants

- (1) Where several investors seek to institute their claims in a single arbitral proceeding against the same State, the tribunal shall ensure, in its determination of jurisdiction and admissibility and in its procedural directions, that the parties are treated with equality.
- (2) When determining its jurisdiction, the tribunal must be satisfied that:

- (a) Each claimant individually satisfies the jurisdictional requirements (both of the instrument of consent and, where applicable, Article 25 of the ICSID Convention) in order to bring its claim; and
- (b) The claim as a whole advances a single dispute, in that the interest represented by the claimants is in all respects identical, so that the respondent is not prejudiced by having to defend itself against claims that differ materially in the interest to be vindicated.

The tribunal may hold a claim brought by multiple claimants to be inadmissible if it finds that the manner in which the claim is brought would adversely affect the tribunal's ability to ensure that both sides of the dispute are treated with equality in the presentation of their case or in their defence of the claims.

Article 6

Counterclaims

- (1) The ability of a respondent to assert a counterclaim that is admissible before a tribunal ensures the procedural equality of the parties.
- (2) In order to be admissible, such a counterclaim must:
 - (a) Be within the jurisdiction of the tribunal; and,
 - (b) Arise directly out of the subject matter of the investment.
- (3) The jurisdictional requirement is met when, by virtue of the instrument of consent invoked by the respondent, the tribunal would have had jurisdiction over the counterclaim had it been asserted as a primary claim. Whether or not the tribunal has jurisdiction over a counterclaim does not depend upon the respondent invoking the same ground of jurisdiction as that relied upon by the claimant for its claim, nor is the tribunal's jurisdiction limited by the scope of the dispute as framed by the claimant in its Request for Arbitration.
- (4) Where the dispute is submitted to arbitration under the ICSID Convention, the requirement in Article 46 that the counterclaim must also be 'otherwise within the jurisdiction of the Centre' means that it must fall within the criteria of Article 25(1) of the Convention by being a 'legal

dispute arising directly out of an investment, between a Contracting State...and a national of another Contracting State.’

- (5) The requirement of sufficiency of connection with the subject matter of the dispute is met where the counterclaim concerns the same investment that gave rise to the claim. It does not require that the counterclaim be founded upon the same legal instrument or cause of action asserted by the claimant.
- (6) The tribunal may find a counterclaim to be admissible, whether it is founded upon international law or host State law, provided that it fulfils the other requirements set out in this Article and concerns a subject matter that is capable of submission to arbitration.

Article 7

Third person submissions

- (1) Third person submissions may valuably assist a tribunal to determine the dispute, where they bring a perspective, knowledge or insight that is different from that of the disputing parties.
- (2) In order to protect the equality of the parties, in accordance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014:
 - (a) The third person shall disclose any connection, direct or indirect, which it has with either of the disputing parties, their counsel or members of the tribunal or the subject-matter of the dispute;
 - (b) The tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any third person submission; and,
 - (c) The tribunal shall ensure that any such submission does not unfairly prejudice either disputing party.

CHAPTER 2
PLEADING AND EVIDENCE

Article 8

Equality of arms

- (1) The equality of the parties includes the principle of the equality of arms, namely that:
 - (a) Each party shall have the right to be heard on the submissions of the other (*audi alteram partem*); and,
 - (b) Each party shall enjoy reciprocal treatment in the procedural timetable and in matters of pleading, production of documents and evidence.
- (2) The tribunal should order and enforce a procedural timetable, which promotes both efficiency and equality of the parties.
- (3) Where, exceptionally, a party is able to establish a compelling case for the admission of late evidence or pleading, the tribunal must be satisfied that, if it admits the evidence or pleading, it is able to afford the other party equality of treatment, including an effective right to be heard on the new material.
- (4) Equality of treatment in a hearing requires that each party be allocated substantial equality of time to plead and present its evidence; subject always to the tribunal's overall authority to ensure the fair and efficient conduct of the hearing, taking into account the number of witnesses and its own mandate to hear and test the evidence and arguments of the parties.

Article 9

Production of Documents and Evidence

- (1) During the written phase, each party shall produce to the other the evidence on which it relies, so that the other party has a reasonable opportunity to respond.

- (2) The same standards shall be applied to adjudge the requests of both parties for the production of specific documents. The IBA Rules on the Taking of Evidence in International Arbitration 2010 provide a useful general framework for such determinations.
- (3) In ordering a timetable for production, the tribunal should take into account the particular challenges faced by States, especially developing States, in locating and producing documents. This must be balanced against ensuring that the other party has an adequate opportunity to consider and respond to the documents within the procedural timetable.
- (4) Where the investor is part of a group of companies, the principles of equality and good faith require that it should use best efforts to produce relevant documents that are held by its parent or affiliated companies or shareholders, when the respondent State so requests and the tribunal so directs.
- (5) Where a party has requested the attendance of a witness for cross-examination at the hearing and the party relying on the evidence of that witness fails without a valid reason to produce that witness, the tribunal may (save in exceptional circumstances) disregard that evidence in order to preserve the procedural equilibrium between the parties.

Article 10

Objections to production

- (1) The tribunal shall apply the equality principle in making decisions with regard to pleas of privilege from disclosure, in light of the fact that the applicable standards may differ between the national laws of the parties. The tribunal should strive to apply a standard that operates equally for both parties.
- (2) Where the parties raise objections to disclosure with regard to documents on grounds of, respectively, commercial confidentiality or State secrecy, the tribunal should strive to secure a balance of treatment between the parties so as to ensure that each party has the ability to obtain evidence that is relevant and material to the issues in dispute, whilst at the same time respecting the wider interests of each party beyond the instant case and relevant policy considerations.

- (3) In the case of a plea of State secrecy, the tribunal shall balance the public interest in the administration of justice which supports disclosure against the public interest underlying the confidentiality of governmental communications.
- (4) In so doing, it should invite the parties to agree protocols for the protection of confidentiality or secrecy in documents or parts thereof applicable in the case before the tribunal.
- (5) In a case in which an objection to production is raised:
 - (a) The objection must be justified with sufficient specificity in order to enable the opposing party to contest it and the objection to be determined;
 - (b) The tribunal has discretion whether to accept the objection, balancing the public interests involved;
 - (c) The tribunal shall apply international law to its decision on the objection;
 - (d) The tribunal should, in appropriate cases, consider, in consultation with the parties, appointing an independent third party expert to review the documents and decide contested objections to production.

Article 11

Improper means

- (1) Both parties owe a duty to each other and to the tribunal to conduct themselves in the proceedings in good faith.
- (2) The tribunal has the power to exclude evidence where it is satisfied that it has been obtained in violation of the principle of good faith and that it is essential to do so in order to preserve the equality of the parties.
- (3) Exceptionally, in order to protect the fairness of its own procedure and the equality of the parties, the tribunal may recommend to the State measures concerning the effect of the exercise of its powers of criminal investigation and prosecution upon the tribunal's own process.

- (4) In such a case, the tribunal will only act on the basis of clear evidence of conduct that is aimed at obtaining an unfair advantage in the proceedings before it or otherwise imperils the fair conduct of those proceedings.

CHAPTER 3

SUBSTANTIVE EQUALITY OF ARMS

Article 12

Costs

- (1) The ability of parties, whether investors or States, to pursue or defend claims before a tribunal should not be determined on grounds of cost. Particular regard should be paid in this context to the position of small and medium-sized enterprises and to that of developing States.
- (2) Where a party's pursuit of its claim or defence is supported by third party funding, that party shall disclose the identity of the third party funder, so that the tribunal may consider, inter alia, any possible implications for the maintenance of the impartiality of the tribunal.
- (3) Where on application the tribunal is satisfied that a claimant may be unable to pay an award of costs in the event that its claim is unsuccessful and that the provision of security is necessary to preserve the equal protection of the parties, the tribunal has discretion to order security for costs.

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