Volume 3

ICSID Secretariat

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Proposals for Amendment of the ICSID Rules — Working Paper

Propositions d'amendement des règlements du CIRDI — Document de travail

Propuesta de Enmiendas a las Reglas del CIADI — Documento de Trabajo

ICSID
International Centre for Settlement of Investment Disputes
WORLD BANK GROUP

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ABBREVIATIONS

(AF)AFR	(Additional Facility) Administrative and Financial Regulations
(AF)AR currently A(AF)R	(Additional Facility) Arbitration Rules
(AF)CR currently C(AF)R	(Additional Facility) Conciliation Rules
(AF)FFR currently FF(AF)R	(Additional Facility) Fact-Finding Rules
(AF)MR	(Additional Facility) Mediation Rules
AF Rules	Additional Facility Rules
AFR	Administrative and Financial Regulations
AR	Arbitration Rules – ICSID Convention
BIT	Bilateral Investment Treaty
CAFTA-DR	Central America-Dominican Republic-United States Free Trade Agreement
CETA	Canada-EU Comprehensive Economic and Trade Agreement (not yet in force)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (not yet in force)
CR	Conciliation Rules – ICSID Convention
EU	European Union
FTA	Free Trade Agreement
IBRD (Bank)	International Bank for Reconstruction and Development (World Bank)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IR	Institution Rules – ICSID Convention
ISDS	Investor-State Dispute Settlement
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration
Member States	Contracting States of ICSID Convention (ICSID 3)
MIT	Multilateral Investment Treaty
NAFTA	North American Free Trade Agreement
NDP	Non-disputing Party
NDTP	Non-disputing Treaty Party
REIO	Regional Economic Integration Organization
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (2010)
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
USD	US dollars
VCLT	Vienna Convention on the Law of Treaties
WP	ICSID Working Paper on Amendment (2018)

INTRODUCTION

1. Article 6(1) of the ICSID Convention authorizes the ICSID Administrative Council to adopt administrative and financial regulations for the Centre and rules of procedure for the institution and conduct of arbitration and conciliation proceedings. Amendments to rules under the Convention must be adopted by two-thirds of the Member States of the Administrative Council. ICSID currently has 153 Contracting States, hence rule amendments must be approved by 102 or more members. Amendments to the Additional Facility rules require majority approval (77/153 votes) pursuant to Art. 6(1) of the Convention and AFR Reg. 7(1).

2. The ICSID Convention Rules and Regulations were adopted in 1967, and the Additional Facility Rules were adopted in 1978. The rules were amended in 1984, 2003 and 2006. The first two amendment processes resulted in modest changes. The third, in 2006, introduced important innovations on transparency, arbitrator declarations and early dismissal of claims. Further background on rule amendments can be found on the ICSID webpage on amendment.

3. Amendments to the ICSID Convention arbitration and conciliation rules will apply to all cases based on consent given after the amendments are brought into force, except as the parties otherwise agree (Art. 33 and 44 Convention). The rules applicable to Additional Facility arbitration, conciliation, fact-finding and mediation cases are those in force on the date of initiation of the proceeding, unless the parties otherwise agree.

BACKGROUND

4. ICSID launched the current amendment process in October 2016 and invited Member States to suggest topics that merited consideration. In January 2017, ICSID invited the public to suggest topics for rule amendments. Submissions received from the public have been posted on the ICSID webpage on amendment. The Secretariat reviewed all comments received and prepared this Working Paper (WP) to inform further discussions on amendment. In addition, ICSID conducted a survey on recovery of costs and damages awards at the request of the Republic of Panama. The results of that survey were released in November 2017.

OBJECTIVES

5. The philosophy motivating these amendments is that States and investors should have a range of modern dispute settlement options available to resolve their disputes. These may be used individually, or at times in parallel. For example, parties may suspend an on-going arbitration to mediate their dispute or may obtain a binding determination in a fact-finding proceeding that will be used in an on-going arbitration. As a result, the proposals update the existing rules for arbitration, conciliation and fact-finding, and expand the scope of the Additional Facility to encompass a new set of mediation rules. The proposals also reflect four core objectives:

- Continued modernization of ICSID procedure – the accretion of case experience and current discussion on ISDS reform have suggested ways to further improve the investor-State dispute resolution process. For example, there have been suggestions for consolidation of cases, increased transparency, criteria to apply in awarding costs and more flexible alternate dispute resolution mechanisms. Such suggestions are reflected in the proposals for discussion.

- Simplification of the rules – the rules have been comprehensively reviewed. Numerous drafting changes are proposed to streamline language, re-order provisions, and adopt gender-neutral language. The proposals also correct discrepancies between the English, French and Spanish versions of the rules, which are equally authentic as the official languages of the Centre.

- Reducing time and cost – a prominent concern is the cost of arbitration, which is directly affected by the length of proceedings. The WP proposes a general duty to act expeditiously, numerous specific rule changes to reduce the duration of cases and an optional expedited arbitration procedure.

- Go green – reducing the paper burden of proceedings will further reduce time and cost and respect environmental concerns. Proposals for use of electronic transmission and fewer copies promote these goals.

At the same time, all amendments must maintain the procedural equilibrium between disputing parties so that proceedings are fair and equally effective for all participants.

ORGANIZATION OF THE WORKING PAPER

6. The WP reviews the ICSID rules roughly in the sequence of the current rules. Each section explains the concerns identified, current practice, potential amendments, and the reasoning behind the proposals. In most instances, revised draft language in English (green), French (pink) and Spanish (blue) is provided with each provision to clarify the scope of the change suggested. The WP is accompanied by a volume that compiles all of the proposed provisions in the official languages with a table of concordance showing the number of the current relevant provision and the proposed amended provision.

7. In some instances, the WP proposes changes other than rule amendment, including practice changes and practice guidance notes.

8. The WP also notes where a change might be useful but would require amendment to the ICSID Convention. Art. 65 and 66 of the Convention require a two-step process, and ultimately 100% approval of Member States, to amend the Convention. Convention amendment is not under consideration in this process. However, Member States may ultimately prefer to address some changes by Convention amendment and therefore these possibilities are flagged in the WP for future work.

9. Member States may also decide that some procedural changes are best addressed in their individual investment treaties, contracts or laws, especially if such changes are beyond the scope of procedural rules or where there is no consensus on an amendment.

10. The proposals in the WP are intended to encourage discussion and are not prescriptive. ICSID offers these for consideration by Member States and the public, and looks forward to a constructive dialogue that will result in consensus on proposals that could realistically be advanced to the Administrative Council for adoption.

NEXT STEPS

11. ICSID distributed the WP to Member States on August 2, 2018 and published the WP on its website on August 3, 2018. It will overview these proposals at a meeting of State experts in Washington, D.C. in September 2018 and in public consultation meetings and webinars in various regions in the autumn of 2018. The ICSID website will list public consultation events and provide further background documents and videos.

12. ICSID invites written comments from the public and Member States by December 28, 2018. Feedback from the public should be submitted to icsidideas@worldbank.org and will be posted on the website.

13. Feedback from Member States should be sent to icsidruleamendments@worldbank.org and will be posted on the ICSID website with consent of the Member State.

14. The feedback will be collated in early 2019. Depending on the extent and nature of the feedback received, ICSID will propose a package of amendments for further consideration and potential adoption in 2019 or 2020.

I. ADMINISTRATIVE AND FINANCIAL REGULATIONS

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ADMINISTRATIVE AND FINANCIAL REGULATIONS (AFR)

Introductory Note

The Administrative and Financial Regulations were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention.

These Regulations concern the functioning of ICSID as an international institution. They contain provisions that apply generally in proceedings and are complementary to the Convention and the Institution, Conciliation and Arbitration Rules, adopted pursuant to Article 6(1)(b) and (c) of the Convention.

Note introductive

Le Règlement administratif et financier a été adopté par le Conseil administratif du Centre conformément à l'article 6(1)(a) de la Convention CIRDI.

Le présent Règlement concerne le fonctionnement du CIRDI en tant qu'institution internationale. Il contient les dispositions qui s'appliquent généralement dans les instances et complète la Convention et les Règlements d'introduction des instances, de conciliation et d'arbitrage, adoptés conformément à l'article 6(1)(b) et (c) de la Convention.

Nota Introductoria

El Reglamento Administrativo y Financiero fue adoptado por el Consejo Administrativo del Centro de conformidad con el Artículo 6(1)(a) del Convenio del CIADI.

El presente Reglamento se refiere al funcionamiento del CIADI como una institución internacional. El mismo contiene las disposiciones que aplican generalmente a los procedimientos y complementa al Convenio y a las Reglas de Iniciación, de Conciliación y Arbitraje, adoptadas de conformidad con el Artículo 6(1)(b) y (c) del Convenio.

15. The proposals below address the operation of ICSID as an international institution. They simplify the language and modernize procedures to reflect the growth in the membership and the Secretariat. They also address case procedure for the arbitration (AR) and conciliation (CR) rules. Several rules specific to case procedure have been moved to the AR or CR rules. Other provisions applicable to proceedings under multiple sets of rules remain in the AFR, for example, rules relating to case finances.

16. The AFR applies to ICSID Convention cases.

CHAPTER I – PROCEDURES OF THE ADMINISTRATIVE COUNCIL

REGULATION 1 – DATE AND PLACE OF THE ANNUAL MEETING

CURRENT RELATED PROVISIONS: Convention Art. 4, 5

Chapter I
Procedures of the Administrative Council

Regulation 1
Date and Place of the Annual Meeting

The Annual Meeting of the Administrative Council shall take place in conjunction with the Annual Meeting of the Board of Governors of the International Bank for Reconstruction and Development ("Bank"), unless the Council specifies otherwise.

Chapitre I
Procédures du Conseil administratif

Article 1
Date et lieu de la session annuelle

La session annuelle du Conseil administratif a lieu conjointement avec l'Assemblée annuelle du Conseil des Gouverneurs de la Banque internationale pour la reconstruction et le développement (« Banque »), sauf si le Conseil en décide autrement.

Capítulo I
Procedimientos del Consejo Administrativo

Regla 1
Fecha y Lugar de la Reunión Anual

La reunión anual del Consejo Administrativo se celebrará conjuntamente con la reunión anual de la Junta de Gobernadores del Banco Internacional de Reconstrucción y Fomento (el "Banco"), salvo determinación en contrario del Consejo.

17. The drafting of proposed AFR 1 is streamlined. In addition, current AFR 1(2) is deleted and incorporated into proposed AFR 5.

REGULATION 2 – NOTICE OF MEETINGS

CURRENT RELATED PROVISION: Convention Art. 7

Regulation 2
Notice of Meetings

(1) The Secretary-General shall give each member notice of the time and place of meetings of the Administrative Council by any rapid means of communication. This notice shall be dispatched not less than 42 days prior to the date set for such meeting, except that in urgent cases notice shall be sufficient if dispatched not less than 10 days prior to the date of the meeting.

(2) Any meeting of the Administrative Council at which no quorum is present may be adjourned by a majority of the members present and notice of the adjourned meeting need not be given.

Article 2
Notification des sessions

(1) Le ou la Secrétaire général(e) notifie à chaque membre le lieu et la date des sessions du Conseil administratif par tout moyen de communication rapide. Cette notification est envoyée au moins 42 jours avant la date fixée pour une telle session, exception faite des cas d'urgence dans lesquels il suffit d'envoyer la notification au moins 10 jours avant la date de la session.

(2) Toute séance du Conseil administratif, pour laquelle le quorum n'est pas atteint, peut être ajournée par la majorité des membres présents sans qu'il soit nécessaire de notifier l'ajournement.

Regla 2
Notificación de las Reuniones

(1) El o la Secretario(a) General notificará a cada miembro la fecha y el lugar de las reuniones del Consejo Administrativo por cualquier medio expedito de comunicación. Esta notificación deberá enviarse por lo menos 42 días antes de la fecha fijada para dicha reunión, salvo en casos urgentes, en los que será suficiente que se realice la notificación al menos 10 días antes de la fecha fijada para la reunión.

(2) Cualquier reunión del Consejo Administrativo para la que no hubiere quórum podrá ser aplazada por la mayoría de los miembros presentes, sin que sea necesario notificar el aplazamiento.

18. Proposed AFR 2 deletes reference to specific means of communication. In practice, notices are sent by electronic mail to addressees designated by Member States.

REGULATION 3 – AGENDA FOR MEETINGS

Regulation 3
Agenda for Meetings

(1) The Secretary-General shall prepare an agenda for each meeting of the Administrative Council under the direction of the Chairman and shall transmit the agenda to each member with notice of the meeting.

(2) Additional subjects may be placed on the agenda by any member if it gives notice thereof to the Secretary-General not less than 14 days prior to the date set for such meeting.

(3) In special circumstances the Chairman, or the Secretary-General after consulting with the Chairman, may at any time place additional subjects on the agenda for a meeting of the Administrative Council.

(4) The Secretary-General shall promptly give each member notice of additional subjects on the agenda.

(5) The Administrative Council may authorize any subject to be placed on the agenda at any time even though the notice required by this Regulation has not been given.

Article 3
Ordre du jour des sessions

(1) Le ou la Secrétaire général(e) prépare un ordre du jour pour chaque session du Conseil administratif sous la direction de son ou de sa Président(e) et le transmet à chaque membre avec la notification de la session.

(2) D'autres questions peuvent être inscrites à l'ordre du jour par tout membre s'il en informe le ou la Secrétaire général(e) au moins 14 jours avant la date fixée pour la session.

(3) Dans des circonstances particulières, le ou la Président(e) du Conseil administratif, ou le ou la Secrétaire général(e) après consultation du ou de la Président(e), peut à

tout moment inscrire d'autres questions à l'ordre du jour d'une session du Conseil administratif.

(4) Le ou la Secrétaire général(e) doit notifier à chaque membre, sans délai, toute nouvelle question inscrite à l'ordre du jour.

(5) Le Conseil administratif peut à tout moment autoriser qu'une nouvelle question soit inscrite à l'ordre du jour d'une session, même si la notification requise par le présent article n'a pas été faite.

Regla 3
Agenda de las Reuniones

(1) El o la Secretario(a) General preparará una agenda para cada reunión del Consejo Administrativo bajo la dirección de su Presidente(a) y transmitirá la agenda a cada miembro con la notificación de la reunión.

(2) Cualquier miembro podrá agregar asuntos adicionales a la agenda si notifica al o a la Secretario(a) General al menos 14 días antes de la fecha fijada para la reunión.

(3) En circunstancias especiales, el o la Presidente(a), o bien, el o la Secretario(a) General después de consultar con el o la Presidente(a), podrá agregar en cualquier momento asuntos adicionales a la agenda de una reunión del Consejo Administrativo.

(4) El o la Secretario(a) General deberá notificar con prontitud respecto de la incorporación de asuntos adicionales en la agenda a cada uno de los miembros.

(5) El Consejo Administrativo podrá autorizar que se agregue en cualquier momento un asunto a la agenda, aun cuando no se hubiere efectuado la notificación requerida por esta Regla.

19. Current AFR 3 has been simplified and current AFR 3(2) has been divided into separate paragraphs (proposed AFR 3(2) and 3(3)) as it deals with two distinct matters.

20. Proposed AFR 3 suggests a 14-day period for a State to add a subject to the agenda, rather than the current seven days. This change gives ICSID sufficient time to transmit the additional agenda item to Member States and allows Member States sufficient time to develop an informed position on the proposed item. Such item should be in English, French and Spanish. Proposed AFR 3 retains the right of the Administrative Council to add subjects to the agenda at any time despite the absence of notice, and would not impede the addition of an urgent agenda item.

REGULATION 4 – PRESIDING OFFICER

CURRENT RELATED PROVISION: Convention Art. 5

Regulation 4
Presiding Officer

(1) The Chairman shall be the Presiding Officer at meetings of the Administrative Council.

(2) The Chairman shall designate a Vice-President of the Bank to preside over all or any part of a meeting if the Chairman is unable to preside.

Article 4
Présidence des sessions

(1) Le ou la Président(e) du Conseil administratif assure la présidence des sessions du Conseil administratif.

(2) Le ou la Président(e) du Conseil administratif désigne un ou une Vice-Président(e) de la Banque pour présider tout ou partie d'une session si le ou la Président(e) n'est pas en mesure de présider.

Regla 4
Presidencia de las Reuniones

(1) El o la Presidente(a) del Consejo Administrativo presidirá las reuniones del Consejo Administrativo.

(2) El o la Presidente(a) del Consejo Administrativo designará a un o una Vicepresidente(a) del Banco para presidir toda o una parte de una reunión si el o la Presidente(a) no pudiera presidir.

21. Current AFR 4(2) applies when the Chairman is unable to chair a meeting of the ICSID Administrative Council. While infrequently used, the existing process is cumbersome: identifying the State next in line to chair, explaining why they are called on to chair, and briefing the individual nominated to act as temporary Presiding Officer is time consuming and a burden on the State involved.

22. This amendment proposes that the Chairman designate a Vice-President of the Bank to chair the meeting if the Chairman is unable to do so. As the Chairman casts no vote and plays a purely procedural role in the meeting, this should be satisfactory.

REGULATION 5 – SECRETARY OF THE COUNCIL

CURRENT RELATED PROVISION: Convention Art. 11

Regulation 5
Secretary of the Council

(1) The Secretary-General shall serve as Secretary of the Administrative Council.

(2) Except as otherwise directed by the Administrative Council, the Secretary-General, in consultation with the Chairman, shall have charge of all arrangements for meetings of the Council and may coordinate with appropriate officers of the Bank for this purpose.

(3) The Secretary-General shall present the annual report on the operation of the Centre to each Annual Meeting of the Administrative Council for its approval pursuant to Article 6(1)(g) of the Convention.

(4) The Secretary-General shall publish the annual report and a summary record of the proceedings of the Administrative Council.

Article 5
Le ou la Secrétaire du Conseil

(1) Le ou la Secrétaire général(e) fait fonction de Secrétaire du Conseil administratif.

(2) Sauf instruction contraire du Conseil administratif, le ou la Secrétaire général(e), en consultation avec le ou la Président(e) du Conseil administratif, est chargé(e) de toutes dispositions relatives aux sessions du Conseil et peut à cette fin se concerter avec les fonctionnaires concernés de la Banque.

(3) Le ou la Secrétaire général(e) présente le rapport annuel sur les activités du Centre à chaque session annuelle du Conseil administratif pour approbation conformément à l'article 6(1)(g) de la Convention.

(4) Le ou la Secrétaire général(e) publie le rapport annuel et un compte rendu sommaire des sessions du Conseil administratif.

Regla 5
Secretario(a) del Consejo

(1) El o la Secretario(a) General actuará como Secretario(a) del Consejo Administrativo.

(2) Salvo instrucción en contrario del Consejo Administrativo, el o la Secretario(a) General, en consulta con el o la Presidente(a) del Consejo Administrativo, tendrá a su cargo todos los arreglos relativos a las reuniones del Consejo y podrá coordinar con los funcionarios correspondientes del Banco a tal efecto.

(3) El o la Secretario(a) General someterá el informe anual de actividades del Centro a cada reunión anual del Consejo Administrativo para su aprobación de conformidad con lo dispuesto en el Artículo 6(1)(g) del Convenio.

(4) El o la Secretario(a) General publicará el informe anual y un acta sumaria de las reuniones del Consejo Administrativo.

23. In practice, the Secretary-General, Secretariat staff and the World Bank Corporate Secretariat make administrative and logistic arrangements for Administrative Council meetings. This includes preparation of the annual report, holding the meeting, and follow up with a record of the proceedings.

24. Proposed AFR 5 includes the content of current AFR 1(2) and reorders the paragraphs in AFR 5 consistent with the order in which the tasks are completed.

REGULATION 6 – ATTENDANCE AT MEETINGS

Regulation 6
Attendance at Meetings

(1) The Secretary-General and the Deputy Secretaries-General may attend all meetings of the Administrative Council.

(2) The Secretary-General, in consultation with the Chairman, may invite observers to attend any meeting of the Administrative Council.

Article 6
Participation aux sessions

(1) Le ou la Secrétaire général(e) et les Secrétaires généraux(ales) adjoint(e)s peuvent assister à toutes les sessions du Conseil administratif.

(2) Le ou la Secrétaire général(e), en consultation avec le ou la Président(e) du Conseil administratif, peut inviter des observateurs à assister à toute session du Conseil administratif.

Regla 6
Asistencia a las Reuniones

(1) El o la Secretario(a) General y los o las Secretarios(as) Generales Adjuntos(as) podrán asistir a todas las reuniones del Consejo Administrativo.

(2) El o la Secretario(a) General, en consulta con el o la Presidente(a) del Consejo Administrativo, podrá invitar a observadores a cualquier reunión del Consejo Administrativo.

25. No changes are proposed to AFR 6.

REGULATION 7 – VOTING

CURRENT RELATED PROVISIONS: Convention Art. 6, 7

Regulation 7
Voting

(1) Except as otherwise provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. At any meeting the Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but shall require a formal vote upon the request of any member. The written text of the motion shall be distributed to the members if a formal vote is required.

(2) No member of the Administrative Council may vote by proxy or by any method other than in person, but a member may designate a temporary alternate to cast its vote at any meeting at which the regular alternate is not present.

(3) Between Annual Meetings, the Chairman may call a special meeting or request that the Administrative Council vote by correspondence on a motion. The Secretary-General shall transmit the motion to each member. Votes shall be cast within 30 days after such transmission, unless a longer period is approved by the Chairman. Upon expiry of the established period, the Secretary-General shall record the results and notify all members of the outcome. The motion shall be considered lost if the replies received do not include those of a majority of the members.

(4) If all Contracting States are not represented at a meeting of the Administrative Council and the votes necessary to adopt a proposed decision by a majority of two-thirds of the members of the Council are not obtained, the Council, with the concurrence of the Chairman, may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members shall be solicited in accordance with paragraph (3). Votes registered at the meeting may be changed by the member before the expiry of the voting period established pursuant to paragraph (3).

Article 7
Vote

(1) Sauf disposition contraire de la Convention, toutes les questions soumises au Conseil administratif sont résolues à la majorité des voix exprimées. Au cours d'une session, la personne assurant la présidence peut, au lieu d'un vote formel, constater par elle-même les conclusions de la session, mais elle doit exiger un vote formel à la demande de tout membre. Le texte écrit de la motion doit être distribué aux membres si un vote formel est exigé.

(2) Aucun membre du Conseil administratif ne peut voter par procuration ou autrement qu'en personne, mais un membre peut désigner un suppléant temporaire pour voter à sa place à toute session du Conseil à laquelle le suppléant permanent n'est pas présent.

(3) Entre les sessions annuelles, le ou la Président(e) du Conseil administratif peut convoquer une session spéciale ou exiger que le Conseil administratif vote par correspondance sur une motion. Le ou la Secrétaire général(e) transmet la motion à chaque membre. Les votes doivent être exprimés dans un délai de 30 jours après une telle transmission, à moins qu'un délai plus long n'ait été approuvé par le ou la Président(e) du Conseil administratif. Á l'expiration du délai fixé, le ou la Secrétaire général(e) enregistre les résultats et notifie l'issue du vote à tous les membres. La motion doit être considérée comme ayant été rejetée si les réponses reçues ne comprennent pas celles de la majorité des membres.

(4) Si tous les États contractants ne sont pas représentés lors d'une session du Conseil administratif, et si le nombre de voix nécessaires pour l'adoption d'un projet de décision à la majorité des deux tiers des membres du Conseil n'est pas réuni, le Conseil peut, avec l'accord du ou de la Président(e) du Conseil administratif, décider que les voix des membres du Conseil représentés à la session seront recueillies et que les membres absents seront invités à voter conformément aux dispositions du paragraphe (3). Les voix recueillies à cette session peuvent être modifiées par un membre avant l'expiration du délai prévu audit paragraphe (3).

Regla 7
Votación

(1) Salvo disposición en contrario en el Convenio, todas las decisiones del Consejo Administrativo se tomarán por la mayoría de los votos emitidos. En el curso de cualquier reunión, la persona que ejerce la presidencia, en lugar de pedir una votación formal, podrá establecer el propósito de la reunión, pero dispondrá que se vote formalmente si así lo solicitara cualquiera de sus miembros. Si se requiere una votación formal, se deberá distribuir el texto escrito de la moción que se somete a votación a los miembros.

(2) Ningún miembro del Consejo Administrativo podrá votar por poder o por cualquier método que no sea personalmente. No obstante, un miembro podrá designar un suplente interino para que emita su voto en cualquier reunión en que esté ausente el suplente titular.

(3) Entre las reuniones anuales, el o la Presidente(a) del Consejo Administrativo podrá convocar una reunión especial o solicitar que el Consejo Administrativo vote por correspondencia sobre una moción. El o la Secretario(a) General transmitirá la moción a cada miembro. Los votos deberán emitirse dentro de los 30 días siguientes a dicha transmisión, salvo que el o la Presidente(a) del Consejo Administrativo apruebe un plazo mayor. Al término del plazo establecido, el o la Secretario(a) General registrará los resultados y los notificará a todos los miembros. La moción se tendrá por rechazada si las respuestas recibidas no comprenden las de una mayoría de los miembros.

(4) Si todos los Estados Contratantes no están representados en una reunión del Consejo Administrativo y no se obtuvieren los votos necesarios para tomar una decisión propuesta por la mayoría de los dos tercios de los miembros del Consejo, el Consejo, con la anuencia del o de la Presidente(a), podrá decidir que se deje constancia de los votos de los miembros del Consejo representados en la reunión y que se solicite a los miembros ausentes que voten de acuerdo con el párrafo (3). Los votos emitidos en dicha reunión podrán ser modificados por un miembro antes de que venza el plazo de votación establecido de conformidad con lo dispuesto en el párrafo (3).

26. AFR 7 addresses voting in person and by correspondence. No change is proposed for in-person voting. Several changes are proposed for AFR 7(3) in respect of voting by correspondence.

27. ***First***, it is suggested that the Chairman be entitled to propose a vote by correspondence at any time. Current AFR 7(3) allows the Chairman to call for a vote by correspondence only if the action to be voted on must be taken before the next Annual Meeting and it does not warrant calling a special meeting. To date, written votes have been used to adopt some rule changes and to elect a Secretary-General to avoid long vacancies in the position. Proposed

AFR 7 would give the Chairman greater flexibility to request a written vote between meetings. This could enhance efficiency since Administrative Council representatives are not at the Centre. The proposed amendment retains the safeguard that a written motion must be passed by a majority of Member States and not simply by a majority of those voting.

28. ***Second***, proposed AFR 7(3) would give members 30 days to cast a written vote rather than the current 21 days. Member States may benefit from additional time to consider and cast their vote. The ICSID Chairman's ability to extend the period to return a written vote is retained in the proposed amendment.

29. ***Third***, proposed AFR 7(4) is simplified. It allows the Administrative Council to request a written vote from absent members if a two-thirds majority is required to adopt a decision but is not obtained at the in-person meeting.

CHAPTER II – THE SECRETARIAT

REGULATION 8 – ELECTION OF THE SECRETARY-GENERAL AND DEPUTY SECRETARIES-GENERAL

CURRENT RELATED PROVISIONS: Convention Art. 10; AFR 13

Chapter II
The Secretariat

Regulation 8
Election of the Secretary-General and Deputy Secretaries-General

In proposing to the Administrative Council one or more candidates for the office of Secretary-General or Deputy Secretary-General, the Chairman may also make proposals with respect to their term and conditions of service.

Chapitre II
Le Secrétariat

Article 8
Élection du ou de la Secrétaire général(e) et des Secrétaires généraux(ales) adjoint(e)s

Lorsqu'il présente au Conseil administratif un(e) ou plusieurs candidat(e)s pour le poste de Secrétaire général(e) ou de Secrétaire général(e) adjoint(e), le ou la Président(e) du Conseil administratif peut également soumettre des propositions au sujet de la durée du mandat et des conditions d'emploi.

Capítulo II
El Secretariado

Regla 8
Elección del o de la Secretario(a) General y de los o las Secretarios(as) Generales Adjuntos(as)

Al proponer al Consejo Administrativo uno o más candidatos para el puesto de Secretario(a) General o de Secretario(a) General Adjunto(a), el o la Presidente(a) del Consejo Administrativo podrá también efectuar recomendaciones respecto de la duración del cargo y las condiciones de empleo.

30. Proposed AFR 8 is simplified by not repeating the conditions imposed by Convention Art. 10 and 13. The title of AFR 8 is also amended to use gender-neutral language.

REGULATION 9 – ACTING SECRETARY-GENERAL

CURRENT RELATED PROVISION: Convention Art. 10(3)

Regulation 9
Acting Secretary-General

(1) If there is more than one Deputy Secretary-General, the Chairman may propose to the Administrative Council the order in which these Deputies shall act as Secretary-General pursuant to Article 10(3) of the Convention. In the absence of such a decision by the Administrative Council, the Secretary-General shall determine which Deputy Secretary-General shall act as Secretary-General.

(2) The Secretary-General shall designate the member of the staff of the Centre who shall be acting as Secretary-General during the absence or inability to act of both the Secretary-General and the Deputy Secretaries-General. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chairman shall designate the member of the staff who shall act for the Secretary-General.

Article 9
Secrétaire général(e) par intérim

(1) S'il y a plusieurs Secrétaires généraux(ales) adjoint(e)s, le ou la Président(e) du Conseil administratif peut proposer au Conseil administratif l'ordre dans lequel ces

adjoint(e)s feront fonction de Secrétaire général(e) en vertu de l'article 10(3) de la Convention. A défaut d'une telle décision du Conseil administratif, le ou la Secrétaire général(e) détermine lequel des Secrétaires généraux(ales) adjoint(e)s remplit les fonctions de Secrétaire général(e).

(2) Le ou la Secrétaire général(e) désigne le membre du personnel du Centre qui fera fonction de Secrétaire général(e), en cas d'absence ou d'empêchement du ou de la Secrétaire général(e) et de tous(tes) les Secrétaires généraux(ales) adjoint(e)s. En cas de vacance simultanée des postes de Secrétaire général(e) et de Secrétaire général(e) adjoint(e), le ou la Président(e) du Conseil administratif désigne le membre du personnel qui exercera les fonctions de Secrétaire général(e).

Regla 9
Secretario(a) General Interino(a)

(1) Si hay más de un o una Secretario(a) General Adjunto(a), el o la Presidente(a) del Consejo Administrativo podrá proponer al Consejo Administrativo el orden en que dichos Secretarios(as) Adjuntos(as) actuarán como Secretario(a) General de conformidad con lo dispuesto en el Artículo 10(3) del Convenio. A falta de decisión del Consejo Administrativo sobre el particular, el o la Secretario(a) General determinará cuál de los o las Secretarios(as) Generales Adjuntos(as) actuará como Secretario(a) General.

(2) El o la Secretario(a) General designará a un miembro del personal del Centro para que actúe como Secretario(a) General durante la ausencia o incapacidad para actuar, tanto del o de la Secretario(a) General, como de los o las Secretarios(as) Generales Adjuntos(as). Si se produjere la vacancia simultánea de los cargos de Secretario(a) General y Secretario(a) General Adjunto(a), el o la Presidente(a) del Consejo Administrativo designará a un miembro del personal para que actúe como Secretario(a) General.

31. Current AFR 9(1) requires the Chairman to propose the order in which the Deputy Secretaries-General shall act for the Secretary-General. Absent such a designation, the more senior-in-post Deputy shall act.

32. The current regulation has gaps. First, when the Deputies are elected at the same time (as is currently the case), neither is more senior in post. Second, Deputy Secretaries-General are often called upon to act for the Secretary-General for periods of one day to several weeks. Flexibility to nominate either Deputy for different dates is preferable.

33. The proposed amendment allows the Secretary-General to designate which Deputy will act during each period of absence, in default of an Administrative Council order to the contrary.

34. Proposed AFR 9(2) is simplified, but maintains the current rule that the Secretary-General shall name the staff member who will act in the absence of both the Secretary-General and the Deputies. If the offices of Secretary-General and Deputy Secretary-General are both vacant, the Chairman will designate the staff member who will act as Secretary-General.

REGULATION 10 – APPOINTMENT OF STAFF MEMBERS

Regulation 10
Appointment of Staff Members

The Secretary-General shall appoint the staff of the Centre. Appointments may be made directly or by secondment.

Article 10
Recrutement du personnel

Le ou la Secrétaire général(e) recrute le personnel du Centre. Le recrutement peut se faire directement ou par détachement.

Regla 10
Nombramiento del Personal

El o la Secretario(a) General nombrará al personal del Centro. Los nombramientos podrán hacerse directamente o mediante comisiones de servicio.

35. No changes are proposed to AFR 10.

REGULATION 11 – CONDITIONS OF SERVICE

Regulation 11
Conditions of Service

(1) The conditions of service of the staff of the Centre shall be the same as those of the staff of the Bank.

(2) The Secretary-General shall make arrangements with the Bank, within the framework of the general administrative arrangements approved by the Administrative Council pursuant to Article 6(1)(d) of the Convention, for the participation of members of the Secretariat in the Staff Retirement Plan of the Bank and in other facilities and contractual arrangements established for the benefit of the staff of the Bank.

Article 11
Conditions d'emploi

(1) Les conditions d'emploi du personnel du Centre sont les mêmes que celles du personnel de la Banque.

(2) Le ou la Secrétaire général(e) prend avec la Banque, dans le cadre des arrangements administratifs de caractère général approuvés par le Conseil administratif en vertu de l'article 6(1)(d) de la Convention, toutes dispositions nécessaires pour la participation des membres du Secrétariat au régime de retraite du personnel de la Banque, ainsi qu'à tous autres avantages ou arrangements contractuels établis au profit du personnel de la Banque.

Regla 11
Condiciones de Empleo

(1) Las condiciones de empleo del personal del Centro serán las mismas que las del personal del Banco.

(2) El o la Secretario(a) General hará arreglos con el Banco, dentro del marco de los arreglos administrativos generales que el Consejo Administrativo haya aprobado de conformidad con lo dispuesto en el Artículo 6(1)(d) del Convenio, para que los miembros del Secretariado participen en el Plan de Pensiones del Personal del Banco así como en los demás servicios y arreglos contractuales establecidos en beneficio del personal del Banco.

36. The language of proposed AFR 11 is streamlined.

REGULATION 12 – AUTHORITY OF THE SECRETARY-GENERAL

CURRENT RELATED PROVISIONS: Convention Art. 9, 10

Regulation 12
Authority of the Secretary-General

(1) Deputy Secretaries-General and the staff of the Centre shall act solely under the direction of the Secretary-General.

(2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. Deputy Secretaries-General may only be dismissed with the concurrence of the Administrative Council.

Article 12
Pouvoirs du ou de la Secrétaire général(e)

(1) Les Secrétaires généraux(ales) adjoint(e)s et le personnel du Centre ne reçoivent d'instructions que du ou de la Secrétaire général(e).

(2) Le ou la Secrétaire général(e) peut renvoyer les membres du Secrétariat et leur imposer des mesures disciplinaires. Les Secrétaires généraux(ales) adjoint(e)s ne peuvent être renvoyé(e)s qu'avec l'accord du Conseil administratif.

Regla 12
Facultades del o de la Secretario(a) General

(1) Los o las Secretarios(as) Generales Adjuntos(as) y el personal del Centro actuarán solamente bajo la dirección del o de la Secretario(a) General.

(2) El o la Secretario(a) General tendrá la facultad de despedir a los miembros del Secretariado y de imponer medidas disciplinarias. Los o las Secretarios(as) Generales Adjuntos(as) podrán ser despedidos sólo con el consentimiento del Consejo Administrativo.

37. This proposal streamlines the language in current AFR 12 given the related definitions in the Convention and AFR, but makes no substantive change.

REGULATION 13 – INCOMPATIBILITY OF FUNCTIONS

Regulation 13
Incompatibility of Functions

The Secretary-General, the Deputy Secretaries-General and the staff of the Centre may not serve on the Panels of Conciliators or of Arbitrators, or as members of any Commission or Tribunal.

Article 13
Incompatibilité de fonctions

Le ou la Secrétaire général(e), les Secrétaires généraux(ales) adjoint(e)s et le personnel du Centre ne peuvent pas figurer sur la liste de conciliateurs ou d'arbitres, ni être membres d'une Commission ou d'un Tribunal.

Regla 13
Incompatibilidad de Funciones

El o la Secretario(a) General, los o las Secretarios(as) Generales Adjuntos(as) y el personal del Centro no podrán formar parte de las Listas de Conciliadores o de Árbitros, ni actuar como miembros de una Comisión o Tribunal.

38. The proposal streamlines the language in AFR 13 but makes no substantive change.

CHAPTER III – FINANCIAL PROVISIONS

REGULATION 14 – COSTS OF PROCEEDINGS

RELATED DOCUMENTS: Draft Memorandum on Fees and Expenses (Schedule 1)

CURRENT RELATED PROVISIONS: Convention Art. 59-61; AR 28, 43-45, 47

Chapter III
Financial Provisions

Regulation 14
Costs of Proceedings

(1) Each member of a Commission, Tribunal or Committee shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a hearing or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a hearing or session held away from the member's place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing or session is held; and

(iii) a *per diem* allowance for each day the member spends away from their place of residence.

(2) The Secretary-General, with the approval of the Chairman, shall determine and publish the amount of the fee and the *per diem* allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the first session of the Commission, Tribunal or Committee and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties for the services of the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) members of Commissions, Tribunals and Committees, and any assistants approved by the parties;

(b) witnesses and experts called by a Commission, Tribunal or Committee, and not by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any hearing or session held away from an ICSID facility.

(5) To enable the Centre to pay the costs referred to in paragraphs (1)-(4), the parties shall make payments to the Centre in accordance with the following:

(a) upon registration of a Request for arbitration or conciliation, the Secretary-General shall request the claimant(s) to make a payment to defray the estimated costs of the proceeding through the first session of the Tribunal, which shall be considered partial payment by the claimant(s) of the payment referred to in paragraph (5)(b);

(b) upon constitution of a Commission or Tribunal, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding;

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding. The Centre shall provide a statement of account to the parties with any request for a supplementary payment;

(d) in conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (5)(b) and (c), unless the parties agree on a different division. In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (5)(b) and (c), unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal's final decision on the payment of costs pursuant to Article 61(2) of the Convention;

(e) payments shall be payable on the date of the request from the Secretary-General. The following procedure shall apply in the event of non-payment:

(i) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(ii) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (5)(e)(i), the Secretary-General may, after notice to and as far as possible in consultation with the parties and the Commission or Tribunal, if constituted, suspend the proceeding until payment is made; and

(iii) if any proceeding is suspended for non-payment for more than 90 days, the Secretary-General may, after notice to and as far as possible in consultation with the parties and the Commission or Tribunal, if constituted, discontinue the proceeding.

(6) Regulation 14(5) shall apply to an application for annulment of an Award, except that the applicant shall be solely responsible for making the payments requested by the Secretary-General.

(7) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission, Tribunal or Committee, unless the parties have made sufficient payments to defray the costs of the proceeding.

(8) For the purposes of this Regulation, "party" includes, where the context so admits, all parties acting as claimants or as respondents.

Chapitre III
Dispositions financières

Article 14
Frais des instances

(1) Chaque membre d'une Commission, d'un Tribunal ou d'un Comité perçoit :

(a) des honoraires pour chaque heure de travail effectué se rapportant à l'instance ;

(b) lorsqu'aucun voyage n'a été entrepris pour se rendre à une audience ou une session, le remboursement de ses frais raisonnablement encourus aux seules fins de l'instance ;

(c) lorsqu'un voyage a été entrepris pour se rendre à une audience ou une session tenue en dehors du lieu de résidence du membre :

(i) le remboursement des coûts de transport terrestre entre les lieux de départ et d'arrivée ;

(ii) le remboursement des coûts de transports terrestre et aérien vers et depuis la ville dans laquelle l'audience ou la session se tient ;

(iii) une allocation de base pour chaque jour passé par le membre hors de son lieu de résidence.

(2) Le ou la Secrétaire général(e), avec l'accord du ou de la Président(e) du Conseil administratif, détermine et publie le montant des honoraires et de l'allocation de base visés au paragraphe (1)(a) et (c). Toute demande par un membre d'un montant plus élevé devra être faite par l'intermédiaire du ou de la Secrétaire général(e) et ne peut être adressée directement aux parties. Cette demande doit être présentée avant la première session de la Commission, du Tribunal ou du Comité et doit justifier l'augmentation demandée.

(3) Le ou la Secrétaire général(e) détermine et publie les droits administratifs dus par les parties pour les services du Centre.

(4) Tous paiements aux personnes suivantes, y compris les remboursements de dépenses, doivent être versés par le Centre aux :

(a) membres des Commissions, Tribunaux et Comités ainsi que tout(e) assistant(e) approuvé(e) par les parties ;

(b) témoins et experts appelés par une Commission, un Tribunal ou un Comité et non par une partie ;

(c) prestataires de services engagés par le Centre pour une instance ;

(d) hôtes d'une audience ou session tenue en dehors d'un établissement du CIRDI.

(5) Pour permettre au Centre de payer les frais prévus aux paragraphes (1) - (4), les parties effectuent des paiements au Centre comme il suit :

(a) dès l'enregistrement d'une requête d'arbitrage ou de conciliation, le ou la Secrétaire général(e) demande à la ou aux partie(s) demanderesse(s) de procéder à un paiement pour couvrir les frais estimés de l'instance jusqu'à la première session du Tribunal ou de la Commission. Ce versement est considéré comme un règlement partiel par les parties demanderesses du paiement mentionné au paragraphe (5)(b) ;

(b) dès la constitution d'une Commission ou d'un Tribunal, le ou la Secrétaire général(e) demande aux parties de procéder à un paiement pour couvrir les frais estimés de la phase ultérieure de l'instance ;

(c) le ou la Secrétaire général(e) peut demander aux parties d'effectuer des paiements supplémentaires à tout moment si nécessaire pour couvrir les frais estimés de l'instance. Le Centre fournit un état financier aux parties avec toute demande de paiement supplémentaire ;

(d) dans les instances de conciliation, chaque partie s'acquitte de la moitié des paiements mentionnés au paragraphe (5)(b) et (c), sauf si une répartition différente est convenue par les parties. Dans les instances d'arbitrage, chaque partie s'acquitte de la moitié des paiements mentionnés au paragraphe (5)(b) et (c), sauf si une répartition différente est convenue par les parties ou ordonnée par le Tribunal. Le paiement de ces sommes est sans préjudice de la décision finale du Tribunal sur le paiement des frais conformément à l'article 61(2) de la Convention ;

(e) les paiements sont dus à la date de la demande du ou de la Secrétaire général(e). La procédure suivante sera appliquée en cas de non-paiement :

(i) si les sommes demandées ne sont pas payées intégralement dans les 30 jours suivants la date de la demande, le ou la Secrétaire général(e) peut notifier aux deux parties le défaut et leur donner une opportunité de procéder au paiement demandé ;

(ii) si une partie du paiement demandé reste impayée 15 jours après la date de la notification au paragraphe 5(e)(i), le ou la Secrétaire général(e) peut suspendre l'instance jusqu'à ce que le paiement soit effectué, après notification aux parties et à la Commission ou au Tribunal, s'ils sont constitués, et autant que possible après les avoir consultés ; et

(iii) si une instance est suspendue pour non-paiement pendant plus de 90 jours, le ou la Secrétaire général(e) peut mettre fin à l'instance, après notification aux parties et à la Commission ou au Tribunal, s'ils sont constitués, et autant que possible après les avoir consultés.

(6) L'article 14(5) s'applique également aux demandes en annulation d'une sentence, étant entendu que la partie requérante est toutefois seule responsable pour effectuer les paiements demandés par le ou la Secrétaire général(e).

(7) Le Centre n'est pas tenu de fournir des services se rapportant à une instance, ni de s'acquitter des honoraires, allocations et remboursements des membres d'une Commission, d'un Tribunal ou d'un Comité, à moins que les parties n'aient effectué des paiements suffisants pour couvrir les frais de l'instance.

(8) Aux fins du présent article, « partie » inclut, quand le contexte le permet, toutes les parties intervenant comme demanderesses ou défenderesses.

Capítulo III
Disposiciones financieras

Regla 14
Costos del Procedimiento

(1) Cada miembro de una Comisión, Tribunal o Comité recibirá:

(a) un honorario por cada hora de trabajo invertida en asuntos relacionados con el procedimiento;

(b) cuando no haya viajado para asistir a una audiencia o sesión, el reembolso de los gastos razonablemente incurridos al solo efecto del procedimiento; y

(c) cuando haya viajado para asistir a una audiencia o una sesión celebrada en un lugar distinto del lugar de residencia del miembro:

(i) un reembolso del costo de transporte terrestre entre los puntos de partida y llegada;

(ii) un reembolso del costo de transporte aéreo y terrestre hacia y desde la ciudad en la que se celebra la audiencia o sesión; y

(iii) un *per diem* por cada día que el miembro pase en un lugar distinto de su lugar de residencia.

(2) El o la Secretario(a) General, con la aprobación del o de la Presidente(a) del Consejo Administrativo, determinará y publicará el importe del honorario y el *per diem* a los que se hace referencia en los párrafos (1)(a) y (c). Cualquier solicitud de un importe mayor por parte de un miembro, deberá ser efectuada a través del o de la Secretario(a) General, y no directamente a las partes. Dicha solicitud deberá efectuarse con anterioridad a la primera sesión de la Comisión, Tribunal o Comité y deberá justificar el aumento solicitado.

(3) El o la Secretario(a) General determinará y publicará un cargo administrativo anual a ser pagado por las partes por los servicios del Centro.

(4) El Centro realizará todos los pagos que deban efectuarse, lo cual incluye el reembolso de gastos, a:

(a) los miembros de las Comisiones, Tribunales y Comités, así como a los asistentes aprobados por las partes;

(b) los y las testigos y peritos(as) llamados a declarar por una Comisión, un Tribunal o un Comité y no por una de las partes;

(c) proveedores de servicios que el Centro contrate para un procedimiento; y

(d) los anfitriones de audiencias o sesiones celebradas fuera de una instalación del CIADI.

(5) Para que el Centro pueda pagar los costos a los que se hace referencia en los párrafos (1)-(4), las partes deberán realizar pagos al Centro de conformidad con lo siguiente:

(a) al registrar una solicitud de arbitraje o de conciliación el o la Secretario(a) General solicitará a la o las demandante(s) que haga(n) un pago para sufragar los costos estimados del procedimiento hasta la primera sesión del Tribunal, el cual se considerará un pago parcial por parte de la o las demandante(s) respecto del pago al que se hace referencia en el párrafo (5)(b);

(b) al constituirse una Comisión o Tribunal, el o la Secretario(a) General solicitará a las partes que hagan un pago para sufragar los costos estimados de la fase siguiente del procedimiento;

(c) el o la Secretario(a) General podrá solicitar que las partes hagan pagos suplementarios en cualquier momento si fuera necesario para sufragar los costos estimados del procedimiento. El Centro proporcionará un estado de cuenta a las partes con cualquier solicitud de pago suplementario;

(d) en los procedimientos de conciliación, cada parte abonará la mitad de los pagos a los que se hace referencia en el párrafo (5)(b) y (c), a menos que las partes

acuerden una división distinta. En los procedimientos de arbitraje, cada parte deberá abonar la mitad de los pagos a los que se hace referencia en el párrafo (5)(b) y (c), a menos que las partes acuerden o el Tribunal ordene una división distinta. El pago de estas sumas es sin perjuicio de la decisión final del Tribunal respecto al pago de costos de conformidad con lo dispuesto en el Artículo 61(2) del Convenio;

(e) los pagos serán exigibles en la fecha de la solicitud del o de la Secretario(a) General. En caso de no efectuarse el pago, se aplicará el siguiente procedimiento:

(i) si las cantidades solicitadas no fueran pagadas en su totalidad dentro de los 30 días siguientes a la fecha de la solicitud, el o la Secretario(a) General podrá notificar acerca de la omisión a ambas partes y les dará una oportunidad para que efectúen el pago requerido;

(ii) si cualquier parte del pago requerido continúa pendiente después de 15 días de la fecha de la notificación prevista en el párrafo (5)(e)(i), el o la Secretario(a) General, después de notificar tanto a las partes como a la Comisión o Tribunal, si se hubiere constituido y, en lo posible, de consultar con ellos, podrá suspender el procedimiento hasta que se efectúe el pago; y

(iii) si un procedimiento se suspendiera por más de 90 días por falta de pago, el o la Secretario(a) General, después de notificar tanto a las partes como a la Comisión o Tribunal, si se hubiere constituido y, en lo posible, de consultar con ellos, podrá discontinuar el procedimiento.

(6) La Regla 14(5) aplicará a una solicitud de anulación de un laudo, salvo que la parte solicitante de la anulación será la única responsable de efectuar los pagos que requiera el o la Secretario(a) General.

(7) El Centro no estará obligado a suministrar servicios en relación con cualquier procedimiento o a pagar honorarios, *per diem* o reembolsos de los miembros de cualquier Comisión, Tribunal o Comité, a menos que las partes hayan hecho pagos suficientes para sufragar los costos del procedimiento.

(8) A los fines de este Reglamento, "parte" incluye, cuando el contexto así lo admite, a todas las partes que actúen como demandantes o demandadas.

39. AFR 14 governs compensation of Commission, Tribunal and Committee members, the costs that ICSID incurs in each proceeding, the advance payments that parties make to ICSID to cover these costs and discontinuance for failure to pay advances. The proposed amendments simplify financial administration of proceedings, while ensuring that costs are transparent, predictable and fair.

Members' Compensation – AFR Reg. 14(1)

40. AFR 14(1) addresses the compensation of members of Commissions, Tribunals and Committees (referred to as "members" in this comment). Members are entitled to fees, reimbursements, and *per diem* allowances.

41. Fees. Under current AFR 14(1)(a) and (b), members receive a flat daily fee for each day of hearings or deliberations, irrespective of the number of hours worked during the hearing or deliberation, and receive an hourly fee (prorated from the daily fee) for all other work on the case. Proposed AFR 14(1)(a) modifies this to provide that members are entitled to a fixed fee measured only by hours of work. This proposal unifies the fee structure so that all work performed is compensated equally and exactly. It also simplifies accounting for time by members.

42. In the comments received, two law firms suggested that ICSID account for efficiency or complexity of the case in determining members' fees. Alternatively, there were suggestions to withhold payment until the Award is rendered.

43. ICSID shares the goal of efficiency and considered several possible fee structures that might factor in considerations other than actual time spent on the case. However, the fixed hourly fee remains appropriate for several reasons. First, it accurately compensates members for their actual work. Second, it is difficult to distinguish amongst investment cases based on level of complexity. The complexity of a case varies depending on numerous factual and legal arguments, and the amount of the claim is not a reliable predictor of complexity in many investment cases. Third, reducing or withholding payment of fees until the case concludes would exclude arbitrators without other financial means. Fourth, a fixed hourly fee increases transparency of members fees. This complements proposals to include a statement of each member's fees and expenses in each Report and Award, showing the number of hours spent on the proceeding. Fifth, the fixed hourly fee can be administered objectively and consistently across ICSID cases. Therefore, the WP proposes that AFR 14(1)(a) retain the principle that arbitrators be compensated based on the actual time spent on a case, and that their fees be paid as they are invoiced throughout the proceeding.

44. The amount of the fee is published in the ICSID Memorandum on Fees and Expenses. Schedule 1 provides the Memorandum on Fees and Expenses that would be issued with the amended rules. It explains how to complete and file the claim form. The hourly fee is USD 375 per hour, which corresponds to the fee that Tribunal members currently receive based on the prorated daily fee of USD 3000 per eight-hour day. This fee remains appropriate, especially when compared with the range of fees of international adjudication institutions administering comparable cases (*see* table below).

Comparison of Arbitrator Fees by Institution

(all rates of exchange are approximate as of July 1, 2018)

Institutions with Hourly Fees (hourly rate per Arbitrator)			
ICSID	USD 375/hour		
HKIAC*	Maximum rate: HKD 6500 *(USD 828/hour)*		
LCIA	Maximum rate: GBP 450 (*USD 594/hour*)		
PCA**	Rates observed: USD 375 to 1,000/hour		
Bodies with Daily Rates (daily rate per Member)			
NAFTA Chapter 19 Panels	CAD 800 *(USD 609/day)*		
NAFTA Chapter 20 Arbitral Panels	CAD 800 *(USD 609/day)*		
WTO Panels and Appellate Body***	USD 900/day		
Institutions with *Ad Valorem* Fees (scheduled rate per Arbitrator)			
Amount in Dispute:	***USD 10 million***	***USD 100 million***	***USD 1 billion***
CIETAC ISDS	RMB 179,921–701,607 (*USD 27,194–106,046*)	RMB 354,961–1,634,110 (*USD 53,651–246,991*)	RMB 536,500–10,000,000 (*USD 81,090–1,511,474*)
HKIAC*	HKD 965,251 (*USD 123,060)*	HKD 2,061,692 *(USD 262,846*)	HKD 4,432,653 (*USD 565,122*)
ICC	USD 39,167–187,400	USD 77,867–351,300	USD 171,867–783,300
SCC** (for presiding arbitrator)**	EUR 50,000–139,000 (*USD 58,403–162,360*)	EUR 90,000–261,500 (*USD 105,125–305,448)*	*Set by the SCC Board if amount in dispute exceeds EUR 100 million*
SIAC	S$ 161,900 (*USD 126,820*)	S$ 344,900 (*USD 270,500*)	S$ 949,576 (*USD 696,242)*

*HKIAC has both hourly and *ad valorem* fee options. The method of compensation is to be agreed between the parties, failing which the Tribunal is compensated based on the hourly fee schedule.

**Arbitrator fees in PCA-administered proceedings are determined by the arbitrators on a case-by-case basis. As information concerning arbitrator fees is not published, the rates are based on publicly-available case documents from 2010-2018.

***WTO Appellate Body members also receive a monthly retainer.

****In SCC proceedings, co-arbitrators receive 60% of the presiding arbitrator's rate, unless the SCC Board determines that a different rate shall apply.

45. The suitability of the ICSID rate is confirmed by the fact that it is increasingly suggested by parties in investment cases before other institutions and by States negotiating new investment treaties (*see e.g.*, CETA, Art. 8.27(14); Singapore-EU FTA, Art. 8(2)). As a result, no proposal is made to increase the hourly fee.

46. The Memorandum on Fees and Expenses also sets out ICSID's mandatory billing practices, designed to ensure that claims are detailed and filed quarterly or more frequently.

47. ICSID has a three-step process to scrutinize claims for accuracy and reasonableness. Each claim is reviewed by the ICSID Secretary, an ICSID Financial Officer and the Secretary-General before approval. ICSID will continue to scrutinize the accuracy and reasonableness of claims. In addition, members will be instructed to share copies of their claim forms with their co-arbitrators so they can ensure overall economy.

48. Reimbursements and *per diem* allowances. Current AFR 14(1) states that members are entitled to a *per diem* allowance for each day spent away from their normal place of residence, reimbursement for travel expenses not covered by the *per diem*, and reimbursement for certain direct expenses.

49. The proposed amendments simplify how members are compensated while traveling for hearings and deliberations. Proposed AFR 14(1)(b) clarifies that direct expenses (other than travel expenses) are reimbursable only when reasonably incurred for the sole purpose of the proceedings.

50. Proposed AFR 14(1)(c) provides members a flat *per diem* allowance to cover lodging, meals, within-city transportation, and other incidental expenses when away from their place of residence for the purpose of the proceeding. The only travel expenses that are reimbursed at cost is transportation to and from the city where the sitting is held, and transportation to and from the points of departure and entry. This approach replaces the current, more complicated, formula in which members are entitled to a small *per diem* allowance to cover subsistence expenses (based on an allowance for Executive Directors no longer used by the World Bank) and reimbursement at cost for all other travel expenses. The proposed amendments will streamline the accounting process and enhance predictability of the costs of sittings.

51. The proposed Memorandum on Fees and Expenses will also provide instructions regarding reimbursements and the *per diem* allowance. As the *per diem* allowance will now cover lodging, meals and subsistence expenses, it will increase to USD 800 for each day overnight lodging is required. For each day of travel not requiring overnight lodging, the proposed *per diem* allowance is USD 200. These amounts have been calculated based on an analysis of members' recent claim forms. They also fall within the range of *per diem* allowances currently paid by other international institutions (*see* table below).

Per Diem Allowance by Arbitral Institution

(exchange rates are approximate as of July 1, 2018)

Institution	*Per Diem* – With Overnight Accommodation	*Per Diem* – No Overnight Accommodation
ICSID	USD 800 (proposed)	USD 200 (proposed)
ICC	USD 1,200	USD 400
HKIAC	HK 5,500 (*USD 700*)	HK 1,500 (*USD 191*)

LCIA	None (actual expenses reimbursed)	None (actual expenses reimbursed)
PCA	Case-by-case determination	Case-by-case determination
SCC	EUR 500 (*USD 584*)	None (actual expenses reimbursed)
SIAC	SGD 1,000 (*USD 733*)	SGD 400 (*USD 293*)

52. Request for a higher fee. Proposed AFR 14(2) maintains the rule that members may not approach the parties directly to seek a higher fee pursuant to Art. 60(2) of the Convention, but could raise the question of an increase with the Secretary-General. Any such request must be made before the first session. In practice, and in line with ICSID's expectations, members very rarely seek a higher fee.

53. ICSID notes that the potential for the parties to agree in advance on a different (higher or lower) fee or expense arrangement is in Art. 60 of the Convention and may be suitable for discussion in the context of Convention amendment.

Administrative Charge – AFR 14(3)

54. The reference to the annual administrative charge in proposed AFR 14(3) makes AFR 14 a comprehensive description of the costs of the proceeding that is consistent with Art. 59 of the Convention. The services provided under the annual administrative charge include the service of the ICSID Secretary, financial administration of party escrow funds and free use of ICSID facilities.

Other Direct Costs – AFR 14(4)

55. Proposed AFR 14(4) clarifies that ICSID directly pays certain service providers in a proceeding. A reference to such direct expenses is currently in a separate subparagraph. The proposed text addresses all direct expenses in the same provision.

Advance Payments – AFR 14(5)

56. Proposed AFR 14(5) addresses advance payments from parties to cover the costs of the proceeding. The proposal streamlines the procedure in line with current practice, and addresses procedural issues that ICSID has identified.

57. ***First***, the WP proposes that an advance payment be requested upon registration of the Request for arbitration or conciliation. This payment is to be made by the party instituting the proceeding and is credited toward its portion of the advance payment requested when constituting of the Tribunal. This will expedite proceedings.

58. ***Second***, the WP proposes to remove the requirement that the Secretary-General consult the President of the Tribunal before requesting advance payments from the parties. In practice, ICSID is best placed to estimate the costs of the proceeding, and to determine the

appropriate amount of advance payments at each relevant stage. ICSID consults the President if information is needed to estimate the advance funds required.

59. ***Third***, the reference to "three to six months" currently in AFR 14(3)(a)(i) is proposed to be removed. This period is impractical in light of the procurement process of many States and can be inconvenient for investors. Reflecting this reality, advance payments cover a longer period of time; the initial advance payment often covers the cost of the arbitration proceeding up to the oral hearing. The revised text brings the Regulation in line with this practice.

60. ***Fourth***, current AFR 14(3)(b) is moved to AFR 14(7), so that all instructions relating to advance payments are together in proposed AFR 14(5) and 14(6). No substantive change is proposed.

61. ***Fifth***, current AFR 14(3)(c) is outdated, as ICSID's case accounts are updated in real-time. Thus, it is proposed to omit this language and instead require that ICSID provide the parties with a statement of the amounts paid and the costs incurred with each request for a supplementary payment. This reflects ICSID's current practice.

62. ***Sixth***, the current text of AFR 14(3)(d) is separated into subparagraphs that address distinct subjects. The division of advance payments between the parties is now addressed in proposed AFR 14(5)(d). The proposed text is made consistent with the proposal of an advance payment upon registration. No other changes are proposed.

63. ***Seventh***, proposed AFR 14(5)(e) addresses the default procedure that applies when parties fail to make timely advance payments. The proposed text gives the Secretary-General greater flexibility regarding when to commence the default procedure. This flexibility is important for situations in which it is impractical to start the default procedure exactly 30 days after the date of the request for advances because, for example, a party's payment is in process but has not yet reached the case account. This amendment is consistent with current practice.

64. Proposed AFR 14(5)(e) shortens the period during which a proceeding can be suspended for non-payment from six months to 90 days. This will reduce the number of cases in which parties do not pursue the case, but are unwilling to discontinue the proceeding. This will also reduce the incidence of procedural complications, such as a vacancy on the Commission, Tribunal or Committee, during the suspension.

65. Proposed AFR 14(5)(e) also specifies that the Secretary-General has the ultimate responsibility to carry out the default procedure by suspending or discontinuing the proceeding when necessary. This is a change from the current text, which states that the Secretary-General "moves" the relevant body to act. In practice, the relevant body necessarily follows the Secretary-General's motion because the case cannot proceed with insufficient funds. The approach is consistent with proposed AFR 14(7), requiring the Centre not to provide services or pay fees unless the parties have made sufficient advance payments to cover the cost.

66. The amended provision retains the requirement that the Secretary-General give notice to and consult with the parties as far as possible before the proceeding is discontinued, and extends this requirement to the suspension of the proceeding. This ensures that proceedings are not suspended or discontinued except where appropriate. For example, the Secretary-General would not discontinue a proceeding when the parties have mutually requested a period of time to discuss settlement. As a further protection, the new provision also requires that the Secretary-General consult with the relevant body. AR 54 also provides for suspension by agreement of the parties.

67. ***Eighth***, current AFR 14(3)(e) is now proposed AFR 14(6), and the language is consistent with the rest of AFR 14. No other changes are proposed. Under this provision, the advance payments and default procedure discussed above also apply in annulment proceedings, except that the applicant on annulment is responsible for paying the advances.

REGULATION 15 – SPECIAL SERVICES

Regulation 15 **Special Services** (1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services. (2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.
Article 15 **Services particuliers** (1) Le Centre peut rendre des services particuliers se rapportant aux différends si la partie requérante dépose à l'avance un montant suffisant pour couvrir les coûts de ces services. (2) Les coûts des services particuliers sont normalement établis d'après un barème des frais publié par le ou la Secrétaire général(e).
Regla 15 **Servicios Especiales** (1) El Centro podrá prestar servicios especiales en relación con las diferencias si el solicitante previamente deposita una cantidad suficiente para sufragar los cargos por tales servicios. (2) Los cargos por servicios especiales serán normalmente establecidos en un arancel de derechos publicado por el o la Secretario(a) General.

68. Services provided in administering a case are paid by the parties from advances held in the case escrow account. Typically, they include the fees and expenses of arbitrators or conciliators, the administrative fee, interpreters, translators, and the like. These costs are termed "direct costs of the proceeding" and are collected under current AFR 14.

69. Fees for special services are collected under proposed AFR 15. The title of proposed AFR 15 is revised to delete "to Parties", since special services may sometimes be provided to persons who are not parties to a pending ICSID arbitration or conciliation. Examples of these costs include costs to host a mediation or an UNCITRAL investment case, to decide challenges in non-ICSID investment cases or to provide training.

REGULATION 16 – FEE FOR LODGING REQUESTS

CURRENT RELATED PROVISION: IR 5(2); AR 49(2), 50(1)(d)-(2), 55(1)(d), 55(2); ICSID Schedule of Fees

Regulation 16
Fee for Lodging Requests

The party or parties (if a request is made jointly) wishing to institute an arbitration or conciliation proceeding, or requesting a supplementary decision, rectification, interpretation, revision or annulment of an Award, or resubmission of a dispute, shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

Article 16
Droit pour le dépôt des requêtes

La partie ou les parties (en cas de requête conjointe) qui désirent introduire une instance en arbitrage, ou conciliation, ou requièrent une décision supplémentaire, la rectification, l'interprétation, la révision ou l'annulation de la sentence, ou le nouvel examen du différend, versent au Centre un droit de dépôt non-remboursable fixé par le ou la Secrétaire général(e) et publié dans le barème des frais.

Regla 16
Derecho de Presentación de las Solicitudes

La parte o partes (si la solicitud es conjunta) que desee(n) iniciar un procedimiento de arbitraje o conciliación, o que solicite(n) una decisión suplementaria, rectificación, aclaración, revisión o anulación de un laudo, o nueva sumisión de una diferencia, pagará(n) al Centro el derecho de presentación no reembolsable que el o la Secretario(a) General determine y publique en el arancel de derechos.

70. This provision is simplified.

REGULATION 17 – THE BUDGET

CURRENT RELATED PROVISION: Convention Art. 17

Regulation 17
The Budget

(1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of the following year.

(2) Before the end of each fiscal year, the Secretary-General shall prepare a budget indicating expected expenditures of the Centre (excepting those to be incurred on a reimbursable basis) and expected revenues (excepting reimbursements) for the following fiscal year. The budget shall be submitted for adoption by the Administrative Council at its next Annual Meeting in accordance with Article 6(1)(f) of the Convention.

(3) If the Secretary-General determines during the fiscal year that the expected expenditures will exceed those authorized in the budget, or wishes to incur expenditures not previously authorized, the Secretary-General shall prepare a supplementary budget in consultation with the Chairman and submit it to the Administrative Council for adoption, in accordance with Regulation 7.

(4) The adoption of a budget constitutes authority for the Secretary-General to make expenditures and incur obligations for the purposes and within the limits specified in the budget. Unless otherwise provided by the Administrative Council, the Secretary-General may exceed the amount specified for any given budget item, provided that the total amount of the budget is not exceeded.

(5) Pending the adoption of the budget by the Administrative Council, the Secretary-General may incur expenditures for the purposes and within the limits specified in the budget submitted, up to one quarter of the amount authorized to be expended in the previous fiscal year but in no event exceeding the amount that the Bank has agreed to make available for the current fiscal year.

Article 17
Budget

(1) L’exercice du Centre commence le 1er juillet de chaque année et se termine au 30 juin de l’année suivante.

(2) Avant la fin de chaque exercice, le ou la Secrétaire général(e) prépare un budget indiquant les dépenses prévues du Centre (sauf celles devant être engagées contre remboursement) et les recettes prévues (sauf les remboursements) pour l'exercice suivant. Le budget est soumis à l'approbation du Conseil administratif à sa prochaine session annuelle conformément à l'article 6(1)(f) de la Convention.

(3) Si au cours de l'exercice, le ou la Secrétaire général(e) considère que les dépenses prévues excéderont le montant autorisé dans le budget ou s'il souhaite engager des dépenses qui n'ont pas été autorisées, le ou la Secrétaire général(e) prépare un budget supplémentaire en consultation avec le ou la Président(e) du Conseil administratif et le soumet à l'approbation du Conseil administratif conformément à l'article 7.

(4) L'adoption du budget autorise le ou la Secrétaire général(e) à engager des dépenses et à contracter des obligations aux fins et dans les limites précisées dans le budget. A moins que le Conseil administratif n'en décide autrement, le ou la Secrétaire général(e) peut dépasser le montant autorisé pour tout poste du budget, sous réserve de ne pas dépasser le montant total du budget.

(5) En attendant que le Conseil administratif ait adopté le budget, le ou la Secrétaire général(e) peut engager des dépenses aux fins et dans les limites précisées dans le budget soumis, à concurrence du quart du montant des dépenses autorisées pour l'exercice précédent, mais ne doit en aucun cas dépasser le montant que la Banque est convenue d'accorder pour l'exercice en cours.

Regla 17
Presupuesto

(1) El ejercicio fiscal del Centro comenzará el 1° de julio de cada año y terminará el 30 de junio del año siguiente.

(2) Antes de que termine cada ejercicio fiscal, el o la Secretario(a) General preparará un presupuesto que indique los gastos estimados del Centro (con excepción de los que han de incurrirse sobre la base de que son reembolsables) y los ingresos estimados (con excepción de los reembolsos) para el ejercicio fiscal siguiente. El presupuesto se someterá para su adopción por parte del Consejo Administrativo en su reunión anual siguiente y de conformidad con lo que dispone el Artículo 6(1)(f) del Convenio.

(3) Si el o la Secretario(a) General determinare durante el transcurso del ejercicio fiscal que los gastos estimados excederán a los autorizados en el presupuesto, o si quisiere incurrir en gastos no autorizados previamente, el o la Secretario(a) General deberá preparar un presupuesto suplementario en consulta con el o la Presidente(a) del Consejo Administrativo y someterlo a la aprobación del Consejo Administrativo, de conformidad con lo que dispone la Regla 7.

(4) La adopción del presupuesto faculta al o a la Secretario(a) General a efectuar gastos y contraer obligaciones dentro de los límites y a los fines que se especifiquen en él. Salvo que el Consejo Administrativo decida lo contrario, el o la Secretario(a) General podrá exceder la cantidad especificada para cualquier partida presupuestaria, con tal que no exceda el monto total del presupuesto.

(5) Hasta tanto el Consejo Administrativo adopte el presupuesto, el o la Secretario(a) General podrá incurrir en gastos dentro de los límites y a los fines especificados en el presupuesto sometido a aprobación, hasta por una cuarta parte del monto autorizado a ser gastado en el ejercicio fiscal anterior, con tal que no exceda en caso alguno el monto que el Banco hubiere convenido en facilitarle para el ejercicio fiscal en curso.

71. The provision is simplified but no substantive change is made.

REGULATION 18 – ASSESSMENT OF CONTRIBUTIONS

CURRENT RELATED PROVISION: Convention Art. 17

Regulation 18
Assessment of Contributions

(1) Any excess of expected expenditures over expected revenues shall be assessed on the Contracting States. Each State that is not a member of the Bank shall be assessed a fraction of the total assessment equal to the fraction of the budget of the International Court of Justice that it would have to bear if that budget were divided only among the Contracting States in proportion to the then current scale of contributions applicable to the budget of the Court; the balance of the total assessment shall be divided among the Contracting States that are members of the Bank in proportion to their respective subscription to the capital stock of the Bank. The assessments shall be calculated by the Secretary-General immediately after the adoption of the annual budget, on the basis of the then current membership of the Centre, and shall be promptly communicated to all Contracting States. The assessments shall be payable as soon as they are communicated.

(2) On the adoption of a supplementary budget, the Secretary-General shall immediately calculate supplementary assessments, which shall be payable as soon as they are communicated to the Contracting States.

(3) A State which is party to the Convention during any part of a fiscal year shall be assessed for the entire fiscal year. If a State becomes a party to the Convention after the assessments for a given fiscal year have been calculated, its assessment shall be

calculated by the application of the same appropriate factor as was applied in calculating the original assessments, and no recalculation of the assessments of the other Contracting States shall be made.

(4) If, after the close of a fiscal year, it is determined that there is a cash surplus, such surplus shall, unless the Administrative Council decides otherwise, be credited to the Contracting States in proportion to the assessed contributions they had paid for that fiscal year. These credits shall be made with respect to the assessments for the fiscal year commencing two years after the end of the fiscal year to which the surplus pertains.

Article 18
Charges

(1) Tout excédent des dépenses prévues sur les recettes prévues est mis à la charge des États contractants. Tout État non membre de la Banque a à sa charge une fraction du montant total égale à la fraction du budget de la Cour internationale de Justice que cet État supporterait si ce budget n'était réparti qu'entre les États contractants proportionnellement à l'échelle des contributions au budget de la Cour en vigueur à cette date ; le solde de la charge totale est réparti entre les États contractants membres de la Banque proportionnellement à leur contribution respective au capital de la Banque. Les charges des États contractants sont calculées par le ou la Secrétaire général(e) immédiatement après l'adoption du budget annuel, sur la base des adhésions au Centre à cette date, et sont promptement communiquées à tous les États contractants. Les charges sont payables dès qu'elles sont communiquées.

(2) Dès qu'un budget supplémentaire est adopté, le ou la Secrétaire général(e) calcule les charges supplémentaires, qui sont payables dès qu'elles ont été notifiées aux États contractants.

(3) La charge d'un État partie à la Convention pendant une partie d'un exercice est calculée sur la base de l'ensemble de l'exercice. Si un État adhère à la Convention après que les charges d'un exercice donné ont été calculées, sa charge est évaluée en utilisant le même coefficient approprié utilisé pour le calcul des charges initiales, sans qu'aucune réévaluation des charges des autres États contractants soit effectuée.

(4) Si, après la clôture d'un exercice, il apparaît qu'il y a des fonds excédentaires, cet excédent, sauf décision contraire du Conseil administratif, est porté au crédit des États contractants proportionnellement aux contributions à leur charge qu'ils ont payées pour cet exercice. Ces crédits seront pris en considération dans le calcul des charges relatives à l'exercice commençant deux ans après la fin de l'exercice auquel correspond l'excédent.

Regla 18
Recaudación de Aportes

(1) Se cobrará a los Estados Contratantes toda cantidad por la que los gastos estimados excedan a los ingresos estimados. Todo Estado que no sea miembro del Banco deberá aportar una cuota del monto total que se deba recaudar, la que será igual a la cuota del presupuesto de la Corte Internacional de Justicia que le sería cobrada si se lo dividiese sólo entre los Estados Contratantes en proporción a los aportes aplicables entonces al presupuesto de la Corte; y el resto se dividirá entre los Estados Contratantes que son miembros del Banco en proporción a sus respectivas subscripciones del capital del Banco. El o la Secretario(a) General calculará inmediatamente después de la adopción del presupuesto anual los montos que deban cobrarse, en base a la composición de los miembros del Centro entonces vigente, y se los notificará con prontitud a todos los Estados Contratantes. Los montos deberán pagarse en cuanto hayan sido notificados.

(2) Inmediatamente después que se adopte un presupuesto suplementario, el o la Secretario(a) General calculará los montos suplementarios que deberá cobrar, los que se deberán pagar en cuanto se los haya notificado a los Estados Contratantes.

(3) A los Estados que sean parte en el Convenio por cualquier período en un ejercicio fiscal se les cobrará por la totalidad del ejercicio fiscal. Si un Estado se adhiere al Convenio después que se haya calculado el aporte requerido para un ejercicio fiscal, se calculará su cuota aplicando el mismo factor que se utilizó al calcular los pagos originales, y no se hará ningún nuevo cálculo de los pagos que les corresponde hacer a los demás Estados Contratantes.

(4) Si después del cierre de un ejercicio fiscal se determinare que hay un superávit de caja y salvo que el Consejo Administrativo decida otra cosa, se acreditará dicho superávit a los Estados Contratantes en proporción a los pagos que hubieren efectuado en relación a ese ejercicio fiscal. Estos créditos se harán efectivos respecto de los aportes del ejercicio fiscal que comience dos años después de finalizar el ejercicio fiscal que arroje dicho superávit.

72. No changes are proposed to AFR 18.

REGULATION 19 – AUDITS

Regulation 19 **Audits** The Secretary-General shall have an audit of the accounts of the Centre made once each year and on the basis of this audit submit a financial statement to the Administrative Council for consideration at the Annual Meeting.
Article 19 **Vérification des comptes** Le ou la Secrétaire général(e) fait vérifier les comptes du Centre chaque année et, sur cette base, soumet des états financiers à l'examen du Conseil administratif lors de sa session annuelle.
Regla 19 **Auditorías** El o la Secretario(a) General hará que las cuentas del Centro sean auditadas una vez por año y, con base en esa auditoría, someterá un estado financiero al Consejo Administrativo para su consideración en la reunión anual.

73. No changes are proposed to AFR 19.

CHAPTER IV – GENERAL FUNCTIONS OF THE SECRETARIAT

REGULATION 20 – LIST OF CONTRACTING STATES

CURRENT RELATED PROVISION: Convention Art. 67-75

Chapter IV
General Functions of the Secretariat

Regulation 20
List of Contracting States

The Secretary-General shall maintain and publish a list of the Contracting States (including former Contracting States, showing the date on which their notice of denunciation was received by the depositary), indicating for each:

(a) the date on which the Convention entered into force with respect to it;

(b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;

(c) any designation pursuant to Article 25(1) of the Convention of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;

(d) any notification pursuant to Article 25(3) of the Convention that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;

(e) any notification pursuant to Article 25(4) of the Convention of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;

(f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention; and

(g) any legislative or other measures taken pursuant to Article 69 of the Convention for making the provisions of the Convention effective in the territories of the State and communicated by the State to the Centre.

Chapitre IV
Fonctions générales du Secrétariat

Article 20
Listes des États contractants

Le ou la Secrétaire général(e) tient et publie une liste des États contractants (comprenant aussi les anciens États contractants et indique la date à laquelle la notification de dénonciation a été reçue par le dépositaire), qui précise pour chaque État contractant :

(a) la date à laquelle la Convention est entrée en vigueur à l'égard de cet État ;

(b) tous territoires exclus conformément à l'article 70 de la Convention et la date à laquelle la notification d'exclusion et toute modification d'une telle notification ont été reçues par le dépositaire ;

(c) toute désignation, en vertu de l'article 25(1) de la Convention, d'une collectivité publique ou d'un organisme dépendant d'un État contractant auquel s'étend la compétence du Centre en ce qui concerne ses différends relatifs aux investissements ;

(d) toute notification en vertu de l'article 25(3) de la Convention que l'approbation de l'État n'est pas nécessaire pour qu'une collectivité publique ou un organisme dépendant de lui puisse donner son consentement à la compétence du Centre ;

(e) toute notification, en vertu de l'article 25(4) de la Convention, de la ou des catégories de différends que l'État considérerait comme pouvant être soumis ou non à la compétence du Centre ;

(f) le tribunal national ou toute autre autorité compétente pour la reconnaissance et l'exécution d'une sentence arbitrale, que l'État a désigné en vertu de l'article 54(2) de la Convention ; et

(g) toute mesure législative ou autre prise conformément à l'article 69 de la Convention en vue de la mise en vigueur des dispositions de la Convention sur les territoires dudit État et communiquée par lui au Centre.

Capítulo IV
Funciones Generales del Secretariado

Regla 20
Lista de Estados Contratantes

El o la Secretario(a) General mantendrá y publicará una lista de los Estados Contratantes (lo cual incluye los que hayan sido Estados Contratantes, pero consignando la fecha en que el depositario haya recibido notificación de su denuncia), debiendo indicar respecto de cada uno:

(a) la fecha en que el Convenio entró en vigor respecto de ese Estado;

(b) los territorios excluidos de conformidad con lo dispuesto en el Artículo 70 del Convenio y las fechas en que el depositario haya recibido la notificación de exclusión y cada modificación a esa notificación;

(c) las acreditaciones efectuadas de conformidad con lo dispuesto en el Artículo 25(1) del Convenio de las subdivisiones políticas y organismos públicos a cuyas diferencias relativas a inversiones se extiende la jurisdicción del Centro;

(d) las notificaciones efectuadas de conformidad con lo dispuesto en el Artículo 25(3) del Convenio de que no se requiere aprobación alguna por parte del Estado para que una subdivisión política u organismo público consienta a la jurisdicción del Centro;

(e) las notificaciones efectuadas de conformidad con lo dispuesto en el Artículo 25(4) del Convenio sobre la clase o clases de diferencias que el Estado consideraría, o no, someter a la jurisdicción del Centro;

(f) el tribunal u otra autoridad competente para el reconocimiento y ejecución de los laudos, designada de conformidad con lo dispuesto en el Artículo 54(2) del Convenio; y

(g) toda medida legislativa o de otro orden, tomada de conformidad con lo dispuesto en el Artículo 69 del Convenio, para que las disposiciones del Convenio tengan vigencia en los territorios del Estado y que el Estado haya comunicado al Centro.

74. The language of the provision is simplified but no substantive change is made. The lists are public, continuously up to date, and posted on the ICSID website, so no transmission is required.

CURRENT RELATED PROVISIONS: Convention Art. 12-16

Regulation 21
Panels of Conciliators and of Arbitrators

(1) The Secretary-General shall invite each Contracting State to make its designations to the Panels of Conciliators and of Arbitrators if a designation has not been made or the period of a designation has expired.

(2) Each designation made by a Contracting State or by the Chairman shall indicate the designee's name, contact information, nationality and qualifications, with particular reference to competence in the fields of law, commerce, industry or finance.

(3) The Secretary-General shall immediately inform a designee of their designation, the designating authority, and the end of the designation period, and shall request confirmation that the designee is willing to serve.

(4) The Secretary-General shall maintain and publish lists naming the members of the Panels of Conciliators and of Arbitrators, indicating the contact information, nationality, end of the designation period, designating authority, and qualifications of each member.

Article 21
Listes de conciliateurs et d'arbitres

(1) Le ou la Secrétaire général(e) invite chaque État contractant à procéder à ses désignations sur les listes de conciliateurs et d'arbitres si une désignation n'a pas été faite ou si le terme de la désignation a expiré.

(2) Toute désignation faite par un État contractant ou par le ou la Président(e) du Conseil administratif doit comporter le nom, les coordonnées, la nationalité et les qualifications de la personne désignée, et plus particulièrement sa compétence en matière juridique, commerciale, industrielle ou financière.

(3) Le ou la Secrétaire général(e) informe immédiatement la personne désignée de sa désignation, de l'autorité qui la désigne et de la date à laquelle sa désignation prend fin et lui demande confirmation qu'elle accepte de figurer sur la liste.

(4) Le ou la Secrétaire général(e) tient et publie les listes de conciliateurs et d'arbitres indiquant les noms de leurs membres, et pour chacun d'eux ses coordonnées, sa

nationalité, la date à laquelle la désignation prend fin, l'autorité qui l'a désigné et ses qualifications.

Regla 21
Listas de Conciliadores y de Árbitros

(1) El o la Secretario(a) General invitará a cada Estado Contratante a hacer sus designaciones a las Listas de Conciliadores y de Árbitros, si no se ha hecho una designación o el período de una designación ha expirado.

(2) Toda designación hecha por un Estado Contratante o por el o la Presidente(a) del Consejo Administrativo deberá contener el nombre, información de contacto, nacionalidad y calificaciones de la persona designada, destacando la competencia en el campo del derecho, el comercio, la industria o las finanzas.

(3) El o la Secretario(a) General informará inmediatamente a la persona designada de su designación, la autoridad que le ha designado y la fecha en que termina el período por el cual se le ha designado, y le pedirá que confirme que está dispuesto a desempeñar su cargo.

(4) El o la Secretario(a) General mantendrá y publicará las Listas de Conciliadores y de Árbitros indicando los nombres de sus miembros, la información de contacto, nacionalidad, fecha en que termina el período por el cual se le ha designado, autoridad que le ha designado, y las calificaciones para cada uno(a) de ellos(as).

75. The proposal simplifies the language of current AFR 21 but does not change the substance. The phrase "terminal date" is replaced by "end of the designation period". AFR 21(2) is amended to track the language in Convention Art. 14 ("or" finance, not "and" finance).

REGULATION 22 – PUBLICATION

Regulation 22
Publication

With a view to furthering the development of international law in relation to investment, the Centre shall publish:

(a) information about the operation of the Centre; and

(b) documents generated in proceedings, in accordance with the applicable rules.

Article 22
Publication

Afin de contribuer au développement du droit international en matière d'investissements, le Centre publie :

(a) des informations sur les activités du Centre ; et

(b) les documents générés dans les instances, conformément aux règles applicables.

Regla 22
Publicaciones

Con el fin de fomentar el desarrollo del derecho internacional en materia de inversión, el Centro publicará:

(a) información sobre las actividades del Centro; y

(b) documentos generados en los procedimientos, de conformidad con las normas aplicables.

76. Proposed AFR 22 maintains the obligation to publish information about the operation of the Centre. This is provided through multiple sources, including Annual Reports and the ICSID website. Proposed AFR 22 does not elaborate on publishing information about the registration or termination of cases because this is addressed by proposed AFR 23.

77. Current AFR 22(2) is deleted and addressed specifically in the ICSID Convention AR 44-46 and CR 7-8 and Additional Facility (AF)AR 54-55, (AF)CR 15-16, (AF)FF 13 and (AF)MR 16. Proposed AFR 22 therefore refers to publication in accordance with relevant rules. This would include treaty-specific rules (*see* Schedule 8 on Transparency for a discussion of these proposals).

REGULATION 23 – THE REGISTERS

CURRENT RELATED PROVISION: Convention Art. 11

Regulation 23
The Registers

The Secretary-General shall maintain and publish a Register for each case containing all significant data concerning the institution, conduct and disposition of the proceeding, including the method of constitution and the membership of each Commission, Tribunal and Committee.

Article 23
Registres

Le ou la Secrétaire général(e) tient et publie un registre pour chaque affaire, dans lequel figurent toutes les informations importantes concernant l'introduction, la conduite et l'issue de l'instance, y compris la méthode de constitution de chaque Commission, Tribunal et Comité, et sa composition.

Regla 23
Los Registros

El o la Secretario(a) General mantendrá y publicará un Registro de cada caso que contenga toda la información relevante sobre la iniciación, la tramitación, y terminación del procedimiento, lo cual incluye el método de constitución y la integración de cada Comisión, Tribunal y Comité.

78. The WP proposes to delete the chapter title preceding current AFR 23-28 ("Functions with Respect to Individual Proceedings") because these regulations generally describe the role of ICSID and can properly be included under the previous title, "Chapter IV – General Functions of the Secretariat".

79. The WP also proposes to move case specific provisions in the AFR (current AFR 22, 24, 29 and 30) into the relevant portions of the rules on arbitration and conciliation.

80. The Secretary-General of ICSID acts as Registrar under Art. 11 of the Convention. The Registrar function includes keeping records of the steps taken in each case and making these available to the public.

81. Presently, the ICSID Secretariat publishes these registers electronically on its website. Each case has a website page with information concerning: the subject matter and economic sector of the dispute; the instrument of consent invoked; the applicable procedural rules; the identity of the parties and their representatives; the date of registration; the status of the proceeding; the manner of constitution and composition of the Commission, Tribunal or Committee; and all procedural steps taken during the case.

82. In addition, public documents filed in the case are hyperlinked on the website. This information is updated daily and is available on the ICSID website. ICSID also includes bibliographic references to case material from other sources.

83. Proposed AFR 23 reflects the current practice of publishing registers on the website. The language of current AFR 23(1) is streamlined, while maintaining the description of information to be published. Current AFR 23(2) is deleted as it is unnecessary given electronic publication.

REGULATION 24 – COMMUNICATIONS WITH CONTRACTING STATES

CURRENT RELATED PROVISION: Convention Art. 4

Regulation 24
Communications with Contracting States

Unless a specific channel of communication is notified by the State concerned, all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State's representative on the Administrative Council and sent by rapid means of communication.

Article 24
Communication avec les États contractants

Sauf si un moyen de communication particulier est notifié par l'État concerné, toutes les communications à l'attention des États contractants exigées au terme de la Convention ou de ce Règlement seront adressées aux représentants de l'État siégeant du Conseil administratif et adressé par des moyens rapides de communication.

Regla 24
Comunicaciones con los Estados Contratantes

Todas las comunicaciones que el Convenio o este Reglamento requieran que se efectúen a los Estados Contratantes serán enviadas al representante del Estado en el Consejo Administrativo por medios expeditos de comunicación, salvo que el Estado en cuestión hubiera especificado otro canal de comunicación.

84. The provisions of AFR 24 are specific to individual cases, and have been moved to the arbitration and conciliation rules.

85. Proposed AFR 24 has also been amended to address communications with the Centre in non-case related matters. The content of current AFR 33 respecting institutional communications has been moved to proposed AFR 24. The title of current AFR 24 has been amended to reflect this change.

REGULATION 25 – SECRETARY

Regulation 25
Secretary

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from the Secretariat, and shall be considered as a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the Rules with regard to individual proceedings or assigned to the Secretary-General by the Convention, and delegated to the Secretary; and

(b) assist the parties and the Commission, Tribunal or Committee with all aspects of the proceedings.

Article 25
Le ou la secrétaire

Le ou la Secrétaire général(e) désigne pour chaque Commission, Tribunal et Comité un ou une secrétaire qui peut appartenir au Secrétariat et est considéré(e) comme un membre du personnel du Centre durant l'exercice de ses fonctions de secrétaire. Ce ou cette secrétaire :

(a) représente le ou la Secrétaire général(e) et peut exercer toutes fonctions qui sont confiées au ou à la Secrétaire général(e) par le présent Règlement ou par les Règlements de procédure en ce qui concerne des instances déterminées, ou qui sont confiées au ou à la Secrétaire général(e) par la Convention, et déléguées au ou à la secrétaire ; et

(b) assiste les parties, ainsi que la Commission, le Tribunal ou le Comité dans tous les aspects de l'instance.

Regla 25
El o la Secretario(a)

El o la Secretario(a) General nombrará un o una Secretario(a) para cada Comisión, Tribunal y Comité. El o la Secretario(a) podrá pertenecer al Secretariado y será

considerado como miembro de su personal mientras actúe como Secretario(a). El o la Secretario(a) tendrá las siguientes funciones:

(a) representar al o a la Secretario(a) General y podrá desempeñar todas las funciones que este Reglamento o las Reglas asignan al o a la Secretario(a) General respecto de cada procedimiento o que el Convenio asigna al o a la Secretario(a) General, y que se hayan delegado en el o la Secretario(a); y

(b) asistir tanto a las partes como a la Comisión, Tribunal o Comité en todos los aspectos del procedimiento.

86. AFR 25 addresses the role of Secretary to the Tribunal, Commission or Committee.

87. ICSID Secretaries are always members of the ICSID staff. Nonetheless, this draft preserves the flexibility to appoint a Secretary from outside the Secretariat. In some instances, Tribunals or Committees also appoint an assistant who is paid from the case escrow account. Such assistants are not under the direction of the Secretary-General.

88. Proposed AFR 25 is also amended to include current AFR 26. ICSID has dedicated facilities for proceedings in Paris and Washington, D.C. and can arrange hearings at country offices of the World Bank Group. ICSID also has 19 facilities cooperation agreements with arbitration institutions in every region that allow it to organize proceedings in those facilities. It also arranges hearings in private facilities if requested by the parties and suitable for the case.

REGULATION 26 – DEPOSITARY FUNCTIONS

Regulation 26
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for arbitration, conciliation, supplementary decisions, rectification, interpretation, revision or applications for annulment;

(b) all written submissions, observations, supporting documents and communications filed in a proceeding;

(c) the recordings and transcripts of hearings in the proceeding; and

(d) any order, decision, Report or Award by a Commission, Tribunal or Committee.

(2) Subject to the applicable rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(b)-(d) available to the parties. Certified copies of the documents referred to in paragraph (1)(d) shall reflect any supplementary decision, rectification, interpretation, revision or annulment and any stay of enforcement in effect.

Article 26
Conservation des documents

(1) Le ou la Secrétaire général(e) dépose dans les archives du Centre, et prend toutes dispositions utiles pour qu'il y soit conservé en permanence :

(a) toutes requêtes d'arbitrage, conciliation, décision supplémentaire, rectification, interprétation, révision, ou demandes en annulation ;

(b) toutes les écritures, observations, documents justificatifs et communications écrites soumis en lien avec une instance ;

(c) tous enregistrements et les transcriptions d'audiences d'une instance ; et

(d) toutes les décisions, ordonnances, procès-verbaux ou sentences d'une Commission, d'un Tribunal ou d'un Comité ;

(2) Sous réserve des règlements de procédure applicables et de l'accord des parties à une instance, et dès paiement des redevances dues au titre du Barème des frais, le ou la Secrétaire général(e) met à la disposition des parties des copies certifiées conformes des documents visés au paragraphe (1)(b)-(d). Les copies certifiées conformes des documents visés au paragraphe (1)(d) refléteront toute décision supplémentaire, aux fins de rectification, interprétation, révision ou annulation et toute suspension de l'exécution en cours.

Regla 26
Funciones del Depositario

(1) El o la Secretario(a) General depositará en los archivos del Centro y hará los arreglos necesarios para la conservación permanente de:

(a) toda solicitud de arbitraje, conciliación, decisión suplementaria, rectificación, aclaración, revisión o anulación;

(b) todos los escritos, observaciones, documentos de respaldo y comunicaciones presentados en un procedimiento;

(c) las grabaciones y transcripciones de las audiencias del procedimiento; y

(d) toda resolución, decisión, informe o laudo de una Comisión, Tribunal o Comité.

(2) De conformidad con las reglas aplicables y lo acordado por las partes en el procedimiento, y contra el pago de los derechos requeridos por el arancel de derechos, el o la Secretario(a) General proporcionará a las partes copias certificadas de los documentos a los que se hace referencia en el párrafo (1)(b)- (d). Las copias certificadas de los documentos a los que se hace referencia en el párrafo 1(d) reflejarán toda decisión suplementaria, rectificación, aclaración, revisión o anulación y toda suspensión de ejecución vigente.

89. Current AFR 28 is renumbered as proposed AFR 26. The regulation is simplified but the obligation to permanently retain the listed documents is maintained.

90. Reference to minutes in this regulation is deleted as minutes are no longer compiled. Recordings of proceedings are retained in the archives and would replace minutes.

REGULATION 27 – TIME LIMITS

Regulation 27
Time Limits

The time limits specified in Articles 65 and 66 of the Convention and Regulations 2, 3 and 7 shall be calculated from the date on which the Secretary-General transmits or receives the pertinent document. The date of transmittal or receipt shall be excluded from the calculation.

Article 27
Délais

Les délais prévus aux articles 65 et 66 de la Convention et aux articles 2, 3 et 7 sont calculés à partir de la date à laquelle le ou la Secrétaire général(e) envoie ou reçoit le document correspondant. Le jour de l'envoi ou de la réception n'est pas compris dans le calcul.

Regla 27
Plazos

Los plazos especificados en los Artículos 65 y 66 del Convenio y las Reglas 2, 3 y 7 se calcularán desde la fecha en la cual el o la Secretario(a) General transmita o reciba el documento pertinente. Se excluirá de dicho cálculo la fecha de transmisión o recepción.

91. Current AFR 29 is renumbered as proposed AFR 27 and amended to address time limits for non-case related matters only. Provisions regarding time limits for case related matters have been inserted in the arbitration and conciliation rules to make these "stand-alone" rules.

92. The Chapter heading and title is deleted as the provisions no longer address proceedings.

CHAPTER V – IMMUNITIES AND PRIVILEGES

REGULATION 28 – CERTIFICATES OF OFFICIAL TRAVEL

Chapter V **Immunities and Privileges** **Regulation 28** **Certificates of Official Travel** The Secretary-General may issue certificates of official travel to members of Commissions, Tribunals or Committees, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Convention.
Chapitre V **Immunités et privilèges** **Article 28** **Certificats de mission officielle** Le ou la Secrétaire général(e) peut délivrer aux membres de Commissions, Tribunaux ou Comités, aux personnes les assistant, aux membres du Secrétariat, et aux parties, agents, conseillers, avocats, témoins ou experts comparaissant au cours de l'instance, des certificats de voyage officiel indiquant que leur déplacement est en rapport avec une instance dans le cadre de la Convention.
Capítulo V **Inmunidades y Privilegios** **Regla 28** **Certificados de Viaje Oficial** El o la Secretario(a) General podrá emitir certificados de viaje oficial a los miembros de las Comisiones, Tribunales o Comités, a las personas que los asistan, a los miembros del Secretariado, y a las partes, agentes, consejeros(as), abogados(as), testigos o peritos(as)

que comparezcan en los procedimientos, indicando que viajan en relación con un procedimiento previsto en el Convenio.

93. No change is proposed to the substance of current AFR 31. It is renumbered as proposed AFR 28 and the Chapter title is renumbered to reflect the deletion of the prior chapter heading.

REGULATION 29 – WAIVER OF IMMUNITIES

Regulation 29
Waiver of Immunities

(1) The Secretary-General may waive the immunity of:

(a) the Centre; and

(b) members of the Secretariat.

(2) The Chairman of the Administrative Council may waive the immunity of:

(a) the Secretary-General and any Deputy Secretary-General;

(b) members of a Commission, Tribunal or Committee; and

(c) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, if the Commission, Tribunal or Committee concerned recommends such waiver.

(3) The Administrative Council may waive the immunity of:

(a) the Chairman and members of the Council;

(b) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned; and

(c) the Centre or any person referred to in paragraphs (1) or (2).

Article 29
Levée d'immunités

(1) Le ou la Secrétaire général(e) peut lever l'immunité :

(a) du Centre ; et

(b) des membres du Secrétariat.

(2) Le ou la Président(e) du Conseil administratif peut lever l'immunité :

(a) du ou de la Secrétaire général(e) ou de tout Secrétaire général(e) adjoint(e) ;

(b) des membres d'une Commission, d'un Tribunal ou d'un Comité ; et

(c) des parties, agents, conseillers, avocats, témoins ou experts comparaissant au cours d'une instance, si une recommandation pour la levée de cette immunité est faite par la Commission, le Tribunal ou le Comité intéressé.

(3) Le Conseil administratif peut lever l'immunité :

(a) Du ou de la Président(e) du Conseil administratif et des membres du Conseil ;

(b) des parties, agents, conseillers, avocats, témoins ou experts comparaissant au cours de l'instance, même si la Commission, le Tribunal ou le Comité intéressé n'a fait aucune recommandation pour la levée de cette immunité ; et

(c) du Centre ou de toute personne mentionnée au paragraphe (1) ou (2).

Regla 29
Renuncia de las Inmunidades

(1) El o la Secretario(a) General podrá renunciar a ejercer la inmunidad:

(a) del Centro; y

(b) de los miembros del Secretariado.

(2) El o la Presidente(a) del Consejo Administrativo podrá renunciar a ejercer la inmunidad:

(a) del o de la Secretario(a) General y cualquier Secretario(a) General Adjunto(a);

(b) de los miembros de una Comisión, Tribunal o Comité; y

(c) de las partes, apoderados(as), consejeros(as), abogados(as), testigos o peritos(as) que comparezcan en un procedimiento, siempre que la Comisión, Tribunal o Comité pertinente hubiere recomendado tal renuncia.

(3) El Consejo Administrativo podrá renunciar a ejercer la inmunidad:

(a) del o de la Presidente(a) del Consejo Administrativo y los miembros del Consejo;

(b) de las partes, agentes, consejeros(as), abogados(as), testigos o peritos(as) que comparezcan en un procedimiento, incluso si la Comisión, Tribunal o Comité pertinente no hubiere recomendado tal renuncia; y

(c) del Centro o cualquier persona a la que se hace referencia en el párrafo 29(1) o 29(2).

94. No change is proposed to current AFR 32 other than its renumbering as proposed AFR 29.

CHAPTER VI – OFFICIAL LANGUAGES

REGULATION 30 – OFFICIAL LANGUAGES

Chapter VI
Official Languages

Regulation 30
Languages of Regulations

(1) The official languages of the Centre are English, French and Spanish.

(2) The texts of these Regulations in each official language are equally authentic.

Chapitre VI
Langues officielles

Article 30
Langues du Règlement

(1) Les langues officielles du Centre sont l'anglais, l'espagnol et le français.

(2) Les textes du présent Règlement dans chaque langue officielle font également foi.

Capítulo VI
Idiomas Oficiales

Regla 30
Idiomas del Reglamento

(1) Los idiomas oficiales del Centro son el español, el francés y el inglés.

(2) Los textos de este Reglamento en cada uno de los idiomas oficiales son igualmente auténticos.

95. No change is proposed to current AFR 34 other than renumbering as proposed AFR 30.

96. One State proposed adding additional official languages to ICSID. The Secretariat supports this proposal, however, ICSID does not currently have resources to make the necessary translations of relevant institutional documents. The Administrative Council may wish to address official languages generally.

II. INSTITUTION RULES – ICSID CONVENTION PROCEEDINGS

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INSTITUTION RULES – ICSID CONVENTION PROCEEDINGS

Introductory Note

The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the Institution Rules) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention.

The Institution Rules apply from the filing of a Request for arbitration or conciliation under the ICSID Convention to the date of registration or refusal to register. If a Request is registered, the Arbitration or Conciliation Rules apply to the subsequent procedure. The Institution Rules do not apply to the initiation of post-Award remedy proceedings and do not apply to proceedings under the Additional Facility.

Note introductive

Le Règlement de procédure relatif à l'introduction des instances de conciliation et d'arbitrage (Règlement d'introduction des instances) a été adopté par le Conseil administratif du Centre conformément à l'article 6(1)(b) de la Convention du CIRDI.

Le Règlement d'introduction des instances s'applique du dépôt d'une requête d'arbitrage ou de conciliation en application de la Convention du CIRDI à la date de l'enregistrement ou du refus de l'enregistrement. Si une requête est enregistrée, le Règlement d'arbitrage ou le Règlement de conciliation s'applique à la procédure qui s'ensuit. Le Règlement d'introduction des instances ne s'applique pas à l'introduction de recours post-sentence ; il ne s'applique pas non plus aux instances régies par le Mécanisme supplémentaire.

Nota Introductoria

Las Reglas Procesales Aplicables a la Iniciación de los Procedimientos de Conciliación y Arbitraje (Reglas de Iniciación) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en el Artículo 6(1)(b) del Convenio del CIADI.

Las Reglas de Iniciación se aplican desde la presentación de una solicitud de arbitraje o conciliación en virtud del Convenio del CIADI hasta la fecha del registro o el rechazo del mismo. Si se registra una solicitud, las Reglas de Arbitraje o Conciliación se aplicarán a las actuaciones posteriores. Las Reglas de Iniciación no se aplican a la iniciación de recursos posteriores al laudo ni a los procedimientos en virtud del Mecanismo Complementario.

97. The Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("IR") establish the requirements for initiating arbitration or conciliation proceedings under the ICSID Convention. They govern a proceeding from the date on which a request for arbitration or conciliation ("Request") is made to the date of the notice of registration or refusal to register.

98. The IR do not apply to the initiation of post-Award remedy proceedings, *i.e.*, supplementary decision, rectification, interpretation, revision, annulment, and resubmission; nor do they apply to initiating proceedings under the ICSID Additional Facility.

99. The test for reviewing a Request under the IR is whether the dispute is "manifestly outside the jurisdiction of the Centre" (Art. 28(3) and 36(3) of the ICSID Convention).

100. The reviewing process takes three weeks on average, depending on whether ICSID needs additional information or documents from the requesting party. Detailed information on how to file a Request is available on the ICSID website.

101. The proposed amendments streamline the IR and codify ICSID practice with respect to the Request. They also provide greater direction concerning the information and supporting documents required in a Request.

RULE 1 – THE REQUEST

CURRENT RELATED PROVISIONS: Convention Art. 28, 36

Rule 1
The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute proceedings under the Convention shall file a Request for arbitration or conciliation together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

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

Article 1
La requête

(1) Un État contractant ou le ou la ressortissant(e) d'un État contractant, qui désire introduire une instance sur le fondement de la Convention dépose une requête d'arbitrage ou de conciliation ainsi que les documents justificatifs demandés (« requête ») auprès du ou de la Secrétaire général(e) et paie le droit de dépôt indiqué dans le barème des frais.

(2) La requête peut être déposée par une ou plusieurs parties requérantes, ou déposée conjointement par les parties au différend.

Regla 1
La Solicitud

(1) Todo Estado Contratante o nacional de un Estado Contratante que quiera dar inicio a un procedimiento de conformidad con lo dispuesto en el Convenio, deberá presentar una solicitud de arbitraje o conciliación junto con los documentos de respaldo requeridos (la "solicitud") al o a la Secretario(a) General y pagar el derecho de presentación publicado en el arancel de derechos.

(2) La solicitud podrá ser presentada por una o más partes solicitantes o presentarse en forma conjunta por las partes en una diferencia.

102. Several changes are proposed to IR 1. ***First,*** proposed IR 1(1) clarifies that the Request includes necessary supporting documents.

103. ***Second***, the requirement that the Request be addressed to the seat of the Centre is eliminated, given that it is to be filed electronically (*see* proposed IR 4).

104. ***Third***, the second sentence of current IR 1(1) is deleted. The general requirements for a Request now appear in proposed IR 2, which comprehensively lists all required contents of the Request.

105. ***Fourth***, proposed IR 1(2) confirms that more than one requesting party may file a Request, as is current ICSID practice. In such cases, the Request must contain the information and supporting documents required by IR 2 in respect of each requesting party.

RULE 2 – CONTENTS OF THE REQUEST

CURRENT RELATED PROVISIONS: Convention Art. 25, 28, 36

Rule 2
Contents of the Request

(1) The Request shall:

(a) state whether it relates to an arbitration or conciliation proceeding;

(b) be in English, French or Spanish;

(c) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(d) be signed by each requesting party or its representative and be dated;

(e) attach proof of any representative's authority to act; and

(f) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations.

(2) With regard to the jurisdiction of the Centre, the Request shall include:

(a) a description of the investment, a statement of the relevant facts, claims, and request for relief, and an indication that there is a legal dispute between the parties arising directly out of the investment;

(b) with respect to each party's consent to submit the dispute to arbitration or conciliation under the Convention:

(i) the instrument(s) in which each party's consent is recorded;

(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre;

(c) if a party is a natural person:

(i) information concerning that person's nationality on both the date of consent and on the date of the Request, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of the Contracting State party to the dispute on the date of consent and on the date of the Request;

(d) if a party is a juridical person:

(i) information concerning that party's nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the Contracting State party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another Contracting State pursuant to Article 25(2)(b) of the Convention, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision or agency of a Contracting State:

(i) the State's designation to the Centre pursuant to Article 25(1) of the Convention; and

(ii) supporting documents demonstrating the State's approval of consent pursuant to Article 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.

Article 2
Contenu de la requête

(1) La requête :

(a) indique s'il s'agit d'une instance d'arbitrage ou de conciliation ;

(b) est rédigée en anglais, en espagnol ou en français;

(c) désigne chaque partie au différend et indique ses coordonnées, notamment son adresse électronique, son adresse postale et son numéro de téléphone ;

(d) est signée par chaque partie requérante ou son ou sa représentant(e) et est datée ;

(e) est accompagnée d'une preuve de l'habilitation à agir du ou de la représentant(e) ; et

(f) si la partie requérante est une personne morale, indique qu'elle a obtenu toutes les autorisations nécessaires aux fins de déposer la requête et est accompagnée de ces autorisations.

(2) En ce qui concerne la compétence du Centre, la requête contient :

(a) une description de l'investissement, un exposé des faits pertinents, des allégations et des demandes, et une indication qu'il existe un différend d'ordre juridique entre les parties qui est en relation directe avec l'investissement ;

(b) s'agissant du consentement de chaque partie à soumettre le différend à l'arbitrage ou à la conciliation sur le fondement de la Convention :

(i) le ou les instrument(s) dans le(s)quel(s) le consentement de chaque partie est consigné ;

(ii) la date d'entrée en vigueur de l'instrument (ou des instruments) servant de fondement au consentement, ainsi que les documents justificatifs prouvant cette date ; et

(iii) la date du consentement, à savoir la date à laquelle les parties ont consenti par écrit à soumettre le différend au Centre ou, si les parties n'ont pas donné leur consentement à la même date, la date à laquelle la dernière partie à consentir a donné son consentement par écrit à soumettre le différend au Centre ;

(c) si une partie est une personne physique :

(i) des informations relatives à la nationalité de cette personne tant à la date du consentement qu'à la date de la requête, ainsi que les documents justificatifs prouvant cette nationalité ; et

(ii) une déclaration selon laquelle la personne n'avait la nationalité de l'État contractant partie au différend ni à la date du consentement, ni à la date de la requête ;

(d) si une partie est une personne morale :

(i) des informations relatives à la nationalité de cette partie à la date du consentement, ainsi que les documents justificatifs prouvant cette nationalité ; et

(ii) si cette partie avait la nationalité de l'État contractant partie au différend à la date du consentement, des informations relatives à l'accord des parties pour considérer cette personne morale comme ressortissante d'un autre État contractant conformément à l'article 25(2)(b) de la Convention, ainsi que les documents justificatifs prouvant cet accord ;

(e) si une partie est une collectivité publique ou un organisme dépendant d'un État contractant :

(i) le fait qu'elle a été désignée au Centre par cet État conformément à l'article 25(1) de la Convention ; et

(ii) les documents justificatifs prouvant l'approbation par l'État du consentement conformément à l'article 25(3) de la Convention, sauf si celui-ci a notifié au Centre qu'une telle approbation n'est pas nécessaire.

Regla 2
Contenido de la Solicitud

(1) La solicitud deberá:

(a) indicar si se refiere a un procedimiento de arbitraje o conciliación;

(b) estar redactada en español, francés o inglés;

(c) identificar a cada parte en la diferencia y proporcionar su información de contacto, lo cual incluye su dirección de correo electrónico, dirección postal y número de teléfono;

(d) estar firmada por cada parte solicitante o su representante y estar fechada;

(e) acompañar pruebas del poder de representación de cada representante; y

(f) si la parte solicitante es una persona jurídica, indicar que ha obtenido todas las autorizaciones necesarias para presentar la solicitud y adjuntar dichas autorizaciones.

(2) Respecto de la jurisdicción del Centro, la solicitud deberá incluir:

(a) una descripción de la inversión, una relación de los hechos pertinentes, alegaciones y petitorios, y una indicación de que existe una diferencia de naturaleza jurídica entre las partes que surge directamente de la inversión;

(b) respecto del consentimiento de cada parte a someter la diferencia a arbitraje o conciliación de conformidad con lo dispuesto en el Convenio:

(i) el o los instrumento(s) que contiene(n) el consentimiento de cada parte;

(ii) la fecha de entrada en vigor del o de los instrumento(s) en que se funda el consentimiento, junto con documentos de respaldo que demuestren esa fecha; y

(iii) la fecha del consentimiento, a saber, la fecha en que las partes hayan consentido por escrito a someter la diferencia al Centro, o bien, si las partes no consintieron en la misma fecha, la fecha en que la última parte haya consentido por escrito a someter la diferencia al Centro;

(c) si una de las partes es una persona natural:

(i) información respecto a la nacionalidad de esa persona tanto a la fecha del consentimiento como a la fecha de la solicitud, junto con documentos de respaldo que demuestren dicha nacionalidad; y

(ii) una declaración de que la persona no tenía la nacionalidad del Estado Contratante que es parte en la diferencia ni en la fecha del consentimiento ni en la fecha de la presentación de la solicitud;

(d) si una parte es una persona jurídica:

(i) información respecto a la nacionalidad de esa parte a la fecha del consentimiento, junto con documentos de respaldo que demuestren dicha nacionalidad; y

(ii) si esa parte tenía la nacionalidad del Estado Contratante parte en la diferencia a la fecha del consentimiento, información que identifique el acuerdo de las partes para que la persona jurídica sea tratada como si fuese nacional de otro Estado Contratante de conformidad con lo dispuesto en el Artículo 25(2)(b) del Convenio, junto con documentos de respaldo que demuestren dicho acuerdo;

(e) si una parte es una subdivisión política o un organismo público de un Estado Contratante:

(i) la debida acreditación del Estado ante el Centro de conformidad con lo dispuesto en el Artículo 25(1) del Convenio; y

(ii) documentos de respaldo que demuestren la aprobación del consentimiento por parte del Estado de conformidad con lo dispuesto en el Artículo 25(3) del Convenio, salvo que el Estado haya notificado al Centro que dicha aprobación no es necesaria.

106. Proposed IR 2 comprehensively lists the mandatory contents of a Request and the documents to attach. Proposed IR 2 is restructured to include general requirements in the first paragraph and requirements relating to the jurisdiction of the Centre in the second paragraph.

107. The purpose of this proposal is to ensure requesting parties file a complete Request to expedite the registration process. A complete Request will also assist responding parties in assessing the claim, retaining counsel, and making procedural decisions that ultimately can reduce the duration of the proceeding.

108. It should be noted that proposed AR 13(2) (Written Submissions and Observations) allows a claimant to ask that its Request be considered as the memorial for purposes of the pleadings in an arbitration. If allowed by the Tribunal, this would further expedite the overall proceeding.

109. Proposed IR 2 requires a description of the facts, claims asserted and request for relief, together with an indication that there is a legal dispute arising directly out of an investment. It reflects existing practice. If the requesting party intends to ask that the Request to be considered as the memorial, it will prepare a more fulsome document including the contents referred to in proposed AR 13(3) and all the evidence relied on in accordance with proposed AR 3(2).

110. Proposed IR 2 also contains amendments related to the supporting documents required to be filed with the Request.

111. Proposed IR 2 lists the supporting documents required together with the issues to which they relate. For example, the need for supporting documents regarding a company's authority to initiate the Request is noted in proposed IR 2(1)(e), where the requirement for such authorization appears.

112. The requirement for supporting documents is also expanded to demonstrate the requesting party's nationality. This addresses the frequent objection that a Request is manifestly outside the jurisdiction of the Centre because the requesting party lacks the stated nationality.

113. Proposed IR 2(2)(b)(ii) now clarifies that when consent to ICSID arbitration or conciliation is based on a treaty or law, a requesting party must provide documentation indicating the date of entry into force of the instrument on which consent is based. An extract from a State's collection of laws or a reference to a State's website indicating that the treaty is in force is sufficient for the purposes of registration.

114. Proposed IR 2(2)(b)(iii) reflects current IR 2(3) defining the date of consent. The proposal clarifies that the definition extends to situations where consent is recorded in multiple instruments, *i.e.* the last party to consent in writing will determine the date of consent.

115. Proposed IR 2(2)(c)(i) and (ii) require a requesting party to provide documentation concerning nationality on the date of consent. A copy of a passport or an extract from a commercial register would be sufficient for purposes of registration.

116. Proposed IR 2(2)(d)(ii) refers to Art. 25(2)(b) of the Convention with respect to the parties' possible agreement to treat a juridical person that has the same nationality as the State party to the dispute as a national of another Contracting State. The requesting party must attach

the supporting documents demonstrating such agreement and should also address the requirement of foreign control.

117. Proposed IR 2(2)(e) requires supporting documents to demonstrate that a subdivision or agency that is a party to the dispute has been designated by the relevant Contracting State pursuant to Art. 25(1) of the Convention. If the designation has previously been notified to the Centre, the requesting party could simply refer to such designation. Designations that are notified to the Centre are published on ICSID's website: Designations by Member States of constituent Subdivisions or Agencies" (ICSID/8-C). As always, the requesting party must provide documentation demonstrating that the Contracting State has approved the subdivision or agency's consent to arbitration or conciliation pursuant to Art. 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.

118. Other edits modernize and streamline the rule, such as the requirement that the Request include electronic mail addresses of each party to facilitate communication.

RULE 3 – RECOMMENDED ADDITIONAL INFORMATION

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.
Article 3 **Informations complémentaires recommandées** Il est recommandé que la requête contienne également : (a) une estimation du montant de la réparation pécuniaire demandée, le cas échéant ; (b) une proposition relative au nombre et à la méthode de nomination des arbitres ou des conciliateur(trice)(s) ; (c) la ou les langue(s) de la procédure proposée(s) ;

(d) toutes autres propositions en matière de procédure ; et

(e) tous accords relatifs à la procédure conclus par les parties.

Regla 3
Información Adicional Recomendada

Se recomienda que la solicitud también contenga:

(a) una estimación del monto de la compensación pecuniaria pretendida, si la hubiera;

(b) una propuesta relativa al número y método de nombramiento de los o las árbitros o conciliadores(as);

(c) el o los idioma(s) del procedimiento propuesto(s);

(d) cualquier otra propuesta procesal; y

(e) cualquier acuerdo procesal alcanzado por las partes.

119. Proposed IR 3 is renamed to indicate that the Centre recommends that the Request include additional information. While this information is not mandatory—given that the Centre's review process concerns the jurisdiction of ICSID only—the inclusion of this information in the Request will expedite the case after registration.

120. ***First***, proposed IR 3(a) recommends that the Request contain an estimate of the pecuniary compensation sought, if any. This is consistent with current practice.

121. ***Second***, proposed IR 3(b) recommends that the Request include proposals on the number of arbitrators and the method of their appointment, if there is not yet an agreement on this issue. This will reduce the time between registration and constitution of the Commission or Tribunal.

122. ***Third***, proposed IR 3(c) also recommends a proposal on the language(s) of the proceeding, if there is not yet an agreement on this issue. This will allow the parties to consider the appointment of arbitrators who are proficient in the relevant language(s) and reduce interpretation and translation costs.

123. ***Fourth***, proposed IR 3(d) recommends the inclusion of any other procedural proposals. This would include, for example, a proposal to have an expedited arbitration pursuant to Chapter XII of the Arbitration Rules.

124. ***Fifth***, proposed IR 3(e) recommends that the Request include any procedural agreements that the parties may have reached.

RULE 4 – FILING OF THE REQUEST AND SUPPORTING DOCUMENTS

Rule 4
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient. The Secretary-General may require a fuller or a complete translation of the document.

Article 4
Dépôt de la requête et des documents justificatifs

(1) La requête est déposée par voie électronique. Le ou la Secrétaire général(e) peut exiger que la requête soit déposée sous une autre forme, si nécessaire.

(2) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. Le ou la Secrétaire général(e) peut exiger une version plus complète de l'extrait ou une version intégrale du document.

(3) Tout document dans une langue autre que l'anglais, l'espagnol ou le français est accompagné d'une traduction dans l'une de ces langues. Il suffit que seule soit traduite la partie pertinente du document. Le ou la Secrétaire général(e) peut demander une traduction plus complète ou intégrale du document.

Regla 4
Presentación de la Solicitud y de los Documentos de Respaldo

(1) La solicitud deberá ser presentada electrónicamente. El o la Secretario(a) General podrá requerir que la solicitud sea presentada en un formato alternativo si fuere necesario.

(2) Se podrá presentar un extracto de un documento de respaldo, siempre que la omisión del texto no altere el sentido del extracto. El o la Secretario(a) General podrá solicitar una versión más amplia del extracto o una versión completa del documento.

(3) Todo documento redactado en un idioma que no sea el español, francés o inglés deberá ser acompañado de una traducción a uno de esos idiomas. Será suficiente que se traduzcan solamente las partes pertinentes de un documento. El o la Secretario(a) General podrá requerir una traducción más amplia o completa del documento.

125. Proposed IR 4 requires the Request and supporting documents to be filed electronically. This reflects the Centre's practice of transmitting the Request electronically to the responding party as soon as both the Request and lodging fee are received. It is also consistent with the proposal to modernize the AR and CR by requiring electronic filing as a default, without paper copies. A Request in paper copy or on an electronic storage device may still be required by the Centre if no electronic address for the responding party is available or the circumstances require a paper copy.

126. Some States have notified the Centre of a central authority within their government which is designated to receive any Request filed against that State. States are encouraged to do so to ensure the Request is immediately directed to the most appropriate officers. If no such notification has been made, the Centre sends a copy of the Request to the State's embassy in Washington, D.C. and the addresses provided for the State in the Request. Following the adoption of the amendments, the Centre will additionally send the Request to the State's designated representative on the ICSID Administrative Council.

RULE 5 – RECEIPT OF THE REQUEST AND ROUTING OF WRITTEN COMMUNICATIONS

CURRENT RELATED PROVISIONS: Convention Art. 28, 36

Rule 5
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Article 5
Réception de la requête et transmission des communications écrites

Le ou la Secrétaire général(e) :

(a) accuse réception dans les plus brefs délais de la requête à la partie requérante ;

(b) transmet la requête à l'autre partie dès réception du droit de dépôt ; et

(c) est l'intermédiaire officiel pour les communications écrites entre les parties.

Regla 5
Recepción de la Solicitud y Transmisión de Comunicaciones Escritas

El o la Secretario(a) General deberá:

(a) acusar recibo de la solicitud a la parte solicitante con prontitud;

(b) transmitir la solicitud a la otra parte una vez que reciba el derecho de presentación; y

(c) actuar como intermediario oficial de las comunicaciones escritas entre las partes.

127. Proposed IR 5(a) reflects the practice that the Secretary-General promptly acknowledges receipt of a Request but takes no further action until the lodging fee is received. Current IR 5(2) concerning the transmission of the Request to the responding party is simplified in proposed IR 5(b). The reference to "accompanying documentation" in current IR 5(2) is also deleted as such documents are defined as part of the Request in proposed IR 1.

128. Proposed IR 5(c) codifies existing practice relating to the routing of communications after ICSID receives a Request.

RULE 6 – REVIEW AND REGISTRATION OF THE REQUEST

CURRENT RELATED PROVISIONS: Convention Art. 28, 36

Rule 6
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall review the Request pursuant to Article 28(3) or 36(3) of the Convention.

(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.

Article 6
Examen et enregistrement de la requête

(1) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) examine la requête conformément à l'article 28(3) ou 36(3) de la Convention.

(2) Le ou la Secrétaire général(e) informe les parties sans délai de l'enregistrement de la requête ou du refus d'enregistrer celle-ci et des motifs de ce refus.

Regla 6
Revisión y Registro de la Solicitud

(1) Una vez recibida la solicitud y el derecho de presentación, el o la Secretario(a) General deberá revisar la solicitud de conformidad con lo dispuesto en el Artículo 28(3) o 36(3) del Convenio.

(2) El o la Secretario(a) General deberá notificar con prontitud el registro de la solicitud a las partes, o la denegación del mismo y los motivos de dicha denegación.

129. Proposed IR 6 is retitled to note that the Secretary-General reviews the Request pursuant to ICSID Convention Art. 28(3) (conciliation) or 36(3) (arbitration). Proposed IR 6(2) states that the review of the Request will result in one of two outcomes: registration of the Request or a refusal to register.

130. In practice, the party responding to the Request sometimes submits observations on the Request before the Secretary-General's review is completed. Such observations are transmitted to the requesting party. The Secretary-General's authority to consider the responding party's observations is limited because Art. 28(3) and 36(3) of the ICSID Convention require the decision to register to be based on the information contained in the Request. However, if the Centre receives information showing that the requesting party omitted to address a point relevant to the Centre's reviewing function, the Secretariat will invite the requesting party to do so and consider its response in the decision on registration. Because the Secretary-General must promptly register or refuse to register the Request,

any observations by the responding party must be communicated to the Centre as soon as possible after receipt of the Request.

131. Current IR 6(2) explaining when a proceeding is deemed to have been instituted is deleted; it is not necessary to indicate when a proceeding is "instituted" as the time limits for subsequent steps in the proceeding are computed from the date of registration.

RULE 7 – NOTICE OF REGISTRATION

Rule 7
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators or conciliators, unless such information has already been provided;

(d) invite the parties to constitute a Tribunal or Commission without delay; and

(e) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal or Commission in regard to jurisdiction of the Centre, competence of the Tribunal or Commission, and to the merits.

Article 7
Notification de l'enregistrement

La notification de l'enregistrement de la requête :

(a) indique que la requête a été enregistrée et précise la date de l'enregistrement ;

(b) confirme que toutes correspondances destinées aux parties dans le cadre de l'instance leur seront envoyées à l'adresse de contact figurant dans la notification, à moins que des coordonnées différentes ne soient indiquées au Centre ;

(c) invite les parties à informer le ou la Secrétaire général(e) de leur accord relatif au nombre et à la méthode de nomination des arbitres ou des conciliateur(trice)(s), à moins que ces informations n'aient déjà été communiquées ;

(d) invite les parties à constituer sans délai un Tribunal ou une Commission ; et

(e) rappelle aux parties que l'enregistrement de la requête ne porte en aucune manière atteinte aux pouvoirs et fonctions du Tribunal ou de la Commission relatifs aux questions de compétence du Centre, du Tribunal ou de la Commission, et aux questions de fond.

Regla 7
Notificación del Registro

La notificación del registro de la solicitud deberá:

(a) dejar constancia de que la solicitud ha sido registrada e indicar la fecha del registro;

(b) confirmar que toda la correspondencia dirigida a las partes en relación con el procedimiento será enviada a la dirección de contacto consignada en la notificación, a menos que se le comunique otra información de contacto al Centro;

(c) invitar a las partes a que informen al o a la Secretario(a) General de su acuerdo respecto del número y método de nombramiento de los y las árbitros o conciliadores(as), salvo que dicha información ya hubiere sido proporcionada;

(d) invitar a las partes a que constituyan un Tribunal o una Comisión sin demora; y

(e) recordar a las partes que el registro de la solicitud es sin perjuicio de los poderes y funciones del Tribunal o de la Comisión respecto de la jurisdicción del Centro, la competencia del Tribunal o la Comisión y el fondo.

132. Proposed IR 7 is simplified and encompasses the following additional changes.

133. ***First***, proposed IR 7(b) states that case correspondence will be sent to the addresses on the notice of registration, and not to the addresses on the Request. This accounts for changes to contact information made during the review process.

134. ***Second***, proposed IR 7(d) invites the parties to proceed "without delay" to constitute a Tribunal to reduce the time between registration and constitution.

135. ***Third***, current IR 7(f) is deleted. The list of Members of the Panels of Arbitrators and Conciliators and their CV's are available on the ICSID website. Although parties may select arbitrators or conciliators from the list, they are not required to do so by the ICSID rules.

136. It should also be noted that proposed AR 21 and CR 13 require parties to disclose third-party funding upon registration.

RULE 8 – WITHDRAWAL OF THE REQUEST

Rule 8 **Withdrawal of the Request** At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there are several requesting parties, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 5(b).
Article 8 **Retrait de la requête** À tout moment avant l'enregistrement, une partie requérante peut notifier par écrit au ou à la Secrétaire général(e) le retrait de la requête ou, s'il y a plusieurs parties requérantes, qu'elle se retire de la requête. Le ou la Secrétaire général(e) avise sans délai les autres parties de ce retrait, à moins que la requête n'ait pas encore été transmise conformément à l'article 5(b).
Regla 8 **Retiro de la Solicitud** En cualquier momento antes del registro, una parte solicitante podrá notificar por escrito el retiro de la solicitud al o a la Secretario(a) General o, si hubiere varias partes solicitantes, que se retira de la solicitud. El o la Secretario(a) General notificará con prontitud a las partes de dicho retiro, a menos que la solicitud aún no hubiera sido transmitida de conformidad con lo dispuesto en la Regla 5(b).

137. Proposed IR 8 allows a requesting party to withdraw from the Request before registration. This complements proposed IR 1(2), which reflects the practice of multiple requesting parties submitting a joint Request. In such case, one or more requesting parties may withdraw from the Request, even if others do not. The review of the Request continues with respect to any remaining requesting parties. Consistent with current IR 8, the Request may also be withdrawn in full if all requesting parties file a notice of withdrawal.

RULE 9 – FINAL PROVISIONS

Rule 9 **Final Provisions** (1) The English, French and Spanish texts of these Rules are equally authentic. (2) These Rules may be cited as the "Institution Rules" of the Centre.
Article 9 **Dispositions finales** (1) Les textes anglais, espagnol et français du présent Règlement font également foi. (2) Le présent Règlement peut être cité comme le « Règlement d'introduction des instances » du Centre.
Regla 9 **Disposiciones Finales** (1) Los textos de estas Reglas en español, francés e inglés son igualmente auténticos. (2) Se podrá citar estas estas Reglas como las "Reglas de Iniciación" del Centro.

138. The provision is simplified.

III. RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

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RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

Introductory Note

The Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulation 14.

The Arbitration Rules apply from the date of registration of a Request for arbitration until an Award is rendered and to any post-Award remedy proceedings.

Note introductive

Le Règlement de procédure relatif aux instances d'arbitrage (Règlement d'arbitrage) a été adopté par le Conseil administratif du Centre conforment à l'article 6(1)(c) de la Convention CIRDI.

Le Règlement d'arbitrage est complété par le Règlement administratif et financier du Centre, en particulier par l'article 14.

Le Règlement d'arbitrage s'applique de la date de l'enregistrement d'une requête d'arbitrage jusqu'au moment où une sentence est rendue ainsi qu'à toute instance de recours post-sentence.

Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Arbitraje (Reglas de Arbitraje) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en el Artículo 6(1)(c) del Convenio del CIADI.

Las Reglas de Arbitraje están complementadas por el Reglamento Administrativo y Financiero del Centro, en particular por la Regla 14.

Las Reglas de Arbitraje se aplican desde la fecha del registro de una solicitud de arbitraje hasta que sea dictado el laudo, así como a cualquier recurso posterior al laudo.

CHAPTER I – GENERAL PROVISIONS

RULE 1 – APPLICATION OF RULES

CURRENT RELATED PROVISIONS: Convention Art. 44; AR 56

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") in accordance with Article 44 of the Convention.

(2) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(3) These Rules may be cited as the "Arbitration Rules" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique à toute instance d'arbitrage conduite en vertu de la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissant(e)s d'autres États (« Convention ») conformément à l'article 44 de la Convention.

(2) Les langues officielles du Centre sont l'anglais, l'espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(3) Le présent Règlement peut être cité comme le « Règlement d'arbitrage » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de arbitraje tramitado en virtud del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados ("Convenio") de conformidad con el Artículo 44 del Convenio.

(2) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(3) Estas Reglas podrán ser citadas como las "Reglas de Arbitraje" del Centro.

139. The Rules of Procedure for Arbitration Proceedings ("Arbitration Rules" or "AR") complement the procedural provisions in the ICSID Convention and apply from registration of the Request for arbitration to rendering of the Award and any post-Award remedy proceedings.

140. Proposed new Chapter I contains general provisions concerning the application of the Arbitration Rules. Article 44 of the ICSID Convention provides that the applicable AR are those in effect on the date on which the parties consented to arbitration, except as the parties otherwise agree. Proposed AR 1(1) mirrors this principle by stating these rules apply to any arbitration conducted under the ICSID Convention. In addition, under proposed AR 12(3), the Tribunal must apply an agreement of the parties on procedural matters in addition to or instead of the AR, except as otherwise provided in the Convention or the Administrative and Financial Regulations (AFR).

141. Proposed AR 1(2) and 1(3) correspond to current AR 56 (Final Provisions).

CHAPTER II - CONDUCT OF THE PROCEEDING

142. This proposed Chapter II merges current Chapter II (Working of the Tribunal), Chapter III (General Procedural Provisions) and Chapter IV (Written and Oral Provisions). It concerns all general provisions relating to the conduct of the proceeding.

RULE 2 – MEANING OF PARTY AND PARTY REPRESENTATION

CURRENT RELATED PROVISIONS: AR 18

Chapter II
Conduct of the Proceeding

Rule 2
Meaning of Party and Party Representation

(1) For the purposes of these Rules, "party" may include, where the context so admits:

(a) all parties acting as claimants or as respondents; and

(b) an authorized representative of a party.

(2) Each party may be represented or assisted by agents, counsel or advocates ("representative(s)"), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Chapitre II
Conduite de l'instance

Article 2
Sens du terme « partie » et représentation des parties

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet :

(a) toutes les parties agissant en qualité de demanderesses ou de défenderesses ; et

(b) tout(e) représentant(e) habilité(e) d'une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocats (« représentant(s) »), dont le nom et la preuve de l'habilitation à agir doivent être notifiés par cette partie au Secrétariat.

Capítulo II
Tramitación del Procedimiento

Regla 2
Significado de Parte y Representación de las Partes

(1) A los fines de estas Reglas, "parte" puede incluir, cuando el contexto así lo admite, a:

(a) todas las partes que actúen como demandantes o como demandadas; y

(b) un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) ("representante(s)"), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

143. Proposed AR 2 is current AR 18 with minor language modifications.

144. ***First***, proposed AR 2(1) specifies that the expression "party" may include, where the context so admits, all parties acting as claimants or respondents and any authorized representatives of the parties. This accommodates multiparty proceedings (*see* Schedule 7 on Multiparty Claims and Consolidation).

145. ***Second***, proposed AR 2(2) addresses party representation. Under current AR 18, parties may represent themselves before ICSID Tribunals or may authorize someone to represent them. A representative need not be an attorney and may be an officer of the company or government entity or another duly authorized individual. Typically, either a party itself or its counsel informs the Secretariat of its legal representation and attaches a power of attorney. If new counsel notifies the Secretariat of its involvement without providing a power of attorney, the Secretariat requests that the authorization be provided before transmitting files to the new representative. The authorization may take the form of a simple letter.

RULE 3 – METHOD OF FILING

CURRENT RELATED PROVISIONS: AFR 24, 28, 30; AR 23-24

Rule 3
Method of Filing

(1) Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal orders otherwise. They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge receipt and distribute them in accordance with Rule 4.

(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.

Article 3
Modalités de dépôt

(1) Les écritures, observations, documents justificatifs et communications sont déposés par voie électronique, sauf si les parties en conviennent ou le Tribunal en décide autrement. Leur production au cours de l'instance se fait par leur dépôt auprès du Secrétariat, qui en accuse réception et en assure la distribution conformément à l'article 4.

(2) Les documents justificatifs, notamment les déclarations de témoins, les rapports d'experts, les pièces factuelles et les sources juridiques, sont déposés avec les écritures auxquelles ils se rapportent, dans les délais fixés pour le dépôt de ces écritures.

(3) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. Le Tribunal peut exiger une version plus complète de l'extrait ou une version intégrale du document.

Regla 3
Método de Presentación

(1) Los escritos, observaciones, documentos de respaldo y comunicaciones se presentarán electrónicamente, salvo acuerdo de las partes o resolución del Tribunal en contrario. Los mismos se incorporarán al procedimiento mediante la presentación ante el Secretariado, que acusará recibo y los distribuirá de conformidad con la Regla 4.

(2) Los documentos de respaldo, lo cual incluye declaraciones testimoniales, informes periciales, anexos documentales y anexos legales, se presentarán junto con los escritos a los que se refieren, dentro del plazo fijado para la presentación de dichos escritos.

(3) Se podrá presentar un extracto de un documento de respaldo siempre que la omisión del texto no altere el sentido del extracto. El Tribunal podrá solicitar una versión más amplia del extracto o una versión completa del documento.

146. Current AR 23 requires hard copy filing of all submissions, except as otherwise ordered by the Tribunal. The Rule anticipates the filing of an original for the archives of the Centre and five additional copies where there are three Tribunal members. In practice, parties send

their submissions by electronic mail and upload them to a file-sharing platform created by the Secretariat for the specific case. At the same time, hard copies of the submission and electronic devices containing a digital copy are sent by courier. The format and number of copies is typically agreed by the Tribunal and the parties at the first session (*see* proposed AR 34) and specified in Procedural Order No. 1 (*see* draft Procedural Order No. 1 template, item 13).

147. Recently, Tribunals and parties have increasingly dispensed with hard copies of supporting documents. It has become standard practice to file legal authorities in soft (electronic) copy only, and some arbitrators wish to receive only the main submissions in hard copy (with some foregoing hard copies altogether). However, the process remains paper intensive, and the Centre continues to promote efforts to reduce paper use in its daily operations.

148. ICSID offers secure, cloud-based servers to facilitate electronic filing, and its electronic archiving system allows documents to be retained permanently and provided to the parties on request (*see* proposed AFR 26). Parties and Tribunals can thus upload, download and read submissions on the secure file-sharing platform, and use various software tools to annotate electronic documents in lieu of handwritten notes on hard copies.

149. As part of these efforts, electronic filing is required by proposed AR 3(1). The Rule allows the parties to agree otherwise and the Tribunal to order the production of hard copies only if necessary. Departure from the default of electronic filing should be exceptional and for good cause; Tribunals should not order the production of hard copies merely for convenience. Moreover, if hard copies are required, it is recommended that a single format be used for all sets of submissions.

150. The second sentence of proposed AR 3(1) concerns the method of introducing documents into the proceeding and stems from current AFR 24(2). Documents become part of the record in the case if they have been filed with the Secretariat. The Rule has been revised to account for electronic filing of documents. Once case documents are transmitted by electronic mail or uploaded to a cloud-based server, the Secretary of the Tribunal will acknowledge receipt of the documents and transmit them to the Tribunal and the other party as necessary, subject to the parties' agreement on the routing of written communications (*see* proposed AR 4). This proposed Rule deals with introduction of documents. It does not deal with the admissibility of documents and evidence into the formal record, which is a matter to be decided by the Tribunal (*see e.g.*, proposed AR 39).

151. Proposed AR 3(2) is current AR 24 on the filing of supporting documentation with minor language modifications.

152. Proposed AR 3(3) is based on current AFR 30, and concerns supporting documents. It is revised to account for electronic filing without an original hard copy or certified copies. In practice, parties tend not to submit originals as supporting documents unless their authenticity is disputed and the Tribunal wishes to examine the originals. Current AFR 30(2) also contains an outdated procedure for filing extracts of a document. Certification is no longer necessary and, instead, the other party may request a fuller extract or the whole document if it believes that the omitted text renders the extract misleading. Other parts of

current AFR 30 have been incorporated into proposed AR 5 concerning translations of documents.

RULE 4 – ROUTING OF WRITTEN COMMUNICATIONS

CURRENT RELATED PROVISIONS: Convention Art. 9; AFR 24, 28

Rule 4
Routing of Written Communications

(1) The Secretariat shall be the official channel of written communications among the parties, the Tribunal, and the Chairman of the Administrative Council ("Chairman"), except that:

(a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the proceeding;

(b) the members of the Tribunal shall communicate directly with each other; and

(c) a party may communicate directly with the Tribunal if requested to do so by the Tribunal, provided that the other party and the Secretariat are copied on the communications.

(2) The Secretariat shall acknowledge receipt of all communications filed by a party and, subject to paragraph (1)(a) and (c), distribute them to the other party and the Tribunal.

Article 4
Transmission des communications écrites

(1) Le Secrétariat est l'intermédiaire officiel pour les communications écrites entre les parties, le Tribunal et le ou la Président(e) du Conseil administratif (« Président(e) du Conseil administratif »), sauf dans les cas suivants :

(a) les parties peuvent communiquer directement entre elles, à condition que le Secrétariat reçoive copie de toutes communications devant être produites au cours de l'instance;

(b) les membres du Tribunal communiquent directement entre eux ; et

(c) les parties peuvent communiquer directement avec le Tribunal si celui-ci lui en fait la demande, à condition que l'autre partie et le Secrétariat reçoivent copie de ces communications.

(2) Le Secrétariat accuse réception de toutes les communications déposées par une partie et, sous réserve du paragraphe (1)(a) et (c), les transmet à l'autre partie et au Tribunal.

Regla 4
Transmisión de Comunicaciones Escritas

(1) El Secretariado será el intermediario oficial de toda comunicación escrita entre las partes, el Tribunal y el o la Presidente(a) del Consejo Administrativo ("Presidente(a) del Consejo Administrativo"), excepto que:

(a) las partes podrán comunicarse directamente entre sí, siempre que el Secretariado sea copiado en todas las comunicaciones que se presenten en el procedimiento;

(b) los miembros del Tribunal se comunicarán directamente entre sí; y

(c) a solicitud del Tribunal, una parte podrá comunicarse directamente con el Tribunal, siempre que la otra parte y el Secretariado sean copiados en las comunicaciones.

(2) El Secretariado acusará recibo de todas las comunicaciones presentadas por una parte y, sujeto a lo dispuesto en el párrafo (1)(a) y (c), las distribuirá a la otra parte y al Tribunal.

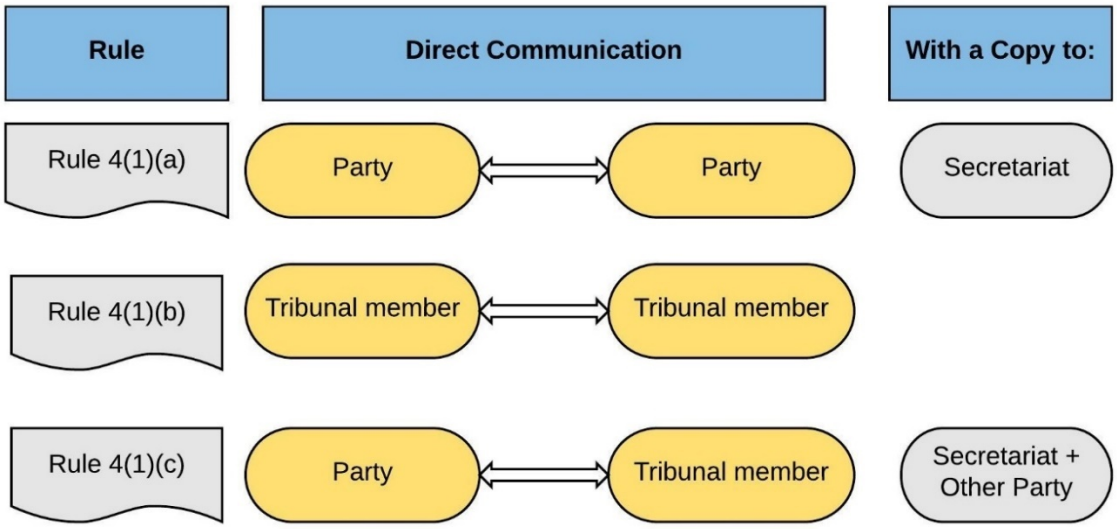
153. Proposed AR 4 contains the basic principle, currently in AFR 24, that the Secretariat is the official channel of communications. This distinguishes ICSID from most arbitral institutions, which do not provide this service. In practice, it serves an important role in ensuring the integrity of the process, equality of treatment of the parties, avoidance of *ex parte* communications, and fulfilment of the Centre's mandatory archiving function (*see* current AFR 28 and proposed AFR 26). When a party files a submission or letter, the Secretariat sends an acknowledgment (with a copy of the incoming correspondence) to both parties, and immediately transmits the filing to the Tribunal by separate communication. The acknowledgement and the transmittal are made on the day the filing is received, or on the following business day when it is received late at night or on the weekend. Concurrently, the filing is saved in the Centre's archiving system.

154. The basic principle has certain exceptions for practical purposes. First, the Secretariat does not act as intermediary between the Tribunal members, who may communicate directly with each other. Such communications are confidential and do not form part of the official record of the case. Second, it has become standard for parties to copy each other on all communications sent to the Secretariat, obviating the need for the Secretariat to transmit them to the other party. Hard copies and soft (electronic) copies of submissions and case correspondence are thus usually exchanged directly between the parties. Third, the parties

and the Tribunal usually agree to send hard copy submissions directly to the Tribunal members. This saves time and cost.

155. Sometimes the parties also agree on direct communication with the Tribunal by electronic mail; however, this is less common as there is a risk that sensitive messages are inadvertently copied to an unintended addressee. Proposed AR 4(1) lists these exceptions, and specifies that the Secretariat must in all circumstances be copied on submissions and communications that are introduced into the proceeding, to fulfil the Centre's depositary role (*see* proposed AFR 26). The chart below notes the options for routing of communications.

Routing of Communications – Rule 4



RULE 5 – PROCEDURAL LANGUAGES, TRANSLATION AND INTERPRETATION

CURRENT RELATED PROVISIONS: AFR 30; AR 22

Rule 5
Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Tribunal and the Secretariat regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Written submissions, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages.

(4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Tribunal may require a fuller or a complete translation. If the translation is disputed, the Tribunal may require a certified translation.

(5) Any written communication from the Tribunal or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal and, where applicable the Secretary-General, shall render orders, decisions, and the Award in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may require interpretation into the other procedural language. The recordings and transcripts of a hearing shall be kept in the procedural language(s) used at the hearing.

(7) The testimony of a witness or an expert in a language other than a procedural language shall be interpreted into the procedural language(s) used at the hearing.

Article 5
Langues de la procédure, traduction et interprétation

(1) Les parties peuvent convenir d'utiliser une ou deux langues pour la conduite de procédure. Les parties doivent consulter le Tribunal et le Secrétariat sur l'utilisation d'une langue qui n'est pas une langue officielle du Centre.

(2) Si les parties ne se mettent pas d'accord sur la ou les langue(s) de la procédure, chacune d'elles peut choisir l'une des langues officielles du Centre.

(3) Les écritures, observations, documents justificatifs et communications sont déposés dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger d'une partie qu'elle dépose tout document dans les deux langues de la procédure.

(4) Tout document dans une langue autre qu'une langue de la procédure est accompagné d'une traduction dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger d'une partie qu'elle traduise tout document dans les deux langues de la procédure. Il suffit que seule la partie pertinente d'un document soit traduite, étant entendu que le Tribunal peut

exiger une traduction plus complète ou intégrale. Si la traduction est contestée, le Tribunal peut exiger une traduction certifiée conforme.

(5) Toute communication écrite émanant du Tribunal ou du Secrétariat est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal et, le cas échéant, le ou la Secrétaire général(e), rendent des ordonnances, décisions et la sentence dans les deux langues de la procédure, sauf si les parties en conviennent autrement.

(6) Toute communication orale est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger une interprétation dans l'autre langue de la procédure. Les enregistrements et transcriptions d'une audience sont effectués dans la ou les langues(s) de la procédure utilisée(s) au cours de l'audience.

(7) La déclaration d'un témoin ou d'un expert dans une langue autre qu'une langue de la procédure fait l'objet d'une interprétation dans la ou les langue(s) de la procédure utilisée(s) au cours de l'audience.

Regla 5
Idiomas del Procedimiento, Traducción e Interpretación

(1) Las partes podrán acordar la utilización de uno o dos idiomas en el procedimiento. Las partes consultarán al Tribunal y al Secretariado respecto del uso de un idioma que no sea un idioma oficial del Centro.

(2) Si las partes no acordaran el o los idioma(s) del procedimiento, cada una podrá escoger uno de los idiomas oficiales del Centro.

(3) Los escritos, observaciones, documentos de respaldo y comunicaciones se presentarán en un idioma del procedimiento. En un procedimiento que tenga dos idiomas del procedimiento, el Tribunal podrá solicitar a una parte que presente cualquier documento en ambos idiomas del procedimiento.

(4) Un documento redactado en un idioma que no sea un idioma del procedimiento será acompañado de una traducción a un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, el Tribunal podrá solicitar a una parte que traduzca cualquier documento a ambos idiomas del procedimiento. Será suficiente que se traduzcan solamente las partes pertinentes de un documento; sin embargo, el Tribunal podrá solicitar una traducción más amplia o completa del documento. El Tribunal podrá solicitar una traducción certificada en caso de que se impugne la traducción.

(5) Cualquier comunicación escrita de parte del Tribunal o del Secretariado deberá estar redactada en un idioma del procedimiento. En un procedimiento con dos idiomas del

procedimiento, el Tribunal y, cuando corresponda, el o la Secretario(a) General, emitirán resoluciones, decisiones y el laudo en ambos idiomas del procedimiento, salvo acuerdo en contrario de las partes.

(6) Cualquier comunicación oral deberá realizarse en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento el Tribunal podrá solicitar la interpretación al otro idioma del procedimiento. Las grabaciones y transcripciones de una audiencia se realizarán en el o los idioma(s) del procedimiento utilizado(s) en la audiencia.

(7) El testimonio de un o una testigo o un o una perito(a) en un idioma que no sea un idioma del procedimiento será interpretado al o a los idioma(s) del procedimiento utilizado(s) en la audiencia.

156. Proposed AR 5 merges and revises current AR 22 and AFR 30. It deals with all matters concerning the language to be employed in the proceeding, including the choice of language, translation of documents and interpretation at hearings.

157. The ICSID Convention, Regulations and Rules are drafted in English, French and Spanish, all three texts being equally authentic. The parties often agree to use just one of these languages in the proceeding, and may also agree to use another, either official or non-official, language in the proceeding ("procedural language(s)"). Proposed AR 5(1) provides that the selection of a non-official language is subject to consultation with the Tribunal and the Secretariat, to ensure that the Tribunal can work and the Secretariat can assist in that language. At present, the Secretariat is proficient in 25 languages.

158. Proposed AR 5(2) provides that where parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre (current AR 22). Many ICSID cases involve two procedural languages, with English and Spanish being the most common combination.

159. Using multiple languages necessarily increases the cost of the proceeding and may cause delay, as many documents, including the Tribunal's decisions, orders and the Award, need to be issued in both procedural languages. In practice, the parties and the Tribunal try to limit the administrative and financial burden resulting from a bilingual proceeding, especially in the first procedural order (*see* draft Procedural Order No. 1). This largely depends on the language capacity of the Tribunal members and the parties. For example, the parties usually agree that the Tribunal and Secretariat may communicate in the procedural language of their choice in routine administrative or procedural correspondence.

160. If all Tribunal members have working knowledge of the procedural languages selected by the parties, the parties typically also agree that their submissions (including written submissions, expert opinions, witness statements, and all supporting documents) may be filed in the procedural language of their choice. However, if an arbitrator is not proficient

in both procedural languages, a translation must be provided by the parties, even if the parties can work in both languages.

161. The parties often agree that translations may be delivered later than the scheduled filing date, and the time required for producing translations is taken into account in the procedural calendar of the case (*see* proposed AR 34(4)). The parties usually also agree that each party pays for the translation of its own submissions, and the parties share the cost of translation of Tribunal orders, decisions and the Award, subject to the Tribunal's ultimate decision on how to allocate costs.

162. In spite of its considerable impact on costs, it is vital to continue to offer the option of bilingual proceedings in view of the Centre's official languages, the language capacities of arbitrators, counsel and parties, and the geographic spread of ICSID's membership. At the same time, the Centre wishes to promote techniques for reducing costs arising from the use of multiple procedural languages, and proposes to reflect some of these practices in the revised Rules.

163. ***First***, it proposes to invite parties to indicate their preferred procedural language before the appointment of arbitrators, so that the parties can consider candidates with the necessary language skills (*see* proposed IR 3).

164. ***Second***, proposed AR 5(3) allows the parties to file submissions in the procedural language of their choice, and the Tribunal may require translations into the other procedural language when necessary. As mentioned above, a translation is necessary when a Tribunal member is not proficient in a procedural language, or when the other party (or its counsel) is at a linguistic disadvantage.

165. ***Third***, proposed AR 5(4) specifies that if a document filed in the proceeding is not in a procedural language, it must be accompanied by a translation to a procedural language, and translated into both procedural languages if the Tribunal so requires. However, the parties need not translate the full document and the translation need not be certified, unless the Tribunal orders otherwise. This typically occurs when the other party disputes the translation or claims that the translated part is misleading given the contents of the remaining part of the document.

166. ***Fourth***, proposed AR 5(5) and 5(6) allow the Tribunal and the Secretary-General to communicate with the parties in any procedural language, except that all decisions, orders and the Award must be rendered in both procedural languages unless the parties agree otherwise.

167. ***Fifth***, proposed AR 5(6) allows the parties to use any procedural language at a hearing, subject to interpretation into the other procedural language as required. If both procedural languages are used at the hearing, full transcripts will be made in both (including interpretations into those languages).

168. ***Sixth***, proposed AR 5(7) specifies that if testimony at a hearing is given in a language other than a procedural language, it shall be interpreted into both procedural languages used at

the hearing. The parties may nevertheless agree to limit the use of interpretation and thus the associated costs.

RULE 6 – CORRECTION OF ERRORS AND DEFICIENCIES

CURRENT RELATED PROVISIONS: AFR 24; AR 25

Rule 6
Correction of Errors and Deficiencies

(1) A party may correct an accidental error in any written submission, observation, supporting document or communication at any time before the Award is rendered, with agreement of the other party or with leave of the Tribunal.

(2) The Secretariat may request that a party correct any deficiency in a filing, at the party's own cost.

Article 6
Correction des erreurs et insuffisances

(1) Une partie peut corriger une erreur accidentelle dans les écritures, observations, documents justificatifs ou communications à tout moment avant que la sentence ne soit rendue, avec l'accord de l'autre partie ou l'autorisation du Tribunal.

(2) Le Secrétariat peut demander qu'une partie remédie à une insuffisance dans un dépôt, aux frais de celle-ci.

Regla 6
Corrección de Errores y Deficiencias

(1) Una parte podrá corregir cualquier error accidental en un escrito, observación, documento de respaldo o comunicación en cualquier momento antes de que se dicte el laudo, si cuenta con el acuerdo de la otra parte o con la autorización del Tribunal.

(2) El Secretariado podrá solicitar que una parte corrija cualquier deficiencia en una presentación por cuenta propia de la parte.

169. Proposed AR 6 merges current AFR 24(2) on deficiencies and current AR 25 on accidental errors in submissions filed by the parties. Errors such as mislabelling of exhibits, miscalculations, misnomers, typographical errors, and the like are common. Typically,

these are discovered shortly after a submission has been filed and the relevant party seeks to introduce an *errata* sheet or to file a corrected submission. This is almost always allowed by the Tribunal for inadvertent errors. This Rule remains the same in proposed AR 6, with minor language changes.

170. When the Secretary of the Tribunal notices a deficiency in a filing (*e.g.*, an omission to translate a document or missing exhibits), this is brought to the attention of the party filing the submission, which is invited to correct the deficiency. Proposed AR 6(2) is a simplified version of AFR 24(2), as the requirements for documents introduced into the proceeding have been streamlined (*e.g.*, there is no certification required of copies or of translations) and there has rarely been any issue with deficiencies. If a filing is deficient, the Secretariat may, as in the past, correct the deficiency at the cost of the party concerned.

RULE 7 – CALCULATION OF TIME LIMITS

CURRENT RELATED PROVISIONS: AFR 29; AR 26

Rule 7
Calculation of Time Limits

(1) Any time limit expressed as a period of time shall be calculated from the day after the date:

(a) of the relevant notice;

(b) on which the Tribunal announces the period; or

(c) on which the procedural step starting the period is taken.

(2) A time limit expires at 11:59 p.m. at the seat of the Centre on the relevant date. Where the end of a time limit falls on a Saturday, Sunday, or a holiday observed by the Secretariat, it shall be satisfied if the relevant step is taken or the relevant document is received by the Secretariat on the subsequent business day.

Article 7
Calcul des délais

(1) Tout délai exprimé sous la forme d'une durée est calculé à compter du lendemain de la date :

(a) de la notification concernée ;

(b) à laquelle le Tribunal annonce cette durée ; ou

(c) à laquelle l'acte d'ordre procédural qui fait courir le délai est accompli.

(2) Un délai expire à 23h59 au siège du Centre à la date concernée. Dans le cas où un délai expire un samedi, un dimanche ou un jour férié observé par le Secrétariat, il est respecté si l'acte concerné est accompli, ou si le document concerné est reçu par le Secrétariat, le jour ouvré suivant.

Regla 7
Cálculo de los Plazos

(1) Cualquier plazo expresado como período de tiempo se calculará desde el día posterior a la fecha:

(a) de la notificación pertinente;

(b) en la que el Tribunal anuncie el período; o

(c) en la que se inicie la etapa procesal que comienza el período.

(2) Un plazo vence a las 11:59 p.m. en la sede del Centro en la fecha pertinente. Cuando el final de un plazo coincida con un sábado, domingo, o un feriado observado por el Secretariado, será suficiente que la actuación pertinente se realice o el Secretariado reciba el documento pertinente el día hábil siguiente.

171. Time limits are currently addressed in AFR 29 and AR 26, which concern time limits prescribed by the Convention and the Rules, or fixed by the Secretary-General or the Tribunal. A time limit will be satisfied if the relevant submission is received by electronic means by 11:59 p.m. at the seat of the Centre (in Washington D.C.) on the day the submission is due.

172. Proposed AR 7(1) confirms that time periods under this provision are calculated from the day after the date when the relevant event was notified to the parties (*e.g.*, the registration of a Request for arbitration, the constitution of a Tribunal or the dispatch of the Award) or from the day after a procedural step triggering the period is taken.

173. Proposed AR 7(2) recalls the current Rule that a time limit not falling on a business day is satisfied if the submission is received by the Secretary-General on the subsequent business day, taking into account holidays observed by the ICSID Secretariat, which are announced on ICSID's website.

RULE 8 – TIME LIMITS SPECIFIED BY THE CONVENTION AND THESE RULES OR FIXED BY THE SECRETARY-GENERAL

CURRENT RELATED PROVISIONS: AFR 29; AR 26

Rule 8
Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General

(1) The parties may agree to extend a time limit fixed by the Secretary-General or specified by the Convention or these Rules if such time limit is not mandatory under the Convention.

(2) Any step taken by the parties after expiry of a time limit fixed by the Secretary-General or specified by the Convention or these Rules shall be disregarded, unless the Secretary-General or the Tribunal, as applicable, concludes that there are special circumstances justifying the delay.

(3) Where these Rules prescribe time limits for orders, decisions and the Award, the Tribunal, or the Chairman, where applicable, shall use best efforts to meet those time limits. If special circumstances arise which prevent the Tribunal from complying with a time limit, it shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered.

Article 8
Délais prévus par la Convention et le Règlement ou fixés par le ou la Secrétaire général(e)

(1) Les parties peuvent convenir de prolonger un délai fixé par le ou la Secrétaire général(e) ou prévu par la Convention ou le présent Règlement si ce délai n’est pas impératif aux termes de la Convention.

(2) Il n’est tenu compte d’aucun acte accompli par les parties après l’expiration d’un délai fixé par le ou la Secrétaire général(e) ou prévu par la Convention ou le présent Règlement, sauf si le ou la Secrétaire général(e) ou le Tribunal, selon le cas, conclut que des circonstances particulières justifient le retard.

(3) Dans le cas où le présent Règlement impose des délais pour les ordonnances, les décisions et la sentence, le Tribunal, ou le ou la Président(e) du Conseil administratif, le cas échéant, déploie tous les efforts possibles pour respecter ces délais. S’il survient des circonstances particulières qui empêchent le Tribunal de

respecter un délai, il doit informer les parties du motif du retard et de la date à laquelle il prévoit que l'ordonnance, la décision ou la sentence sera rendue.

Regla 8
Plazos Determinados por el Convenio y estas Reglas o Fijados por el o la Secretario(a) General

(1) Las partes podrán acordar ampliar un plazo fijado por el o la Secretario(a) General o establecido por el Convenio o estas Reglas si dicho plazo no es obligatorio en virtud del Convenio.

(2) Toda actuación de las partes después del vencimiento de un plazo fijado por el o la Secretario(a) General o establecido en el Convenio o estas Reglas se tendrá por no realizada, salvo que el o la Secretario(a) General o el Tribunal, según corresponda, concluya que existen circunstancias especiales que justifican la demora.

(3) Cuando estas Reglas establezcan plazos para resoluciones, decisiones y el laudo, el Tribunal, o el o la Presidente(a) del Consejo Administrativo, cuando corresponda, hará lo posible para cumplir esos plazos. Si surgen circunstancias especiales que impidan al Tribunal cumplir con un plazo, este notificará a las partes el motivo de la demora y la fecha en la que prevé que se emitirá la resolución, decisión o el laudo.

174. Proposed AR 8 concerns time limits specified in the Convention and the AR, for example, the time limit to file an objection that the dispute is manifestly without legal merit (current AR 41(5)), the period of grace granted to a defaulting party (current AR 42), and the time limit to file post-Award remedy applications (Convention Art. 50-52, current AR 49 and 50). The Rule also concerns time limits fixed by the Secretary-General, for example, a briefing schedule fixed to file observations on a request for provisional measures before the Tribunal is constituted under current AR 39 (*see* proposed AR 50).

175. Because these time limits are not fixed by the Tribunal, they cannot be extended by the Tribunal. The parties may, however, agree to extend the time limits in the AR, as long as these are not mandatory under the Convention. The mandatory time limits specified in the Convention and reflected in the Arbitration Rules are: Art. 49(2) and current AR 49(5)/proposed AR 62(1) (a request for rectification of the Award and supplementary decision to be made within 45 days after the award was rendered); Art. 51(2)) and current AR 50(3)(a)/proposed AR 63(3) (an application for revision of the Award to be made within 90 days after discovery of a fact of such a nature as decisively to affect the Award and in any event within three years after the Award was rendered); and Art. 52(2) and current AR 50(3)(b)/proposed AR 63(4) (an application for annulment of the Award to be made within 120 days after the award was rendered, or within 120 days after discovery of corruption if annulment is requested on that ground, and in any event within three years after the Award was rendered). Time limits fixed by the Secretary-General may also be

extended by agreement of the parties. This applies in practice and is now codified in proposed AR 8(1).

176. If the parties do not extend a time limit that they could extend and fail to take a step within a time limit prescribed by the Convention or the Rules, or fixed by the Secretary-General, the late step is disregarded. This corresponds to the current Rules and practice and is now contained in proposed AR 8(2).

177. Proposed AR 8(3) addresses the time limits applicable to Tribunal orders, decisions and the Award. The WP proposes a number of time limits for the Tribunal (*e.g.*, to issue a decision on an objection that the claim manifestly lacks legal merit within 60 days after the last submissions pursuant to proposed AR 35(2)(c)). However, the WP recognizes that flexibility is desirable to address the circumstances of each case. For example, the length of the parties' pleadings and complexity of the issues. As well, it would be counter-productive to have an "absolute" time for such decisions and Award and potentially nullify the entire proceeding if the Tribunal failed to meet the time frame. AR 8(3) therefore proposes a "best efforts" obligation for Tribunals to comply with time limits for orders, decisions and the Award. If a Tribunal in special circumstances is prevented from complying with a time limit, it must advise the parties of the specific circumstances causing the delay and the anticipated date of delivery of the order, decision or Award.

178. It should be noted that proposed AR 34(4) expects the parties and the Tribunal to include the timing of the Tribunal's anticipated decisions and orders in the procedural timetable. This will help the Tribunal to reserve adequate time for deliberations and for drafting orders, decisions and the Award and the parties to estimate the overall length of the case.

RULE 9 – TIME LIMITS FIXED BY THE TRIBUNAL

CURRENT RELATED PROVISIONS: AR 26

Rule 9
Time Limits Fixed by the Tribunal

(1) The Tribunal shall fix time limits for completion of each step in the proceeding, other than time limits specified by the Convention or these Rules.

(2) The Tribunal may extend a time limit it fixed upon reasoned application by a party made prior to the expiry of the time limit. The Tribunal may delegate this power to its President.

(3) The Tribunal shall disregard any step taken after expiry of a time limit it fixed unless it concludes that there are special circumstances justifying the delay.

Article 9
Délais fixés par le Tribunal

(1) Le Tribunal fixe les délais pour l'accomplissement de chaque étape de l'instance, autres que les délais prévus par la Convention ou le présent Règlement.

(2) Le Tribunal peut prolonger un délai qu'il a fixé, sur demande motivée présentée par une partie avant l'expiration du délai. Le Tribunal peut déléguer ce pouvoir à son Président.

(3) Le Tribunal ne tient pas compte d'un acte accompli après l'expiration d'un délai qu'il a fixé, sauf s'il conclut que des circonstances particulières justifient le retard.

Regla 9
Plazos Fijados por el Tribunal

(1) El Tribunal fijará los plazos para llevar a cabo cada etapa del procedimiento que no hayan sido establecidos por el Convenio o estas Reglas.

(2) El Tribunal podrá extender un plazo fijado por este, previa solicitud fundada de una parte presentada antes del vencimiento del plazo. El Tribunal podrá delegar esta facultad a su Presidente(a).

(3) El Tribunal tendrá por no presentada toda actuación realizada después del vencimiento de un plazo fijado por este, salvo que concluya que existen circunstancias especiales que justifican la demora.

179. Proposed AR 9 concerns time limits fixed by the Tribunal and is currently in AR 26.

180. Proposed AR 7(2) contains a default rule clarifying that a time limit falling on a weekend or holiday observed by the Secretariat shall be satisfied if the relevant filing is received or procedural step is taken on the next business day. However, the parties and the Tribunal may agree on a time limit falling on a weekend or holiday. This may be important for urgent matters, for example, to address a procedural issue before a hearing. In practice, the parties are given the opportunity to propose and comment on time limits fixed by the Tribunal and can therefore consider all circumstances in scheduling written submissions and hearings.

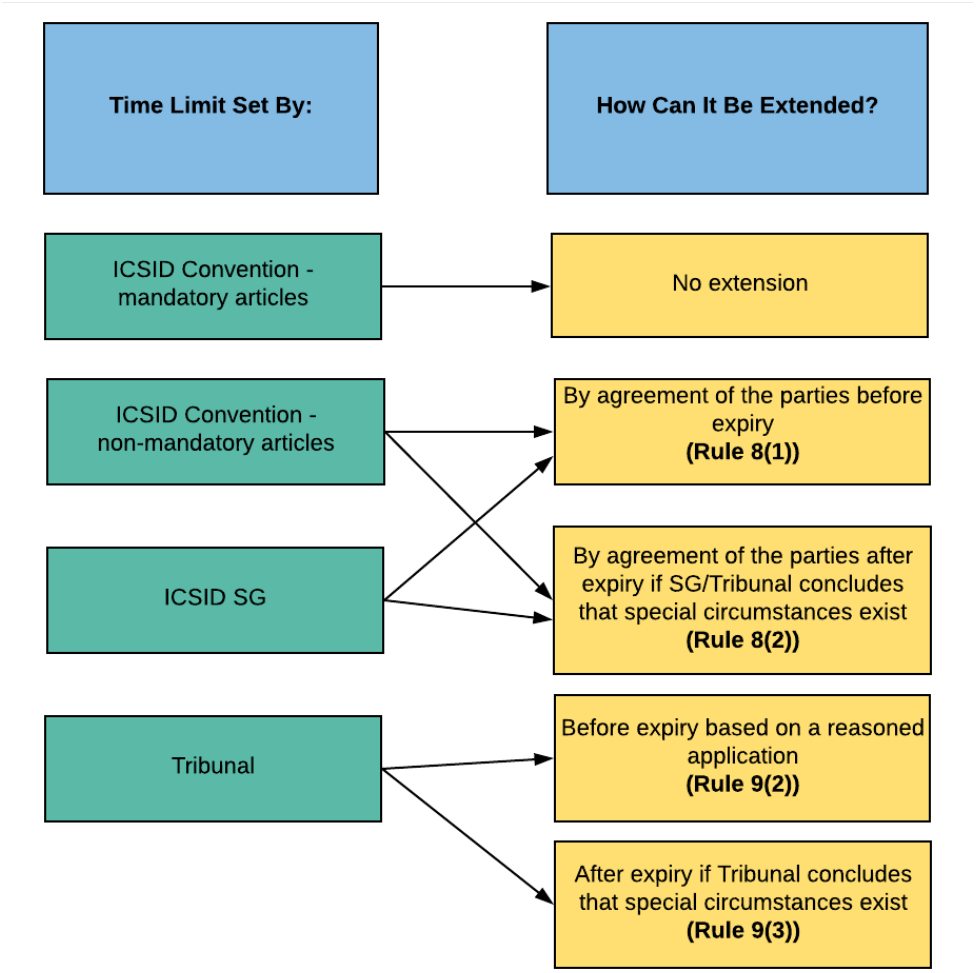
181. Under proposed AR 9(2), the Tribunal may extend a time limit upon application of either party or the parties jointly, if such application is made prior to the expiry of the time limit. Requests for extension of time are common, and are usually granted if the parties agree on the extension or if the request is justified in the circumstances. The proposed Rule adds to current AR 26 that the application must be reasoned, and it is expected that a Tribunal will

consider any request for extension in light of the duty to act expeditiously in proposed AR 11(3). The parties and Tribunals should consider the effect of a request for extension of time on the procedural calendar, especially when the extension might affect hearing dates. This could cause significant delay, as it is often difficult to find common availability for arbitrators and counsel for hearings.

182. Under proposed AR 9(3), if a party does not request an extension before the time limit expires, the request is disregarded unless there are special circumstances that justify the delay and the Tribunal decides to accept the submission. As indicated in proposed AR 3(2), all supporting documents must also be filed within the time limit, or they risk being disregarded. Therefore, a party that anticipates difficulty in satisfying a time limit should request an extension before the expiry (s*ee* also current AR 42 and proposed AR 53 on default).

183. The chart below summarizes how parties can obtain extensions of time limits in proceedings.

Extension of Time Limits – Rules 8-9



RULE 10 – WAIVER

CURRENT RELATED PROVISIONS: Convention Art. 45; AR 27

Rule 10
Waiver

Subject to Article 45 of the Convention, if a party knows or should have known that an applicable rule, agreement of the parties, or any order or decision of the Tribunal or the Secretary-General has not been complied with, and does not promptly object, then that party shall be deemed to have waived its right to object to that non-compliance.

Article 10
Renonciation à un droit

Sous réserve de l'article 45 de la Convention, si une partie a ou devrait avoir connaissance du fait qu'une disposition applicable d'un règlement, un accord des parties ou une ordonnance, ou une décision du Tribunal ou du ou de la Secrétaire général(e) n'a pas été respecté et qu'elle ne fait pas valoir d'objection dans les plus brefs délais, cette partie est réputée avoir renoncé à son droit d'objecter à ce non-respect.

Regla 10
Renuncias

Sujeto a lo establecido por el Artículo 45 del Convenio, si una parte sabe, o debería haber sabido, que no se ha observado alguna regla aplicable, algún acuerdo de las partes, o alguna resolución o decisión del Tribunal, o del o de la Secretario(a) General, y no objeta con prontitud, entonces se considerará que esa parte ha renunciado a su derecho a objetar dicho incumplimiento.

184. Proposed AR 10 is current AR 27 with minor language revisions.

CURRENT RELATED PROVISIONS: AR 34

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.

Article 11
Obligations générales

(1) Le Tribunal traite les parties de manière égale et donne à chacune d'elles une possibilité raisonnable de faire valoir ses prétentions.

(2) Le Tribunal consulte les parties avant de rendre de sa propre initiative une ordonnance ou décision qu'il est autorisé à rendre par le présent Règlement.

(3) Le Tribunal et les parties conduisent l'instance avec célérité et efficacité en termes de coûts.

(4) Les parties coopèrent dans la mise en œuvre des ordonnances et des décisions du Tribunal.

Regla 11
Obligaciones Generales

(1) El Tribunal deberá tratar a las partes de manera igualitaria y brindarle a cada parte una oportunidad razonable de plantear su postura.

(2) El Tribunal consultará con las partes antes de adoptar de oficio una resolución o decisión autorizada por estas Reglas.

(3) El Tribunal y las partes tramitarán el procedimiento de manera expedita y eficaz en materia de costos.

(4) Las partes cooperarán en la implementación de las resoluciones y decisiones del Tribunal.

185. Duty to Treat Parties Equally and the Parties' Right to be Heard. Proposed AR 11(1) confirms the application of certain fundamental duties under the AR: equality of treatment of the parties and the parties' right to be heard. It adopts wording similar to Article 17(1) of the UNCITRAL Arbitration Rules (2010).

186. Typically, a Tribunal must give a party a reasonable opportunity to file observations when the other party files a request or submission. This includes procedural requests, such as a request for an extension of a time limit (unless there are exceptional circumstances requiring a Tribunal decision before it obtains the other party's comments). The interpretation of what is "a reasonable opportunity to present its case" will depend on the circumstances of each case. For example, the Tribunal may direct the parties that it is sufficiently briefed and does not wish to receive any further submissions.

187. As a result of the proposed amendment, the WP proposes not to restate in each rule that a party has the right to file observations, with the exception of those provisions which include a time limit for filing the observations.

188. Duty to Consult with the Parties. Proposed AR 11(2) reflects current practice and avoids the need to reiterate the Tribunal's duty to consult with the parties prior to taking a step authorized by these Rules to be taken on its own initiative. Examples of such Rules include proposed AR 36 on preliminary objections, proposed AR 37 on bifurcation, proposed AR 40 on production of documents, proposed AR 43 on site visits, proposed AR 50 on provisional measures or proposed AR 51 on security for costs. Tribunals will typically consult the parties before they take any procedural step on their own initiative, except when it is a minor procedural matter.

189. Duty to Act Expeditiously. Proposed AR 11(3) introduces a general duty to act in an expeditious and cost-effective manner. This is a new Rule for parties and Tribunal members, who share the responsibility of ensuring timeliness and cost-efficiency.

190. It is expected that the Tribunal and the parties will cooperate to achieve the objective of this new Rule through pro-active case management. The Tribunal and the parties should discuss any appropriate means to expedite a case early in the process. The ICSID Secretariat will also issue a guidance note on case management techniques.

191. Duty to Cooperate to Implement Decisions. Proposed AR 11(4) is a new provision modelled on current AR 34(3). The parties have a generally recognized duty to cooperate with the Tribunal deriving from their consent to arbitration. Under current AR 34(4), if a party fails to comply with a Tribunal order to produce evidence, the Tribunal must take

note of this failure and the reasons for the failure. While current AR 34(3) is specific to the production of evidence, the general duty in proposed AR 11(4) applies to all aspects of the procedure. In practice, Tribunals take into consideration the conduct of the parties during the proceeding in deciding on the allocation of costs (*see* proposed AR 19(4)).

RULE 12 – ORDERS, DECISIONS AND AGREEMENTS

CURRENT RELATED PROVISIONS: AR 19, 20

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.

Article 12
Ordonnances, décisions et accords

(1) Le Tribunal rend les ordonnances et les décisions requises pour la conduite de la procédure.

(2) Les ordonnances et les décisions peuvent être rendues par tous moyens de communication appropriés et peuvent être signées par le ou la Président(e) pour le compte du Tribunal, sauf si les parties en conviennent autrement.

(3) Le Tribunal applique tout accord des parties sur les questions de procédure, pour autant que celui-ci soit conforme à la Convention et au Règlement administratif et financier.

Regla 12
Resoluciones, Decisiones y Acuerdos

(1) El Tribunal emitirá las resoluciones y decisiones necesarias para la tramitación del procedimiento.

(2) Las resoluciones y decisiones podrán ser emitidas por cualquier medio de comunicación apropiado y podrán estar firmadas por el o la Presidente(a) en nombre y representación del Tribunal, salvo acuerdo en contrario de las partes.

(3) El Tribunal aplicará cualquier acuerdo de las partes sobre cuestiones procesales en la medida en que cumpla con lo establecido en el Convenio y en el Reglamento Administrativo y Financiero.

192. Proposed AR 12 merges current AR 19 and 20(2) with minor language modifications. The parties are free to agree on any procedural provisions as long as they conform with the ICSID Convention and the Administrative and Financial Regulations. Typically, procedural agreements are reached at the first session of the Tribunal held pursuant to proposed AR 34, but they can be made at any time.

193. Proposed AR 12(2) reflects modern practice and specifies that there need not be an in-person quorum for a Tribunal decision, which can be taken by any means of communication. In practice, many decisions are taken by electronic mail exchanges between the Tribunal members, and the decision (by consensus or by majority) is signed by the President of the Tribunal on behalf of the full Tribunal once all members have had the opportunity to state their views. The exception is the Award, which must be signed by all Tribunal members who voted for it (*see e.g.*, Art. 48(2) of the Convention and current AR 48(1)).

RULE 13 – WRITTEN SUBMISSIONS AND OBSERVATIONS

CURRENT RELATED PROVISIONS: AR 31

Rule 13
Written Submissions and Observations

(1) The parties shall file the following written submissions, with any supporting documents, within the time limits fixed by the Tribunal:

(a) a memorial by the requesting party, subject to paragraph (2);

(b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal finds it necessary:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

(2) The requesting party may elect to have the Request for arbitration considered as the memorial.

(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.

(4) The Tribunal shall grant leave to file unscheduled written submissions, observations or supporting documents upon a timely and reasoned application and only if these are necessary in view of all relevant circumstances.

Article 13
Écritures et observations

(1) Les parties déposent les écritures suivantes avec tous documents justificatifs dans les délais fixés par le Tribunal :

(a) un mémoire de la partie requérante, sous réserve du paragraphe (2) ;

(b) un contre-mémoire de l'autre partie ;

et, si les parties en conviennent ou le Tribunal le juge nécessaire :

(c) une réponse de la partie requérante ; et

(d) une réplique de l'autre partie.

(2) La partie requérante a la faculté de demander que la requête d'arbitrage soit considérée comme le mémoire.

(3) Le mémoire contient un exposé des faits pertinents, du droit et des arguments, ainsi que les demandes. Le contre-mémoire contient un exposé des faits pertinents, y compris l'admission ou la contestation des faits exposés dans le mémoire et tous faits supplémentaires nécessaires, un exposé du droit en réponse au mémoire, les arguments et les demandes. La réponse et la réplique se limitent à répondre aux écritures précédentes.

(4) Le Tribunal autorise le dépôt non prévu d'écritures, d'observations ou de documents justificatifs si une demande motivée à cet effet est présentée en temps voulu et

uniquement si ceux-ci sont nécessaires au regard de l'ensemble des circonstances pertinentes.

Regla 13
Escritos y Observaciones

(1) Las partes presentarán los siguientes escritos, junto con cualquier documento de respaldo, dentro de los plazos fijados por el Tribunal:

(a) un memorial de la parte solicitante, sujeto a lo dispuesto en el párrafo (2);

(b) un memorial de contestación de la otra parte;

y si las partes lo acordaran o si el Tribunal lo estimara necesario:

(c) una réplica de la parte solicitante; y

(d) una dúplica de la otra parte.

(2) La parte solicitante podrá elegir que la solicitud de arbitraje se considere como el memorial.

(3) El memorial deberá contener una relación de los hechos pertinentes, el derecho, los argumentos y petitorios. El memorial de contestación contendrá una relación de los hechos pertinentes, lo cual incluye la aceptación o negación de los hechos declarados en el memorial y cualesquiera hechos adicionales pertinentes, una declaración del derecho en respuesta al memorial, los argumentos y petitorios. La réplica y la dúplica se limitarán a responder al último escrito presentado.

(4) El Tribunal concederá autorización para presentar escritos, observaciones, o documentos de respaldo fuera del calendario previa solicitud oportuna y fundada, y solo si resultan necesarios en vista de todas las circunstancias pertinentes.

194. Proposed AR 13 is current AR 31 with some modifications.

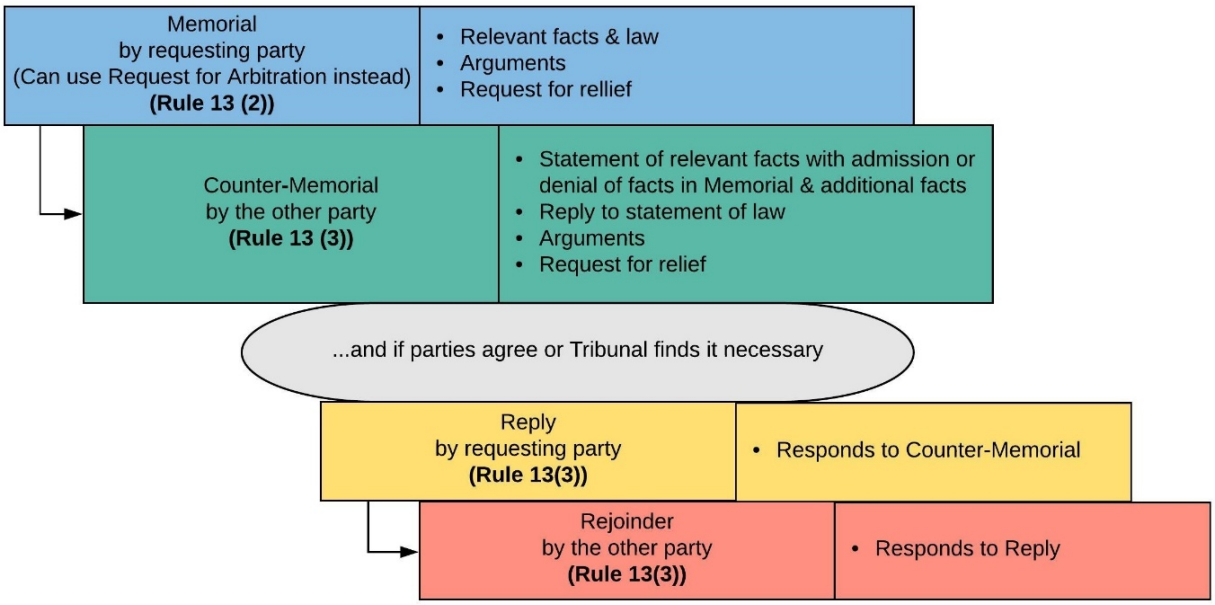
195. ***First***, proposed AR 13(1) sets out the basic written submissions on any claim.

196. ***Second***, proposed AR 13(2) allows a requesting party filing a Request for arbitration to consider that pleading as the memorial for the purposes of proposed AR 13(1)(a). A requesting party may thus elect to file a Request for arbitration as a full memorial, which would reduce the time in the procedural calendar. Paragraph (2) of current AR 31 is deleted because it is unnecessary and has not been used to date.

197. ***Third***, proposed AR 13(3) restricts the contents of a reply and rejoinder to submissions responsive to the last previous pleading. 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. Written submissions must be responsive to the prior submission and join issue on the points in dispute.

198. As a result, written submissions address the following:

Written Submissions – Rule 13



199. ***Fourth***, proposed AR 13(4) deals with unscheduled submissions and provides that these will only be admitted upon a timely and reasoned application, if the Tribunal finds that they are necessary in view of all relevant circumstances.

RULE 14 – CASE MANAGEMENT CONFERENCE

CURRENT RELATED PROVISIONS: AR 21

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.

Article 14
Conférence sur la gestion de l'instance

En vue d'accélérer le déroulement de l'instance, le Tribunal peut convoquer à tout moment une conférence de gestion de l'instance avec les parties pour :

(a) identifier les faits dont l'existence n'est pas contestée ;

(b) circonscrire les questions faisant l'objet du différend ; et

(c) traiter toute autre question de procédure ou de fond en relation avec la résolution du différend.

Regla 14
Conferencia Relativa a la Gestión del Caso

Con miras a que el procedimiento pueda conducirse con mayor celeridad, el Tribunal podrá convocar en cualquier momento una conferencia con las partes relativa a la gestión del caso, con el fin de:

(a) identificar los hechos no controvertidos;

(b) delimitar los asuntos en disputa; y

(c) abordar cualquier otra cuestión procesal o sustantiva relacionada con la resolución de la diferencia.

200. Proposed AR 14 is based on current AR 21(2) concerning a pre-hearing conference to consider the issues in dispute with a view to reaching a settlement. The scope of the proposed provision is expanded to identify uncontested facts, narrow the issues in dispute or address issues that the Tribunal deems relevant for the resolution of the dispute.

201. The proposed rule empowers parties and Tribunals to actively manage the case to achieve an expeditious proceeding. Case management meetings can be convened at any time during the process, or multiple times as useful. For example, a Tribunal could convene a case management conference after the first round of pleadings to guide the parties with regard to the scope, subject matters and questions to be covered in the parties' second round of pleadings. This would help the parties to focus their pleadings.

RULE 15 – HEARINGS

CURRENT RELATED PROVISIONS: Convention Art. 62, 63; AR 29, 32

Rule 15
Hearings

(1) There shall be one or more hearings before the Tribunal, unless the parties agree otherwise.

(2) The President of the Tribunal shall determine the date, time and method of holding hearings, after consulting with the other members of the Tribunal and the parties.

(3) If a hearing is to be held in person, it may be held at any place agreed to by the parties after consulting with the Tribunal and the Secretariat. If the parties do not agree on the place of a hearing, it shall be held at the seat of the Centre pursuant to Article 62 of the Convention.

(4) Any member of the Tribunal may put questions to the parties and ask for explanations at any time during a hearing.

Article 15
Audiences

(1) Le Tribunal tient une ou plusieurs audiences, sauf si les parties en conviennent autrement.

(2) Le ou la Président(e) du Tribunal fixe la date, l'heure et les modalités de la tenue des audiences, après consultation des autres membres du Tribunal et des parties.

(3) Si une audience doit se tenir en personne, elle peut se tenir en tout lieu convenu entre les parties après consultation du Tribunal et du Secrétariat. Si les parties ne se mettent pas d'accord sur le lieu d'une audience, celle-ci se tient au siège du Centre, conformément à l'article 62 de la Convention.

(4) Tout membre du Tribunal peut poser des questions aux parties et leur demander des explications à tout moment au cours d'une audience.

Regla 15
Audiencias

(1) Se celebrarán una o más audiencias ante el Tribunal, salvo acuerdo en contrario de las partes.

(2) El o la Presidente(a) del Tribunal determinará la fecha, la hora y la modalidad de celebración de las audiencias, previa consulta a los otros miembros del Tribunal y a las partes.

(3) Si una audiencia debe celebrarse en persona, podrá celebrarse en cualquier lugar acordado por las partes, previa consulta al Tribunal y al Secretariado. Si las partes no acordaran el lugar de una audiencia, la misma se celebrará en la sede del Centro de conformidad con lo dispuesto en el Artículo 62 del Convenio.

(4) Cualquier miembro del Tribunal podrá interrogar a las partes y solicitarles explicaciones en cualquier momento durante una audiencia.

202. Proposed AR 15 is current AR 13 and 14 with revised content. The current AR refer to sittings of the Tribunal, consisting of hearings and deliberations. In addition, the current AR refer to "sessions," which consist of one of more "sittings". In arbitration practice, the term "sitting" is rarely used and has no significance except for the rule on quorum contained in current AR 14(2) (*see* below proposed AR 17). Therefore, the WP proposes to refer to the first session held pursuant to proposed AR 34 as the "first session" and any subsequent sessions, hearings, meetings or sittings between the parties and the Tribunal as a "hearing".

203. Proposed AR 15(1) provides that there shall be one or more hearings except when the parties agree otherwise. This principle derives from current AR 29. In practice, it is rare for parties to consent to the Tribunal dealing with the issues before it on the basis of the written pleadings only.

204. Proposed AR 15(2) provides that the President of the Tribunal determines the date, time and method of holding hearings, after consultation with the other members and the parties. Shorter hearings on procedural matters and the first session are increasingly held by telephone or video conference, which reduces costs and increases efficiency. However, hearings with oral argument, examination of witnesses and experts, such as hearings on jurisdiction and on the merits, are almost always held in person. In-person hearings could also include a shorter hearing on an objection that a claim manifestly lacks legal merit, on bifurcation, on provisional measures and on stay of enforcement. Typically, if a party wishes to hold an in-person hearing on such matters, the Tribunal or Committee accommodates the request. The below table shows the number and type of hearings held in FY2017.

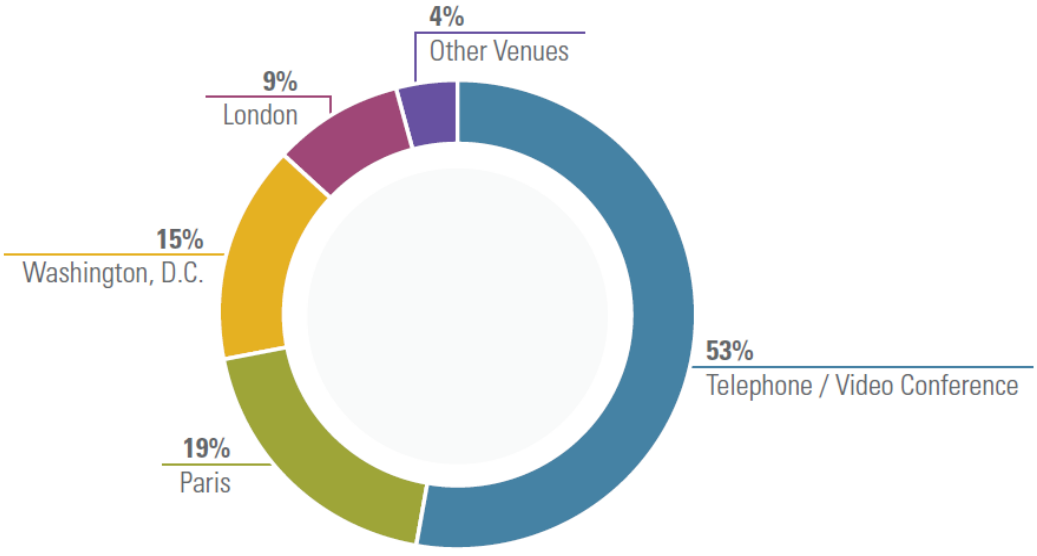
Number and Types of Hearings -- FY2017

First Session	Hearings	Pre-hearing Organizational Meeting	Other Procedural Meetings/Sessions
53	83	38	8

205. Under the current AR, the parties may agree on the place(s) where hearings will be held, after consulting with the Tribunal. This principle is reflected in Art. 63 of the Convention and is now included in proposed AR 15(3).

206. As long as the place of proceedings is in a Contracting State, it has no legal significance in ICSID Convention proceedings and its only relevance is to determine where hearings will be held if the parties do not otherwise agree. In practice, ICSID hearings are held worldwide at World Bank Group offices or at any hearing facility, provided that adequate logistical arrangements can be made. Most hearings are held by telephone or video conference. A mixed method may also be adopted, for example, with the President physically present with the parties and the Tribunal Secretary, and the co-arbitrators joining by telephone or video conference. The graph below shows the location and method of hearings held in FY2017.

Location & Method of ICSID Hearings – FY2017



207. Art. 62 of the Convention provides that hearings must be held at the seat of the Centre in Washington, D.C. if the parties do not agree to hold hearings elsewhere. Comments received suggest that users and Member States would prefer that the Tribunal be given full discretion to select the most convenient and cost-efficient venue in view of all the circumstances of the case rather than mandating a specific place as a default hearing

location. This would require a Convention amendment and unanimous approval of all Member States and might be considered in the future.

208. Proposed AR 15(4) is current AR 32(3) with minor language modifications. The reference to agents, counsel and advocates is deleted as it is understood from proposed AR 2 (Meaning of Party and Party Representation).

RULE 16 – DELIBERATIONS

CURRENT RELATED PROVISIONS: AR 14, 15

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.

Article 16
Délibérations

(1) Les délibérations du Tribunal ont lieu à huis clos et demeurent confidentielles.

(2) Le Tribunal peut délibérer en tout lieu qu'il juge pratique.

(3) Seuls les membres du Tribunal prennent part à ses délibérations. Aucune autre personne n'est admise sauf si le Tribunal en décide autrement.

(4) Le Tribunal délibère sur toute question devant être tranchée immédiatement après les dernières écritures ou plaidoiries sur cette question.

Regla 16
Deliberaciones

(1) Las deliberaciones del Tribunal se realizarán en privado y serán de carácter confidencial.

(2) El Tribunal podrá deliberar en cualquier lugar que estime conveniente.

(3) Solo los miembros del Tribunal tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario del Tribunal.

(4) El Tribunal deliberará inmediatamente después del último escrito o presentación oral sobre cualquier asunto que esté sujeto a decisión.

209. There are no changes to proposed AR 16(1) and (3) concerning the Tribunal's deliberations. Tribunal members cannot disclose any part of the deliberations even after the case concludes. This assures their independence.

210. Only the Tribunal members can attend the deliberations, unless they decide to admit another person to assist them (AR 16(2)). In practice, Tribunals and Committees often request the attendance of the Secretary of the Tribunal appointed from ICSID Secretariat staff (*see* proposed AFR 25).

211. Proposed AR 16(4) requires Tribunals to schedule and reserve time for deliberations on the procedural calendar immediately after the hearing, and paragraph (2) facilitates the Tribunal's prompt deliberations by recognizing the Tribunal's ability to deliberate at any convenient location.

212. It is understood from the inherent functions of the President of the Tribunal that the President presides at its deliberations. Therefore, current AR 14(1) is not necessary and has been deleted.

RULE 17 – QUORUM

CURRENT RELATED PROVISIONS: AR 14

Rule 17
Quorum

The participation of a majority of the 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.

Article 17
Quorum

La participation d'une majorité des membres du Tribunal est exigée lors de la première session, des audiences et des délibérations, par tous moyens de communication appropriés, sauf si les parties en conviennent autrement.

Regla 17
Quórum

La participación de la mayoría de los miembros del Tribunal será requerida tanto en la primera sesión como en las audiencias y deliberaciones, por cualquier medio de comunicación apropiado, salvo acuerdo en contrario de las partes.

213. Proposed AR 17 is current AR 14(2) dealing with the quorum of the Tribunal. The proposal reflects the practice that a quorum does not require in-person participation but can be attained by any means of communication, for example, through telephone conference, unless the parties agree otherwise. The quorum requirement is typically discussed at the first session (*see* proposed AR 34(4)(b)).

RULE 18 – DECISIONS TAKEN BY MAJORITY VOTE

CURRENT RELATED PROVISIONS: Convention Art. 48; AR 16

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.

Article 18
Décisions du Tribunal

Le Tribunal prend ses décisions à la majorité des voix de tous ses membres. L'abstention est considérée comme un vote négatif.

Regla 18
Decisiones Tomadas por Mayoría de Votos

El Tribunal adoptará decisiones por mayoría de votos de todos sus miembros. Las abstenciones se contarán como votos en contra.

214. Proposed AR 18 is current AR 16 with minor language modifications. Art. 48(1) of the Convention provides that the Tribunal shall decide questions by a majority of the votes of all its members. Proposed AR 18 reflects this principle, and applies to all decisions, orders and the Award of the Tribunal, irrespective of the subject matter. Tribunal members are expected to deliberate and vote on all matters before the Tribunal. However, if a member does not, the abstention is deemed a negative vote. Abstentions are rare in practice. Instead, negative votes are sometimes expressed through dissents, either in the decision itself or in a separate statement by the dissenting arbitrator.

RULE 19 – PAYMENT OF ADVANCES AND COSTS OF THE PROCEEDING

CURRENT RELATED PROVISIONS: Convention Art. 59, 60, 61; AFR 14; AR 28

Rule 19
Payment of Advances and Costs of the Proceeding

(1) The Tribunal shall determine the portion of the advances payable by each party in accordance with Administrative and Financial Regulation 14(5) to defray the costs of the Tribunal and the Centre in connection with the proceeding.

(2) The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:

(a) the legal fees and expenses of the parties;

(b) the fees and expenses of the members of the Tribunal; and

(c) the administrative charges and direct costs of the Centre.

(3) The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties.

(4) In determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:

(a) the outcome of any part of the proceeding or overall;

(b) the parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;

(c) the complexity of the issues; and

(d) the reasonableness of the costs claimed.

(5) The Tribunal may at any time make interim decisions on the costs of any part of a proceeding.

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

Article 19
Paiement d'avances et frais de procédure

(1) Le Tribunal détermine la quote-part des avances dues par chaque partie conformément à l'article 14(5) du Règlement administratif et financier pour couvrir les frais du Tribunal et du Centre dans le cadre de l'instance.

(2) Les frais de procédure correspondent à l'ensemble des frais exposés par les parties dans le cadre de l'instance, notamment :

(a) les honoraires et frais d'avocat exposés par les parties ;

(b) les honoraires et frais des membres du Tribunal ; et

(c) les frais administratifs et les frais directs du Centre.

(3) Le Tribunal demande à chaque partie de déposer un état des frais avant de répartir les frais de procédure entre les parties.

(4) Pour déterminer et répartir les frais de procédure, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment :

(a) l'issue de toute partie ou de l'ensemble de l'instance ;

(b) la conduite des parties au cours de l'instance, notamment la mesure dans laquelle elles ont agi avec célérité et efficacité en termes de coûts ;

(c) la complexité des questions ; et

(d) le caractère raisonnable des frais réclamés.

(5) Le Tribunal peut rendre à tout moment des décisions intérimaires sur les frais relatifs à quelque partie de l'instance que ce soit.

(6) Le Tribunal s'assure que toutes ses décisions sur les frais sont motivées et font partie intégrante de la sentence.

Regla 19
Pago de Anticipos y Costos del Procedimiento

(1) El Tribunal determinará la porción de los anticipos que debe pagar cada parte de conformidad con la Regla 14(5) del Reglamento Administrativo y Financiero para sufragar los costos del Tribunal y del Centro en relación con el procedimiento.

(2) Los costos del procedimiento consisten en todos los costos incurridos por las partes en relación con el procedimiento, lo cual incluye:

(a) los honorarios y gastos legales de las partes;

(b) los honorarios y gastos de los miembros del Tribunal; y

(c) los cargos administrativos y costos directos del Centro.

(3) El Tribunal solicitará que cada parte presente una declaración sobre los costos antes de decidir la distribución de los costos del procedimiento entre las partes.

(4) Al momento de determinar y distribuir los costos del procedimiento, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) el resultado de cualquier parte del procedimiento o del procedimiento en su totalidad;

(b) la conducta de las partes durante el procedimiento, lo cual incluye la medida en la que hayan actuado de manera expedita y eficaz en materia de costos;

(c) la complejidad de las cuestiones; y

(d) la razonabilidad de los costos reclamados.

(5) El Tribunal podrá en cualquier momento adoptar decisiones provisionales respecto de los costos de cualquier parte del procedimiento.

(6) El Tribunal deberá asegurarse de que todas las decisiones sobre costos sean fundadas y formen parte del laudo.

215. Chapter VI of the Convention (Art. 59-61) concerns the costs associated with ICSID proceedings. Art. 61(2) of the Convention specifically addresses cost allocation, providing Tribunals with wide discretion to decide this issue. It plainly states that save for party agreement, the Tribunal "shall decide how and by whom" the costs of the proceeding shall be paid.

216. Aside from granting Tribunals discretion in allocating costs, neither the ICSID Convention nor the current Arbitration Rules provide guidance to Tribunals on how costs should be allocated. In the past, Tribunals tended to allocate costs evenly between the parties. However, Tribunals increasingly allocate costs by taking specific factors into consideration, including the outcome of the proceeding or the behaviour of the parties.

217. The comments received from States and the public on cost allocation unanimously suggested that the amended rule on cost allocation should provide greater guidance to Tribunals on how and when to allocate costs among parties. Some comments supported the introduction of a presumption that Tribunals allocate costs in accordance with the principle that "costs follow the event", while others requested that the Centre set out factors to be considered by Tribunals.

218. Consistent with the role conferred on Tribunals under Art. 61 of the Convention, Tribunals maintain full discretion in allocating costs under proposed AR 19. For this reason, the WP does not propose to mandate the "costs follow the event" principle. However, proposed AR 19 lists factors that Tribunals must consider when exercising discretion to allocate costs, including case outcome.

219. Proposed AR 19 revises current AR 28 addressing the costs of the proceeding. Proposed AR 19 now encompasses six subparagraphs: paragraph (1) concerns the Tribunal's power to apportion the advances paid by the parties pursuant to AFR 14; paragraph (2) defines "costs of the proceeding"; paragraph (3) provides that a Tribunal must request a statement of costs from the parties before allocating them; paragraph (4) provides guidance to Tribunals on criteria relevant to the exercise of discretion to allocate costs; paragraph (5) allows interim decisions on costs; and paragraph (6) requires a reasoned decision on costs that ultimately will be part of the Award.

220. ***First***, proposed AR 19(1), like its predecessor current AR 28(1)(a), permits a Tribunal to decide the portion of the advances to be paid by each party pursuant to proposed AFR 14(5). The advances enable the Centre to pay the costs incurred in connection with a proceeding, including Tribunal members' fees and expenses, the Centre's administrative charges and other direct costs. Generally, each party pays one half of the advances. However, upon request of a party and depending on the circumstances of the case, a Tribunal may divide the advances among the parties in a different proportion. Such a request may be made at any stage of a proceeding.

221. ***Second***, proposed AR 19(2) defines "costs of the proceeding". The definition derives from Art. 61 of the Convention and establishes that "costs of the proceeding" include: (i) the legal costs and expenses of the parties; (ii) the fees and expenses of the Tribunal; and (iii) the annual administrative charge and other direct costs of the Centre related to a

proceeding. The inclusion in the definition clarifies the costs that Tribunals may allocate. The parties' legal fees and expenses generally amount to 80% or more of the overall costs of a proceeding.

222. ***Third***, proposed AR 19(3) provides for the filing of statements of costs by the parties before the Tribunal's allocation of the costs of the proceeding. The Tribunal may request statements of costs at any time during the proceeding (*see* below with regard to interim decisions on costs) and must in any event request them before rendering the Award.

223. ***Fourth***, proposed AR 19(4) introduces certain factors as guidance to Tribunals on how to determine the costs of the proceeding and how to allocate those costs. These factors were included in response to comments received from both Member States and the public and reinforce the requirement to act expeditiously and in a cost-effective manner. The proposed rule requires Tribunals to take into account any circumstance that it finds relevant in allocating costs, including certain factors most often relied on by ICSID Tribunals in allocating costs. Tribunals are thus to consider: (i) the outcome of the proceeding generally or a phase of the proceeding, accounting for who prevailed and the extent to which a party obtained the relief it sought (proposed AR 19(4)(a)); (ii) the parties' conduct in the proceeding, including whether the parties or counsel acted in good faith and the extent to which they acted in an expeditious and cost-effective manner (proposed AR 19(4)(b)); (iii) the complexity of the case, such as the nature of the claims and the novelty of the issues raised (proposed AR 19(4)(c)); and (iv) the reasonableness of the costs claimed in the circumstances (proposed AR 19(4)(d)).

224. Some Tribunals first determine the reasonableness of the costs claimed before proceeding to allocate those costs. This is possible under proposed AR 19(4)(d). At the same time, the rule recognizes that other factors may be relevant in determining the reasonableness of the costs, for example, the complexity of the issues. In any event, the intended result is the same: only reasonable costs claimed can be awarded.

225. ***Fifth***, proposed AR 19(5) concerns the allocation of costs with respect to specific phases of the proceeding during the pendency of the case. This is consistent with current AR 28(1)(b). The Tribunal may thus request that the parties file a statement of the costs incurred with respect to a certain part of the proceeding at any time and decide on the allocation of those costs in an order or decision. The practice of issuing interim decisions on costs is not commonly used but is encouraged. The issuance of interim cost decisions may promote time and cost efficiency by exposing the parties to the magnitude of costs incurred. The order or decision would eventually be incorporated into and form part of the Award.

226. ***Sixth***, in accordance with proposed AR 19(6) and AR 60(1)(j), the Tribunal must include a reasoned decision on costs in the Award, including a statement of the costs of the proceeding. The Tribunal should request a final statement of costs after all main procedural steps have been taken in accordance with proposed AR 19(3).

227. ***Finally***, proposed AR 19 deletes the reference regarding a request for the Secretary-General to provide the Tribunal with further information on the cost of the proceeding. The

Secretariat keeps detailed records of all case accounts and regularly submits financial statements to the Tribunal and the parties, so this is unnecessary.

CHAPTER III - CONSTITUTION OF THE TRIBUNAL

228. These proposed amendments seek to simplify the AR and codify ICSID practice. They also address efficiency in constitution of the Tribunal, in response to comments from Member States and the public seeking to reduce the time between registration and constitution.

RULE 20 – GENERAL PROVISIONS REGARDING THE CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 39

Chapter III
Constitution of the Tribunal

Rule 20
General Provisions Regarding the Constitution of the Tribunal

(1) The parties shall constitute a Tribunal without delay after registration of the Request for arbitration.

(2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.

(3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party.

(4) A person previously involved in the resolution of the parties' dispute as a judge, mediator, conciliator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

Chapitre III
Constitution du Tribunal

Article 20
Dispositions générales relatives à la constitution du Tribunal

(1) Les parties constituent un Tribunal sans délai après l'enregistrement de la requête d'arbitrage.

(2) Les arbitres composant la majorité d'un Tribunal doivent être ressortissant(e)s d'États autres que l'État partie au différend et que l'État dont le ou la ressortissant(e) est partie au différend, sauf si l'arbitre unique ou chacun des membres du Tribunal est nommé par accord des parties.

(3) Une partie ne peut pas nommer un(e) arbitre qui est ressortissant(e) de l'État partie au différend ou de l'État dont le ou la ressortissant(e) est partie au différend, sans l'accord de l'autre partie.

(4) Une personne ayant précédemment participé à la résolution du différend entre les parties en qualité de juge, médiateur, conciliateur ou en toute qualité de nature similaire ne peut être nommée arbitre que par accord des parties.

Capítulo III
Constitución del Tribunal

Regla 20
Disposiciones Generales acerca de la Constitución del Tribunal

(1) Las partes deberán constituir un Tribunal sin demora luego del registro de la solicitud de arbitraje.

(2) La mayoría de los o las árbitros de un Tribunal no podrá tener la nacionalidad del Estado Contratante parte en la diferencia, ni la del Estado al que pertenezca el nacional parte en la diferencia, salvo que el o la Árbitro Único o cada uno de los miembros del Tribunal sean nombrados de común acuerdo por las partes.

(3) Una parte no podrá nombrar a un árbitro que tenga la nacionalidad del Estado Contratante parte en la diferencia ni la del Estado a que pertenezca el nacional parte en la diferencia sin el acuerdo de la otra parte.

(4) Una persona que haya participado anteriormente en la resolución de la diferencia entre las partes como juez(a), mediador(a), conciliador(a) o en una calidad similar podrá ser nombrada árbitro solo de común acuerdo por las partes.

229. Proposed AR 20 confirms the obligation to constitute a Tribunal rapidly, and limits who may be nominated as arbitrator on the basis of nationality and prior involvement in the dispute. The obligation to inform the Secretary-General promptly of any agreement regarding the method of constituting the Tribunal in current AR 1(2) has been removed. A modified version of this obligation is found in proposed AR 22, which expressly deals with the method of constitution.

230. Nationality. Proposed AR 20(2) simplifies current AR 1(3) regarding the nationality of arbitrators.

231. The current rule stems from Art. 39 of the Convention, which requires that the majority of arbitrators to be nationals of States other than the Contracting State party and the Contracting State whose national is a party (except where the parties agree to the appointment of each individual member of the Tribunal). Without any further restrictions, it would, in principle, be possible for the first appointing party (typically the claimant) to select an arbitrator of its own nationality, and in doing so to preclude the second-appointing party from acting in the same manner. Accordingly, in the original 1968 Arbitration Rules, the precursor to current AR 1(3) was included. It provided that unless each member of the Tribunal is appointed by agreement of the parties, "nationals of the State party to the dispute or of the State whose national is a party to the dispute may be appointed by a party only if appointment by the other party to the dispute of the same number of arbitrators or either of these nationalities would not result in a majority of arbitrators of these nationalities". The commentary to those rules stated that the provision was designed "to ensure the fair application of Art. 39 of the Convention".

232. In 2003, the provision was expanded to its current formulation. The drafters at that time sought to retain the original principle, and to expand the provision to explain how the prohibition would operate in cases of three-member Tribunals and five or more-member Tribunals. Commentary explaining that amendment noted that "the [original] provision had proven to be confusing to parties" (Antonio R. Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes" (2007), 22 ICSID Rev.– FILJ 57, 63).

233. Despite that amendment, the provision remains confusing to users today. Therefore, the proposed text simplifies the restriction and abandons the distinction based on size of the Tribunal.

234. With respect to a three-member Tribunal, the principle underlying current AR 1(3) remains unaltered by the proposed text; under both the current and proposed formulations, the agreement of the other party to the dispute is always required where a party wants to appoint an arbitrator who is a national of the State party to the dispute or of the State whose national is a party to the dispute.

235. Moreover, there is no practical need to spell out separate applications of the principle for Tribunals comprising more than three members as there has never been a Tribunal comprised of five or more-members.

236. Prior involvement in the dispute. Proposed AR 20(4) expands the categories of individuals who may have acted in some capacity in earlier attempts to resolve the dispute. Such individuals may be appointed arbitrator only with party agreement. This gives parties flexibility to agree on appointment of a person with prior involvement in the case, for example a mediator or conciliator. This might reduce the time for explaining the facts to the arbitrator, although usually parties want to select someone with no prior exposure to the case.

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.

Article 21
Divulgation d'un financement par un tiers

(1) « Financement par un tiers » désigne l'apport de fonds ou de tout autre soutien matériel pour la poursuite d'une instance ou la défense contre une instance, par une personne physique ou morale qui n'est pas partie au différend (« tiers financeur »), à une partie à l'instance, une affiliée de cette partie ou un cabinet d'avocats représentant cette partie. Ces fonds ou ce soutien matériel peuvent être apportés :

(a) par le biais d'un don ou d'une subvention ; ou

(b) en contrepartie d'une prime ou en échange d'une rémunération ou d'un remboursement dépendant en totalité ou en partie de l'issue de l'instance.

(2) Une partie doit déposer une notification écrite divulguant qu'elle bénéficie d'un financement par un tiers et indiquant le nom du tiers financeur. Cette notification est adressée au Secrétariat immédiatement après l'enregistrement de la requête d'arbitrage ou dès la conclusion d'un accord de financement par un tiers après l'enregistrement.

(3) Chaque partie a une obligation continue de divulguer toute modification dans les informations visées au paragraphe (2) intervenant après la divulgation initiale, y compris la cessation de l'accord de financement.

Regla 21
Revelación de Financiamiento por Terceros

(1) El "financiamiento por terceros" es la provisión de fondos u otro apoyo sustancial a efectos de dar curso o defenderse en un procedimiento por una persona natural o jurídica que no es parte en la diferencia ("tercero financiador") a una parte del procedimiento, una sociedad relacionada con esa parte o a una firma de abogados que represente a esa parte. Dichos fondos o apoyo sustancial podrán proporcionarse:

(a) mediante una donación o un subsidio; o

(b) en contraprestación de una prima o a cambio de una remuneración o un reembolso total o parcialmente dependiente del resultado del procedimiento.

(2) Una parte deberá presentar una notificación escrita revelando que goza de financiamiento por terceros y el nombre de dicho tercero financiador. Esta notificación deberá enviarse al Secretariado inmediatamente después del registro de la solicitud de arbitraje o una vez se celebre el acuerdo de financiamiento por terceros si este ocurre con posterioridad al registro.

(3) Cada parte tendrá la obligación permanente de revelar cualquier cambio en la información a la que se hace referencia en el párrafo (2) que tenga lugar después de la revelación inicial, lo cual incluye la resolución o rescisión del acuerdo de financiamiento.

237. In recent years there has been increased resort to third-party funding (TPF) in domestic and international litigation, including in Investor-State Dispute Settlement (ISDS). TPF is obtained mainly by claimants, but has also been used by respondents, including States.

238. Although labelled generically as "TPF", there are many different models of TPF, which can have significantly different terms (*see* The ICCA Reports No. 4, *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (April 2018) (ICCA-TPF Report) 1-16, and generally for a review of different models of TPF and legal issues arising from TPF in arbitration).

239. While professional funders and funding brokers are usually the focus of discussion in this context, funding can be obtained from a variety of sources, including insurers (with "after the event" and "before the event" funding), traditional loans from financial institutions or affiliated companies, attorneys acting on contingency or alternate fee arrangements, and

NGOs that support a particular position in a case (*see e.g.*, contribution of the Bloomberg Foundation to tobacco labelling litigation in *Philip Morris Brand Sàrl and others v. Uruguay* (ARB/10/7); *see* also ICCA-TPF Report, 17-43).

240. The availability of TPF has prompted discussion among commentators and ISDS users regarding the effects, if any, of TPF on ISDS.

241. ICSID received two categories of comment on TPF in its rules amendment consultations. The first category consisted of suggestions from a few States that TPF be prohibited entirely; these States argue that TPF promotes frivolous claims and is inapt for dispute settlement involving a State. The second category of comments received by ICSID related to disclosure of information concerning TPF in individual cases.

242. With respect to the first category, the WP does not propose to prohibit TPF. The receipt of TPF does not, in itself, mean a claim is frivolous, and some argue that TPF enables the pursuit of meritorious claims or defences, including those that otherwise might not be pursued due to impecuniosity. In addition, the ICSID Rules create many effective mechanisms to address concern that a claim may be frivolous, including screening for manifest lack of jurisdiction before registration of a request, a motion to dismiss for manifest lack of legal merit, bifurcated preliminary motions, and costs awards.

243. More generally, TPF is available for litigation in many Member States. In addition, States that have addressed TPF in their investment instruments to date have not sought to prohibit it altogether; rather, they have provided for disclosure. Given the continuing discussion as to how to assess the costs and benefits of TPF for both States and investors, the balance struck in proposed Rule 21 is apt. Full prohibition of TPF remains a policy choice for individual States in their investment instruments rather than in the ICSID Rules.

244. With respect to the second category of comments received by ICSID, many States and some organizations proposed mandatory disclosure of TPF to avoid undisclosed conflicts of interest between the funder and an arbitrator. The WP addresses such disclosure in proposed AR 21.

245. Definition and Regulation of TPF. Proposed AR 21 defines TPF for the purposes of TPF disclosure. The various forms of TPF and the fact that new approaches continue to emerge make definition difficult (*see* ICCA-TPF Report, 45-80, 85-115). However, definition of TPF is an essential predicate to imposing any obligations relating to TPF.

246. Several studies, rules and treaties have sought to define TPF. The ICCA-TPF Report (81) defines a third-party funder for the purposes of disclosure as:

> […] any natural or legal person who is not a party to the dispute and is not a party's legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

> a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and
>
> b) such support or financing is provided through a donation, or grant, in return for a premium, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute.

247. The International Bar Association Guidelines on Conflict of Interest in International Arbitration (2014) (IBA Conflict Guidelines (2014)) address disclosure requirements to facilitate arbitrator assessments of potential conflict of interest. General Standard 6(b) defines TPF as:

> For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

Under the IBA Conflict Guidelines (2014), a TPF who satisfies this requirement "may be considered to be the equivalent of the party".

248. Three arbitral institutions have adopted rules on disclosure of TPF. Their provisions address both disclosure of the fact of TPF and its effect on costs.

249. Rule 24 of the Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (2017) (SIAC Investment Arbitration Rules (2017)) states:

> Unless otherwise agreed by the Parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:
>
> [l] order the disclosure of the existence of a Party's third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details 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; [...]

Rule 33.1 of the SIAC Investment Arbitration Rules (2017) also allows the Tribunal to take into account any third-party funding arrangements in apportioning the costs of the arbitration (*see* also, SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding, PN-01/17 (March 2017).

250. Article 27 of the China International Economic and Trade Arbitration Commission (CIETAC) International Investment Arbitration Rules (2017) (CIETAC Investment

Arbitration Rules (2017)) addresses TPF in relation to disclosure and decisions on costs. It states:

> 1. In these Rules, a "third party funding" means the situation where a natural person or an entity, who is not a party to the dispute, provides funds to a party to the arbitration to cover all or part of that party's costs for the arbitral proceedings, through an agreement with the party accepting the funding.
>
> 2. As soon as the third party funding agreement is concluded, the party accepting the funding shall notify in writing, without delay, to the other party or parties, the arbitral tribunal, and the IDSC or the CIETAC Hong Kong Arbitration Center that administers the case, of the existence and nature of the third party funding arrangement, and the name and address of the third party funder. The arbitral tribunal shall have the power to order the disclosure by the party accepting the funding of any relevant information of the third party funding arrangement.
>
> 3. When making a decision on the costs of arbitration and other fees, the arbitral tribunal may take into account the existence of any third party funding arrangement, and the fact whether the requirements set forth in the preceding Paragraph 2 are complied with by the party or parties accepting the funds.

251. The ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration (October 2017) (¶ 24) states:

> For the scope of disclosures, an arbitrator will be considered as bearing the identity of his or her law firm, and a legal entity will include its affiliates. In addressing possible objections to confirmation or challenges, the Court will consider the activities of the arbitrator's law firm and the relationship of the law firm with the arbitrator in each individual case. Arbitrators should in each case consider disclosing relationships with another arbitrator or counsel who is a member of the same barristers' chambers. Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.

252. Finally, several recent EU investment treaties regulate TPF, for example:

- The Comprehensive Economic and Trade Agreement (CETA) (not yet in force) Chap. 8, Art. 8.1, 8.26, defines TPF and requires disclosure of a funder:

  Article 8.1 - Definitions

[T]hird party funding means any funding provided by a natural or legal person who is not a disputing party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute. […]

Article 8.26 - Third party funding

(1) Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.

(2) The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

- The Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (EU-Vietnam FTA) (not yet in force) Chap. 8(II), Sec. 3, Art. 2, 11 defines TPF and requires disclosure of the agreement, makes TPF a relevant factor in ordering security for costs, and provides that a party's conduct in promptly giving notice of TPF must be accounted for in awarding case costs. It states:

Article 2 - Definitions

[…] 'Third Party funding' means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant. […]

Article 11- Third party funding

(1) Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder.

(2) Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement concluded or the donation or grant is made.

(3) When applying Article 22 (Security for Cost), the Tribunal shall take into account whether there is third party funding. When deciding on the cost of

proceedings pursuant to Article 27(4) (Provisional Award) the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 have been respected.

- Investment Protection Agreement between the European Union and the Republic of Singapore (EU-Singapore Investment Protection Agreement) (not yet in force), Chap. 3, Art. 3.1, 3.8, defines TPF and requires notification of TPF: It states:

  Article 3.1(2)(f)

  […] 'third party funding' means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled, or in the form of a donation or grant.

  Article 3.8 - Third Party Funding

  Any disputing party benefiting from third party funding shall notify the other disputing party and the Tribunal of the name and address of the third party funder.

  Such notification shall be made at the time of submission of a claim, or without delay as soon as the third party funding is agreed, donated or granted, as applicable.

253. The WP proposes to define TPF in a manner similar to the definitions in the above texts for the purposes of the ICSID Rules.

254. Proposed AR 21(1) refers to the pursuit or defense of an arbitration, as it applies to funding of both claimants and respondents. Proposed AR 21(1) also expressly applies to funds provided through donation or grant, and not only to funds provided in return for remuneration. This definition captures funding received for a public interest or advocacy purpose.

255. Disclosure of TPF to Avoid Conflicts of Interest. There is potential for a conflict of interest when an undisclosed entity provides TPF to a party in arbitration. This conflict could arise in various circumstances, for example, if an arbitrator provides due diligence opinions at the request of a funder or an arbitrator serves on the board of a funder. Absent disclosure, parties and arbitrators may be unaware of such conflicts, which could affect the integrity of ISDS and could give rise to challenges that delay the proceedings.

256. Increasingly, parties voluntarily disclose the existence of TPF if requested by opposing counsel. In fact, in at least 20 recent cases in which the existence of TPF was at issue before

an ICSID Tribunal, the parties disclosed the existence of TPF and the identity of the funder without requiring an express order to this effect from the Tribunal.

257. ICSID Tribunals have also ordered disclosure of TPF in some cases. The case law recognizes the discretion of a Tribunal to order disclosure of TPF in appropriate circumstances (*see e.g.*, *Muhammet Çap v. Turkmenistan* (ARB/12/6), Procedural Order No. 3 (June 12, 2015)).

258. Proposed AR 21(2) makes early disclosure of the existence of TPF mandatory in every case. It requires the parties to disclose the existence of any TPF upon the earlier registration of the Request, or the conclusion of a funding arrangement entered into after registration. This duty of disclosure is a continuing one throughout the proceeding.

259. Proposed AR 21(2) ensures that the other party, persons proposed for appointment to the Tribunal or Committee, and ICSID as appointing authority, have the relevant information to assess possible conflicts arising from a relationship between a funder and an arbitrator.

260. Complementary obligations are found in other parts of the AR. Proposed AR 26(3) and Schedule 2 requires arbitrators to sign a declaration stating that they have no conflict of interest with a funder whose identity has been disclosed by a party, and imposes a continuing obligation on the arbitrator to disclose changed circumstances.

261. For the purposes of assessing conflicts of interest, most cases to date have only required disclosure of the existence of TPF and identification of the funder. However, several cases have gone farther and ordered information about the terms of funding or production of the TPF documents. Likewise, most arbitral rules and investment treaties that address TPF only require disclosure of the existence of TPF and the identity of the funder (*see* ICCA-TPF Report, 106-110 for discussion of cases; *see* above for relevant provisions of rules and treaties).

262. Proposed AR 21(2) follows the majority line of cases and treaties by requiring disclosure of only the fact of funding and the identity of the funder for the purposes of assessing conflict of interest. It does not create a general duty to disclose the terms of funding or the agreement itself. This is because more elaborate information is not required to achieve the objective of preventing conflicts of interest.

263. While proposed AR 21(2) does not require disclosure of the terms of funding or the funding agreement itself, such disclosure remains in the discretion of the Tribunal pursuant to current AR 34(2)(a) (proposed AR 40(2)) should it subsequently become relevant to an issue to be decided in the proceeding.

264. Maintenance of Confidential Information. The WP does not make a proposal concerning privilege and maintenance of confidential information held by or provided to a funder. Instead, proposed AR 21(2) will assure knowledge of TPF at an early stage and will allow parties to address related questions of confidentiality of information and the application of legal privileges against disclosure at the first session, and to seek appropriate procedural orders regarding confidentiality (*see* ICCA-TPF Report, 117-143 for detailed discussion of relevant laws and cases).

265. Relationship of TPF to Security for Costs. Under the current AR, security for costs has generally been requested under the rule concerning provisional measures (current AR 39, Art. 47 of the Convention). Accordingly, parties have been required to meet the legal standard for provisional measures, and in practice, this has been difficult to do. To date, there has been only one public decision granting an application for security for costs (*see RSM v. St. Lucia* (ARB/12/10), Decision on St. Lucia's Request for Security for Costs (Aug. 13, 2014); *see also*, ICCA-TPF Report, 163-183, 221-227; Jeffrey Commission & Rahim Moloo (eds.), *Procedural Issues in International Investment Arbitration*, (OUP 2018), 38-40; Eduardo Zuleta, 'Security for Costs: Authority of the Tribunal and Third-Party Funding' in Meg Kinnear *et al* (eds.), *Building International Investment Law: The First 50 Years of ICSID*, (Kluwer Law International 2015), 567-81).

266. In several cases, the party requesting security for costs has raised the existence of TPF to support its request. Tribunals have generally held that the mere existence of TPF, without any other relevant circumstances, is an insufficient basis for requiring a party to provide security for costs (*see e.g., EuroGas v. Slovak Republic* (ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures (June 23, 2015); *RSM v. St. Lucia* (ARB/12/10), Decision on St. Lucia's Request for Security for Costs (Aug. 13, 2014); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), Procedural Order No. 10 (Jan. 11, 2016) 59, 77-78, 83; *Guaracachi & Rurelec v. Bolivia*, (UNCITRAL, PCA Case No. 2011-17), Procedural Order No. 14 (March 11, 2013) 6-7).

267. Proposed AR 51 on security for costs is a new Rule and does not address the effect of TPF. Instead, proposed AR 51 requires the Tribunal to consider the responding party's ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. As a result, the mere fact of TPF, without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51. On the other hand, the existence of TPF coupled with other relevant circumstances may form part of the relevant factual circumstances considered by a Tribunal in ordering security for costs. This will be a fact-based determination in each case.

268. Relationship of TPF to Compliance with Award Debtor's Obligations Regarding Costs. A related question arises regarding the effect, if any, of TPF on Awards and especially whether a funder might be responsible for an Award of costs made against the funded party. A simplified mechanism for compliance with and enforcement of ICSID Awards is established in Art. 53-54 of the Convention. However, the Tribunal has no jurisdiction over a non-party. It is therefore unlikely that a funder could be liable for the Tribunal Award on costs, unless such an obligation arises under the terms of the funding agreement. The WP does not propose any new rules addressing this topic.

269. Relationship of TPF to Allocation of Costs. Cases have been consistent in holding that TPF is generally irrelevant to determining whether (and how) costs should be allocated to a party (*see Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ARB/05/18 and ARB/07/15), Award (March 3, 2010), ¶691; *ATA Construction, Industrial and Trading Co. v. Jordan* (ARB/08/2), Order Taking Note of Discontinuance of the Proceeding (July 11,

2011), ¶34; ICCA-TPF Report, 151-163; Commission & Moloo, *Procedural Issues in International Investment Arbitration*, 201-202).

270. The changes in proposed AR 19 on the costs of the proceeding do not change the basic principle that the allocation of costs is in the discretion of the Tribunal. As a result, the cases holding that the existence of TPF does not affect allocation of costs remain relevant.

271. The one caveat to this is that proposed AR 19 has been revised to ensure Tribunals consider the conduct of the parties, among other factors, when allocating costs. Failure to comply with proposed AR 21(2) requiring disclosure of a funding arrangement and the reasons for such failure might become relevant to cost allocation if a Tribunal finds that such failure reflects on the conduct of a party in the proceeding to such an extent that an adverse costs order is appropriate. Again, this would be a question of fact in each case, and is not expressly addressed in the proposed AR.

272. Similarly, whether the costs associated with TPF are recoverable in an order for costs remains a question of fact for the Tribunal and is not expressly addressed in the proposed AR.

RULE 22 – METHOD OF CONSTITUTING THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 37; IR 3

Rule 22
Method of Constituting the Tribunal

(1) The number of arbitrators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.

Article 22
Méthode de constitution du Tribunal

(1) Le nombre d'arbitres et la méthode de leur nomination doivent être déterminés avant que le ou la Secrétaire général(e) ne puisse intervenir sur une quelconque nomination proposée par une partie.

(2) Les parties s'efforcent de se mettre d'accord sur un nombre impair d'arbitres et la méthode de leur nomination. Si les parties n'informent pas le ou la Secrétaire

général(e) d'un accord dans les 60 jours suivant la date de l'enregistrement, le Tribunal est constitué conformément à l'article 37(2)(b) de la Convention.

Regla 22
Método de Constitución del Tribunal

(1) El número de árbitros y el método de su nombramiento deben determinarse antes de que el o la Secretario(a) General pueda pronunciarse respecto de cualquier nombramiento propuesto por una parte.

(2) Las partes procurarán acordar cualquier número impar de árbitros y el método de su nombramiento. Si las partes no informan al o a la Secretario(a) General de un acuerdo dentro de los 60 días siguientes a la fecha de registro, el Tribunal será constituido de conformidad con lo dispuesto en el Artículo 37(2)(b) del Convenio.

273. The number of arbitrators on a Tribunal and the method of their appointment is determined either by agreement of the parties in accordance with Art. 37(2)(a) of the Convention or by recourse to the formula in Art. 37(2)(b) of the Convention. A Tribunal must always consist of a Sole Arbitrator or any uneven number of arbitrators.

274. Premature Appointments. To encourage parties to take immediate steps to agree on the number of arbitrators and the method of their appointment, proposed AR 22(1) confirms that the Secretary-General may not take any action regarding a proposed appointment until the parties reach an agreement about the number of arbitrators and the method of their appointment or the formula in Art. 37(2)(b) of the Convention is triggered. As the method of constitution sets the legal basis for any appointment, determination of the method must necessarily predate any action by the Secretariat on a proposed appointment. The amendment also seeks to reduce the confusion often evident among users regarding the nature and effect of premature appointments.

275. Establishing the Method of Constitution by Agreement. Absent a prior agreement, the parties must agree on the number of arbitrators and the method for their appointment. Current AR 2(1) provides a detailed multi-step process and deadlines for exchanging proposals, subject to modification by party agreement. The process contemplated in current AR 2(1) is envisioned to last 50 days. But parties can and often do continue to try to reach agreement after the expiry of the relevant deadlines, and are not limited in the number of proposals or counterproposals that can be made. This can lead to delay in the process of constitution. By eliminating the multistep process in current AR 2(1), which is rarely followed in practice, proposed AR 22(2) affords further flexibility and encourages the parties to agree on a method of constituting the Tribunal within 60 days.

276. Establishing the Method of Constitution by Default. Under current AR 2(3), if no agreement regarding the number of arbitrators and the method of their appointment is

reached within 60 days of registration of the Request for arbitration, either party may select the formula in Art. 37(2)(b) of the Convention by giving notice to the Secretary-General. This establishes an implicit deadline of 60 days to agree on these matters. However, current AR 2(3) also requires that a party expressly opt for the formula in Art. 37(2)(b) before the constitution can move forward on that basis. As a result, party inaction has led to a proceeding remaining in limbo for a number of months.

277. To address this potential source of inefficiency, proposed AR 22(2) stipulates that the default formula in Art. 37(2)(b) of the Convention is automatically triggered if no agreement on the number of arbitrators and the method of their appointment is communicated to the Secretary-General within 60 days from the date of registration of the Request. The proposed amendment is consistent with Art. 37(2)(b) of the Convention which does not require the formality of an express trigger of the default formula by a party.

278. Channel of Communication. Pursuant to current AR 2(2), the parties must transmit their proposals on the number of arbitrators and the method for their appointment through, or with a copy to, the Secretary-General. This requirement has no practical import as no action can be taken by the Secretary-General based on these unilateral proposals. Accordingly, proposed AR 22(2) now specifies that the parties are only required to advise the Secretary-General once an agreement is actually reached.

RULE 23 – APPOINTMENT OF ARBITRATORS TO A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ARTICLE 37(2)(B) OF THE CONVENTION

CURRENT RELATED PROVISIONS: Convention Art. 37, 38

Rule 23
Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.

Article 23
Nomination des arbitres dans un Tribunal constitué conformément à l'article 37(2)(b) de la Convention

Si le Tribunal doit être constitué conformément à l'article 37(2)(b) de la Convention, chaque partie nomme un(e) arbitre et les parties nomment conjointement le ou la Président(e) du Tribunal.

Regla 23
Nombramiento de los o las Árbitros en un Tribunal Constituido de Conformidad con el Artículo 37(2)(b) del Convenio

Si un Tribunal debe constituirse de conformidad con el Artículo 37(2)(b) del Convenio, cada parte nombrará a un o una árbitro, y las partes nombrarán conjuntamente al o a la Presidente(a) del Tribunal.

279. This provision describes the process for the appointment of arbitrators when the formula in Art. 37(2)(b) of the Convention applies as a result of the parties' lack of agreement on the method of constituting the Tribunal.

280. The Appointment Process. Current AR 3(1) sets forth a multistep process which is not conducive to rapid Tribunal constitution. It requires the first party making an appointment also to propose a candidate for President of the Tribunal. The other party must then appoint an arbitrator and either concur in the appointment of the arbitrator proposed by the first party for President of the Tribunal or propose another candidate for President. The party making the first appointment must then indicate whether it concurs in the appointment of the new arbitrator proposed as President of the Tribunal by the other party.

281. Rather than codifying multiple steps for appointment, proposed AR 23 only specifies the principle underlying Art. 37(2)(b) of the Convention: each party appoints an arbitrator and the parties jointly appoint the President of the Tribunal. If the process is not completed within 90 days from registration, either party may request that the Chairman of the ICSID Administrative Council appoint the arbitrator or arbitrators not yet appointed under Art. 38 of the Convention.

282. Channel of Communication. Current AR 3(2) provides that communications between the parties pursuant to this rule shall be made through, or be copied to, the Secretary-General. This provision is deleted to streamline the process and increase efficiency. As described below, proposed AR 26 (following current AR 5) specifies that the Secretariat shall be notified when an appointment is made, including the appointment of the President; therefore, there is no need to repeat the same provision in proposed AR 23.

RULE 24 – ASSISTANCE OF THE SECRETARY-GENERAL WITH APPOINTMENT

CURRENT RELATED PROVISIONS: Convention Art. 37, 38

Rule 24
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

Article 24
Assistance du ou de la Secrétaire général(e) dans les nominations

Les parties peuvent demander conjointement au ou à la Secrétaire général(e) de les assister dans la nomination d'un(e) Président(e) du Tribunal ou d'un(e) arbitre unique.

Regla 24
Asistencia del o de la Secretario(a) General con los Nombramientos

Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una Presidente(a) del Tribunal o de un o una Árbitro Único.

283. Currently, where the parties do not agree on the appointment of the President of the Tribunal and the Chairman is asked to make that appointment under Art. 38 of the Convention, the Secretary-General first offers to conduct a ballot procedure. Under this procedure, the Secretary-General proposes a ballot of 5 or more candidates. If the parties agree on a name in the ballot, the resulting appointment is a consent appointment by the parties. If the parties fail to agree on a ballot candidate, the Chairman will select the presiding arbitrator from the ICSID Panel in accordance with Art. 38 and 40(1) of the Convention.

284. Proposed AR 24 stems from the current ICSID practice described above, but does not specify a method to be followed by the Secretary-General. This gives the parties more options concerning the method of appointment. The parties can ask the Secretary-General to propose a list of candidates for party ranking, a non-binding ballot or any other viable mechanism. In practice, the Secretary-General will consult with the parties to determine the method most suitable to the circumstances.

285. The Secretary-General's assistance can be requested by the parties at any time after the number of arbitrators and the method of their appointment has been determined in

accordance with proposed AR 22(1). It is not limited to instances when Art. 38 of the Convention is invoked. The Secretary-General's assistance may be requested when the Tribunal is to be constituted in accordance with the formula in Art. 37(2)(b) of the Convention or following the parties' agreement; but in an Art. 37(2)(b) scenario, the role would necessarily be limited to assisting the parties in reaching agreement on a President, as under Art. 37(2)(b) the appointment of the President must be made by agreement of the parties.

286. Further information on the process of identifying candidates for appointment can be found in ICSID's *Submission on Arbitrators' Appointments* of February 15, 2018, submitted to UNCITRAL's Working Group III in preparation for its thirty-fifth session of April 23-27, 2018 in New York (Document A/CN.9/WG.III/WP.146).

RULE 25 – APPOINTMENT OF ARBITRATORS BY THE CHAIRMAN OF THE ADMINISTRATIVE COUNCIL IN ACCORDANCE WITH ARTICLE 38 OF THE CONVENTION

CURRENT RELATED PROVISIONS: Convention Art. 38, 40(1)

Rule 25
Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention

(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chairman appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.

(2) The Chairman shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.

(3) The Chairman shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

Article 25
Nomination des arbitres par le ou la Président(e) du Conseil administratif conformément à l'article 38 de la Convention

(1) Si le Tribunal n'a pas été constitué dans un délai de 90 jours suivant la date de l'enregistrement, ou tout autre délai convenu entre les parties, l'une ou l'autre des parties peut demander au ou à la Président(e) du Conseil administratif de nommer

l'arbitre ou les arbitres non encore nommé(e)(s), conformément à l'article 38 de la Convention.

(2) Le ou la Président(e) du Conseil administratif nomme le ou la Président(e) du Tribunal après avoir nommé tous membres non encore nommés.

(3) Dans la mesure du possible, le ou la Président(e) du Conseil administratif consulte les parties avant de nommer un(e) arbitre et il ou elle déploie tous les efforts possibles pour nommer tout(e) arbitre ou tou(te)s arbitres dans un délai de 30 jours à compter de la réception de la demande de nomination.

Regla 25
Nombramiento de los o las Árbitros por el o la Presidente(a) del Consejo Administrativo de Conformidad con el Artículo 38 del Convenio

(1) Si el Tribunal no se hubiese constituido dentro de los 90 días siguientes a la fecha de registro, o dentro del plazo que las partes hubieran acordado, cualquiera de las partes podrá solicitar que el o la Presidente(a) del Consejo Administrativo nombre al o a los/ o a las árbitro(s) que aún no haya(n) sido nombrado(s) de conformidad con lo dispuesto en el Artículo 38 del Convenio.

(2) El o la Presidente(a) del Consejo Administrativo nombrará al o a la Presidente(a) del Tribunal luego de nombrar a los miembros que aún no hayan sido nombrados.

(3) El o la Presidente(a) del Consejo Administrativo deberá consultar a las partes en la medida de lo posible antes de nombrar a un árbitro y hará lo posible para nombrar a cualquier(a) de los o las árbitro(s) dentro de los 30 días siguientes a la fecha de la recepción de la solicitud de nombramiento.

287. Current AR 4 reflects Art. 38 of the Convention. If a Tribunal is not constituted within 90 days after registration of the Request for arbitration, or such other period as agreed by the parties, either party may request that the Chairman appoint the arbitrator or arbitrators not yet appointed. This ensures completion of the constitution of a Tribunal. When the Chairman appoints pursuant to Art. 38, the arbitrator is selected from the ICSID Panel of Arbitrators, following consultation with the parties. Art. 40(1) of the Convention makes it clear that the Panel restriction applies only when the Chairman acts pursuant to Art. 38 of the Convention. Current AR 4 establishes a "best efforts" obligation to appoint within 30 days of the request to appoint.

288. Proposed AR 25 does not differ much from current AR 4. The proposed amendments comprise one simplification and two clarifications.

289. ***First***, current AR 4(2) is deleted as it is not necessary. It provides that current AR 4(1) applies *mutatis mutandis* if the parties have agreed that the arbitrators shall elect the

President of the Tribunal and they fail to do so. There is no need for such specification. This situation is clearly covered by current AR 4(1) and proposed AR 25(1).

290. ***Second***, consistent with the Convention, proposed AR 25(1) clarifies that any request made pursuant to Art. 38 of the Convention must relate to *all* appointments that have not been made. This is because Art. 38 is designed to enable the complete constitution of the Tribunal.

291. ***Third***, proposed AR 25(2) specifies, consistent with current practice, that where the Chairman is asked to appoint the presiding arbitrator and another arbitrator, the non-presiding arbitrator shall be appointed first.

RULE 26 – ACCEPTANCE OF APPOINTMENT

CURRENT RELATED PROVISIONS: AR 5, 6(2)

Rule 26
Acceptance of Appointment

(1) A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) and contact information.

(2) The Secretariat shall request an acceptance from the appointee upon receipt of the notice referred to in paragraph (1). The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

(3) Within 20 days after the receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

(b) 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.

(4) The Secretariat shall notify the parties of the acceptance of appointment by each arbitrator and provide their signed declaration.

(5) The Secretariat shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.

(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

Article 26
Acceptation des nominations

(1) Une partie qui nomme un(e) arbitre notifie au Secrétariat la nomination et indique le nom, la ou les nationalité(s) et les coordonnées de la personne nommée.

(2) Dès réception de la notification visée au paragraphe (1), le Secrétariat demande à la personne nommée si elle accepte sa nomination. Le Secrétariat transmet également à chaque personne nommée les informations reçues des parties pertinentes pour l'établissement de la déclaration visée au paragraphe (3)(b).

(3) Dans les 20 jours suivant la réception de la demande d'acceptation d'une nomination, toute personne nommée doit :

(a) accepter sa nomination ; et

(b) remettre une déclaration signée conforme au modèle publié par le Centre, qui porte sur certaines questions telles que l'indépendance, l'impartialité, la disponibilité de l'arbitre et son engagement à préserver le caractère confidentiel de l'instance.

(4) Le Secrétariat notifie aux parties l'acceptation de chaque nomination et fournit la déclaration signée de chaque arbitre.

(5) Le Secrétariat notifie aux parties si un(e) arbitre n'accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe (3), et une autre personne est nommée en qualité d'arbitre conformément à la méthode suivie pour la précédente nomination.

(6) Chaque arbitre a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3)(b).

Regla 26
Aceptación del Nombramiento

(1) La parte que nombre a un o una árbitro notificará al Secretariado el nombramiento y proporcionará el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada.

(2) El Secretariado solicitará la aceptación de la persona nombrada una vez recibida la notificación a la que se hace referencia en el párrafo (1). El Secretariado también le

transmitirá a cada persona nombrada la información recibida de las partes que sea relevante para completar la declaración a la que se hace referencia en el párrafo (3)(b).

(3) Dentro de los 20 días siguientes a la recepción de la solicitud de aceptación de un nombramiento, la persona nombrada deberá:

(a) aceptar el nombramiento; y

(b) proporcionar una declaración firmada en la forma publicada por el Centro, en la que indique cuestiones tales como la independencia, imparcialidad y disponibilidad del o de la árbitro y su compromiso de mantener la confidencialidad del procedimiento.

(4) El Secretariado notificará a las partes la aceptación de cada nombramiento y distribuirá la declaración firmada por cada árbitro.

(5) El Secretariado notificará a las partes si un o una árbitro no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada como árbitro de conformidad con el método seguido para el nombramiento anterior.

(6) Cada árbitro tendrá la obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3)(b).

292. Proposed AR 26 introduces modifications intended to reflect current practice and to limit delays in constituting the Tribunal.

293. ***First***, proposed AR 26(1) expands the information that a party is expressly required to provide when it notifies the Centre of its appointment of an arbitrator.

294. ***Second***, proposed AR 26(2) confirms that the Secretariat shall transmit to each appointee all information received from the parties that is relevant to the completion of the declaration required under proposed AR 26(3).

295. ***Third***, proposed AR 26(3), in conjunction with proposed AR 28, seeks to reduce the delay and modernize the procedure regarding the arbitrator's acceptance.

296. Proposed AR 26 includes a reduced timeframe; the appointee now has 20 days from the Secretariat's request to accept the appointment and to send the executed declaration with any statement of disclosure. Under current AR 6(2), an arbitrator has until the end of the first session (which takes place within 60 days from constitution) to provide the declaration.

297. ***Fourth***, proposed AR 26 does not include the text of the declaration to be signed (in current AR 6). However, it makes clear that the declaration form must address matters related to the arbitrator's independence, impartiality, availability and commitment to the confidentiality of the proceeding. Pursuant to proposed AR 26(3)(b), the form of the declaration to be signed will be published from time to time by ICSID (*see* Schedule 2 – Arbitrator Declaration). This introduces flexibility for ICSID to adapt the contents of the declaration form.

298. Arbitrator Declaration. The proposed AR do not yet include a Code of Conduct for ICSID Arbitration. ICSID is currently working on a Code of Conduct for arbitrators with UNCITRAL Working Group III (Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018) (Document A/CN.9/935) ¶64). This approach is preferable because it has the potential to memorialize a uniform set of ethical expectations for ISDS generally. Once final, this Code of Conduct should be attached to the Arbitrator Declaration in Schedule 2.

299. In the interim, the WP proposes an expanded disclosure in declarations by arbitrators. It will provide parties with more information to determine whether there is a reasonable concern as to conflict of interest.

300. The proposed new declaration adds language stipulating that the arbitrator is "impartial and independent of […] the parties…" thus expanding the disclosure requirement to encompass the notion of "impartiality". The English version of Art. 14 of the Convention refers to "independent judgment". The Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that both versions are equally authentic, it has been accepted that arbitrators must be both impartial and independent. The addition reflects the prevailing standard under the Convention and how it has been applied. It also mirrors the language in other arbitration rules.

301. The proposed new declaration specifies an express requirement to disclose professional, business and other significant relationships, within the past five years, with: (i) the parties; (ii) counsel for the parties; (iii) other members of the Tribunal (presently known); and (iv) any third-party funder disclosed pursuant to proposed AR 21. It also requires an arbitrator to disclose other investor-State cases in which the arbitrator has been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, fact-finding Committee member, mediator or expert.

302. This last requirement responds to concerns expressed by some States and members of the public about the potential for conflict of interest arising from the practice of "double-hatting" (*i.e.*, individuals simultaneously acting as an arbitrator and as counsel or expert in separate and unrelated proceedings).

303. There is debate about double-hatting among commentators. Some suggest that double-hatting should be prohibited because it creates either an actual conflict of interest or because it creates a perception of conflict of interest that undermines confidence in the ISDS system to such a degree that it should not be permitted. Other commentators disagree. In their view, the determination of whether there is a conflict of interest must in every case

be decided on the basis of the specific facts of the case. These commentators argue that the mere fact that an arbitrator also acts as counsel or expert in unrelated cases, without anything further, does not establish conflict of interest and that double hatting cannot be used as a proxy for a reasoned and fact-specific determination of conflict in the circumstances of the individual case. Moreover, some see a prohibition on double-hatting as a contradiction of the principle of party-autonomy in the selection of arbitrators. Finally, some commentators suggest that a prohibition on double hatting will result in a shortage of qualified arbitrators with experience in ISDS. They also suggest that a prohibition on double-hatting will adversely affect arbitrator diversity by disqualifying new entrants and persons of different genders, ages and regional origin who may be unable to afford to limit their employment to arbitral appointments.

304. A prohibition on double-hatting would also be difficult to reconcile with the fact that ICSID Member States have designated numerous individuals to the Panels of Arbitrators and Conciliators who are practicing attorneys and would become ineligible to act if a blanket prohibition on double-hatting were imposed.

305. The WP therefore does not take a position on double-hatting, and leaves this for the joint ICSID–UNCITRAL discussions. However, the proposed rules do require greater disclosure and provide a better basis to assess whether a conflict exists in fact. The disclosure of additional information regarding an arbitrator's other roles proposed in the declaration would enhance transparency and enable the parties to consider potential conflicts of interest deriving from double-hatting on a case-by-case basis, and to pursue the available remedies should they choose to do so.

306. The proposed declaration requires that qualifying relationships that have existed within the past five years be disclosed. This timeframe is slightly longer than the 3-year standard contained in the IBA Conflict Guidelines (2014). The new declaration also requires disclosure of "significant" relationships. This proposed criterion seeks to assist arbitrators in determining what information is relevant for purposes of disclosure.

307. The proposed declaration also adds a requirement to confirm sufficient availability to conduct the arbitration in an expeditious and cost-effective manner. This requirement has been added in light of the comments expressing concern about delays in proceedings occasioned by extended periods of arbitrator unavailability, and by some arbitrators accepting appointments despite insufficient availability. The requirement is intended to provide the parties with specific information regarding the availability of the arbitrators in their dispute. The addition of this requirement does not convey any change in the applicable standards for the challenge of an arbitrator.

308. Finally, the proposed declaration requires confirmation that the arbitrator will adhere to the fee and billing practices in the proposed Memorandum of Fees and Expenses (*see* Schedule 1). This addition seeks to enhance arbitrator compliance with the requirement to timely submit claims for fees and expenses, and enhances the management of case finances. A revised Memorandum of Fees will be issued with the new rules, once adopted.

RULE 27 – REPLACEMENT OF ARBITRATORS PRIOR TO CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 56; AR 7

Rule 27
Replacement of Arbitrators Prior to Constitution of the Tribunal

(1) At any time before the Tribunal is constituted:

(a) an arbitrator may withdraw an acceptance;

(b) a party may replace an arbitrator whom it appointed; or

(c) the parties may agree to replace any arbitrator.

(2) A replacement arbitrator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced arbitrator was appointed.

Article 27
Remplacement d'arbitres avant la constitution du Tribunal

(1) À tout moment avant que le Tribunal ne soit constitué :

(a) un(e) arbitre peut retirer son acceptation ;

(b) une partie peut remplacer un(e) arbitre qu'elle a nommé(e) ; ou

(c) les parties peuvent convenir du remplacement de tout arbitre.

(2) Un(e) arbitre remplaçant est nommé(e) dès que possible, selon la même méthode que celle utilisée pour l'arbitre ayant retiré son acceptation ou l'arbitre remplacé(e).

Regla 27
Reemplazo de Árbitros con Anterioridad a la Constitución del Tribunal

(1) En cualquier momento antes de que se constituya el Tribunal:

(a) Un o una árbitro podrá retirar su aceptación;

(b) una parte podrá reemplazar a cualquier árbitro que haya nombrado; o

(c) las partes podrán acordar reemplazar a cualquier árbitro.

(2) Se nombrará a un o una árbitro sustituto(a) lo antes posible, de conformidad con el método utilizado para el nombramiento del o de la árbitro que se haya retirado o reemplazado.

309. Under current AR 7, a party may replace the arbitrator it has appointed, and the parties may agree to replace any arbitrator, at any time prior to the constitution of the Tribunal. Proposed AR 27(1)(b) and (2) maintain the same principle, clarifying that the replacement must follow the method of the original appointment. Reference to the procedure in current AR 1, 5 and 6 is deleted, as it is encompassed in the general statement that the replacement must follow the method of the original appointment.

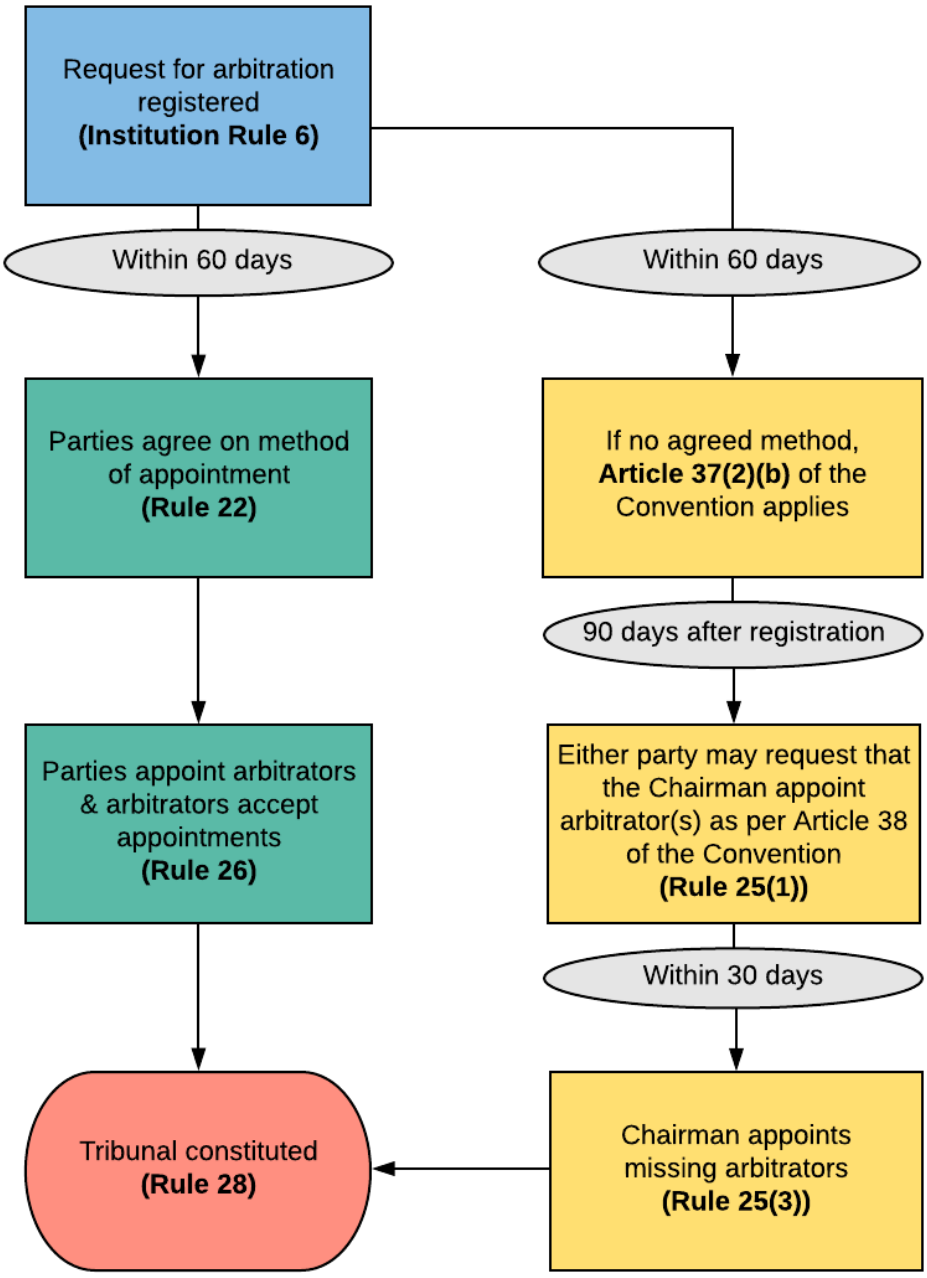
310. Proposed AR 27(1)(a) codifies current practice with respect to an arbitrator stepping down from an accepted appointment prior to the constitution of the Tribunal, a situation not covered by the AR. Current AR 8 only addresses resignation after constitution.

311. To address the obvious inefficiency of constituting a Tribunal with a member who will resign immediately after constitution, in practice arbitrators have been allowed to withdraw their acceptance of an appointment prior to constitution of the Tribunal. Proposed AR 27(1)(a) codifies that practice. It is also consistent with the AR allowing a party to replace an arbitrator at any time prior to constitution of the Tribunal.

312. Finally, the principle in proposed AR 27(2) that the replacement must follow the same method as the original appointment also applies to the withdrawal of an arbitrator in proposed AR 27(1)(a).

313. The basic steps in constitution of a Tribunal are shown below:

Constitution of the Tribunal – Rules 22-28



RULE 28 – CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 56(1); AFR 24; AR 6(1), 30

Rule 28
Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointments.

(2) As soon as the Tribunal is constituted, the Secretary-General shall transmit the Request for arbitration, the supporting documents, the notice of registration and communications with the parties to each member.

Article 28
Constitution du Tribunal

(1) Le Tribunal est réputé constitué à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que tou(te)s les arbitres ont accepté leur nomination.

(2) Dès que le Tribunal est constitué, le ou la Secrétaire général(e) transmet à chaque membre la requête d'arbitrage, les documents justificatifs, la notification d'enregistrement et toutes communications avec les parties.

Regla 28
Constitución del Tribunal

(1) Se entenderá que se ha constituido el Tribunal en la fecha en que el o la Secretario(a) General notifique a las partes que todos los o las árbitros han aceptado sus nombramientos.

(2) Tan pronto como se haya constituido el Tribunal, el o la Secretario(a) General transmitirá la solicitud de arbitraje, los documentos de respaldo, la notificación del registro y las comunicaciones con las partes a cada uno de los miembros del Tribunal.

314. Current AR 6 stipulates the date on which the Tribunal is deemed to be constituted. Proposed AR 28(1) reflects the same principle while streamlining the text.

315. The first step after the constitution of the Tribunal is the Secretary-General's transmission of all documents received from the parties to the members of the Tribunal. Proposed AR 28(2) corresponds to current AR 30 with minor modifications. Unless there are exceptional circumstances, documents would be made available to the Tribunal members only in electronic format in accordance with proposed AR 3.

CHAPTER IV - DISQUALIFICATION OF ARBITRATORS AND VACANCIES

316. Disqualification, death, incapacity and resignation of arbitrators are the only exceptions to the principle in Art. 56(1) of the Convention that the composition of the Tribunal shall remain unchanged.

317. The rules governing disqualification, death, incapacity and resignation of arbitrators have been in place since the first AR entered into force in 1968, with minor exceptions. Most notably, AR 8(1), governing incapacity, was modified in 1984 to regulate the scenario where an arbitrator becomes incapacitated but takes no action, or refuses to resign. The 1984 AR 8(1) established that the procedure for disqualification would apply to instances of incapacity that are not resolved through the resignation of the incapacitated arbitrator. The most recent amendment was AR 9(5) in 2003, which made the timeline of 30 days for the Chairman of the Administrative Council to decide on a disqualification a "best efforts" standard.

318. ICSID received multiple comments from Member States and the public in relation to the disqualification of arbitrators. Most comments addressed the procedure to disqualify arbitrators and the disruptive effect that disqualification proposals have on the procedural calendar.

319. Some comments proposed charging a fee to file a disqualification proposal to deter frivolous applications. Disqualification proposals are part of the system established by the Convention to ensure proper composition of the Tribunal. Accordingly, the proposed AR do not include a fee as a prerequisite to file a disqualification proposal. However, the Tribunal may allocate costs with respect to any part of the proceeding, including a disqualification proposal, under proposed AR 19(5), and the Tribunal shall take into consideration the conduct of the parties and the outcome of any part of the proceeding in determining how to allocate costs, under proposed AR 19(4). These proposed amendments provide a tool to deter frivolous challenges.

320. Other commentators suggested the possibility of having third parties make recommendations on the proposal before it is decided, adding a further step to the process. Articles 57 and 58 of the Convention establish who is tasked with deciding a proposal for disqualification. Exceptionally, the decision-makers (the Chairman or the co-arbitrators) have requested a recommendation from a third party. For example, in a few cases where the challenged arbitrator was a former staff member of the World Bank, the Centre requested a recommendation from a third party (*see Siemens v Argentina* (ARB/02/8), Award (February 6, 2007), ¶36; *Generation Ukraine Inc. v. Ukraine* (ARB/00/9), Award (September 16, 2003), ¶4.16). On each such occasion, it has been made clear to the parties

that this is an exceptional manner of proceeding and that the final determination remains solely with the decision-maker. Given the exceptional nature of such requests, their limited scope, and the need to decide challenges expeditiously, no amendment is proposed in this regard.

321. The proposed amendments address the remaining concerns raised by the Member States and the public, simplifying the rules and codifying ICSID practice regarding disqualification, death, incapacity and resignation of arbitrators. These proposed amendments are limited by Art. 56-58 of the Convention, which regulate the grounds for, legal standard, decision-making and consequences of a proposal, as well as resignation and incapacity. Articles 56-58 can only be changed by an amendment to the Convention.

RULE 29 – PROPOSAL FOR DISQUALIFICATION OF ARBITRATORS

CURRENT RELATED PROVISIONS: Convention Art. 56-58

Chapter IV
Disqualification of Arbitrators and Vacancies

Rule 29
Proposal for Disqualification of Arbitrators

(1) A party may propose the disqualification of one or more arbitrators ("proposal") pursuant to Article 57 of the Convention.

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Tribunal and within 20 days after the later of:

(i) the constitution of the Tribunal; or

(ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based;

(b) the party proposing the disqualification shall file a written submission, specifying the grounds on which it is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file its response and supporting documents within seven days after receipt of the written submission;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. This statement shall be filed within five days after receipt of the written submissions referred to in paragraph (2)(c); and

(e) the parties may file final written submissions on the proposal within seven days after expiry of the time limit referred to in paragraph (2)(d).

(3) The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued by the Tribunal while the proposal was pending, be reconsidered by the reconstituted Tribunal.

Chapitre IV
Récusation d'arbitres et vacances

Article 29
Proposition de récusation d'arbitres

(1) Une partie peut proposer la récusation d'un(e) ou plusieurs arbitre(s) (« proposition ») en vertu de l'article 57 de la Convention.

(2) La procédure suivante s'applique :

(a) une proposition est soumise après la constitution du Tribunal et dans un délai de 20 jours suivant la plus tardive des dates suivantes :

(i) la date de constitution du Tribunal ; ou

(ii) la date à laquelle la partie qui propose la récusation a pris connaissance ou aurait dû avoir connaissance des faits sur lesquels est fondée la proposition ;

(b) la partie proposant la récusation dépose des écritures précisant les motifs sur lesquels elle est fondée et comprenant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ;

(c) l'autre partie dépose sa réponse et ses documents justificatifs dans un délai de sept jours à compter de la réception des écritures ;

(d) l'arbitre qui fait l'objet de la proposition peut déposer une déclaration limitée à des informations factuelles pertinentes au regard de la proposition. Cette déclaration est déposée dans un délai de cinq jours à compter de la réception des écritures visées au paragraphe (2)(c) ; et

(e) les parties peuvent déposer des écritures finales relatives à la proposition dans un délai de sept jours à compter de l'expiration du délai visé au paragraphe (2)(d).

(3) L'instance se poursuit pendant que la proposition est pendante, sauf si elle est suspendue, en tout ou partie, par accord des parties. Si la proposition se solde par une récusation, l'une ou l'autre des parties peut demander que toute ordonnance ou décision rendue par le Tribunal alors que la proposition était pendante soit réexaminée par le Tribunal reconstitué.

Capitulo IV
Recusación de Árbitros y Vacantes

Regla 29
Propuesta de Recusación de los o las Árbitros

(1) Una parte podrá proponer la recusación de uno o más árbitros ("propuesta") de conformidad con lo dispuesto en el Artículo 57 del Convenio.

(2) Se aplicará el siguiente procedimiento:

(a) cualquier propuesta deberá presentarse después de la constitución del Tribunal y dentro de los 20 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal; o

(ii) la fecha en la que la parte que propone la recusación tuvo conocimiento o debería haber adquirido conocimiento de los hechos en los que se funda la propuesta;

(b) la parte que proponga la recusación deberá presentar un escrito especificando las causales en que se funda la propuesta e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(c) la otra parte deberá presentar su respuesta y documentos de respaldo dentro de los siete días siguientes a la recepción del escrito;

(d) el o la árbitro a quien se refiera la propuesta podrá presentar una explicación que se limite a información de hecho relevante para la propuesta. Esta explicación se presentará dentro de los cinco días siguientes a la recepción de los escritos a los que se hace referencia en el párrafo (2)(c); y

(e) las partes podrán presentar escritos finales acerca de la propuesta dentro de los siete días siguientes al vencimiento del plazo al que se hace referencia en el párrafo (2)(d).

(3) A menos que el procedimiento sea suspendido, total o parcialmente, de común acuerdo por las partes, este continuará mientras la propuesta de recusación se encuentre en curso. Si la propuesta tiene como consecuencia la recusación del o de la árbitro, cualquiera de las partes podrá solicitar que el Tribunal, una vez que sea reconstituido, reconsidere cualquier resolución o decisión emitida por el Tribunal mientras la propuesta de recusación se encontraba en curso.

322. Proposed AR 29 replaces current AR 9 and makes several changes.

323. ***First***, proposed AR 29(1) adopts the basic rule in current AR 9(1) that a challenge must be filed in accordance with Art. 57 of the Convention. No amendments are proposed to this portion of the rule as it reflects the corresponding treaty provision.

324. ***Second***, proposed AR 29(2)(a) contains the time limit for filing a disqualification proposal. It clarifies that a proposal can only be filed after the Tribunal has been constituted. Proposed AR 29(2) further requires that a proposal for disqualification be filed within 20 days after the later of the constitution of the Tribunal or the date on which the party challenging knew or should have known of the relevant facts. This specific time limit replaces the term "promptly" in current AR 9(1) and affords greater clarity concerning filing deadlines.

325. Proposed AR 29(2)(a) also eliminates the cut-off date to file a disqualification proposal. Currently this is the date on which the proceeding is declared closed (AR 9(1) and 38(1)). Eliminating this cut-off is consistent with the elimination of the formal closure of the proceeding (*see* Chapter X – The Award) and reflects the fact that arbitrators must retain the qualities required by Art. 14(1) of the Convention until the Award is rendered.

326. ***Third***, proposed AR 29(2)(b) requires that the disqualification proposal include all arguments and supporting documents on which the proposal is based. This amendment transforms what could otherwise be a formal lodging of a challenge into a complete written submission, thereby reducing the overall time needed for briefing.

327. ***Fourth***, proposed AR 29(2)(c) establishes a specific time limit of seven days for the filing of a submission by the responding party.

328. ***Fifth***, proposed AR 29(2)(d) gives the challenged arbitrator the opportunity to file a statement within 5 days from receipt of the other party's submissions. The statement is limited to factual information and therefore avoids the challenged arbitrators making legal argument as to why they ought not be disqualified.

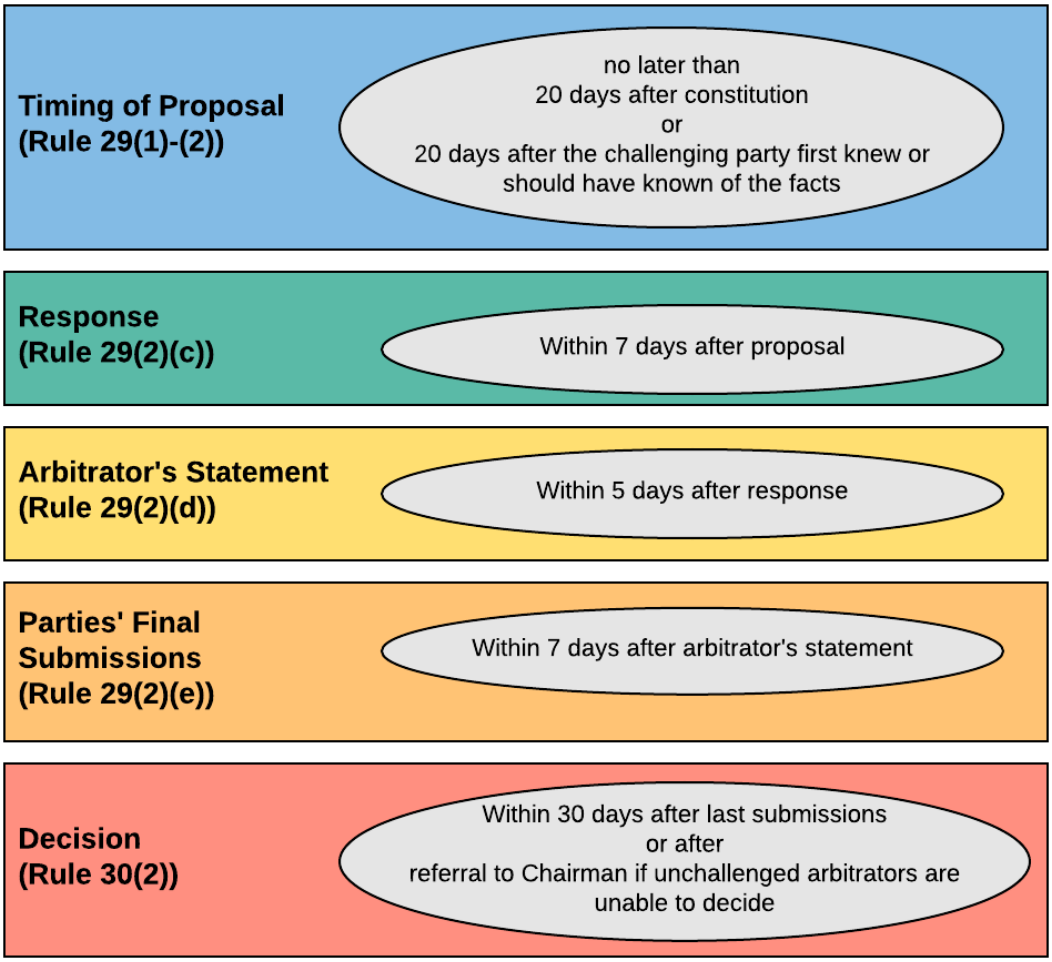
329. ***Sixth***, proposed AR 29(2)(e) permits a final round of observations on the proposal from both parties within seven days. Following ICSID practice, the final round of submissions is filed simultaneously by the parties.

330. ***Seventh***, proposed AR 29(3) eliminates the automatic suspension of the proceeding upon the filing of a challenge and the proceeding continues to the extent the parties agree. This gives the parties the ability to agree to full, partial, or no suspension of the proceeding while the proposal is pending. For example, the parties might agree to maintain the schedule for filing the main pleadings while suspending other timelines regarding interlocutory motions. By requiring the parties' agreement to suspend the proceeding, the proposed rule minimizes the potential for challenges intended to delay the arbitration.

331. Given that the proceeding will continue unless otherwise agreed by the parties, it is possible that the Tribunal will have to issue orders and decisions unrelated to the challenge during its pendency. To safeguard the legitimacy of the proceeding, proposed AR 29(3) provides that if the challenge ultimately results in the disqualification of an arbitrator, any orders or decisions issued by the Tribunal during the pendency of the challenge may be reconsidered by the new Tribunal once it has been reconstituted, upon request of either party.

332. The procedure for disqualification is summarized below:

Disqualification of Arbitrators – Rule 29



RULE 30 – DECISION ON THE PROPOSAL FOR DISQUALIFICATION

CURRENT RELATED PROVISIONS: Convention Art. 58

Rule 30
Decision on the Proposal for Disqualification

(1) The decision on a proposal shall be taken by the arbitrators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention.

(2) For the purposes of Article 58 of the Convention:

(a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided;

(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Tribunal.

(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 29(2)(e) or the notice in Rule 30(2)(a).

Article 30
Décision sur la proposition de récusation

(1) La décision relative à une proposition est prise par les arbitres ne faisant pas l'objet de cette proposition ou par le ou la Président(e) du Conseil administratif conformément à l'article 58 de la Convention.

(2) Aux fins de l'article 58 de la Convention :

(a) si les arbitres ne faisant pas l'objet de la proposition ne parviennent pas à prendre une décision relative à la proposition pour quelque raison que ce soit, ils ou elles le notifient au ou à la Secrétaire général(e) ; une telle situation est réputée constituer un cas de partage égal des voix ;

(b) si une proposition ultérieure est soumise alors que la décision sur une proposition précédente est pendante, les deux propositions sont tranchées par le ou la Président(e) du Conseil administratif comme s'il s'agissait d'une proposition de récusation visant une majorité du Tribunal.

(3) La décision relative à une proposition est prise dans les 30 jours suivant la plus tardive des dates suivantes, à savoir la date d'expiration du délai visé à l'article 29(2)(e) ou la date de la notification visée à l'article 30(2)(a).

Regla 30
Decisión sobre la Propuesta de Recusación

(1) La decisión sobre una propuesta de recusación será adoptada por los o las árbitros que no sean objeto de la propuesta o por el o la Presidente(a) del Consejo Administrativo de conformidad con el Artículo 58 del Convenio.

(2) A los efectos del Artículo 58 del Convenio:

(a) si los o las árbitros que no sean objeto de una propuesta de recusación no pueden decidir la propuesta por cualquier motivo, notificarán al o a la Secretario(a) General y se considerará que su voto ha resultado en un empate;

(b) si se presenta una propuesta de recusación posterior mientras la decisión sobre una propuesta anterior se encuentra pendiente, el o la Presidente(a) del Consejo Administrativo decidirá ambas propuestas como si se tratara de una propuesta de recusación de la mayoría del Tribunal.

(3) La decisión sobre cualquier propuesta de recusación se adoptará dentro de los 30 días siguientes a lo que suceda de último, sea el vencimiento del plazo al que se hace referencia en la Regla 29(2)(e) o bien la notificación prevista en la Regla 30(2)(a).

333. The Centre received numerous comments from States and the public that favoured repeal of the portion of Art. 58 of the Convention conferring a decision on a challenge to co-arbitrators unless they are "equally divided" on the matter. This change would require an amendment to Art. 58 of the Convention, and may be suitable for consideration by Member States in the future.

334. The proposed rule amendments to the decision-making process thus focus not on who the decision-makers are, but on some of the circumstances that lead to their intervention, namely: (i) the determination that the non-challenged arbitrators are "equally divided"; and (ii) the circumstances in which one or more challenges would be treated as a challenge to the majority of the Tribunal.

335. ***First***, proposed AR 30(1) reflects that portion of Art. 58 of the Convention conferring the decision on a challenge of one member of a three-person Tribunal to the other members of the Tribunal, unless they are "equally divided". If the proposal concerns a Sole Arbitrator or a majority of the Tribunal, the decision is made by the Chairman of the Administrative Council.

336. ***Second***, proposed AR 30(2)(a) clarifies that the co-arbitrators need not be divided on the merits of the challenge for the purposes of Art. 58 of the Convention. Instead, their lack of consensus may be caused by any reason that leads to their inability to decide it. This reflects case practice.

337. ***Third***, proposed AR 30(2)(b) addresses the situation where a second challenge is filed while a first challenge is still pending. As explained above in regard to proposed AR 29(3), current AR 9(6) automatically suspends the proceeding following a disqualification proposal. The automatic suspension precludes the possibility of a second challenge being filed while the first one is pending. Consequently, the two proposals have to be argued and decided consecutively, creating extended delays. In several cases, parties confronted with this situation agreed to treat consecutive challenges as one proposal for the disqualification of the majority of the Tribunal, leaving the decision to the Chairman. With the proposed elimination of the automatic suspension, subsequent challenges will be possible. Under

proposed AR 30(2)(b), two or more challenges pending simultaneously will be treated as a challenge to the majority of the Tribunal and decided by the Chairman.

338. ***Fourth***, in keeping with the overall goal of improving efficiency, proposed AR 30(3) provides for a time limit of 30 days to decide the disqualification proposal, running from the later of the expiry of the time limit for simultaneous comments from the parties under proposed AR 29(2)(e) or the notice that the co-arbitrators are "equally divided" in AR 30(2)(a). In accordance with proposed AR 8(3), the co-arbitrators and the Chairman, where applicable, shall use "best efforts" to meet this time limit.

RULE 31 – INCAPACITY OR FAILURE TO PERFORM DUTIES

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 31
Incapacity or Failure to Perform Duties

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 29 and 30 shall apply.

Article 31
Incapacité ou défaillance dans l'exercice des fonctions

Si un(e) arbitre devient incapable d'exercer ou n'exerce pas ses fonctions d'arbitre, la procédure prévue par les articles 29 et 30 s'applique.

Regla 31
Incapacidad o Imposibilidad de Desempeñar Funciones

Si un o una árbitro se incapacitara o no pudiera desempeñar las funciones de su cargo, se aplicará el procedimiento establecido en las Reglas 29 y 30.

339. Current AR 8(1) regulates incapacity and the inability to perform the duties of the office. It provides that a request to remove an arbitrator based on incapacity or inability to perform shall follow the same procedure as for a disqualification proposal.

340. Proposed AR 31 replaces inability to perform with failure to perform. Thus, an arbitrator who fails to perform the duties of the office may be subject to a challenge applying the procedure in proposed AR 29 and 30.

RULE 32 – RESIGNATION

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 32
Resignation

(1) An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation.

(2) If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General whether they consent to the arbitrator's resignation for the purposes of Rule 33(3)(a).

Article 32
Démission

(1) Un(e) arbitre peut démissionner en adressant une notification à cet effet au ou à la Secrétaire général(e) et aux autres membres du Tribunal et en indiquant les motifs de sa démission.

(2) Si cet(te) arbitre a été nommé(e) par une partie, les autres membres du Tribunal notifient dans les plus brefs délais au ou à la Secrétaire général(e) s'ils ou elles consentent à la démission de l'arbitre, aux fins de l'article 33(3)(a).

Regla 32
Renuncia

(1) Un o una árbitro podrá renunciar a su cargo notificando al o a la Secretario(a) General y a los otros miembros del Tribunal y exponiendo las razones de la renuncia.

(2) Si el o la árbitro fue nombrado por una de las partes, los demás miembros del Tribunal notificarán con prontitud al o a la Secretario(a) General si aceptan la renuncia del o de la árbitro a los efectos de la Regla 33(3)(a).

341. Proposed AR 32 addresses resignation of arbitrators. The proposed rule simplifies the language used.

342. ***First***, proposed AR 32(1) retains the arbitrator's obligation to notify both the Tribunal and the Secretary-General of the resignation. Current AR 8 does not expressly require an arbitrator to provide reasons for resignation. Current AR 8(2), however, provides that the other arbitrators shall consider the reasons for the resignation, if the resigning arbitrator was appointed by one of the parties.

343. Proposed AR 32(1) requires that reasons be provided for the resignation, regardless of how the resigning arbitrator was appointed and, consequently, regardless of whether the resignation requires the consent of the other members of the Tribunal.

344. ***Second***, proposed AR 32(2) deals with the particularities of a resignation by a party-appointed arbitrator. Article 56(3) of the Convention requires the Tribunal to consent to the resignation of any party-appointed arbitrator, failing which the vacancy will be filled by the Chairman of the Administrative Council instead of following the original method of appointment. This provision seeks to prevent collusion between the resigning arbitrator and the appointing party. Proposed AR 32(2) simplifies the wording in current AR 8(2) by referring only to the notification of consent.

RULE 33 – VACANCY ON THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 33
Vacancy on the Tribunal

(1) The Secretary-General shall notify the parties of any vacancy on the Tribunal.

(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.

(3) A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Chairman shall fill the following vacancies from the Panel of Arbitrators:

(a) a vacancy caused by the resignation of a party-appointed arbitrator without the consent of the other members of the Tribunal; or

(b) a vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. A newly appointed arbitrator may require that any portion of a hearing be recommenced if necessary to decide a pending matter.

Article 33
Vacance au sein du Tribunal

(1) Le ou la Secrétaire général(e) notifie aux parties toute vacance au sein du Tribunal.

(2) L'instance est suspendue de la date de la notification de la vacance jusqu'à ce que la vacance ait été remplie.

(3) Une vacance au sein du Tribunal est remplie selon la méthode utilisée pour procéder à la nomination initiale, étant toutefois entendu que le ou la Président(e) du Conseil administratif remplit les vacances suivantes en nommant des personnes figurant sur la liste des arbitres :

(a) une vacance résultant de la démission d'un(e) arbitre nommé(e) par une partie sans le consentement des autres membres du Tribunal ; ou

( ) une vacance qui n'a pas été remplie dans un délai de 45 jours à compter de la notification de la vacance.

( ) Dès qu'une vacance a été remplie et que le Tribunal a été reconstitué, l'instance reprend au point où elle était arrivée au moment où la vacance a été notifiée. Un(e) arbitre nouvellement nommé(e) peut requérir que toute partie d'une audience soit recommencée, si cela est nécessaire à la détermination d'une question pendante.

Regla 33
Vacante en el Tribunal

(1) El o la Secretario(a) General notificará a las partes cualquier vacante en el Tribunal.

(2) El procedimiento se suspenderá desde la fecha de notificación de la vacante hasta suplir la vacante.

(3) Cualquier vacante en el Tribunal se suplirá siguiendo el método utilizado para realizar el nombramiento original, excepto que el o la Presidente(a) del Consejo Administrativo suplirá las siguientes vacantes de entre las personas que figuran en la Lista de Árbitros:

(a) una vacante producida por la renuncia de un árbitro nombrado por una de las partes sin el consentimiento de los otros miembros del Tribunal; o

(b) una vacante que no se ha suplido dentro de los 45 días siguientes a la notificación de la vacante.

(4) Una vez que se haya suplido una vacante y el Tribunal se haya reconstituido, el procedimiento continuará a partir de la etapa a la que se había llegado cuando se

notificó la vacante. El o la nuevo árbitro podrá solicitar que cualquier parte de una audiencia se reinicie en caso de que fuera necesario para decidir algún asunto pendiente.

345. Current AR 10, 11 and 12 regulate vacancies on the Tribunal resulting from the disqualification, death, incapacity or resignation of arbitrators. Proposed AR 33 combines and simplifies AR 10-12.

346. ***First***, proposed AR 33(1) simplifies the wording of current AR 11(1) related to the notification of vacancies by the Secretary-General to the parties.

347. ***Second***, proposed AR 33(2), much like current AR 10(2), establishes the suspension of the proceeding from the date of notification of a vacancy on the Tribunal until the vacancy has been filled.

348. ***Third***, proposed AR 33(3) determines how vacancies are filled. The proposed AR does not change the content of the current AR but simplifies the language. Effectively, vacancies continue to be filled through the original method except where: (a) the co-arbitrators do not consent to the resignation of a party-appointed arbitrator; or (b) the vacancy has not been filled within 45 days after its notification. In both cases, the vacancy will be filled by the Chairman with arbitrators selected from the Panel of Arbitrators. A difference from current AR 11(2)(b) is that any appointments by the Chairman under scenario (b) will happen automatically upon the expiry of 45 days after the notice of vacancy, whereas the current rule requires a party to expressly request that the vacancy be filled by the Chairman.

349. ***Fourth***, proposed AR 33(4) deals with the resumption of the proceeding once the vacancy has been filled. The proposed AR contains few changes from the current rules except to clarify the procedure. It refers to the reconstitution of the Tribunal as a step prior to the resumption of the proceeding, establishes that the resumed proceeding will continue from the time of notification of the vacancy (as opposed to the moment when the vacancy occurred as in the current AR), and gives the newly appointed arbitrator the right to request that any portion of a hearing (as opposed to the "oral procedure" in current AR 12) be recommenced if necessary to decide a pending matter.

CHAPTER V - INITIAL PROCEDURES

350. This new chapter entitled "Initial Procedures" incorporates the steps which take place immediately after the Tribunal is constituted and certain procedures which are available to the parties at an early stage in the process. They stem from current AR 13, 20 and 41.

CURRENT RELATED PROVISIONS: AR 13, 20

Chapter V
Initial Procedures

Rule 34
First Session

(1) Subject to paragraph (2), the Tribunal shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).

(2) The first session shall be held within 60 days after the Tribunal's constitution or such other period as the parties may agree. If the President of the Tribunal determines that it is not possible to convene the parties and the other members within this period, the first session shall be held solely among the Tribunal members after consulting with the parties in writing on the matters listed in paragraph (4).

(3) The first session may be held in person or remotely, by any means that the Tribunal deems appropriate. The agenda, method and date of the first session shall be determined by the President of the Tribunal after consulting with the other members and the parties.

(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;

(c) the division of advances payable pursuant to the Administrative and Financial Regulation 14(5);

(d) the procedural language(s), translation and interpretation;

(e) the method of filing and routing of written communications;

(f) the number, type and format of written submissions;

(g) the place of hearings;

(h) the scope, timing and procedure for requests for production of documents between the parties, if any;

(i) the procedural calendar, including written submissions, hearings, the Tribunal's orders, decisions and the Award;

(j) the manner of keeping the recordings and transcripts of hearings;

(k) the publication of documents and recordings; and

(l) the protection of confidential information.

(5) The Tribunal shall issue an order recording the parties' agreements and any Tribunal decisions on the procedure within 15 days after the later of the first session or the last written submission on procedural matters addressed at the first session.

Chapitre V
Procédures initiales

Article 34
Première session

(1) Sous réserve du paragraphe (2), le Tribunal tient sa première session avec les parties pour traiter des questions de procédure, notamment celles qui sont énumérées au paragraphe (4).

(2) La première session se tient dans les 60 jours suivant la constitution du Tribunal ou tout autre délai convenu entre les parties. Si le ou la Président(e) du Tribunal estime qu'il n'est pas possible de convoquer les parties et les autres membres dans ce délai, la première session se tient uniquement entre les membres du Tribunal après consultation des parties par écrit sur les questions énumérées au paragraphe (4).

(3) La première session peut se tenir en personne ou à distance, par tous moyens que le Tribunal juge appropriés. L'ordre du jour, les modalités et la date de la première session sont déterminés par le ou la Président(e) du Tribunal après consultation des autres membres et des parties.

(4) Préalablement à la première session, le Tribunal communique un ordre du jour aux parties et les invite à lui faire part de leurs observations sur les questions de procédure, notamment :

(a) le règlement d'arbitrage applicable ;

(b) le nombre de membres requis pour constituer le quorum au sein du Tribunal ;

(c) la répartition des avances devant être payées conformément à l'article 14(5) du Règlement administratif et financier ;

(d) la ou les langue(s) de la procédure, la traduction et l'interprétation ;

(e) les modalités de dépôt et de transmission des communications écrites ;

(f) le nombre, la nature et le format des écritures ;

(g) le lieu des audiences ;

(h) la portée des éventuelles demandes de production de documents entre les parties, ainsi que les délais et la procédure qui leur sont applicables ;

(i) le calendrier de la procédure, notamment les écritures, les audiences, les ordonnances, les décisions et la sentence du Tribunal ;

(j) les modalités d'enregistrement et de transcription des audiences ;

(k) la publication de documents et enregistrements ; et

(l) la protection des informations confidentielles.

(5) Le Tribunal rend une ordonnance prenant acte des accords des parties et de toutes décisions du Tribunal sur la procédure dans un délai de 15 jours à compter de la plus tardive des dates suivantes, soit la date de la première session, soit celle des dernières écritures relatives aux questions de procédure traitées lors de la première session.

Capítulo V
Actuaciones Iniciales

Regla 34
Primera Sesión

(1) Sujeto a lo dispuesto en el párrafo (2), el Tribunal celebrará una primera sesión con las partes para abordar cuestiones procesales, lo cual incluye las cuestiones enumeradas en el párrafo (4).

(2) La primera sesión se celebrará dentro de los 60 días siguientes a la constitución del Tribunal, o cualquier otro plazo acordado por las partes. Si el o la Presidente(a) del Tribunal determina que no es posible convocar a las partes y a los otros miembros dentro de este plazo, la primera sesión se celebrará exclusivamente entre los miembros del Tribunal después de consultar a las partes por escrito respecto de la lista de cuestiones referidas en el párrafo (4).

(3) La primera sesión podrá celebrarse en persona o a distancia, por cualquier medio que el Tribunal estime apropiado. La agenda, la modalidad y la fecha de la primera sesión serán determinadas por el o la Presidente(a) del Tribunal previa consulta a los otros miembros y a las partes.

(4) Antes de la primera sesión, el Tribunal circulará una agenda a las partes y las invitará a presentar sus observaciones sobre cuestiones procesales, lo cual incluye:

(a) las reglas de arbitraje aplicables;

(b) el número de miembros necesario para constituir el quórum del Tribunal;

(c) la división de los anticipos que deban pagarse de conformidad con lo dispuesto en la Regla 14(5) del Reglamento Administrativo y Financiero;

(d) el(los) idioma(s) del procedimiento, traducción e interpretación;

(e) el método de presentación y transmisión de comunicaciones escritas;

(f) el número, tipo y formato de los escritos;

(g) el lugar de las audiencias;

(h) el alcance, los plazos y el procedimiento aplicables a las solicitudes de exhibición de documentos entre las partes, si las hubiera;

(i) el calendario procesal, lo cual incluye los escritos, audiencias, y las resoluciones, decisiones y el laudo del Tribunal;

(j) la modalidad de las grabaciones y transcripciones de las audiencias;

(k) la publicación de los documentos y las grabaciones; y

(l) la protección de información confidencial.

(5) El Tribunal emitirá una resolución mediante la cual se deje constancia de los acuerdos de las partes y las decisiones del Tribunal sobre el procedimiento dentro de los 15 días siguientes a lo que suceda de último, sea la primera sesión o el último escrito sobre cuestiones procesales abordadas en la primera sesión.

351. Proposed AR 34 merges current AR 13(1) and 20, which provide for a first session and a preliminary procedural consultation between the Tribunal and the parties to determine the procedure that will govern each case. The amendment consolidates the procedure under the two rules and codifies current practice.

352. Consolidation of AR 13(1) and 20. Current AR 20 refers to a "Preliminary Procedural Consultation" to ascertain the parties' positions on procedural questions. Current AR 13(1) addresses the scheduling and location of sessions, including the Tribunal's "first session," which must be held within 60 days after the constitution of the Tribunal unless the parties agree otherwise. In practice, the "first session" and the "preliminary procedural consultation" are carried out as a single process with only one meeting. This process is consolidated in proposed AR 34.

353. Scheduling of the First Session. No change has been made to the 60-day deadline to hold the first session, and the parties may extend that deadline by agreement. In practice, it is sometimes difficult to coordinate the agendas of parties, arbitrators and counsel to find a common date for a first session (*see* Schedule 2 – Arbitrator Declaration - arbitrators are asked to confirm their availability for the case and their calendar when they accept the appointment). Where a first session with the parties is not feasible within the 60-day time limit and the parties do not agree on an extension, proposed AR 34(2) provides that the Tribunal may convene without the parties within the required time limit to consider the parties' written procedural proposals. This codifies established practice.

354. Means of Holding the First Session. Current AR 13 indicates that the parties may agree on a venue for an in-person first session and that, if they do not agree, such meeting must be held at ICSID's headquarters in Washington, D.C. in accordance with Art. 62 of the Convention. To promote efficiency and reduce costs, the Secretariat encourages holding the first session by video or telephone conference. In FY 2017, 80% of all first sessions were held in this manner. The sessions are typically less than a half-day long and the Tribunal will have received the parties' views in advance.

355. In view of this trend, it is reasonable to propose that first sessions be held by telephone or video conference, unless otherwise agreed. Some comments suggested that in-person first sessions should be mandatory to encourage in-depth discussion and pro-active case management. Proposed AR 34(3) allows the first session to be held by any means of communication, and the Tribunal will decide the appropriate means of holding the session in case of disagreement. This maintains flexibility to hold in-person first sessions.

356. Matters to be addressed at the First Session. Current AR 20(1) identifies a number of procedural matters to be addressed during the preliminary procedural consultation. The ICSID Secretariat has developed a template agenda with these and other items typically addressed at the first session. Proposed AR 34(4) lists the key items which the parties and the Tribunal should consider to ensure an efficient process and clear expectations. The proposal deletes the reference in current AR 20(1)(d) to the number of copies to be filed, as the default is now electronic filing (*see* proposed AR 3). It also deletes current AR 20(1)(e) concerning the possibility of dispensing with the written or the oral procedure, as that is rarely exercised in practice. The WP proposes the addition of the below items.

357. The applicable arbitration rules (proposed AR 34(4)(a)). The parties may agree on the applicable arbitration rules and may tailor the rules to their case provided this does not conflict with the Convention, AFRs or any mandatory treaty provisions (*see* current AR 20(2)). In addition, the parties are now given the option to select an expedited process (*see*

Chapter XII – Expedited Arbitration and Schedule 9 on Time and Cost). It is important to clarify the rules applicable to the case as early as possible.

358. The method of filing and routing of written communications (proposed AR 34(4)(e)). Unless the parties agree otherwise, proposed AR 3 and 4 will govern the method of filing and routing of communications. Recognizing that the parties and the Tribunal may have other preferences, it is recommended that they discuss these at the first session.

359. The number, type and format of written submissions (proposed AR 34(4)(f)). While current AR 20(c) discusses the same matter, this item adds the question of the type of submissions that the parties will file. For example, it is recommended that the parties discuss whether they intend to file objections to jurisdiction, requests concerning refusals to produce documents, requests for bifurcation, and counter-claims.

360. The place of hearings (proposed AR 34(4)(g)). As provided in proposed AR 15, the parties can agree on any place for a hearing or hold it by means other than an in-person meeting, after consulting with the Tribunal and subject to adequate logistical arrangements. In practice, most hearings are held at the World Bank Group facilities in Paris or Washington. The place need not be the same for every hearing, and the default is the Secretariat's seat when the parties do not agree on the location, in accordance with Art. 62 of the Convention. It is recommended that the parties and the Tribunal discuss the place that is the most cost-effective at the first session.

361. The scope, timing and procedure for requests for production of documents (proposed AR 34(4)(h)). This new item is intended to avoid any delay in the proceeding caused by unanticipated requests for production of documents. First, the general approach to document production should be addressed early in the proceeding, *e.g.*, whether the Tribunal will allow requests for production of documents during the first round of pleadings, and whether the IBA Rules on the Taking of Evidence in International Arbitration (2010) will apply. Second, it is also useful to discuss the procedure, *e.g.*, whether requests will be simultaneous, and the format for making requests (*see e.g.*, Redfern Schedule). The Tribunal's decision on disputes arising from the parties' requests for production of documents is addressed in proposed AR 40, which is discussed under Chapter VI – Evidence.

362. The procedural calendar, including written submissions, hearings and the Tribunal's orders, decisions and the Award (proposed AR 34(4)(i)). The Secretariat encourages parties and Tribunals to establish as detailed a procedural calendar as possible. This will allow the Tribunal Members and counsel to reserve time in their calendars and avoid conflicting commitments. First, the calendar should account for any anticipated written submissions, requests or other submissions. This should include potential preliminary objections, requests for bifurcation of the proceeding, requests for production of documents to be decided by the Tribunal, etc. Second, the procedural calendar should include the dates of hearings. A significant cause of delay in investment arbitration is the scheduling of hearings. Common availability is difficult to find if a hearing is scheduled with short notice. Therefore, hearing dates for the proceeding ought to be reserved in the first session. Third, the calendar should also estimate the timing for delivery of the Tribunal's orders, decisions

and the Award. This is a new requirement that is intended to establish reasonable and shared expectations as to the length of the proceeding. The revision addresses unanimous comments received from Member States and the public that timeliness of rulings needs to be improved. In current practice, Tribunals often commit to updating the parties on the progress of the drafting of the Award and its timing. This proposed item takes that practice further to require Tribunals to enter the estimated delivery date of a decision, order and the Award in the procedural calendar.

363. If the parties agree to expedited arbitration (Chapter XII of AR), the procedural calendar is modified by proposed AR 75.

364. Publication of documents and recordings and protection of confidential information (proposed AR 34(4)(k)-(l)). This is also a new item, introduced in view of the proposals on access to documents, access to hearings and non-disputing party participation (*see* Schedule 8 on Transparency). The parties and Tribunal are invited to discuss the details of publication of case materials and the protection of confidential information, including the procedure for redaction of documents and decisions.

365. Procedural Order No. 1. Proposed AR 34(5) codifies the practice of issuing a first procedural order which contains the parties' agreements and the Tribunal's decisions from the first session. The order must be issued as soon as possible after the session, as it typically triggers time limits in the proceeding. In practice, it is often issued within days of the first session. The Tribunal must now ensure it is issued within 15 days after the later of the first session or the last written submission on any outstanding procedural matter addressed at the first session.

366. Current AR 13(3), 16(2) and 20(2) have been moved to proposed AR 12 (Orders, Decisions and Agreements). Current AR 13(4) is deleted because it does not reflect existing practice. Once the details of a session have been determined, the Tribunal notifies the parties through the ICSID Secretariat.

Rule 35
Manifest Lack of Legal Merit

(1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.

(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;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the objection;

(c) if a party files the objection before constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the objection within 60 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the objection; or

(iii) the last oral submission on the objection.

(3) The decision of the Tribunal shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 36 or to argue subsequently in the proceeding that a claim is without legal merit.

(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.

Article 35
Défaut manifeste de fondement juridique

(1) Une partie peut soulever une objection selon laquelle une demande est manifestement dénuée de fondement juridique. L'objection peut porter sur le fond de la demande, la compétence du Centre ou la compétence du Tribunal.

(2) La procédure suivante s'applique :

(a) une partie dépose des écritures dans un délai maximum de 30 jours après la constitution du Tribunal, en indiquant précisément les motifs sur lesquels l'objection est fondée, et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ;

(b) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l'objection ;

(c) si une partie soulève l'objection avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais relatifs aux écritures concernant l'objection, de telle sorte que le Tribunal puisse l'examiner dès sa constitution ; et

(d) le Tribunal rend sa décision concernant l'objection dans un délai de 60 jours à compter de la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à l'objection ; ou

(iii) la date de la dernière plaidoirie relative à l'objection.

(3) La décision du Tribunal ne porte en aucune manière atteinte au droit d'une partie de soulever une objection préliminaire conformément à l'article 36 ou de soutenir ultérieurement au cours de l'instance qu'une demande est dénuée de fondement juridique.

(4) Si le Tribunal décide que toutes les demandes sont manifestement dénuées de fondement juridique, il rend une sentence dans ce sens. Dans le cas contraire, le Tribunal rend une décision sur l'objection et fixe tout délai nécessaire à la poursuite de l'instance.

Regla 35
Manifiesta Falta de Mérito Jurídico

(1) Una parte podrá oponer una excepción relativa a la manifiesta falta de mérito jurídico de una reclamación. La excepción podrá referirse al fondo de la reclamación, la jurisdicción del Centro o la competencia del Tribunal.

(2) Se aplicará el siguiente procedimiento:

(a) una parte deberá presentar un escrito a más tardar 30 días después de la constitución del Tribunal, especificando las causales en que se funda la excepción, e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción;

(c) si una parte opone la excepción antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la excepción, de tal forma que el Tribunal pueda considerar la excepción con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la excepción dentro de los 60 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la excepción; o

(iii) la última presentación oral sobre la excepción.

(3) La decisión del Tribunal será sin perjuicio del derecho de una parte a oponer una excepción preliminar de conformidad con lo dispuesto en la Regla 36 o a argumentar posteriormente en el procedimiento que una reclamación carece de mérito jurídico.

(4) Si el Tribunal decide que todas las reclamaciones carecen manifiestamente de mérito jurídico, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión sobre la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

367. Current AR 41 contains all rules concerning preliminary objections, including: (i) the procedure for filing preliminary objections (AR 41(1)); (ii) bifurcation of distinct issues to be heard in separate phases of the proceeding (AR 41(4)); and (iii) the expedited procedure for dealing with objections that a claim is manifestly without legal merit (AR 41(5)). The

WP proposes to divide these into three different rules: AR 35, 36 and 37. They are included in this Chapter because they are typically considered at an early stage in the proceeding.

368. Proposed AR 35 is current AR 41(5). This Rule was adopted in 2006 to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties' resources. This innovation has since been emulated by other arbitral institutions that have adopted similar provisions.

369. Since it was adopted, objections under current AR 41(5) and AR(AF) 45(6) have been raised in 27 cases, with Tribunals rendering three Awards upholding the objections in full and disposing of the case in its entirety. Some Tribunals have maintained these objections in part, rendering decisions that permit only part of the claim to advance (*see e.g.*, *Emmis et al v. Hungary* (ARB/12/2), Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) (March 11, 2013), and *Accession v. Hungary* (ARB/12/3), Decision on Respondent's Objection under Arbitration Rule 41(5) (January 13, 2013)). Other Tribunals have rendered decisions dismissing these objections in their entirety (*see e.g.*, *Eskosol v. Italy* (ARB/15/50), Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) (March 20, 2017)).

370. The procedure for dealing with the objection is designed to be completed at the first session (within 60 days of the Tribunal's constitution or such other period as agreed by the parties) or promptly thereafter. In practice, parties have agreed on a longer process, with written and oral submissions ranging between 12 to 183 days from the Tribunal constitution, and Tribunal rulings being issued within an average of 149 days from the Tribunal constitution. Tribunals have generally taken more time to render Awards disposing of the case than decisions dismissing the objection.

371. Proposed changes to current AR 41(5) address: (i) the scope of application of the Rule; (ii) clarification of the procedure and the time limit for submitting an objection; and (iii) the timing of the Tribunal's ruling.

372. The Scope of the Rule. Tribunals have uniformly employed a high standard for determining whether a claim manifestly lacks legal merit. For example, in *Trans-Global v. Jordan* (ARB/07/25), Decision on Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules (May 12, 2008), ¶¶ 88, 92). The Tribunal held that "the ordinary meaning of the word 'manifestly' requires the respondent to establish its objection clearly and obviously, with relative ease and despatch".

373. A few Tribunals have questioned whether the Rule extends to jurisdictional objections, in addition to objections to the merits of a claim. Following the line of cases interpreting current AR 41(5) as applicable to merits and jurisdiction (*see e.g.*, *Ansung v. China* (ARB/14/25), Award (March 9, 2017)), proposed AR 35(1) now clarifies that the rule covers objections to jurisdiction and to the Tribunal's competence.

374. Some comments suggested that the rule be extended to counterclaims and defences, *i.e.* objections by the claimant to a claim made by the respondent. However, this does not fit with the objective of the rule which is to dispose of the case at an early stage, as

counterclaims and defences are generally filed at a later stage of the proceeding. Under the current AR, a claimant may file preliminary objections concerning counterclaims and defences under current AR 41(1) or in the context of other scheduled submissions and may request that the Tribunal deal with them on an expedited basis.

375. Time Limit for Filing the Objection and the Procedure. Some comments raised concerns that the procedure for dealing with the objection might lead to increased delay and cost and could be abused. Current AR 41(5) provides that the objection must be filed within 30 days of the constitution of the Tribunal or at the latest before the Tribunal holds its first session. In practice, AR 41(5) objections are filed on average 28 days after the constitution of the Tribunal.

376. To expedite the process and make use of the time while the arbitrators are being appointed, the WP proposes to permit a party to file an objection under this rule at any time after the registration of the Request for arbitration, and no later than 30 days after the Tribunal's constitution (proposed AR 35(2)(a)). If the objection is filed before the Tribunal is constituted, the Secretary-General will fix time limits for observations so that the Tribunal may deal with the objections as soon as possible after its constitution (AR 35(2)(c)). This proposal follows the procedure for dealing with early requests for provisional measures (*see* current AR 39(5)), which has worked well in practice.

377. In line with the current rule and practice, proposed AR 35 keeps the procedure flexible to allow the Tribunal and the parties to determine the number of submissions on the objection and whether a hearing is necessary. Proposed AR 35(2)(b) thus only specifies that the Tribunal is to fix the time limits for submissions on the objection. In practice, when a hearing is called for, the parties have typically agreed to extend the time for holding the first session beyond the 60 days and to combine the hearing on current AR 41(5) objections with the first session. This allowed for a longer briefing schedule, but also led to a longer procedure than the intended 60 days. The proposed rule keeps the option of extending the briefing schedule if necessary.

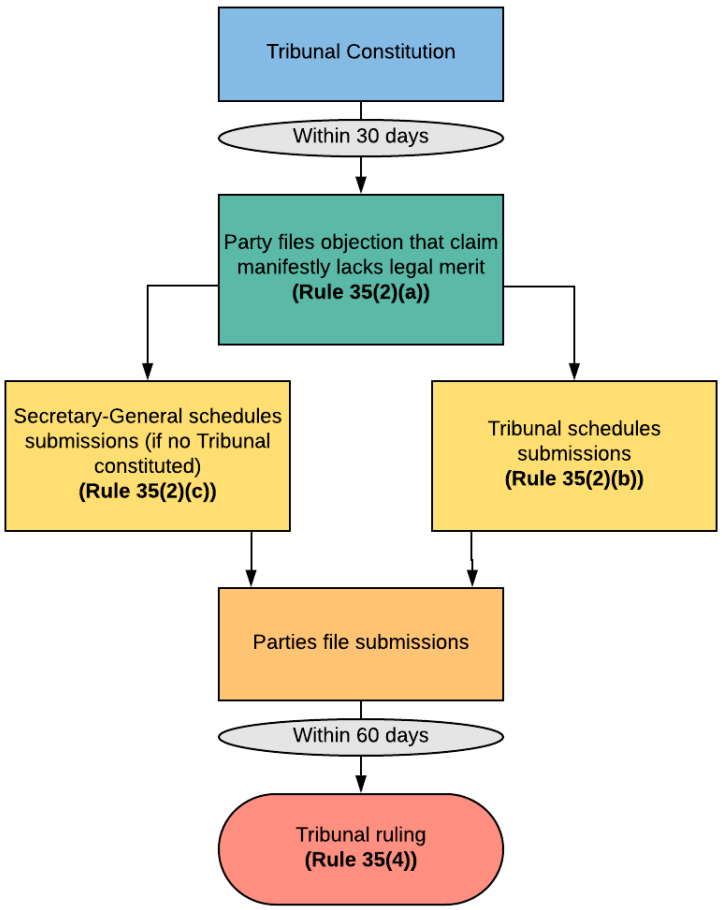
378. Timing of the Tribunal's Ruling. To further address delay, proposed AR 35(2)(d) requires the Tribunal to rule on the objection within 60 days after the latest of the constitution of the Tribunal or the last written or oral submission on the objection. As noted in proposed AR 8(3), this is a "best efforts" obligation, however it is expected that the time limit will be met unless there are special circumstances (*see* explanation under proposed AR 8(3) in Chapter II – Conduct of the Proceeding). In practice, Tribunals have made their rulings on average within 53 days from the last submission on the objection.

379. The Tribunal's Ruling and Allocation of Costs. Proposed AR 35(4) requires the Tribunal to render an Award if it upholds the objection that the claim is manifestly without legal merit, as is reflected in current AR 41(6). If the Tribunal rejects the objection or finds that only part of the claim manifestly lacks legal merit, it issues a decision and the proceeding continues. Some comments suggested that 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.

380. In practice, cost shifting is possible under the current rule although not expressly required, and two of the three Awards on current AR 41(5) awarded costs to the prevailing respondent. As the allocation of costs pertaining to an objection under this rule is covered in proposed AR 19, it is unnecessary to address costs in proposed AR 35. Proposed AR 19(4) lists factors to be considered by Tribunals when assessing costs, including the outcome (*e.g.*, that the claim does or does not manifestly lack legal merit). It also allows a Tribunal to issue interim decisions on costs (proposed AR 19(3)), which would become enforceable upon rendering the Award.

381. The Procedure After the Tribunal's Ruling. If a Tribunal holds that a claim is not manifestly without legal merit, proposed AR 35(3) clarifies that the objection may be raised in the ensuing proceeding. However, such objection would be decided under the usual standards for burden of proof and assessment of evidence, after full briefing by parties. If the objection concerns the jurisdiction of the Tribunal or its competence, the respondent may also raise it as a preliminary objection under proposed AR 36 and request bifurcation under proposed AR 37. The Tribunal will fix any necessary time limits for the further procedure (proposed AR 35(4)). The basic steps in an application to dismiss a claim for manifest lack of legal merit are shown below.

Manifest Lack of Legal Merit Objection – Rule 35



CURRENT RELATED PROVISIONS: Convention Art. 41; AR 41

Rule 36
Preliminary Objections

(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal.

(2) The following procedure shall apply:

(a) a preliminary objection shall be made as soon as possible. Unless the facts on which the objection is based are unknown to the party at the relevant time, the objection shall be made no later than:

( ) the date to file the counter-memorial if the objection relates to the main claim; or

( ) the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim;

( ) the party shall file a written submission, specifying the grounds on which the preliminary objection is based and including a statement of relevant facts, law and arguments, with any supporting documents; and

( ) the Tribunal shall fix time limits for written or oral submissions, as required, on the preliminary objection.

(3) The Tribunal may address a preliminary objection in a separate phase of the proceeding pursuant to Rule 37 or join the objection to the merits. If the Tribunal decides to address the preliminary objection in a separate phase, it may suspend the proceeding on the merits.

( ) If a party files a preliminary objection it shall also file its counter-memorial on the merits, or file its next written submission after an ancillary claim is raised if the objection relates to the ancillary claim, unless the Tribunal has ordered otherwise.

( ) The Tribunal may at any time on its own initiative consider whether a claim is within the jurisdiction of the Centre or within its own competence.

(6) The Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.

(7) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within its competence, 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.

Article 36
Objections préliminaires

(1) Une partie peut soulever une objection préliminaire fondée sur le motif que le différend ou toute demande accessoire ne ressortit pas à la compétence du Centre ou, pour toute autre raison, à celle du Tribunal.

(2) La procédure suivante s'applique :

(a) une objection préliminaire est soulevée aussitôt que possible. Sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré, l'objection est soulevée au plus tard :

( ) à la date fixée pour le dépôt du contre-mémoire si l'objection se rapporte à la demande principale ; ou

( ) à la date fixée pour le dépôt des écritures suivantes après qu'une demande accessoire soit soulevée, si l'objection se rapporte à la demande accessoire ;

( ) la partie dépose des écritures indiquant précisément les motifs sur lesquels l'objection est fondée et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ; et

( ) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l'objection préliminaire.

(3) Le Tribunal peut traiter une objection préliminaire au cours d'une phase distincte de l'instance conformément à l'article 37 ou l'examiner avec les questions de fond. Si le Tribunal décide de traiter l'objection préliminaire au cours d'une phase distincte, il peut suspendre la procédure sur le fond.

( ) Si une partie soulève une objection préliminaire, elle dépose également son contre-mémoire sur le fond, ou ses écritures suivantes après qu'une demande accessoire soit soulevée, si l'objection se rapporte à la demande accessoire, sauf instructions contraires du Tribunal.

(5) Le Tribunal peut, à tout moment et de sa propre initiative, examiner si une demande ressortit à la compétence du Centre ou à sa propre compétence.

(6) Le Tribunal rend sa décision concernant l'objection préliminaire dans un délai de 180 jours à compter des dernières écritures ou plaidoiries relatives à l'objection.

(7) Si le Tribunal décide qu'un différend ne ressortit pas à la compétence du Centre ni, pour toutes autres raisons, à sa propre compétence, il rend une sentence dans ce sens. Dans le cas contraire, le Tribunal rend une décision sur l'objection et fixe tout délai nécessaire à la poursuite de l'instance.

Regla 36
Excepciones Preliminares

(1) Una parte podrá oponer una excepción preliminar según la cual la diferencia, o una demanda subordinada, no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de la competencia del Tribunal.

(2) Se aplicará el siguiente procedimiento:

(a) una excepción preliminar deberá oponerse lo antes posible. A menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción, la excepción deberá oponerse a más tardar:

( ) en la fecha de presentación del memorial de contestación si la excepción se refiere a la reclamación principal; o

( ) en la fecha de presentación del escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere a la demanda subordinada;

( ) la parte deberá presentar un escrito, especificando las causales en las cuales se funda la excepción preliminar e incluir una relación de los hechos pertinentes, el derecho y los argumentos junto con cualquier documento de respaldo; y

( ) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción preliminar.

(3) El Tribunal podrá pronunciarse sobre una excepción preliminar en una fase separada del procedimiento de conformidad con lo dispuesto en la Regla 37 o conjuntamente con las cuestiones de fondo. Si el Tribunal decide pronunciarse sobre la excepción preliminar en una fase separada, podrá suspender el procedimiento sobre las cuestiones de fondo.

(4) Si una parte opone una excepción preliminar, también deberá presentar su memorial de contestación sobre el fondo, o presentar el escrito inmediatamente posterior a la presentación de una demanda subordinada si la excepción se refiere a la demanda subordinada, salvo resolución en contrario del Tribunal.

(5) El Tribunal podrá en cualquier momento considerar de oficio si una reclamación se encuentra dentro de la jurisdicción del Centro o es de su propia competencia.

(6) El Tribunal emitirá su decisión relativa a la excepción preliminar dentro de los 180 días siguientes a lo que suceda de último, sea la presentación de un escrito, o bien, una presentación oral sobre la excepción.

(7) Si el Tribunal decide que la diferencia no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de su propia competencia, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión relativa a la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

382. Preliminary objections are common in ICSID cases and are typically raised by the respondent early in the process. They mostly concern the Tribunal's jurisdiction and the admissibility of the claim. The claimant may also raise preliminary objections to ancillary claims made by the respondent, for example, a counter-claim.

383. When a preliminary objection is raised, the Tribunal may: (i) deal with the objection as a preliminary question, with or without suspending consideration of the merits; or (ii) join the objection to the merits of the dispute. How to deal with the objection is typically discussed at the first session. The timing implications are discussed in Schedule 9 on Time and Cost.

384. Proposed AR 36 updates current AR 41 language and revises the procedure to reflect current practice.

385. ***First***, in line with current practice, the parties and the Tribunal may agree on the time limit for filing the preliminary objection, which is to be filed as early as possible under current AR 41(1). If the parties are unable to agree on the time for filing the preliminary objection, the respondent must file the objection at the latest by the date fixed by the Tribunal to file the counter-memorial on the merits. Some comments suggested moving up the deadline for filing jurisdictional objections or giving the Tribunal discretion to fix this deadline. The WP proposes to keep the existing time limit (proposed AR 36(2)(a)(i)), but requires that a party file a request for bifurcation within 30 days after the memorial on the merits (*see* proposed AR 37(2)(a)).

386. ***Second***, proposed AR 36(3) confirms that the Tribunal may deal with the objection as a preliminary question in a bifurcated proceeding or join it to the merits. The rule also proposes to delete the reference to a suspension of the proceeding on the merits upon the formal raising of the objection. In practice, the Tribunal addresses the question of

bifurcation before deciding whether to suspend the merits. The WP proposes to allow Tribunal discretion to consult with the parties and to decide when suspension of the proceeding is appropriate. If all jurisdictional objections are to be addressed in a separate phase of the proceeding before the merits, the proceeding on the merits will likely be suspended unless the parties agree otherwise.

387. ***Third***, proposed AR 36(4) provides that a party filing a preliminary objection must also file its counter-memorial on the merits, unless the Tribunal has ordered bifurcation under proposed AR 37. This is a new provision that is intended to promote efficiency and fairness, avoiding delay due to late requests for bifurcation. In view of proposed AR 37(2)(d) requiring a party to file a request for bifurcation within 30 days after the memorial on the merits (most likely before the counter-memorial), it is expected that jurisdictional objections will be filed together with the counter-memorial only when the moving party does not wish to bifurcate jurisdiction from the merits. The moving party may thus not avoid filing the counter-memorial if the jurisdictional objections are filed at a late stage.

388. ***Fourth***, proposed AR 36(5) mirrors current AR 41(2). In accordance with proposed AR 11(2), the Tribunal must consult with the parties before deciding on its own initiative that a claim is not within the jurisdiction of the Centre or within its own competence.

389. ***Fifth***, some comments suggested a time limit for the Tribunal's decision on the preliminary objection. The issues before the Tribunal vary in scope, complexity, and the number of pleadings and supporting documents. A review of the cases where a decision on jurisdiction was rendered between January 1, 2016 and June 30, 2017 shows that decisions on jurisdiction have taken on average 185 days from the last submission. In line with this data and comments received, the WP proposes in AR 36(6) and AR 59(1)(b) that the Tribunal issue a decision or Award on the objection within 180 days after the last written or oral submission. As noted above, this is a "best efforts" obligation pursuant to proposed AR 8(3).

RULE 37 – BIFURCATION

CURRENT RELATED PROVISIONS: AR 41

Rule 37
Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").

(2) The following procedure shall apply:

(a) if the request for bifurcation relates to a preliminary objection, a party shall file the request within 30 days after the filing of the memorial on the merits or, if the

objection relates to an ancillary claim, within 30 days after the filing of the written submission containing the ancillary claim, unless the facts on which the objection is based are unknown to the party at the relevant time;

(b) the request for bifurcation shall specify the questions to be bifurcated;

(c) the Tribunal shall fix time limits for written or oral submissions, as required, on the request for bifurcation; and

(d) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the last written or oral submission on the request.

(3) The Tribunal may at any time on its own initiative decide whether a question is to be addressed in a separate phase of the proceeding.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether bifurcation would materially reduce the time and cost of the proceeding.

Article 37
Bifurcation

(1) Une partie peut demander qu'une question soit traitée au cours d'une phase distincte de l'instance (« demande de bifurcation »).

(2) La procédure suivante s'applique :

(a) si la demande de bifurcation se rapporte à une objection préliminaire, une partie présente la demande dans un délai de 30 jours suivant le dépôt du mémoire sur le fond ou, si l'objection se rapporte à une demande accessoire dans un délai de 30 jours suivant le dépôt des écritures contenant la demande accessoire, sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré ;

(b) la demande de bifurcation précise les questions devant faire l'objet de la bifurcation ;

(c) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant la demande de bifurcation ; et

(d) le Tribunal rend sa décision concernant une demande de bifurcation dans un délai de 30 jours à compter des dernières écritures ou plaidoiries relatives à la demande.

(3) Le Tribunal peut, à tout moment et de sa propre initiative, décider si une question doit être traitée au cours d'une phase distincte de l'instance.

(4) Pour déterminer s'il se prononce en faveur de la bifurcation, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment il examine si la bifurcation réduirait de manière significative la durée et le coût de l'instance.

Regla 37
Bifurcación

(1) Una parte podrá solicitar que una cuestión sea abordada en una fase separada del procedimiento ("solicitud de bifurcación").

(2) Se aplicará el siguiente procedimiento:

(a) si la solicitud de bifurcación se refiere a una excepción preliminar, una parte presentará la solicitud dentro de los 30 días siguientes a la presentación del memorial sobre el fondo o, si la excepción se refiere a una demanda subordinada, dentro de los 30 días siguientes a la presentación del escrito que contenga la demanda subordinada, a menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción;

(b) la solicitud de bifurcación deberá especificar las cuestiones que deben bifurcarse;

(c) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de bifurcación; y

(d) el Tribunal emitirá su decisión sobre una solicitud de bifurcación dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.

(3) El Tribunal podrá en cualquier momento decidir de oficio si una cuestión debe abordarse en una fase separada del procedimiento.

(4) Al momento de determinar si corresponde bifurcar, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye si la bifurcación reduciría sustancialmente el tiempo y costo del procedimiento.

390. Bifurcation refers to the consideration of distinct issues for preliminary determination in a separate phase of the proceeding. Requests for bifurcation typically concern the separation of jurisdictional issues from the merits of the dispute. They may be made by claimants but are most often made by respondents. From January 2000 through December 2017, there were 115 decisions on bifurcation. The Tribunal may also hear other issues in separate

phases, for example, bifurcating consideration of the merits into liability and quantum phases.

391. The possibility of bifurcation is foreseen in current AR 41(4), but the rule does not provide any further detail. Proposed AR 37 follows suggestions to include a stand-alone provision on bifurcation and to provide more guidance on the timing, procedure and factors to be considered.

392. Several Member States commented that bifurcation should be allowed more often, or automatically, when jurisdictional objections are raised. The WP does not propose automatic bifurcation because the facts of each case are relevant to determining whether bifurcation is appropriate.

393. ICSID case law has uniformly held that there is no presumption in favour of bifurcation, and has identified certain factors to be considered. For jurisdictional objections these factors include: (i) whether the objection is closely intertwined with the merits of the claim; (ii) whether the objection is capable of disposing of the entire case; (iii) whether the objection has merit and is not frivolous; and (iv) whether procedural economy would be served by dealing with the objection prior to the merits (*see e.g.*, *Tulip v. Turkey* (ARB/11/28), Decision on Bifurcated Jurisdictional Issue (March 5, 2013), and *Emmis et al. v. Hungary* (ARB/12/2), Decision on Respondent's Application for Bifurcation (July 13, 2013)). The last factor addresses whether bifurcation would materially reduce time and cost, and applies to all bifurcation scenarios. This test is incorporated into the proposed rule. Time and cost savings are likely if the proceeding on jurisdiction leads to an Award on jurisdiction disposing of the case. However, if jurisdiction is upheld and the case continues on the merits, the proceeding could be longer and more expensive (*see* Schedule 9 on Time and Cost). Therefore, the WP proposes to maintain the current discretion of Tribunals to decide whether to bifurcate depending on the circumstances of each case.

394. The Request for Bifurcation. Proposed AR 37(1) allows the parties to request bifurcation of preliminary objections and other matters, *e.g.*, dealing with liability before quantifying damages. Proposed AR 37 is intended to cover all types of requests for bifurcation.

395. Tribunal Ordered Bifurcation. The Tribunal may sometimes conclude on its own initiative that bifurcation of a particular issue is appropriate or that a particular issue should be joined to the merits after bifurcation. Proposed AR 37(3) reflects the discretion of the Tribunal to order bifurcation in such circumstances or to join the bifurcated issue to the merits, after hearing the parties' views (*see* proposed AR 11(2)). The provision anticipates that the Tribunal will apply the standard for bifurcation indicated in proposed AR 37(4).

396. Timing of Requests for Bifurcation. Typically, requests concerning bifurcation of jurisdictional objections are made earlier than other requests for bifurcation, but there is no time limit for the request in the current AR. In practice, the deadline for a request for bifurcation often corresponds to the deadline for raising an objection to jurisdiction, although requests for bifurcation are increasingly filed before the objections. Several comments suggested that a time limit be introduced for requests to bifurcate to address delay.

397. Proposed AR 37(2)(a) requires the parties to file a request for bifurcation within 30 days after the memorial on the merits or on the ancillary claim. A review of the 60 cases which led to decisions on bifurcation issued between May 30, 2014 and December 14, 2017 showed that requests for bifurcation concerning jurisdictional objections are made before filing the counter-memorial on the merits in approximately 73% of the cases and are filed on average 37 days after the memorial on the merits.

398. As indicated in proposed AR 37(2)(b), the request for bifurcation should specify the issues that the party wishes the Tribunal to hear in a separate phase to allow the Tribunal to determine whether bifurcation is appropriate in the circumstances.

399. The Procedure. The Tribunal will establish a procedural calendar to deal with the request for bifurcation (*see* proposed AR 37(2)(c)). Typically, Tribunals have allowed one round of submissions on bifurcation, with short time limits. Proposed AR 37(2)(d) addresses delay in the issuance of a decision on bifurcation. Based on a review of the 60 cases referred to above, decisions on bifurcation have taken on average 28 days from the last submission, with a range of 2 to 159 days depending on the circumstances of the case. Typically, where concurrent applications were pending before the Tribunal, the decision took longer (*e.g.*, proposals for disqualification or requests for provisional measures). In the vast majority of cases (46 cases), however, the decision on bifurcation was rendered less than 40 days after the last submission.

400. In line with the average length and with comments received concerning timeliness of rulings, the WP proposes a deadline of 30 days from the last submission for the Tribunal to issue its decision. The Tribunal and the parties are encouraged to discuss the timing of potential requests for bifurcation, observations on the requests, and the Tribunal's decision at the first session.

401. Factors to Be Considered by Tribunal. Several comments suggested that the AR provide guidance regarding the factors to be considered by Tribunals when considering a request for bifurcation. These may vary depending on the nature of the issues to be heard in a separate phase. As mentioned above, a common factor is whether the bifurcation would reduce time and cost. Because other factors are specific to bifurcation of preliminary objections, proposed AR 37(4) only includes that factor.

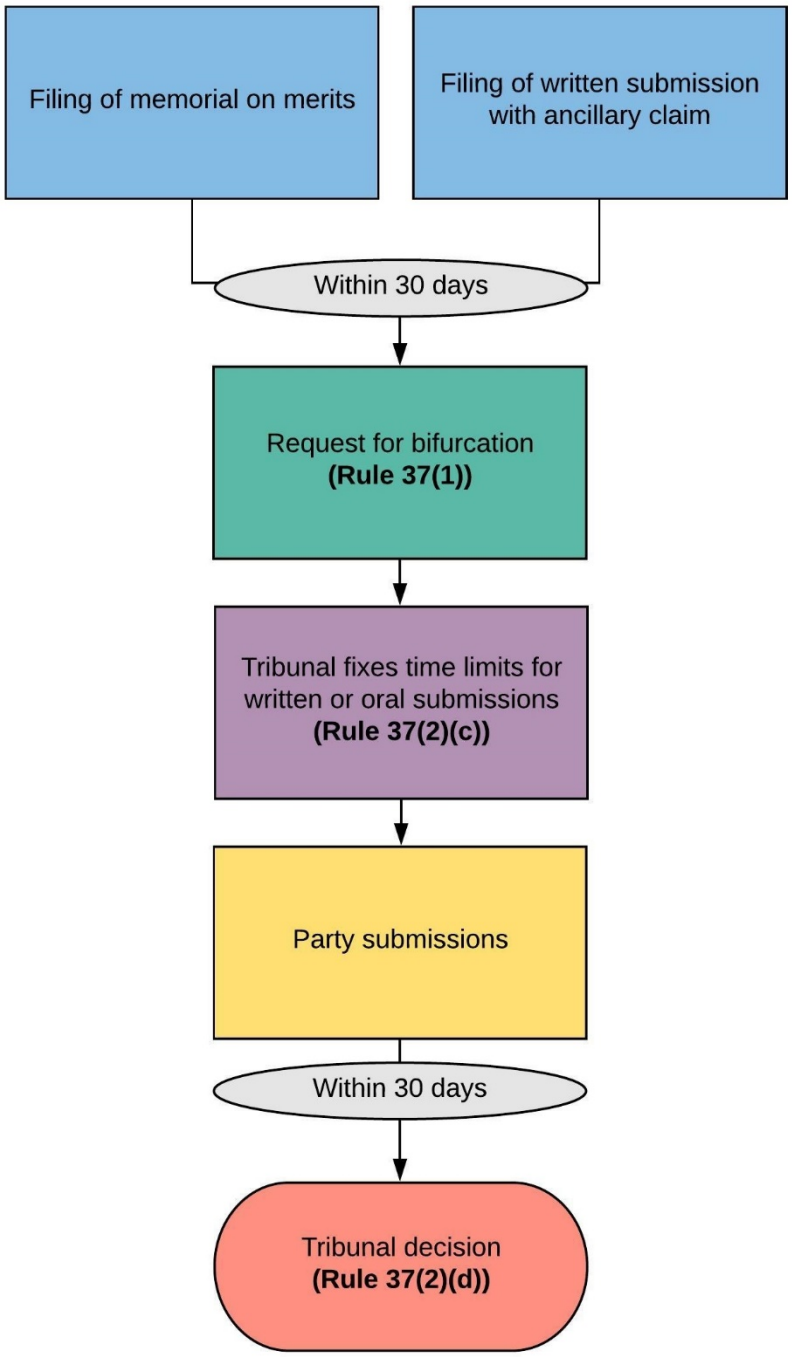
402. Suspension of the proceeding. One Member State commented that suspension of the proceeding on the merits should be automatic if the Tribunal decides to bifurcate jurisdictional objections. The 2006 Rules made suspension of the merits discretionary. This was an amendment to previous versions of the AR under which suspension was mandatory, and addressed the possibility of an objection that a claim manifestly lacks legal merit, which is automatically bifurcated under current AR 41(5) (meaning there can be no suspension if the objection concerns the merits).

403. In practice, most Tribunals do suspend the proceeding on the merits when they grant bifurcation of an objection to jurisdiction. However, the practical implication is minimal and only serves to confirm that certain time limits for pleadings dealing with other matters

are suspended. In some cases, the parties agree to proceed with the merits of the case on a slower track.

404. The main steps in an application to bifurcate are as follows:

Bifurcation – Rule 37



RULE 38 – CONSOLIDATION OR COORDINATION ON CONSENT OF PARTIES

CURRENT RELATED PROVISIONS: Convention Art. 44; AR 19; AR(AF) 27

Rule 38
Consolidation or Coordination on Consent of Parties

(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.

(2) The parties referred to in paragraph (1) shall provide the Secretary-General with written terms of reference, specifying the terms of consolidation or coordination to which they would consent.

(3) The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties if the consolidation or coordination requested would promote a fair and efficient resolution of all or any claims asserted in the arbitrations.

Article 38
Consolidation ou coordination consentie par les parties

(1) Les parties à un ou plusieurs arbitrages pendants et administrés par le Centre peuvent convenir de consolider ou coordonner ces arbitrages.

(2) Les parties mentionnées au paragraphe (1) doivent fournir au ou à la Secrétaire général(e) un acte de mission précisant les conditions de la consolidation ou de la coordination à laquelle elles consentiraient.

(3) Si le ou la Secrétaire général(e) considère que la consolidation ou la coordination demandée contribuera au règlement juste et efficace de toutes les demandes formulées dans les arbitrages, il ou elle prendra toutes les mesures administratives nécessaires à la mise en œuvre de l'accord des parties.

Regla 38
Acumulación o Coordinación con el Consentimiento de las Partes

(1) Las partes de dos o más arbitrajes en curso administrados por el Centro podrán acordar acumular o coordinar estos arbitrajes.

(2) Las partes a las que se hace referencia en el párrafo (1) le proporcionarán al o a la Secretario(a) General términos de referencia escritos, especificando los términos de acumulación o coordinación que aceptarían.

(3) El o la Secretario(a) General realizará todas las actuaciones administrativas que sean necesarias para implementar el acuerdo de las partes si la acumulación o coordinación solicitada promoviera una resolución justa y eficiente de la totalidad o de algunas de las reclamaciones planteadas en los arbitrajes.

405. Schedule 7 to the WP provides a detailed overview of Multiparty Claims and Consolidation. It identifies existing procedural mechanisms at ICSID that facilitate the resolution of related investment claims in a like and cost-effective manner, including ancillary and counterclaims (*see* proposed AR 52) and multiparty claims (*see* proposed IR 1 and 8, and AR 2), and explains proposed Rule 38.

406. The Schedule addresses two options for consolidation: (i) voluntary consolidation with party consent (proposed AR 38); and (ii) mandatory consolidation by a Tribunal (proposed AR 38BIS), and discusses the rationale for each option. While both varieties of consolidation could be incorporated in the Rules, the WP only proposes voluntary consolidation. The proposed Rule should be read in conjunction with Schedule 7 to understand how consolidation has been achieved in ICSID-administered arbitrations to date and how the proposed mechanism could help parties maximize potential efficiency gains.

407. The ICSID Convention and the current AR do not address consolidation of claims. Proposed AR 38 provides for voluntary consolidation and coordination of proceedings on consent of the parties. This allows parties to consent to consolidation, or where not available, to coordinate aspects of related cases.

408. By offering both consolidation and coordination, the proposed rule takes a broader approach than most consolidation rules. The intent is to offer a wider variety of mechanisms for joint resolution of disputes, and not to be limited to formal consolidation of claims.

409. Proposed AR 38(1) provides that parties in two or more pending arbitrations that were commenced separately, but are all administered by the Centre, may agree to consolidate or coordinate these arbitrations, subject to applicable jurisdictional limitations (*see* Schedule 7 for examples from current practice).

410. This includes arbitrations under the ICSID Convention, ICSID Additional Facility, UNCITRAL Arbitration Rules, or *ad hoc* arbitration. It demonstrates another advantage of a rule under the auspices of ICSID: it allows parties to coordinate, and in some circumstances to consolidate, claims commenced under different sets of rules.

411. Proposed AR 38(2) requires the parties to those arbitrations to provide the Secretary-General with written terms of reference, detailing the terms of consolidation or

coordination to which they would consent. This ensures clarity about the scope of consolidation or coordination and gives the Secretary-General an opportunity to ensure that the proposed terms of reference are workable and can be implemented by the Centre.

412. Under proposed AR 38(3), the Secretary-General will take all necessary administrative steps to implement the agreement of the parties. The administrative steps will depend on the agreed terms and could include appointing the same arbitrators to hear otherwise separate arbitrations, organizing joint hearings, or ensuring that the Award(s) are rendered simultaneously. When arbitration claims are consolidated, in full or in part, the Secretary-General may appoint the same Secretary to the Tribunal (*see* proposed AFR 25) to facilitate efficient procedural coordination.

413. If the parties agree to full consolidation, two or more pending arbitrations would be combined into one arbitration, with one set of pleadings, a common Tribunal, a common hearing and a single Award rendered. In a partial consolidation, only some claims would be brought together in the consolidated proceeding while the remaining claims would stay with the individual Tribunals to allow for individual determination of certain matters in each of the related proceedings.

414. Alternatively, parties might agree to have distinct stages of related cases proceed together, although the claims remain separate. While sometimes called partial consolidation, procedural alignment or case coordination more accurately describes this approach. In practice, this approach has been used the most frequently (*see* Schedule 7 for further information).

415. Proposed AR 38BIS is a draft of a potential mandatory consolidation provision for discussion (*see also* Schedule 7). This mandatory consolidation provision is not incorporated in the consolidated draft rule texts, pending a decision by Member States on whether they want to include mandatory consolidation in the ICSID Rules. While mandatory consolidation has obvious benefits in reducing arbitration costs and ensuring consistent Awards, both claimants and respondents may be reluctant to allow parallel claims to be joined against their will.

Rule 38BIS
Consolidation by Order

(1) A party may request full or partial consolidation of two or more arbitrations ("the individual arbitrations") pending under the ICSID Convention Arbitration Rules.

(2) The individual arbitrations proposed for consolidation shall:

(a) arise out of the same circumstances;

(b) have a question of law or fact in common; and

(c) if consolidated, promote a fair and efficient resolution of all or any of the claims asserted in the individual arbitrations.

(3) A party requesting consolidation shall file a written request with the Secretary-General specifying:

(a) the arbitrations proposed for consolidation;

(b) the grounds for consolidation;

(c) the relevant facts and evidence relied on, attaching supporting documents;

(d) observations on why consolidation is warranted; and

(e) the terms of consolidation sought in the order.

(4) The Secretary-General shall transmit the request for consolidation referred to in paragraph (1) to all parties named in the request and invite them to:

(a) submit their observations on the request with any supporting documents within 45 days after the date of receipt of the request; and

(b) indicate whether a hearing is requested or whether they consent to the order being made on the basis of the written submissions filed.

(5) The Secretary-General shall also transmit a copy of the request for consolidation to all arbitrators appointed in the individual arbitrations.

(6) The request for consolidation shall be decided by a single Consolidating Arbitrator who shall:

(a) be selected by the Secretary-General from the ICSID Panel of Arbitrators, after consulting as far as possible with the parties named in the request for consolidation;

(b) not have the nationality of any of the parties to the individual arbitrations;

(c) not be appointed in any of the individual arbitrations;

(d) be appointed as soon as possible, and no later than 60 days after the Secretary-General receives the request for consolidation referred to in paragraph (3); and

(e) set a date for a hearing on the request for consolidation, if required, to take place no later than 30 days after the Consolidating Arbitrator accepts the appointment.

(7) Pending the order on consolidation, each arbitration sought to be consolidated may be suspended by the Tribunal established for that individual arbitration, or suspended by the Secretary-General if no Tribunal has been constituted for the individual arbitration.

(8) The Consolidating Arbitrator may order consolidation of the individual arbitrations in full or in part, or may reject the request for consolidation. The Consolidating Arbitrator shall give brief reasons for the order within 45 days after the last written or oral submissions.

(9) If the Consolidating Arbitrator orders consolidation in full, the Tribunals constituted to hear the individual arbitrations shall be deemed discontinued pursuant to AR 53. If the Consolidating Arbitrator orders consolidation in part, the Tribunals constituted to hear the individual arbitrations shall continue only with respect to those parts that were not consolidated.

(10) If the Consolidating Arbitrator orders consolidation in full or in part, a Tribunal shall be constituted to hear and decide the Consolidated Arbitration.

(11) The Tribunal for the Consolidated Arbitration shall consist of three members, with one selected by the claimants jointly, one selected by the respondents jointly, and the Presiding arbitrator selected by agreement of the claimants and the respondent. If the Tribunal for the Consolidated Arbitration has not been constituted within 45 days after dispatch of the order on consolidation, the Chairman shall appoint the arbitrators not yet appointed in accordance with the procedure in AR 25.

(12) The Tribunal for the Consolidated Arbitration may consider requests by other parties to join the Consolidated Arbitration. In so doing, the Tribunal shall consider the stage of the proceedings, the costs incurred to date by the existing parties, and whether the criteria referred to in paragraph (2) are met.

416. Draft AR 38BIS is provided for consideration by Member States. It is based on the numerous investment treaties that include consolidation provisions, some of which may mandate consolidation of all or part of related investment claims submitted to international arbitration on the basis of a treaty (*see* Schedule 7 for an overview of relevant investment treaties).

417. Any proposal in the ICSID Rules on mandatory consolidation would have to address several considerations, and Schedule 7 identifies the architecture for designing such a provision.

CHAPTER VI - EVIDENCE

RULE 39 – EVIDENCE: GENERAL PRINCIPLE

CURRENT RELATED PROVISIONS: Convention Art. 43; AR 33-37

Chapter VI
Evidence

Rule 39
Evidence: General Principle

The Tribunal shall determine the admissibility and probative value of the evidence adduced.

Chapitre VI
La preuve

Article 39
La preuve : principe général

Le Tribunal est juge de la recevabilité et de la valeur probatoire de tous moyens de preuve invoqués.

Capítulo VI
Prueba

Regla 39
La Prueba: Principio General

El Tribunal determinará la admisibilidad y el valor probatorio de los medios de prueba invocados.

418. Evidentiary issues are decided by Tribunals or agreed to by the parties on a case by case basis. The ICSID rules on presentation of evidence have worked well in most instances but prevailing practice is not always reflected in the wording of the current AR. The AR have therefore been updated to reflect existing practice.

419. In particular, current AR 33 on the marshalling of evidence does not reflect case practice and portions of it overlap with other Rules, notably current AR 24 on supporting

documentation. The WP proposes to delete current AR 33. The contents of current AR 33 that are still relevant are incorporated in a series of rules concerning evidence (proposed AR 39-43).

420. Proposed AR 39 is now titled "Evidence: General Principle" and sets out the general principle that the Tribunal is the sole judge of the admissibility and probative value of the evidence. This applies to all evidence in a proceeding, including written evidence and oral testimony.

421. Current AR 34(2)(a) concerning Tribunal orders to produce evidence is now addressed in AR 40(2). Current AR 34(2)(b) and current AR 37(1), which deal with site visits and inquiries, are moved to a stand-alone proposed AR 43 devoted to visits and inquiries.

422. Current AR 34(4) is proposed for deletion. It is not necessary to specify that expenses related to the production of evidence are part of the parties' costs, as all expenses incurred in connection with the proceeding are part of the parties' costs pursuant to Art. 61(2) of the Convention. The Tribunal has overall discretion to allocate such costs between the parties (*see* proposed AR 19).

RULE 40 – TRIBUNAL ORDER TO PRODUCE DOCUMENTS OR OTHER EVIDENCE

CURRENT RELATED PROVISIONS: Convention Art. 43; AR 33-34

Rule 40
Tribunal Order to Produce Documents or Other Evidence

(1) The Tribunal shall decide any dispute arising out of a party's request for production of documents or other evidence. In doing so, it shall consider all relevant circumstances including the scope and timeliness of the request, the relevance of the documents and evidence requested, the time and burden of production and any objections raised by the other party.

(2) The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.

Article 40
Ordonnance du Tribunal aux fins de produire des documents ou autres moyens de preuve

(1) Le Tribunal statue sur tout différend découlant de la demande de production de documents ou d'autres moyens de preuve présentée par une partie. À cet effet, il tient compte de l'ensemble des circonstances pertinentes, notamment l'étendue et la ponctualité de la demande, la pertinence des documents et preuves demandés, les

délais de production et le fardeau que représente une telle production ainsi que toutes objections soulevées par l'autre partie.

(2) Le Tribunal peut, à tout moment et de sa propre initiative, ordonner à une partie de produire tous documents ou autres moyens de preuve.

Regla 40
Resolución del Tribunal sobre Exhibición de Documentos u Otros Medios de Prueba

(1) El Tribunal decidirá cualquier diferencia que surja a partir de la solicitud de exhibición de documentos u otros medios de prueba presentada por una parte. Al hacerlo, considerará todas las circunstancias pertinentes lo cual incluye el alcance y la prontitud de la solicitud, la relevancia de los documentos y los medios de prueba solicitados, el momento y la carga de proporcionar los documentos, así como las excepciones opuestas por la otra parte.

(2) El Tribunal podrá en cualquier momento ordenar de oficio a una parte que exhiba documentos u otros medios de prueba.

423. Most of the comments received on evidence concerned document production requests between the parties and, in particular, the time and cost of the document production process. There are no guidelines in the current AR concerning the conduct of document production. In many cases, ICSID Tribunals have been guided by the 2010 International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration. Tribunals also regularly use Redfern Schedules to address objections to production of documents.

424. A new item for document production requests between parties is included in proposed AR 34 as a procedural matter to be considered during the first session.

425. Proposed AR 40 combines the Tribunal's power to decide disputes that may arise out of the parties' document production requests (proposed AR 40(1)), with the Tribunal's power to order the parties to produce documents or other evidence (proposed AR 40(2)).

426. Parties frequently ask Tribunals to decide disputes regarding document production. For example, the Tribunal may have to rule on whether a refusal to produce is justified or whether reliance on a privilege is well-founded. Proposed AR 40(1) allows the Tribunal to decide an application concerning a refusal to produce documents, and sets out criteria to guide Tribunals in the exercise of this discretion. The criteria considered include the scope and timeliness of the request and the burden of production. They also include the relevance of the requested documents to the dispute. Under the ICSID Convention and Rules, the term "relevance" is broad enough to encompass other criteria taken into consideration when assessing a refusal to produce documents; in particular, the weight and materiality of the documents or evidence requested (*see e.g., Churchill Mining and Planet Mining Pty*

Ltd v. Indonesia (ARB/12/14 and ARB/12/40), Procedural Order No. 5 (March 18, 2013); *Azurix Corp. v. Argentina* (ARB/01/12), Decision on the Application for Annulment of the Argentine Republic (September 1, 2009)).

427. Among the suggestions received on document production were to have Tribunals more actively case-manage document production requests between the parties, for example, by convening meetings to confer on the scope of document production. This can be done pursuant to proposed AR 14 on case management conferences.

428. Proposed AR 40(2) reiterates the authority of Tribunals to require a party to produce documents or other evidence at any stage. The term "documents or other evidence" is used to ensure that the requests cover different types of evidence including documentary evidence, expert reports and witness testimony.

RULE 41 – WITNESSES AND EXPERTS

CURRENT RELATED PROVISIONS: Convention Art. 43; AR 33-36

Rule 41
Witnesses and Experts

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.

(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(7) Each witness shall make the following declaration before giving evidence:

"I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth."

(8) Each expert shall make the following declaration before giving evidence:

"I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief."

Article 41
Témoins et experts

(1) Une partie qui entend se fonder sur des preuves fournies par un témoin soumet une déclaration écrite de ce témoin. La déclaration identifie le témoin, contient son témoignage et est signée et datée.

(2) Un témoin qui a soumis une déclaration écrite peut être appelé en vue d'être interrogé lors d'une audience.

(3) Le Tribunal détermine la manière dont l'interrogatoire est conduit.

(4) Tout témoin est interrogé devant le Tribunal, par les parties et sous le contrôle du ou de la Président(e). Tout membre du Tribunal peut lui poser des questions.

(5) L'interrogatoire d'un témoin se déroule en personne, à moins que le Tribunal ne décide que d'autres modalités d'interrogatoire sont appropriées compte tenu des circonstances.

(6) Les paragraphes (1) - (5) s'appliquent, avec les modifications qui s'imposent, aux moyens de preuve fournis par un expert.

(7) Avant de témoigner, tout témoin fait la déclaration suivante :

« Je m'engage solennellement, sur mon honneur et sur ma conscience, à dire la vérité, toute la vérité et rien que la vérité ».

(8) Avant de témoigner, tout expert fait la déclaration suivante :

« Je m'engage solennellement, sur mon honneur et sur ma conscience, à faire ma déposition en toute sincérité ».

Regla 41
Testigos y Peritos(as)

(1) La parte que pretenda invocar prueba aportada por un o una testigo deberá presentar una declaración escrita de ese(a) testigo. La declaración deberá identificar al o a la testigo, contener su testimonio, estar firmada y fechada.

(2) Un o una testigo que haya presentado una declaración escrita podrá ser interrogado(a) durante una audiencia.

(3) El Tribunal determinará la manera en que se lleve a cabo el interrogatorio.

(4) Un o una testigo será interrogado(a) por las partes ante el Tribunal, bajo el control del o de la Presidente(a). Cualquier miembro del Tribunal podrá formularle preguntas al o a la testigo.

(5) Un o una testigo podrá ser interrogado(a) en persona salvo que el Tribunal determine que otro medio para conducir el interrogatorio es apropiado en las circunstancias del caso.

(6) Los párrafos (1)-(5) serán aplicables a la prueba aportada por un(a) perito(a) con las modificaciones necesarias.

(7) Antes de su interrogatorio, cada testigo hará la siguiente declaración:

"Declaro solemnemente, por mi honor y conciencia, que diré la verdad, toda la verdad y solo la verdad".

(8) Antes de su interrogatorio, cada perito(a) hará la siguiente declaración:

"Declaro solemnemente, por mi honor y conciencia, que lo que manifestaré estará de acuerdo con lo que sinceramente creo".

429. Current AR 35 and 36 do not reflect established practice concerning witness and expert evidence. In practice, parties invariably file written witness statements and expert reports in advance of the hearing. These are usually filed with the pleading to which they relate. There is no specific form requirement for a witness statement or expert report, other than that it must be in writing, identify the witness or expert, describe the testimony of the witness or expert, and be signed and dated. The statement or report need not be notarized.

430. Parties are entitled to call witnesses and experts to testify at a hearing, but are not required to do so. Typically, each party selects the witnesses and experts whom it wishes to cross-examine at the hearing. The written statements of the witnesses and experts who have not been called for cross-examination will stand as their evidence in chief, *i.e.*, taken "as read". The witnesses and experts to be called, the subject of their testimony, the procedure for examination, the time allotted to each witness and other specific details are decided by the Tribunal in consultation with the parties, usually at the pre-hearing organizational call. Sometimes, a party may be allowed a brief direct examination of its own witness or expert, even if that person has not been called by the other party or the Tribunal.

431. Proposed AR 41 simplifies current AR 35 and 36, and combines the rules concerning witnesses in one provision. The title of AR 35 has been changed to reflect its current content. As drafted, the proposal represents well-established arbitral practice.

432. Some comments suggested that the amended rules should address witness conferencing and other methods of examination. Witness conferencing allows two (or more) witnesses on the same topic to present their oral evidence simultaneously, allowing the Tribunal and parties to compare the responses of each witness on the same question. It is most frequently used with experts, but can also be used with fact witnesses. Proposed AR 41(3) contemplates and accommodates different methods of examination including witness conferencing, hence the technique is not expressly addressed by the proposed AR.

433. Similarly, some comments suggested express provisions on protection of witnesses. Proposed AR 41(3) allows the Tribunal to make orders necessary to ensure efficient presentation of evidence, which would include orders to ensure the protection of witnesses, hence this is also not expressly addressed.

434. Proposed AR 41(4) and (5) maintain the usual rule that witnesses who are called for examination at a hearing are examined in person by the parties and before the Tribunal. However, it allows the Tribunal to order otherwise if justified by the circumstances. For example, the Tribunal might order a witness to be examined by video-conference if the witness is unable to travel to the hearing. Other situations pertaining to witness evidence or examination are generally addressed in Procedural Order No. 1.

435. Proposed AR 41(7) and (8) reiterate the usual form of oath for fact and expert witnesses.

RULE 42 – TRIBUNAL-APPOINTED EXPERTS

CURRENT RELATED PROVISIONS: Convention Art. 43; AR 33-36

Rule 42
Tribunal-Appointed Experts

(1) The Tribunal may appoint one or more independent experts to report to it on specific matters.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.

(3) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.

(4) The parties shall have the right to make written or oral submissions on the report of the Tribunal-appointed expert.

(5) Rule 41(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal-appointed expert.

Article 42
Experts nommés par le Tribunal

(1) Le Tribunal peut nommer un ou plusieurs experts indépendants chargés de lui présenter un rapport sur des questions particulières.

(2) Le Tribunal consulte les parties sur la nomination d'un expert, y compris sur sa mission.

(3) Les parties communiquent à l'expert nommé par le Tribunal toutes informations, tous documents ou toutes autres preuves que l'expert peut demander. Le Tribunal statue sur tout différend relatif aux preuves demandées par l'expert nommé par le Tribunal.

(4) Les parties ont le droit de déposer des écritures ou de plaider sur le rapport de l'expert nommé par le Tribunal.

(5) L'article 41(1) - (5) et (8) s'applique, avec les modifications qui s'imposent, à l'expert nommé par le Tribunal.

Regla 42
Peritos(as) Nombrados(as) por el Tribunal

(1) El Tribunal podrá nombrar a uno(a) o más peritos(as) independientes para que lo informen acerca de cuestiones específicas.

(2) El Tribunal consultará a las partes respecto del nombramiento de un(a) perito(a), lo cual incluye respecto de los términos de referencia del o de la perito(a).

(3) Las partes le proporcionarán al o a la perito(a) nombrado(a) por el Tribunal cualquier información, documento u otra prueba que el o la perito(a) pueda solicitar. El Tribunal decidirá cualquier diferencia relativa a la prueba requerida por el o la perito(a) nombrado por el Tribunal.

(4) Las partes tendrán derecho a presentar escritos o realizar presentaciones orales sobre el informe del o de la perito(a) nombrado(a) por el Tribunal.

(5) La Regla 41(1)-(5) y (8) se aplica al o a la perito(a) nombrado(a) por el Tribunal con las modificaciones necesarias.

436. Proposed AR 42 is a new rule. It reflects ICSID practice on Tribunal appointment of independent experts to assist the arbitrators with specific issues raised in the arbitration. Tribunal-appointed experts have been relied on for a variety of issues, including data verification, environmental assessment and calculation of compensatory damages. The proposed AR expressly gives the Tribunal the power to appoint its own expert(s) after consulting with the parties. It encompasses the selection, appointment and role played by Tribunal-appointed experts and ensures the parties' participation in the process. The proposed rule is broad enough to allow for the adoption of various selection and appointment techniques developed in practice and that the Tribunal may wish to apply (*e.g.* expert-teaming).

RULE 43 – VISITS AND INQUIRIES

CURRENT RELATED PROVISIONS: Convention Art. 43; AR 34, 37

Rule 43
Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party's request, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.

Article 43
Transports sur les lieux et enquêtes

(1) Le Tribunal peut ordonner un transport sur les lieux ayant un lien avec le différend, de sa propre initiative ou à la demande d'une partie, s'il estime ce transport nécessaire, et il peut procéder à des enquêtes sur place si nécessaire.

(2) L'ordonnance définit la portée du transport sur les lieux et l'objet de l'enquête, la procédure à suivre, les délais applicables et autres conditions.

(3) Les parties ont le droit de participer à tout transport sur les lieux ou à toute enquête.

Regla 43
Visitas e Investigaciones

(1) El Tribunal podrá ordenar, de oficio o a solicitud de una de las partes, una visita a cualquier lugar relacionado con la diferencia, si estima la visita necesaria, y una vez en el lugar podrá realizar investigaciones según corresponda.

(2) La resolución definirá el alcance de la visita y el objeto de cualquier investigación, el procedimiento que se deberá seguir, los plazos aplicables y demás términos.

(3) Las partes tendrán derecho a participar en cualquier visita o investigación.

437. Current AR 37(1) regulates the conduct of site visits and inquiries pursuant to Art. 43(b) of the Convention and current AR 34(2)(b). The WP proposes to combine the text of current AR 34(2)(b) and AR 37(1) in a stand-alone provision on the conduct of visits and inquiries.

438. Proposed AR 43(1) expressly states that a site visit may be ordered either on the Tribunal's own initiative or upon a party's request. The parties are entitled to participate in a site visit.

CHAPTER VII - PUBLICATION, ACCESS TO PROCEEDINGS AND NON-DISPUTING PARTY SUBMISSIONS

439. Schedule 8 to this WP is a detailed overview of the transparency provisions proposed for the ICSID rules amendment. It explains the current provisions, the proposals made, and the rationale for such proposals. Proposed AR 44-49 should be read in conjunction with this Schedule to understand the broader scheme proposed for transparency.

RULE 44 – PUBLICATION OF AWARDS AND DECISIONS ON ANNULMENT

CURRENT RELATED PROVISIONS: Convention Art. 48(5), AR 48(4)

Chapter VII
Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 44
Publication of Awards and Decisions on Annulment

(1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.

(2) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the date of dispatch of the document.

(3) Absent consent of the parties referred to in paragraphs (1) or (2), the Centre shall publish excerpts of the legal reasoning in such documents ("excerpts"). The following procedure shall apply to publication of excerpts:

(a) the Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to publication of a document referred to in paragraph (1);

(b) the parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt; and

(c) the Centre shall publish excerpts within 30 days after receipt of the parties' comments on the proposed excerpts, if any.

Chapitre VII
Publication, accès à l'instance et écritures des parties non contestantes

Article 44
Publication des sentences et des décisions sur l'annulation

(1) Avec le consentement des parties, le Centre publie toute sentence, décision supplémentaire d'une sentence, rectification, interprétation et révision d'une sentence, et toute décision sur l'annulation.

(2) Le consentement à publier les documents visés au paragraphe (1) est réputé avoir été donné si aucune partie ne s'oppose par écrit à une telle publication dans les 60 jours suivant la date d'envoi du document.

(3) À défaut du consentement des parties visé aux paragraphes (1) ou (2), le Centre publie des extraits du raisonnement juridique contenu dans ces documents (« extraits »). La procédure suivante s'applique à la publication d'extraits :

(a) le Centre propose des extraits aux parties dans les 30 jours suivant la réception d'une notification par laquelle une partie refuse son consentement à la publication d'un document visé au paragraphe (1) ;

(b) les parties peuvent faire part au Centre de leurs commentaires sur les extraits proposés dans les 30 jours suivant leur réception ; et

(c) le Centre publie des extraits dans les 30 jours suivant la réception des éventuels commentaires des parties sur les extraits proposés.

Capítulo VII
Publicación, Acceso al Procedimiento y Presentaciones de Partes No Contendientes

Regla 44
Publicación de Laudos y Decisiones sobre Anulación

(1) El Centro publicará todo laudo, decisión suplementaria sobre un laudo, rectificación, aclaración, y revisión de un laudo y decisión sobre anulación, con el consentimiento de las partes.

(2) Si ninguna de las partes objeta por escrito a la publicación de los documentos a los que se hace referencia en el párrafo (1) dentro de los 60 días siguientes a la fecha de envío del documento, se considerará que esta ha otorgado su consentimiento para publicarlos.

(3) En ausencia del consentimiento de las partes al que se hace referencia en los párrafos (1) o (2), el Centro publicará extractos del razonamiento jurídico de dichos documentos ("extractos"). El siguiente procedimiento será aplicable a la publicación de extractos:

(a) el Centro les propondrá extractos a las partes dentro de los 30 días siguientes a la recepción de la notificación de que una parte se niega a consentir a la publicación de uno de los documentos a los que se hace referencia en el párrafo (1);

(b) las partes podrán enviar comentarios al Centro sobre los extractos propuestos, dentro de los 30 días siguientes a su recepción; y

(c) el Centro publicará los extractos dentro de los 30 días siguientes a la recepción de los comentarios de las partes sobre los extractos propuestos, si los hubiera.

440. Parties may address publication of Awards in their individual treaties, contracts or laws, or by ratifying the United Nations Convention on Transparency in Treaty Based Investor-State Arbitration (2017) (Mauritius Convention). They may also agree with the other party to a case-specific approach to publication of Awards. However, if parties do not do so, the ICSID Rules will govern publication of Awards.

441. Article 48(5) of the ICSID Convention states that the Centre shall not publish Awards without the consent of the parties. Article 48 cannot be changed without amendment, and

hence constrains the extent to which a rule could allow publication of Awards in Convention arbitration without party consent. If both parties do not consent to publication of the Award, current AR 48(4) allows ICSID to publish excerpts of the legal reasoning in the Award.

442. Proposed AR 44(1) reiterates that Awards will be published with party consent. It makes clear that in this context, "Award" includes supplementary rulings on Awards as well as decisions on annulment. This reflects current practice.

443. Proposed AR 44(2) is a new provision. It deems the parties to have consented to publication of an Award if they do object to its publication, in writing, within 60 days after dispatch of the Award. The proposed deeming of consent does not prejudice the parties in that it gives them a clear and simple way to maintain an objection to publication should they wish to do so.

444. At the same time, proposed AR 44(2) requires a timely and unambiguous decision on whether parties consent to publish the Award. If consent is refused, proposed AR 44(2) allows the Centre to prepare excerpts immediately and hence publish them earlier than otherwise might have been the case.

445. Proposed AR 44(3) maintains the current rule that the Centre will prepare and publish excerpts of the legal reasoning in the Award if the parties do not consent to publication. However, it now establishes a procedure to do so, with clear time frames attached. The procedure proposed allows the parties to agree on redactions from the excerpts, to ensure that confidentiality is respected.

RULE 45 – PUBLICATION OF ORDERS AND DECISIONS

CURRENT RELATED PROVISIONS: AFR 22, 23

Rule 45
Publication of Orders and Decisions

(1) The Centre shall publish orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.

(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on the redactions, the Centre shall refer the order or decision to the Tribunal to determine any redactions, and shall publish the order or decision with the redactions approved by the Tribunal.

Article 45
Publication des ordonnances et des décisions

(1) Le Centre publie les ordonnances et les décisions dans les 60 jours suivant la date à laquelle elles ont été rendues, avec tous caviardages convenus entre les parties et notifiés conjointement au Centre dans ce délai de 60 jours.

(2) Si l'une des parties notifie au Centre, dans le délai de 60 jours visé au paragraphe (1), que les parties ne sont pas d'accord sur les caviardages, le Centre soumet l'ordonnance ou la décision au Tribunal qui détermine le caviardage à effectuer, et publie l'ordonnance ou la décision avec les caviardages approuvés par le Tribunal.

Regla 45
Publicación de Resoluciones y Decisiones

(1) El Centro publicará resoluciones y decisiones dentro de los 60 días siguientes a su emisión, con cualquier supresión de texto que haya sido acordada por las partes y notificada conjuntamente al Centro dentro del plazo de 60 días.

(2) Si cualquiera de las partes notificara al Centro dentro del plazo de 60 días al que se refiere el párrafo (1) que las partes no están de acuerdo respecto de las supresiones de texto, el Centro remitirá la resolución o decisión al Tribunal quien determinará las supresiones de texto que deban ser realizadas, y publicará la resolución o decisión con las supresiones de texto que sean aprobadas por el Tribunal.

446. As in the case of Awards, parties may address publication of orders and decisions in their individual treaties, contracts or laws, by ratifying the Mauritius Convention, or by case-specific agreements. However, if parties do not do so, the ICSID Rules will govern publication of decisions and orders by tribunals.

447. Unlike for Awards, there is no requirement in the ICSID Convention or the AR requiring party consent to publication of orders and decisions. As a result, they may be published by either party (subject to any confidentiality undertakings in the arbitration) and by the Centre.

448. Proposed AR 45 recognizes that parties are free to publish orders and decisions, but that there may well be legitimate claims to confidentiality in these. As a result, proposed AR 45 establishes a 60-day period after dispatch of the decision or order for the parties to agree on publication and to provide the Centre with the document, jointly redacted if necessary. The fact that parties must jointly redact the document should ensure that redactions are properly limited.

449. In any event, proposed AR 45 allows the parties to refer disputes on redaction of orders and decisions to the Tribunal. ICSID will then publish the decision or order.

450. If parties fail to provide any notice within the 60-day period after dispatch, ICSID will automatically publish the order or decision in full.

451. This provision should result in publication of a greater number of orders and decisions, while preserving the ability of the parties to protect legitimately confidential information that might be in such documents. It also allows ICSID to publish orders or decisions which have been jointly redacted by the parties.

RULE 46 – PUBLICATION OF DOCUMENTS FILED BY A PARTY

CURRENT RELATED PROVISIONS: AFR 22, 23

Rule 46
Publication of Documents Filed by a Party

Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.

Article 46
Publication des documents déposés par une partie

À la demande d'une partie, le Centre publie toutes écritures, observations, ou tous autres documents que cette partie a déposés au cours de l'instance, avec les caviardages convenus entre les parties.

Regla 46
Publicación de Documentos Presentados por una Parte

A solicitud de una de las partes, el Centro publicará cualquier escrito, observación u otro documento que esa parte haya presentado en el marco del procedimiento, con las supresiones de texto acordadas por las partes.

452. Numerous documents other than Awards, orders and decisions are generated in an arbitration. These include memorials, witness statements, expert opinions and exhibits.

453. Again, parties may address publication of such documents in their individual treaties, contracts or laws, by ratifying the Mauritius Convention, or by case-specific agreements. However, if parties do not do so, the ICSID Rules will govern publication of orders and decisions. There is currently no ICSID rule preventing publication of these documents, although it is often addressed in a first session.

454. Proposed AR 46 allows parties to provide a copy of such documents to ICSID, with mutually agreed redaction, for publication. This ensures that ICSID can publish an accurate document which does not breach confidences of either party.

RULE 47 – OBSERVATION OF HEARINGS

CURRENT RELATED PROVISIONS: AR 32

Rule 47
Observation of Hearings

(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal to observe hearings, unless either party objects.

(2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.

(3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.

Article 47
Observation des audiences

(1) Le Tribunal permet à des personnes, outre les parties, leurs représentants, les témoins et experts au cours de leurs dépositions, et les autres personnes assistant le Tribunal, d'observer les audiences, sauf si l'une des parties s'y oppose.

(2) Le Tribunal met en place des procédures pour empêcher la divulgation d'informations confidentielles aux personnes qui observent les audiences.

(3) Le Centre publie les enregistrements et les transcriptions des audiences, sauf si l'une des parties s'y oppose.

Regla 47
Observación de las Audiencias

(1) El Tribunal permitirá que otras personas además de las partes, sus representantes, testigos y peritos(as) durante su testimonio, así como las personas que asistan al Tribunal observen las audiencias, a menos que cualquiera de las partes se oponga.

(2) El Tribunal establecerá procedimientos para prevenir la revelación de información de carácter confidencial a las personas que observen las audiencias.

(3) El Centro publicará las grabaciones y transcripciones de las audiencias, a menos que cualquiera de las partes se oponga.

455. Parties also regulate observation of hearings in their individual treaties, by accession to the Mauritius Convention, or by case-specific agreement. Many States have treaty-specific provisions addressing access to hearings. These range from full access, to access with permission of both parties or of the respondent, to no access at all. Such provisions take precedence over the ICSID rules on attendance at hearings.

456. Proposed AR 47(1) maintains the current Rule allowing public access to hearings unless either party objects.

457. Proposed AR 47(2) requires the Tribunal to take necessary steps to preserve confidentiality during a hearing. Schedule 8 describes how the Centre provides for public access to hearings in person or through broadcast or webcast, and how it ensures confidential portions of a hearing remain closed.

458. Proposed AR 47(3) is a new provision, and requires publication of recordings or transcript of a hearing unless either party objects. This mirrors proposed AR 47(1) and provides a further method of allowing access to hearings. The Centre maintains a library of hearing videos on its public website and these are also accessible through the relevant case webpage (*see e.g.*, *BSG Resources Ltd v. Republic of Guinea* (ARB/14/22)).

RULE 48 – SUBMISSION OF NON-DISPUTING PARTIES

CURRENT RELATED PROVISIONS: AR 37(2)

Rule 48
Submission of Non-disputing Parties

(1) Any person or entity that is not a disputing party ("non-disputing party") may apply

for permission to file a written submission in the proceeding.

(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

(a) whether the submission would address a matter within the scope of the dispute;

(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(c) whether the non-disputing party has a significant interest in the proceeding;

(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and

(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on the conditions for filing such a submission, if any.

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to:

(a) the format, length or scope of the submission;

(b) the date of filing; and

(c) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation.

(5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.

(6) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

Article 48
Écritures des parties non contestantes

(1) Toute personne ou entité qui n'est pas partie au différend (« partie non contestante ») peut demander l'autorisation de déposer des écritures dans le cadre de l'instance.

(2) Afin de déterminer s'il autorise les écritures d'une partie non contestante, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment :

(a) si les écritures aborderaient une question qui s'inscrit dans le cadre du différend ;

(b) comment les écritures aideraient le Tribunal à trancher une question de fait ou de droit relative à l'instance en y apportant un point de vue, une connaissance ou un éclairage particulier distincts de ceux présentés par les parties au différend ;

(c) si la partie non contestante porte à l'instance un intérêt significatif ;

(d) l'identité, les activités, l'organisation et les propriétaires de la partie non contestante, y compris toute affiliation directe ou indirecte entre la partie non contestante, une partie ou une Partie à un Traité non contestante ; et

(e) si une personne ou une entité apportera à la partie non contestante une assistance financière ou autre pour déposer les écritures.

(3) Les parties ont le droit de présenter leurs observations sur la question de savoir si une partie non contestante doit être autorisée à déposer des écritures dans le cadre de l'instance et sur les conditions éventuelles du dépôt de telles écritures.

(4) Le Tribunal s'assure que la participation de la partie non contestante ne perturbe pas l'instance ou qu'elle n'impose pas une charge excessive à l'une des parties ou lui cause injustement un préjudice. À cette fin, le Tribunal peut imposer des conditions à la partie non contestante, notamment en ce qui concerne :

(a) la forme, la longueur ou l'étendue des écritures;

(b) la date de dépôt ; et

(c) le versement de fonds pour couvrir les frais supplémentaires de la procédure imputables à la participation de la partie non contestante.

(5) Le Tribunal peut donner à la partie non contestante accès aux documents pertinents déposés dans le cadre de l'instance, sauf si l'une des parties s'y oppose.

(6) Si le Tribunal autorise une partie non contestante à déposer des écritures, les parties ont le droit de présenter des observations sur ces écritures.

Regla 48
Escritos de Partes No Contendientes

(1) Cualquier persona o entidad que no sea parte en la diferencia ("parte no contendiente") podrá solicitar permiso para presentar un escrito en el marco del procedimiento.

(2) Al determinar si permite la presentación de un escrito de una parte no contendiente, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) si el escrito se referiría a una cuestión dentro del ámbito de la diferencia;

(b) de qué manera el escrito ayudaría al Tribunal en la determinación de las cuestiones de hecho o de derecho relacionadas con el procedimiento al aportar una perspectiva, un conocimiento o una visión particulares distintos a aquéllos de las partes en la diferencia;

(c) si la parte no contendiente tiene un interés significativo en el procedimiento;

(d) la identidad, actividades, organización y los propietarios de la parte no contendiente, lo cual incluye toda afiliación directa o indirecta entre la parte no contendiente, una parte o una parte no contendiente del tratado; y

(e) si alguna persona o entidad le proporcionara a la parte no contendiente asistencia financiera u otro tipo de asistencia para efectuar la presentación.

(3) Las partes tendrán derecho a formular observaciones respecto de si debería permitirse a una parte no contendiente presentar un escrito en el marco del procedimiento y, en su caso, respecto de las condiciones para la presentación de dicho escrito, si se presentara.

(4) El Tribunal deberá asegurarse de que la participación de la parte no contendiente no perturbe el procedimiento, o genere una carga indebida, o perjudique injustamente a cualquiera de las partes. A tal fin, el Tribunal podrá imponer condiciones a la parte no contendiente, lo cual incluye con respecto a lo siguiente:

(a) el formato, extensión o alcance del escrito;

(b) la fecha de la presentación; y

(c) el desembolso de fondos para sufragar el aumento de costos del procedimiento que sean atribuibles a la participación de la parte no contendiente.

(5) El Tribunal le podrá proporcionar a la parte no contendiente acceso a los documentos pertinentes presentados en el marco del procedimiento, a menos que cualquiera de las partes se oponga.

(6) Si el Tribunal le permitiera a una parte no contendiente presentar un escrito, las partes tendrán derecho a formular observaciones sobre el mismo.

459. Proposed AR 48 addresses non-disputing party (NDP) participation. Again, the ICSID Rules apply only to the extent that a treaty-specific or case-specific provision does not apply.

460. NDP provisions first appeared in the ICSID Rules pursuant to the 2006 amendments. Since then, over 60 cases have addressed non-disputing participation (*see* table on Decisions on Non-disputing Party Participation in ICSID Cases). The proposed rules in this WP build off the 2006 rules, and make some changes based on practice and experience to date.

461. Schedule 8 addresses NDP participation and describes the history, practice and rationale for these proposals in detail.

462. Proposed AR 48(1) allows any party that is not a disputing party to apply for permission to file an NDP submission. This maintains the two-step process in the current rules whereby permission to file must be obtained prior to filing the substantive submission addressing the point in issue.

463. Proposed AR 48(2)(a)–(c) retain the criteria for obtaining permission to file an NDP submission found in the 2006 rules. In addition, two criteria arising from caselaw and some new treaties are added.

464. Proposed AR 48(2)(d) requires further information about the entity applying to file the submission. This will allow parties and the Tribunal to better assess the perspective and expertise of the proposed NDP and whether there are any relationships between the proposed NDP and any party.

465. Similarly, proposed AR 48(2)(e) is new, and reflects comments received from States or applied in some cases and new treaties. It requires a proposed NDP to state whether it is receiving financial or other assistance in filing the submission. While such assistance is not a bar to participation, it bears on the perspective which that NDP might have.

466. Proposed AR 48(3) allows disputing parties to file observations on whether the NDP should be allowed to file a written submission. It expressly notes that such observations may address both whether such participation should be granted and if so, on what conditions. This reflects existing practice, where disputing parties address both the potential to participate and whether conditions should be imposed on such participation.

467. Proposed AR 48(4) is related to proposed AR 48(3) in that it addresses some of the potential conditions for NDP participation in greater detail than did the prior rules. It maintains the

general conditions in the prior rules, that the NDP submission not unduly burden or unfairly prejudice the disputing parties.

468. Proposed AR 48(4)(a) and (b) expressly note the potential for conditions as to the length and filing dates of the NDP submission. This is intended to remind Tribunals and parties to address these points, preferably early in the process.

469. Proposed AR 48(4)(c) gives the Tribunal discretion to order the NDP to contribute funds as a pre-condition to filing an NDP submission. This is a new provision, and reflects the comments of many parties and of several Tribunals on the extent to which an NDP submission may significantly increase costs in the case. The proposed AR gives the Tribunal discretion to order a contribution; it may decide not to do so given the financial capacity of an NDP or their public mandate. On the other hand, some NDP may have a commercial purpose or financial capacity to contribute, and in these cases, Tribunals might consider such a pre-condition as appropriate. Any such pre-condition must be linked to the actual increased cost attributable to the participation of the NDP.

470. Proposed AR 48(5) addresses an inconsistency in the caselaw. Some Tribunals have ordered disputing parties to provide documents to NDP to ensure the NDP submission is focused. In some cases, these have been redacted and non-public documents. Other Tribunals have refused to order access to documents, noting that NDP participation is a limited right to make a written submission, and not a greater right to access party documents or otherwise be a participant in the arbitration. Proposed AR 48(5) allows the Tribunal to order production of case documents, but either party may object to such production. As a result, parties are not faced with the possibility of having to provide an NDP with a confidential document.

471. Finally, proposed AR 48(6) allows disputing parties to make observations on the submissions of NDP that are granted the right to file a written submission. This reflects current practice.

RULE 49 – PARTICIPATION OF NON-DISPUTING TREATY PARTY

CURRENT RELATED PROVISIONS: AR 37(2)

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.

(2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 48.

(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.

Article 49
Participation d'une Partie à un Traité non contestante

(1) Le Tribunal doit autoriser une partie à un traité qui n'est pas partie au différend (« Partie à un Traité non contestante ») à présenter des écritures sur l'application ou l'interprétation d'un traité en cause dans le différend.

(2) Un Tribunal peut autoriser une Partie à un Traité non contestante à présenter des écritures sur toute autre question dans le cadre du différend, conformément à la procédure prévue à l'article 48.

(3) Les parties ont le droit de présenter des observations sur les écritures de la Partie à un Traité non contestante.

Regla 49
Participación de una Parte No Contendiente del Tratado

(1) El Tribunal permitirá que una parte de un tratado que no sea parte en la diferencia ("parte no contendiente del tratado") presente un escrito sobre la aplicación o interpretación de un tratado objeto de la diferencia.

(2) Un Tribunal podrá permitir que una parte no contendiente del tratado presente un escrito sobre cualquier otra cuestión dentro del ámbito de la diferencia, de conformidad con el procedimiento establecido en la Regla 48.

(3) Las partes tendrán derecho a presentar observaciones sobre el escrito de la parte no contendiente del tratado.

472. Proposed AR 49 is a new provision. It allows a non-disputing Treaty Party (NDTP) to make a submission on a question of interpretation or application of a treaty as a matter of right. It is inspired by various modern investment treaties which specifically confer this right on non-disputing State parties and REIO signatories to the treaty. It is proposed for consideration as many older treaties do not contain such a provision, and States, investors and Tribunals sometimes need the perspective of the other Treaty Party to understand an issue fully.

473. Proposed AR 49 would only apply to arguments on the interpretation or application of the treaty, where the other Treaty Party would be expected to have relevant knowledge. It does not apply to participation for other purposes, in which case the State or REIO would have to apply under proposed AR 48 for permission to participate and would have to meet the conditions in that rule.

CHAPTER VIII - SPECIAL PROCEDURES

474. The proposed Chapter on Special Procedures includes provisions that may be used in proceedings depending on the circumstances of each case. This Chapter is currently titled "Particular Procedures" and includes the provisions on Preliminary Objections and Settlement and Discontinuance. The rule on Preliminary Objections has been moved to Chapter V on Initial Procedures to emphasize that such objections must be raised as soon as possible in the proceeding (*see* proposed AR 35-37). The rules on Settlement and Discontinuance are now in a special Chapter (*see* Chapter IX – Suspension and Discontinuance).

475. The remaining provisions in the proposed Chapter concern provisional measures (current AR 39), a new provision on security for costs, ancillary claims (current AR 40) and default (current AR 42).

RULE 50 – PROVISIONAL MEASURES

CURRENT RELATED PROVISIONS: Convention Art. 47; AR 39

Chapter VIII
Special Procedures

Rule 50
Provisional Measures

(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party's rights, including measures to:

(a) prevent action that is likely to cause:

(i) current or imminent harm to the other party; or

(ii) prejudice to the arbitral process;

(b) maintain or restore the *status quo* pending determination of the dispute; and

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances. The Tribunal shall only recommend provisional measures if it determines that they are urgent and necessary.

(4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request.

(7) A party may request any judicial or other authority to order provisional measures if such recourse is available in the instrument recording the parties' consent to arbitration.

Chapitre VIII
Procédures particulières

Article 50
Mesures conservatoires

(1) Une partie peut à tout moment requérir du Tribunal qu'il recommande des mesures conservatoires pour préserver les droits de cette partie, notamment des mesures destinées à :

(a) empêcher un acte susceptible de :

(i) causer un dommage réel ou imminent à l'autre partie ; ou

(ii) porter préjudice au processus arbitral ;

(b) maintenir ou rétablir le *statu quo* en attendant que le différend soit tranché ; et

(c) préserver des moyens de preuve susceptibles d'être pertinents pour le règlement du différend.

(2) La procédure suivante s'applique :

(a) la requête spécifie les droits devant être préservés, les mesures sollicitées et les circonstances qui rendent ces mesures nécessaires ;

(b) le Tribunal fixe les délais dans lesquels les écritures ou plaidoiries, le cas échéant, relatives à la requête doivent être présentées ;

(c) si une partie sollicite des mesures conservatoires avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais dans lesquels les écritures relatives à la requête doivent être présentées, de sorte que le Tribunal puisse examiner la requête sans délai après sa constitution ; et

(d) le Tribunal rend sa décision sur la requête dans les 30 jours suivant la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à la requête; ou

(iii) la date des dernières plaidoiries relatives à la requête.

(3) Afin de décider s'il recommande des mesures conservatoires, le Tribunal tient compte de l'ensemble des circonstances pertinentes. Le Tribunal ne recommande des mesures conservatoires que s'il détermine qu'elles sont urgentes et nécessaires.

(4) Le Tribunal peut recommander des mesures conservatoires de sa propre initiative. Il peut également recommander des mesures conservatoires différentes de celles sollicitées par une partie.

(5) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a recommandé des mesures conservatoires.

(6) Le Tribunal peut à tout moment modifier ou révoquer les mesures conservatoires, de sa propre initiative ou à la demande d'une partie.

(7) Une partie peut demander à toute autorité judiciaire ou autre d'ordonner des mesures conservatoires si un tel recours est prévu dans l'instrument prenant acte du consentement des parties à l'arbitrage.

Capítulo VIII
Procedimientos Especiales

Regla 50
Medidas Provisionales

(2) En cualquier momento, cualquiera de las partes puede solicitar que el Tribunal recomiende la adopción de medidas provisionales para salvaguardar sus derechos, lo cual incluye medidas para:

(a) impedir acciones que probablemente ocasionen:

(i) un daño actual o inminente a la otra parte; o

(ii) un menoscabo al proceso arbitral;

(b) mantener o restablecer el *status quo* hasta que se decida la diferencia; y

(c) preservar los medios de prueba que pudieran ser relevantes para la resolución de la diferencia.

(3) Se aplicará el siguiente procedimiento:

(a) la solicitud deberá especificar los derechos que se salvaguardarán, las medidas solicitadas, y las circunstancias que requieren la adopción de tales medidas;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de medidas provisionales;

(c) si una parte solicita medidas provisionales antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la solicitud, de tal forma que el Tribunal pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(4) Al momento de decidir si recomienda medidas provisionales, el Tribunal deberá considerar todas las circunstancias pertinentes. El Tribunal solamente recomendará que se adopten medidas provisionales si determina que estas son urgentes y necesarias.

(5) El Tribunal podrá recomendar medidas provisionales de oficio. El Tribunal también podrá recomendar medidas provisionales distintas de aquellas solicitadas por una parte.

(6) Una parte deberá revelar con prontitud cualquier cambio sustancial en las circunstancias en las que el Tribunal recomendó las medidas provisionales.

(7) El Tribunal podrá modificar o revocar las medidas provisionales en cualquier momento, de oficio o a solicitud de una de las partes.

(8) Una parte podrá solicitar a cualquier autoridad judicial o de otra naturaleza que adopte medidas provisionales si dicho recurso se encuentra disponible en el instrumento que refleje el consentimiento de las partes al arbitraje.

476. Provisional measures are usually requested by one of the parties to require the other party to maintain or restore the *status quo* or preserve evidence, or to refrain from acting in a manner that could harm the applicant or the proceeding pending the final decision of the Tribunal. Under Art. 47 of the Convention, a Tribunal can recommend provisional measures, but no definition or applicable criteria are provided to guide Tribunals in exercising this power. Article 47 is the result of a compromise during drafting between proponents of powerful provisional measures with binding effect and sanctions for non-compliance, and States that did not want any such provision.

477. Current AR 39, which implements Art. 47 of the Convention, was amended in 1984 and 2006. The 1984 amendment to current AR 39(6) included the possibility of requesting provisional measures from national courts if allowed by the instrument of consent to arbitration. The 2006 amendment reflected in current AR 39(5) allowed parties to submit a request for provisional measures prior to the constitution of the Tribunal with a briefing schedule fixed by the Secretary-General so that the Tribunal could decide the request soon after its constitution.

478. Comments received from Member States mainly suggested stricter criteria to grant provisional measures or to exclude measures seen as interfering with State sovereignty. Comments also called for clarification of the nature of the measures that could be granted and the binding nature of a Tribunal recommendation. Comments received from the public called for specific criteria to reconsider a decision on provisional measures and the introduction of an emergency arbitration procedure in the ICSID system.

479. Nature of Measures. Article 47 and current AR 39 do not specify the type of measures that can be requested. However, they establish that the purpose of provisional measures is to preserve the parties' procedural or substantive rights. These rights include preservation of the *status quo* and non-aggravation of the dispute, preservation of the procedural integrity of the proceedings (including access to and preservation of evidence), the exclusivity of ICSID proceedings under Art. 26 of the Convention, and preventing frustration of the anticipated Award.

480. Proposed AR 50(1)(a) to (c) provides a non-exhaustive list of provisional measures that a party may request from a Tribunal. This list is consistent with existing practice and mirrors existing arbitration rules, such as the UNCITRAL Arbitration Rules (2010), except that security for costs is addressed by a stand-alone provision (*see* below). The amendment proposed provides greater certainty about the measures that can be requested while maintaining flexibility for Tribunals and parties.

481. The WP does not propose to limit the type of measures that can be granted. Tribunals have been cautious in dealing with States' sovereign powers. For example, it is recognized that the right and duty to conduct criminal investigations and prosecutions is a sovereign prerogative of a State and that there is a "high threshold" before ICSID Tribunals recommend provisional measures in such a context (*see e.g.*, *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Kazakhstan* (ARB/13/13), Decision on the Claimant's Request for Provisional Measures (December 4, 2014), ¶135; *Churchill Mining v. Indonesia* (ARB/12/14 and 12/40), Procedural Order No. 14 (December 22, 2014), ¶72). In a few instances, Tribunals have found that the preservation of the *status quo* or the integrity of the proceedings warranted a stay of criminal proceedings because of exceptional circumstances (*see e.g.*, *Hydro v. Albania* (ARB/15/28), Order on Provisional Measures (March 3, 2016), ¶3.41; and *Quiborax S.A. and Non-Metallic Minerals S.A. v. Bolivia* (ARB/06/2), Decision on Provisional Measures (February 26, 2010), ¶164). Those exceptional circumstances are difficult to codify and the WP therefore proposes to leave them to the appreciation of Tribunals after hearing both parties.

482. Criteria for Recommending Provisional Measures. Proposed AR 50(2)(a) reprises the current wording of AR 39(1) which provides that the request shall specify the rights to be preserved, the measures requested and the circumstances that require such measures. In practice, an applicant must establish the urgency and necessity of the measures. Some Tribunals also require that the applicant show *prima facie* jurisdiction of the Tribunal a *prima facie* case on the merits. Tribunals also sometimes require that the measure be proportionate, known as the "balance of interests" or "convenience" test.

483. Proposed AR 50(3) specifies that the Tribunal must consider all the circumstances and imposes the requirements of urgency and necessity, which have uniformly been required in cases to date. However, the proposed rule does not incorporate certain other criteria, such as a requirement to demonstrate "irreparable harm," or a "risk thereof," or "harm not adequately reparable by an award of damages", as these have not been uniformly adopted in investment cases and may not be suitable in every circumstance.

484. Procedure. The WP clarifies the procedure to request provisional measures.

485. ***First***, proposed AR 50(2) deals with the handling of the request. Proposed AR 50(2)(b) states that the Tribunal fixes time limits for submissions regarding the request. Proposed AR 50(2)(c) reprises current AR 39(5) allowing the Secretary-General to automatically fix the calendar for submissions on receipt of a request for provisional measures prior to the constitution of the Tribunal. The requirement to ask the Tribunal to set time limits is deleted as it appeared futile. The Tribunal can require further observations once constituted and can also require a hearing if needed.

486. Proposed AR 50(2)(d) echoes current AR 39(2) in that priority is given to a request, and imposes a deadline of 30 days on the Tribunal to issue its recommendation. This deadline runs either from the constitution of the Tribunal contemplated in proposed AR 50(2)(d), if the Tribunal does not require further observations from the parties, or from the last oral or written submissions on the request, whichever is the latest.

487. ***Second***, as in current AR 39, proposed AR 50(4) concerns the general power of the Tribunal with respect to provisional measures and clarifies that the Tribunal has discretion to impose measures other than those requested by a party.

488. ***Third***, proposed AR 50(5) is partly new and relates to the modification or revocation of the measures. It requires the parties to provide information on any material change in the circumstances that led the Tribunal to grant the request. As under current AR 39(3), proposed AR 50(6) states that a Tribunal can modify or revoke the measures, even on its own initiative.

489. ***Fourth***, proposed AR 50(7) clarifies and modernizes the language of current AR 39(6) to the effect that the parties can submit a request for provisional measures to a national court if the instrument recording the parties' consent (*e.g.* a bilateral investment treaty, investment agreement, etc) so allows.

490. Decision is a Recommendation. As indicated above, some comments requested that the nature of Tribunals' decisions be clarified. Under Art. 47 of the ICSID Convention, the

drafters expressly provided that a Tribunal *recommends* provisional measures. Various Tribunals have ruled that *recommend* equates to *order*, although some have pointed out the difference between the two. Some treaties address this issue expressly. For example, NAFTA Art. 1134 provides that the Tribunal may "*order*" an interim measure, and that "[f]or purposes of this paragraph, an order includes a recommendation". As the term *recommend* appears in the Convention, it can only be modified through a Convention amendment.

491. Some comments also suggested elaborating on the term *recommend* by specifying the consequences of any default. However, taking into consideration the contentious debates during the drafting of the Convention and the objection of some States to binding provisional measures, the WP does not propose a new provision in this regard. At the same time, Tribunals remain free to draw inferences from the failure of a party to follow a recommendation for provisional measures.

492. Emergency Provisional Measures. Some comments suggested the introduction of emergency procedures in the ICSID system, arguing that the constitution of an ICSID Tribunal can be lengthy and that there is a risk of irreparable harm if a matter is not treated with urgency during that time. The WP does not propose such a mechanism. The tight schedule required for emergency arbitration could raise due process issues in cases involving States. Such a mechanism would in any event require an opt-in scheme, namely that both parties consent to the application of rules on emergency application. It is also worth noting that the trend in the latest BITs and FTAs is to allow a request for provisional measures before domestic courts prior to constitution of the Tribunal, hence offering possible urgent relief to the claimant pending the constitution of a Tribunal.

RULE 51 – SECURITY FOR COSTS

CURRENT RELATED PROVISIONS: Convention Art. 47; AFR 14; AR 16, 38, 39, 54

Rule 51
Security for Costs

(1) A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.

(2) The following procedure shall apply:

(a) the request shall specify the circumstances that require security for costs;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.

(4) If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request.

Article 51
Garantie du paiement des frais

(1) Une partie peut requérir du Tribunal qu'il ordonne à l'autre partie de fournir une garantie relative aux frais de la procédure et de déterminer les conditions appropriées pour qu'une telle garantie soit fournie.

(2) La procédure suivante s'applique :

(a) la requête précise les circonstances exigeant la garantie pour le paiement des frais ;

(b) le Tribunal fixe les délais dans lesquels les écritures ou plaidoiries, le cas échéant, relatives à la requête doivent être présentées ;

(c) si une partie sollicite une garantie pour le paiement des frais avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais dans lesquels les

écritures relatives à la requête doivent être présentées, afin que le Tribunal puisse examiner la requête dans les plus brefs délais après sa constitution ; et

(d) le Tribunal rend sa décision concernant la requête dans les 30 jours suivant la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à la requête ; ou

(iii) la date des dernières plaidoiries relatives à la requête.

(3) Afin de déterminer s'il ordonne à une partie de fournir une garantie pour le paiement des frais, le Tribunal tient compte de la capacité de cette partie à se conformer à une décision la condamnant à payer les frais ainsi que de toutes autres circonstances pertinentes.

(4) Si une partie ne se conforme pas à une ordonnance lui imposant de fournir une garantie pour le paiement des frais, le Tribunal peut suspendre la procédure jusqu'à ce que cette garantie soit fournie. Si la procédure est suspendue pendant plus de 90 jours, le Tribunal peut, après consultation des parties, ordonner la fin de l'instance.

(5) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a ordonné que la garantie pour le paiement des frais soit fournie.

(6) Le Tribunal peut à tout moment modifier ou révoquer son ordonnance imposant que la garantie pour le paiement des frais soit fournie, de sa propre initiative ou à la demande d'une partie.

Regla 51
Garantía por Costos

(1) Una parte podrá solicitar que el Tribunal ordene que la otra parte otorgue una garantía por costos del procedimiento y determine los términos adecuados para el otorgamiento de dicha garantía.

(2) Se aplicará el siguiente procedimiento:

(a) la solicitud especificará las circunstancias que requieran una garantía por costos;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud;

(c) si una parte solicita una garantía por costos antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la solicitud, de tal forma que el Tribunal pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(3) Al determinar si le ordena a una parte que otorgue una garantía por costos, el Tribunal deberá considerar la capacidad que tiene dicha parte para cumplir con una decisión adversa en materia de costos y cualquier otra circunstancia relevante.

(4) Si una parte incumpliera una orden de garantía por costos, el Tribunal podrá suspender el procedimiento hasta que se otorgue la garantía. Si el procedimiento se suspendiera durante más de 90 días, el Tribunal podrá, previa consulta a las partes, ordenar la discontinuación del procedimiento.

(5) Una parte deberá revelar con prontitud cualquier cambio sustancial en las circunstancias en las que el Tribunal ordenó la garantía por costos.

(6) El Tribunal podrá en cualquier momento modificar o revocar la orden de garantía por costos de oficio o a solicitud de una de las partes.

493. The form of relief known as "security for costs" addresses the risk that a party may not comply with a costs award rendered against it. An order for security for costs requires a party to provide a security to cover the estimated costs that the other party will incur in the proceeding, including arbitration costs and legal fees. The security may be a deposit into an escrow account, a letter of credit, a bank guarantee or another form of financial security.

494. Security for costs are normally ordered early in the proceeding. At the conclusion of the case, depending on the Tribunal's decision on costs, the security will either be returned to the party that posted it or collected by the other party.

495. Security for costs must be distinguished from other forms of security, which are addressed elsewhere in the ARs. For example, pre-judgment security relating to an anticipated damages award (*i.e.*, security for an Award) may be requested by a claimant under proposed AR 50 on provisional measures if the circumstances allow (*e.g.*, to maintain the *status quo* between the parties). More commonly, in the context of an annulment

proceeding, the Committee may order a party to provide security as a condition of the stay of enforcement of the Award (*see* proposed AR 67 on Stay of Enforcement).

496. Policy Considerations.The question of whether security for costs should be ordered in a specific case depends on the circumstances of that case and the applicable rules. Yet there is also a broader policy level discussion concerning whether the remedy should be granted in international dispute settlement proceedings only rarely, or whether it should be more readily available.

497. The policy arguments most often raised in favor of security for costs include the following:

- Security for costs ordered against a claimant may balance the positions of the parties. On the one hand, a claimant can choose whether to incur the costs of pursuing a claim based on an assessment of the strength of its case, the likelihood of success, and the prospect of recovery on an Award in its favor. On the other hand, a respondent must either incur costs to defend against the claim or accept the risk of an adverse award.

- Similarly, in the investor-State arbitration context, security for costs may address the perceived imbalance in the parties' ability to enforce an Award. State respondents are less likely to be judgment-proof than individual or corporate claimants which may have insufficient assets as a result of bankruptcy, corporate structuring, or otherwise.

- When a court or Tribunal has the power to allocate the costs of the proceeding among the parties, it also must have the power to order security for costs to ensure that its award of costs is given effect.

- While the risk that security for costs will deter valid claims is an important concern, it is not a reason to restrict access to the remedy generally. Rather, it is one of several factors that a court or Tribunal must consider in deciding whether to grant a specific request for security for costs.

- The perceived risk of non-compliance with costs awards has increased with growing reliance on third-party funding. Third-party funding arrangements may allow impecunious claimants to pursue claims. The funder will benefit if such a claimant prevails, but if the case is lost, the funder may avoid liability for any costs awarded in favor of the respondent.

498. The main arguments made against security for costs are as follows:

- Making security for costs more available to respondents may deter meritorious claims. In this way, a claimant that is unable to post a security to cover the respondent's expected costs will be deprived of its access to justice and potentially to obtain recourse on its claim.

- Security for costs also raises concerns about fairness. It may be perceived as punishing a claimant for financial difficulties that are unrelated to the proceeding. In some instances, those difficulties may even be the result of the respondent's actions, which

form the basis of the claimant's claim. Requiring a claimant to post security for a future costs award prior to an assessment of its claims could compound the claimant's financial distress.

- A party's right to recover its costs materializes only once it receives a favorable costs award from the Tribunal, often in connection with having prevailed in the case. Thus, deciding an application for security for costs can be perceived as requiring the Tribunal to prejudge the merits of the case and the future allocation of costs.

- In international dispute settlement proceedings, parties come from a range of legal systems that treat security for costs differently. In this context, the permissive use of security for costs disfavors parties from jurisdictions where security for costs is not available as a matter of domestic law.

- Third-party funding does not necessarily indicate a party's inability or unwillingness to pay a costs award.

499. ICSID Practice. Currently, neither the Convention nor the Arbitration Rules expressly address security for costs. Because security for costs can be considered a form of interim relief, it has generally been requested and decided under current AR 39 governing provisional measures, and by reference to the Tribunal's inherent powers under Art. 44 of the Convention in annulment proceedings.

500. Accordingly, parties requesting security for costs have been required to establish that the legal standard for provisional measures has been met. The threshold element of this test, discussed above in relation to AR 50, is the existence of a right in need of protection. The prevailing view has been that Tribunals have the power to order security for costs as a provisional measure to preserve a party's (hypothetical) right to an eventual costs award. However, a small number of Tribunals have arrived at the opposite conclusion.

501. Tribunals have also required the requesting party to prove that it will suffer serious or irreparable harm if an order of security for costs is not granted, and that the security is "urgent" and "necessary". In undertaking this analysis, Tribunals have considered factors such as: whether the other party has insufficient assets to cover a costs award, has failed to comply with past costs awards or other obligations, or may act in bad faith to shield assets. Evidence of "exceptional circumstances" is routinely required.

502. In practice, it has been difficult for parties requesting security for costs to meet this burden. As of July 2018, there has been only one public decision granting an application for security for costs (*RSM Production Corporation v. Saint Lucia* (ARB/12/10), Decision on Saint Lucia's Request for Security for Costs (August 13, 2014)). In that case, the Tribunal's decision was based on its finding that the claimant: (a) had a proven history of non-compliance with costs awards due to its unwillingness or inability to pay; (b) had admitted that it did not have sufficient financial resources to fund its case; and (c) was funded by an unknown third party which the Tribunal considered might not comply with a possible costs award rendered in favor of the respondent.

503. Recent Developments. Express references to security for costs have become more common in international arbitration rules and in international investment treaties as a result of recent rule amendments and treaty negotiations.

504. For example, the 2010 UNCITRAL Arbitration Rules include a non-exhaustive list of possible interim measures, including measures that "provide a means of preserving assets out of which a subsequent award may be satisfied" (Art. 26(2)). It is understood that "award" in this context includes costs awards, and that security for costs would therefore fall within this provision. Both the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules and the 2017 Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules include an independent provision on security for costs. The 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) include a provision which expressly empowers the Tribunal to order security for costs and to "stay or dismiss a party's claims in whole or in part" if that party fails to comply with such an order. It also sets out circumstances that the Tribunal "shall have regard to" in deciding whether to order security (Art. 38). In contrast, the 2017 Arbitration Rules of the International Chamber of Commerce (ICC) do not refer expressly to security for costs.

505. Recent treaty negotiations have also led to the inclusion of provisions on security for costs in the investment chapters of the EU-Vietnam FTA (Art. 22) and the EU-Mexico FTA (Art. 22) drafts. Both expressly empower the Tribunal to order security for costs "if there are reasonable grounds to believe that the claimant risks not being able to honor a possible decision on costs issued against [it]" and to suspend or terminate the proceeding if a claimant fails to comply with the order within 30 days.

506. Comments Received. ICSID received nearly twenty submissions on security for costs, primarily from Member States, but also from a few organizations and individuals. The submissions proposed various amendments to the ICSID Rules.

507. Several States suggested that the parties' right to request security for costs should be codified, either as a provisional measure or separately. A few States and commentators proposed specifying the criteria Tribunals should consider in deciding a request for security for costs, including:

- the existence of reasonable grounds to believe there is a risk of the claimant not being able to honor a possible costs award in favor of the respondent;
- whether the request for arbitration has been filed by multiple claimants; or
- the existence and scope of third-party funding and whether the arrangement provides for the funder to pay an adverse costs order against the claimant.

508. In contrast, one commentator expressed the view that the way in which a claimant chooses to fund its ICSID claim is not a matter which should concern the respondent or a Tribunal.

509. Some States suggested that the perceived strict standard for an order of security for costs should be lowered, and that the Tribunal should be permitted to suspend or discontinue the proceeding if a claimant does not comply with an order for security for costs within 30 days.

510. One State proposed that the obligation to pay all costs of the proceedings should transfer to the claimant if:

- the claimant does not submit evidence of sufficient funds to pay the full costs of the proceedings or an agreement providing that a third party will cover the full costs of the proceedings within 15 days after the constitution of the Tribunal;
- the claimant is in default on a costs award or any other monetary obligation issued by an ICSID Tribunal;
- the claimant fails to pay the first advance payment to ICSID within the period established by the Secretary General; or
- the respondent demonstrates that the claimant has committed an abuse of process in any arbitral proceeding, or that it is a shell company without sufficient assets to cover the full costs of the proceedings.

511. Another State similarly suggested that the claimant should be required to post security for costs if it cannot demonstrate in the Request for arbitration that it has sufficient resources to pay the other party's costs, or if it has failed to comply with a costs award in other investment arbitrations.

512. Overall, the comments of Member States reflect a central concern: the risk that claimants will fail to comply with costs awards. In practice, successful respondents have been awarded costs in many ICSID cases. As part of this amendment process, and at the request of Panama, ICSID conducted a survey on compliance with and enforcement of such costs awards, the results of which are available on ICSID's website.

513. Proposals. Any express reference to security for costs in the AR must balance the rights of the parties. Specifically, it should address the risk of non-compliance with costs awards while preserving the right to resolve disputes through ICSID arbitration. At the same time, it must be sufficiently flexible to apply fairly and effectively across the diverse range of ICSID cases.

514. The WP proposes a new stand-alone provision, AR 51, to address security for costs in accordance with these principles. It provides guidance to Tribunals on security for costs without affecting their approach to provisional measures (proposed AR 50). In this way, the proposal treats security for costs as a unique form of relief, reflecting the view that a Tribunal's power to order security for costs flows not only from Art. 47 of the Convention, but also is connected to its power to allocate the costs of the proceeding among the parties.

515. Accordingly, proposed AR 51(1) states that the Tribunal may order a party to provide security for the costs of the proceeding. One question for Member States is whether the

term "order" is preferable to the term "recommend". As discussed above in relation to provisional measures, proposed AR 50 aligns with the language of Art. 47 of the Convention by stating that a Tribunal may "recommend" provisional measures. If security for costs is included in a separate provision that is not required to align with Article 47, the use of the term "order" would be consistent with the Convention.

516. The use of the term "order" may be preferable in a separate provision on security for costs if Member States wish to expressly empower the Tribunal to suspend or discontinue the proceeding as a possible consequence of non-compliance with an order for security for costs (*see* the discussion of proposed AR 51(3) below).

517. Several other aspects of AR 51(1) should be noted. It allows security for costs orders to be made against either party. This flexibility ensures that the provision can apply effectively in all circumstances, including, for example, when a respondent raises counterclaims.

518. Proposed AR 51(1) also specifies that security for costs may be ordered only upon the request of a party. This recognizes the unique nature of security for costs. While it is sensible for the Tribunal to have the power to call for certain forms of relief on its own initiative (*e.g.*, provisional measures for the preservation of evidence), there is no scenario in which the Tribunal needs this power with respect to security for costs. As any security ordered will be in favor of a party, it is reasonable to require that party to determine whether it wants a security and, if so, to make a reasoned request.

519. Proposed AR 51(1) refers to "security for the costs of the proceeding". This phrase "costs of the proceeding" is defined in AR 19(2) (Costs of the Proceeding) as the legal fees and expenses incurred by the parties in connection with the proceeding, the fees and expenses of the Tribunal, and the administrative charges and other direct costs of the Centre.

520. Proposed AR 51(1) also specifies that the Tribunal is to determine the appropriate terms for provision of the security. The relevant "terms" could include, for example, the form of security (*e.g.*, a bank guarantee or a letter of credit), the duration of the security, the issuer of the security, other specific requirements, and the party that is to bear the cost of the security. In many cases, Tribunals may consult with the parties to determine what terms are available and appropriate.

521. Proposed AR 51(2) sets forth the procedure for a request for security for costs, which is similar to the procedure for a request for provisional measures under proposed AR 50 and a request for stay of enforcement of an Award under proposed AR 65.

522. ***First***, proposed AR 51(2)(a) states that the request must specify the circumstances that require an order of security for costs.

523. ***Second***, proposed AR 51(2)(b) requires that the Tribunal fix time limits for the submissions on the request.

524. ***Third***, proposed AR 51(2)(c) addresses the situation in which the request for security for costs precedes the constitution of the Tribunal. It states that the Secretary-General is to fix time limits for observations on the request, so that the Tribunal can consider the parties'

submissions promptly after it is constituted. This provision does not, however, prevent the Tribunal from instructing the parties to make further submissions on the request.

525. ***Fourth***, AR 51(2)(d) limits the time to issue the Tribunal's decision to 30 days, starting either from the constitution of the Tribunal or the parties' last oral or written submissions on the request, whichever is later. This time limit is intended to promote time and cost efficiency with respect to a request for security for costs without compromising the Tribunal's ability to fully consider the parties' submissions in reaching its decision.

526. Proposed AR 51(3) addresses the criteria relevant to a Tribunal's decision on a request for security for costs. The Tribunal is required to consider two broad criteria. The aim is to provide general guidelines for Tribunals without inhibiting the flexibility they will need to address a vast range of factual circumstances.

527. The Tribunal must consider a party's ability to comply with an adverse decision on costs. This reflects current practice; Tribunals have consistently analyzed whether the relevant party has sufficient assets to satisfy a potential costs award. Importantly, however, Tribunals have not found that a lack of assets alone justifies granting security for costs. As discussed above, there must be other circumstances present, such as a history of noncompliance with legal orders or bad faith.

528. The Tribunal must also take into account "any other relevant circumstances". This broad formulation allows a Tribunal to consider any additional circumstances that weigh in favor of security for costs, including those mentioned above. In addition, it permits the Tribunal to take into account circumstances that may weigh against an order for security for costs, such as its effect on the party's ability to pursue its case in good faith.

529. The proposal avoids more specific mandatory criteria because: (i) the relevance of certain criteria varies on a case-by-case basis; (i) currently, there is insufficient case experience with security for costs in investment arbitration to devise a comprehensive list of mandatory criteria; and (iii) specific criteria could become outdated and compromise the longevity of the provision.

530. Consistent with this approach, proposed AR 51(3) does not refer expressly to TPF. Instead, it is drafted in general terms that would cover TPF or any other funding arrangement to the extent that such arrangement: (i) reflects on the party's ability to comply with an adverse decision on costs; or (ii) is a circumstance relevant to assessing the appropriateness of the security. Under proposed AR 21, parties are under a continuing obligation to disclose the existence of TPF immediately upon registration of the request for arbitration. As a consequence, this fact will be available to a party seeking security for costs and to the Tribunal that must decide the application. The Tribunal can then make further inquiries as needed.

531. Proposed AR 51(4) raises another important policy question for Member States: Should the ICSID rules identify the consequence of a party's failure to comply with an order for security for costs, and if so, what is the appropriate consequence? The new provision proposes that the Tribunal have the power to stay the proceeding until the security is

provided. If the proceeding is stayed for more than 90 days, the Tribunal may discontinue the proceeding after consulting with the parties. This procedure is again permissive, not mandatory; the Tribunal has discretion to determine whether to follow it in a particular case.

532. In assessing this proposal, Member States may wish to consider the following points:

- Proposed AR 51(4) would be unique within the AR, which otherwise give the Tribunal the power to discontinue the proceedings only with the (deemed) agreement or acquiescence of the parties (*see* proposed AR 55-58).

- In the context of security for costs, many of the tools normally employed by Tribunals to address non-compliance with an order may be ineffective. For example, a Tribunal is unable to draw adverse inferences on factual issues based on a party's failure to post security. Most notably, a Tribunal's allocation of costs against the non-complying party may be ineffective, as that party may be unable or unwilling to pay the costs award.

- Most arbitration rules, even those that expressly refer to the Tribunal's power to order security for costs, do not specify the consequence of non-compliance with such an order. The 2017 SCC Arbitration Rules are an exception to this. They provide that the Tribunal may stay or dismiss a party's claims in whole or in part if that party fails to comply with an order to provide security.

- A small number of recent treaty negotiations have resulted in provisions that allow the Tribunal to suspend or dismiss the case if a claimant fails to comply with an order for security for costs (*see* EU-Vietnam FTA and EU-Mexico FTA (not yet in force)).

533. Finally, proposed AR 51(5) and (6) concern modification or revocation of an order for security for costs. Proposed AR 51(6) mirrors AR 50(6), which relates to the modification or revocation of a recommendation for provisional measures. Under this proposal, once the Tribunal has issued an order for security for costs, it is expressly permitted to modify or revoke the order, either on the request of a party or on its own initiative. The Tribunal can thus ensure the effectiveness of its order or take account of a change in the circumstances on which the order was based. To assist the Tribunal in this regard, proposed AR 51(5) requires the parties to inform the Tribunal of any material change in those circumstances.

RULE 52 – ANCILLARY CLAIMS

CURRENT RELATED PROVISIONS: Convention Art. 46; AR 31(1), 40, 41(1)

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") arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented no later than the date to file the reply, and a counter-claim shall be presented no later than the date to file the counter-memorial, unless the Tribunal decides otherwise.

Article 52
Demandes accessoires

(1) Sauf accord contraire des parties, une partie peut déposer une demande incidente, additionnelle ou reconventionnelle (« demande accessoire ») se rapportant directement à l'objet du différend, à condition que cette demande accessoire soit couverte par le consentement des parties et qu'elle relève de la compétence du Centre.

(2) Une demande incidente ou additionnelle est présentée au plus tard à la date prévue pour le dépôt de la réponse, et une demande reconventionnelle est présentée au plus tard à la date prévue pour le dépôt du contre-mémoire, sauf si le Tribunal en décide autrement.

Regla 52
Demandas Subordinadas

(1) Salvo acuerdo en contrario de las partes, cualquiera de ellas podrá presentar una demanda incidental o adicional o una demanda reconvencional ("demanda subordinada") que se relacione directamente con el objeto de la diferencia, siempre que la demanda subordinada esté dentro del ámbito del consentimiento de las partes y de la jurisdicción del Centro.

(2) Toda demanda incidental o adicional se presentará a más tardar en la fecha de presentación de la réplica, y toda reconvención se presentará a más tardar en la fecha de presentación del memorial de contestación, salvo decisión en contrario del Tribunal.

534. Counterclaims and other ancillary claims have always been available under Art. 46 the Convention, which is mirrored in current AR 40. These provisions allow Tribunals to

address closely related claims in a single proceeding. Certain requirements must be met, namely that the relevant claim: (i) arises directly out of the same subject-matter as the main dispute; (ii) is covered by the consent of the parties; and (iii) falls within the jurisdiction of the Centre under Art. 25 of the Convention.

535. In addition, ancillary claims must be filed within certain time limits. Incidental and additional claims are submitted by the moving party and must be filed no later than with that party's reply (filed in accordance with current AR 31(1)(c)). Counterclaims are submitted by the other party and must be filed no later than with that party's counter-memorial (to be filed in accordance with current AR 31(1)(b)). If there is an objection to an ancillary claim, it should be filed no later than with the rejoinder (filed in accordance with current AR 31(1)(d)).

536. Counterclaims have not been very common in practice and have predominantly been raised in cases under investment contracts (*see e.g., Amco Asia Corporation and others v. Republic of Indonesia* (ARB/81/1), Award (November 20, 1984)). In most cases under investment treaties, Tribunals dealing with counterclaims found that they did not have jurisdiction over the counterclaim because this was not foreseen by the treaty (*see e.g., Gavazzi v. Romania* (ARB/12/25), Award (April 18, 2017)). However, some Tribunals have allowed a counterclaim in an investment treaty case and have ruled on its merits (*see e.g., Burlington v. Ecuador* (ARB/08/5), Decision on Counterclaims (February 7, 2017) and Decision on Reconsideration and Award (February 7, 2017)).

537. In recent years, some investment treaties have provided for the possibility of a respondent State filing a counterclaim under certain circumstances. For example, Art. 9.19.2 of the CPTPP provides: "When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant".

538. Counter-claims could become increasingly relevant under investment treaties that include reciprocal obligations for the investor and the State.

539. Few comments were received on current AR 40. One Member State suggested addressing counterclaims to ensure greater equality between the parties. Since the requirements to admit an ancillary claim are stated in the ICSID Convention, the WP does not propose to amend the current AR 40 requirements, which simply reflect the text of the Convention.

540. A comment by a member of the public noted that counterclaims may require additional briefing (a second round of submissions) and that this should be addressed in current AR 31. This is in line with current practice and the AR, as both parties typically are given the opportunity to file two rounds of submissions on questions related to jurisdiction or the merits. In view of this practice, the WP does not propose any change to AR 31 (*see* proposed AR 13).

541. The WP does propose an amendment to current AR 40(2) dealing with the time limit for filing an ancillary claim. The proposal in AR 52(2) anchors the time limit to the date

originally scheduled for the filing of the counter-memorial and reply, as opposed to the date these pleadings are actually filed. This change is made to promote efficiency and avoid abuse.

RULE 53 – DEFAULT

CURRENT RELATED PROVISIONS: Convention Art. 45; AR 42

Rule 53
Default

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.

(4) If the default relates to a first session or hearing, the Tribunal may set the grace period as follows:

(a) reschedule the first session or hearing to a date within 60 days after the original date;

(b) proceed with the first session or hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the first session or hearing; or

(c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the first session or hearing.

(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).

(6) A party's default shall not be deemed an admission of the assertions made by the other party.

(7) The Tribunal may invite the party appearing to file observations, produce evidence or make oral submissions.

(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering an Award.

Article 53
Défaut

(1) Une partie est en défaut si elle ne comparaît pas ou s'abstient de faire valoir ses prétentions ou qu'elle fait savoir qu'elle ne comparaîtra pas ou s'abstiendra de faire valoir ses prétentions.

(2) Si une partie est en défaut à une quelconque étape de l'instance, l'autre partie peut demander au Tribunal de considérer les questions qui lui sont soumises et de rendre une sentence.

(3) Dès réception de la requête visée au paragraphe (2), le Tribunal la notifie à la partie en défaut et lui accorde un délai de grâce pour remédier au défaut, sauf s'il considère que celle-ci n'a pas l'intention de comparaître ou de faire valoir ses prétentions. Le délai de grâce ne doit pas excéder 60 jours, sauf consentement de l'autre partie.

(4) Si le défaut concerne une première session ou audience, le Tribunal peut fixer le délai de grâce de la manière suivante :

(a) reporter la première session ou audience à une date devant se situer dans les 60 jours de la date initiale ;

(b) tenir la première session ou audience en l'absence de la partie en défaut et fixer un délai pour le dépôt par celle-ci d'écritures dans les 60 jours suivant la première session ou audience ; ou

(c) annuler l'audience et fixer un délai pour que les parties déposent des écritures dans les 60 jours suivant la date initiale de la première session ou audience.

(5) Si le défaut concerne une autre étape prévue de la procédure, le Tribunal peut fixer le délai de grâce pour remédier au défaut en fixant un nouveau délai permettant à la partie en défaut de procéder à cette étape dans les 60 jours suivant la date de la notification de défaut visée au paragraphe (3).

(6) Le défaut d'une partie ne vaut pas acquiescement par celle-ci aux allégations de l'autre partie.

(7) Le Tribunal peut inviter la partie qui comparaît à déposer des observations, à produire des moyens de preuve ou à fournir des explications orales.

(8) Si la partie en défaut n'agit pas dans le délai de grâce ou si un tel délai n'est pas accordé, le Tribunal examine la compétence du Centre et sa propre compétence avant de se prononcer sur les questions qui lui sont soumises et de rendre une sentence.

Regla 53
Rebeldía

(1) Una parte se encuentra en rebeldía si no compareciera, o se abstuviera de presentar sus argumentos y reclamaciones, o indicara que no comparecerá ni presentará sus argumentos y reclamaciones.

(2) Si una de las partes se encuentra en rebeldía en cualquier etapa del procedimiento, la otra parte podrá solicitarle al Tribunal que aborde las cuestiones que se han sometido a su consideración y dicte un laudo.

(3) Inmediatamente después de que reciba la solicitud a la que se hace referencia en el párrafo (2), el Tribunal notificará tal solicitud a la parte en rebeldía y le otorgará un período de gracia para que subsane la rebeldía, a menos que considere que esa parte no tiene la intención de comparecer o de presentar sus argumentos y reclamaciones. El período de gracia no excederá 60 días sin el consentimiento de la otra parte.

(4) Si la rebeldía estuviera relacionada con una primera sesión o audiencia, el Tribunal podrá fijar el período de gracia de la siguiente manera:

(a) reprogramar la primera sesión o audiencia para una fecha dentro de los 60 días siguientes a la fecha original;

(b) seguir adelante con la primera sesión o audiencia en ausencia de la parte en rebeldía y fijar un plazo para que la parte en rebeldía presente un escrito dentro de los 60 días siguientes a la primera sesión o audiencia; o

(c) cancelar la audiencia y fijar un plazo para que las partes presenten escritos dentro de los 60 días siguientes a la fecha original de la primera sesión o audiencia.

(5) Si la rebeldía estuviera relacionada con otra etapa procesal programada, el Tribunal podrá establecer el período de gracia fijando un nuevo plazo para que la parte en rebeldía cumpla con esa etapa procesal dentro de los 60 días siguientes a la fecha de notificación de la rebeldía a la que se hace referencia en el párrafo (3).

(6) La rebeldía de una parte no supondrá la admisión de las alegaciones de la otra parte.

(7) El Tribunal podrá invitar a la parte que haya comparecido a que presente observaciones, medios de prueba o argumentos orales.

(8) Si la parte en rebeldía se abstuviese de llevar a cabo un acto procesal dentro del período de gracia o si no se hubiera otorgado período de gracia alguno, el Tribunal examinará la jurisdicción del Centro y su propia competencia antes de decidir las cuestiones que le han sido sometidas y dictar el laudo.

542. Art. 45 of the Convention and AR 42 address a party's failure to participate in the proceeding (referred to as "default"). AR 42 establishes a procedure that allows the arbitration to proceed, and the Tribunal to render an Award, when a party is in default. The Tribunal may initiate this procedure upon the request of the non-defaulting party. In practice, this rule has not frequently been invoked.

543. Proposed AR 53 clarifies current AR 42, revises the procedure to reflect practice, and provides further guidance to parties and Tribunals.

544. ***First***, proposed AR 53(1) and (2) clarify and expand on the content of current AR 42(1). Proposed AR 53(1) clearly defines the scope of the rule by specifying when a party is in default. It expressly covers the situation in which a party indicates in advance of a procedural step that it does not intend to appear or to present its case. In the interest of efficiency, the other party may submit a request under current AR 42(2) at any time after such an indication; it is not required to wait until the relevant time limit expires. In turn, proposed AR 53(2) specifies that a party may request the default procedure only if the circumstances for default referred to in AR 53(1) are met. It follows that the Tribunal retains the discretion not to adopt the default procedure if the request does not sufficiently identify such circumstances.

545. ***Second***, the proposal revises the guidance provided in relation to the "grace period". Proposed AR 53(3) maintains the general requirement that before the Tribunal may consider the dispute and render an Award, it must grant the defaulting party a grace period not exceeding 60 days. As an exception, the Tribunal is not required to set a grace period if it determines that the party will not appear or present its case in the proceeding. Proposed AR 53(4) and (5) offer Tribunals practical, non-mandatory guidance on setting a grace period when the default relates to a hearing and when it relates to another scheduled procedural step. The proposal recognizes that the circumstances of default vary widely across cases, and that the Tribunal should have the flexibility to set a grace period that is fair and efficient in light of the relevant circumstances.

546. The remaining revisions reflected in proposed AR 53(6)-(7) modernize and streamline the text of the rule.

CHAPTER IX - SUSPENSION AND DISCONTINUANCE

547. The WP proposes to introduce a new provision on suspension and to streamline the Rules concerning settlement and discontinuance of the proceeding.

548. Suspension. The current Rules recognize various examples of automatic suspension, *i.e.*, suspension pending a decision on the proposal for the disqualification of an arbitrator (current AR 9(6)), or during a vacancy on the Tribunal (current AR 10(2)). The Rules also give a Tribunal discretion to suspend the proceeding. For instance, the Tribunal may suspend the proceeding on the merits when jurisdictional objections are raised (current AR 41(3)), or on the motion of the Secretary-General until an overdue advance payment towards the costs of the proceeding has been made (current AFR 14(3)(d)).

549. Proceedings may also be suspended by agreement of the parties or in the discretion of the Tribunal. Parties often agree to a suspension while they are negotiating a settlement of the dispute. In addition, any party may ask the Tribunal to suspend the proceeding, for instance, to give it time to appoint new counsel. A party may also apply for suspension pending the outcome of a related proceeding which could affect the ICSID arbitration.

550. In addition to the proposed Rules on suspension set out below, a proceeding may also be suspended under proposed AR 51, which deals with the Tribunal's authority to order security for costs. Further, a proceeding may be suspended by the Secretary-General pursuant to proposed AFR 14(5)(e)(ii) if the parties fail to make payments to defray the costs of the proceeding.

551. Settlement and Discontinuance. Proceedings are discontinued before the Award is rendered in roughly 36% of the cases. The proposed amendments streamline the current discontinuance Rules (current AR 43-45), but do not alter the substance of these provisions.

RULE 54 – SUSPENSION

CURRENT RELATED PROVISIONS: AR 9(6), 10(2); AFR 14(3)(d)

Chapter IX
Suspension and Discontinuance

Rule 54
Suspension

(1) Except as otherwise provided in the Administrative and Financial Regulations or these Rules, the Tribunal may suspend the proceeding on:

(a) agreement of the parties;

(b) request of a party; or

(c) its own initiative.

(2) The Tribunal shall give the parties the opportunity to make observations before ordering the suspension of the proceeding pursuant to paragraph (1)(b) or (c).

(3) In its order recording the suspension of the proceeding the Tribunal shall specify:

(a) the period of the suspension;

(b) any appropriate conditions; and

(c) a modified procedural calendar to take effect on resumption of the proceeding.

(4) The Tribunal may extend the period of the suspension prior to its expiry, on its own initiative or upon a party's request.

(5) The Secretary-General shall suspend the proceedings pursuant to paragraph (1)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any conditions agreed to by the parties.

Chapitre IX
Suspension et désistement

Article 54
Suspension

(1) Sauf disposition contraire du Règlement administratif et financier ou du présent Règlement, le Tribunal peut suspendre l'instance :

(a) par accord des parties ;

(b) à la demande d'une partie ; ou

(c) de sa propre initiative.

(2) Le Tribunal donne aux parties la possibilité de faire part de leurs observations avant d'ordonner la suspension de l'instance conformément au paragraphe (1)(b) ou (c).

(3) Dans son ordonnance prenant acte de la suspension de l'instance, le Tribunal indique :

(a) la durée de la suspension ;

(b) toutes conditions appropriées ; et

(c) un calendrier de la procédure modifié devant prendre effet dès la reprise de l'instance.

(4) Le Tribunal peut prolonger la durée de la suspension avant son expiration, de sa propre initiative ou à la demande d'une partie.

(5) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) suspend l'instance conformément au paragraphe (1)(a). Les parties informent le ou la Secrétaire général(e) de la durée de la suspension et de toutes conditions convenues entre les parties.

Capítulo IX
Suspensión y Discontinuación

Regla 54
Suspensión

(1) Salvo disposición en contrario establecida en el Reglamento Administrativo y Financiero o en estas Reglas, el Tribunal podrá suspender el procedimiento en las siguientes circunstancias:

(a) por acuerdo de las partes;

(b) a solicitud de una de las partes; o

(c) de oficio.

(2) El Tribunal brindará a las partes la oportunidad de formular observaciones antes de ordenar la suspensión del procedimiento de conformidad con lo dispuesto en el párrafo (1)(b) o (c).

(3) En su resolución suspendiendo el procedimiento, el Tribunal deberá especificar lo siguiente:

(a) el período de la suspensión;

(b) cualquier condición pertinente; y

(c) un calendario procesal modificado que surtirá efecto con la reanudación del procedimiento.

(4) El Tribunal podrá prorrogar el período de suspensión con anterioridad a su vencimiento, de oficio o a solicitud de una de las partes.

(5) El o la Secretario(a) General suspenderá el procedimiento de conformidad con lo dispuesto en el párrafo (1)(a) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal. Las partes informarán al o a la Secretario(a) General sobre el período de suspensión y cualquier condición acordada por las partes.

552. Proposed AR 54 introduces a new Rule to codify the practice concerning suspension of proceedings.

553. Proposed AR 54(1) and (2) allow the Tribunal to suspend the proceeding on request of a party or on its own initiative, after giving the parties a reasonable opportunity to make observations. The proceeding may also be suspended by agreement of the parties, with the approval of the Tribunal. In most cases, the parties' agreement to suspend is automatically approved. However, the Tribunal may attach conditions to its approval. For example, ICSID Tribunals frequently require the parties to provide regular updates on the status of their settlement negotiations and on any agreement to further extend the agreed period of suspension.

554. Pursuant to proposed AR 54(3), the suspension order of the Tribunal must specify the suspension period and provide an adjusted procedural calendar for the resumed proceeding. The modified procedural calendar applies automatically after the suspension period has expired. The Tribunal may therefore decide any matter that was completely briefed before the suspension once the proceeding resumes. Similarly, the parties must comply with filings and other steps in the procedural calendar upon expiry of the suspension.

RULE 55 – SETTLEMENT AND DISCONTINUANCE

CURRENT RELATED PROVISIONS: AR 43

Rule 55
Settlement and Discontinuance

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.

(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or

(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Article 55
Règlement amiable et désistement

(1) Si les parties notifient au Tribunal qu'elles sont convenues de se désister, le Tribunal rend une ordonnance prenant acte de la fin de l'instance.

(2) Si les parties sont d'accord pour régler le différend à l'amiable avant que la sentence ne soit rendue, le Tribunal :

(a) rend une ordonnance prenant acte de la fin de l'instance, si les parties le demandent ; ou

(b) peut procéder à l'incorporation du règlement amiable dans une sentence, si les parties déposent le texte complet et signé de leur règlement amiable et demandent au Tribunal de l'incorporer dans une sentence.

(3) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) rend l'ordonnance visée aux paragraphes (1) et (2)(a).

Regla 55
Avenencia y Discontinuación

(1) Si las partes notificaran al Tribunal que han acordado discontinuar el procedimiento, el Tribunal emitirá una resolución que deje constancia de la discontinuación.

(2) Si las partes acordaran avenirse respecto de la diferencia antes de que se dicte el laudo, el Tribunal:

(a) deberá emitir una resolución que deje constancia de la discontinuación del procedimiento, si las partes así lo solicitaran; o

(b) podrá plasmar la avenencia en la forma de un laudo, si las partes presentan el texto completo y firmado de su avenimiento y solicitan al Tribunal que incorpore dicho avenimiento en un laudo.

(3) El o la Secretario(a) General emitirá la resolución a la que se hace referencia en los párrafos (1) y (2)(a) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

555. Current AR 43(1) deals with discontinuance of a proceeding by agreement of the parties. Under the current text, the parties' request may be made either: (i) when they "agree on a settlement of the dispute"; or (ii) when they agree to discontinue the proceeding for any other reason. Current AR 43(2) provides that the settlement agreement may be embodied in an Award, which facilitates enforcement of the settlement. Thus, the parties can decide whether to ask the Tribunal to issue a discontinuance order or an Award on agreed terms embodying the settlement.

556. Under current AR 43(1), a party agreement to discontinue is possible "before the award is rendered". The *mutatis mutandis* application of current AR 43 to post-Award proceedings pursuant to current AR 53 left an element of uncertainty as to the proper application of current AR 43 in such proceedings. A suggestion was received to clarify that once the Tribunal has rendered its Award, the parties may not "settle the dispute" in annulment proceedings.

557. Proposed AR 55 addresses these issues. ***First***, proposed AR 55(1) is now dedicated solely to discontinuance based on the procedural agreement of the parties to discontinue the proceeding. The provision is not concerned with the underlying reasons for the discontinuance and no longer provides that the request is to be made prior to rendering the Award. Proposed AR 55(1) is therefore clearly applicable to any type of proceeding conducted under the ICSID Arbitration Rules, including post-Award proceedings.

558. ***Second***, a separate provision – proposed AR 55(2) – deals with the manner in which the Tribunal gives effect to an agreed settlement of the dispute during the arbitration and prior to rendering the Award. The wording of the provision makes clear that an annulment Committee may not render a consent Award, given its limited powers to review the Award on the grounds of annulment in Art. 52 of the ICSID Convention. Under proposed AR 55(2)(a), the parties may request that the Tribunal issue an order taking note of the discontinuance due to the parties' settlement of the dispute. If the parties wish the fact of the agreed settlement to remain undisclosed, they may instead proceed under proposed AR 55(1) and discontinue the proceeding.

559. ***Third***, current AR 43(2) is renumbered as proposed AR 55(2)(b). The proposed AR provides for an enforceable consent Award that embodies the parties' agreed terms. The language of current AR 43(1) and (2) has been revised to fit the new structure of the proposed Rule, but the changes are stylistic only.

560. ***Fourth***, proposed AR 55(3) allows the Secretary-General to issue an order noting the discontinuance, not only prior to the Tribunal's constitution (as is currently permitted), but also during any vacancy on the Tribunal, *e.g.*, following the resignation of one of its members. The proposal improves efficiency by obviating the need to reconstitute a

truncated Tribunal merely to issue a discontinuance order. The change is also justifiable given the consensual character of the discontinuance under proposed AR 55.

RULE 56 – DISCONTINUANCE AT REQUEST OF A PARTY

CURRENT RELATED PROVISIONS: AR 44

Rule 56
Discontinuance at Request of a Party

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Article 56
Désistement sur requête d'une partie

(1) Si une partie requiert le désistement de l'instance, le Tribunal fixe un délai dans lequel l'autre partie peut s'opposer à ce désistement. Si aucune objection n'est soulevée par écrit dans ce délai, l'autre partie est réputée avoir accepté le désistement et le Tribunal rend une ordonnance prenant acte de la fin de l'instance. Si une objection est soulevée par écrit dans ce délai, l'instance continue.

(2) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) fixe le délai et rend l'ordonnance visés au paragraphe (1).

Regla 56
Discontinuación a Solicitud de una de las Partes

(1) Si una de las partes solicita la discontinuación del procedimiento, el Tribunal fijará el plazo dentro del cual la otra parte podrá oponerse a la discontinuación. Si no se formula objeción alguna por escrito dentro del plazo fijado, se entenderá que la otra parte ha consentido a la discontinuación y el Tribunal emitirá una resolución que

deje constancia de la discontinuación del procedimiento. Si se formula alguna objeción escrita dentro del plazo fijado, el procedimiento continuará.

(2) El o la Secretario(a) General fijará el plazo y emitirá la resolución a la que se hace referencia en el párrafo (1) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

561. Current AR 44 deals with discontinuance of a proceeding at the request of one party, to which the opposing party does not object.

562. Current AR 44 has been renumbered as proposed AR 56(1) with some language modifications. The WP proposes to delete the requirement that a briefing schedule fixed for party observations take the form of a formal "order". Finally, it is proposed that the word "any" be added before the word "objection" in the last sentence to introduce a necessary clarification, explained below.

563. Pursuant to current AR 44, if the opposing party objects to discontinuance, the proceeding continues. Frequently, rather than stating a straightforward 'objection', the opposing party attaches conditions to its consent to the proposed discontinuance. In most cases, conditions concern the costs of the proceeding, but there could be other conditions. Such conditions are treated by the Tribunal as 'objections' to the discontinuance because the discontinuance order pursuant to this provision merely reflects the consensual character of the discontinuance. If conditions have been notified, the proceeding continues. Should the parties wish to recover costs, they may prefer to proceed to an Award which benefits from the enforcement regime of the ICSID Convention.

564. The powers of the Secretary-General under current AR 44 are now reflected in proposed AR 56(2). The Secretary-General exercises the same powers as the Tribunal with respect to the discontinuance, not only prior to the Tribunal's constitution (as currently permitted by AR 44), but also during any vacancy on the Tribunal. The rationale for this change is the same as for the parallel provision in proposed AR 55(3).

RULE 57 – DISCONTINUANCE FOR FAILURE OF PARTIES TO ACT

CURRENT RELATED PROVISIONS: Convention Art. 38, 45; AFR 14; AR 4(1), 42

Rule 57
Discontinuance for Failure of Parties to Act

(1) If the parties fail to take any steps in the proceeding for more than 150 days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.

(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal may issue an order taking note of the discontinuance.

(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.

(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Article 57
Désistement pour cause d'inactivité des parties

(1) Si les parties n'accomplissent aucune démarche relative à l'instance pendant 150 jours, le Tribunal leur adresse une notification les informant du délai écoulé depuis la dernière démarche accomplie dans l'instance.

(2) Si les parties n'accomplissent aucune démarche dans les 30 jours suivant la notification visée au paragraphe (1), elles sont réputées s'être désistées et le Tribunal peut rendre une ordonnance prenant acte de la fin de l'instance.

(3) Si l'une ou l'autre des parties accomplit une démarche dans les 30 jours suivant la notification visée au paragraphe (1), l'instance continue.

(4) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) adresse la notification et rend l'ordonnance visées aux paragraphes (1) et (2).

Regla 57
Discontinuación por Inacción de las Partes

(1) Si las partes omiten realizar cualquier acto procesal durante más de 150 días, el Tribunal notificará a las partes que dicho tiempo ha transcurrido desde el último acto procesal.

(2) Si las partes omiten actuar dentro de los 30 días siguientes a la notificación a la que se hace referencia en el párrafo (1), se entenderá que las partes han discontinuado el procedimiento, y el Tribunal podrá emitir una resolución dejando constancia de la discontinuación.

(3) Si cualquiera de las partes realiza un acto procesal dentro de los 30 días siguientes a la notificación a la que se hace referencia en el párrafo (1), el procedimiento continuará.

(4) El o la Secretario(a) General emitirá la notificación y la resolución a las que se hace referencia en los párrafos (1) y (2) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

565. Current AR 45 deals with discontinuance when all parties fail to take any step in the proceeding for a specified period of time.

566. In ICSID arbitration, either party's failure to take steps does not prevent the arbitration from advancing, as long as the opposing party acts to ensure the continuation of the proceeding. Specific powers that enable the arbitration to continue, despite the failure of a non-complying party to act, are provided in the ICSID Convention and the AR, for example, the right of either party to unilaterally request the constitution of the Tribunal by the Chairman of the Administrative Council (Art. 38 of the Convention and current AR 4(1)); the right to request that the Tribunal deal with the questions submitted to it and render an Award (Art. 45 of the Convention and current AR 42); or the right of a party to make an outstanding advance payment, if the other party does not pay advances (current AFR 14(3)(d)). Such rules apply equally to the parties.

567. Pursuant to current AR 45, the presumption that the parties have abandoned the proceeding arises only when all parties remain inactive. In such circumstances, the continuation of the proceeding becomes impossible and the Rule directs the Tribunal, after notifying the parties of its intent to discontinue, to issue an order taking note of the discontinuance of the proceeding.

568. The Rule has sometimes been taken as the equivalent of an involuntary dismissal of court actions due to the plaintiff's 'failure to prosecute' its claim under national law, when the defendant may move to dismiss the action or any claim against it.

569. The application of current AR 45 is not dependent on a party's request to discontinue the proceeding. In practice, when the claimant fails to take steps to continue the proceeding, the respondent is normally content to have the proceeding discontinued without a decision on the merits. In that event, the parties may consider a discontinuance pursuant to either current AR 43(1) or AR 44. If the respondent has counter-claims or claims for costs against the claimant, the proceeding must continue. To ensure the continuation of the proceeding, the respondent may request that the Tribunal deal with these claims and render an Award pursuant to current AR 42 ("Default").

570. Preliminary suggestions received from Member States and commentators relating to current AR 45 primarily concerned the allocation of costs against the party that initiated the arbitration when it subsequently failed to act in the proceeding.

571. Current AR 45 (proposed AR 57) has remained substantially the same with some language modification. The words "or such period as they may agree with the approval of the Tribunal" have been deleted, but a similar concept is provided under proposed AR 54(1)(a) on suspension by agreement of the parties.

572. Proposed AR 57 introduces a procedure to facilitate application of current AR 45. Proposed AR 57(1) establishes an obligation on the Tribunal to notify the parties of the status of the proceeding if 150 days have elapsed without either party taking any step in the proceeding. As proposed in AR 57(2), the advance notice allows the parties to act within 30 days of the notice to prevent the issuance of a discontinuance order.

573. Proposed AR 57(4) makes it clear that the Secretary-General may exercise the same powers as the Tribunal with respect to the discontinuance not only prior to the Tribunal's constitution (as permitted by current AR 45), but also during any vacancy on the Tribunal. The rationale for this change is the same as for the parallel provision in proposed AR 56(2).

RULE 58 – DISCONTINUANCE FOR FAILURE TO PAY

CURRENT RELATED PROVISIONS: AFR 14

Rule 58
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by Administrative and Financial Regulation 14, the proceeding may be discontinued pursuant to that Regulation.

Article 58
Fin de l'instance pour défaut de paiement

Si les parties ne procèdent pas, comme l'exige l'article 14 du Règlement administratif et financier, au paiement des montants destinés à couvrir les frais de la procédure, la fin de l'instance peut être prononcée conformément à cet article.

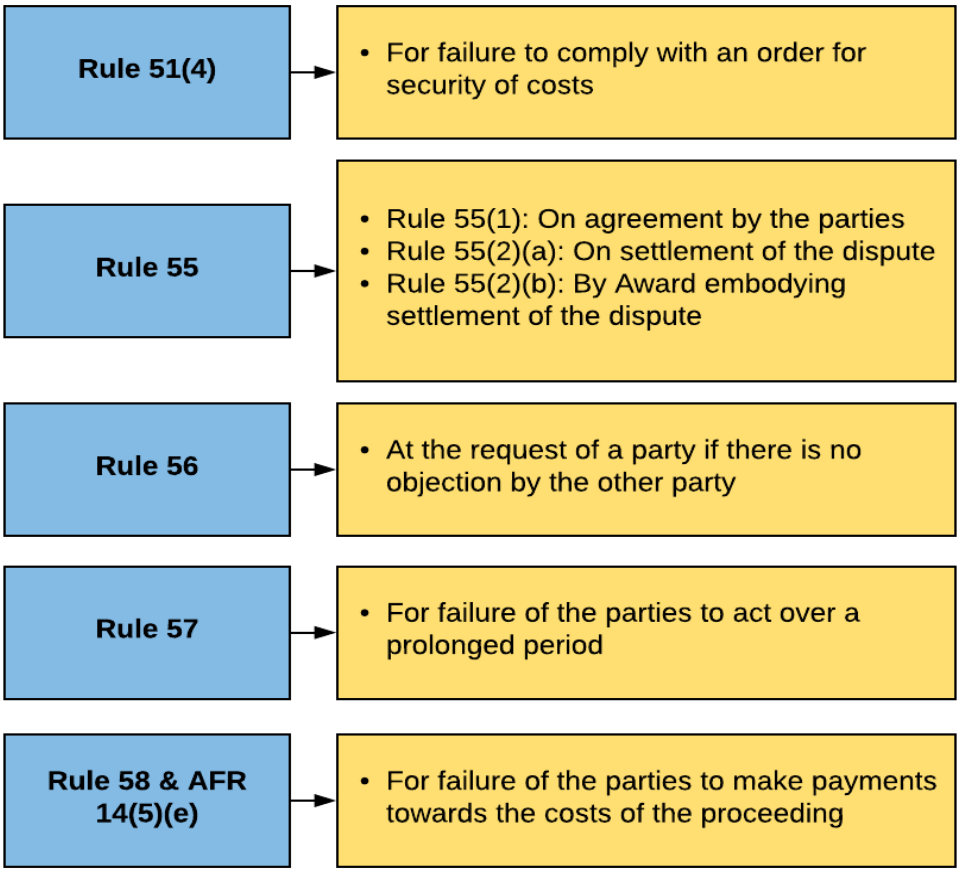
Regla 58
Discontinuación por Falta de Pago

Si las partes no realizan los pagos para sufragar los costos del procedimiento tal como lo exige la Regla 14 del Reglamento Administrativo y Financiero, podrá discontinuarse el procedimiento de conformidad con lo dispuesto en dicha Regla.

574. Proposed AR 58 is a new provision that notes the possibility of discontinuance because of the parties' failure to pay.

575. In summary, there are five types of discontinuance under the proposed AR.

Ways to Discontinue the Proceeding Under the Arbitration Rules – Rule 51, 55-58



CHAPTER X - THE AWARD

576. This proposed Chapter X is current Chapter VI – The Award, and includes provisions from current Chapter IV – Written and Oral Procedures. It concerns all provisions relating to the preparation and rendering of the Award, as well as any supplementary decisions and rectifications of the Award after it is rendered.

577. ***First***, the WP proposes to delete current AR 38 (Closure of Proceeding), which provides that a proceeding will be declared closed after presentation of the case by the parties is completed. Current AR 38 allows Tribunals to reopen the proceeding, but only on an exceptional basis.

578. Presently, the closure of the proceeding has three main purposes: (i) it triggers the 120-day deadline for the Tribunal to render the Award (*see* current AR 46); (ii) it sets a time limit

for parties to submit a proposal for disqualification of an arbitrator (*see* current AR 9(1)); and (iii) it provides that once the proceeding is closed, the parties cannot file further evidence unless the Tribunal decides to reopen the proceeding on the basis of exceptional circumstances (*see* current AR 38(2)).

579. In practice, the closure of the proceeding usually does not occur until the Award is drafted and ready to be rendered. When the Tribunal deals with jurisdictional objections which have been bifurcated from the merits of the dispute, the proceeding is only declared closed if the Tribunal renders an Award dismissing jurisdiction (*i.e.*, disposing of the case). Such closure typically occurs on the same date as the Award so that the outcome of the ruling is not revealed to the parties before the Award is rendered or the Decision on Jurisdiction is issued.

580. The late timing of the closure of the proceeding has been commented on by Member States and the public. Suggestions have been made to require closure of the proceeding after a particular step in the proceeding, for example, at the end of the oral procedure or after the last written submission. The comments focused on the timing of the Award rather than the other effects of the closure on the proceeding.

581. To address the first purpose which current AR 38 was intended to fulfill, the WP proposes to require the Tribunal to issue the Award as soon as possible and in any event within 60 days, 180 days, or 240 days after the last major procedural step in the proceeding depending on the applicable Rule (*see* proposed AR 59 discussed below). This would replace the Tribunal's discretion to determine when the presentation of the case is completed and would create a clear expectation concerning the time within which the Award is to be rendered. While the prescribed time limit is a "best efforts" obligation under proposed AR 8(3), it is expected that Tribunals will meet the applicable time limit unless there are special circumstances.

582. With regard to the second purpose identified above, the proposed amendments to current AR 9 (Disqualification of Arbitrators) delete the reference to the filing of a proposal "before the proceeding is declared closed". Accordingly, deleting current AR 38 would have no impact on the amended version of current AR 9. Rather, a proposal to disqualify could be submitted until the Award is rendered, as long as the proposal meets the requirement of timeliness in proposed AR 29(2).

583. With respect to the third purpose identified above, ICSID's draft Procedural Order No. 1 template, item 16.3, addresses this matter by establishing that parties shall not submit additional evidence after their last authorized submission without requesting leave from the Tribunal. Proposed AR 13(4) also addresses this issue by providing that Tribunals shall grant leave to file unscheduled written submissions or evidence upon a party's timely and reasoned application and only if these are necessary in view of all relevant circumstances.

584. The Secretariat currently employs several complementary practices to ensure expeditious completion of Awards. For example, it strongly encourages Tribunals to deliberate immediately after the hearing, to set aside days for deliberation in advance, and to provide the parties with regular updates on the expected date of rendering the Award. If proposed

AR 59 is accepted, ICSID will adopt an additional practice of requiring that the Tribunal send a letter to the parties within 30 days after the last hearing or the filing of the last submission informing them that the Tribunal considers that it has been sufficiently briefed by the parties and that it does not require further evidence. This would further encourage Tribunals to promptly review the whole file after the hearing or last submission and pose any additional questions to the parties to expedite the Tribunal's deliberations.

RULE 59 – TIMING OF THE AWARD

CURRENT RELATED PROVISIONS: Convention Art. 48; AR 47, 48

Chapter X
The Award

Rule 59
Timing of the Award

(1) The Tribunal shall render the Award as soon as possible and in any event no later than:

(a) 60 days after the last written or oral submission if the Award is rendered pursuant to Rule 35(4);

(b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 36(7); or

(c) 240 days after the last written or oral submission on all other matters.

(2) A statement of costs filed in accordance with Rule 19(3) shall not be considered a submission for the purposes of calculating the time limits referred to in paragraph (1).

Chapitre X
La sentence

Article 59
Délai pour rendre la sentence

(1) Le Tribunal rend la sentence dès que possible et, en tout état de cause, au plus tard :

(a) 60 jours après la dernière écriture ou la dernière plaidoirie si la sentence est rendue conformément à l'article 35(4) ;

(b) 180 jours après la dernière écriture ou la dernière plaidoirie si la sentence est rendue conformément à l'article 36(7) ; ou

(c) 240 jours après la dernière écriture ou la dernière plaidoirie relative à toutes autres questions.

(2) Un état des frais déposé conformément à l'article 19(3) n'est pas considéré comme une écriture aux fins du calcul des délais visés au paragraphe (1).

Capítulo X
El Laudo

Regla 59
Plazos para el Laudo

(1) El Tribunal dictará el laudo lo antes posible y, en cualquier caso, a más tardar:

(a) 60 días después del último escrito o presentación oral si el laudo se dictara de conformidad con lo dispuesto en la Regla 35(4);

(b) 180 días después del último escrito o presentación oral si el laudo se dictara de conformidad con lo dispuesto en la Regla 36(7); o

(c) 240 días después del último escrito o presentación oral sobre cualquier otra cuestión.

(2) Cualquier declaración sobre los costos presentada de conformidad con la Regla 19(3) no será considerada una presentación a efectos de calcular los plazos al que se hace referencia en el párrafo (1).

585. Proposed AR 59 revises current AR 46, which deals with the preparation and timing of the Award. Under the current Rule, the Award must be rendered within 120 days after the closure of the proceeding. However, Tribunals typically do not close the proceedings until the Award is almost finalized, hence this provision rarely limits the time for deciding the matter.

586. ICSID received numerous comments from parties, States and the public to the effect that Tribunals generally take too long to render Awards. The latest available numbers based on all ICSID arbitration proceedings which concluded with an Award during the past 15 years demonstrate that the average duration from registration of the case until the rendering of the Award was approximately 49 months (*see also* the detailed review of cases that concluded with an Award in the period from January 1, 2015 to June 30, 2017 in Schedule 9 on Time and Cost). Commentators suggest that Tribunals be required to render Awards within 6 to 12 months after the final hearing or final written submission. The proposal in

AR 59 sets clear expectations on Tribunal members to render the Award in a timely manner while maintaining flexibility based on the circumstances of each case and the application of other proposed AR.

587. Proposed AR 59(1) requires the Award to be rendered as soon as possible and in any event within 60 days (two months) if the Award is rendered pursuant to proposed AR 35(4) on Manifest Lack of Legal Merit, within 180 days (six months) if the Award is rendered pursuant to proposed AR 36(7) on Preliminary Objection, or within 240 days (eight months) after the last written or oral submission on all other matters (*e.g.*, hearing on the merits, post-hearing briefs, additional evidence, answering Tribunal questions, etc). Proposed AR 59(2) specifies that a cost submission or statement of costs filed pursuant to proposed AR 19(3) (current AR 28) would not be considered a submission for the purposes of calculating the time under proposed AR 59(1). Final cost submissions are typically filed at the very end of the process after all other submissions.

588. The proposed rule recognizes that the time required to render an Award may vary depending on the circumstances of each case and the scope of the parties' claims. The Award may take more time if pleadings and supporting documents are substantial, or if the parties make requests that require the Tribunal's attention during the deliberation period (*e.g.*, a request for provisional measures or a proposal for disqualification). However, it establishes an expectation that the Tribunal will set aside adequate time to prepare the Award and will render the Award within an outer limit of 240 days. The rule is complemented by proposed AR 16(4), which provides that the Tribunal must deliberate immediately after the last written or oral submission on any matter for decision.

589. The time limit of 240 days is a "best efforts" obligation under proposed AR 8(3) (Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General). If a Tribunal is unable to render the Award within the applicable period, it should advise the parties before the expiry of the period of the circumstances that are causing the delay and provide an estimate of the time when the Award will be ready. In any event, consistent with current practice, Tribunals should provide the parties with regular updates regarding their progress on the Award and should include an estimate concerning the timing of the Award. This practice is typically reflected in draft Procedural Order No. 1.

590. The amendment seeks to ensure Awards are issued more expeditiously and in a specified amount of time based on the scope of the claims and issues before the Tribunal, and complements the general duty in proposed AR 11(3) that the Tribunal and the parties must conduct the proceeding in an expeditious and cost-effective manner (*see* Chapter II – Conduct of the Proceeding).

RULE 60 – CONTENTS OF THE AWARD

CURRENT RELATED PROVISIONS: Convention Art. 48; AR 28, 46, 48

Rule 60
Contents of the Award

(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;

(d) the name of each member of the Tribunal and the appointing authority of each;

(e) the dates and place(s) of the first session and the hearings;

(f) a brief summary of the proceeding;

(g) a statement of the relevant facts as found by the Tribunal;

(h) a brief summary of the submissions of the parties, including the relief sought;

(i) the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision regarding the allocation of the costs of the proceeding.

(2) The Award shall be signed by the members of the Tribunal who voted for it. It may be signed by electronic means if the parties agree.

(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.

Article 60
Contenu de la sentence

(1) La sentence est rendue par écrit et contient :

(a) la désignation précise de chaque partie ;

(b) les noms des représentants des parties ;

(c) une déclaration selon laquelle le Tribunal a été constitué en vertu de la Convention, et la description de la façon dont il a été constitué ;

(d) le nom de chaque membre du Tribunal et l'autorité ayant nommé chacun d'eux ;

(e) les dates et le(s) lieu(x) de la première session et des audiences ;

(f) un bref résumé de la procédure ;

(g) un exposé des faits pertinents, tels qu'ils sont établis par le Tribunal ;

(h) un bref résumé des prétentions des parties, y compris des demandes présentées ;

(i) la décision du Tribunal sur chaque question qui lui a été soumise et les motifs sur lesquels la sentence est fondée ; et

(j) un état des frais de la procédure, y compris les honoraires et frais de chaque membre du Tribunal et une décision motivée relative à la répartition des frais de la procédure.

(2) La sentence est signée par les membres du Tribunal qui se sont prononcés en sa faveur. Elle peut être signée par voie électronique, si les parties sont d'accord.

(3) Tout membre du Tribunal peut joindre à la sentence son opinion individuelle ou une mention de son dissentiment avant que la sentence ne soit rendue.

Regla 60
Contenido del Laudo

(1) El laudo deberá dictarse por escrito y deberá incluir:

(a) la identificación de cada parte de manera precisa;

(b) el nombre de los representantes de las partes;

(c) una declaración de que el Tribunal ha sido constituido de conformidad con lo dispuesto en el Convenio, y una descripción del método de su constitución;

(d) el nombre de cada miembro del Tribunal y de la persona que designó a cada uno;

(e) las fechas y el o los lugar(es) de la primera sesión y de las audiencias;

(f) un breve resumen del procedimiento;

(g) una relación de los hechos pertinentes, tal como hayan sido establecidos por el Tribunal;

(h) un breve resumen de los argumentos de las partes, lo cual incluye sus petitorios;

(i) la decisión del Tribunal sobre cada cuestión que le haya sido sometida, y las razones en que se funda el laudo; y

(j) una declaración de los costos del procedimiento, lo que incluye los honorarios y gastos de cada uno de los miembros del Tribunal, y una decisión razonada respecto de la distribución de los costos del procedimiento.

(2) El laudo deberá estar firmado por los miembros del Tribunal que se hayan pronunciado a favor del mismo. Podrá ser firmado a través de medios electrónicos si las partes así lo acordaran.

(3) Antes de que se dicte el laudo, cualquier miembro del Tribunal podrá adjuntar al laudo su opinión individual o disidencia al laudo.

591. Proposed AR 60 is current AR 47 with some modifications.

592. The main amendments in proposed AR 60 are: (i) to clarify the required contents of the Award; (ii) to clarify that the Award need not be detailed with regard to the summary of the proceeding and the parties' submissions; (iii) to clarify that the Award need only contain the reasons upon which it is based; and (iv) to delete the requirement that the Award indicate the date of the arbitrators' signatures and provide for the possibility of electronic signatures.

593. ***First***, the amendments in proposed AR 60(1)(b) and (e) reflect definition changes included in proposed AR 2 (Meaning of Party and Party Representation) and proposed AR 34 and 15 (First Session and Hearings).

594. ***Second***, the amendments in proposed AR 60(1)(f), (g) and (h) contribute to the efficient preparation of the Award by limiting the required level of detail in certain parts of the Award. As a result, there need only be brief summaries of the proceeding (the procedural history) and the parties' submissions, and the Award need only include those facts found by the Tribunal to be "relevant" for its decisions. These and other changes should shorten the Award-writing process and will help Tribunals meet the target date for rendering the Award.

595. ***Third***, proposed AR 60(1)(i) addresses the need to provide reasoning. The WP proposes to keep the requirement, consistent with Art. 48(3) of the Convention, that the Tribunal decide on every question submitted to it. The proposed amendment is intended to better reflect Art. 48(3) of the Convention, which requires that the Award contain the 'reasons upon which the Award is based' rather than the 'reasons for the decision of the Tribunal on every

question submitted to it.' This does not reflect a change of substance as the provision must be interpreted in line with the Convention.

596. ***Fourth***, to reflect current practice and enhance transparency, proposed AR 60(1)(j) requires the Award to contain a detailed financial statement of the case account, including a breakdown of the fees and expenses of each member of the Tribunal. It also requires a reasoned decision regarding the allocation of the costs of the proceeding made in accordance with proposed AR 19(3).

597. ***Fifth***, the Rule proposes to delete the requirement that the Award indicate the date of signature of each arbitrator. The signatures are not relevant for the purposes of the date of the Award or any time limits specified by the Rules. The relevant date is the date of dispatch of the Award, and that date appears on the cover page of the Award.

598. ***Sixth***, the possibility of using electronic signatures has also been considered. Some jurisdictions do not accept electronic signatures as a legally valid form of acceptance and authentication, which might pose problems for the enforcement of awards in those countries. However, electronic signatures are gaining acceptance across different jurisdictions and proposed AR 60(2) therefore allows their use if both parties agree. This is already an established practice for procedural orders and decisions. Adoption of this practice would expedite the dispatch of the Award, as it is otherwise often circulated to three different locations.

599. No substantive amendment is proposed to current AR 47(3). Individual opinions and statements of dissent may be attached to the Award. There has sometimes been delay in rendering the Award to accommodate additional time needed to complete an individual opinion or statement of dissent. Given the time requirement in proposed AR 59 for rendering the Award, Tribunals should factor in any potential individual opinion or statement of dissent in the preparation and timing of the Award. This may entail fixing reasonable time limits within which an opinion or dissent may be prepared, and rendering the Award (signed by the whole Tribunal or by the majority members who voted for it) without the individual opinion or statement if the time limit is not met. The ICSID Secretariat will prepare a practice note for the preparation of the Award to provide guidance to Tribunals in the deliberation phase.

RULE 61 – RENDERING OF THE AWARD

CURRENT RELATED PROVISIONS: Convention Art. 49(1); AR 46, 47, 48

Rule 61
Rendering of the Award

(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.

(2) The Award shall be deemed to have been rendered on the date of dispatch.

(3) The Secretary-General shall provide additional certified copies of the Award to a party upon request.

Article 61
Prononcé de la sentence

(1) Après signature de la sentence par les membres du Tribunal qui se sont prononcés en sa faveur, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) envoyer à chaque partie une copie certifiée conforme de la sentence, ainsi que de toute opinion individuelle et mention du dissentiment, en indiquant la date d'envoi sur la sentence ; et

(b) déposer la sentence aux archives du Centre, en y joignant toute opinion individuelle et toute mention de dissentiment.

(2) La sentence est réputée avoir été rendue à la date d'envoi.

(3) Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires de la sentence.

Regla 61
Comunicación del Laudo

(1) Una vez que el laudo haya sido firmado por los miembros del Tribunal que votaron en su favor, el o la Secretario(a) General deberá, a la brevedad:

(a) enviar una copia certificada del laudo a cada una de las partes, junto con las opiniones individuales y disidencias, indicando la fecha del envío del laudo; y

(b) depositar el laudo en los archivos del Centro, junto con las opiniones individuales y disidencias.

(2) Se considerará que el laudo ha sido dictado en la fecha de envío.

(3) El o la Secretario(a) General proporcionará copias certificadas adicionales del laudo a una parte a petición de esta.

600. The WP does not propose any substantive changes to current AR 48, except for the revision and relocation of the provision concerning publication in current AR 48(4). Specific provisions on publication of the Award are included in proposed Chapter VII – Access to Proceedings and Non-Disputing Party Submissions, AR 44.

601. The date of the Award for all relevant purposes, including post-Award remedies under current AR 49-52, is the date of its dispatch as provided in current AR 48(2) and Art. 49(1) of the Convention. The Award is dispatched by electronic means and certified copies are dispatched by courier on the same date. That date is noted on the cover page of the Award.

602. Given that the Award typically exists in electronic format and may be signed electronically, there is no need to refer to an original text of the Award (suggesting a hard copy original) as distinguished from copies of that text. In accordance with Art. 49 of the Convention, proposed AR 61 provides that the Secretary-General will continue to dispatch authenticated, certified copies of the Award to the parties and to provide them with additional certified copies of the Award upon request.

603. A number of post-Award recourses are available, as described in Chapter X and Chapter XI of the Rules, and in the table below.

POST-AWARD REMEDIES IN ICSID CONVENTION ARBITRATION			
REMEDY	**TIME LIMIT FOR FILING**	**TRIBUNAL / COMMITTEE**	**RESULT**
Supplementary Decision **or** Rectification of Award (**Rule 62**)	Within **45 days** after date Award was rendered	Original Tribunal (**Rule 62**)	Decision **within 60 days** after last written or oral submission on request (**Rule 62**)
Interpretation of Award (**Rule 63**)	**Any time** after dispatch of Award	Original Tribunal (**Rule 64**)	Decision **within 120 days** after last written or oral submission on request (**Rule 66**)

Revision of Award (**Rule 63**)	Within **90 days** after discovery of a fact of such a nature as to decisively affect Award	Original Tribunal (**Rule 64**)	Decision **within 120 days** after last written or oral submission on request (**Rule 66**)
Annulment (**Rule 63**)	Within **120 days** after date Award was rendered **or** Within **120 days** after discovery of corruption on part of Tribunal member and within **3 years** of date Award was rendered	*Ad hoc* Committee (**Rule 65**)	Decision **within 120 days** after last written or oral submission on request (**Rule 66**)

RULE 62 – SUPPLEMENTARY DECISION AND RECTIFICATION

CURRENT RELATED PROVISIONS: Convention Art. 49(2); AFR 26; AR 46-48

Rule 62
Supplementary Decision and Rectification

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 30 days after rendering the Award.

(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.

(3) The request referred to in paragraph (2) shall:

(a) identify the Award to which it relates;

(b) be signed by each requesting party or its representative and be dated; and

(c) specify:

(i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award; and

(ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award.

(4) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request to the other party;

(b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (2); and

(c) notify the parties of the registration or refusal to register.

(5) As soon as the request is registered, the Secretariat shall transmit the request and the notice of registration to each member of the Tribunal.

(6) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(7) Rules 60-61 shall apply to any decision of the Tribunal pursuant to this Rule.

(8) The Tribunal shall issue the supplementary decision or rectification within 60 days after the last written or oral submission on the request.

(9) The date of dispatch of the supplementary decision or rectification shall be the relevant date for the purposes of calculating the time limits specified in Articles 51(2) and 52(2) of the Convention.

(10) A supplementary decision or rectification under this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.

Article 62
Décision supplémentaire et rectification

(1) Un Tribunal peut rectifier de sa propre initiative toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence dans les 30 jours suivant le prononcé de la sentence.

(2) Une partie qui demande une décision supplémentaire ou la rectification d'une sentence conformément à l'article 49(2) de la Convention dépose une requête à cet effet auprès du ou de la Secrétaire général(e) dans les 45 jours suivant le prononcé de la sentence et s'acquitte du droit de dépôt publié dans le barème des frais.

(3) La requête visée au paragraphe (2) :

(a) identifie la sentence visée ;

(b) est signée par chaque partie requérante ou son représentant et est datée ; et

(c) indique précisément :

(i) s'agissant d'une requête aux fins d'obtention d'une décision supplémentaire, toute question sur laquelle le Tribunal a omis de se prononcer dans sa sentence ; et

(ii) s'agissant d'une requête aux fins de rectification, toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence.

(4) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre la requête à l'autre partie ;

(b) enregistrer la requête ou refuser de l'enregistrer si elle n'est pas présentée dans le délai visé au paragraphe (2) ; et

(c) aviser les parties de l'enregistrement ou du refus d'enregistrement.

(5) Dès que la requête est enregistrée, le Secrétariat la transmet à chaque membre du Tribunal avec la notification de l'enregistrement.

(6) Le ou la Président(e) du Tribunal détermine la procédure à suivre pour l'examen de la requête, après consultation des autres membres du Tribunal et des parties.

(7) Les articles 60 - 61 s'appliquent à toute décision du Tribunal rendue en vertu du présent article.

(8) Le Tribunal rend la décision supplémentaire ou la rectification dans les 60 jours suivant les dernières écritures ou plaidoiries sur la requête.

(9) La date d'envoi de la décision supplémentaire ou de la rectification est la date prise en compte aux fins du calcul des délais indiqués aux articles 51(2) et 52(2) de la Convention.

(10) La décision supplémentaire ou la rectification en vertu du présent article fait partie intégrante de la sentence et figure sur toutes les copies certifiées conformes de la sentence.

Regla 62
Decisión Suplementaria y Rectificación

(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 30 días siguientes a la fecha en que se haya dictado el laudo.

(2) Una parte que solicite una decisión suplementaria o la rectificación de un laudo de conformidad con lo dispuesto en el Artículo 49(2) del Convenio, deberá presentar la solicitud al o a la Secretario(a) General dentro de los 45 días siguientes a la fecha en que se haya dictado el laudo y pagar el derecho de presentación publicado en el arancel de derechos.

(3) La solicitud deberá:

(a) identificar el laudo de que se trata;

(b) estar fechada y firmada por cada una de las partes solicitantes o su(s) representante(s); y

(c) especificar:

(i) con respecto a una solicitud de decisión suplementaria, toda cuestión que el Tribunal hubiera omitido decidir en el laudo; y

(ii) con respecto a una solicitud de rectificación, errores de forma, aritméticos o similares en el laudo.

(4) Inmediatamente después de recibir la solicitud y el derecho de presentación, el o la Secretario(a) General deberá, con prontitud:

(a) enviar la solicitud a la otra parte;

(b) registrar la solicitud, o rechazar el registro si la solicitud no se realiza dentro del plazo al que se hace referencia en el párrafo (2); y

(c) notificar a las partes el registro o la denegación del registro.

(5) En cuanto se registre la solicitud, el Secretariado enviará la solicitud y la notificación del registro a cada uno(a) de los o las miembros del Tribunal.

(6) El o la Presidente(a) del Tribunal determinará el procedimiento para considerar la solicitud, previa consulta a los otros miembros del Tribunal y a las partes.

(7) Las Reglas 60-61 serán aplicables a cualquier decisión del Tribunal de conformidad con lo dispuesto en esta Regla.

(8) El Tribunal emitirá la decisión suplementaria o rectificación dentro de los 60 días siguientes a lo que suceda más tarde, sea esto, el último escrito o bien la última presentación oral sobre la solicitud.

(9) La fecha de envío de la decisión suplementaria o rectificación será la fecha relevante a los fines del cálculo de los plazos especificados en los Artículos 51(2) y 52(2) del Convenio.

(10) Una decisión suplementaria o rectificación en virtud de esta Regla formará parte del laudo y se reflejará en todas las copias certificadas del laudo.

604. Proposed AR 62 concerns a request for supplementary decision and rectification of the Award made pursuant to Art. 49(2) of the Convention and current AR 49. Current AR 49 is amended to clarify the requirements and contents of this type of request, and to align it with proposed similar provisions in the Institution Rules (*see* IR 2 – Contents of the Request) and AR Chapter XI – Interpretation, Revision and Annulment of the Award.

605. Requests for supplementary decisions or rectification are not uncommon. Most of them relate to arithmetical errors in the Award or omissions in the operative part of the Award, and other inadvertent errors (*e.g.*, relating to the interest rate, see *Getma Int'l and others v. Guinea* (ARB/11/29), Decision on Claimants' Request for Supplementary Decision of the Award (December 13, 2016)). A party may request both a supplementary decision and rectification concerning the Award in the same request. This type of request must be made within 45 days after the Award is rendered and is most often dealt with on the basis of written submissions without a hearing. The time required to address the request depends on the nature of the alleged omission or error in the Award and the parties' agreement on the procedural calendar.

606. Proposed AR 62(1) is new. It allows a Tribunal to rectify any clerical, arithmetical or similar error on its own initiative within 30 days after rendering the Award. The provision is intended to make obvious corrections without requiring the parties to bring a motion for rectification. A Tribunal proposing to rectify on its own initiative would consult the parties on any proposed Tribunal-initiated rectification (*see* proposed AR 11(2)).

607. Proposed AR 62(2)(c)(ii) requires that a request for rectification specify "any clerical, arithmetical or similar error in the Award". The wording in Art. 49(2) of the Convention differs slightly in English, French and Spanish. The wording in proposed Rule 62(1) is intended to harmonize the provision and reflect the meaning and scope of rectification.

608. Proposed AR 62(3)(b) includes the possibility (currently in AR 49(5)), that the request is not registered if it is filed more than 45 days after the Award was rendered.

609. Proposed AR 62(4) is current AR 60(2)(d). Unlike in Interpretation and Revision proceedings, a decision can only be made by the Tribunal that rendered the Award and the Tribunal is therefore reconvened. The steps in proposed AR 62(4) and (5) typically take 1-2 days if the lodging fee has been received.

610. Proposed AR 62(6) simplifies current AR 60(3) and reflects the current practice that the President consults with the other members of the Tribunal and the parties to find an agreement on the procedure for considering the request. This includes determining whether the members of the Tribunal need to meet in person, either alone or with the parties.

611. Proposed AR 62(7) is current AR 49(4) with the omission of "*mutatis mutandis*," which is not necessary.

612. Proposed AR 62(8) provides a time limit of 60 days for the Tribunal to issue the supplementary decision or rectification following the last written or oral submission on the request.

613. Proposed AR 62(9) clarifies that the date of dispatch of the supplementary decision or rectification is the relevant date to start the time limits for the post-Award remedies of annulment and revision, as provided in Art. 49(2) of the Convention.

614. Finally, proposed AR 62(10) specifies that the Decision on supplementary decision and rectification will be reflected on all certified copies of the Award, so that it is clear in any possible subsequent enforcement proceeding that the Award was supplemented or rectified (*see also* proposed AFR 26).

CHAPTER XI - INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

615. Current AR 50-55 apply to the post-Award remedies of interpretation, revision, and annulment. They establish the requirements for filing and registration of an application, the procedure and rules applicable to these remedies, requests for stay of enforcement of the Award, and the resubmission of the dispute after an annulment.

616. The amendments discussed below in proposed AR 63-68 streamline these rules, in particular the filing and registration of the application, and some of the further rules of procedure governing interpretation, revision and annulment proceedings. The proposed amendments also codify ICSID practice in relation to post-Award remedy proceedings.

RULE 63 – THE APPLICATION

CURRENT RELATED PROVISIONS: Convention Art. 50-52; AR 50

Chapter XI
Interpretation, Revision and Annulment of the Award

Rule 63
The Application

(1) A party applying for interpretation, revision or annulment of an Award shall file the application with the Secretary-General, together with any supporting documents and pay the lodging fee published in the schedule of fees.

(2) The application shall:

(a) identify the Award to which it relates;

(b) be in a procedural language used in the original proceeding;

(c) be signed by each applicant or its representative and be dated;

(d) attach proof of any representative's authority to act; and

(e) include the contents and be filed within the time limits referred to in paragraphs (3)-(5).

(3) An application for interpretation made pursuant to Article 50(1) of the Convention may be filed at any time after the dispatch of the Award and shall specify the points in dispute concerning the meaning or scope of the Award.

(4) An application for revision made pursuant to Article 51(1) of the Convention shall be filed within 90 days after the discovery of a fact of such a nature as decisively to affect the Award, and in any event within three years after the Award (or any supplementary decision on or rectification of the Award) was rendered. The application shall specify:

(a) the change sought in the Award;

(b) the newly discovered fact that decisively affects the Award; and

(c) evidence that when the Award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence.

(5) An application for annulment made pursuant to Article 52(1) of the Convention shall:

(a) be filed within 120 days after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered if the application is based on any of the grounds in Article 52(1)(a), (b), (d) or (e) of the Convention; or

(b) be filed within 120 days after the discovery of corruption on the part of a member of the Tribunal and in any event within three years after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered, if the application is based on Article 52(1)(c) of the Convention; and

(c) specify the grounds on which it is based, limited to the grounds in Article 52(1)(a)-(e) of the Convention, and the reasons in support of each ground.

(6) Upon receiving an application and the lodging fee, the Secretary-General shall promptly:

(a) transmit the application and the supporting documents to the other party;

(b) register the application, or refuse registration if the application is not made within the relevant time limits referred to in paragraphs (3) or (4); and

(c) notify the parties of the registration or refusal to register.

(7) The last date for filing an application under this Rule shall be determined in accordance with Rule 7. A complete application and evidence of payment of the lodging fee must be filed by such date.

(8) An applicant may withdraw from its application before it has been registered by filing a written notice of withdrawal with the Secretary-General. The Secretariat shall promptly notify the parties of the withdrawal, unless the application has not yet been transmitted to the other party pursuant to paragraph (5)(a).

Chapitre XI
Interprétation, révision et annulation de la sentence

Article 63
La demande

(1) Une partie qui demande l'interprétation, la révision ou l'annulation d'une sentence dépose une demande à cet effet auprès du ou de la Secrétaire général(e), avec tous documents justificatifs, et s'acquitte du droit de dépôt publié dans le barème des frais. La demande :

(a) identifie la sentence visée ;

(b) est rédigée dans une langue de la procédure utilisée dans l'instance initiale ;

(c) est signée par chaque partie requérante ou son représentant et est datée ;

(d) comprend la preuve de l'habilitation à agir du représentant ; et

(e) contient les mentions et est déposée dans les délais indiqués aux paragraphes (3) - (5).

(2) Une demande en interprétation introduite conformément à l'article 50(1) de la Convention peut être déposée à tout moment après l'envoi de la sentence et indique précisément les points en litige concernant le sens ou la portée de la sentence.

(3) Une demande en révision introduite conformément à l'article 51(1) de la Convention est déposée dans les 90 jours suivant la découverte d'un fait de nature à exercer une influence décisive sur la sentence, et, en tout état de cause, dans les trois ans suivant le prononcé de la sentence (ou toute décision supplémentaire ou rectification de la sentence). La demande indique précisément :

(a) la modification souhaitée dans la sentence ;

(b) le fait nouveau découvert qui exerce une influence décisive sur la sentence ; et

(c) la preuve que, avant le prononcé de la sentence, ce fait ait été inconnu du Tribunal et de la partie requérante et qu'il n'y a pas eu, de la part de celle-ci, faute à l'ignorer.

(4) Une demande en annulation introduite conformément à l'article 52(1) de la Convention :

(a) est déposée dans les 120 jours suivant la date du prononcé de la sentence (ou toute décision supplémentaire ou rectification de la sentence), si la demande est fondée sur l'un quelconque des motifs visés à l'article 52(1)(a), (b), (d) ou (e) de la Convention ; ou

(b) est déposée dans les 120 jours suivant la découverte de la corruption de la part d'un membre du Tribunal et, en tout état de cause, dans les trois ans suivant la date du prononcé de la sentence (ou toute décision supplémentaire ou rectification de la sentence), si la demande est fondée sur l'article 52(1)(c) de la Convention ; et

(c) indique précisément les motifs sur lesquels elle est fondée, qui ne peuvent être que ceux indiqués à l'article 52(1)(a) - (e) de la Convention, et les raisons à l'appui de chaque motif.

(5) Dès réception d'une demande et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre à l'autre partie la demande et les documents justificatifs ;

(b) enregistrer la demande ou refuser de l'enregistrer si elle n'est pas présentée dans les délais applicables visés aux paragraphes (4) ou (5) ; et

(c) aviser les parties de l'enregistrement ou du refus d'enregistrement.

(6) La date butoir pour déposer une demande conformément au présent article est déterminée conformément à l'article 7. Une demande complète et la preuve du paiement du droit de dépôt doivent être déposées au plus tard à cette date.

(7) Une partie requérante peut retirer sa demande avant qu'elle n'ait été enregistrée, en déposant une notification écrite de retrait auprès du ou de la Secrétaire général(e). Le Secrétariat avise les parties du retrait dans les plus brefs délais, sauf si la demande n'a pas encore été transmise à l'autre partie conformément au paragraphe (5)(a).

Capítulo XI
Aclaración, Revisión y Anulación del Laudo

Regla 63
La Solicitud

(1) Una parte que solicite la aclaración, revisión o anulación de un laudo deberá presentar la solicitud al o a la Secretario(a) General, junto con cualquier documento de respaldo y pagará el derecho de presentación publicado en el arancel de derechos.

(2) La solicitud deberá:

(a) identificar el laudo de que se trata;

(b) estar en un idioma procesal utilizado en el procedimiento original;

(c) estar fechada y firmada por cada una de las solicitantes o su(s) representante(s);

(d) estar acompañada de prueba del poder de representación de cada representante; e

(e) incluir los contenidos y estar presentada dentro de los plazos a los que se hace referencia en los párrafos (3)-(5).

(3) Una solicitud de aclaración realizada de conformidad con lo dispuesto en el Artículo 50(1) del Convenio podrá ser presentada en cualquier momento después del envío

del laudo y especificará los puntos controvertidos relativos al sentido o alcance del laudo.

(4) Una solicitud de revisión realizada de conformidad con lo dispuesto en el Artículo 51(1) del Convenio deberá presentarse dentro de los 90 días siguientes a que se tome conocimiento del hecho que, por su naturaleza, afecte de manera decisiva el laudo, y en cualquier caso dentro de los tres años siguientes a la fecha en que se hubiera dictado el laudo (o cualquiera decisión suplementaria o rectificación posterior del mismo). La solicitud especificará:

(a) el cambio que se pretende en el laudo;

(b) el nuevo hecho del que se tomó conocimiento que afecta de manera decisiva al laudo; y

(c) prueba de que al momento de dictarse el laudo, el Tribunal y el o la solicitante no tenían conocimiento del hecho, y que el desconocimiento del hecho por parte del o de la solicitante no fue por negligencia.

(5) Una solicitud de anulación realizada de conformidad con lo dispuesto en el Artículo 52(1) del Convenio deberá:

(a) ser presentada dentro de los 120 días siguientes a la fecha en que se dictó el laudo (o cualquiera decisión suplementaria o rectificación posterior del mismo) si la solicitud estuviera basada en cualquiera de las causales previstas en el Artículo 52(1)(a), (b), (d) o (e) del Convenio; o

(b) ser presentada dentro de los 120 días siguientes a que se tome conocimiento de la existencia de corrupción de parte de un miembro del Tribunal y en cualquier caso dentro de los tres años siguientes a la fecha en que se hubiera dictado el laudo (o cualquiera decisión suplementaria o rectificación posterior del mismo), si la solicitud estuviera basada en el Artículo 52(1)(c) del Convenio; y

(c) especificar las causales en que se funda, circunscriptas a las causales establecidas en el Artículo 52(1)(a)-(e) del Convenio, y las razones en sustento de cada causal.

(6) Inmediatamente después de recibir una solicitud y el derecho de presentación, el o la Secretario(a) General deberá, con prontitud:

(a) enviar la solicitud y los documentos de respaldo a la otra parte;

(b) registrar la solicitud, o rechazar el registro si la solicitud no se realiza dentro del plazo al que se hace referencia en los párrafos (4) o (5); y

(c) notificar a las partes el registro o la denegación del registro.

(7) La última fecha para la presentación de una solicitud en virtud de esta Regla se determinará de conformidad con la Regla 7. Deberá presentarse una solicitud completa y la prueba del pago del derecho de presentación a más tardar en esa fecha.

(8) Un(a) solicitante podrá retirarse de la solicitud antes que ésta sea registrada mediante la presentación de una notificación escrita del retiro al o a la Secretario(a) General. El Secretariado notificará sin demora a las partes sobre el retiro, a menos que la solicitud no se hubiese enviado aún a la otra parte de conformidad con lo dispuesto en el párrafo (5)(a).

617. Proposed AR 63, current AR 50, and the subsequent rules in this Chapter implement the procedures in Art. 50-52 of the Convention.

618. The IR do not apply to post-Award proceedings. However, the rules relating to the filing and registration of a post-Award application are analogous to the filing of a Request for arbitration under the IR, with the notable exception of the review process. There is no review similar the review pursuant to Art. 36 of the ICSID Convention concerning an application under current AR 50, and the Secretary-General may only refuse to register an application if it is filed after the expiry of the applicable time limit. The Centre may nevertheless request that an application which does not conform to the formal requirements in proposed AR 63 be supplemented before registration.

619. The purpose of the proposed amendments is to clarify the filing requirements and to ensure that applicants file a complete application to expedite the registration process. Where relevant, the proposed amendments mirror the proposed amendments to the IR (*see e.g.* proposed AR 63(2)(c), (d) and (e), and AR 63(5)).

620. ***First***, proposed AR 63(1) lists the formal requirements for filing an application for interpretation, revision and annulment of the Award.

621. As provided in proposed AR 66(1) and (2) and based on current practice, the arbitration rules and the parties' agreements in Procedural Order No. 1 in the original proceeding also apply to the post-Award remedy proceedings, unless otherwise agreed or directed, and to the extent they are relevant given the particular remedy. The application should therefore be drawn up and filed in the procedural language(s) used in the original proceeding. This is clarified in proposed AR 63(2)(b).

622. The parties sometimes change counsel in post-Award remedy proceedings, or their power of attorney does not extend to such proceedings. Proposed AR 63(2)(c) and (d) require proof of authority to act. This could refer to the original power of attorney if counsel for the post-Award remedy proceeding is the same and the original power of attorney extends to the relevant post-Award remedy. A party may be asked to provide an updated power of attorney before documents from the record are provided to its counsel in the post-Award remedy proceeding.

623. Proposed AR 63(2)(e) reflects the proposal in proposed AR 3(1) that all pleadings and supporting documents be filed electronically unless otherwise agreed or ordered. If the parties agreed to file hard copies in the original proceeding in addition to electronic filing, the application should be filed also in hard copy. The Secretary-General may require that the application be filed in an alternative format for transmittal to the other party. This may be necessary where the other party is no longer represented by counsel in the original proceeding and there is no electronic mail address on file for that party.

624. ***Second***, proposed AR 63(2)-(5) specify the content requirements for each type of application and its time limit. For example, proposed AR 63(3) specifies that an application for interpretation may be filed at any time after the dispatch of the Award, and only needs to specify the points in dispute concerning the meaning or scope of the Award.

625. ***Third***, proposed AR 63(5) states that an application for annulment must specify the grounds under Art. 52(1) of the Convention on which it is based and include the reasons in support of each ground. This addresses possible objections to the admissibility of any particular ground for annulment concerning the Award which was not mentioned in the application. It will reduce the need for multiple rounds of written submissions after the constitution of the Committee (*see* current AR 50(1)(e)(iii)). Any admissibility objection must be addressed by the *ad hoc* Committee once it is constituted, as the Secretary-General's power to review an application is limited.

626. ***Fourth***, proposed AR 63(6) clarifies the steps following receipt of the application and lodging fee through to the notice of registration or refusal to register. The Secretary-General's power to refuse registration is limited to applications that are not filed within the applicable time limit.

627. ***Fifth***, proposed AR 63(8) addresses the withdrawal of application before it is registered. This is analogous to current IR 8. Following registration, the rules on discontinuance apply as in original arbitration proceedings.

RULE 64 – INTERPRETATION OR REVISION: RECONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 50(2), 51(3); AR 51

Rule 64
Interpretation or Revision: Reconstitution of the Tribunal

(1) As soon as an application for the interpretation or revision of an Award is registered, the Secretary-General shall:

(a) transmit the notice of registration, the application and any supporting documents to each member of the original Tribunal; and

(b) request each member of the Tribunal to inform the Secretary-General within 10 days whether that member can take part in the consideration of the application.

(2) If all members of the Tribunal can take part in the consideration of the application, the Secretary-General shall notify the Tribunal and the parties of the reconstitution of the Tribunal.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall invite the parties to constitute a new Tribunal without delay. The new Tribunal shall have the same number of arbitrators and be appointed by the same method as the original Tribunal.

Article 64
Interprétation ou révision : reconstitution du Tribunal

(1) Dès l'enregistrement d'une demande en interprétation ou en révision d'une sentence, le ou la Secrétaire général(e) :

(a) transmet la notification d'enregistrement, la demande et tous documents justificatifs à chaque membre du Tribunal initial ; et

(b) demande à chaque membre du Tribunal de lui faire savoir dans un délai de 10 jours s'il ou elle peut participer à l'examen de la demande.

(2) Si tous les membres du Tribunal peuvent participer à l'examen de la demande, le ou la Secrétaire général(e) notifie au Tribunal et aux parties que le Tribunal est reconstitué.

(3) Si le Tribunal ne peut pas être reconstitué conformément au paragraphe (2), le Secrétaire général invite les parties à constituer sans délai un nouveau Tribunal. Le nouveau Tribunal comprend le même nombre d'arbitres et est constitué selon la même méthode que le Tribunal initial.

Regla 64
Aclaración o Revisión: Reconstitución del Tribunal

(1) En cuanto se registre la solicitud de aclaración o revisión de un laudo, el o la Secretario(a) General deberá:

(a) enviar la notificación de registro, la solicitud y cualquier documento de respaldo a cada miembro del Tribunal; y

(b) solicitar a cada miembro del Tribunal que le informe al o a la Secretario(a) General dentro de los 10 días siguientes si ese miembro puede participar en la consideración de la solicitud.

(2) Si todos los miembros del Tribunal pueden participar en la consideración de la solicitud, el o la Secretario(a) General notificará al Tribunal y a las partes que el Tribunal ha sido reconstituido.

(3) Si el Tribunal no pudiera reconstituirse de conformidad con el párrafo (2), el o la Secretario(a) General instará a las partes a que constituyan un nuevo Tribunal sin demora. El nuevo Tribunal tendrá el mismo número de árbitros y será constituido siguiendo el mismo método que el Tribunal original.

628. The language of proposed AR 64, current AR 51, is simplified but there are no substantive changes to the provision. Proposed AR 64(1)(b) reflects the assumption that the original Tribunal will be reconstituted unless a member is not able to take part in the proceeding.

CURRENT RELATED PROVISIONS: Convention Art. 52(3); AR 52

Rule 65
Annulment: Appointment of *ad hoc* Committee

(1) As soon as an application for annulment of an Award is registered, the Chairman shall appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

(2) Each member of the Committee shall provide a signed declaration in accordance with Rule 26.

(3) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment.

Article 65
Annulation : nomination d'un Comité *ad hoc*

(1) Dès l'enregistrement d'une demande en annulation d'une sentence, le ou la Président(e) du Conseil administratif procède à la nomination d'un Comité *ad hoc* conformément à l'article 52(3) de la Convention.

(2) Chaque membre du Comité remet une déclaration signée conformément à l'article 26.

(3) Le Comité est réputé constitué à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que tous les membres ont accepté leur nomination.

Regla 65
Anulación: Nombramiento del Comité ad hoc

(1) En cuanto se registre una solicitud de anulación de un laudo, el o la Presidente(a) del Consejo Administrativo nombrará un Comité *ad hoc* de conformidad con el Artículo 52(3) del Convenio.

(2) Cada miembro del Comité deberá proporcionar una declaración firmada de conformidad con la Regla 26.

(3) El Comité se considerará constituido en la fecha en que el o la Secretario(a) General notifique a las partes que todos sus miembros han aceptado su nombramiento.

629. Proposed AR 65 is current AR 52 and has minor modifications to language.

630. Proposed AR 65 addresses the constitution of an *ad hoc* Committee of three persons appointed by the Chairman of the Administrative Council from the Panel of Arbitrators, following the registration of an application for annulment. Paragraph (3) prescribes the date of constitution of the Committee and requires each member to sign a declaration (*see* Schedule 4 – *Ad Hoc* Committee Member Declaration) similar to that specified in proposed AR 26, current AR 6(2).

631. Comments were received from some Member States and the public requesting that the qualifications of *ad hoc* Committee members be enhanced compared to those required of Tribunal Members.

632. The Centre is required to select *ad hoc* Committee members based on the qualifications mandated by Art. 14 of the ICSID Convention, which are equally applicable to arbitrators. In addition to these general qualifications, Committee members cannot have the same nationalities as the parties or the original Tribunal members, and cannot be designated to the Panel of Arbitrators by the State party to the dispute or the State of the national who is a party to the dispute (*see* Art. 52(3) of the Convention). The potential inclusion of additional qualifications applicable only to panellists appointed to annulment proceedings would thus require an amendment to the Convention.

633. The process by which each Member State identifies and selects Panel designees remains within the discretion of that State. The Centre encourages Member States to continue designating candidates with qualifications appropriate for both arbitrators and annulment Committee members.

634. Further details concerning the appointment of Committee members, including the names and origins of the appointees, may be found in ICSID's Background Paper on Annulment (2016).

RULE 66 – PROCEDURE APPLICABLE TO INTERPRETATION, REVISION AND ANNULMENT

CURRENT RELATED PROVISIONS: AR 53

Rule 66
Procedure Applicable to Interpretation, Revision and Annulment

(1) Except as provided below, the provisions of these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee.

(2) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall apply to a proceeding under this Rule, with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.

(3) In addition to the application, the written procedure shall consist of one round of written submissions, unless the parties agree or the Tribunal or Committee orders otherwise.

(4) A hearing shall be held upon the request of either party, or if ordered by the Tribunal or Committee.

(5) The Tribunal or Committee shall issue its decision within 120 days after the last written or oral submission on the application.

Article 66
Procédure applicable à l'interprétation, la révision et l'annulation

(1) Sous réserve des dispositions ci-dessous, les dispositions du présent Règlement s'appliquent, avec les modifications qui s'imposent, à toute procédure relative à l'interprétation, la révision ou l'annulation d'une sentence et à la décision du Tribunal ou du Comité.

(2) Les accords et ordonnances en matière de procédure sur les questions traitées au cours de la première session du Tribunal initial s'appliquent, avec les modifications qui s'imposent, à une procédure introduite selon le présent article, sauf si les parties en conviennent autrement ou sauf instructions contraires du Tribunal ou du Comité.

(3) Outre la demande, la procédure écrite comprend un seul échange d'écritures, sauf si les parties en conviennent ou le Tribunal ou le Comité en décide autrement.

(4) Une audience se tient à la demande de l'une ou l'autre des parties ou si le Tribunal ou le Comité l'ordonne.

(5) Le Tribunal ou le Comité rend sa décision dans les 120 jours suivant les dernières écritures ou plaidoiries sur la demande.

Regla 66
Procedimiento Aplicable a la Aclaración, Revisión y Anulación

(1) Salvo lo dispuesto a continuación, estas Reglas se aplicarán, con las modificaciones necesarias, a todo procedimiento relacionado con la aclaración, revisión o anulación de un laudo y a la decisión del Tribunal o Comité.

(2) Los acuerdos y resoluciones procesales sobre cuestiones abordadas durante la primera sesión del Tribunal original serán aplicables a un procedimiento en virtud de esta Regla, con las modificaciones necesarias, salvo acuerdo de las partes o resolución del Tribunal o Comité en contrario.

(3) Además de la solicitud, el procedimiento escrito constará de una ronda de escritos, salvo acuerdo de las partes o resolución del Tribunal o Comité en contrario.

(4) Se celebrará una audiencia a petición de cualquiera de las partes, o si lo resolviera el Tribunal o Comité.

(5) El Tribunal o Comité emitirá su decisión dentro de los 120 días siguientes al último escrito o presentación oral sobre la solicitud.

635. Proposed AR 66 is current AR 53 with amendments simplifying the text, clarifying the applicable rules and procedure, and addressing efficiency of the process.

636. ***First***, given the nature of post-Award proceedings, not all rules in an original arbitration proceeding are applicable. The legal and the factual issues will be fewer and more specific. Art. 52(4) of the Convention provides that certain provisions of the Convention will apply *mutatis mutandis*, with the necessary changes taking into account the particular remedy at hand. Similarly, the AR will apply with the necessary changes in view of the procedure before the Tribunal or Committee. This is provided in proposed AR 66(1).

637. ***Second***, proposed AR 66(2) reflects the practice that the relevant body may assume that the parties' procedural agreements in the original proceeding will apply to the post-Award remedy proceeding, unless the parties agree otherwise. For example, if the parties agreed on the Arbitration Rules of 2006 in the original proceeding, the 2006 Rules are presumed to apply to the post-Award proceeding. This also applies to the method of filing (electronic or hard copy pursuant to proposed AR 3).

638. ***Third***, given the limited nature of post-Award remedies, there may be no need for more than one round of written submissions in annulment proceedings. Proposed AR 66(3) addresses the difference in scope of the original proceeding and post-Award remedies. It proposes to limit the number of pleadings in the written procedure to one round, unless the parties agree or the Tribunal or Committee orders another round.

639. ***Fourth***, the rule does not assume that a hearing will be held but proposed AR 66(4) maintains the possibility of a hearing if either party or the Tribunal or Committee thinks it would be useful. Hearings on annulment are often limited to oral submissions by counsel and do not require examination of witnesses and experts. They provide an opportunity for the Committee to pose questions; however, these may also be put in writing.

640. A suggestion was also made to clarify the admission of new evidence and document production in the context of annulment proceedings, and to completely exclude new evidence. However, while annulment is not an appeal and new evidence is thus not needed to prove a claim, it may be relevant, for example to a request for stay of enforcement of an Award or in a revision proceeding. Current practice is to ascertain the parties' views on this matter at the first session and to state in annulment cases that the Committee expects that the parties will primarily refer to the evidentiary record of the original proceeding. Therefore, no amendment is proposed to address new evidence in annulment proceedings.

641. ***Fifth***, proposed AR 66(5) requires the Tribunal or Committee to issue its decision within 120 days after the last written or oral submission on the application in an effort to encourage the expeditious resolution of the matter (*see* Schedule 9 on Time and Costs for an overview of time limits in the proposed Rules and related measures).

RULE 67 – STAY OF ENFORCEMENT OF THE AWARD

CURRENT RELATED PROVISIONS: Convention Art. 50(2), 51(4), 52(5), 53(1); AR 54

Rule 67
Stay of Enforcement of the Award

(1) A party to an interpretation, revision or annulment proceeding may request a stay of enforcement of all or part of the Award at any time before the final decision on the application.

(2) If the stay is requested in the application for revision or annulment of an Award, enforcement shall be stayed provisionally by the Secretary-General until the Tribunal or Committee decides on the request.

(3) The following procedure shall apply:

(a) the request shall specify the circumstances that require the stay;

(b) the Tribunal or Committee shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party files the request before the constitution of the Tribunal or Committee, the Secretary-General shall fix time limits for written submissions on the

request, so that the Tribunal or Committee may consider the request promptly upon its constitution; and

(d) the Tribunal or Committee shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal or Committee;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(4) If a Tribunal or Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.

(5) A party must promptly disclose to the Tribunal or Committee any change in the circumstances upon which the enforcement was stayed.

(6) The Tribunal or Committee may at any time modify or terminate a stay of enforcement, on its own initiative or upon a party's request.

(7) A stay of enforcement shall terminate on the date of dispatch of the decision on the application for interpretation, revision or annulment, or on the date of discontinuance of the proceeding.

Article 67
Suspension de l'exécution de la sentence

(1) Une partie à une instance en interprétation, révision ou annulation peut requérir qu'il soit sursis à l'exécution de tout ou partie de la sentence à tout moment avant qu'il ait été définitivement statué sur la demande.

(2) Si la suspension est sollicitée dans la demande en révision ou annulation de la sentence, l'exécution est provisoirement suspendue par le ou la Secrétaire général(e) jusqu'à ce que le Tribunal ou le Comité ait statué sur la requête.

(3) La procédure suivante s'applique :

(a) la requête précise les circonstances qui exigent la suspension ;

(b) le Tribunal ou le Comité fixe les délais relatifs aux écritures ou plaidoiries, le cas échéant, concernant la requête ;

(c) si une partie dépose la requête avant la constitution du Tribunal ou du Comité, le ou la Secrétaire général(e) fixe les délais pour le dépôt des écritures relatives à la

requête, de sorte que le Tribunal ou le Comité puisse l'examiner dans les plus brefs délais après sa constitution ; et

(d) le Tribunal ou le Comité rend sa décision sur la requête dans un délai de 30 jours à compter de la plus tardive des dates suivantes :

(i) la date de constitution du Tribunal ou du Comité ;

(ii) la date des dernières écritures relatives à la requête ; ou

(iii) la date des dernières plaidoiries relatives à la requête.

(4) Si un Tribunal ou un Comité décide de suspendre l'exécution de la sentence, il peut imposer des conditions pour la suspension, ou la levée de la suspension, au regard de l'ensemble des circonstances pertinentes.

(5) Une partie doit divulguer dans les plus brefs délais au Tribunal ou au Comité tout changement dans les circonstances sur le fondement desquelles l'exécution a été suspendue.

(6) Le Tribunal ou le Comité peut à tout moment modifier ou mettre fin à une suspension d'exécution, de sa propre initiative ou à la demande d'une partie.

(7) Une suspension d'exécution prend fin à la date d'envoi de la décision sur la demande en interprétation, révision ou annulation, ou à la date de la fin de l'instance.

Regla 67
Suspensión de la Ejecución del Laudo

(1) Una parte de un procedimiento de aclaración, revisión o anulación podrá solicitar una suspensión de la ejecución de una parte o de todo el laudo en cualquier momento antes que se emita la decisión final sobre la solicitud.

(2) Si se solicitara la suspensión en la solicitud de revisión o de anulación de un laudo, se suspenderá la ejecución de manera provisional por el o la Secretaria General hasta que el Tribunal o el Comité decida sobre la solicitud.

(3) Se aplicará el siguiente procedimiento:

(a) la solicitud especificará las circunstancias que requieren la suspensión;

(b) el Tribunal o Comité deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud;

(c) si una parte presenta la solicitud antes de la constitución del Tribunal o Comité, el o la Secretario(a) General fijará los plazos para los escritos sobre la solicitud, de modo tal que el Tribunal o Comité pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal o Comité emitirá su decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal o Comité;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(4) Si un Tribunal o Comité decide suspender la ejecución del laudo, podrá imponer condiciones para la suspensión, o para el levantamiento de la suspensión, tomando en consideración todas las circunstancias relevantes.

(5) Una parte deberá revelar al Tribunal o Comité con prontitud cualquier cambio en las circunstancias en las que se suspendió la ejecución.

(6) El Tribunal o Comité podrá, en cualquier momento, modificar o poner término a una suspensión de la ejecución, de oficio o a solicitud de una de las partes.

(7) Una suspensión de la ejecución terminará en la fecha de envío de la decisión sobre la solicitud de aclaración, revisión o anulación, o en la fecha de discontinuación del procedimiento.

642. Proposed AR 67 is current AR 54. The proposed amendments simplify the text, codify practice, clarify procedure and address efficiency of process.

643. ***First***, the Convention establishes that enforcement shall be stayed whenever a request is included in an application for the revision or annulment of an Award. However, the Convention also requires that the Tribunal or Committee decide that request. These two mandates are accommodated through a stay that is put in place "provisionally" until the Tribunal or Committee decides a request included in the application for annulment or revision of the Award. A stay of enforcement may otherwise be requested at any time until there is a decision on the application that puts an end to the proceeding, without a provisional stay in place. Proposed AR 67(1) and (2) provides for these scenarios. In both scenarios, the request for stay of enforcement must specify the circumstances that justify the stay in accordance with proposed AR 67(3)(a).

644. ***Second***, the WP clarifies and simplifies the procedure to decide the stay. The current rule establishes two procedures to decide a stay of enforcement request: (i) a default procedure according to which consideration of the request is given priority (current AR 54(1)); and

(ii) an expedited procedure with a fixed deadline for the decision (current AR 54(2)). The latter only applies if either party requests the procedure. The fact that these two procedures could potentially apply to the same request has resulted in inconsistent application of the rule. In addition, Committees have found it difficult to decide the stay within the shorter time limit as they also need to be briefed in writing and, potentially, at a hearing. The Centre has received comments from Member States and the public concerning the interplay of these two procedures and requesting that the rule be clarified.

645. In response to these comments, proposed AR 67(3) addresses procedure. These paragraphs provide for only one procedure applicable to all stay of enforcement requests. This provision also clarifies that the party requesting the stay must establish the circumstances that require it, regardless of whether the request is in the application and will lead to a provisional stay of enforcement (proposed AR 67(3)(a)).

646. To maintain the same expediency as the current rule while increasing the time available to Tribunals and Committees to consider the request, the proposed amendment requires that a schedule of submissions be established before the constitution of the Tribunal or Committee if the request is filed before the constitution (proposed AR 67(3)(c)). It further anchors the start of the deadline of 30 days for a decision on the request to the last written or oral submission or, if the last submission was received before the constitution of the Tribunal or Committee, the date of constitution (proposed AR 67(3)(d)).

647. ***Third***, the Convention does not indicate whether a stay of enforcement can be subject to conditions, and the current rule does not address this matter. While several Committees have issued conditional stays of enforcement, the silence in the Convention and the Rules has resulted in inconsistent interpretations and been the subject of comment from the public.

648. Proposed AR 67(4) codifies and regulates the practice of conditionally staying enforcement if: (i) a stay is required by the circumstances; and (ii) the condition(s) is necessary in light of the circumstances. The condition should not amount to compliance with the terms of the Award (*see* Art. 53(1) of the Convention, which establishes the obligation to comply with the Award "except to the extent that enforcement shall have been stayed", and should address other circumstances that warrant the condition(s). A conditional stay is typically not an alternative to not staying enforcement, but an exercise of Tribunal or Committee discretion, having already determined that a stay is required.

649. ***Fourth***, proposed AR 67(5) deals with the subsequent alteration of a stay of enforcement decided by a Tribunal or Committee, as reflected in current AR 54(3). The proposed amendments introduce a disclosure obligation on the parties. Proposed AR 67(6) clarifies that a Tribunal or Committee has discretion to alter a stay of enforcement on its own initiative. The purpose of the requirement that both parties disclose any material change in the circumstances on which enforcement was stayed is to address questions of fairness, and to provide consistent procedure with the rule on provisional measures (*see* proposed AR 50 in Chapter VIII – Special Procedures).

650. ***Fifth***, proposed AR 67(7) addresses the termination of any stay of enforcement still in place when the interpretation, revision or annulment proceeding terminates. The proposed rule clarifies that a stay of enforcement terminates with the proceeding, regardless of whether the proceeding concludes with a final decision on the application or is otherwise discontinued.

651. The proposed rule also eliminates the potential to continue a stay of enforcement beyond a decision annulling an Award in full or in part. This amendment better reflects Art. 52(5) of the Convention, which provides that enforcement may be stayed while the Committee's decision on the application for annulment is "pending".

RULE 68 – RESUBMISSION OF DISPUTE AFTER AN ANNULMENT

CURRENT RELATED PROVISIONS: Convention Art. 52(6); AR 55

Rule 68
Resubmission of Dispute after an Annulment

(1) If a Committee annuls all or part of an Award, either party may file with the Secretary-General a request to resubmit the dispute to a new Tribunal, together with any supporting documents and pay the lodging fee published in the schedule of fees. The request shall:

(a) identify the Award to which it relates;

(b) be in a procedural language used in the original proceeding;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative's authority to act; and

(e) specify which aspect(s) of the dispute is resubmitted to the new Tribunal.

(2) Upon receiving a request for resubmission and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request and the supporting documents to the other party;

(b) register the request;

(c) notify the parties of the registration; and

(d) invite the parties to constitute a new Tribunal without delay, which shall have the same number of arbitrators, and be appointed by the same method as the

original Tribunal.

(3) If the original Award was annulled in part, the new Tribunal shall only reconsider that part of the dispute pertaining to the annulled portion of the Award.

(4) Except as otherwise provided in paragraphs (1)-(3), these Rules shall apply to the resubmission proceeding.

(5) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall apply to the resubmission proceeding, with necessary modifications, unless the parties agree or the new Tribunal orders otherwise.

Article 68
Nouvel examen d'un différend après une annulation

(1) Si un Comité annule une sentence en totalité ou en partie, l'une ou l'autre des parties peut déposer auprès du ou de la Secrétaire général(e) une requête aux fins de soumettre le différend à un nouveau Tribunal, avec tous documents justificatifs, et s'acquitter du droit de dépôt publié dans le barème des frais. La requête :

(a) identifie la sentence visée ;

(b) est rédigée dans une langue de la procédure utilisée dans l'instance initiale ;

(c) est signée par chaque partie requérante ou son représentant et est datée ;

(d) comprend la preuve de l'habilitation à agir de tout représentant ; et

(e) précise quel(s) aspect(s) du différend doi(ven)t être soumis au nouveau Tribunal.

(2) Dès réception de la requête en nouvel examen et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre à l'autre partie la requête et les documents justificatifs ;

(b) enregistrer la requête ;

(c) aviser les parties de l'enregistrement ; et

(d) inviter les parties à constituer sans délai un nouveau Tribunal, qui comprend le même nombre d'arbitres et est nommé selon la même méthode que le Tribunal initial.

(3) Si la sentence initiale a été annulée en partie, le nouveau Tribunal n'examine que la partie du différend relatif à la partie annulée de la sentence.

(4) Sauf dispositions contraires des paragraphes (1) - (3), le présent Règlement s'applique à une instance de nouvel examen.

(5) Les accords et ordonnances en matière de procédure sur les questions traitées au cours de la première session du Tribunal initial s'appliquent, avec les modifications qui s'imposent, à une instance de nouvel examen, sauf si les parties en conviennent autrement ou sauf instructions contraires du nouveau Tribunal.

Regla 68
Nueva Sumisión de una Diferencia después de la Anulación

(1) Si un Comité anulara total o parcialmente un laudo, cada parte podrá presentar al o a la Secretario(a) General una solicitud para que se someta la diferencia a un nuevo Tribunal, junto con cualquier documento de respaldo y pagar el derecho de presentación publicado en el arancel de derechos. La solicitud deberá:

(a) identificar el laudo de que se trata;

(b) estar en un idioma procesal utilizado en el procedimiento original;

(c) estar fechada y firmada por cada una de las partes solicitantes o su(s) representante(s);

(d) estar acompañada de prueba del poder de representación del representante; y

(e) especificar qué aspecto(s) de la diferencia ha(n) de someterse al nuevo Tribunal.

(2) Inmediatamente después de recibir una solicitud de nueva sumisión y el derecho de presentación, el o la Secretario(a) General, deberá con prontitud:

(a) enviar la solicitud y los documentos de respaldo a la otra parte;

(b) registrar la solicitud;

(c) notificar a las partes el registro; e

(d) invitar a las partes a que constituyan, sin demora, un nuevo Tribunal que tendrá la misma cantidad de árbitros y será constituido siguiendo el mismo método que el Tribunal original.

(3) Si el laudo original fuera anulado en parte, el nuevo Tribunal solo reconsiderará aquella parte de la diferencia que corresponda a la parte anulada del laudo.

(4) Salvo disposición en contrario establecida en los párrafos (1)-(3), estas Reglas se

aplicarán al procedimiento de nueva sumisión.

(5) Los acuerdos y resoluciones procesales sobre cuestiones abordadas durante la primera sesión del Tribunal original serán aplicables al procedimiento de nueva sumisión con las modificaciones necesarias, salvo acuerdo de las partes o resolución del nuevo Tribunal en contrario.

652. Proposed AR 68 implements Art. 52(6) of the Convention and addresses the resubmission of a dispute to a new Tribunal following a full or partial annulment of an Award. To date, disputes have been resubmitted in eight cases. There is no time limit for resubmission of a dispute, and the Secretary-General cannot refuse registration if the request is filed and the lodging fee is paid.

653. Proposed AR 68 suggests the same type of amendments as proposed AR 63 concerning the request for resubmission and the procedure to be applied to a resubmission proceeding. Proposed AR 68 also deletes the reference to a possible stay of enforcement in current AR 55(3). Issues that may arise in the context of a resubmission (such as the scope of the new Tribunal's mandate or the admissibility of new claims and counterclaims) are, as in current practice, left to be decided on a case-by-case basis by Tribunals.

654. Consistent with the amendments to AR 54 on stay of enforcement, the proposed AR 68 eliminates the possibility of staying or continuing to stay enforcement of the Award during the resubmission proceeding.

CHAPTER XII - EXPEDITED ARBITRATION

655. The expedited procedures in this Chapter allow an arbitration to conclude within 470-530 days after the date of registration of the Request for arbitration. They provide for a Sole Arbitrator or three-member Tribunal to be appointed on an expedited basis, and for all matters to be heard in a single proceeding before the Tribunal without bifurcation. The Arbitration Rules in Chapters I-XI apply to an expedited arbitration under this Chapter, except as expressly modified or excluded by Chapter XII.

656. The background and reasons for adopting expedited arbitration ("EA") provisions are explained in the Schedule concerning time and cost (see Schedule 9 – Addressing Time and Cost in ICSID Arbitration). EA addresses comments received from Member States and the public that investment arbitrations are too long and too costly.

657. The EA provisions focus on reducing the length of three main phases in an arbitration with long durations (*see* Schedule 9): (i) the establishment of the Tribunal; (ii) written procedures, especially interlocutory applications; and (iii) rendering the Award. These areas are also addressed in Chapters I-XI of the AR. However, the EA go a step further in that they offer a stand-alone expedited process, with clear deadlines on the time of a process

from the registration of the Request for arbitration, to rendering the Award and any post-Award remedies.

658. By comparison, AR Chapters I-XI enable parties to agree on case-specific timelines for constituting the Tribunal and the procedural time-table for their case. It is important to maintain these options, since the Convention allows for party agreement on such matters and the procedural calendar of any given case may differ depending on the issues involved in the case. Party autonomy on these matters also recognizes that the complexity of cases may vary, for example depending on whether a case is based on consent to arbitration in an investment contract or in an investment law or treaty, on the underlying circumstances or the legal questions for decision.

659. Investment arbitrations can also follow a variety of scenarios. For example, a respondent might raise objections to the jurisdiction of the Tribunal which may be heard as a preliminary matter in a bifurcated proceeding or joined to the merits of the case. A respondent might raise objections that the claim manifestly lacks legal merit early on in the process, leading to an automatic bifurcation of the matter for an early decision; and questions of liability and damage may be heard in different phases. The parties might suspend a case to pursue settlement negotiations or mediation. All of these tracks affect the overall time to conclude the case.

660. The EA provide less flexibility to change time frames, but more certainty as to the timing of the process. Parties can agree on the number of arbitrators – a Sole Arbitrator or three-member Tribunal – but have an expedited method to appoint these arbitrators, including time limits for their appointment. The procedural calendar maintains two rounds of submissions and a hearing as provided in proposed AR 13(1) and 15, but joins all issues in one proceeding without the possibility of bifurcation. The Award is still an ICSID Convention Award and must comply with the requirements for such Awards, but must be rendered on an expedited basis. To meet these time limits, the EA regulates filing dates and limits the length of written submissions. Tribunals may also employ complementary case management techniques to address timing.

661. The following table shows the basic steps in the process and the time line for an EA with a Sole Arbitrator. As can be seen from this table, the parties are able to complete all briefing and get to a hearing on merits and jurisdiction within one year.

Day No. (Cumulative No. of Days)	Step in the Proceeding	No. of Days for Step	Rule Reference (Proposed Provision)
Day 1	Registration		
Day 20	Agreement on EA	20 after registration	Rule 69(3)
Day 30	Agreement on number of arbitrators and method	30 after registration	Rule 70(2)
Day 50	Parties appoint Sole Arbitrator (SA)	20	Rule 71(a)
Day 60	SA accepts appointment / constitution of Tribunal	10	Rule 71(b)
Day 90	First session	30	Rule 74
Day 150	Claimant(s)' memorial	60	Rule 75(1)(a)

Day 210	Respondent(s)' counter-memorial	60	Rule 75(a)(b)
Day 250	Claimant(s)' reply	40	Rule 75(1)(c)
Day 290	Respondent(s)' rejoinder	40	Rule 75(1)(d)
Day 350	Hearing (no. of days determined between SA and parties)	60	Rule 75(1)(e)
Day 360 (+ no. of hearing days)	Parties' statements of costs	10	Rule 75(1)(f)
Day 470	Award	120	Rule 75(1)(g)

662. The time limits in the EA are ambitious but on a slower track than expedited procedures in commercial arbitration rules, which typically provide for an arbitration to conclude within 6 months (*see* Schedule 9). The EA endeavour to strike a balance between an expedited procedure under commercial arbitration rules and a realistic schedule for investment disputes given their special characteristics.

663. Electing an EA necessarily means parties and counsel have to make certain compromises. First, parties and counsel must be prepared to limit the length of submissions and the number of separate procedural applications they bring (*e.g.* requests for provisional measures and production of documents). Practice has shown that many arbitrations are delayed due to the high number of procedural applications made by the parties during the proceeding. By definition, an arbitration cannot be expedited if there are numerous disputes as to refusals to produce documents, special procedures, and the like. As a result, the approach of counsel will be vital to making the EA effective.

664. Second, parties must be prepared to merge all matters before the Tribunal in one procedural schedule. There is no option to bifurcate proceedings or have parallel schedules. If a party wishes to raise objections to jurisdiction, these would need to be included in that party's counter-memorial or reply (*see* proposed AR 36 and 52) and heard jointly with the other issues in dispute at the hearing.

665. Third, the Tribunal must be available to conduct the proceeding under the EA. An expedited proceeding means the Tribunal must devote significant time from the moment it is constituted until the Award is rendered, *i.e.* during a period of approximately 450-500 days. Candidates for appointment should therefore be prepared to meet the shorter deadlines of the EA and case manage the process.

666. The EA is particularly apt for cases where parties are mindful of costs. For example, an EA might be especially suitable for investment contract disputes of small and medium-sized enterprises ("SMEs"). Instead of referring to commercial arbitration rules in their arbitration agreements because of time and cost considerations, SMEs and other parties who need an expedited arbitration in an investor-State dispute context would now have the option to select the EA.

667. States may also refer to the EA in their investment laws and treaties for disputes concerning certain categories of investors or disputes. For example, the CETA includes specific provisions regarding investment disputes involving SMEs (*see* CETA Art. 8.19(3), 8.23(5),

8.27(9)). This could complement the efforts to promote international investment among SMEs.

RULE 69 – CONSENT OF PARTIES TO EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: Conv. Art. 44

Chapter XII
Expedited Arbitration

Rule 69
Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration in accordance with this Chapter ("expedited arbitration") by following the procedure in paragraph (2).

(2) The parties shall jointly notify the Secretariat in writing of their consent to an expedited arbitration in accordance with this Chapter. Such notice must be received within 20 days after the date of registration of the Request for arbitration.

(3) Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:

(a) Rules 8(1), 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; and

(b) Rules 26, 30, 34, 36, 40, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter.

Chapitre XII – Arbitrage Accéléré

Article 69
Consentement des parties à un arbitrage accéléré

(1) Les parties à un arbitrage conduit sur le fondement de la Convention du CIRDI peuvent consentir à accélérer l'arbitrage conformément au présent chapitre (« arbitrage accéléré ») en suivant la procédure indiquée au paragraphe (2).

(2) Les parties notifient conjointement par écrit au Secrétariat leur consentement à un arbitrage accéléré conformément au présent chapitre. Cette notification doit être

reçue dans un délai de 20 jours à compter de la date de l'enregistrement de la requête d'arbitrage.

(3) Les chapitres I à XI du Règlement d'arbitrage s'appliquent à un arbitrage accéléré, étant toutefois entendu que :

(a) les articles 8(1), 22, 23, 25, 35, 37, 38, 42 et 43 ne s'appliquent pas à un arbitrage accéléré sur le fondement du présent chapitre ; et

(b) les articles 26, 30, 34, 36, 40, 53, 59, 62 et 66, modifiés par les articles 70 - 78, s'appliquent à un arbitrage accéléré sur le fondement du présent chapitre.

Capítulo XII
Arbitraje Expedito

Regla 69
Consentimiento de las Partes a un Arbitraje Expedito

(1) Las partes de un arbitraje tramitado en virtud del Convenio del CIADI pueden consentir a que dicho arbitraje sea conducido con mayor rapidez de conformidad con este Capítulo ("arbitraje expedito") siguiendo el procedimiento descrito en el párrafo (2).

(2) Las partes notificarán al Secretariado, en forma conjunta y por escrito su consentimiento a un arbitraje expedito de conformidad con este Capítulo. Dicha notificación debe recibirse dentro de los 20 días siguientes a la fecha de registro de la solicitud de arbitraje.

(3) Los Capítulos I-XI de las Reglas de Arbitraje serán de aplicación a un arbitraje expedito salvo que:

(a) Las Reglas 8(1), 22, 23, 25, 35, 37, 38, 42 y 43 no son aplicables en un arbitraje expedito de conformidad con lo dispuesto en este Capítulo; y

(b) Las Reglas 26, 30, 34, 36, 40, 53, 59, 62 y 66, según fueran modificadas por las Reglas 70-78, son aplicables en un arbitraje expedito de conformidad con lo dispuesto en este Capítulo.

668. The EA do not apply automatically, and Tribunals cannot apply them without the express consent of the parties. Parties need to agree in writing to the application of Chapter XII of the Arbitration Rules (proposed AR 69(1)). Such agreement is in addition to the agreement to arbitrate under the ICSID Convention.

669. An EA arbitration clause in a contract could be formulated as follows:

> The [Government]/[name of constituent subdivision or agency] of name of Contracting State and name of investor hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of this agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention"). The Parties agree to apply Chapter XII of the [2019] Arbitration Rules of the Centre (Expedited Arbitration) to the arbitration proceeding.

670. A reference to the EA could also be contained in a State's offer to arbitrate in an investment treaty or contract. By accepting that offer, the investor would agree to arbitration under Chapter XII of the AR.

671. If the parties agree to apply the EA in their arbitration agreement, such agreement will be notified to the Centre with the filing of the Request for arbitration, and the EA will apply immediately from the date of registration of the Request.

672. Alternatively, even if the EA is not noted in the investment instrument, the parties can agree to apply it in a specific case by mutual agreement. In this instance, the parties would agree to apply the EA after the dispute has arisen, within 20 days after the date of registration. If so, they must notify the Secretary-General of their agreement, and the EA will apply from the date of the notice (proposed AR 69(2)).

673. An EA remains an arbitration under the ICSID Convention, hence the framework and mandatory provisions of the Convention apply. Chapter XII incorporates all of the provisions of the AR (and thus the Convention), and expressly lists those that are excluded (proposed AR 69(3)(a)). The excluded provisions are: proposed AR 8(1) (the option for parties to agree to extend a time limit), 22 (method of constituting the Tribunal), 23 (appointment of arbitrators to a Tribunal constituted in accordance with Art. 37(2)(b) of the Convention), 25 (appointment of arbitrators by the Chairman of the Administrative Council in accordance with Art. 38 of the Convention), 35 (Manifest Lack of Legal Merit), 37 (Bifurcation), 38 (Consolidation on Consent of Parties), 42 (Tribunal-appointed experts), and 43 (visits and inquiries).

674. The EA also lists the provisions of the AR which apply as modified by Chapter XII (proposed AR 69(3)(b)). These provisions are: proposed AR 26 (acceptance of appointment), 30 (decision on the proposal for disqualification), 34 (first session), 36 (preliminary objection), 40 (Tribunal order to produce documents or other evidence), 53 (default), 59 (timing of the Award), 62 (supplementary decision and rectification) and 66 (procedure applicable to interpretation, revision and annulment). The exclusions and modifications are explained below.

RULE 70 – NUMBER OF ARBITRATORS AND METHOD OF CONSTITUTING THE TRIBUNAL FOR EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: Conv. Art. 37; AR 2, 3

Rule 70
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 71 or a three-member Tribunal appointed pursuant to Rule 72.

(2) The parties shall jointly notify the Secretariat in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of registration of the Request for arbitration.

(3) If the parties do not notify the Secretariat of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed in accordance with Rule 71.

(4) An appointment under Rules 71-72 shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the Convention.

Article 70
Nombre d'arbitres et méthode de constitution du Tribunal dans un arbitrage accéléré

(1) Le Tribunal dans un arbitrage accéléré comprend un(e) arbitre unique nommé(e) conformément à l'article 71 ou trois membres nommés conformément à l'article 72.

(2) Dans les 30 jours suivant la date de l'enregistrement de la requête d'arbitrage, les parties notifient conjointement par écrit au Secrétariat si elles ont choisi un(e) arbitre unique ou un Tribunal composé de trois membres.

(3) Si les parties ne notifient pas leur choix au Secrétariat dans le délai visé au paragraphe (2), le Tribunal comprend un(e) arbitre unique devant être nommé(e) conformément à l'article 71.

(4) Toute nomination effectuée en application des articles 71 - 72 est réputée constituer une nomination selon la méthode convenue entre les parties conformément à l'article 37(2)(a) de la Convention.

Regla 70
Número de Árbitros y Método de Constitución del Tribunal para el Arbitraje Expedito

(1) El Tribunal en un arbitraje expedito estará compuesto por un o una Árbitro Único nombrado de conformidad con lo dispuesto en la Regla 71 o de un Tribunal de tres miembros nombrados de conformidad con lo dispuesto en la Regla 72.

(2) Las partes notificarán en forma conjunta y por escrito al Secretariado su elección de un o una Árbitro Único o de un Tribunal de tres miembros dentro de los 30 días siguientes a la fecha de registro de la solicitud de arbitraje.

(3) Si las partes no notificaran al Secretariado su elección dentro del plazo al que se hace referencia en el párrafo (2), el Tribunal estará compuesto por un o una Árbitro Único que será nombrado de conformidad con la Regla 71.

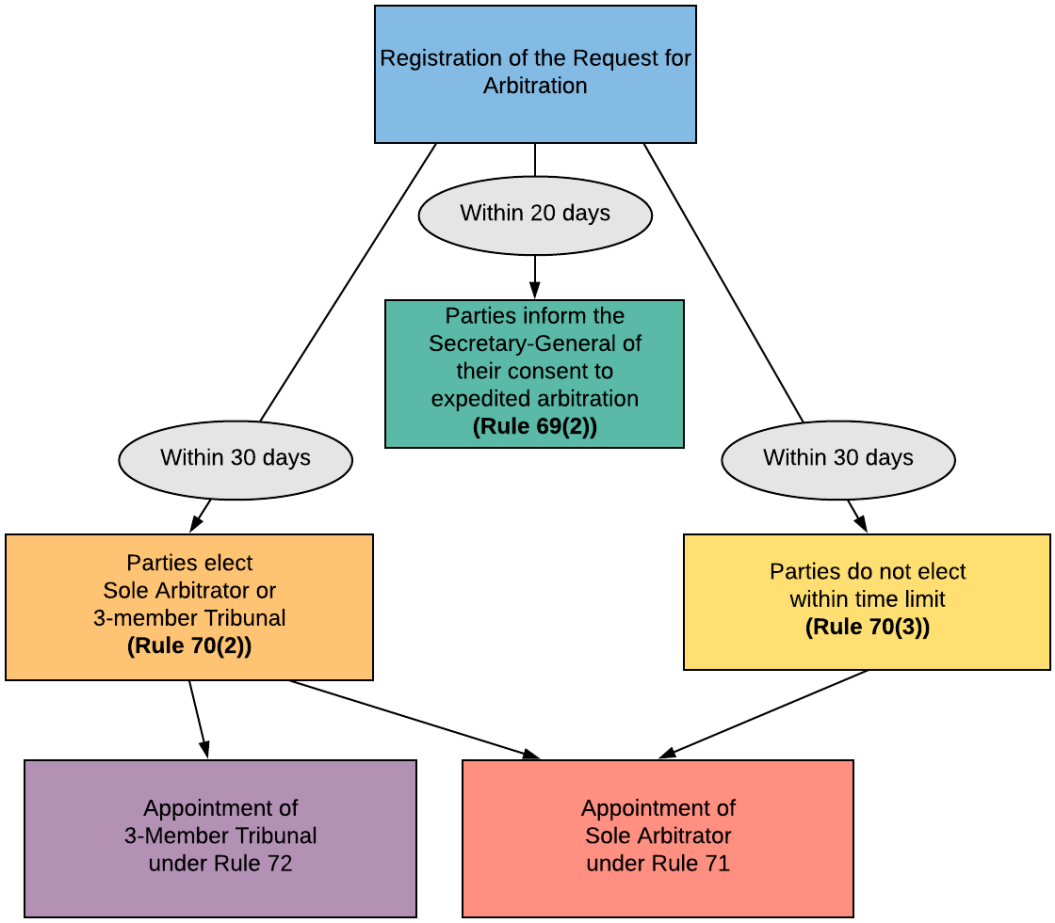
(4) Un nombramiento de conformidad con lo dispuesto en las Reglas 71-72 será considerado un nombramiento de conformidad con el método acordado por las partes según lo dispuesto en el Artículo 37(2)(a) del Convenio.

675. The parties electing to apply the EA are given two options for the Tribunal: a Sole Arbitrator or a three-member Tribunal (proposed AR 70(1)). Typically, a proceeding conducted by a Sole Arbitrator is more expeditious than a proceeding with several arbitrators. Although the AR envisage the possibility of a Sole Arbitrator, parties may prefer three-member Tribunals in investment arbitrations. This is also the default option under Art. 37(2)(b) of the Convention, if the parties do not agree on the number of arbitrators and the method of constituting the Tribunal. Therefore, the EA keep the option of a three-member Tribunal, but provide for a Sole Arbitrator as a default if the parties fail to agree on either option (proposed AR 70(3)).

676. The parties must notify the Centre of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after registration of the Request for arbitration (proposed AR 70(2)). This means that if they agree on the application of the EA on the last day allowed (20 days after registration), they will have 10 further days to make the election between a sole or a three-person Tribunal.

677. The Tribunal will be constituted in accordance with the method provided in proposed AR 71 or 72. Such agreement is considered an agreement on the number of arbitrators and the method of constituting the Tribunal in accordance with Art. 37(2)(a) of the Convention. Because the methods in AR 71 and 72 lead to constitution of the Tribunal, there is no need to apply the default provision in Art. 37(2)(b) of the Convention or to resort to Art. 38 of the Convention for the appointment by the Chairman of the Administrative Council of any missing arbitrators. Therefore, AR 22, 23 and 25 do not apply.

Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration – Rule 69 & 70



RULE 71 – APPOINTMENT OF SOLE ARBITRATOR FOR EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: Conv. Art. 37, AR 2, 3

Rule 71
Appointment of Sole Arbitrator for Expedited Arbitration

(1) A Sole Arbitrator in an expedited arbitration shall be appointed in accordance with the following procedure:

(a) The parties shall jointly advise the Secretary-General in writing of their agreement on a Sole Arbitrator and shall provide the appointee's name,

nationality(ies) and contact information within 20 days after the notice referred to in Rule 70(2); and

(b) The Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(2) The Secretary-General shall appoint the Sole Arbitrator if:

(a) the parties do not agree on the Sole Arbitrator within the time limit referred to in paragraph (1)(a);

(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator;

(c) the appointee does not accept the appointment within the time limit referred to in Rule 73; or

(d) the appointee declines the appointment.

(3) The following procedure shall apply to an appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73; and

(e) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.

Article 71
Nomination d'un(e) arbitre unique dans un arbitrage accéléré

(1) Un(e) arbitre unique dans un arbitrage accéléré est nommé(e) conformément à la procédure suivante :

(a) les parties notifient conjointement par écrit au ou à la Secrétaire général(e) leur accord sur l'arbitre unique et indiquent le nom, la ou les nationalité(s) et les coordonnées de la personne nommée, dans les 20 jours suivant la notification visée à l'article 70(2) ; et

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception conformément à l'article 73 ;

(2) Le ou la Secrétaire général(e) nomme l'arbitre unique si :

(a) les parties ne se mettent pas d'accord sur l'arbitre unique dans le délai visé au paragraphe (1)(a) ;

(b) les parties notifient au ou à la Secrétaire général(e) qu'elles ne parviennent pas à se mettre d'accord sur l'arbitre unique ;

(c) la personne nommée n'accepte pas sa nomination dans le délai visé à l'article 73 ; ou

(d) la personne nommée refuse sa nomination.

(3) La procédure suivante s'applique à la nomination par le ou la Secrétaire général(e) de l'arbitre unique en application du paragraphe (2) :

(a) le ou la Secrétaire général(e) transmet aux parties une liste de cinq candidat(e)s en vue de la nomination d'un(e) arbitre unique, dans les 10 jours suivant l'événement pertinent visé au paragraphe (2) ;

(b) chaque partie peut rayer un seul nom de la liste et classe les autres candidat(e)s par ordre de préférence, puis transmet ce classement au ou à la Secrétaire général(e) dans les 10 jours suivant la réception de la liste ;

(c) le ou la Secrétaire général(e) informe les parties du résultat des classements le jour ouvré suivant la réception des classements et nomme le ou la candidat(e) le (la) mieux classé(e). Si plusieurs candidat(e)s obtiennent le premier rang, le ou la Secrétaire général(e) choisit l'un(e) d'entre eux (elles) ;

(d) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception conformément à l'article 73 ; et

(e) si le ou la candidat(e) retenu(e) n'accepte pas sa nomination, le ou la Secrétaire général(e) choisit le ou la candidat(e) le (la) mieux classé(e) suivant(e).

Regla 71
Nombramiento de un o una Árbitro Único para el Arbitraje Expedito

(1) Un o una Árbitro Único en un arbitraje expedito será nombrado de conformidad con el siguiente procedimiento:

(a) las partes notificarán en forma conjunta y por escrito al o a la Secretario(a) General de su acuerdo respecto del o de la Árbitro Único y le proporcionarán el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada dentro de los 20 días siguientes a la notificación a la que se hace referencia en la Regla 70(2); y

(b) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73;

(2) El o la Secretario(a) General nombrará al o a la Árbitro Único si:

(a) las partes no se ponen de acuerdo sobre el o a la Árbitro Único a ser nombrado dentro del plazo al que se hace referencia en el párrafo (1)(a);

(b) las partes le notifican al o a la Secretario(a) General que no pueden llegar a un acuerdo sobre el o la Árbitro Único a ser nombrado;

(c) la persona nombrada no acepta el nombramiento dentro del plazo al que se hace referencia en la Regla 73; o

(d) la persona nombrada rechaza el nombramiento.

(3) El siguiente procedimiento será aplicable al nombramiento del o de la Árbitro Único por el o la Secretario(a) General de conformidad con lo dispuesto en el párrafo (2):

(a) el o la Secretario(a) General enviará a las partes, dentro de los 10 días siguientes al hecho relevante al que se hace referencia en el párrafo (2), una lista de cinco candidatos(as) para el nombramiento del o de la Árbitro Único;

(b) cada una de las partes podrá tachar un nombre de la lista, y calificará a los o las candidatos(as) restantes por orden de preferencia y enviará dicha calificación al o a la Secretario(a) General dentro de los 10 días siguientes a la recepción de la lista;

(c) el o la Secretario(a) General informará a las partes del resultado de las calificaciones el día hábil inmediatamente posterior a la recepción de las calificaciones y nombrará al o a la candidato(a) que tenga la calificación más alta. Si dos o más candidatos(as) obtienen la calificación más alta, el o la Secretario(a) General seleccionará a uno o una de ellos(as);

(d) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73; y

(e) si el o la candidata(a) seleccionado no aceptara el nombramiento, el o la Secretario(a) General seleccionará al o a la candidato(a) que haya obtenido la siguiente mejor calificación.

678. The parties are invited to agree on their nominee within 20 days after the parties' notice of their election to have a Sole Arbitrator under proposed AR 71. This Rule also applies if they fail to agree on the number of arbitrators or do not notify the Secretary-General of their election within the relevant time period under proposed AR 70.

679. If the parties do not advise the Secretary-General of their agreed upon Sole Arbitrator within the 20 days, the Sole Arbitrator will be appointed by the Secretary-General of ICSID (proposed AR 71(2)).

680. If the Secretary-General is to make the appointment, the parties will receive a list of 5 candidates within 10 days after the expiry of the time limit for the appointment. These candidates will be contacted to ensure there is no conflict and they are willing to conduct an expedited arbitration. The parties then rank the candidates in the order of preference (1-5, giving the highest number to the most preferred candidate) and send the list back to the Secretary-General within 10 days of receipt of the list. The highest ranked candidate is appointed, or, if there is a tie, the Secretary-General selects one of the tied candidates. As soon as the appointee is selected, the Secretary-General seeks their acceptance under proposed AR 26, but the appointee must accept within 10 days (proposed AR 70(3) and 73).

681. This procedure means that the Tribunal consisting of a Sole Arbitrator would be constituted within 60 days (in case of party agreement) and 91 days (in case of a list ranking procedure) after the date of registration.

RULE 72 – APPOINTMENT OF THREE-MEMBER TRIBUNAL FOR EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: Conv. Art. 37; AR 2, 3

Rule 72
Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator ("co-arbitrators") within 20 days after the notice referred to in Rule 70(2) and shall notify the Secretary-General of the appointees' names, nationalities and contact information within such time;

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(c) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of acceptance of both appointments made pursuant to paragraph (1)(a) and shall notify the Secretary-General of the appointee's name, nationality(ies) and contact information within such time; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the time limits referred to in paragraph (1)(a) or (c);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal;

(c) an appointee does not accept the appointment within the time limit referred to in Rule 73; or

(d) an appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators not yet appointed pursuant to paragraphs (1) and (2):

(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed, after consulting as far as possible with the parties. The Secretary-General shall use best efforts to make the co-arbitrator appointment(s) within 15 days after the relevant event in paragraph (2);

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(c) as soon as both co-arbitrators have accepted their appointment, or within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(d) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(e) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(f) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73; and

(g) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.

Article 72
Nomination d'un Tribunal composé de trois membres dans un arbitrage accéléré

(1) Un Tribunal composé de trois membres est nommé conformément à la procédure suivante :

(a) chaque partie nomme un(e) arbitre (« co-arbitres ») dans les 20 jours suivant la notification visée à l'article 70(2) et notifie au ou à la Secrétaire général(e) le nom, la ou les nationalité(s) et les coordonnées de chacune des personnes nommées, dans ce même délai ;

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 73 ;

(c) les parties nomment conjointement le ou la Président(e) du Tribunal dans les 20 jours suivant la réception de l'acceptation des deux nominations effectuées conformément au paragraphe (1)(a) et notifient au ou à la Secrétaire général(e) le nom, la ou les nationalité(s) et les coordonnées de la personne nommée, dans ce même délai ; et

(d) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception conformément à l'article 73.

(2) Le ou la Secrétaire général(e) nomme les arbitres non encore nommé(e)s si :

(a) une nomination n'est pas effectuée dans les délais visés au paragraphe (1)(a) ou (c) ;

(b) les parties notifient au ou à la Secrétaire général(e) qu'elles ne parviennent pas à se mettre d'accord sur le ou la Président(e) du Tribunal ;

(c) une personne nommée n'accepte pas sa nomination dans le délai visé à l'article 73 ; ou

(d) une personne nommée refuse sa nomination.

(3) La procédure suivante s'applique à la nomination par le ou la Secrétaire général(e) de tou(te)s arbitres non encore nommé(e)s conformément aux paragraphes (1) et (2) :

(a) le ou la Secrétaire général(e) nomme en premier lieu le(s) co-arbitre(s) non encore nommé(e)(s), après consultation des parties dans la mesure du possible. Il ou elle déploie tous les efforts possibles pour procéder à la (aux) nomination(s) du (de la) ou des co-arbitre(s) dans un délai de 15 jours suivant l'événement pertinent visé au paragraphe (2) ;

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 73 ;

(c) dès que les deux co-arbitres ont accepté leur nomination ou dans un délai de 10 jours suivant l'événement pertinent visé au paragraphe (2), le ou la Secrétaire général(e) transmet aux parties une liste de cinq candidat(e)s en vue de la nomination d'un ou d'une Président(e) du Tribunal ;

(d) chaque partie peut rayer un seul nom de la liste et classe les autres candidat(e)s par ordre de préférence, puis transmet ce classement au ou à la Secrétaire général(e) dans les 10 jours suivant la réception de la liste ;

(e) le ou la Secrétaire général(e) informe les parties du résultat des classements le jour ouvré suivant la réception des classements et nomme le ou la candidat(e) le (la) mieux classé(e). Si plusieurs candidat(e)s obtiennent le premier rang, le ou la Secrétaire général(e) choisit l'un(e) d'entre eux (elles) ;

(f) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 73 ; et

(g) si le ou la candidat(e) retenu(e) n'accepte pas sa nomination, le ou la Secrétaire général(e) choisit le ou la candidat(e) le (la) mieux classé(e) suivant(e).

Regla 72
Nombramiento de un Tribunal de Tres Miembros para el Arbitraje Expedito

(1) Un Tribunal de tres miembros será nombrado de conformidad con el siguiente procedimiento:

(a) cada una de las partes nombrará a un árbitro ("coárbitros") dentro de los 20 días siguientes a la notificación a la que se hace referencia en la Regla 70(2) y notificará al o a la Secretario(a) General los nombres, la(s) nacionalidad(es) y la información de contacto de las personas nombradas dentro de dicho plazo;

(b) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73;

(c) las partes nombrarán en forma conjunta al Presidente del Tribunal dentro de los 20 días siguientes a la recepción de la aceptación de ambos nombramientos realizados de conformidad con lo dispuesto en el párrafo (1)(a) y notificarán al o a la Secretario(a) General el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada dentro de dicho plazo; y

(d) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73.

(2) El o la Secretario(a) General nombrará a los árbitros que aún no hayan sido nombrados si:

(a) un nombramiento no se realiza dentro de los plazos a los que se hace referencia en el párrafo (1)(a) o (c);

(b) las partes notifican al o a la Secretario(a) General que no pueden llegar a un acuerdo sobre el Presidente del Tribunal;

(c) una de las personas nombradas no acepta el nombramiento dentro del plazo al que se hace referencia en la Regla 73; o

(d) una de las personas nombradas rechaza el nombramiento.

(3) El siguiente procedimiento será aplicable al nombramiento por parte del o de la Secretario(a) General de los árbitros que aún no hayan sido nombrados de conformidad con lo dispuesto en los párrafos (1) y (2):

(a) el o la Secretario(a) General nombrará en primer lugar al o a los o las coárbitro(s) que aún no hayan sido nombrados, previa consulta, en la medida de lo posible, a las partes. El o la Secretario(a) General hará lo posible para realizar el o los nombramiento(s) del o de los coárbitro(s) dentro de los 15 días siguientes al hecho relevante al que se hace referencia en el párrafo (2);

(b) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73;

(c) tan pronto como ambos coárbitros hayan aceptado sus nombramientos, o dentro de los 10 días siguientes al hecho relevante al que se hace referencia en el párrafo (2), el o la Secretario(a) General enviará a las partes una lista de cinco candidatos(as) para su nombramiento como Presidente del Tribunal;

(d) cada una de las partes podrá tachar un nombre de la lista, y calificará a los o las candidatos(as) restantes por orden de preferencia y enviará dicha calificación al o a la Secretario(a) General dentro de los 10 días siguientes a la recepción de la lista;

(e) el o la Secretario(a) General informará a las partes del resultado de las calificaciones el día hábil inmediatamente posterior a la recepción de las calificaciones y nombrará al o las candidato(a) que tenga la mejor calificación. Si dos o más candidatos(as) obtienen la mejor calificación, el o la Secretario(a) General seleccionará a uno de ellos;

(f) el o la Secretario(a) General trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73; y

(g) si el o la candidato(a) seleccionado no aceptara el nombramiento, el o la Secretario(a) General seleccionará al o a la candidato(a) que haya obtenido la siguiente calificación más alta.

682. Proposed AR 72 applies if the parties agree on a three-member Tribunal and notify their agreement to the Secretary-General within 30 days after the date of registration.

683. Under this method, each party is invited to appoint an arbitrator within 20 days after the date of the notice to apply Rule 72. The parties notify the Secretary-General of their respective appointment, and the Secretary-General seeks the appointees' acceptance, which must be provided within 10 days in accordance with proposed AR 73. After both co-arbitrators have accepted their appointment, the parties are invited to agree on the President of the Tribunal within 20 days. Thus, if all arbitrators accept their appointments on the last date allowed (day 10), the constitution of the Tribunal is completed within 90 days after the date of registration.

684. If an arbitrator or the President is not appointed within the relevant time limit, or the appointee does not accept or declines the appointment, the Secretary-General will appoint the missing arbitrator(s). With regard to a co-arbitrator, the Secretary-General consults with the parties and uses best efforts to make the appointment within 15 days after the event triggering the default appointment. With regard to the President of the Tribunal, the Secretary-General follows the same list-ranking procedure as for the appointment of a Sole Arbitrator. This procedure means that, where the parties failed to agree on a President (the most likely default scenario) the Tribunal would be constituted within 121 days after the date of registration.

RULE 73 – ACCEPTANCE OF APPOINTMENT BY ARBITRATORS IN EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: AR 5, 6

Rule 73
Acceptance of Appointment in Expedited Arbitration

An arbitrator appointed in an expedited arbitration shall accept the appointment and provide a declaration pursuant to Rule 26(3) within 10 days after receipt of the request for acceptance.

Article 73
Acceptation des nominations dans un arbitrage accéléré

Un(e) arbitre nommé(e) dans un arbitrage accéléré doit accepter sa nomination et remettre une déclaration conformément à l'article 26(3) dans les 10 jours suivant la réception de la demande d'acceptation.

Regla 73
Aceptación del Nombramiento en el Arbitraje Expedito

Un o una árbitro nombrado(a) en un arbitraje expedito deberá aceptar el nombramiento y proporcionar una declaración de conformidad con lo dispuesto en la Regla 26(3) dentro de los 10 días siguientes a la recepción de la solicitud de aceptación.

685. Proposed AR 26(3) provides that an appointee must accept the appointment and provide a signed declaration within 20 days after the request for acceptance. In order to expedite the constitution of the Tribunal, this time limit is shortened to 10 days. Prospective candidates will be made aware of this Rule prior to their appointment and ensure that they comply with it, as the failure to do so would mean a default appointment by the Secretary-General.

RULE 74 – FIRST SESSION IN EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: AR 13, 20

Rule 74
First Session in Expedited Arbitration

(1) The Tribunal shall hold a first session pursuant to Rule 34 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication unless both parties and the Tribunal agree it shall be held in person.

Article 74
Première session dans un arbitrage accéléré

(1) Le Tribunal tient une première session conformément à l'article 34 dans les 30 jours suivant la constitution du Tribunal.

(2) La première session se tient par téléphone ou par tous moyens de communication électroniques, à moins que les deux parties et le Tribunal ne conviennent de la tenir en personne.

Regla 74
Primera Sesión en el Arbitraje Expedito

(1) El Tribunal celebrará una primera sesión de conformidad con lo dispuesto en la Regla 34 dentro de los 30 días siguientes a la constitución del Tribunal.

(2) La primera sesión se celebrará por vía telefónica o a través de medios electrónicos de comunicación salvo que ambas partes y el Tribunal acuerden que deberá celebrarse en persona.

686. Under proposed AR 34, the first session is to be held within 60 days after the constitution of the Tribunal or such other period as the parties may agree. In an expedited arbitration, the time limit is shortened to 30 days after constitution without the option to agree on a longer period (proposed AR 74(1)). The idea is to start the time limits for submissions under proposed AR 75 as soon as possible, which are triggered by the date of the first session.

687. The method for holding the first session is by telephone or electronic means, unless both parties and the Tribunal agree that it should be held in-person (proposed AR 74(2)). This avoids unnecessary costs and time associated with holding an in-person session.

RULE 75 – THE PROCEDURAL SCHEDULE IN EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: AR 31, 32

Rule 75
The Procedural Schedule in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply in the expedited arbitration:

(a) the requesting party shall file a memorial within 60 days after the first session, unless the Request for arbitration is to be considered the memorial pursuant to Rule 13(2);

(b) the other party shall file a counter-memorial within 60 days after the date of filing the memorial, or within 60 days after the first session if the requesting party has elected to use the Request for arbitration as its memorial pursuant to Rule 13(2);

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;

(d) the requesting party shall file a reply within 40 days after the date of filing of the counter-memorial;

(e) the other party shall file a rejoinder within 40 days after the date of filing of the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and(e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counter-claim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents or other evidence pursuant to Rule 40(1). The Tribunal shall decide such applications based on written submissions and without an in-person hearing.

(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule in paragraph (1), unless the Tribunal determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.

Article 75
Calendrier de la procédure dans un arbitrage accéléré

(1) Le calendrier suivant relatif aux écritures et à l'audience est applicable dans un arbitrage accéléré :

(a) la partie requérante dépose un mémoire dans les 60 jours suivant la première session, sauf si la requête d'arbitrage doit être considérée comme le mémoire conformément à l'article 13(2) ;

(b) l'autre partie dépose un contre-mémoire dans les 60 jours suivant la date de dépôt du mémoire, ou dans les 60 jours suivant la première session si la partie requérante a choisi d'utiliser la requête d'arbitrage comme son mémoire conformément à l'article 13(2) ;

(c) le mémoire et le contre-mémoire visés au paragraphe (1)(a) et (b) ne doivent pas dépasser 200 pages ;

(d) la partie requérante dépose une réponse dans les 40 jours suivant la date de dépôt du contre-mémoire ;

(e) l'autre partie dépose une réplique dans les 40 jours suivant la date de dépôt de la réponse ;

(f) la réponse et la réplique visées au paragraphe (1)(d) et (e) ne doivent pas dépasser 100 pages ;

(g) l'audience se tient dans les 60 jours suivant le dépôt des dernières écritures ;

(h) les parties déposent chacune un état des frais dans les 10 jours suivant le dernier jour de l'audience visée au paragraphe (1)(g) ; et

(i) le Tribunal rend une sentence dès que possible et, en tout état de cause, au plus tard 120 jours après l'audience visée au paragraphe (1)(g).

(2) Toute objection préliminaire ou toute demande reconventionnelle, incidente ou additionnelle est jointe au calendrier principal visé au paragraphe (1). Le Tribunal ajuste le calendrier si une partie soulève une telle question, en tenant compte de la nature accélérée de la procédure.

(3) Le Tribunal peut prolonger les délais indiqués au paragraphe (1)(a) et (b) d'une durée maximale de 30 jours si une partie demande au Tribunal de statuer sur un différend découlant d'une demande de production de documents ou d'autres moyens de preuve conformément à l'article 40(1). Le Tribunal statue sur une telle demande sur le fondement d'écritures et sans tenir d'audience en personne.

(4) Les délais applicables aux écritures autres que celles visées aux paragraphes (1) - (3) courent parallèlement à ceux du calendrier principal visé au paragraphe (1), à moins que le Tribunal ne décide que des circonstances exceptionnelles justifient la suspension du calendrier principal. Pour fixer les délais pour ces écritures, le Tribunal tient compte de la nature accélérée de la procédure.

Regla 75
El Calendario Procesal en el Arbitraje Expedito

(1) El siguiente calendario será aplicable para la presentación de los escritos y para la audiencia en el arbitraje expedito:

(a) la parte solicitante presentará un memorial dentro de los 60 días siguientes a la primera sesión, salvo que la solicitud de arbitraje haya de considerarse como el memorial de conformidad con lo dispuesto en la Regla 13(2);

(b) la otra parte presentará un memorial de contestación dentro de los 60 días siguientes a la fecha de presentación del memorial, o dentro de los 60 días siguientes a la primera sesión si la parte solicitante ha elegido utilizar la solicitud de arbitraje como su memorial de conformidad con lo dispuesto en la Regla 13(2);

(c) el memorial y el memorial de contestación a los que se hace referencia en el párrafo (1)(a) y (b) tendrán una extensión de no más de 200 páginas;

(d) la parte solicitante presentará una réplica dentro de los 40 días siguientes a la fecha de presentación del memorial de contestación;

(e) la otra parte presentará una dúplica dentro de los 40 días siguientes a la fecha de presentación de la réplica;

(f) la réplica y la dúplica a las que se hace referencia en el párrafo (1)(d) y (e) tendrán una extensión de no más de 100 páginas;

(g) la audiencia se celebrará dentro de los 60 días siguientes a la presentación del último escrito;

(h) las partes presentarán declaraciones sobre los costos dentro de los 10 días siguientes al último día de la audiencia a la que se hace referencia en el párrafo (1)(g); y

(i) el Tribunal dictará el laudo lo antes posible y, en cualquier caso, a más tardar 120 días después de la celebración de la audiencia a la que se hace referencia en el párrafo (1)(g).

(2) Cualquier excepción preliminar, reconvención, demanda incidental o adicional se incorporará al calendario principal al que se hace referencia en el párrafo (1). El Tribunal deberá adaptar el calendario si una de las partes plantea cualquiera de estas cuestiones, teniendo en cuenta la naturaleza expedita del proceso.

(3) El Tribunal podrá prorrogar los plazos previstos en el párrafo (1)(a) y (b) por un máximo de 30 días si alguna de las partes solicita que el Tribunal resuelva una diferencia que surja de las solicitudes de exhibición de documentos u otras pruebas de conformidad con lo dispuesto en la Regla 40(1). El Tribunal decidirá estas solicitudes sobre la base de escritos y sin una audiencia en persona.

(4) Cualquier calendario para las presentaciones además de aquellas a las que se hace referencia en los párrafos (1)-(3) transcurrirá en paralelo al calendario principal previsto en el párrafo (1), salvo que el Tribunal determine que existen circunstancias excepcionales que justifiquen la suspensión del calendario principal. Al fijar los plazos para dichas presentaciones, el Tribunal tomará en consideración la naturaleza expedita del proceso.

688. The EA provides a fixed schedule of submissions, the hearing and the Award in proposed AR 75.

689. The schedule contemplates a joint proceeding on all matters before the Tribunal. It does not allow the bifurcation of the proceeding under proposed AR 37 or an objection that the claim manifestly lacks legal merit under proposed AR 35. These provisions are excluded under proposed AR 69.

690. Thus, if a party believes that it has a strong case for disposing of the claim on the basis of manifest lack of legal merit, it may wish to have the objection addressed under the procedure in proposed AR 35 and not consent to the EA.

691. However, in cases where there the parties believe that the issues might appropriately be heard jointly in one proceeding and wish to have a speedy result, they should consider the application of the EA.

692. Written Submissions. With regard to the written submissions, the first submission (the memorial) is to be filed by the requesting party (claimant) within 60 days after the first session. The claimant may also choose to consider its Request for arbitration as the memorial, in which case it would be the respondent's turn to file a counter-memorial within 60 days after the first session. Otherwise, the respondent is to file the counter-memorial within 60 days after the date of filing the memorial. Thus, the first round of submissions is completed within a maximum of 4 months after the first session (proposed AR 75(1)(a)

and (b)). The length of the memorial and counter-memorial cannot exceed 200 pages per submission (proposed AR 75(1)(c)).

693. If the respondent has preliminary objections under proposed AR 36 (*e.g.* objections to jurisdiction) or a counter-claim under proposed AR 52, it must file those with the counter-memorial foreseen by proposed AR 75(1)(b), in accordance with proposed AR 36(2) and 52(2). In such case, the Tribunal must consider adjusting the schedule to ensure both parties are allowed an opportunity to brief on the preliminary objection or counter-claim, taking into account the nature of the expedited process (proposed AR 75(3)).

694. The second round of submissions are to be filed within 30 days after the counter-memorial (claimant's reply) and 30 days after the reply (respondent's rejoinder). The length of the reply and rejoinder cannot exceed 100 pages per submission (proposed AR 75(1)(f)). If there are preliminary objections, counter-claims or incidental or additional claims, there may be a further opportunity to address those after the respondent's rejoinder in accordance with the Tribunal's discretion in proposed AR 75(2). In principle, there are two rounds of pleadings on all matters before the Tribunal.

695. Requests for production of documents. Proposed AR 75(3) allows the Tribunal to determine the procedure to address requests by a party for production of documents by the other party. This includes any decision by the Tribunal addressing disputes arising from the requests pursuant to AR 40(1). Such procedure is typically discussed at the first session and included in the procedural calendar for the case. Proposed AR 75(3) provides that the Tribunal may extend the main procedural schedule by up to 30 days if required to address disputed production requests. It also provides that requests for production of documents will be decided based on written submissions only.

696. Other procedural applications. Proposed AR 75(4) foresees that any other time limits for any type of other written submissions (*e.g.* requests for provisional measures, security for costs, proposals for disqualification) run in parallel with the main procedural calendar. In other words, the main procedural calendar is unaffected by any unscheduled request or other submission. As noted above, it is expected that parties will limit this type of application in an EA to ensure the Award may be rendered on schedule.

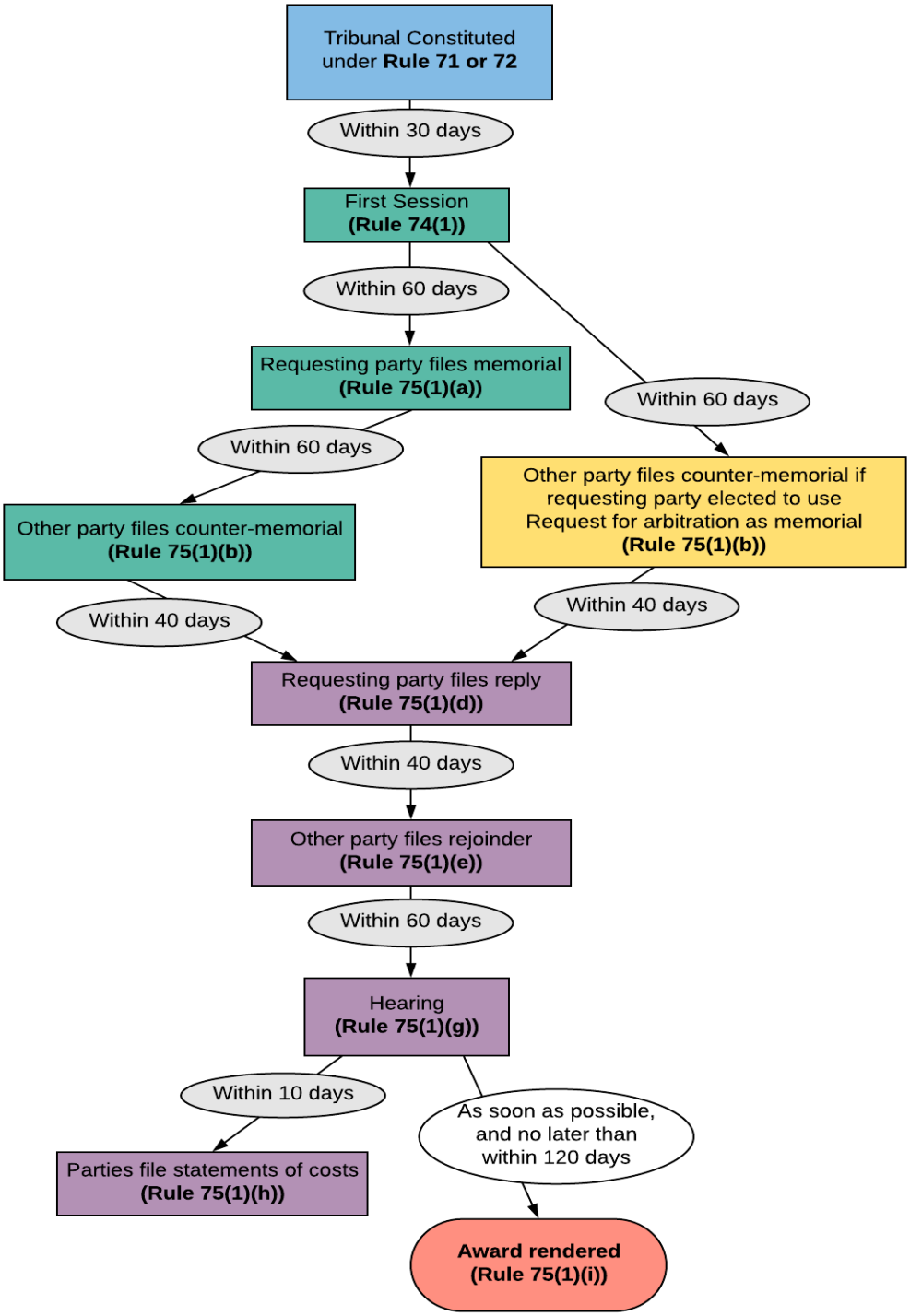
697. The Hearing. The hearing is to be held within 60 days after the last written submission (proposed AR 75(1)(g)). This means that the hearing must be held within 9 months after the first session. The EA anticipates only one hearing, which is to deal with all matters before the Tribunal.

698. Statements of Costs. The parties are to file their statements of costs within 10 days after the final hearing day (proposed AR 75(1)(h)).

699. The Award. The Tribunal must render the Award within 120 days after the hearing, which is the date of the last submission (proposed AR 75(1)(i)). In accordance with proposed AR 8(3), this is a best-effort obligation which Tribunals are expected to meet, especially in an EA, unless there are special circumstances that are notified to the parties prior to the expiry of the deadline.

700. The following chart shows the procedural steps from the constitution of the Tribunal up to the Award. This process would take 410 days.

Procedural Schedule in an Expedited Arbitration – Rule 74-75



RULE 76 – DEFAULT DURING EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: Conv. Art. 45; AR 42

Rule 76
Default during Expedited Arbitration

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 53.

Article 76
Défaut au cours d'un arbitrage accéléré

Le Tribunal peut accorder à une partie en défaut un délai de grâce ne devant pas excéder 30 jours, conformément à l'article 53.

Regla 76
Rebeldía durante el Arbitraje Expedito

Un Tribunal podrá otorgarle a una parte en rebeldía un período de gracia que no supere los 30 días de conformidad con lo dispuesto en la Regla 53.

701. If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award (Art. 45(2) of the Convention). Proposed AR 53 dealing with a party's default provides for a grace period of 60 days to cure the default. Proposed AR 76 modifies AR 53 in that the grace period is shortened to 30 days.

702. If the defaulting party fails to act within the grace period, the Tribunal examines the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering the Award (proposed AR 53(8)).

RULE 77 – THE PROCEDURAL SCHEDULE FOR SUPPLEMENTARY DECISION AND RECTIFICATION IN EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: Conv. Art. 49(2); AR 49

Rule 77
The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 62 within 30 days after the last written or oral submission on the request.

Article 77
Calendrier de la procédure applicable à une décision supplémentaire et une rectification dans une procédure accélérée

(1) Un Tribunal peut rectifier de sa propre initiative toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence dans les 15 jours suivant le prononcé de la sentence.

(2) Le Tribunal rend une décision supplémentaire ou une rectification conformément à l'article 62 dans les 30 jours suivant les dernières écritures ou plaidoiries sur la requête.

Regla 77
El Calendario Procesal para la Decisión Suplementaria y la Rectificación en el Arbitraje Expedito

(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 15 días siguientes a la fecha en que se haya dictado el laudo.

(2) El Tribunal emitirá una decisión suplementaria o rectificación de conformidad con lo dispuesto en la Regla 62 dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.

703. Proposed AR 77(1) allows a Tribunal to rectify any clerical, arithmetical or similar error on its own initiative within 15 days after rendering the Award compared to 30 days in proposed 62(1). The provision is intended to make obvious corrections without requiring the parties to bring a motion for rectification. A Tribunal proposing to rectify on its own initiative would consult the parties on any proposed Tribunal-initiated rectification (*see* proposed AR 11(2)).

704. The time limit for filing a request for supplementary decision or rectification of an Award applies as provided in proposed AR 62, which is based on a mandatory provision in Art.

49(2) of the Convention. Proposed AR 62 provides that the Tribunal must issue a supplementary decision or rectification within 60 days after the last written or oral submission on the request, while proposed AR 77 shortens the time for issuing the decision to 30 days.

RULE 78 – THE PROCEDURAL SCHEDULE FOR AN APPLICATION FOR INTERPRETATION, REVISION OR ANNULMENT OF AN AWARD RENDERED IN EXPEDITED ARBITRATION

Rule 78
The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) The following schedule for written submissions and the hearing shall apply to the procedure relating to an interpretation, revision or annulment of an Award rendered in an expedited arbitration:

(a) the applicant shall file a memorial on interpretation, revision or annulment within 30 days after the first session;

(b) the other party shall file a counter-memorial on interpretation, revision or annulment within 30 days after the memorial;

(c) a hearing shall be held within 45 days after the date for filing the counter-memorial;

(d) the parties shall file statements of costs within 5 days after the last day of the hearing referred to in paragraph (2)(c); and

(e) the Tribunal or Committee shall render the decision on interpretation, revision or annulment as soon as possible, and in any event no later than 60 days after the hearing referred to in paragraph (2)(c).

(3) Any schedule for submissions other than those referred to in paragraph (2) shall run in parallel with the main schedule, unless the Tribunal or Committee determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal or Committee shall take into account the expedited nature of the process.

Article 78
Calendrier de la procédure applicable à une demande en interprétation, révision ou annulation d'une sentence rendue dans un arbitrage accéléré

(1) La procédure relative à l'interprétation, la révision ou l'annulation d'une sentence rendue dans un arbitrage accéléré se déroule selon le calendrier suivant applicable aux écritures et à l'audience :

(a) la partie requérante dépose un mémoire sur l'interprétation, la révision ou l'annulation dans les 30 jours suivant la première session ;

(b) l'autre partie dépose un contre-mémoire sur l'interprétation, la révision ou l'annulation dans les 30 jours suivant la date de dépôt du mémoire ;

(c) une audience se tient dans les 45 jours suivant la date de dépôt du contre-mémoire ;

(d) les parties déposent chacune un état des frais dans les 5 jours suivant le dernier jour de l'audience visée au paragraphe (2)(c) ; et

(e) le Tribunal ou le Comité rend sa décision sur l'interprétation, la révision ou l'annulation dès que possible et, en tout état de cause, au plus tard 60 jours après l'audience visée au paragraphe (2)(c).

(2) Les délais applicables aux écritures autres que celles visées au paragraphe (2) courent parallèlement à ceux du calendrier principal, à moins que le Tribunal ou le Comité ne décide que des circonstances exceptionnelles justifient la suspension du calendrier principal. Pour fixer les délais pour ces écritures, le Tribunal tient compte de la nature accélérée de la procédure.

Regla 78
El Calendario Procesal para una Solicitud de Aclaración, Revisión o Anulación de un Laudo Dictado en el Arbitraje Expedito

(1) El siguiente calendario será aplicable para la presentación de los escritos y la audiencia en el procedimiento relacionado con una aclaración, revisión o anulación de un laudo dictado en un arbitraje expedito:

(a) el solicitante presentará un memorial sobre la aclaración, revisión o anulación dentro de los 30 días siguientes a la primera sesión;

(b) la otra parte presentará un memorial de contestación sobre la aclaración, revisión o anulación dentro de los 30 días siguientes al memorial;

(c) se celebrará una audiencia dentro de los 45 días siguientes a la fecha establecida para la presentación del memorial de contestación;

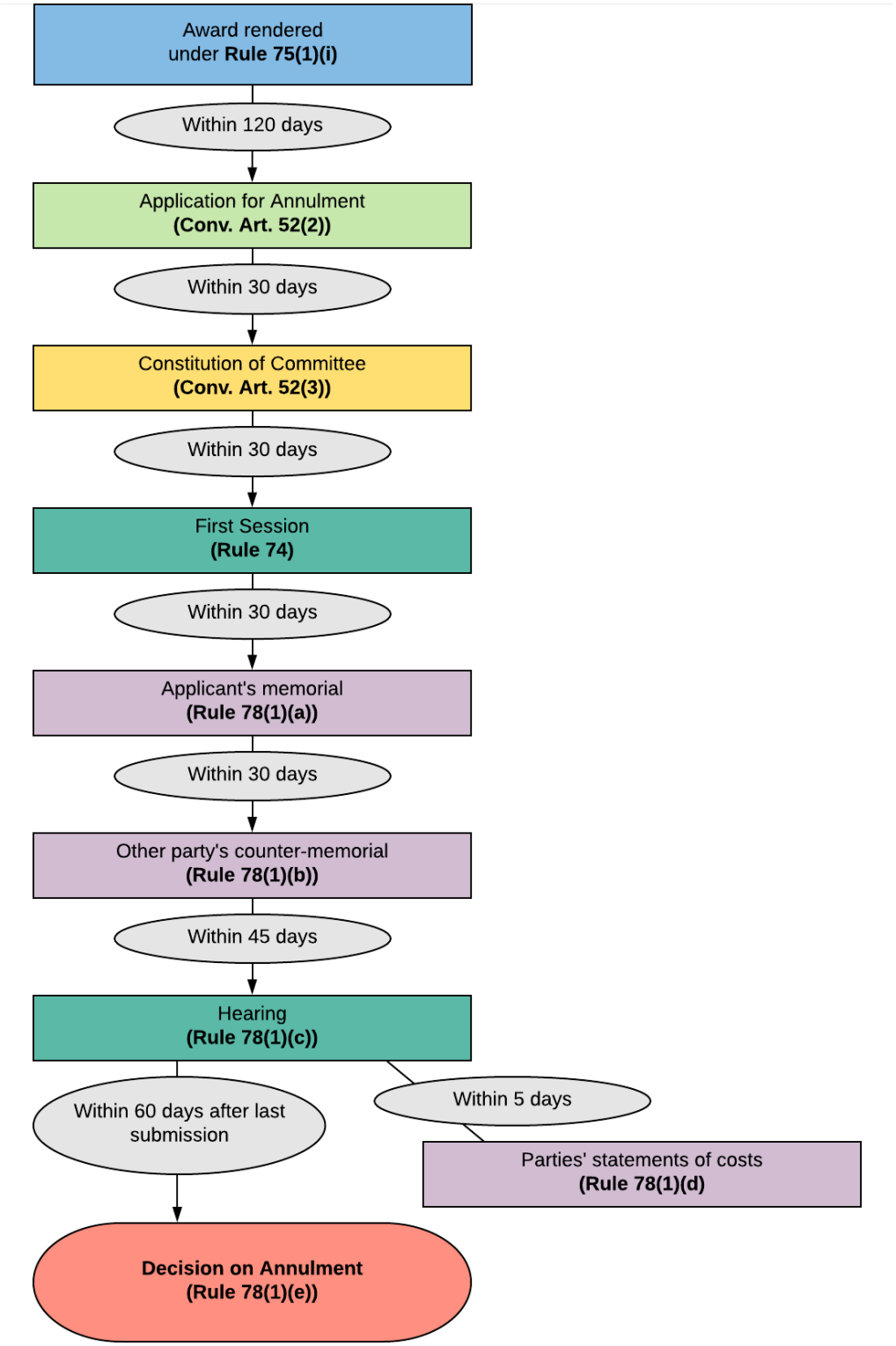
(d) las partes presentarán declaraciones sobre los costos dentro de los 5 días siguientes al último día de la audiencia a la que se hace referencia en el párrafo (1)(c); y

(e) el Tribunal o Comité emitirá su decisión sobre aclaración, revisión o anulación lo antes posible y, en cualquier caso, a más tardar 60 días después de la audiencia a la que se hace referencia en el párrafo (1)(c).

(2) Cualquier calendario para presentaciones además de aquellas a las que se hace referencia en el párrafo (1) transcurrirá en paralelo al calendario principal, salvo que el Tribunal o Comité determine que existen circunstancias excepcionales que justifiquen la suspensión del calendario principal. Al fijar los plazos para dichos escritos, el Tribunal o Comité tomará en consideración la naturaleza expedita del proceso.

705. Proposed AR 78 addresses the procedural schedule in post-Award remedy proceedings under Chapter XI of the AR. The proposed Rule is complementary to the streamlining of the procedures dealing with applications for interpretation, revision and annulment. It fixes the procedural schedule to address such applications, anticipating only one round of submissions (with a 30-day time limit), and a hearing held within 45 days after the last written submission. The time limit for the Tribunal's or Committee's decision is shorter than under proposed AR 66(5) and must be issued within 60 days after the hearing. This means that post-remedy proceedings would be concluded within 8 months from registration of the relevant application. The following chart illustrates the procedural steps.

PROCEDURAL SCHEDULE FOR AN INTERPRETATION, REVISION OR ANNULMENT PROCEEDING IN EXPEDITED ARBITRATION – RULE 78



RULE 79 – RESUBMISSION OF A DISPUTE AFTER AN ANNULMENT IN EXPEDITED ARBITRATION

Rule 79 **Resubmission of a Dispute after an Annulment in Expedited Arbitration** The consent of the parties given pursuant to Rule 69 shall not apply to resubmission of the dispute.
Article 79 **Nouvel examen d'un différend après une annulation dans un arbitrage accéléré** Le consentement des parties donné conformément à l'article 69 ne s'applique pas au nouvel examen du différend.
Regla 79 **Nueva Sumisión de una Diferencia después de la Anulación en el Arbitraje Expedito** El consentimiento otorgado por las partes de conformidad con lo dispuesto en la Regla 69 no será aplicable a la nueva sumisión de la diferencia.

706. Proposed AR 79 clarifies that the parties' agreement to apply the EA does not extend to resubmission proceedings after the annulment of an Award. The parties are nevertheless free to agree on the application of the EA to such proceeding under proposed AR 69.

IV. RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS (CONCILIATION RULES)

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RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS (CONCILIATION RULES)

Introductory Note

The Rules of Procedure for Conciliation Proceedings (the Conciliation Rules) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Conciliation Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulation 14.

The Conciliation Rules apply from the date of registration of a Request for conciliation until a Report is issued.

Note introductive

Le Règlement de procédure relatif aux instances de conciliation (Règlement de conciliation) a été adopté par le Conseil administratif du Centre conforment à l'article 6(1)(c) de la Convention CIRDI.

Le Règlement de conciliation est complété par le Règlement administratif et financier du Centre, en particulier par l'article 14.

Le Règlement de conciliation s'applique de la date de l'enregistrement d'une requête de conciliation jusqu'au moment où un procès-verbal est établi.

Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Conciliación (Reglas de Conciliación) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en el Artículo 6(1)(c) del Convenio del CIADI.

Las Reglas de Conciliación están complementadas por el Reglamento Administrativo y Financiero del Centro, en particular por la Regla 14.

Las Reglas de Conciliación se aplican desde la fecha del registro de una solicitud de conciliación hasta la emisión de un informe.

707. The Rules of Procedure for Conciliation Proceedings ("Conciliation Rules" or "CR") complement the procedural provisions on conciliation in the ICSID Convention ("Convention"). They apply from the registration of the Request for conciliation to the communication of the Report.

708. The proposed revisions to the Conciliation Rules clarify and simplify the process while providing the parties greater flexibility. Given the similarities of the Convention provisions relating to the constitution of conciliation commissions and arbitral tribunals, certain proposed revisions to the Arbitration Rules (AR) are also reflected in the Conciliation Rules, where apt.

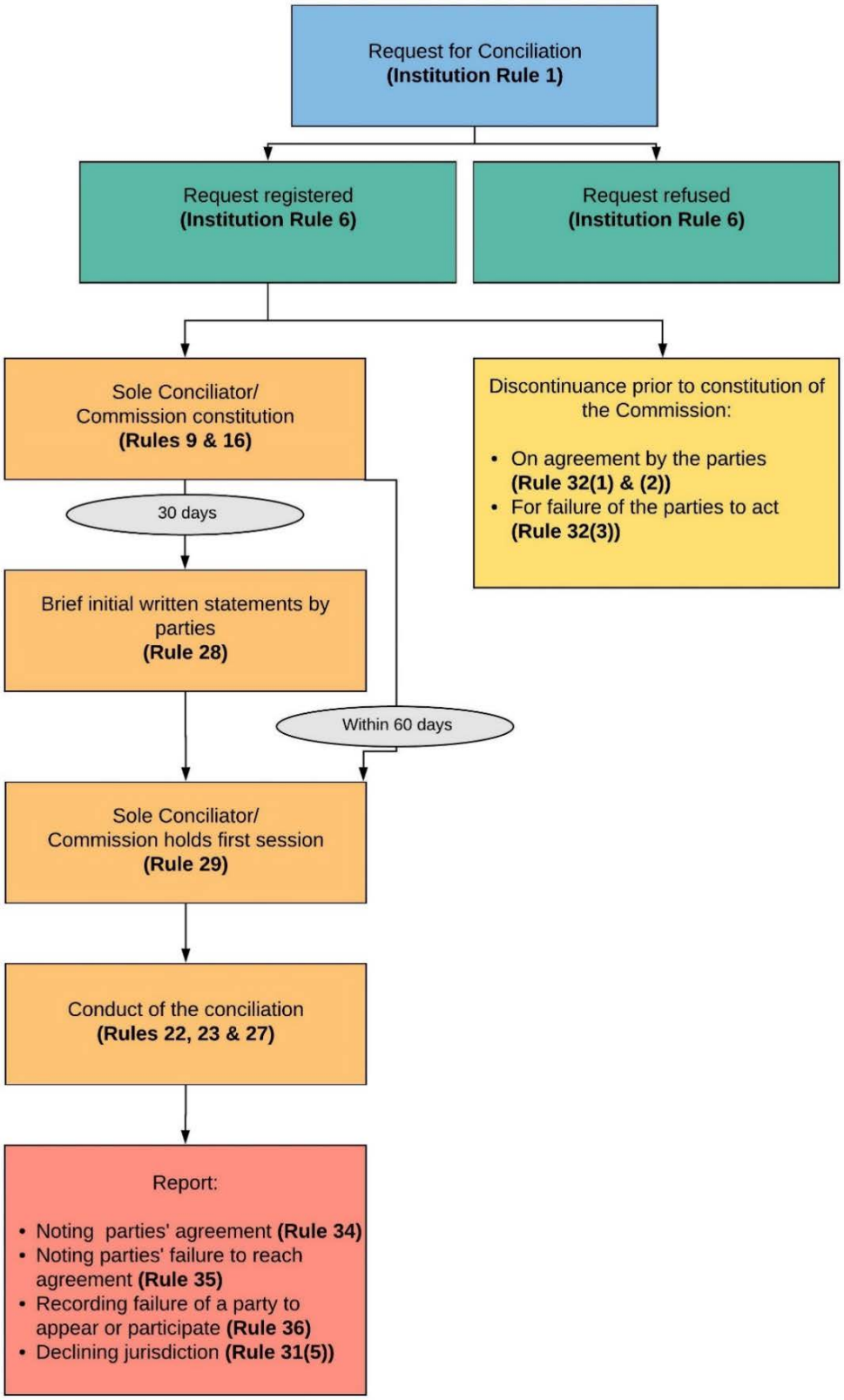
709. As set out in the History of the ICSID Convention, the drafters of the Convention defined conciliation as a process aimed at bringing the parties to an agreed solution with the assistance of one or more persons ("conciliators"). Conciliator(s) not only help clarify the issues in dispute but also assist the parties to settle the dispute. To that end, conciliators are empowered to make recommendations, which are not binding on the parties unless they agree otherwise.

710. There has been limited use of conciliation to date. However, increased use of conciliation is likely, given the references to conciliation in a number of recent treaties and the increasing desire by States and investors to settle investment disputes in a less adversarial manner.

711. ICSID supports efforts by parties to resolve investment disputes through alternate mechanisms and offers its staff and facilities for such processes. In recent years, ICSID has provided its good offices to assist with settlement discussions between investors and States (for more information regarding these activities please visit ICSID's website). A set of investment-specific mediation rules is also proposed for adoption by the Administrative Council. The (Additional Facility) Mediation Rules ("(AF)MR") are Annex E to the proposed revised AF Rules.

712. This WP explains the newly proposed amendments to the conciliation framework. The overall conciliation process is shown in the chart below:

Overview of Conciliation Process



CHAPTER I – GENERAL PROVISIONS

713. Proposed Chapter I contains general provisions relating to the conduct of the conciliation. This Chapter also merges certain provisions in current Chapter II (Working of the Commission) and Chapter III (General Procedural Provisions).

RULE 1 – APPLICATION OF RULES

CURRENT RELATED PROVISIONS: Convention Art. 33

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any conciliation proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") in accordance with Article 33 of the Convention.

(2) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(3) These Rules may be cited as the "Conciliation Rules" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique à toute instance de conciliation conduite en vertu de la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États (« Convention ») conformément à l'article 33 de la Convention.

(2) Les langues officielles du Centre sont l'anglais, l'espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(3) Le présent Règlement peut être cité comme le « Règlement de conciliation » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de conciliación tramitado en virtud del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados ("Convenio") de conformidad con el Artículo 33 del Convenio.

(2) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(3) Estas Reglas podrán ser citadas como las "Reglas de Conciliación" del Centro.

714. By introducing the reference to Art. 33 of the Convention, proposed CR 1(1) clarifies that except as the parties otherwise agree, the applicable CR are those in effect on the date on which the parties consented to conciliation.

715. Proposed CR 1(2) and (3) correspond to current CR 34 (Final Provisions).

RULE 2 – MEANING OF PARTY AND PARTY REPRESENTATION

Rule 2
Meaning of Party and Party Representation

(1) For the purposes of these Rules, "party" may include, where the context so admits:

(a) all parties acting as claimants or as respondents; and

(b) an authorized representative of a party.

(2) Each party may be represented or assisted by agents, counsel or advocates ("representative(s)"), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Article 2
Sens du terme « partie » et représentation des parties

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet :

(a) toutes les parties agissant en qualité de demanderesses ou de défenderesses ; et

(b) tout(e) représentant(e) habilité(e) d'une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocat(e)s (« représentant(s) »), dont le nom et la preuve de l'habilitation à agir doivent être notifiés par cette partie au Secrétariat.

Regla 2
Significado de Parte y Representación de las Partes

(1) A los fines de estas Reglas, "parte" puede incluir, cuando el contexto así lo admite, a:

(a) todas las partes que actúen como demandantes o como demandadas; y

(b) un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) ("representante(s)"), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

716. Proposed CR 2 is current CR 18 with minor modifications of language. Under the current CR 18, parties may represent themselves before ICSID Commissions or may authorize someone to represent them. A representative need not be an attorney. Typically, either a party or its counsel informs the Secretariat of its legal representation and attaches a document indicating its authority to act. If new counsel notifies the Secretariat of its involvement without providing a power of attorney, the Secretariat requests that the authorization be provided before files from the record are transmitted. There is no particular format for the authorization, which may take the form of a simple letter.

717. The costs of legal representation are paid directly by each party, as each party bears the costs it incurs in connection with a conciliation (*see* Art. 61(1) of the Convention and proposed CR 6).

RULE 3 – METHOD OF FILING

CURRENT RELATED PROVISIONS: AFR 24, 28, 30; CR 25(2), 26

Rule 3
Method of Filing

(1) Written statements, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Commission orders otherwise. They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge their receipt and distribute them in accordance with Rule 4.

(2) Supporting documents shall be filed together with the written statements to which they relate, within the time limit fixed to file such written statements.

(3) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Commission may require a fuller extract or a complete version of the document.

Article 3
Modalités de dépôt

(1) Les exposés écrits, observations, documents justificatifs et communications sont déposés par voie électronique, sauf si les parties en conviennent autrement ou sauf si la Commission en décide autrement. Leur production au cours de l'instance se fait par leur dépôt auprès du Secrétariat, qui en accuse réception et en assure la distribution conformément à l'article 4.

(2) Les documents justificatifs sont déposés avec les exposés écrits auxquels ils se rapportent, dans le délai fixé pour le dépôt de ces exposés écrits.

(3) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. La Commission peut exiger une version plus complète de l'extrait ou une version intégrale du document.

Regla 3
Método de Presentación

(1) Las presentaciones escritas, observaciones, documentos de respaldo y comunicaciones se presentarán electrónicamente, salvo acuerdo de las partes o resolución de la Comisión en contrario. Las mismas se incorporarán al procedimiento mediante su presentación ante el Secretariado, que acusará recibo de ellas y las distribuirá de conformidad con la Regla 4.

(2) Los documentos de respaldo se presentarán junto con las presentaciones escritas a las que se refieren, dentro del plazo fijado para dicha presentación.

(3) Se podrá presentar un extracto de un documento de respaldo siempre que la omisión del texto no altere el sentido del extracto. La Comisión podrá solicitar una versión más amplia del extracto o una versión completa del documento.

718. Current CR 25(2) and AFR 30 require hard copy filing of all written statements, except as otherwise provided by the Commission after consultation with the parties and the Secretary-General. The rule anticipates filing of one original and five hard copies where there are three Committee members. In practice, parties send their statements by electronic mail or upload them to a file-sharing platform created by the Secretariat for the specific case. At the same time, hard copies of the statements and electronic devices containing a digital copy are sent by courier. The format and number of copies is typically agreed by the Commission and the parties at the first session (*see* proposed CR 29).

719. ICSID offers secure, cloud-based servers to facilitate electronic filing. Its electronic archiving system allows documents to be retained permanently and provided to the parties on request (*see* proposed AFR 28). Parties and Commissions can thus upload, download and read written statements on case-specific servers, and use various software to annotate electronic documents in lieu of handwritten notes.

720. In light of these capabilities, and in line with comments received from Member States and parties, electronic filing is the default proposed in CR 3(1). The rule allows the parties to agree otherwise and the Commission can request hard copies if desired. However, departure from the default of electronic filing should be exceptional and for good cause.

721. The second sentence of proposed CR 3(1) concerns the method of introducing documents into the proceeding and stems from current AFR 24(2). Documents will become part of the record in the conciliation if they have been filed with the Secretariat (represented by the Secretary of the Commission in each case once the Commission has been constituted). The rule has been revised to account for electronic filing of documents. Once case documents are either transmitted by electronic mail or uploaded to a cloud-based server, the Secretary of the Commission will acknowledge receipt of the documents and transmit them to the Commission and the other party as necessary, subject to the parties' agreement on the routing of written communications (*see* proposed CR 4).

722. Proposed CR 3(2) corresponds to current CR 26(2) with minor language modification.

723. Proposed CR 3(3) is based on current AFR 30, and concerns supporting documents. The provision is revised to account for electronic filing without an original hard copy or certified copies. In practice, parties tend not to submit originals as supporting documents unless their authenticity is disputed and the Commission wishes to examine the originals.

724. Current AFR 30(2) also contains an outdated procedure for filing extracts of a document. Under proposed CR 3(3), certification of extracts is no longer necessary and, instead, uncertified extracts may be filed as a matter of course, but the Commission may request

production of the full document. Other parts of current AFR 30 have been incorporated into proposed CR 5 concerning translation of documents.

RULE 4 – ROUTING OF WRITTEN COMMUNICATIONS

CURRENT RELATED PROVISIONS: AFR 24, 28

Rule 4
Routing of Written Communications

(1) The Secretariat shall be the official channel of written communications among the parties, the Commission, and the Chairman of the Administrative Council ("Chairman"), except that:

(a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the conciliation;

(b) the members of the Commission shall communicate directly with each other; and

(c) a party may communicate directly with the Commission if requested to do so by the Commission, provided that the Secretariat is copied on all communications.

(2) The Secretariat shall acknowledge receipt of all communications filed by a party and, subject to paragraph (1)(a) and (c), distribute them to the other party and the Commission.

Article 4
Transmission des communications écrites

(1) Le Secrétariat est l'intermédiaire officiel pour les communications écrites entre les parties, la Commission et le ou la Président(e) du Conseil administratif (« Président(e) du Conseil administratif »), sauf dans les cas suivants :

(a) les parties peuvent communiquer directement entre elles, à condition que le Secrétariat reçoive copie de toutes communications devant être produites au cours de la conciliation ;

(b) les membres de la Commission communiquent directement entre eux ; et

(c) une partie peut communiquer directement avec la Commission si celle-ci le requiert, à condition que le Secrétariat reçoive copie de toutes ces communications.

(2) Le Secrétariat accuse réception de toutes les communications déposées par une partie et, sous réserve du paragraphe (1)(a) et (c), les transmet à l'autre partie et à la Commission.

Regla 4
Transmisión de Comunicaciones Escritas

(1) El Secretariado será el intermediario oficial de toda comunicación escrita entre las partes, la Comisión y el o la Presidente(a) del Consejo Administrativo ("Presidente(a) del Consejo Administrativo"), excepto que:

(a) las partes podrán comunicarse directamente entre sí, siempre que el Secretariado sea copiado en todas las comunicaciones que se presenten en la conciliación;

(b) los miembros de la Comisión se comunicarán directamente entre sí; y

(c) A solicitud de la Comisión, una parte podrá comunicarse directamente con la Comisión siempre que el Secretariado esté copiado en todas las comunicaciones.

(2) El Secretariado acusará recibo de todas las comunicaciones presentadas por una parte y, sujeto a lo dispuesto en el párrafo (1)(a) y (c), las distribuirá a la otra parte y a la Comisión.

725. Proposed CR 4 contains the basic principle, currently in AFR 24, that the Secretariat is the official channel of communication. This distinguishes ICSID from most institutions, which do not provide this service. In practice, this serves an important role in ensuring the integrity of the process, equality of treatment of the parties, avoidance of *ex parte* communications unless directed by the Commission, and fulfilment of the Centre's mandatory archiving function (*see* current AFR 28). When a party files a statement or a letter, the Secretariat sends an acknowledgment (with a copy of the incoming correspondence) to both parties, and immediately transmits the filing to the Commission by separate communication. The acknowledgement and the transmittal are made on the day the filing is received, or on the following business day when it is received late at night or on the weekend. Concurrently, the filing is saved in the Centre's archiving system.

726. The basic principle has certain exceptions for practical purposes. First, the Secretariat does not act as intermediary between the members of the Commission, who may communicate directly with each other. Such communications are confidential and do not form part of the official record of the case. Second, parties typically copy each other on all electronic communications sent to the Secretariat, obviating the need for the Secretariat to transmit

them to the other party. Copies of statements and case correspondence are thus usually exchanged directly between the parties. Third, the parties and the Commission usually agree to send hard copy statements directly to the Commission members. This saves time and cost. Proposed CR 4 lists these exceptions, and specifies that the Secretariat must always be copied on statements and communications that are introduced into the proceeding, to fulfil the Centre's depositary role.

727. A party may also communicate directly with the Commission if requested to do so (*see* also proposed CR 22(4)(b)). Proposed CR 4(1)(c) addresses the routing of communications between the Commission and one of the parties, as provided for in proposed CR 22(4)(b). The provision strikes a balance between facilitating the Centre's archiving functions while allowing a flexible manner of communication during the conciliation. The routing of communication is also addressed at the first session (*see* proposed CR 29(4)(e)) and may be modified at any time by party agreement.

RULE 5 – PROCEDURAL LANGUAGES, TRANSLATION AND INTERPRETATION

CURRENT RELATED PROVISIONS: AFR 30; CR 21

Rule 5
Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the conciliation. The parties shall consult with the Commission and the Secretariat regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Written statements, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Commission may require a party to file any document in both procedural languages.

(4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Commission may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Commission may require a fuller or a complete translation. If the translation is disputed, the Commission may require a certified translation.

(5) Any written communication from the Commission or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Commission and, where applicable the Secretary-General, shall issue orders, decisions, recommendations and the Report in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Commission may require interpretation into the other procedural language.

Article 5
Langues de la procédure, traduction et interprétation

(1) Les parties peuvent convenir d'utiliser une ou deux langues pour la conduite de la conciliation. Les parties doivent consulter la Commission et le Secrétariat sur l'utilisation d'une langue qui n'est pas une langue officielle du Centre.

(2) Si les parties ne se mettent pas d'accord sur la ou les langue(s) de la procédure, chacune d'elles peut choisir l'une des langues officielles du Centre.

(3) Les exposés écrits, observations, documents justificatifs et communications sont déposés dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission peut exiger d'une partie qu'elle dépose tout document dans les deux langues de la procédure.

(4) Tout document dans une langue autre qu'une langue de la procédure est accompagné d'une traduction dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission peut exiger d'une partie qu'elle traduise tout document dans les deux langues de la procédure. Il suffit que seule la partie pertinente d'un document soit traduite, étant entendu que la Commission peut exiger une traduction plus complète ou intégrale. Si la traduction est contestée, la Commission peut exiger une traduction certifiée conforme.

(5) Toute communication écrite émanant de la Commission ou du Secrétariat est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission et, le cas échéant, le ou la Secrétaire général(e), rendent des ordonnances, des décisions, des recommandations, et établissent le procès-verbal dans les deux langues de la procédure, sauf si les parties en conviennent autrement.

(6) Toute communication orale est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission peut exiger une interprétation dans l'autre langue de la procédure.

Regla 5
Idiomas del Procedimiento, Traducción e Interpretación

(1) Las partes podrán acordar la utilización de uno o dos idiomas en la conciliación. Las partes consultarán a la Comisión y al Secretariado respecto del uso de un idioma que no sea un idioma oficial del Centro.

(2) Si las partes no acordaran el o los idioma(s) del procedimiento, cada una podrá escoger uno de los idiomas oficiales del Centro.

(3) Las presentaciones escritas, observaciones, documentos de respaldo y comunicaciones se presentarán en un idioma del procedimiento. En un procedimiento que tenga dos idiomas del procedimiento, la Comisión podrá solicitar a una parte que presente cualquier documento en ambos idiomas del procedimiento.

(4) Un documento redactado en un idioma que no sea un idioma del procedimiento será acompañado de una traducción a un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, la Comisión podrá solicitar a una parte que traduzca cualquier documento a ambos idiomas del procedimiento. Será suficiente que se traduzcan solamente las partes pertinentes de un documento; sin embargo, la Comisión podrá solicitar una traducción más amplia o completa del documento. La Comisión podrá solicitar una traducción certificada en caso de que se impugne la traducción.

(5) Cualquier comunicación escrita de parte de la Comisión o del Secretariado deberá estar redactada en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, la Comisión y, cuando corresponda, el o la Secretario(a) General emitirán resoluciones, decisiones, recomendaciones y el informe en ambos idiomas del procedimiento, salvo acuerdo en contrario de las partes.

(6) Cualquier comunicación oral deberá realizarse en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, la Comisión podrá solicitar la interpretación al otro idioma del procedimiento.

728. Proposed CR 5 merges and revises current CR 21 and AFR 30. It deals with all matters concerning the language to be employed in the conciliation, including the choice of language, translation of documents and interpretation at meetings.

729. The ICSID Convention, Regulations and Rules are drafted in English, French and Spanish, all three texts being equally authentic. The parties often agree to use just one of these languages in the proceeding, and may also agree to use another, either official or non-official, language in the proceeding ("procedural language(s)"). The selection of a non-official language is subject to a consultation requirement, to ensure that the Commission

can work, and the Secretariat can assist, in that language. At present, the Secretariat is proficient in over 25 languages.

730. Where parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre (current CR 21). Many ICSID cases involve two procedural languages, with English and Spanish being the most common combination. This increases the cost of the proceeding and may cause delay, as many documents, including the Commission's recommendations, decisions and the Report, need to be issued in both procedural languages.

731. In practice, the parties and the Commission try to limit the administrative and financial burden resulting from a bilingual proceeding. This largely depends on the language capacity of the Commission members and the parties. For example, the parties usually agree that the Commission and Secretariat may communicate in the procedural language of their choice in routine, administrative or procedural correspondence. If all Commission members have working knowledge of the procedural languages selected by the parties, the parties typically also agree that their statements and all supporting documents may be filed in the procedural language of their choice. However, if a conciliator is not proficient in both procedural languages, a translation must be provided by the parties.

732. Despite its impact on cost, it is vital to continue to offer the option of bilingual proceedings in view of the Centre's official languages, the language capacities of conciliators, counsel and parties, and the geographic spread of ICSID's membership. At the same time, the Centre wishes to promote techniques for reducing costs arising from the use of multiple procedural languages, and proposes to reflect some of these practices in the revised Rules.

733. ***First***, it proposes to invite parties to indicate their preferred procedural language before the appointment of conciliators, so that the parties can consider candidates with the necessary language skills (*see* proposed IR 3).

734. ***Second***, proposed CR 5(3) allows the parties to file statements in the procedural language of their choice, and the Commission may require translations into the other procedural language when necessary. As mentioned above, a translation is necessary when a Commission member is not proficient in a procedural language.

735. ***Third***, proposed CR 5(4) specifies that if a document filed in the proceeding is not in a procedural language, it must be accompanied by a translation to a procedural language, and translated into both procedural languages if the Commission so requires. However, the parties need not translate the full document and the translation need not be certified, unless the Commission requests otherwise. This typically occurs when the other party disputes the translation or claims that the translated part is misleading given the contents of the remaining part of the document.

736. ***Fourth***, proposed CR 5(5) and 5(6) allow the Commission and the Secretary-General to communicate with the parties in any procedural language, except that in a proceeding with two procedural languages, all decisions, recommendations and the Report must be issued in both languages unless the parties agree otherwise.

737. ***Fifth***, proposed CR 5(6) allows the parties to use any procedural language at a meeting, subject to interpretation into the other procedural language as required.

RULE 6 – PAYMENT OF ADVANCES AND COSTS OF THE PROCEEDING

CURRENT RELATED PROVISIONS: Convention Art. 61; AFR 14

Rule 6
Payment of Advances and Costs of the Proceeding

(1) Each party shall pay one half of the advances payable in accordance with Administrative and Financial Regulation 14(5), unless a different division is agreed to by the parties.

(2) The fees and expenses of the members of the Commission and the administrative charges and direct costs of the Centre incurred in connection with the proceeding shall be borne equally by the parties, in accordance with Article 61(1) of the Convention.

(3) Each party shall bear its own costs and expenses incurred in connection with the proceeding.

Article 6
Paiement d'avances et frais de procédure

(1) Chaque partie s'acquitte de la moitié des avances dues conformément à l'article 14(5) du Règlement administratif et financier, sauf si une répartition différente est convenue par les parties.

(2) Les honoraires et frais des membres de la Commission ainsi que les frais administratifs et les frais directs du Centre exposés dans le cadre de l'instance sont supportés à parts égales par les parties, conformément à l'article 61(1) de la Convention.

(3) Chaque partie supporte les frais et dépenses exposés par elle dans le cadre de l'instance.

Regla 6
Pago de Anticipos y Costos del Procedimiento

(1) Cada parte abonará la mitad de los anticipos exigibles de conformidad con la Regla 14(5) del Reglamento Administrativo y Financiero, salvo que las partes acuerden una división distinta.

(2) Las partes soportarán por partes iguales los honorarios y gastos de los miembros de la Comisión, así como los cargos administrativos y costos directos del Centro, incurridos en relación con la conciliación, de conformidad con el Artículo 61(1) del Convenio.

(3) Cada parte soportará sus propios costos y gastos incurridos en relación con el procedimiento.

738. The current CR do not contain any provisions related to the cost of the conciliation. CR 6(1) sets out the apportionment of advances paid by the parties pursuant to proposed AFR 14(5). The advances enable the Centre to pay the costs incurred in connection with a proceeding, including the Committee members' fees and expenses, the Centre's administrative charges and other direct costs. Proposed CR 6(1) introduces the possibility for parties to agree on the share of advances payable by each party to cover costs. Absent agreement, the costs are borne equally by the parties.

739. Chapter VI of the Convention (Art. 59-61) concerns the costs associated with ICSID proceedings. Proposed CR 6(2) and CR 6(3) set out the principle for division of costs in conciliations contained in Art. 61(1) of the Convention, *i.e.*, (i) that the cost of the conciliation, such as "the fees and expenses of the members of the Commission as well as the charges for the use of the facilities of the Centre" are borne by the parties in equal parts, and (ii) that each party shall bear its own costs and expenses in connection with the conciliation. Therefore, the Commission does not decide on the allocation of costs (*see* also proposed CR 37).

740. The average cost of concluded conciliation proceedings is USD 182,000 (*i.e.*, USD 91,000) per party. This includes the fees and expenses of the Commission, the cost of the proceeding and ICSID's administrative fee. Legal fees and expenses of the parties are not included.

RULE 7 – CONFIDENTIALITY

CURRENT RELATED PROVISIONS: Convention Art. 35; CR 27(2), 33(3)

Rule 7
Confidentiality

Documents generated in the conciliation shall be confidential. The parties to a conciliation may consent to:

(a) disclosure of any document generated in the conciliation to a non-party;

(b) disclosure by one party of any document obtained from the other party in the conciliation; and

(c) publication by the Centre of documents generated in connection with the proceeding.

Article 7
Confidentialité

Les documents générés au cours de la conciliation sont confidentiels. Les parties à une conciliation peuvent consentir à :

(a) la divulgation à une personne autre qu'une partie de tout document généré au cours de la conciliation ;

(b) la divulgation par une partie de tout document obtenu de l'autre partie au cours de la conciliation ; et

(c) la publication par le Centre de tous documents générés en relation avec l'instance.

Regla 7
Confidencialidad

Los documentos que se originen durante la conciliación serán de carácter confidencial. Las partes de una conciliación podrán consentir a:

(a) la revelación a quien no sea parte de cualquier documento que se origine durante la conciliación;

(b) la revelación por una parte de cualquier documento obtenido de la otra parte durante la conciliación; y

(c) la publicación por parte del Centro de los documentos que se originen en relación con el procedimiento.

741. Proposed CR 7 addresses the confidentiality of documents generated in the conciliation, except as the parties otherwise agree.

742. Proposed CR 7 specifies that the parties may agree to: (i) the disclosure of any document generated in the conciliation to a non-party; (ii) the disclosure by one party of any document obtained from the other party in the conciliation; and (iii) the publication by the Centre of any document generated in the proceeding. The latter proposal reflects current CR 33(3).

743. The confidentiality of meetings between the parties and the Commission is addressed in proposed CR 30 below.

RULE 8 – USE OF INFORMATION IN OTHER PROCEEDINGS

CURRENT RELATED PROVISIONS: Convention Art. 35; CR 32(2)

Rule 8
Use of Information in Other Proceedings

Unless the parties to the dispute agree otherwise pursuant to Article 35 of the Convention, neither party shall rely on any of the following in other dispute settlement proceedings:

(a) any views expressed, statements, admissions, or offers of settlement made, or positions taken by the other party in the conciliation;

(b) the Report, order, decision, or any recommendation made by the Commission in the conciliation; or

(c) documents generated in connection with the proceeding.

Article 8
Utilisation d'informations dans d'autres instances

Sauf accord contraire entre les parties au différend conformément à l'article 35 de la Convention, aucune d'elles ne peut, à l'occasion d'une autre procédure de règlement du différend, se fonder sur :

(a) toutes opinions exprimées, déclarations, admissions ou offres de règlement faites, ou positions prises, par l'autre partie au cours de la conciliation ;

(b) le procès-verbal établi, toute ordonnance ou décision rendue ou toute recommandation faite par la Commission au cours de la conciliation ; ou

(c) tous documents générés en relation avec l'instance.

Regla 8
Utilización de Información en el Marco de Otros Procedimientos

Salvo acuerdo en contrario de las partes de la diferencia de conformidad con lo dispuesto en el Artículo 35 del Convenio, ninguna de ellas podrá invocar lo siguiente en cualquier otro procedimiento de arreglo de diferencias:

(a) las consideraciones, declaraciones, admisiones, u ofertas de avenencia realizadas, o posiciones adoptadas por la otra parte durante la conciliación;

(b) el informe, la resolución, la decisión o cualquier recomendación formulada por la Comisión durante la conciliación; o

(c) los documentos originados en relación con el procedimiento.

744. Proposed CR 8 reflects the "without prejudice" principle contained in Art. 35 of the Convention. Article 35 provides that neither party to the dispute may invoke or rely on: (i) any views, statements, admissions or offers of settlement made by the other party in the conciliation; or (ii) the Report or any recommendation made by the Commission in another proceeding, unless the parties otherwise agree. Proposed CR 8(c) clarifies that this principle also applies to documents generated in the conciliation. In other words, any statement made by a party in the conciliation is without prejudice to the legal positions it takes in any other dispute settlement proceeding. This allows the parties to participate freely in the conciliation. Any agreement by the parties not to comply with the 'without prejudice' principle in Art. 35 is to be reflected in the Commission's Report (*see* also current CR 32(2) and proposed CR 37).

745. Similar "without prejudice" provisions can also be found in a number of recent treaties providing for conciliation or mediation of investor-State disputes, such as the EU-Singapore FTA (not yet in force) (*see* Annex 6, Art. 6(1)).

746. The principle contained in Art. 35 of the Convention and reflected in proposed CR 8 further applies to the raising, or not raising, of objections to jurisdiction pursuant to Art. 32 of the Convention in a conciliation proceeding. In other words, the fact that a party does not raise any jurisdictional objections in the conciliation may not later be invoked in the context of an ICSID arbitration.

CHAPTER II – CONSTITUTION OF THE COMMISSION

747. The proposed amendments to Chapter III regarding the establishment and constitution of the Commission seek to modernize, simplify and streamline the CR, codify ICSID practice, and address efficiency vis-à-vis the constitution of Commissions.

RULE 9 – GENERAL PROVISIONS, NUMBER OF CONCILIATORS AND METHOD OF CONSTITUTION

CURRENT RELATED PROVISIONS: Convention Art. 29; IR 3

Chapter II
Constitution of the Commission

Rule 9
General Provisions, Number of Conciliators and Method of Constitution

(1) The parties shall constitute a Commission without delay after registration of the Request for conciliation.

(2) The number of conciliators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.

(3) The parties shall endeavor to agree on a Sole Conciliator, or any uneven number of conciliators, and the method of appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Commission shall be constituted in accordance with Article 29(2)(b) of the Convention.

(4) References in these Rules to a Commission or a President of a Commission shall include a Sole Conciliator.

Chapitre II
Constitution de la Commission

Article 9
Dispositions générales, nombre de conciliateurs(trices) et méthode de constitution

(1) Les parties constituent une Commission sans délai après l'enregistrement de la requête de conciliation.

(2) Le nombre de conciliateurs(trices) et la méthode de leur nomination doivent être déterminés avant que le ou la Secrétaire général(e) ne puisse intervenir sur une quelconque nomination proposée par une partie.

(3) Les parties s'efforcent de se mettre d'accord sur un(e) conciliateur(trice) unique, ou un nombre impair de conciliateurs(trices), et la méthode de nomination. Si les parties n'informent pas le ou la Secrétaire général(e) d'un accord dans les 60 jours suivant la date de l'enregistrement, la Commission est constituée conformément à l'article 29(2)(b) de la Convention.

(4) Les références dans ce Règlement à une Commission ou à un(e) Président(e) de Commission incluent un(e) conciliateur(trice) unique.

Capítulo II
Constitución de la Comisión

Regla 9
Disposiciones Generales, Número de Conciliadores y Método de Constitución

(1) Las partes deberán constituir una Comisión sin demora luego del registro de la solicitud de conciliación.

(2) El número de conciliadores(as) y el método de su nombramiento deben determinarse antes de que el o la Secretario(a) General pueda pronunciarse respecto de cualquier nombramiento propuesto por una parte.

(3) Las partes procurarán ponerse de acuerdo sobre un(a) Conciliador(a) Único(a) (o cualquier número impar de conciliadores(as)) y el método de su nombramiento. Si las partes no informan al o a la Secretario(a) General de un acuerdo dentro de los 60 días siguientes a la fecha de registro, la Comisión será constituida de conformidad con lo dispuesto en el Artículo 29(2)(b) del Convenio.

(4) Las referencias en estas Reglas a una Comisión o a un o una Presidente(a) de una Comisión incluirán a un(a) Conciliador(a) Único(a).

748. Proposed CR 9(1) confirms the obligation to constitute a Commission immediately following the registration. The obligation to promptly inform the Secretary-General of any agreement regarding the method of constituting the Commission in current CR 1(2) is reflected in proposed CR 9(3), which expressly deals with the method of constitution.

749. Members of Commissions must possess the qualities set out in Art. 14 of the ICSID Convention. The Convention does not establish any limitations on conciliators as regards nationality. The nationality constraints for arbitrators in Art. 39 of the Convention do not apply to conciliators.

750. Sole Conciliator or uneven number of conciliators. The number of conciliators on a Commission and the method of their appointment is determined either by agreement of the parties in accordance with Art. 29(2)(a) of the Convention or by recourse to the formula in Art. 29(2)(b) of the Convention. A Commission must always consist of a Sole Conciliator or any uneven number of conciliators. Proposed CR 9 allows parties flexibility regarding the number of conciliators. The appointment of a Sole Conciliator is often preferred to ensure a time and cost-efficient conciliation; this preference has been reflected in the amendment in proposed CR 9(2). Proposed CR 9(4) clarifies that all references to a "Commission" or "President of a Commission" in the Conciliation Rules include a Commission consisting of a Sole Conciliator.

751. Premature Appointments. To encourage parties to take immediate steps to agree on the appointment of a Sole Conciliator or any uneven number of conciliators, proposed CR 9(2) confirms that the Centre may not take any action regarding a proposed appointment until the parties reach an agreement about the number of conciliators and the method of appointment, or the formula in Art. 29(2)(b) of the Convention is triggered. As the method of constitution sets the legal basis for any appointment, determination of the method must necessarily predate any action by the Secretariat on a proposed appointment. The amendment also seeks to reduce the confusion often evident among users regarding the nature and effect of premature appointments.

752. Establishing the Method of Constitution by Agreement. Absent a prior agreement, the parties shall endeavour to agree on the number of conciliators and the method for their appointment. Current CR 2(1) provides a detailed multi-step process and deadlines for exchanging proposals, subject to modification by party agreement. The process contemplated in current CR 2(1) is envisioned to last 50 days. However, parties can continue to try to reach agreement after the expiry of the relevant deadlines, and are not limited in the number of proposals or counterproposals that can be made. This can lead to delay in the process of constitution. Proposed CR 9(3) eliminates the multi-step process in current CR 2(1) and encourages parties to agree on a method of constituting the Commission within 60 days. If the parties want more time than the 60-days prescribed in proposed CR 9(3), they may agree to extend this period in accordance with Art. 33 of the Convention.

753. Establishing the Method of Constitution by Default. Under current CR 2(3), if no agreement regarding the number of conciliators and the method of their appointment is reached within 60 days after registration of the Request for conciliation, either party may

select the formula in Art. 29(2)(b) of the Convention by giving notice to the Secretary-General. This establishes an implicit deadline of 60 days for agreeing on these matters. However, current CR 2(3) also requires that a party expressly opt for the formula in Art. 29(2)(b) before the constitution can move forward on that basis. As a result, party inaction can lead to a proceeding remaining in limbo for a number of months.

754. To address this potential source of inefficiency, proposed CR 9(3) stipulates that the default formula in Art. 29(2)(b) of the Convention is automatically triggered if no agreement on the number of conciliators and the method for their appointment is communicated to the Secretary-General within 60 days from the date of registration of the Request. The proposed amendment is consistent with Art. 29(2)(b) of the Convention which does not require the formality of an express trigger of the default formula by a party.

755. Channel of Communication. Pursuant to current CR 2(2), the parties must transmit their proposals on the number of conciliators and the method for their appointment through, or with a copy to, the Secretary-General. This requirement has no practical import as no action can be taken by the Secretary-General based on these unilateral proposals. Accordingly, proposed CR 9(3) now specifies that the parties are to advise the Secretary-General once an agreement is actually reached.

RULE 10 – APPOINTMENT OF CONCILIATORS TO A COMMISSION CONSTITUTED IN ACCORDANCE WITH ARTICLE 29(2)(B) OF THE CONVENTION

CURRENT RELATED PROVISIONS: Convention Art. 29

Rule 10
Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention

If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention, each party shall appoint a conciliator and the parties shall jointly appoint the President of the Commission.

Article 10
Nomination des conciliateurs(trices) dans une Commission constituée conformément à l'article 29(2)(b) de la Convention

Si la Commission doit être constituée conformément à l'article 29(2)(b) de la Convention, chaque partie nomme un(e) conciliateur(trice) et les parties nomment conjointement le ou la Président(e) de la Commission.

Regla 10
Nombramiento de los o las Conciliadores(as) en una Comisión Constituida de Conformidad con el Artículo 29(2)(b) del Convenio

Si una Comisión debe constituirse de conformidad con el Artículo 29(2)(b) del Convenio, cada parte nombrará a un o una conciliador(a), y las partes nombrarán conjuntamente al o a la Presidente(a) de la Comisión.

756. This proposed provision describes the process for the appointment of conciliators when the formula in Art. 29(2)(b) of the Convention applies as a result of the parties' lack of agreement on the method of constituting the Commission.

757. The Appointment Process. Current CR 3(1) sets forth a multi-step appointment process which is not conducive to rapid Commission constitution.

758. Rather than codifying the process for the appointments to address this issue, proposed CR 10 only specifies the principle underlying Art. 29(2)(b) of the Convention: each party appoints a conciliator and the parties jointly appoint the President of the Commission. If the process is not completed within 90 days from registration, either party may request that the Chairman of the ICSID Administrative Council (the "Chairman") appoint the conciliator or conciliators not yet appointed under Art. 30 of the Convention. In practice, only three Commissions have been constituted on the basis of Art. 29(2) (b); the remainder have been constituted on the basis of a method agreed by the parties.

759. Channel of Communication. Current CR 3(2) provides that communications between the parties shall be made through, or be copied to, the Secretariat. With a view to streamlining the process and increasing efficiency, this provision is deleted. As described below, proposed CR 14 (following current CR 5) specifies that the Secretary-General shall be notified when an appointment is made, including the appointment of the President; therefore, there is no need to repeat the same provision in proposed CR 10.

RULE 11 – ASSISTANCE OF THE SECRETARY-GENERAL WITH APPOINTMENT

CURRENT RELATED PROVISIONS: Convention Art. 29, 30

Rule 11
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a Sole Conciliator, or any uneven number of conciliators.

Article 11
Assistance du ou de la Secrétaire général(e) dans les nominations

Les parties peuvent demander conjointement au ou à la Secrétaire général(e) de les assister dans la nomination d'un(e) conciliateur(trice) unique ou d'un nombre impair de conciliateurs(trices).

Regla 11
Asistencia del o de la Secretario(a) General con los Nombramientos

Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una Conciliador(a) Único(a) (o cualquier número impar de conciliadores(as)).

760. Proposed CR 11 codifies that the parties may jointly ask the Secretary-General to assist with the appointment of a sole conciliator or any uneven number of conciliators. Proposed CR 11 does not specify a method to be followed by the Secretary-General. If assistance is requested, the Secretary-General will consult with the parties to determine the kind of assistance most suitable to the circumstances.

761. The Secretary-General's assistance can be requested by the parties at any time after the number of conciliators and the method of their appointment has been determined in accordance with proposed CR 9, regardless of whether the Commission is to be constituted on the basis of a party agreement or on the basis of Art. 29(2)(b). Such assistance may consist of identification of conciliator candidates for the parties' consideration or otherwise assisting the parties in agreeing on the identity of a Sole Conciliator or all members of the Commission, using a variety of mechanisms.

RULE 12 – APPOINTMENT OF CONCILIATORS BY THE CHAIRMAN OF THE ADMINISTRATIVE COUNCIL IN ACCORDANCE WITH ARTICLE 30 OF THE CONVENTION

CURRENT RELATED PROVISIONS: Convention Art. 30, 31(1)

Rule 12
Appointment of Conciliators by the Chairman of the Administrative Council in Accordance with Article 30 of the Convention

(1) If a Commission has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request

that the Chairman appoint the conciliator(s) who have not yet been appointed pursuant to Article 30 of the Convention.

(2) The Chairman shall appoint the President of the Commission after appointing any other members who have not yet been appointed.

(3) The Chairman shall consult with the parties as far as possible before appointing a conciliator and shall use best efforts to appoint any conciliator(s) within 30 days after receipt of the request to appoint.

Article 12
Nomination des conciliateurs(trices) par le ou la Président(e) du Conseil administratif conformément à l'article 30 de la Convention

(1) Si une Commission n'a pas été constituée dans un délai de 90 jours suivant la date de l'enregistrement, ou tout autre délai convenu entre les parties, l'une ou l'autre des parties peut demander au ou à la Président(e) du Conseil administratif de nommer le ou les conciliateur(trice)(s) non encore nommé(e)(s), conformément à l'article 30 de la Convention.

(2) Le ou la Président(e) du Conseil administratif nomme le ou la Président(e) de la Commission après avoir nommé tous autres membres non encore nommés.

(3) Dans la mesure du possible, le ou la Président(e) du Conseil administratif consulte les parties avant de nommer un(e) conciliateur(trice) et il ou elle déploie tous les efforts possibles pour nommer tout(e) conciliateur(trice) ou tou(te)s conciliateurs(trices) dans un délai de 30 jours à compter de la réception de la demande de nomination.

Regla 12
Nombramiento de los o las Conciliadores(as) por el o la Presidente(a) del Consejo Administrativo de Conformidad con el Artículo 30 del Convenio

(1) Si una Comisión no se hubiese constituido dentro de los 90 días siguientes a la fecha de registro, o dentro del plazo que las partes hubieran acordado, cualquiera de las partes podrá solicitar que el o la Presidente(a) del Consejo Administrativo nombre al/a la o a los/a las conciliador(a)(es)(as) que aún no haya(n) sido nombrado(a)(s)(as) de conformidad con lo dispuesto en el Artículo 30 del Convenio.

(2) El o la Presidente(a) del Consejo Administrativo nombrará al o a la Presidente(a) de la Comisión luego de nombrar a los miembros que aún no hayan sido nombrados.

(3) El o la Presidente(a) del Consejo Administrativo deberá consultar a las partes en la medida de lo posible antes de nombrar a un(a) conciliador(a) y hará lo posible para

nombrar a cualquiera de los o las conciliador(es)(as) dentro de los 30 días siguientes a la fecha de la recepción de la solicitud de nombramiento.

762. Current CR 4 implements Art. 30 of the Convention. If a Commission is not constituted within 90 days after registration of the Request for conciliation, or such other period as agreed by the parties, either party may request that the Chairman appoint the conciliator or conciliators not yet appointed. This ensures the completion of the constitution of a Commission. When the Chairman appoints pursuant to Art. 30, the conciliator is selected from the ICSID Panel of Conciliators following consultation with the parties. Art. 31(1) of the Convention makes clear that the Panel restriction applies only when the Chairman acts pursuant to Art. 30 of the Convention. Current CR 4 establishes a best-efforts obligation to appoint within 30 days of the request.

763. Proposed CR 12 does not differ much from current CR 4. The proposed amendments comprise one simplification and two clarifications.

764. ***First***, current CR 4(2) is deleted as it is not necessary. It provides that current CR 4(1) applies *mutatis mutandis* if the parties have agreed that the conciliators shall elect the President of the Commission and they fail to do so. There is no need for such specification. This situation is clearly covered by current CR 4(1) and proposed CR 12(2).

765. ***Second***, consistent with the Convention, proposed CR 12(1) clarifies that any request made pursuant to Art. 30 of the Convention must relate to all appointments that have not been made. This is because Art. 30 is designed to enable the completion of the Commission.

766. ***Third***, proposed CR 12(2) specifies that where the Chairman is asked to appoint the presiding conciliator and another conciliator, the non-presiding conciliator shall be appointed first.

RULE 13 – DISCLOSURE OF THIRD PARTY FUNDING

Rule 13
Disclosure of Third-party Funding

(1) "Third-party funding" is the provision of funds or other material support to a party in a conciliation, by a natural or juridical person that is not a party to the dispute ("third-party funder"), 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 conciliation, 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 its initial disclosure, including termination of the funding arrangement.

Article 13
Divulgation d'un financement par un tiers

(1) « Financement par un tiers » désigne l'apport de fonds ou de tout autre soutien matériel, par une personne physique ou morale qui n'est pas partie au différend (« tiers financeur »), à une partie à la conciliation, une affiliée de cette partie ou un cabinet d'avocats représentant cette partie. Ces fonds ou ce soutien matériel peuvent être apportés :

(a) par le biais d'un don ou d'une subvention ; ou

(b) en contrepartie d'une prime ou en échange d'une rémunération ou d'un remboursement dépendant en totalité ou en partie de l'issue de l'instance.

(2) Une partie doit déposer une notification écrite divulguant qu'elle bénéficie d'un financement par un tiers et indiquant le nom du tiers financeur. Cette notification est adressée au Secrétariat immédiatement après l'enregistrement de la requête de conciliation ou dès la conclusion d'un accord de financement par un tiers après l'enregistrement.

(3) Chaque partie a une obligation continue de divulguer toute modification dans les informations visées au paragraphe (2) intervenant après leur divulgation initiale, y compris la cessation de l'accord de financement.

Regla 13
Declaración de Financiamiento por Terceros

(1) El "financiamiento por terceros" es la provisión de fondos u otro apoyo sustancial por una persona natural o jurídica que no es parte de la diferencia (el "tercero financiador"), a una parte en una conciliación, a una sociedad relacionada con esa parte o a una firma de abogados que represente a esa parte. Dichos fondos o apoyo sustancial podrán proporcionarse:

(a) mediante una donación o un subsidio; o

(b) en contraprestación de una prima o a cambio de una remuneración o un reembolso total o parcialmente dependiente del resultado del procedimiento.

(2) Una parte deberá presentar una notificación escrita revelando que goza de financiamiento por terceros y el nombre de dicho tercero financiador. Esta notificación deberá enviarse al Secretariado inmediatamente después del registro de la solicitud de conciliación o una vez se celebre el acuerdo de financiamiento por terceros si este ocurre con posterioridad al registro.

(3) Cada parte tendrá la obligación permanente de revelar cualquier cambio en la información a la que se hace referencia en el párrafo (2) que tenga lugar después de la revelación inicial, lo cual incluye la resolución o rescisión del acuerdo de financiamiento.

767. In recent years there has been increased resort to TPF in domestic and international litigation, including in ISDS. While TPF is primarily discussed in the context of arbitration, it is theoretically possible for TPF to be obtained for conciliation proceedings (for a more detailed discussion of TPF *see* proposed AR 21).

768. It is not proposed to prohibit TPF in conciliation. Rather, proposed CR 13 requires disclosure of TPF to avoid unidentified conflicts of interest between the funder and a conciliator.

769. Definition and Regulation of TPF. Proposed CR 13 defines TPF for the purposes of TPF disclosure. The various forms of TPF and the fact that new approaches continue to emerge make definition difficult (*see* proposed AR 21). However, the definition of TPF is an essential predicate to any obligations or regulations relating to TPF.

770. Proposed CR 13(1) refers to the provision of funds or other material support to a party in a conciliation, as it applies to funding of both claimants and respondents. Proposed CR 13(1) also expressly applies to funds provided through donation or grant, and not only to funds provided in return for remuneration. This definition also captures funding received for a public interest or advocacy purpose and not for remunerative purposes.

771. Disclosure of TPF to Avoid Conflicts of Interest. There is potential for a conflict of interest when an undisclosed entity provides TPF to a party in conciliation. This conflict could arise in various circumstances, for example, if a conciliator provides due diligence opinions at the request of a funder or a conciliator serves on the board of a funder. Absent disclosure, parties and conciliators may be unaware of such conflicts, which could affect the integrity of ISDS and could give rise to challenges that delay the proceedings.

772. Proposed CR 13(2) makes early disclosure of TPF mandatory. It requires the parties to disclose TPF upon registration of the Request, or upon conclusion of a funding arrangement entered into after registration. This duty of disclosure is a continuing one throughout the proceeding.

773. Proposed CR 13(2) ensures that the other party to the conciliation, persons proposed for appointment to the Commission, and ICSID as appointing authority, have the relevant information to assess possible conflicts arising from a relationship between a funder and a conciliator.

774. Complementary obligations are found in other parts of the CR. Proposed CR 13(3) requires conciliators to declare they have no conflict of interest with a funder whose identity has been disclosed by a party, and imposes a continuing obligation on the conciliator to disclose changed circumstances.

775. Proposed CR 13(2) requires disclosure of only the fact of funding and the identity of the funder for the purposes of assessing conflict of interest situations. It does not create a general duty to disclose the terms of funding or the agreement itself. This is because more elaborate information is not required to achieve the objective of preventing conflicts of interest.

776. While proposed CR 13(2) does not require disclosure of the terms of funding or the funding agreement itself, such disclosure remains in the discretion of the Commission pursuant to proposed CR 22(4)(a) should it subsequently become relevant to an issue to be decided in the proceeding.

777. Proposed CR 13(2) will assure knowledge of TPF at an early stage and will allow parties to address related questions of confidentiality of information and the application of legal privileges against disclosure at the first session, and to seek appropriate procedural rulings regarding confidentiality.

RULE 14 – ACCEPTANCE OF APPOINTMENT

Rule 14
Acceptance of Appointment

(1) A party appointing a conciliator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) and contact information.

(2) The Secretariat shall request an acceptance from the appointee upon receipt of the notice referred to in paragraph (1). The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

(3) Within 20 days after receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

(b) provide a signed declaration in the form published by the Centre, addressing matters including the conciliator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.

(4) The Secretariat shall notify the parties of the acceptance of appointment by the conciliator(s) and provide the signed declaration.

(5) The Secretariat shall notify the parties if a conciliator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as conciliator in accordance with the method followed for the previous appointment.

(6) Each conciliator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the conciliator agree otherwise, a conciliator may not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to the dispute that is the subject of the conciliation.

Article 14
Acceptation des nominations

(1) Une partie qui nomme un(e) conciliateur(trice) notifie au Secrétariat la nomination et indique le nom, la ou les nationalité(s) et les coordonnées de la personne nommée.

(2) Dès réception de la notification visée au paragraphe (1), le Secrétariat demande à la personne nommée si elle accepte sa nomination. Le Secrétariat transmet également à chaque personne nommée les informations reçues des parties, pertinentes pour l'établissement de la déclaration visée au paragraphe (3)(b).

(3) Dans les 20 jours suivant la réception de la demande d'acceptation d'une nomination, toute personne nommée doit :

(a) accepter sa nomination ; et

(b) remettre une déclaration signée conforme au modèle publié par le Centre, qui porte sur certaines questions telles que l'indépendance, l'impartialité, la disponibilité du ou de la conciliateur(trice) et son engagement à préserver le caractère confidentiel de l'instance.

(4) Le Secrétariat notifie aux parties l'acceptation des conciliateurs(trices) et fournit la déclaration signée.

(5) Le Secrétariat notifie aux parties si un(e) conciliateur(trice) n'accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe

(3), et une autre personne est nommée en qualité de conciliateur(trice) conformément à la méthode suivie pour la précédente nomination.

(6) Chaque conciliateur(trice) a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3)(b).

(7) Sauf si les parties et le ou la conciliateur(trice) en conviennent autrement, le ou la conciliateur(trice) ne peut pas intervenir en qualité d'arbitre, de conseil, d'expert, de témoin, de juge, ni en aucune autre qualité dans une quelconque autre instance relative au différend qui fait l'objet de la conciliation.

Regla 14
Aceptación del Nombramiento

(1) La parte que nombre a un o una conciliador(a) notificará al Secretariado el nombramiento y proporcionará el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada.

(2) El Secretariado solicitará la aceptación de la persona nombrada una vez recibida la notificación a la que se hace referencia en el párrafo (1). El Secretariado también le transmitirá a cada persona nombrada la información recibida de las partes que sea relevante para completar la declaración a la que se hace referencia en el párrafo (3)(b).

(3) Dentro de los 20 días siguientes a la recepción de la solicitud de aceptación de un nombramiento, la persona nombrada deberá:

(a) aceptar el nombramiento; y

(b) proporcionar una declaración firmada en la forma publicada por el Centro, en la que indique cuestiones tales como la independencia, imparcialidad y disponibilidad del o de la conciliador(a) y su compromiso de mantener la confidencialidad del procedimiento.

(4) El Secretariado notificará a las partes la aceptación de cada nombramiento y distribuirá la declaración firmada por cada conciliador(a).

(5) El Secretariado notificará a las partes si un o una conciliador(a) no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada como conciliador(a) de conformidad con el método seguido para el nombramiento anterior.

(6) Cada conciliador(a) tendrá la obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3)(b).

(7) Salvo acuerdo en contrario de las partes y del o de la conciliador(a), el o la conciliador(a) no podrá desempeñarse como árbitro, consejero(a), perito(a), testigo, o juez(a), ni en ninguna otra capacidad en ningún otro procedimiento relacionado con la diferencia objeto de la conciliación.

778. Proposed CR 14 introduces modifications intended to reflect current practice and to limit delays in constituting the Commission.

779. ***First***, proposed CR 14(1) clarifies the information that a party is required to provide when it notifies the Centre of its appointment of a conciliator.

780. ***Second***, proposed CR 14(2) confirms that the Secretariat shall transmit to each appointee all information received from the parties that is relevant to the completion of the declaration required under proposed CR 14(3). This would include the name of a third-party funder, if any.

781. ***Third***, proposed CR 14(3), in conjunction with proposed CR 16, seeks to reduce the delay and to modernize the procedure regarding the seeking of a conciliator's acceptance. Proposed CR 14 includes a reduced timeframe; the appointee has now 20 days from the Secretariat's request to accept the appointment and send the executed declaration (and any statement of disclosure).

782. ***Fourth***, proposed CR 14 does not include the text of the declaration to be signed (in current CR 6), although it makes clear that the declaration form must address matters including the conciliator's independence, impartiality, availability and commitment to the confidentiality of the proceeding. Pursuant to proposed CR 14(3)(b), the form of the declaration to be signed will be published from time to time by ICSID (*see* Schedule 3 – Conciliator Declaration).

783. The current formulation of the declaration in CR 6 does not include a reference to the conciliator's independence and impartiality, nor does it require disclosure of circumstances that might cause the conciliator's independence to be questioned.

784. The proposed declaration adds language stipulating that the conciliator is "impartial and independent of […] the parties…" thus expanding the disclosure requirement to encompass the notion of "impartiality". The English version of Art. 14 of the Convention refers to "independent judgment." The Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that both versions are equally authentic, it has been accepted that conciliators must be both impartial and independent.

785. The proposed declaration also specifies an express requirement to disclose professional, business and other significant relationships within the past five years, with: (i) the parties;

(ii) the parties' counsel; (iii) other members on the Commission (if known); and (iv) any third-party funder disclosed pursuant to proposed CR 13; and a requirement to disclose other investor-State cases in which the conciliator is currently acting as counsel, arbitrator, conciliator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert.

786. This last requirement responds to concerns expressed by some States and members of the public about the potential for conflict of interest arising from the practice of "double-hatting". This concern is usually expressed in the context of investment arbitration and refers to individuals acting at the same time with an arbitrator's "hat" and counsel or expert's "hat", albeit in separate and unrelated proceedings.

787. The disclosure of additional information regarding a conciliator's other roles proposed in the declaration would enhance transparency and enable the parties to consider potential conflicts of interest deriving from double-hatting on a case-by-case basis, and to pursue the available procedures should they choose to do so.

788. The proposed declaration adds a requirement to confirm sufficient availability to conduct the conciliation in an expeditious and cost-effective manner. Again, the requirement is intended to provide the parties with specific information regarding the availability of the conciliators in their dispute, and to ensure that conciliators consider their availability before accepting appointments. The addition of this requirement is not intended to convey any change in the applicable standards for the challenge of a conciliator.

789. Finally, the proposed declaration requires confirmation that the conciliator will adhere to the billing practices in the Memorandum of Fees and Expenses (Schedule – 1 Memorandum on Fees and Expenses). This addition seeks to enhance conciliator compliance with the requirement to timely submit claims for fees and expenses, and hence to enhance the management of the case finances.

790. ***Fifth***, proposed CR 14(7) prohibits a conciliator from acting in a different capacity with respect to the dispute, unless there is agreement to the contrary. This provision has been incorporated for consistency with the corresponding provisions in the (Additional Facility) Mediation Rules ((AF)MR 8(7)), and reflects current practice in ADR processes such as conciliation and mediation.

RULE 15 – REPLACEMENT OF CONCILIATORS PRIOR TO CONSTITUTION OF THE COMMISSION

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 15
Replacement of Conciliators Prior to Constitution of the Commission

(1) At any time before the Commission is constituted:

(a) a conciliator may withdraw an acceptance;

(b) a party may replace a conciliator whom it appointed; or

(c) the parties may agree to replace any conciliator.

(2) A replacement conciliator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced conciliator was appointed.

Article 15
Remplacement de conciliateurs(trices) avant la constitution de la Commission

(1) À tout moment avant que la Commission ne soit constituée :

(a) un(e) conciliateur(trice) peut retirer son acceptation ;

(b) une partie peut remplacer un(e) conciliateur(trice) qu'elle a nommé(e) ; ou

(c) les parties peuvent convenir du remplacement de tout(e) conciliateur(trice).

(2) Un(e) conciliateur(trice) remplaçant(e) est nommé(e) dès que possible, selon la méthode utilisée pour le ou la conciliateur(trice) ayant retiré son acceptation ou le ou la conciliateur(trice) remplacé(e).

Regla 15
Reemplazo de Conciliadores(as) con Anterioridad a la Constitución de la Comisión

(1) En cualquier momento antes de que se constituya la Comisión:

(a) un o una conciliador(a) podrá retirar su aceptación;

(b) una parte podrá reemplazar a cualquier conciliador(a) que haya nombrado; o

(c) las partes podrán acordar reemplazar a cualquier conciliador(a).

(2) Se nombrará a un o una conciliador(a) sustituto lo antes posible, de conformidad con el método utilizado para el nombramiento del o de la conciliador(a) que se haya retirado o reemplazado.

791. Under current CR 7, a party may replace its party-appointed conciliator, and the parties may also agree to replace any conciliator at any time prior to the constitution of the Commission. Proposed CR 15(1)(b) and (2) maintains the same principle, clarifying that the replacement must follow the method of the original appointment. Reference to the procedure in current CR 1, 5 and 6 is deleted, as it is encompassed in the general statement that the replacement must follow the method of the original appointment.

792. Proposed CR 15(1)(a) codifies current practice pertaining to a situation not covered by the current CR, *i.e.*, when a conciliator wishes to step down from an accepted appointment *prior* to the constitution of the Commission. Current CR 8 only addresses resignation *after* constitution.

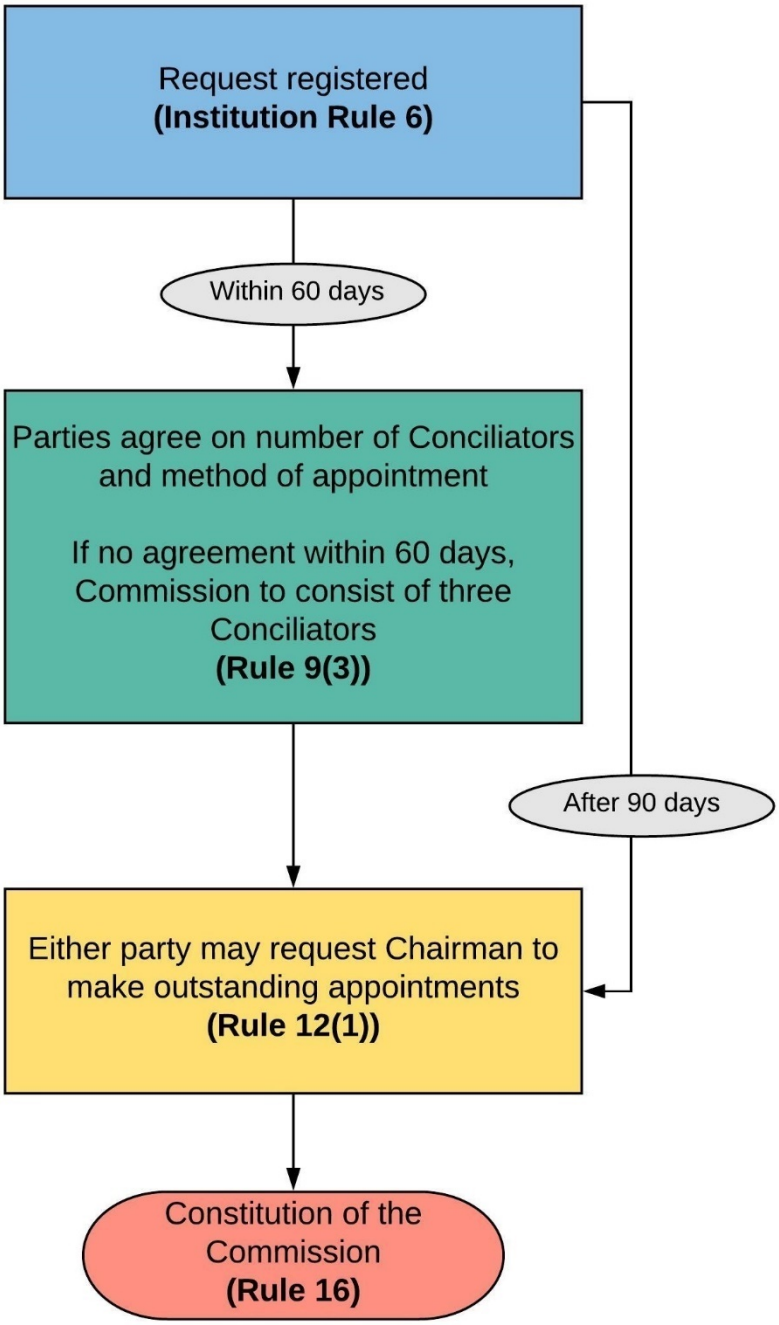
793. This gap could be construed as requiring that where a conciliator wishes to step down *prior* to the constitution of the Commission, the Commission must *first* be constituted and *then* the conciliator shall submit a resignation to the other Commission members.

794. To address the obvious inefficiency of constituting a Commission with a member that will resign immediately after constitution, proposed CR 15(1)(a) codifies that a conciliator may withdraw the acceptance of an appointment *prior* to constitution of the Commission. It is also consistent with the CR allowing a party to replace the conciliator appointed by it at any time prior to constitution of the Commission.

795. Finally, the principle that the replacement must follow the same method as the original appointment in proposed CR 15(2) also applies to the withdrawal of a conciliator in proposed CR 15(1)(a).

796. The basic steps for constitution of a Commission are shown in the chart below:

Constitution of the Commission – Rules 9-16



RULE 16 – CONSTITUTION OF THE COMMISSION

CURRENT RELATED PROVISIONS: Convention Art. 56(1); CR 6(1)

Rule 16
Constitution of the Commission

(1) The Commission shall be deemed to be constituted on the date the Secretary-General notifies the parties that each conciliator has accepted the appointment.

(2) As soon as the Commission is constituted, the Secretary-General shall transmit the Request for conciliation, the supporting documents, the notice of registration and communications with the parties to each conciliator.

Article 16
Constitution de la Commission

(1) La Commission est réputée constituée à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que chaque conciliateur(trice) a accepté sa nomination.

(2) Dès que la Commission est constituée, le ou la Secrétaire général(e) transmet à chaque conciliateur(trice) la requête de conciliation, les documents justificatifs, la notification d'enregistrement et toutes communications avec les parties.

Regla 16
Constitución de la Comisión

(1) Se entenderá que se ha constituido la Comisión en la fecha en que el o la Secretario(a) General notifique a las partes que todos los o las conciliadores(as) han aceptado sus nombramientos.

(2) Tan pronto como se haya constituido la Comisión, el o la Secretario(a) General transmitirá la solicitud de conciliación, los documentos de respaldo, la notificación del registro y las comunicaciones con las partes, a cada conciliador(a).

797. Current CR 6 stipulates the date on which the Commission is deemed to be constituted. Proposed CR 16(1) reflects the same principle while streamlining the text.

798. The first step after the constitution of the Commission is the transmission by the Secretariat of all documents received from the parties to the members of the Commission. Proposed

CR 16(2) corresponds to current CR 24 with minor language modifications. Unless the circumstances otherwise require, documents would be made available to the Commission members in electronic format only in accordance with proposed CR 3. As all communications received by the Secretariat from the parties are acknowledged and transmitted to each party pursuant to proposed CR 3 and 4, there is no need for the Secretariat to again provide a copy of such correspondence to each party at this stage.

CHAPTER III – DISQUALIFICATION OF CONCILIATORS AND VACANCIES

799. Disqualification, death, incapacity and resignation of conciliators constitute the only exceptions to the principle in Art. 56(1) of the Convention that the composition of the Commission shall remain unchanged.

800. The rules governing disqualification, death, incapacity and resignation have remained largely unchanged since the first CR entered into force in 1968, with minor exceptions. Most notably, CR 8(1), governing incapacity, was modified in 1984 to regulate the scenario where a conciliator becomes incapacitated but takes no action, or refuses, to resign. The 1984 CR 8(1) established that the procedure for disqualification would apply to instances of incapacity that are not resolved through the resignation of the incapacitated conciliator. This rule has not been changed since. Current CR 9(5) was amended in 2003, which changed the timeline of 30 days for the Chairman of the Administrative Council to decide on a disqualification, to a "best efforts" standard.

801. Disqualification proposals are part of the system established by the Convention to ensure proper composition of the Commission. ICSID did not receive any comments from Member States or the public in relation to the disqualification of conciliators, presumably because no proposal for disqualification of a conciliator has been filed to date. Comments were however filed in relation to the procedure to disqualify arbitrators and the disruptive effect that disqualification proposals have on the procedural calendar established for the arbitration (*see* proposed AR 29).

802. Given the similarities to the Convention provisions on the disqualification of conciliators and the disqualification of arbitrators, the proposed amendments address the concerns raised by Members States and the public in the context of arbitrations, simplifying the rules and codifying ICSID practice regarding disqualification, incapacity and resignation. These proposed amendments are limited by Art. 56-58 of the Convention, which regulate the grounds for, standard, decision-making and consequences of a proposal, as well as resignation and incapacity. These provisions can only be changed by an amendment to the Convention.

RULE 17 – PROPOSAL FOR DISQUALIFICATION OF CONCILIATORS

CURRENT RELATED PROVISIONS: Convention Art. 56-58

Chapter III
Disqualification of Conciliators and Vacancies

Rule 17
Proposal for Disqualification of Conciliators

(1) A party may propose the disqualification of one or more conciliators ("proposal") pursuant to Article 57 of the Convention.

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Commission and within 20 days after the later of:

(i) the constitution of the Commission; or

(ii) the date on which the party proposing the disqualification first knew or first should have known of the facts upon which the proposal is based;

(b) the party proposing the disqualification shall file a written submission, specifying the grounds on which the proposal is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file its response and supporting documents within seven days after receipt of the written submission;

(d) the conciliator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. This statement shall be filed within five days after receipt of the written submissions referred to in paragraph (2)(c); and

(e) the parties may file final written submissions on the proposal within seven days after expiry of the time limit referred to in paragraph (2)(d).

(3) The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued, or recommendation made by the Commission while the proposal was pending, be reconsidered by the reconstituted Commission.

Chapitre III
Récusation de conciliateurs(trices) et vacances

Article 17
Proposition de récusation de conciliateurs(trices)

(1) Une partie peut proposer la récusation d'un(e) ou plusieurs conciliateur(trice)(s) (« proposition ») en vertu de l'article 57 de la Convention.

(2) La procédure suivante s'applique :

(a) une proposition est soumise après la constitution de la Commission et dans un délai de 20 jours suivant la plus tardive des dates suivantes :

(i) la date de constitution de la Commission ; ou

(ii) la date à laquelle la partie qui propose la récusation a pris connaissance ou aurait dû avoir connaissance des faits sur lesquels est fondée la proposition ;

(b) la partie proposant la récusation dépose des écritures précisant les motifs sur lesquels la proposition est fondée et comprenant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ;

(c) l'autre partie dépose sa réponse et ses documents justificatifs dans un délai de sept jours à compter de la réception des écritures ;

(d) le ou la conciliateur(trice) qui fait l'objet de la proposition peut déposer une déclaration limitée à des informations factuelles pertinentes au regard de la proposition. Cette déclaration est déposée dans un délai de cinq jours à compter de la réception des écritures visées au paragraphe (2)(c) ; et

(e) les parties peuvent déposer des écritures finales sur la proposition dans un délai de sept jours à compter de l'expiration du délai visé au paragraphe (2)(d).

(3) L'instance se poursuit pendant que la proposition est pendante, sauf si elle est suspendue, en tout ou partie, par accord des parties. Si la proposition se solde par une récusation, l'une ou l'autre des parties peut demander que toute ordonnance ou décision rendue ou recommandation faite par la Commission, alors que la proposition était pendante, soit réexaminée par la Commission reconstituée.

Capítulo III
Recusación de Conciliadores(as) y Vacantes

Regla 17
Propuesta de Recusación de los o las Conciliadores(as)

(1) Una parte podrá proponer la recusación de uno(a) o más conciliadores(as) ("propuesta") de conformidad con lo dispuesto en el Artículo 57 del Convenio.

(2) Se aplicará el siguiente procedimiento:

(a) cualquier propuesta deberá presentarse después de la constitución de la Comisión y dentro de los 20 días siguientes a lo que suceda de último, sea:

(i) la constitución de la Comisión; o

(ii) la fecha en la que la parte que propone la recusación tuvo conocimiento o debería haber adquirido conocimiento de los hechos en los que se funda la propuesta;

(b) la parte que proponga la recusación deberá presentar un escrito especificando las causales en que se funda la propuesta e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(c) la otra parte deberá presentar su respuesta y documentos de respaldo dentro de los siete días siguientes a la recepción del escrito;

(d) el o la conciliador(a) a quien se refiera la propuesta podrá presentar una explicación que se limite a información de hecho relevante para la propuesta. Esta explicación se presentará dentro de los cinco días siguientes a la recepción de los escritos a los que se hace referencia en el párrafo (2)(c); y

(e) las partes podrán presentar escritos finales acerca de la propuesta dentro de los siete días siguientes al vencimiento del plazo al que se hace referencia en el párrafo (2)(d).

(3) A menos que el procedimiento sea suspendido, total o parcialmente, de común acuerdo por las partes, este continuará mientras la propuesta de recusación se encuentre en curso. Si la propuesta tiene como consecuencia la recusación del o de la conciliador(a), cualquiera de las partes podrá solicitar que la Comisión, una vez que sea reconstituida, reconsidere cualquier resolución o decisión emitida, o recomendación efectuada, por la Comisión mientras la propuesta de recusación se encontraba en curso.

803. Proposed CR 17 replaces current CR 9 and makes several changes.

804. ***First***, proposed CR 17(1) reflects the basic rule in current CR 9(1) that a challenge must be filed in accordance with Article 57 of the Convention. No amendments are proposed to this portion of the rule as it reflects the corresponding treaty provision.

805. ***Second***, proposed CR 17(2) contains the time limit for filing a disqualification proposal. It clarifies that a proposal can only be filed after the Commission has been constituted. Proposed CR 17(2) requires that a proposal for disqualification be filed within 20 days after the later of the constitution of the Commission or the date on which the party challenging knew or should have known of the relevant facts. This specific time limit replaces the term "promptly" in current CR 9(1) and affords greater clarity concerning filing deadlines.

806. Proposed CR 17(2) also eliminates the cut-off date to file a disqualification proposal, currently the date on which the proceeding is declared closed (current CR 9(1) and 30). The rationale for this is to reflect the fact that conciliators must have the qualities required by Art. 14(1) of the Convention until the moment when the Report is communicated.

807. ***Third***, proposed CR 17(2)(b) requires that the disqualification proposal include all arguments and supporting documents on which the proposal is based. This amendment effectively transforms what could otherwise be a formal lodging of a challenge into a complete submission, thereby reducing the time needed for submissions.

808. ***Fourth***, proposed CR 17(2)(c) establishes a specific time limit of seven days for the filing of submissions by the responding party.

809. ***Fifth***, proposed CR 17(2)(d) gives the challenged conciliator the opportunity to file a statement within five days from receipt of the other party's submissions. The statement must be limited to factual information.

810. ***Sixth***, proposed CR 17(2)(e) permits a final round of observations on the proposal from both parties, to be filed simultaneously within a specified time limit.

811. ***Seventh***, proposed CR 17(3) eliminates the automatic suspension of the proceeding upon the filing of a challenge and the proceeding continues to the extent the parties agree. Given that the conciliation will continue unless otherwise agreed by the parties, it is possible that the Commission will make decisions and recommendations unrelated to the challenge during its pendency. To safeguard the legitimacy of the proceeding, proposed CR 17(3) provides that, should the challenge result in the disqualification of a conciliator, any decisions or recommendations made by the Commission during the pendency of the challenge may be reconsidered by the new Commission once it has been reconstituted, upon request of either party.

RULE 18 – DECISION ON THE PROPOSAL FOR DISQUALIFICATION

CURRENT RELATED PROVISIONS: Convention Art. 58

Rule 18
Decision on the Proposal for Disqualification

(1) The decision on a proposal shall be taken by the conciliators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention.

(2) For the purposes of Article 58 of the Convention:

(a) if the conciliators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided;

(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Commission.

(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 17(2)(e) or the notice in Rule 18(2)(a).

Article 18
Décision sur la proposition de récusation

(1) La décision relative à une proposition est prise par les conciliateurs(trices) ne faisant pas l'objet de cette proposition ou par le Président du Conseil administratif conformément à l'article 58 de la Convention.

(2) Aux fins de l'article 58 de la Convention :

(a) si les conciliateurs(trices) ne faisant pas l'objet de la proposition ne parviennent pas à prendre une décision relative à la proposition pour quelque raison que ce soit, ils ou elles le notifient au ou à la Secrétaire général(e) ; une telle situation est réputée constituer un cas de partage égal des voix ;

(b) si une proposition postérieure est soumise alors que la décision sur une proposition précédente est pendante, les deux propositions sont tranchées par le ou la Président(e) du Conseil administratif comme s'il s'agissait d'une proposition de récusation visant une majorité de la Commission.

(3) La décision relative à une proposition est prise dans les 30 jours suivant la plus tardive des dates suivantes, à savoir la date d'expiration du délai visé à l'article 17(2)(e) ou la date de la notification visée à l'article 18(2)(a).

Regla 18
Decisión sobre la Propuesta de Recusación

(1) La decisión sobre una propuesta de recusación será adoptada por los o las conciliadores(as) que no sean objeto de la propuesta o por el o la Presidente(a) del Consejo Administrativo de conformidad con el Artículo 58 del Convenio.

(2) A los efectos del Artículo 58 del Convenio:

(a) si los o las conciliadores(as) que no sean objeto de una propuesta de recusación no pueden decidir la propuesta por cualquier motivo, notificarán al o a la Secretario(a) General y se considerará que su voto ha resultado en un empate;

(b) si se presenta una propuesta de recusación posterior mientras la decisión sobre una propuesta anterior se encuentra pendiente, el o la Presidente(a) del Consejo Administrativo decidirá ambas propuestas como si se tratara de una propuesta de recusación de la mayoría de la Comisión.

(3) La decisión sobre cualquier propuesta de recusación se adoptará dentro de los 30 días siguientes a lo que suceda de último, sea el vencimiento del plazo al que se hace referencia en la Regla 17(2)(e) o bien la notificación prevista en la Regla 18(2)(a).

812. The Centre received numerous comments from States and the public in the context of arbitration proceedings that favoured repeal of the portion of Art. 58 of the Convention conferring a decision on a challenge to the co-arbitrators unless they are "equally divided" on the matter. This type of change would require an amendment to Art. 58 of the Convention. The proposed amendments to the decision-making process thus focus not on who the decision-makers are, but on some of the circumstances that lead to their intervention, namely: (i) the determination that the non-challenged conciliators are "equally divided"; and (ii) circumstances in which one or more challenges would be treated as a challenge to the majority of the Commission.

813. ***First***, proposed CR 18(1) reflects the portion of Art. 58 of the Convention conferring the decision on a proposal to disqualify on the other members of the Commission unless they are "equally divided" or the proposal concerns a sole conciliator or a majority of the Commission. In such cases the decision is made by the Chairman of the Administrative Council.

814. ***Second***, proposed CR 18(2)(a) clarifies that, for the purposes of Art. 58 of the Convention, the co-conciliators need not be divided on the merits of the challenge, but that their lack of

consensus may be caused by any reason related to the proposal that leads to their inability to decide it.

815. ***Third***, proposed CR 18(2)(b) addresses the situation encountered in the context of arbitration proceedings where a second challenge is filed while a first challenge is still pending. As explained above, current CR 9(6) automatically suspends the proceeding following a disqualification proposal. The automatic suspension precludes the possibility of a second challenge being filed while the first one is pending. Consequently, the two proposals have to be argued and decided consecutively, creating extended delays. In several arbitration cases, parties confronted with this situation agreed to treat consecutive challenges as one proposal for the disqualification of the majority of the Commission, leaving the decision to the Chairman. With the elimination of the automatic suspension, subsequent challenges will be possible. Under proposed CR 18(2)(b), two or more challenges pending simultaneously will be treated as a challenge to the majority of the Commission. The provisions in the CR have been amended accordingly reflecting the identity of the applicable Convention framework.

816. ***Fourth***, in keeping with the overall goal of improving efficiency, proposed CR 18(3) provides for a time limit of 30 days to decide the disqualification proposal after the later of the expiry of the time limit for simultaneous comments from the parties under proposed CR 17(2)(e) or the notice that the co-conciliators are "equally divided" in proposed CR 18(2)(a).

RULE 19 – INCAPACITY OR FAILURE TO PERFORM DUTIES

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 19
Incapacity or Failure to Perform Duties

If a conciliator becomes incapacitated or fails to perform the duties required of a conciliator, the procedure in Rules 17 and 18 shall apply.

Article 19
Incapacité ou défaillance dans l'exercice des fonctions

Si un(e) conciliateur(trice) devient incapable d'exercer ou n'exerce pas ses fonctions de conciliateur(trice), la procédure prévue par les articles 17 et 18 s'applique.

Regla 19
Incapacidad o Imposibilidad de Desempeñar Funciones

Si un o una conciliador(a) se incapacitara o no pudiera desempeñar las funciones de su cargo, se aplicará el procedimiento establecido en las Reglas 17 y 18.

817. Proposed CR 19 introduces two changes to current CR 8, which regulates incapacity, the inability to perform the duties of the office and resignation of conciliators.

818. ***First***, current CR 8(1) provides that a request to remove a conciliator based on incapacity or inability to perform shall follow the same procedure as for a disqualification proposal. Proposed CR 19 replaces inability to perform with failure to perform. Thus, a conciliator who becomes incapacitated or fails to perform the duties of the office may be subject to a proposal for disqualification applying the procedure in proposed CR 17 and 18.

819. ***Second***, current CR 8(2) governs the procedure to be followed by a conciliator when resigning from the Commission. This procedure is now addressed separately in proposed CR 20.

RULE 20 – RESIGNATION

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 20
Resignation

(1) A conciliator may resign by notifying the Secretary-General and the other members of the Commission and providing reasons for the resignation.

(2) If the conciliator was appointed by a party, the other members of the Commission shall promptly notify the Secretary-General whether they consent to the conciliator's resignation for the purposes of Rule 21(3)(a).

Article 20
Démission

(1) Un(e) conciliateur(trice) peut démissionner en adressant une notification à cet effet au ou à la Secrétaire général(e) et aux autres membres de la Commission et en indiquant les motifs de sa démission.

(2) Si ce(tte) conciliateur(trice) a été nommé(e) par une partie, les autres membres de la Commission notifient dans les plus brefs délais au ou à la Secrétaire général(e) s'ils consentent à la démission du ou de la conciliateur(trice) aux fins de l'article 21(3)(a).

Regla 20
Renuncia

(1) Un o una conciliador(a) podrá renunciar a su cargo notificando al o a la Secretario(a) General y a los otros miembros de la Comisión y exponiendo las razones de la renuncia.

(2) Si el o la conciliador(a) fue nombrado(a) por una de las partes, los otros miembros de la Comisión notificarán con prontitud al o a la Secretario(a) General si aceptan a la renuncia del o de la conciliador(a) a los efectos de la Regla 21(3)(a).

820. Proposed CR 20 amends current CR 8(2) dealing with the resignation of conciliators. The proposed rule addresses resignation exclusively and simplifies the language used.

821. ***First***, proposed CR 20(1) retains the conciliator's obligation to notify both the Commission and the Secretary-General of the resignation. Current CR 8 does not expressly require a conciliator to provide reasons for resignation. Current CR 8(2), however, provides that the other conciliator shall consider the reasons for the resignation, if the resigning conciliator was appointed by one of the parties. Proposed CR 20(1) requires that reasons be provided for the resignation, regardless of how the resigning conciliator was appointed and, consequently, regardless of whether the resignation requires the consent of the other members of the Commission.

822. ***Second***, proposed CR 20(2) deals with resignation by a party-appointed conciliator. Article 56(3) of the Convention requires that the Commission consent to the resignation of any party-appointed conciliator, failing which the vacancy will be filled by the Chairman of the Administrative Council instead of following the original method of appointment. This provision seeks to prevent instances of collusion between the resigning conciliator and the appointing party. Proposed CR 20(2) simplifies the wording in current CR 8(2) by referring only to the notification of consent.

RULE 21 – VACANCY ON THE COMMISSION

CURRENT RELATED PROVISIONS: Convention Art. 56

Rule 21
Vacancy on the Commission

(1) The Secretary-General shall notify the parties of any vacancy on the Commission.

(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.

(3) A vacancy on the Commission shall be filled by the method used to make the original appointment, except that the Chairman shall fill the following from the Panel of Conciliators:

(a) a vacancy caused by the resignation of a party-appointed conciliator without the consent of the other members of the Commission; or

(b) a vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Commission has been reconstituted, the conciliation shall continue from the point it had reached at the time the vacancy was notified.

Article 21
Vacance au sein de la Commission

(1) Le ou la Secrétaire général(e) notifie aux parties toute vacance au sein de la Commission.

(2) L'instance est suspendue à compter de la date de la notification de la vacance jusqu'à ce que la vacance ait été remplie.

(3) Une vacance au sein de la Commission est remplie selon la méthode utilisée pour procéder à la nomination initiale, étant toutefois entendu que le ou la Président(e) du Conseil administratif remplit les vacances suivantes en nommant des personnes figurant sur la liste des conciliateurs:

(a) une vacance résultant de la démission, sans le consentement des autres membres de la Commission, d'un(e) conciliateur(trice) nommé(e) par une partie ; ou

(b) une vacance qui n'a pas été remplie dans un délai de 45 jours à compter de la notification de la vacance.

(4) Dès qu'une vacance a été remplie et que la Commission a été reconstituée, la conciliation reprend au point où elle était arrivée au moment où la vacance a été notifiée.

Regla 21
Vacante en la Comisión

(1) El o la Secretario(a) General notificará a las partes de cualquier vacante en la Comisión.

(2) El procedimiento se suspenderá desde la fecha de notificación de la vacante hasta suplir la vacante.

(3) Cualquier vacante en la Comisión se suplirá siguiendo el método utilizado para realizar el nombramiento original, excepto que el o la Presidente(a) del Consejo Administrativo suplirá las siguientes vacantes de entre las personas que figuran en la Lista de Conciliadores:

(a) una vacante producida por la renuncia de un(a) conciliador(a) nombrado(a) por una de las partes sin el consentimiento de los otros miembros de la Comisión; o

(b) una vacante que no se haya suplido dentro de los 45 días siguientes a la notificación de la vacante.

(4) Una vez que se haya suplido una vacante y la Comisión se haya reconstituido, la conciliación continuará a partir de la etapa a la que se había llegado cuando se notificó la vacante.

823. Current CR 10, 11 and 12 regulate vacancies on the Commission resulting from the disqualification, death, incapacity or resignation of conciliators. Proposed CR 21 combines and simplifies current CR 10-12.

824. ***First***, proposed CR 21(1) simplifies the wording of current CR 11(1) related to the notification of vacancies by the Secretary-General to the parties.

825. ***Second***, proposed CR 21(2), much like current CR 10(2), establishes the suspension of the proceeding from the date of notification of a vacancy on the Commission until the vacancy has been filled.

826. ***Third***, proposed CR 21(3) determines how vacancies are filled. Proposed CR 21(3) does not change the content of the current CR 20(2) but simplifies the language. Effectively, vacancies continue to be filled through the original method except where: (i) the co-conciliators do not consent to the resignation of a party-appointed conciliator; or where (ii) the vacancy has not been filled within 45 days after its notification. In both cases, the vacancy will be filled by the Chairman from the Panel of Conciliators. A difference from current CR 11(2)(b) is that any appointments by the Chairman under scenario (ii) will be made automatically upon the expiry of 45 days after the notice of vacancy, whereas the current rule requires a party to request that the vacancy be filled by the Chairman.

827. ***Fourth***, proposed CR 21(4) deals with the resumption of the proceeding once the vacancy has been filled. The proposed CR contains few changes from the current rules. It refers to the reconstitution of the Commission as a step prior to the resumption of the proceeding. It further establishes that the resumed proceeding will continue from the time of notification of the vacancy (as opposed to the moment when the vacancy occurred in the current CR).

828. The proposal also omits the possibility of a meeting being repeated in whole or in part at the request of the newly appointed conciliator, which is provided for in current CR 12. This change is consistent with the proposed amendment to provisions regarding the manner in which meetings between the Commission and the parties are conducted. Conciliation meetings depart from a formal evidentiary inquiry and the Commission and the parties have greater flexibility to determine the type of information and the manner by which such information may be introduced into the proceeding (*see* proposed CR 22 and 30). In the context of proposed CR 21(4), it is therefore difficult to envision that such meetings could be repeated.

CHAPTER IV – CONDUCT OF THE CONCILIATION

829. Proposed Chapter IV deals with the conduct of the conciliation and contains provisions currently in Chapter III (Working of the Commission) and IV (Conciliation Procedures). Current CR 29 on objections to jurisdiction, which is now located in Chapter V (Termination of the Proceeding), is also included in this Chapter.

RULE 22 – FUNCTIONS OF THE COMMISSION

CURRENT RELATED PROVISIONS: Convention Art. 34, CR 22

Chapter IV
Conduct of the Conciliation

Rule 22
Functions of the Commission

(1) The Commission shall clarify the issues in dispute and assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) In order to bring about agreement between the parties, the Commission may, at any stage of the proceeding, after consulting with the parties, recommend:

(a) specific terms of settlement to the parties; or

(b) that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.

(3) Recommendations may be made orally or in writing. Either party may request that the Commission provide reasons for any recommendation. The Commission may invite each party to provide observations concerning any recommendation made.

(4) At any stage of the proceeding, the Commission may:

(a) request explanations, documents or other information from either party or other persons;

(b) communicate with the parties jointly or separately; or

(c) visit any place connected with the dispute or conduct inquiries with the consent and participation of the parties.

Chapitre IV
Conduite de la conciliation

Article 22
Fonctions de la Commission

(1) La Commission éclaircit les points en litige et aide les parties à parvenir à une résolution mutuellement acceptable de la totalité ou d'une partie du différend.

(2) En vue d'amener les parties à un accord, la Commission peut, à une étape quelconque de l'instance et après consultation de celles-ci, recommander :

(a) les termes particuliers d'un règlement aux parties ; ou

(b) aux parties de s'abstenir de certains actes spécifiques susceptibles d'aggraver le différend alors que la conciliation est en cours.

(3) Les recommandations peuvent être formulées par oral ou par écrit. Chacune des parties peut demander à la Commission de motiver toute recommandation. La Commission peut inviter chaque partie à faire part de ses observations sur toute recommandation présentée.

(4) À tout moment de l'instance, la Commission peut :

(a) requérir de l'une ou l'autre des parties ou d'autres personnes des explications, des documents ou toutes autres informations ;

(b) communiquer avec les parties ensemble ou séparément ; ou

(c) avec le consentement et la participation des parties, se transporter sur les lieux ayant un lien avec le différend ou procéder à des enquêtes.

Capítulo IV
Tramitación de la Conciliación

Regla 22
Funciones de la Comisión

(1) La Comisión aclarará los asuntos en disputa y asistirá a las partes para que lleguen a una resolución mutuamente aceptable de la totalidad o de parte de la diferencia.

(2) A fin de lograr el acuerdo de las partes, la Comisión podrá, en cualquier etapa del procedimiento, previa consulta a las partes, recomendar:

(a) términos de solución específicos a dichas partes; o

(b) que las partes se abstengan de realizar actos específicos que pudieran agravar la diferencia mientras la conciliación se encuentre en curso.

(3) Las recomendaciones podrán formularse oralmente o por escrito. Cualquiera de las partes podrá solicitar que la Comisión exponga los fundamentos para cualquier recomendación. La Comisión podrá invitar a cada una de las partes a formular observaciones respecto de cualquier recomendación efectuada.

(4) En cualquier etapa del procedimiento, la Comisión podrá:

(a) solicitar explicaciones, documentos u otro tipo de información de cualquiera de las partes u otras personas;

(b) comunicarse con las partes en forma conjunta o por separado; o

(c) visitar cualquier lugar relacionado con la diferencia o realizar investigaciones con el consentimiento y participación de las partes.

830. Proposed CR 22 implements Art. 34 of the Convention and updates current CR 22, which sets out the general scope of conciliation proceedings and the role of the Commission. The Commission's mandate is to clarify the issues in dispute and assist the parties in reaching agreement on mutually acceptable terms. ICSID conciliation contains facilitative elements but also envisions the possibility of the Commission making recommendations to the parties regarding specific terms of settlement or that the parties refrain from taking any steps that aggravate the dispute while the conciliation is ongoing.

831. ***First***, proposed CR 22(1) and (2) simplify the language in current CR 22(1) and (2).

832. ***Second***, proposed CR 22(2) requires the Commission to consult the parties before issuing any recommendations. This change reflects the party-driven nature of the conciliation

process. It replaces the requirement that every recommendation be reasoned and instead provides each party with an opportunity to request reasons if it so desires.

833. ***Third***, proposed CR 22(3) updates current CR 22(2) (last sentence), by providing that the Commission may invite each party to provide observations concerning a recommendation made. This advances the collaborative nature of conciliation proceedings and allows the Commission to gauge a party's reaction to a recommendation, which may help the Commission determine other options for settlement. Proposed CR 22(3) maintains the concept that recommendations may be made orally or in writing, a concept set forth in current CR 22(2).

834. ***Fourth***, proposed CR 22(4)(a) specifies that the Commission may, on its own initiative and at any stage of the proceeding, request oral explanations or documents from either party or other persons. The reference to the more rigid concept of evidence in current CR 22(3)(b) is proposed to be removed. Instead, proposed CR 22(4)(a) allows the Commission to request explanations, documents, or other relevant information from the parties or from other persons. The change is consistent with the Commission's mandate to clarify the issues in dispute and intended to: (i) broaden the type of information the Commission may request; and (ii) offer added flexibility as to the manner in which such information is provided.

835. ***Fifth***, proposed CR 22(4)(b) specifies that the Commission may communicate with the parties jointly or separately, to clarify the disputed issues or bring about agreement between the parties. This reflects existing conciliation practice in which a Commission may engage with each party separately, either through separate meetings with each party or by way of separate written communications.

836. ***Finally***, proposed CR 22(4)(c) maintains the option for the Commission to conduct site visits and inquiries, with the participation of the parties. Proposed CR 22(4)(c) clarifies that such site visits and inquiries are subject to the consent from both parties.

RULE 23 – GENERAL DUTIES OF THE COMMISSION

Rule 23
General Duties of the Commission

(1) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.

(2) The Commission shall conduct the proceeding in an expeditious and cost-effective manner.

Article 23
Obligations générales de la Commission

(1) La Commission traite les parties de manière égale et donne à chacune d'elles une possibilité raisonnable de comparaître et de participer à l'instance.

(2) La Commission conduit la procédure avec célérité et efficacité en termes de coûts.

Regla 23
Obligaciones Generales de la Comisión

(1) La Comisión deberá tratar a las partes de manera igualitaria y brindarle a cada parte una oportunidad razonable de comparecer y participar en el procedimiento.

(2) La Comisión tramitará el procedimiento de manera expedita y eficaz en materia de costos.

837. Proposed CR 23 sets out the duties of the Commission and confirms the application of certain fundamental rights under the CR: equality of treatment of the parties and the right to be heard.

838. Proposed CR 23(2) introduces a general duty to act in an expeditious and cost-effective manner. This is a new rule for parties and Commission members, who share the responsibility of ensuring timeliness and cost-efficiency. It is expected that the Commission and the parties will cooperate to achieve the objective of this new rule through pro-active process management.

RULE 24 – ORDERS, DECISIONS AND PROCEDURAL AGREEMENTS

CURRENT RELATED PROVISIONS: CR 16, 19, 20(2)

Rule 24
Orders, Decisions and Procedural Agreements

(1) The Commission shall make the orders and decisions required for the conduct of the conciliation.

(2) The Commission shall take decisions by a majority of the votes of all its members. Abstentions shall count as a negative vote.

(3) Orders and decisions may be taken by any appropriate means of communication and may be signed by the President on behalf of the Commission, unless the parties agree otherwise.

(4) The Commission shall apply any agreement between the parties on procedural matters, to the extent that it conforms with the Convention and the Administrative and Financial Regulations.

Article 24
Ordonnances, décisions et accords sur la procédure

(1) La Commission rend les ordonnances et les décisions requises pour la conduite de la conciliation.

(2) La Commission prend ses décisions à la majorité des voix de tous ses membres. L'abstention est considérée comme un vote négatif.

(3) Les ordonnances et décisions peuvent être rendues par tous moyens de communication appropriés et peuvent être signées par le ou la Président(e) pour le compte de la Commission, sauf si les parties en conviennent autrement.

(4) La Commission applique tout accord entre les parties sur les questions de procédure, pour autant que celui-ci soit conforme à la Convention et au Règlement administratif et financier.

Regla 24
Resoluciones, Decisiones y Acuerdos

(1) La Comisión emitirá las resoluciones y decisiones requeridas para la tramitación de la conciliación.

(2) La Comisión adoptará decisiones por mayoría de votos de todos sus miembros. Las abstenciones se contarán como votos en contra.

(3) Las resoluciones y decisiones podrán ser emitidas por cualquier medio de comunicación apropiado y podrán estar firmadas por el o la Presidente(a) en nombre y representación de la Comisión, salvo acuerdo en contrario de las partes.

(4) La Comisión aplicará cualquier acuerdo de las partes sobre cuestiones procesales en la medida en que cumpla con lo establecido en el Convenio y en el Reglamento Administrativo y Financiero.

839. Proposed CR 24 applies to all decisions taken by the Commission, including recommendations and procedural orders. It should be noted that the quorum requirement for decisions in proposed CR 24(2) is not based on the Convention (the quorum requirement in Art. 48(1) of the Convention only applies to Tribunals) and may be modified by party agreement.

840. Proposed CR 24 combines current CR 16, 19 and 20(2) with minor language modifications.

841. ***First***, proposed CR 24(1) clarifies that while the parties may exercise significant control over the conduct of the conciliation, the Commission makes the specific decisions and orders for the conduct of the conciliation.

842. ***Second***, proposed CR 24(3) updates the wording of current CR 20(2). The duty to apply procedural agreements remains unchanged.

843. ***Third***, proposed CR 24(3) reflects current CR 16(2) with minor language modifications to reflect the practice that many decisions are taken by electronic mail exchanges among all Commission members, and that the instrument communicating the decision is signed by the President of the Commission on behalf of the Commission.

RULE 25 – QUORUM

CURRENT RELATED PROVISIONS: CR 14(2)

Rule 25
Quorum

The participation of a majority of the members of the Commission shall be required at the first session, meetings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.

Article 25
Quorum

La participation d'une majorité des membres de la Commission est exigée lors de la première session, des réunions et des délibérations, par tous moyens de communication appropriés, sauf si les parties en conviennent autrement.

Regla 25
Quórum

La participación de la mayoría de los miembros de la Comisión será requerida tanto en la primera sesión como en las reuniones y deliberaciones, por cualquier medio de comunicación apropiado, salvo acuerdo en contrario de las partes.

844. Proposed CR 25 corresponds to current CR 14(2) dealing with the quorum of the Commission. The term "sittings" is replaced by first session, meetings or deliberations, as appropriate. The proposal also reflects that a quorum does not require in-person participation but can be attained by any means of communication, *e.g.*, through telephone or video conference, unless the parties agree otherwise. The quorum requirement is often addressed at the first session (*see* proposed CR 29).

RULE 26 – DELIBERATIONS

Rule 26
Deliberations

(1) The deliberations of the Commission shall take place in private and remain confidential.

(2) The Commission may deliberate at any place it considers convenient.

(3) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

Article 26
Délibérations

(1) Les délibérations de la Commission ont lieu à huis clos et demeurent confidentielles.

(2) La Commission peut délibérer en tout lieu qu'elle juge pratique.

(3) Seuls les membres de la Commission prennent part à ses délibérations. Aucune autre personne n'est admise sauf si la Commission en décide autrement.

Regla 26
Deliberaciones

(1) Las deliberaciones de la Comisión se realizarán en privado y serán de carácter confidencial.

(2) La Comisión podrá deliberar en cualquier lugar que estime conveniente.

(3) Sólo los miembros de la Comisión tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario de la Comisión.

845. Proposed CR 26(1) and (3) are current CR 15(1) and (2) with minor language modification. Proposed CR 26(2) clarifies that the Commission may deliberate at any location it considers convenient.

846. Commission members may not disclose any part of the deliberations (proposed CR 26(1)). This assures their independence as Commission members may not disclose their individual arguments and how they voted. The rule strengthens the collaborative character of the Commission.

847. Attendance at the deliberation is restricted to the Commission members unless they decide to admit another person to assist in the deliberations (proposed CR 26(3)).

848. In practice, Commissions often request the attendance of the Secretary of the Commission appointed from ICSID Secretariat staff (*see* proposed AFR 25).

RULE 27 – COOPERATION OF THE PARTIES

CURRENT RELATED PROVISIONS: Convention Art. 34

Rule 27
Cooperation of the Parties

(1) The parties shall cooperate with the Commission and with one another and shall conduct the conciliation in good faith.

(2) The parties shall provide all relevant explanations, documents or other information. The parties shall also facilitate visits to any place connected with the dispute and the participation of other persons as requested by the Commission.

(3) The parties shall comply with any time limit agreed upon or fixed by the Commission.

(4) The parties shall give their most serious consideration to the Commission's recommendations pursuant to Article 34(1) of the Convention.

Article 27
Collaboration des parties

(1) Les parties collaborent avec la Commission et l'une avec l'autre et conduisent la conciliation de bonne foi.

(2) Les parties fournissent toutes explications, tous documents ou toutes autres informations pertinent(e)s. Elles facilitent également les transports sur les lieux ayant un lien avec le différend et la participation d'autres personnes conformément aux demandes de la Commission.

(3) Les parties respectent tous délais convenus avec la Commission ou fixés par elle.

(4) Les parties doivent tenir le plus grand compte des recommandations de la Commission conformément à l'article 34(1) de la Convention.

Regla 27
Cooperación de las Partes

(1) Las partes cooperarán con la Comisión y entre sí, y tramitarán la conciliación de buena fe.

(2) Las partes proporcionarán todas las explicaciones, los documentos u otra información que sea pertinente. Las partes facilitarán también las visitas a cualquier lugar relacionado con la diferencia y la participación de otras personas a solicitud de la Comisión.

(3) Las partes respetarán todos los plazos acordados o fijados por la Comisión.

(4) Las partes deberán prestar la máxima consideración a las recomendaciones de la Comisión de conformidad con lo dispuesto en el Artículo 34(1) del Convenio.

849. Proposed CR 27 sets out the general duties of the parties. The rule implements Art. 34(1) and (2) of the Convention and reflects current CR 23 with some modified language.

850. ***First***, proposed CR 27(1) reflects the duty of the parties to cooperate in good faith with the Commission, as set out in Art. 34(1) of the Convention and current CR 23(1). The Rule

also clarifies that this duty exists towards the Commission but also vis-à-vis the other party and the conciliation process as a whole, given that the parties' cooperation is the cornerstone of the conciliation process.

851. ***Second***, proposed CR 27(2) and (3) elaborate in more detail on the parties' general duty to cooperate, identifying specifically: (i) the duty of the parties to comply with requests from the Commission to provide explanations, documents, or other information; (ii) the duty to facilitate the participation of other persons as well as the conduct of site visits (*see* proposed CR 22(4)(c) above); and (iii) the duty to comply with time limits agreed with or set by the Commission.

852. ***Third***, proposed CR 27(4) implements the parties' duty reflected in Art. 34(2) of the Convention to give their most serious consideration to the Commission's recommendations. This duty reflects the fact that unlike a decision or Award by an arbitral tribunal, the Commission's recommendations are not binding upon the parties.

RULE 28 – WRITTEN STATEMENTS

Rule 28
Written Statements

(1) Each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views on these issues 30 days after the constitution of the Commission, or such longer time as the Commission may fix, but in any event before the first session.

(2) Either party may file further written statements at any stage of the conciliation within time limits fixed by the Commission.

Article 28
Exposés écrits

(1) Chaque partie dépose simultanément un bref exposé écrit initial qui décrit les questions faisant l'objet du différend ainsi que sa position sur ces questions, 30 jours suivant la constitution de la Commission ou dans tout délai plus long que celle-ci peut fixer, mais en tout état de cause avant la première session.

(2) À tout moment de la conciliation, chaque partie peut déposer tous autres exposés écrits dans les délais fixés par la Commission.

Regla 28
Presentaciones Escritas

(1) Cada parte presentará de manera simultánea una presentación escrita inicial breve que describa los asuntos en disputa y sus posiciones respecto de esos asuntos 30 días después de la constitución de la Comisión u otro plazo mayor que la Comisión fije, pero, en cualquier caso, antes de la primera sesión.

(2) Cualquiera de las partes podrá presentar presentaciones escritas adicionales en cualquier etapa de la conciliación dentro de los plazos fijados por la Comisión.

853. Upon constitution, the Commission will receive a copy of the Request for conciliation and subsequent correspondence (*see* proposed CR 16), and therefore will have some information about the issues in dispute from the perspective of the instituting party. Typically, however, the Commission will not have any views from the respondent (unless the Request was filed jointly).

854. Proposed CR 28 modifies current CR 25.

855. ***First***, proposed CR 28(1) specifies the content of the parties' initial written submissions, envisioning a brief written statement, describing the issues in dispute and each party's views on such issues.

856. ***Second***, proposed CR 28(1) clarifies that the initial statements are to be filed simultaneously by the parties. In keeping with current CR 25(1), the initial statements shall be filed 30 days of the constitution of the Commission. The 30-day time limit may be extended by the Commission up to the date of the first session, which takes place within 60 days after the Commission's constitution unless otherwise agreed (*see* proposed CR 29 below). Having received the parties' written statements prior to the first session, the Commission will be able to commence the conciliation on the disputed issues as rapidly as possible.

857. Proposed CR 28(2) specifies that the parties may file subsequent written statements at any stage of the conciliation within time limits established by the Commission. No change is proposed except for minor language modifications. This provision addresses public comments recommending the Commission to set time limits for written submissions. In practice, written statements have been filed within one month of the first session and in intervals ranging from two weeks to 2.5 months.

858. Written statements may contain descriptions, explanations, summaries of facts, new information, arguments or observations on the other party's views or on the Commission's recommendation(s) (*see* proposed CR 22(3) and (4) above). They may also contain legal argument; however, written statements are not 'pleadings' in the technical sense of the term (*see* Note B to CR 25 (1968)).

RULE 29 – FIRST SESSION

CURRENT RELATED PROVISIONS: CR 13(1), 20

Rule 29
First Session

(1) Subject to paragraph (2), the Commission shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).

(2) The first session shall be held within 60 days of the Commission's constitution or such other period as the parties may agree.

(3) The first session may be held in person or remotely, by any means that the Commission deems appropriate. The agenda, method and date of the first session shall be determined by the Commission after consulting with the parties.

(4) Before the first session, the Commission shall invite the views of the parties on procedural matters, including:

(a) the applicable conciliation rules;

(b) the number of members required to constitute a quorum of the Commission;

(c) the division of advances payable pursuant to Administrative and Financial Regulation 14(5);

(d) the procedural language(s), translation and interpretation;

(e) the method of filing and routing of written communications;

(f) a schedule for further written statements and meetings;

(g) the place and format of meetings between the Commission and the parties;

(h) the manner of recording or keeping minutes of meetings, if any;

(i) the protection of confidential information;

(j) the publication of documents; and

(k) any agreement between the parties:

(i) concerning the treatment of information disclosed by one party to the Commission by way of separate communication pursuant to Rule 22(4)(b);

(ii) not to initiate or pursue during the conciliation any other proceeding in respect of the dispute;

(iii) concerning the application of prescription or limitation periods; and

(iv) pursuant to Article 35 of the Convention.

(5) At the first session or within any other period as the Commission may determine, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

(6) The Commission shall issue summary minutes recording the parties' agreements and the Commission's decisions on the procedure within 15 days after the later of the first session or the last written statement on procedural matters addressed at the first session.

Article 29
Première Session

(1) Sous réserve du paragraphe (2), la Commission tient sa première session avec les parties pour traiter des questions de procédure, notamment celles qui sont énumérées au paragraphe (4).

(2) La première session se tient dans les 60 jours suivant la constitution de la Commission ou tout autre délai convenu par les parties.

(3) La première session peut se tenir en personne ou à distance, par tous moyens que la Commission juge appropriés. L'ordre du jour, les modalités et la date de la première session sont déterminés par la Commission après consultation des parties.

(4) Préalablement à la première session, la Commission invite les parties à lui faire part de leurs observations sur les questions de procédure, notamment:

(a) le règlement de conciliation applicable ;

(b) le nombre de membres requis pour constituer le quorum au sein de la Commission ;

(c) la répartition des avances devant être payées conformément à l'article 14(5) du Règlement administratif et financier ;

(d) la ou les langue(s) de la procédure, la traduction et l'interprétation ;

(e) les modalités de dépôt et de transmission des communications écrites ;

(f) un calendrier des autres exposés écrits et des réunions ;

(g) le lieu et la forme des réunions entre la Commission et les parties ;

(h) les modalités éventuelles d'enregistrement et de rédaction des comptes-rendus des réunions ;

(i) la protection des informations confidentielles ;

(j) la publication de documents ; et

(k) tout accord entre les parties :

(i) relatif au traitement des informations divulguées par une partie à la Commission par le biais d'une communication séparée conformément à l'article 22(4)(b) ;

(ii) de ne pas engager ni poursuivre pendant la conciliation une quelconque autre instance en rapport avec le différend ;

(iii) relatif à l'application de délais de prescription ou de déchéance ; et

(iv) conformément à l'article 35 de la Convention.

(5) Lors de la première session ou dans tout délai déterminé par la Commission, chaque partie doit :

(a) désigner un représentant habilité à résoudre le litige pour son compte ; et

(b) décrire le processus à suivre pour mettre en œuvre le règlement.

(6) La Commission établit un procès-verbal sommaire prenant acte des accords des parties et des décisions de la Commission sur la procédure de conciliation dans un délai de 15 jours à compter de la plus tardive des dates suivantes, soit la date de la première session, soit celle du dernier exposé écrit relatif aux questions de procédure traitées lors de la première session.

Regla 29
Primera Sesión

(1) Sujeto a lo dispuesto en el párrafo (2), la Comisión celebrará una primera sesión con las partes para abordar cuestiones procesales, lo cual incluye las cuestiones enumeradas en el párrafo (4).

(2) La primera sesión se celebrará dentro de los 60 días siguientes a la constitución de la Comisión, o cualquier otro plazo acordado por las partes.

(3) La primera sesión podrá celebrarse en persona o a distancia, por cualquier medio que la Comisión estime apropiado. La agenda, la modalidad y la fecha de la primera sesión serán determinadas por la Comisión previa consulta a las partes.

(4) Antes de la primera sesión, la Comisión invitará a las partes a presentar sus observaciones sobre cuestiones procesales, lo cual incluye:

(a) las reglas de conciliación aplicables;

(b) el número de miembros necesario para constituir el quórum de la Comisión;

(c) la división de los anticipos que deban pagarse de conformidad con lo dispuesto en la Regla 14(5) del Reglamento Administrativo y Financiero;

(d) el(los) idioma(s) del procedimiento, traducción e interpretación;

(e) el método de presentación y transmisión de comunicaciones escritas;

(f) un cronograma para presentaciones escritas y reuniones adicionales;

(g) el lugar y formato de las reuniones entre la Comisión y las partes;

(h) la modalidad de las grabaciones o levantamiento de actas de las reuniones, si las hubiera;

(i) la protección de información confidencial;

(j) la publicación de los documentos; y

(k) cualquier acuerdo entre las partes:

(i) respecto del tratamiento de la información revelada por una parte a la Comisión mediante una comunicación separada de conformidad con lo dispuesto en la Regla 22(4)(b);

(ii) de no iniciar ni promover, durante la conciliación, ningún otro procedimiento con respecto a la diferencia;

(iii) respecto de la aplicación de plazos de prescripción; y

(iv) de conformidad con lo dispuesto en el Artículo 35 del Convenio.

(5) En la primera sesión o dentro de cualquier otro plazo fijado por la Comisión, cada parte deberá:

(a) identificar a un representante que esté autorizado para llegar a un acuerdo con respecto a la diferencia, en su nombre y representación; y

(b) describir el proceso que deberá seguirse para dar aplicación a un acuerdo.

(6) La Comisión emitirá actas resumidas mediante las cuales se deje constancia de los acuerdos de las partes y de las decisiones de la Comisión sobre el procedimiento, dentro de los 15 días siguientes a lo que suceda de último, sea la primera sesión o la última presentación escrita sobre cuestiones procesales abordadas durante la primera sesión.

859. Proposed CR 29 merges current CR 13(1), with some additional changes regarding the matters to consider at the first session.

860. Current CR 13(1) and 20 provide for a first session and preliminary procedural consultation with the Commission and the parties to address procedural matters. The proposed amendment consolidates the procedure under the two rules and codifies current practice.

861. Consolidation of CR 13(1) and 20. Current CR 20 addresses a "Preliminary Procedural Consultation" to ascertain the parties' positions on procedural questions. Current CR 13(1) addresses the scheduling and location of sessions, including the Commission's "first session," which must be held within 60 days after the constitution of the Commission unless the parties agree otherwise. In practice, the "first session" and the "preliminary procedural consultation" are carried out as a single process with only one meeting. This process is consolidated in proposed CR 29.

862. Scheduling of the First Session. No change has been made to the 60-day deadline to hold the first session, and the parties may extend that deadline by agreement. In practice, most first sessions in conciliations were held within the 60-day timeline.

863. Current CR 13 indicates that the parties may agree on a venue for an in-person first session and that, if they do not agree, such meeting must be held at ICSID's headquarters in Washington, D.C. in accordance with Art. 62 of the Convention. In all conciliations that reached the stage of the first session, the parties agreed to hold an in-person meeting.

Parties could also consider holding the first session by video or telephone conference to reduce time and costs.

864. First sessions are typically less than a half-day long and the Commission will have received the parties' views on procedural matters in advance (*see* proposed CR 29(4)). Given that the parties will have submitted the initial written statement pursuant to proposed CR 28, parties and Commissions may consider combining the first session with the Commission's initial meeting with the parties to commence its work clarifying the issues in dispute and exploring opportunities for agreement between the parties on these issues.

865. Matters to be addressed at the First Session. Current CR 20(1) identifies a number of procedural matters to be addressed during the preliminary procedural consultation. Given that the preliminary procedural consultations and the first session are held in one single meeting, the ICSID Secretariat has developed a template agenda with these and other items typically addressed at the first session. Proposed CR 29(4) lists the key items which the parties and the Commission should consider, ensuring an efficient process with a clear framework. The proposal deletes the reference to current CR 20(1)(d) related to the number of copies to be filed, as electronic filing is the proposed default (*see* proposed CR 3). Proposed CR 29(4) further deletes the reference to the concept of evidence in current CR 20(1)(c), as the gathering of information is proposed to be handled in a more flexible manner (*see* proposed CR 22(4)(a)).

866. In addition, it is proposed to add the below items.

867. The applicable conciliation rules (proposed CR 29(4)(a)). The conciliation framework offers ample flexibility to the parties to tailor the conciliation framework to their particular dispute and process preferences. As noted above, the parties may agree on the applicable conciliation rules provided the agreed rules do not conflict with the Convention, the AFR or any mandatory treaty provisions (*see* current CR 20(2)). Subject to these limitations, parties to an ICSID conciliation are free to adapt the process as they see fit.

868. The division of advances payable pursuant to Administrative and Financial Regulation 14(5) (proposed CR 29(4)(c). Proposed AFR 14(5) introduces the option that the advances payable to the Centre to cover the cost of the proceeding do not have to be borne by the parties in equal shares, but the parties may agree on a different division (see also proposed CR 6(1).

869. The method of filing written statements and routing of written communications (proposed CR 29(4)(e)). Unless the parties agree otherwise, proposed CR 3 and 4 will govern the method of filing and routing of written communications. Recognizing that the parties and the Commission may have other preferences, it is recommended that they be discussed at the first session, in line with current practice.

870. A schedule for further written statements and meetings (proposed CR 29(4)(f)). It is proposed that at the first session the parties and the Commission address the next steps in the conciliation process, including the scheduling of further written statements and meetings between the parties and the Commission. Given the flexible nature of the

conciliation process, the parties and the Commission will need to find a balance between securing the availability of all involved ahead of time to conduct an efficient process, and allowing for flexibility depending on the progress achieved in the conciliation. It is recommended that the Commission and the parties address scheduling matters proactively, with due regard to the Commission's duty established in proposed CR 23 to conduct the process expeditiously.

871. The place and format of meetings between the Commission and the parties (proposed CR 29(4)(g)). As provided in proposed CR 30, the parties can agree on any place for a meeting or to hold such meeting by means other than an in-person meeting, after consulting with the Commission and subject to adequate logistical arrangements. In practice, the majority of meetings in conciliation proceedings have been held at the World Bank Group facilities in Paris. The place need not be the same for every meeting, and the default is ICSID's headquarters when the parties do not agree on the location, in accordance with Art. 62 of the Convention. It is recommended that the parties and the Commission discuss the location that is the most suitable at the first session, taking time and cost considerations into account.

872. The protection of confidential information and publication of documents (proposed CR 29(4)(i) and (j)). This change is introduced in view of the proposed provisions regarding the publication of documents generated in the proceeding and observation of meetings (*see* proposed CR 7 and CR 30(4)). The purpose of addressing confidentiality at the first session recognizes that a confidentiality framework creates a sense of security for the parties during the conciliation, thereby allowing the parties to engage freely and creatively.

873. Any agreement between the parties concerning the treatment of information disclosed by one party to the Commission by way of separate communication (proposed CR 29(4)(k)(i)). The conciliation rules allow the Commission to communicate and meet with each party separately (*see* proposed CR 22 and CR 30). However, the proposed CRs do not contain a general rule governing the disclosure of information received in such communications or meetings by the Commission to the other party. This is best left to be determined by the parties and the Commission. It is therefore recommended that this item be addressed at the first session.

874. Any agreement between the parties not to initiate or pursue any other proceeding in respect of the dispute during the pendency of the conciliation (proposed CR 29(4)(k)(ii)). There is no provision in the ICSID Convention or the CR providing for exclusivity of a conciliation proceeding. It is not inconceivable, and has occurred in one case, that parties commence arbitration or other proceedings while the conciliation is ongoing. To allow the conciliation process to effectively run its course, it is recommended that the parties explore an agreement not to pursue any other proceeding in respect of the dispute while the conciliation is ongoing.

875. Any agreement by the parties concerning the non-application of prescription or limitation periods (proposed CR 28(4)(k)(iii)). In certain circumstances, parties may be reluctant to pursue conciliation proceedings, or participate in a conciliation beyond a certain timeframe, given the timelines established by the applicable prescription or limitation periods. To

address such concerns and allow the parties to conduct the conciliation procedure effectively, it is recommended that the parties explore an agreement concerning suspension of such periods, if possible.

876. Any agreement between the parties pursuant to Article 35 of the Convention (proposed CR 29(4)(k)(iv)). Article 35 of the Convention provides that unless the parties agree otherwise, neither party to a conciliation is entitled to invoke or rely on any statements made in the conciliation by the other party, including offers of settlement or admissions, in any other dispute settlement proceeding. It is recommended that the parties explore agreement on the use of information from a conciliation at the first session which might foster the parties' ability to fully engage in the process.

877. Identification of a representative with settlement authority (proposed CR 29(5)). Proposed CR 29(5) envisions that each party identify, either at the first session or subsequently, a representative who is authorized to settle the dispute and describe the process that would be followed to implement a settlement.

878. Given the nature of the parties to investment disputes and the subject matters involved, the authorization from various ministries of governmental agencies or corporate entities might be required. The addition of this item is intended to facilitate the eventual conclusion of a settlement agreement between the parties to the dispute.

879. Minutes. Proposed CR 29(6) requires the Commission to issue summary minutes recording the parties' agreements and the Commission's decision on conciliation procedure within 15 days after the later date of the first session or the last written communication on procedural issues addressed at the first session.

RULE 30 – MEETINGS

Rule 30
Meetings

(1) The Commission may meet with the parties jointly or separately.

(2) The Commission shall determine the date, time and method of holding meetings, after consulting with the parties.

(3) If a meeting is to be held in person, it may be held at any place agreed to by the parties after consulting with the Commission and the Secretariat. If the parties do not agree on the place of a meeting, it shall be held at the seat of the Centre pursuant to Article 62 of the Convention.

(4) Meetings shall remain confidential. The parties may consent to observation of meetings by persons in addition to the parties and the Commission.

Article 30
Réunions

(1) La Commission peut tenir des réunions avec les parties ensemble ou séparément.

(2) La Commission fixe la date, l'heure et les modalités de la tenue des réunions, après consultation des parties.

(3) Si une réunion doit se tenir en personne, elle peut se tenir en tout lieu convenu entre les parties après consultation de la Commission et du Secrétariat. Si les parties ne se mettent pas d'accord sur le lieu d'une réunion, celle-ci se tient au siège du Centre, conformément à l'article 62 de la Convention.

(4) Les réunions demeurent confidentielles. Les parties peuvent consentir à ce que des personnes, autres que les parties et la Commission, observent les réunions.

Regla 30
Reuniones

(1) La Comisión podrá reunirse con las partes en forma conjunta o por separado.

(2) La Comisión determinará la fecha, la hora y la modalidad de celebración de las reuniones, previa consulta a las partes.

(3) Si una reunión debe celebrarse en persona, podrá celebrarse en cualquier lugar acordado por las partes previa consulta a la Comisión y al Secretariado. Si las partes no acordaran el lugar de una reunión, la misma se celebrará en la sede del Centro de conformidad con lo dispuesto en el Artículo 62 del Convenio.

(4) Las reuniones serán de carácter confidencial. Las partes podrán consentir en que otras personas además de las partes y la Comisión observen las reuniones.

880. Current CR 27 envisions that the Commission conduct 'hearings' with the parties to hear evidence and allow the parties to present oral argument and examine witnesses and experts. Hearings are also intended to provide an opportunity for the Commission to explore the possibilities of settlement with the parties. The current CR do not provide specific direction as to the conduct of the hearings.

881. Proposed CR 30 introduces a number of modifications to current CR 27.

882. ***First***, hearings between the Commission and the parties are referred to as "meetings". The change in terminology is intended to highlight their flexible nature and to differentiate between evidentiary hearings held in arbitrations to examine witnesses and experts, and

meetings intended to clarify the disputed issues and facilitate agreements between the parties.

883. ***Second***, it is proposed to maintain the concept that meetings between the parties and the Commission shall remain confidential.

884. ***Third***, references to witness and expert examination are removed, consistent with the suggestion in proposed CR 22(4)(a) to introduce greater flexibility into the process. The Commission may still request the participation of parties other than the disputing party (*see* proposed CR 22(4)(a) and proposed CR 30(4)).

885. ***Fourth***, proposed CR 30 specifies that the Commission may meet with the parties jointly or separately, which is already the practice in ICSID conciliation (*see* proposed CR 22(4)(b) and proposed CR 29(4)(k)(i)).

886. ***Fifth***, proposed CR 30(3) specifies the identification of meeting venues as set out in Art. 62 of the Convention, which provides that conciliations must be held at the seat of the Centre in Washington, D.C. if the parties do not agree otherwise.

887. ***Sixth***, it is proposed to make the observation of meetings between the parties and the Commission by persons other than the parties subject only to the parties' agreement. The concept of such observation is set out in current CR 27(2) and is to be determined by the Commission.

RULE 31 – PRELIMINARY OBJECTIONS

CURRENT RELATED PROVISIONS: Convention Art. 32

Rule 31
Preliminary Objections

(1) A party may file a preliminary objection that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission.

(2) A preliminary objection shall be made as soon as possible. The objection shall be made no later than the date of the initial written statement referred to in Rule 28(1), unless the facts on which the objection is based are unknown to the party at the relevant time.

(3) The Commission may address a preliminary objection separately or with other issues in dispute. If the Commission decides to address the objection separately, it may suspend the conciliation on the other issues in dispute to the extent necessary to address the preliminary objection.

(4) The Commission may at any time on its own initiative consider whether the dispute is within the jurisdiction of the Centre or within its own competence.

(5) If the Commission decides that the dispute is not within the jurisdiction of the Centre or for other reasons is not within its competence, it shall close the proceeding and issue a Report to that effect, in which it shall state its reasons. Otherwise, the Commission shall issue a decision on the objection with brief reasons and fix any time limit necessary for the further conduct of the conciliation.

Article 31
Objections préliminaires

(1) Une partie peut soulever une objection préliminaire fondée sur le motif que le différend ne ressortit pas à la compétence du Centre ou, pour toute autre raison, à celle de la Commission.

(2) Une objection préliminaire est soulevée aussitôt que possible. Sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré, l'objection est soulevée au plus tard à la date de l'exposé écrit initial visé à l'article 28(1).

(3) La Commission peut traiter une objection préliminaire de manière distincte ou avec d'autres questions faisant l'objet du différend. Si la Commission décide de traiter l'objection de manière distincte, elle peut suspendre la conciliation sur les autres questions faisant l'objet du différend dans la mesure nécessaire pour traiter l'objection préliminaire.

(4) La Commission peut, à tout moment et de sa propre initiative, examiner si le différend ressortit à la compétence du Centre ou à sa propre compétence.

(5) Si la Commission décide que le différend ne ressortit pas à la compétence du Centre ni, pour toutes autres raisons, à sa propre compétence, elle prononce la clôture de l'instance et établit un procès-verbal motivé à cet effet. Dans le cas contraire, la Commission rend une décision sur l'objection, qu'elle motive brièvement, et fixe tout délai nécessaire à la poursuite de la conciliation.

Regla 31
Excepciones Preliminares

(1) Una parte podrá oponer una excepción preliminar según la cual la diferencia no se encuentra dentro de la jurisdicción del Centro o que por otras razones no es de la competencia de la Comisión.

(2) Una excepción preliminar deberá oponerse lo antes posible. La excepción deberá oponerse a más tardar en la fecha de la presentación escrita inicial a la que se hace referencia en la Regla 28(1), a menos que la parte no haya tenido conocimiento de los hechos en que se funda la excepción, en el momento pertinente.

(3) La Comisión podrá pronunciarse sobre una excepción preliminar en forma separada o junto con otros asuntos en disputa. Si la Comisión decide pronunciarse sobre la excepción en forma separada, podrá suspender la conciliación respecto de los demás asuntos en disputa en la medida que sea necesario para pronunciarse sobre la excepción preliminar.

(4) La Comisión podrá en cualquier momento considerar de oficio si la diferencia se encuentra dentro de la jurisdicción del Centro o es de su propia competencia.

(5) Si la Comisión decide que la diferencia no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de su competencia, pronunciará el cierre del procedimiento y, a tal efecto, emitirá un informe en el que expresará los motivos en que se funda. De lo contrario, la Comisión emitirá una decisión relativa la excepción con una breve exposición de motivos y fijará cualquier plazo necesario para la continuación de la conciliación.

888. Article 32 of the Convention provides that the Commission is the judge of its own competence and that parties to a conciliation proceeding may raise objections to the Commission's jurisdiction and competence. The concept of 'jurisdiction' in the context of a conciliatory proceeding is difficult reconcile with the nature of conciliation. The Report of the Executive Directors accompanying the Convention explains that the term 'jurisdiction' "is used as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available". In practice, objections to jurisdiction have only been filed in two cases.

889. It is suggested to move proposed CR 31 relating to such objections into Chapter IV dealing with the conduct of the conciliation. Proposed CR 31 introduces certain language modifications to current CR 29.

890. ***First***, the rule is re-named "Preliminary Objections", a term introduced in the context of arbitrations in 2006 to reflect the fact that such objections may relate not only to jurisdiction but also admissibility. This change was not reflected in the CR at the time.

891. ***Second***, in light of the Commission's role, which is to clarify the issues in dispute and assist the parties in reaching agreement (*see* Art. 34 of the Convention and proposed CR 22), it is proposed to clarify that the reference to 'on the merits' in Art. 32 of the Convention refers to "other issues in dispute" (*see* proposed CR 31(3)).

892. Proposed CR 31(2) maintains the timeline in current CR 29(1), *i.e.*, any preliminary objection shall be made as early as possible and no later than the first written statement (*see* proposed CR 28).

893. Proposed CR 31 also introduces a few procedural changes.

894. ***First***, proposed CR 31(3) confirms that the Commission may either address a preliminary objection separately or together with other issues in dispute.

895. ***Second***, the automatic suspension of the conciliation upon the raising of a preliminary objection is removed. This change was introduced into the ICSID arbitration framework in 2006 but not reflected in current CR 29.

896. ***Third***, if the Commission decides to address preliminary objections separately, it now has the discretion to suspend the conciliation on other issues in dispute. This provides greater flexibility and efficiency to the conciliation process.

897. While preliminary objections are common in ICSID arbitration, such objections have only been raised in two conciliation proceedings, as mentioned above. In both cases, the Commission addressed the objections together with the disputed issues.

898. If the Commission determines that the dispute is not within the jurisdiction of the Centre or for other reasons not within its competence, current CR 29(5) provides that the Commission shall close the proceeding and issue a reasoned Report to that effect. Proposed CR 31(5) maintains the same concept. The Commission shall issue a decision and fix any time limit necessary for the further conduct of the conciliation.

899. When considering whether to raise preliminary objections in the context of a conciliation proceeding, parties may wish to keep in mind the "without prejudice" principle contained in Art. 35 of the Convention and reflected in proposed CR 8. That principle provides that neither party to the dispute may invoke or rely on any views, statements, admissions, offers of settlement made or positions taken by the other party in the conciliation, in another dispute settlement proceeding, unless the parties otherwise agree. In other words, the fact that a party did not raise any jurisdictional objections in the conciliation may not later be raised in the context of an ICSID arbitration.

CHAPTER V – TERMINATION OF THE CONCILIATION

900. The termination of the conciliation is addressed in Chapter V of the CR. Under the current CR, conciliation proceedings are terminated by a Report of the Commission. In its Report, the Commission may: (i) conclude that it lacks jurisdiction (current CR 29(5)); (ii) record that the parties reached agreement (current CR 30(1)); (iii) record that the parties failed to reach agreement (current CR 30(2)); or (iv) record that one party failed to appear or participate in the conciliation (current CR 30(3)). A conciliation may also be terminated on the basis of current AFR 14(3)(d) if the parties fail to pay the required advances.

Chapter V
Termination of the Conciliation

Rule 32
Discontinuance Prior to the Constitution of the Commission

(1) If the parties notify the Secretary-General prior to the constitution of the Commission that they have agreed to discontinue the proceeding, the Secretary-General shall issue an order taking note of the discontinuance.

(2) If a party requests the discontinuance of the proceeding prior to the constitution of the Commission, the Secretary-General shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(3) If, prior to the constitution of the Commission, the parties fail to take any steps in the proceeding for more than 150 days, the Secretary-General shall notify them of the time elapsed since the last step taken in the proceeding. If the parties fail to take a step within 30 days after the notice, they shall be deemed to have discontinued the proceeding and the Secretary-General shall issue an order taking note of the discontinuance. If either party takes a step within 30 days after the Secretary-General's notice, the proceeding shall continue.

Chapitre V
Fin de la conciliation

Article 32
Désistement avant la constitution de la Commission

(1) Si les parties notifient au ou à la Secrétaire général(e) avant la constitution de la Commission qu'elles sont convenues de ses désister de la conciliation, le ou la Secrétaire général(e) rend une ordonnance prenant acte de la fin de l'instance.

(2) Si une partie requiert le désistement de la conciliation avant la constitution de la Commission, le ou la Secrétaire général(e) fixe un délai dans lequel l'autre partie peut s'opposer à ce désistement. Si aucune objection n'est soulevée par écrit dans ce délai, l'autre partie est réputée avoir accepté le désistement et le ou la Secrétaire général(e) rend une ordonnance prenant acte de la fin de l'instance. Si une objection est soulevée par écrit pendant ce délai, l'instance se poursuit.

(3) Si, avant la constitution de la Commission, les parties n'accomplissent aucune démarche relative à l'instance pendant 150 jours, le ou la Secrétaire général(e) leur adresse une notification les informant du délai écoulé depuis la dernière démarche accomplie dans l'instance. Si les parties n'accomplissent aucune démarche dans les 30 jours suivant la notification, elles sont réputées s'être désistées de l'instance et le ou la Secrétaire général(e) rend une ordonnance prenant acte de la fin de la conciliation. Si l'une ou l'autre des parties accomplit une démarche dans les 30 jours suivant la notification du ou de la Secrétaire général(e), l'instance continue.

Capítulo V
Conclusión de la Conciliación

Regla 32
Discontinuación con Anterioridad a la Constitución de la Comisión

(1) Si las partes notificaran al o a la Secretario(a) General con anterioridad a la constitución de la Comisión que han acordado discontinuar el procedimiento, el o la Secretario(a) General emitirá una resolución que deje constancia de la discontinuación.

(2) Si una de las partes solicita la discontinuación del procedimiento con anterioridad a la constitución de la Comisión, el o la Secretario(a) General fijará el plazo dentro del cual la otra parte podrá oponerse a la discontinuación. Si no se formula objeción alguna por escrito dentro del plazo fijado, se entenderá que la otra parte ha consentido a la discontinuación y el o la Secretario(a) General emitirá una resolución que deje constancia de la discontinuación del procedimiento. Si se formula una objeción escrita dentro del plazo fijado, el procedimiento continuará.

(3) Si con anterioridad a la constitución de la Comisión, las partes omiten realizar cualquier acto procesal durante más de 150 días, el o la Secretario(a) General notificará a las partes que dicho tiempo ha transcurrido desde el último acto procesal. Si las partes omiten actuar dentro de los 30 días siguientes a la notificación, se entenderá que las partes han discontinuado el procedimiento, y el o la Secretario(a) General emitirá una resolución dejando constancia de la discontinuación. Si cualquiera de las partes realiza un acto procesal dentro de los 30 días siguientes a la notificación del o de la Secretario(a) General, el procedimiento continuará.

901. The conciliation framework does not currently contain any provisions regarding discontinuance of a proceeding *prior* to the constitution of the Commission. In practice, there have been two cases in which the parties asked the Secretary-General to discontinue the proceeding prior to the Commission's constitution. Proposed CR 32(1) and (2) codify the Secretary-General's authority to discontinue the proceeding prior to the constitution of

the Commission if: (i) both parties jointly request the discontinuance; or (ii) if one party requests the discontinuance and the other party does not object to such request.

902. Proposed CR 32(3) allows the Secretary-General to discontinue a proceeding prior to the constitution of the Commission if both parties abandon the proceeding and do not take any steps toward the constitution of the Commission (for failure of a party to appear or participate after constitution of the Commission, *see* current CR 30(3) and proposed CR 36).

903. Under the current and proposed framework, the failure of only one party to take any steps towards the constitution of the Commission does not prevent the conciliation from moving forward. In such circumstances, the other party may, in accordance with proposed CR 9, rely on the default provision for the constitution of the Commission and request that the Chairman of the Administrative Council appoint any conciliators not yet appointed, pursuant to proposed CR 12.

904. Proposed CR 32(3) specifies that if the parties fail to take any steps for 150 days prior to the constitution, the Secretary-General shall discontinue the conciliation, after a 30-day notice to the parties. This new provision ensures that proceedings abandoned by both parties do not stay on the Centre's docket infinitely.

RULE 33 – DISCONTINUANCE FOR FAILURE TO PAY

CURRENT RELATED PROVISIONS: AFR 14

Rule 33
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by Administrative and Financial Regulation 14, the proceeding may be discontinued pursuant to that Regulation.

Article 33
Fin de l'instance pour défaut de paiement

Si les parties ne procèdent pas, comme l'exige l'article 14 du Règlement administratif et financier, au paiement des montants destinés à couvrir les frais de la procédure, la fin de l'instance peut être prononcée conformément à cet article.

Regla 33
Discontinuación por Falta de Pago

Si las partes no realizan los pagos para sufragar los costos del procedimiento tal como lo exige la Regla 14 del Reglamento Administrativo y Financiero, podrá discontinuarse el procedimiento de conformidad con lo dispuesto en dicha Regla.

905. Proposed CR 33 is a new provision that addresses the possibility of discontinuance of the conciliation pursuant to proposed AFR 14 due to the parties' failure to pay the advances required by that Regulation. It informs users that, in addition to the proposed discontinuance provisions in proposed CR 32, a proceeding may also be discontinued pursuant to proposed AFR 14.

RULES 34 – 36 – REPORT NOTING THE PARTIES' AGREEMENT, THE PARTIES' FAILURE TO REACH AGREEMENT OR THE FAILURE OF A PARTY TO APPEAR OR PARTICIPATE

CURRENT RELATED PROVISIONS: Convention Art. 34(2); CR 30

Rule 34
Report Noting the Parties' Agreement

(1) If the parties reach agreement on some or all of the issues in dispute, the Commission shall close the proceedings and issue its Report noting the issues in dispute and recording the issues upon which the parties have agreed.

(2) The parties may provide the Commission with the complete and signed text of their settlement agreement and may request that the Commission embody such settlement in the Report.

Article 34
Procès-verbal prenant acte de l'accord des parties

(1) Si les parties se mettent d'accord sur certains ou l'ensemble des points en litige, la Commission clôt l'instance et établit son procès-verbal prenant note des points en litige et prenant acte des points sur lesquels les parties sont parvenues à un accord.

(2) Les parties peuvent remettre à la Commission le texte complet et signé de leur accord de règlement amiable et lui demander de l'incorporer dans son procès-verbal.

Regla 34
Informe que Deja Constancia del Acuerdo entre las Partes

(1) Si las partes llegan a un acuerdo sobre la totalidad o algunos de los asuntos en disputa, la Comisión declarará cerrado el procedimiento y emitirá un informe en el que dejará constancia de los asuntos en disputa y de las cuestiones en que las partes han logrado llegar a un acuerdo.

(2) Las partes podrán proporcionarle a la Comisión el texto completo y firmado de su acuerdo de avenencia y podrán solicitar que la Comisión refleje dicha avenencia en el informe.

Rule 35
Report Noting the Failure of the Parties to Reach Agreement

At any stage of the proceeding, and after notice to the parties, the Commission shall close the proceedings and issue its Report noting the issues in dispute and recording that the parties have not reached agreement if:

(a) it appears to the Commission that there is no likelihood of agreement between the parties; or

(b) the parties advise the Commission that they have agreed to discontinue the conciliation.

Article 35
Procès-verbal prenant acte de l'impossibilité pour les parties de parvenir à un accord

Á une étape quelconque de l'instance et après en avoir donné notification aux parties, la Commission clôt l'instance et établit son procès-verbal prenant note des points en litige et prenant acte de l'impossibilité pour les parties de parvenir à un accord si :

(a) la Commission estime qu'il n'y a aucune possibilité d'accord entre les parties ; ou

(b) les parties informent la Commission qu'elles sont convenues de mettre fin à la conciliation.

Regla 35
Informe que Deja Constancia de la Falta de Acuerdo entre las Partes

En cualquier etapa del procedimiento y después de notificar a las partes, la Comisión pronunciará el cierre del procedimiento y emitirá un informe en el que tomará nota de los asuntos en disputa y dejará constancia de que las partes no han logrado llegar a un acuerdo, si:

(a) la Comisión estima que no hay probabilidades de lograr un acuerdo entre las partes, o

(b) las partes le informan a la Comisión que han acordado discontinuar la conciliación.

Rule 36
Report Recording the Failure of a Party to Appear or Participate

If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceedings and issue its Report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Article 36
Procès-verbal prenant acte du défaut de comparution ou de participation d'une partie

Si l'une des parties fait défaut ou s'abstient de participer à l'instance, la Commission, après en avoir donné notification aux parties, clôt l'instance et établit son procès-verbal constatant que le différend a été soumis à la conciliation et que la partie en question a fait défaut ou s'est abstenue de participer à l'instance.

Regla 36
Informe que Deja Constancia de que Una de las Partes No Compareció o Participó

Si una de las partes no compareciera o participara en el procedimiento, la Comisión, previa notificación a las partes, pronunciará el cierre del procedimiento y emitirá un informe en el que tomará nota de que la diferencia fue sometida a conciliación y dejará constancia de que dicha parte no compareció o participó.

906. Article 34(2) of the Convention sets out the types of Reports to be issued by the Commission following the closure of the proceeding. Proposed CR 34-36 reflect current

CR 30, with certain language modifications. It is further proposed to introduce the possibility that the Commission's Report embody the parties' complete and signed settlement agreement.

907. ***First***, proposed CR 34(1) reflects current CR 30(1), clarifying that party agreement on some (but not all) issues in dispute is also covered by this rule. In practice, there have been Reports recording the parties' settlement agreements on some but not all issues.

908. ***Second***, proposed CR 34(2) modifies current CR 30(1) and proposes that the Commission's Report may, upon a request by the parties, contain the parties' complete and signed settlement agreement (*see* also proposed CR 37(1)(g)). This change is intended to facilitate the enforcement of any settlement agreement reached as a result of the conciliation, allowing for such settlement to benefit from the future framework for recognition and enforcement pursuant to the Draft Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation). Pursuant to Article 13 of the Draft Convention, once adopted, the Convention will apply to settlements reached in the context of investment disputes and settlements reached in conciliation proceedings pursuant to Article 3.4. The Convention will be open for signature on August 1, 2019.

909. Proposed CR 35 updates current CR 30(2). The provision stipulates that the Commission shall close the proceedings and issue its Report once it determines that there is no likelihood of agreement between the parties. Proposed CR 35 further clarifies that it shall issue a Report upon a request by the parties to terminate the conciliation.

910. Proposed CR 36 reflects CR 30(3) and underlines the importance of active participation of the parties for the conciliation to move forward once the Commission is constituted; without this, the conciliation must terminate. In this sense, conciliation differs from arbitration: in arbitration, the lack of participation by one party does not prevent a Tribunal from rendering an Award if requested by the other party (*see* Art. 45(2) of the Convention and proposed AR 53).

RULE 37 – THE REPORT

CURRENT RELATED PROVISIONS: Convention Art. 34(2), 35

Rule 37
The Report

(1) The Report shall be in writing and shall contain, in addition to the information specified in Rules 34-36:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Commission was established under the Convention and a description of the method of its constitution;

(d) the name of each member of the Commission and of the appointing authority of each;

(e) the dates and place(s) of the first session and of meetings of the Commission with the parties;

(f) a brief summary of the proceeding;

(g) the complete and signed text of the parties' settlement agreement if requested by the parties pursuant to Rule 34(2);

(h) a statement of the costs of the proceeding, including the fees and expenses of each member of the Commission and the costs to be paid by each party pursuant to Rule 6(2); and

(i) any agreement of the parties pursuant to Article 35 of the Convention.

(2) The Report shall be signed by the members of the Commission. It may be signed by electronic means if the parties agree. If a member does not sign the Report, such fact shall be recorded therein.

Article 37
Le procès-verbal

(1) Le procès-verbal est écrit et contient, outre les informations spécifiées aux articles 34 - 36 :

(a) la désignation précise de chaque partie ;

(b) les noms des représentants des parties ;

(c) une déclaration selon laquelle la Commission a été constituée en vertu de la Convention, et la description de la façon dont elle a été constituée ;

(d) le nom de chaque membre de la Commission et de l'autorité ayant nommé chacun d'eux ;

(e) les dates et le(s) lieu(x) de la première session et des réunions de la Commission avec les parties ;

(f) un bref résumé de la procédure ;

(g) le texte complet et signé de l'accord de règlement des parties si les parties le demandent conformément à l'article 34(2) ;

(h) un état des frais de la procédure, y compris les honoraires et frais de chaque membre de la Commission et la répartition des frais incombant à chaque partie conformément à l'article 6(2) ; et

(i) tout accord des parties conformément à l'article 35 de la Convention.

(2) Le procès-verbal est signé par les membres de la Commission. Il peut être signé par voie électronique, si les parties sont d'accord. Si l'un des membres ne signe pas le procès-verbal, il en fait mention dans celui-ci.

Regla 37
El Informe

(1) El Informe deberá dictarse por escrito y deberá incluir, además de la información identificada en las Reglas 34-36:

(a) la identificación de cada parte de manera precisa;

(b) el nombre de los representantes de las partes;

(c) una declaración de que la Comisión ha sido constituida de conformidad con lo dispuesto en el Convenio, y una descripción del método de su constitución;

(d) el nombre de cada miembro de la Comisión y de la persona que designó a cada uno(a);

(e) las fechas y el o los lugar(es) de la primera sesión y de las reuniones de la Comisión con las partes;

(f) un breve resumen del procedimiento;

(g) el texto completo y firmado del acuerdo de avenencia de las partes, si esto es solicitado por las partes de conformidad con lo dispuesto en la Regla 34(2); y

(h) una declaración de los costos del procedimiento, lo que incluye los honorarios y gastos de cada uno de los miembros de la Comisión y de los costos que debe pagar cada una de las partes de conformidad con lo dispuesto en la Regla 6(2); y

(i) cualquier acuerdo de las partes de conformidad con lo dispuesto en el Artículo 35 del Convenio.

(2) El informe deberá estar firmado por los miembros de la Comisión. Podrá ser firmado a través de medios electrónicos si las partes así lo acordaran. Si un miembro no lo firmara, se dejará constancia de ese hecho en el informe.

911. Proposed CR 37 reflects the formal requirements in current CR 32 with minor language modifications and one substantive change. Current CR 32 and proposed CR 37 implement Art. 34(2) and to some extent Art. 35 of the Convention.

912. Given that the Report of a Commission is not binding on the parties, the formal requirements as to the contents of the Report are not as detailed as those relating to Awards rendered under the Convention (*see* proposed AR 60). However, pursuant to proposed CR 34(2), the parties may request that the Report record the complete and signed terms of their settlement agreement. If the Report contains a determination that the Commission lacks jurisdiction, proposed CR 31(5) requires the Commission to set out its reasons.

913. To assist the parties in complying with the division of cost principle in Art. 61(1) of the Convention (*see* also proposed CR 6), proposed CR 37(1)(h) introduces the requirement that the Report contain a statement of the costs of the proceeding, including the fees and expenses of the members of the Commission and an indication of the costs to be paid by each party.

914. The Commission's Report may or may not contain settlement recommendations to the parties. As proposed CR 22 clarifies, the Commission may make recommendation at any stage of the conciliation, and may decide not to include any recommendations in its final Report.

RULE 38 – ISSUANCE OF THE REPORT

Rule 38
Issuance of the Report

(1) Once the Report has been signed by the members of the Commission, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.

Article 38
Communication du procès-verbal

(1) Après signature du procès-verbal par les membres de la Commission, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) envoyer à chaque partie une copie certifiée conforme du procès-verbal, en indiquant la date d'envoi sur le procès-verbal ; et

(b) déposer le procès-verbal aux archives du Centre.

(2) Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires du procès-verbal.

Regla 38
Emisión del Informe

(1) Una vez que el informe haya sido firmado por los miembros de la Comisión, el o la Secretario(a) General deberá, a la brevedad:

(a) enviar una copia certificada del informe a cada una de las partes, indicando la fecha del envío en el informe; y

(b) depositar el informe en los archivos del Centro.

(2) El o la Secretario(a) General proporcionará copias certificadas adicionales del informe a una parte a petición de esta.

915. Proposed CR 38 does not introduce any substantive changes to current CR 33 other than the deletion of the provision regarding the publication by the Centre of the Report. The publication of case materials is addressed in proposed CR 7.

V. RULES GOVERNING THE ADMINISTRATION OF PROCEEDINGS BY THE SECRETARIAT OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ADDITIONAL FACILITY (ADDITIONAL FACILITY RULES)

THE ADDITIONAL FACILITY RULES

INTRODUCTION

916. The Additional Facility Rules (AF Rules) currently enable the ICSID Secretariat to administer investor-State arbitration and conciliation proceedings that cannot be brought under the ICSID Convention. They also allow the Secretariat to administer fact-finding proceedings.

917. Proceedings administered under the Additional Facility are conducted pursuant to ISDS-specific procedural rules (currently in Schedules A to C to the Additional Facility Rules). The Additional Facility provides a stand-alone alternative to the use of other rules for ISDS such as the UNCITRAL Arbitration Rules. These and other commercial arbitration rules are sometimes used when the ICSID Convention is not available because of jurisdictional constraints, in particular where one of the parties is not an ICSID Contracting State.

918. ICSID's authority to conduct proceedings under the Additional Facility complements its administration of arbitration and conciliation under the ICSID Convention. It is supplemented by the Centre's administration of arbitration cases under other rules, including the UNCITRAL Arbitration Rules, *ad hoc* investor-State and State-State arbitration cases, as well as the mediation of international investment disputes, and the administration of other alternative dispute resolution mechanisms.

919. The Administrative Council adopted the AF Rules in 1978, with an undertaking to review their operation after five years. At the 1984 Annual Meeting, the Administrative Council decided to maintain the Additional Facility as a permanent feature of ICSID.

920. Unlike the ICSID Rules and Regulations adopted pursuant to Art. 6 of the ICSID Convention (which require a two-thirds majority vote of the Administrative Council to be amended), the AF Rules may be amended by a simple majority vote of the Administrative Council pursuant to AFR 7(1).

921. Under the current AF Rules, the ICSID Secretariat is authorized to administer arbitration, conciliation and fact-finding proceedings between States and foreign nationals that are outside the jurisdiction of the Centre under Art. 25(1) of the Convention. Because such proceedings are not covered by the ICSID Convention, the provisions of the ICSID Convention and of the ICSID Conciliation or Arbitration Rules are not applicable. Rather, currently such proceedings are governed by the Fact-Finding (AF) Rules (FF(AF)RF), the Conciliation (AF) Rules (C(AF)R), and the Arbitration (AF) Rules (A(AF)R) that are in Schedules A to C to the current AF Rules.

922. While there are some differences between proceedings governed by the AF Rules and the Convention, there is substantial similarity in the procedure for conciliation under the AF and the Convention and for arbitration under the AF and the Convention. The proposals in the Working Paper (WP) maintain this similarity for the most part, with some exceptions explained in the WP text.

923. Overall, there have been 59 AF proceedings to date (2 AF Conciliations, 57 AF Arbitrations, and no Fact-Findings), most of them under NAFTA.

924. This WP addresses the proposed amendments to the AF Rules themselves, as well as to the rules of procedure annexed thereto, namely the (AF) Arbitration Rules (Annex B), (AF) Conciliation Rules (Annex C) and (AF) Fact-Finding Rules (Annex D). This WP also introduces the (AF) Mediation Rules (Annex E) and a set of Administrative and Financial Regulations specifically for Additional Facility cases (Annex A).

925. This Section of the WP addresses the proposed amendments to the AF Rules themselves, which extend the services offered to Member States and investors under the Additional Facility. It also simplifies the AF Rules to four articles.

Introductory Note

Additional Facility proceedings are governed by the Additional Facility Rules, the relevant (Additional Facility) Arbitration (Annex B), Conciliation (Annex C), Fact-Finding (Annex D) or Mediation Rules (Annex E), and the Additional Facility Administrative and Financial Regulations (Annex A). They apply to investment proceedings that cannot be brought under the ICSID Convention due to lack of jurisdiction.

Note introductive

Les instances conduites en vertu du Mécanisme supplémentaire sont régies par le Règlement du Mécanisme supplémentaire et, selon le cas, le Règlement d'arbitrage (Annexe B), le Règlement de conciliation (Annexe C), le Règlement de constatation des faits (Annexe D) ou le Règlement de médiation (Annexe E) (Mécanisme supplémentaire), ainsi que le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A). Ces règlements s'appliquent aux instances relatives à des investissements qui ne peuvent pas être engagées sur le fondement de la Convention CIRDI pour incompétence.

Nota Introductoria

Los procedimientos del Mecanismo Complementario están regulados por el Reglamento del Mecanismo Complementario, y según corresponda, las Reglas del Mecanismo Complementario de Arbitraje (Anexo B), Conciliación (Anexo C), Comprobación de Hechos (Anexo D) o Mediación (Anexo E) (Mecanismo Complementario), y el Reglamento Administrativo y Financiero del Mecanismo Complementario (Annexo A). Este Reglamento se aplica a los procedimientos en materia de inversiones que no pueden iniciarse en virtud del Convenio del CIADI por falta de jurisdicción.

926. The introductory note is modified to remind users that AF proceedings are governed by the AF Rules, the relevant (AF) Arbitration, Conciliation, Fact-Finding or Mediation Rules and the (AF) Administrative and Financial Regulations ((AF)AFR). The proposed (AF)AFR in Annex A incorporates all administrative and financial regulations that are relevant to proceedings under the AF and makes the AF system a stand-alone set of rules.

927. To simplify matters for users, the WP proposes calling the rules in the Annexes "Rules" rather than "Articles" used in the current English formulation.

ARTICLE 1 – DEFINITIONS

CURRENT RELATED PROVISIONS: AF Rules Art. 1

Article 1
Definitions

(1) "Secretariat" means the Secretariat of the Centre.

(2) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.

(3) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 14, 1966.

(4) "Regional Economic Integration Organization" or "REIO" means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of those matters.

(5) "National of another State" means, unless otherwise agreed:

(a) a natural person that is not, at the date of consent to the proceeding and at the date of the Request, a national of the State party to the dispute, or a national of any constituent State of the REIO party to the dispute;

(b) a juridical person that is not, at the date of consent to the proceeding, a national of the State party to the dispute, or a national of any constituent State of the REIO party to the dispute; and

(c) any juridical person that is, at the date of consent to the proceeding, a national of the State party to the dispute or that is a national of any constituent State of the REIO party to the dispute, and which the parties agree not to treat as a national

of that State for the purpose of these Rules.

(6) "Request" means a request for arbitration, conciliation, fact-finding or mediation.

(7) "Contracting State" means a State for which the Convention is in force.

(8) "Contracting REIO" means an REIO for which the Convention is in force.

Article 1
Définitions

(1) « Secrétariat » désigne le Secrétariat du Centre.

(2) « Centre » désigne le Centre international pour le règlement des différends relatifs aux investissements, créé en application de l'article 1 de la Convention.

(3) « Convention » désigne la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États, entrée en vigueur le 14 octobre 1966.

(4) « Organisation d'intégration économique régionale » ou « OIER » désigne une organisation constituée par des États à laquelle ils ont transféré des compétences à l'égard de questions régies par le présent Règlement, y compris le pouvoir de prendre des décisions ayant force obligatoire pour eux sur ces questions.

(5) « Ressortissant(e) d'un autre État » désigne, sauf accord contraire :

(a) une personne physique qui n'est pas, tant à la date du consentement à l'instance qu'à la date de la requête, un(e) ressortissant(e) de l'État partie au différend, ou un(e) ressortissant(e) d'un État membre de l'OIER partie au différend ;

(b) une personne morale qui n'est pas, à la date du consentement à l'instance, un ressortissant(e) de l'État partie au différend ou un(e) ressortissant(e) d'un État membre de l'OIER partie au différend ; et

(c) une personne morale qui est, à la date du consentement à l'instance, une ressortissante de l'État partie au différend ou une ressortissante d'un État membre de l'OIER partie au différend, et que les parties conviennent de ne pas considérer comme ressortissante de cet État aux fins du présent Règlement.

(6) « Requête » désigne une requête d'arbitrage, de conciliation, de constatation des faits ou de médiation.

(7) « État contractant » désigne un État pour lequel la Convention est en vigueur.

(8) « OIER contractante » désigne une OIER pour laquelle la Convention est en vigueur.

Artículo 1
Definiciones

(1) “Secretariado” significa el Secretariado del Centro.

(2) “Centro” significa el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones establecido de conformidad con lo dispuesto en el Artículo 1 del Convenio.

(3) “Convenio” significa el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados que entró en vigor el 14 de octubre de 1966.

(4) “Organización Regional de Integración Económica” u “ORIE” significa una organización constituida por Estados a la que éstos han transferido competencia con respecto a cuestiones reguladas por este Reglamento, lo cual incluye la facultad para tomar decisiones vinculantes para dichos Estados con respecto a dichas cuestiones.

(5) “Nacional de otro Estado” significa, salvo acuerdo en contrario:

(a) una persona física que no sea nacional del Estado parte en la diferencia o nacional de cualquiera de los Estados que integren la ORIE parte en la diferencia, a la fecha del consentimiento al procedimiento y a la fecha de la solicitud;

(b) una persona jurídica que no sea nacional del Estado parte en la diferencia o nacional de cualquiera de los Estados que integren la ORIE parte en la diferencia, a la fecha del consentimiento al procedimiento; y

(c) cualquier persona jurídica que sea nacional del Estado parte en la diferencia o que sea nacional de cualquiera de los Estados que integren la ORIE parte en la diferencia, a la fecha del consentimiento al procedimiento, y que las partes acuerden en no tratar como nacional de dicho Estado a los fines de este Reglamento.

(6) “Solicitud” significa una solicitud de arbitraje, conciliación, comprobación de hechos o mediación.

(7) “Estado Contratante” significa un Estado con respecto al cual ha entrado en vigor el Convenio.

(8) “ORIE Contratante” significa una ORIE con respecto a la cual ha entrado en vigor el

Convenio.

928. Proposed Art. 1 sets forth necessary definitions. The definitions in proposed Art. 1 paras. (1) (Secretariat), (2) (Centre) and (3) (Convention) have been re-ordered but are the same as in the current AF Rules. The definition of Secretary-General in current Art. 1(5) is deleted as no reference is made to the Secretary-General in the AF Rules; rather, the Secretary-General is now referred to in (AF)AFR 2 under Annex A to the AF Rules.

929. Contracting State. The definition in current Art. 1(4) of a Contracting State is slightly modified by proposed Art. 1(7). Specifically, the current formulation of "a State for which the Convention has entered into force" is replaced by "a State for which the Convention is in force". This modification takes account of the possibility that a State has ceased to be an ICSID Member State, due to denunciation in accordance with the ICSID Convention. The relevant date to determine ICSID Convention membership is the date the Request for arbitration, conciliation, fact-finding or mediation is filed.

930. REIO. The definitions in proposed Art. 1(4) and 1(8) address one of the main changes proposed for the AF Rules, namely to allow Regional Economic Integration Organizations (REIOs) to be parties to AF cases. Recently, REIOs have been more active in international investment agreements (IIAs) and some have concluded IIAs in their own name. A well-known example is the European Union, which has signed several IIAs as the EU, along with its constituent States. To accommodate the possibility of REIOs entering into IIAs and investment chapters providing for arbitration, the proposed AF Rules would allow REIOs to be parties to AF proceedings. Art. 1(4) defines REIO and is integral to allowing REIOs to access the AF upon adoption of these Rules.

931. In addition, Art. 1(8) defines a "Contracting REIO". This would apply to an REIO that has joined the ICSID Convention. Article 67 of the Convention is currently open for signature by World Bank States members or ICJ State members invited to join ICSID by the Administrative Council. However, in the future, ICSID Member States may wish to consider an amendment to the Convention allowing REIOs to join the Convention. If so, the definition of a "Contracting REIO" would be required to determine access to the AF and the Convention. It should be highlighted that no formal amendment to this effect is under consideration at this time, and this process concerns rule amendments only.

932. In view of the proposed change to allow REIOs access to the AF, two new definitions are suggested.

933. ***First***, proposed Art. 1(4) contains the definition of an REIO as "an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of those matters". This definition embraces two main elements: (i) the constitution of an REIO by States; and (ii) the transfer of certain competencies by these States to the organization with regard to a subject matter covered by the AF Rules. The requirement that the REIO have the power to bind its member States is typically implied by the competencies transferred to the organization. Nonetheless, adding this requirement implies a certain level of

integration. This can be contrasted with those international organizations having cooperation objectives only, and not being legally integrated as a single organization.

934. The proposed definition of REIO is currently used in other international instruments such as the ECT, the FAO Constitution, the WHO Framework Convention on Tobacco Control, and the Southern Indian Ocean Fisheries Agreement. Very similar definitions can also be found in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the UN Convention on the Use of Electronic Communication in International Contracts, and the UN Convention on the Rights of Persons with Disabilities.

935. ***Second***, proposed Art. 1(8) defines a "Contracting REIO" as "an REIO for which the Convention is in force". Whether a party is eligible to participate in an AF proceeding depends on whether the ICSID Convention is in force for that party at the time of filing of the Request. This requirement has been maintained. Therefore, if the Convention was amended to allow REIOs to join the Convention, such REIO membership would be considered to determine whether proceedings could be initiated under the AF.

936. National of another State. The definition of a National of another State in proposed Art. 1(5) contains several changes from the existing AF Rules and provides additional flexibility to parties through the inclusion of the "unless otherwise agreed" language.

937. ***First***, current Art. 1(6) defines a "National of another State" as a person who is "not a national of the State party to the proceeding". This requirement is maintained in proposed Art. 1(5), but the definition is also expanded to include a national of a constituent State of an REIO that is a party to the dispute. Since nationals of an REIO do not technically exist as such, the nationality of its constituent States is retained because a national of a constituent State of the REIO could not file a claim against that REIO.

938. ***Second***, proposed Art. 1(5) further clarifies that a "national of another State" can be either a physical or a juridical person. As indicated above, such person or company could not sue its own State, or the REIO to which its own State belongs, unless otherwise agreed.

939. ***Third***, the definition in proposed Art. 1(5)(c) clarifies that the parties to the proceeding can agree to treat a juridical person as a national of another State. Typically, this would be the case of a locally incorporated company suing the State in which it is incorporated (*i.e.*, its own State), provided that the State agrees to treat it as a foreign national, for example, because of its foreign ownership or control. The requirement for such an agreement in the proposed AF Rules imposes no requirement that States agree to treat a national as a foreign national. Instead, this is left to the agreement of the parties as there might be various reasons for parties to agree to treat a locally incorporated company as a foreign national.

940. ***Fourth***, proposed Art. 1(5)(a) to (c) now includes the relevant dates for determination of the nationality of natural and juridical persons. The current AF Rules do not mention anything regarding the relevant dates on which nationality is to be assessed. It is proposed to mirror the current Convention system. The relevant dates for a physical person are the date of consent to the proceeding and the date of the Request (as under Art. 25(2)(a) of the

Convention). For a juridical person, the relevant date is the date of consent only, as under Art. 25(2)(b). As a result, the definition of "national" under the AF is:

National of Another State – Art. 1(5) of the AF Rules

Natural Person	• Is not a national of the State Party to the dispute or of any constituent States of an REIO party to the dispute on the date of consent to the proceeding and on the date of the Request.
Juridical Person (different nationality from respondent)	• Is not a national of the State Party to the dispute or of any constituent States of an REIO party to the dispute on the date of consent to the proceeding.
Juridical Person (same nationality as respondent)	• Is a national of the State Party to the dispute or of any constituent State of an REIO party to the dispute, but the parties agree not to treat it as a national for the purposes of the AF Rules on the date of consent to the proceeding.

941. Request. Proposed Art. 1(6) introduces the definition of a Request which is a request for arbitration, conciliation, fact-finding or mediation under the proposed (AF) Arbitration Rules (Annex B), (AF) Conciliation Rules (Annex C), (AF) Fact-Finding Rules (Annex D) or (AF) Mediation Rules (Annex E).

ARTICLE 2 – ADDITIONAL FACILITY PROCEEDINGS

CURRENT RELATED PROVISIONS: AF Rules Art. 2

Article 2
Additional Facility Proceedings

(1) The Secretariat of the Centre is authorized to administer the following proceedings between a State or an REIO on the one hand, and a national of another State on the other hand, which the parties consent in writing to submit to the Centre:

(a) arbitration and conciliation proceedings for the settlement of legal disputes

arising out of an investment if:

(i) none of the parties to the dispute is a Contracting State, a Contracting REIO or a national of a Contracting State; or

(ii) either the State or the REIO party to the dispute, on the one hand, or the State whose national is a party to the dispute, on the other hand, but not both, is a Contracting State or a Contracting REIO;

(b) fact-finding proceedings pertaining to an investment; and

(c) mediation proceedings pertaining to an investment.

(2) Reference to a State or an REIO includes a constituent subdivision of a State, or an agency of a State or an REIO. The State or REIO must approve the consent of the constituent subdivision or agency which is a party to the proceeding pursuant to Article 2(1), unless the State or the REIO concerned notifies the Centre that no such approval is required.

(3) Arbitration, conciliation, fact-finding and mediation proceedings under these Rules shall be conducted in accordance with the (Additional Facility) Arbitration Rules (Annex B), (Additional Facility) Conciliation Rules (Annex C), (Additional Facility) Fact-Finding Rules (Annex D) or (Additional Facility) Mediation Rules (Annex E). The (Additional Facility) Administrative and Financial Regulations (Annex A) shall apply to any such proceedings.

Article 2
Instances en vertu du Mécanisme supplémentaire

(1) Le Secrétariat du Centre est autorisé à administrer les instances suivantes entre un État ou une OIER, d'une part, et un(e) ressortissant(e) d'un autre État, d'autre part, que les parties consentent par écrit à soumettre au Centre :

(a) instances d'arbitrage et de conciliation pour le règlement de différends juridiques en relation avec un investissement, si :

(i) aucune des parties au différend n'est un État contractant, une OIER contractante ou un(e) ressortissant(e) d'un État contractant ; ou

(ii) soit l'État ou l'OIER partie au différend, d'une part, soit l'État dont le ou la ressortissant(e) est partie au différend, d'autre part, mais pas les deux, est un État contractant ou une OIER contractante ;

(b) instances de constatation des faits en rapport avec un investissement ; et

(c) instances de médiation en rapport avec un investissement.

(2) Toute référence à un État ou une OIER comprend une collectivité publique d'un État ou un organisme dépendant d'un État ou d'une OIER. L'État ou l'OIER doit approuver le consentement de la collectivité publique ou de l'organisme partie à l'instance conformément à l'article 2(1), sauf si l'État ou l'OIER concerné(e) notifie au Centre qu'une telle approbation n'est pas nécessaire.

(3) Les instances d'arbitrage, de conciliation, de constatation des faits et de médiation sur le fondement du présent Règlement sont conduites conformément au Règlement d'arbitrage (Mécanisme supplémentaire) (Annexe B), au Règlement de conciliation (Mécanisme supplémentaire) (Annexe C), au Règlement de constatation des faits (Mécanisme supplémentaire) (Annexe D) ou au Règlement de médiation (Mécanisme supplémentaire) (Annexe E). Le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A) s'applique à toutes ces instances.

Artículo 2
Procedimientos del Mecanismo Complementario

(1) El Secretariado del Centro se encuentra autorizado para administrar los siguientes procedimientos entre un Estado o una ORIE, por una parte, y un nacional de otro Estado, por la otra, que las partes hayan consentido por escrito en someter al Centro:

(a) procedimientos de conciliación y arbitraje para el arreglo de diferencias de naturaleza jurídica que surjan de una inversión si:

(i) ninguna de las partes de la diferencia es un Estado Contratante, una ORIE Contratante o un nacional de un Estado Contratante; o

(ii) si el Estado o la ORIE parte en la diferencia, por una parte, o el Estado cuyo nacional es parte en la diferencia, por la otra, pero no ambos, es un Estado Contratante o una ORIE Contratante;

(b) procedimientos de comprobación de hechos en relación con una inversión; y

(c) procedimientos de mediación en relación con una inversión.

(2) La referencia a un Estado o a una ORIE incluye una subdivisión política de un Estado, un organismo público de un Estado o de una ORIE. El Estado o la ORIE deberá aprobar el consentimiento de la subdivisión política o del organismo público que sea parte del procedimiento de conformidad con lo dispuesto en el Artículo 2(1), salvo que el Estado o la ORIE en cuestión notifique al Centro que tal aprobación no es necesaria.

(3) Los procedimientos de arbitraje, conciliación, comprobación de hechos y mediación en virtud de este Reglamento serán tramitados de conformidad con las Reglas de

Arbitraje (Mecanismo Complementario) (Anexo B), las Reglas de Conciliación (Mecanismo Complementario) (Anexo C), las Reglas de Comprobación de Hechos (Mecanismo Complementario) (Anexo D) o las Reglas de Mediación (Mecanismo Complementario) (Anexo E). El Reglamento Administrativo y Financiero (Mecanismo Complementario) (Anexo A) será aplicable a cualquiera de estos procedimientos.

942. The changes proposed to Art. 2 in this WP are discussed below.

943. Title of proposed Art. 2. Current Art. 2 deals with the ICSID Secretariat's authority to administer arbitration, conciliation and fact-finding proceedings that are outside of the jurisdiction of the Centre under Art. 25(1) of the Convention. The current title of the provision is "Additional Facility," which refers to the administration of proceedings authorized by the Rules (*see* Art. 2 last sentence). In practice, the term "Additional Facility" is more commonly used to describe the mechanism as a whole, and the WP therefore proposes to change the title of proposed Art. 2 to "Additional Facility Proceedings" to describe the proceedings covered under the Additional Facility.

944. AF proceedings and who may be a party to them. The WP proposes to keep the three categories of AF proceedings currently capable of being administered: arbitration and conciliation (proposed Art. 2(1)(a)) and fact-finding (proposed Art. 2(1)(b)). In addition, it adds that the Secretariat can administer mediation proceedings (proposed Art. 2(1)(c)).

945. Proposed Art. 2(1) provides that the Centre is authorized to administer the listed types of proceedings between a State, on the one hand, and a national of another State, on the other hand, which the disputing parties consent in writing to submit to the Centre. It also introduces REIOs as potential disputing parties.

946. The use of the singular in Art. 2 does not prevent multiparty proceedings, provided that each party independently satisfies the applicable conditions. This reflects current practice.

947. Scope of AF Arbitration and Conciliation Proceedings (proposed Art. 2(1)(a)). Proposed Art. 2(1)(a) streamlines the prior rule and amends the scope of disputes that can be administered under the AF. The proposed (AF) Arbitration and (AF) Conciliation Rules are found at Annex B and C of the AF Rules.

948. The Centre is currently authorized to administer conciliation and arbitration under the AF that cannot be Convention cases because they are outside the jurisdiction of the Centre under Art. 25(1) of the Convention. The requirements for jurisdiction under the Convention are that: (i) there is a legal dispute arising directly out of an investment; (ii) between an ICSID Member State (or any constituent subdivision or agency of an ICSID Member State designated to the Centre by that State); and (iii) a national of another ICSID Member State; (iv) which the parties to the dispute consent in writing to submit to the Centre.

949. Under the current AF Rules, there are two categories of arbitration or conciliation proceedings that ICSID can administer. Current Art. 2(a) and (b) describe these categories.

They are disputes that do not meet the jurisdictional requirements under the Convention because:

(i) the State party to the dispute or the home State of the foreign national is not an ICSID Member State (current Art. 2(a)); or

(ii) the dispute does not arise *directly* out of an investment (but can be distinguished from an ordinary commercial transaction), and at least one of the parties is an ICSID Member State or a national of an ICSID Member State (current Art. 2(b)).

950. In practice, all 59 AF cases filed to date have been filed under Art. 2(a). No disputes have been filed under Art. 2(b) to date. As a result, the WP proposes to limit AF proceedings to one category of disputes and delete current Art. 2(b).

951. The WP also proposes to expand the category of disputes that can be pursued under the AF beyond that stipulated in current Art. 2(a). Proposed Art. 2(1)(a) simplifies and clarifies the wording of current Art. 2(a) and amends the scope of disputes that can be administered under the AF. The four principal simplifications and changes to this scope are explained below.

952. ***First***, reference in the rule to the jurisdiction under Art. 25 of the ICSID Convention is deleted. This ensures that the rules regarding the jurisdiction of the AF are stand-alone, without any need to resort to the text of the ICSID Convention to determine whether a particular dispute fits under Convention Art. 25 (and hence is not covered under the AF). As a result, proposed Art. 2(1)(a) no longer defines jurisdiction under the AF by reference to what would not be eligible for resolution under the ICSID Convention. The jurisdiction for proceedings commenced under the AF would be delinked from the ICSID Convention and would instead be determined by reference to the relevant instrument of consent (IIAs, laws and contracts) and the AF requirements for administration of such proceedings.

953. In particular, delinking the AF from the Convention means that the definition of investment for the purposes of an AF arbitration or conciliation case relies solely on the definition established by the relevant States in their instrument of consent. The so-called "double keyhole" test applied in Convention cases would not be relevant in an AF case; the relevant definition of investment would be that of the Treaty Parties in their agreement.

954. This is consistent with current practice. An analysis of AF awards to date shows that the vast majority of tribunals have not required the investor to establish any jurisdictional prerequisites (*e.g.* definition of investment) beyond those established expressly in the instrument invoked. These tribunals only examined whether there was an investment for the purposes of the IIA or contract invoked, without doing the "double-keyhole" test usually employed under the Convention. This has been the majority practice in NAFTA and CAFTA cases (*see e.g., Apotex v. USA* (ARB(AF)/12/1), Award (August 25, 2014), *Bayview v. Mexico* (ARB(AF)/05/1), Award (June 19, 2007)). Only a very few cases have applied the "double-keyhole" jurisdictional test to AF proceedings (*see e.g., Nova Scotia v. Venezuela* (ARB(AF)/11/1), Award (April 30, 2014)). Therefore, removing the Convention nexus from proposed Art. 2 would reflect current practice, and make clear that

the test *ratione materiae* is to be assessed only on the basis of the instrument invoked, allowing Treaty Parties and disputing parties to determine the meaning and scope of an investment in their investment treaties, laws and contracts.

955. This allows States to define investment in their agreements without being limited by ICSID Convention case law, as is the case under the UNCITRAL Rules. Of course, international law still applies and Tribunals can examine the term "investment" in the context of international law definitions, as currently.

956. ***Second***, the WP proposes deleting the requirement in current Art. 2(a) that the legal dispute at issue in an AF case arises "*directly"* out of an investment.

957. The directness requirement stems from the Convention. While the drafters of the Convention did not define "*directly*", it has been discussed in a few cases. The directness requirement means that the dispute must be closely connected to an investment. This begs the question of whether transactions that are ancillary to an investment operation, such as loans, are sufficiently closely connected, and whether Tribunals ought to look at each element of the transaction or rather at the overall operation in determining whether the directness requirement has been satisfied.

958. The drafting history indicates that when the drafters of the AF Rules devised current Art. 2(b) for disputes "*not arising directly*" out of an investment, they intended that some investments that would not have qualified under the Convention at that time, would be covered under the AF. A good example of this is turnkey contracts. However, the evolution of the case law shows that nowadays most disputes arising out of a turnkey contract would probably be considered as disputes arising "*directly*" out of an investment.

959. Deleting the word "*directly*" in proposed Art. 2(1)(a) avoids discussion as to whether a dispute arises directly (or not) out of an investment, and again would mean the terms of the instrument containing the State or REIO's consent is the only relevant definition of investment.

960. A number of IIAs do not specifically address the question of whether the dispute must arise directly or indirectly out of the investment. Rather, they refer to disputes "*relating to*" an investment. States are free to posit different or more specific requirements in their instrument of consent, should they wish to do so. In addition, this proposed change is consistent with the deletion of current Art. 2(b).

961. ***Third***, under proposed Art. 2(1)(a)(i), recourse to AF arbitration or conciliation is now offered when neither the State or the REIO party to the dispute, nor the State whose national is a party to the dispute, is a Contracting State or Contracting REIO. Arbitration and conciliation proceedings with a State, an REIO and a national of another State are thus authorized when none of them are parties to the Convention. Some BITs already provide for such a possibility. For example, Indian BITs concluded with Poland, Mexico and Djibouti contain the States' consent to the AF Rules if both disputing parties agree, and where neither party comes from or is an ICSID Contracting State. As a result, the proposed amendment ensures that such provisions can be implemented in practice.

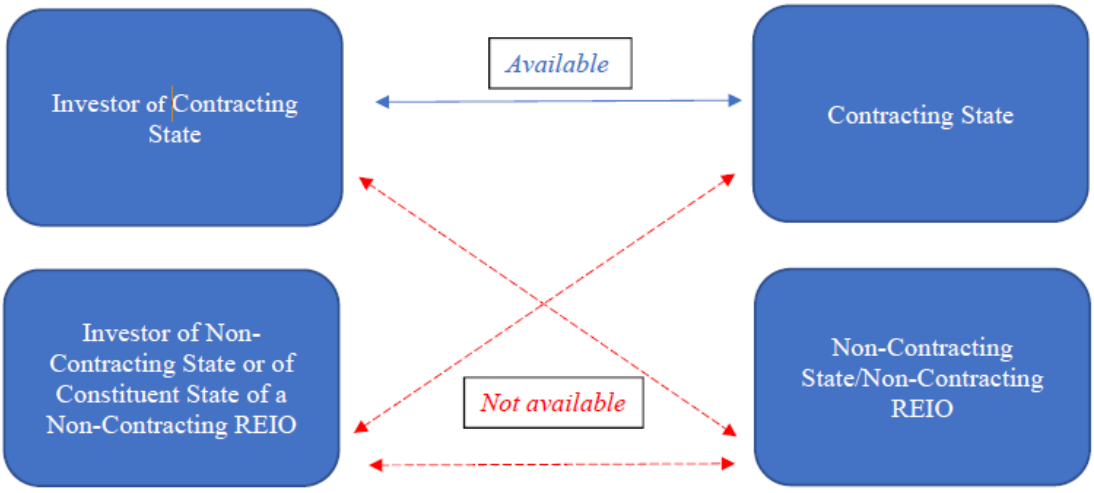
962. Whether to open the AF to non-Contracting States was discussed in 1978, but was rejected at that time due to the opposition of a single delegation. The arguments for not extending the AF to non-Contracting States in 1978 were two-fold. First, that opening the AF to non-Contracting States would operate as a disincentive to such States joining ICSID, and second, that the costs of the Centre are borne by Contracting States, while the costs of the proceedings are borne by the parties to the dispute.

963. Neither argument appears convincing today. There are 153 Contracting States currently at ICSID (soon to be 154 States with the deposit of Mexico's instrument of ratification on July 27, 2018). If anything, participating in an ICSID-administered proceeding could give remaining non-Contracting States an incentive to join the Convention. Further, making the AF available to non-Contracting State parties supports the overall goal of encouraging stable investment climates and increased investment. With respect to costs to date, Contracting States have never been assessed a contribution charge, and ICSID operations are largely supported by lodging and administrative fees in actual cases.

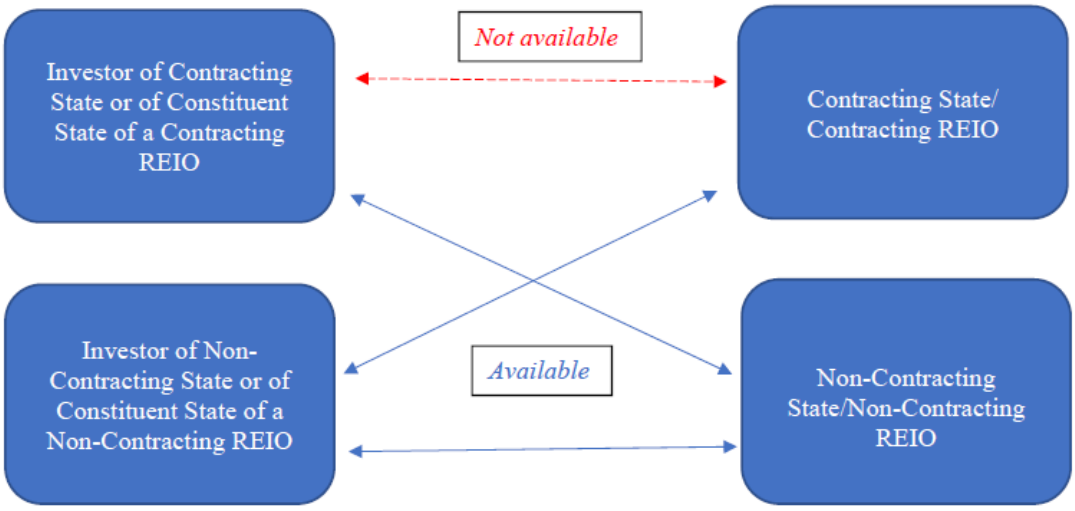
964. ***Fourth***, under proposed Art. 2(1)(a)(ii), recourse to AF arbitration or conciliation is also possible when either the State or the REIO party to the dispute on the one hand, or the State whose national is a party to the dispute on the other hand, but not both, is a Contracting State or Contracting REIO. This is the scenario addressed in current Art. 2(a). Given that REIOs are not currently party to the ICSID Convention, any proceeding involving an REIO under proposed Art. 2(1)(a)(ii) would, for the time being, necessarily involve a national or nationals of a Contracting State on the other side.

965. Pursuant to this proposal, the ability of parties to avail themselves of either ICSID Convention arbitration or AF arbitration would operate as outlined in the charts below:

ICSID Convention Arbitration and Conciliation - *Ratione Personae*



Additional Facility Arbitration and Conciliation (Proposal) – *Ratione Personae*



966. Proposed deletion of current Art. 2(b). The WP proposes deleting current Art. 2(b). That provision deals with disputes *not* arising *directly* out of an investment and thus not falling within the scope of the ICSID Convention in any event, because there is no investment *per se* (but there is more than a simple commercial operation) or because the directness is not sufficient. This provision has never been used; its removal will simplify the AF Rules, and removes a potential source for confusion for users.

967. The WP also proposes deleting current Art. 4(3) and 4(4). Current Art. 4(3) stipulates that, in order to access the AF, the "underlying transaction" must have "features which distinguish it from an ordinary commercial transaction". Current Art. 4(4) requires that, in order to access the AF, the current *rationae personae* requirements of Art. 25 be met and that the Secretary-General be "of the opinion that it is likely that a Conciliation Commission or Arbitral Tribunal, as the case may be, will hold that the dispute arises directly out of an investment". These provisions are no longer required in light of the removal of current Art. 2(b), and the deference proposed to be given to the parties' definition of investment in the AF. This gives parties full autonomy to determine the nature of disputes which can be referred to AF arbitration in the relevant instrument of consent.

968. Updating Fact-finding Proceedings (proposed Art. 2(1)(b)). Fact-finding proceedings offer parties the opportunity to constitute a Committee to inquire into and report on relevant circumstances. They can be used to avoid disputes by ascertaining certain facts through investigation by an independent Committee. They can also be followed by arbitration, conciliation or mediation proceedings, or in parallel with such procedures. Any State, or REIO, irrespective of its membership in the ICSID Convention, and a national of another State, may agree to use the Fact-finding Rules. Fact-finding proceedings are not currently subject to any jurisdictional requirements *rationae materiae*. Proposed Art. 2(1)(b) adds that the fact-finding proceeding must be in connection with an investment to ensure that

the request relates to the Centre's expertise. This mirrors the requirement for Mediation. The proposed Fact-Finding Rules are found at Annex D of the AF Rules.

969. Introduction of Mediation Proceedings (proposed Art. 2(1)(c)). Over the past decade, the concept of resolving investment disputes through mediation has been widely discussed in the ISDS community. Indeed, Member States have acknowledged the suitability of mediation for the resolution of investment disputes and have included mediation provisions in many new bilateral and multilateral treaties. In some cases, mediation has been introduced as a pre-condition to the commencement of investor-State arbitration. In other cases, mediation has been introduced as a stand-alone mechanism for dispute resolution, providing an alternative to arbitration or conciliation. Recent IIAs concluded by the EU and its member States refer to mediation and provide for the ICSID Secretary-General to appoint a mediator where the parties cannot agree to one themselves (*see e.g.*, CETA, Art. 8.20). In addition, a multilateral international framework for the recognition and enforcement of mediated settlements will soon be adopted.

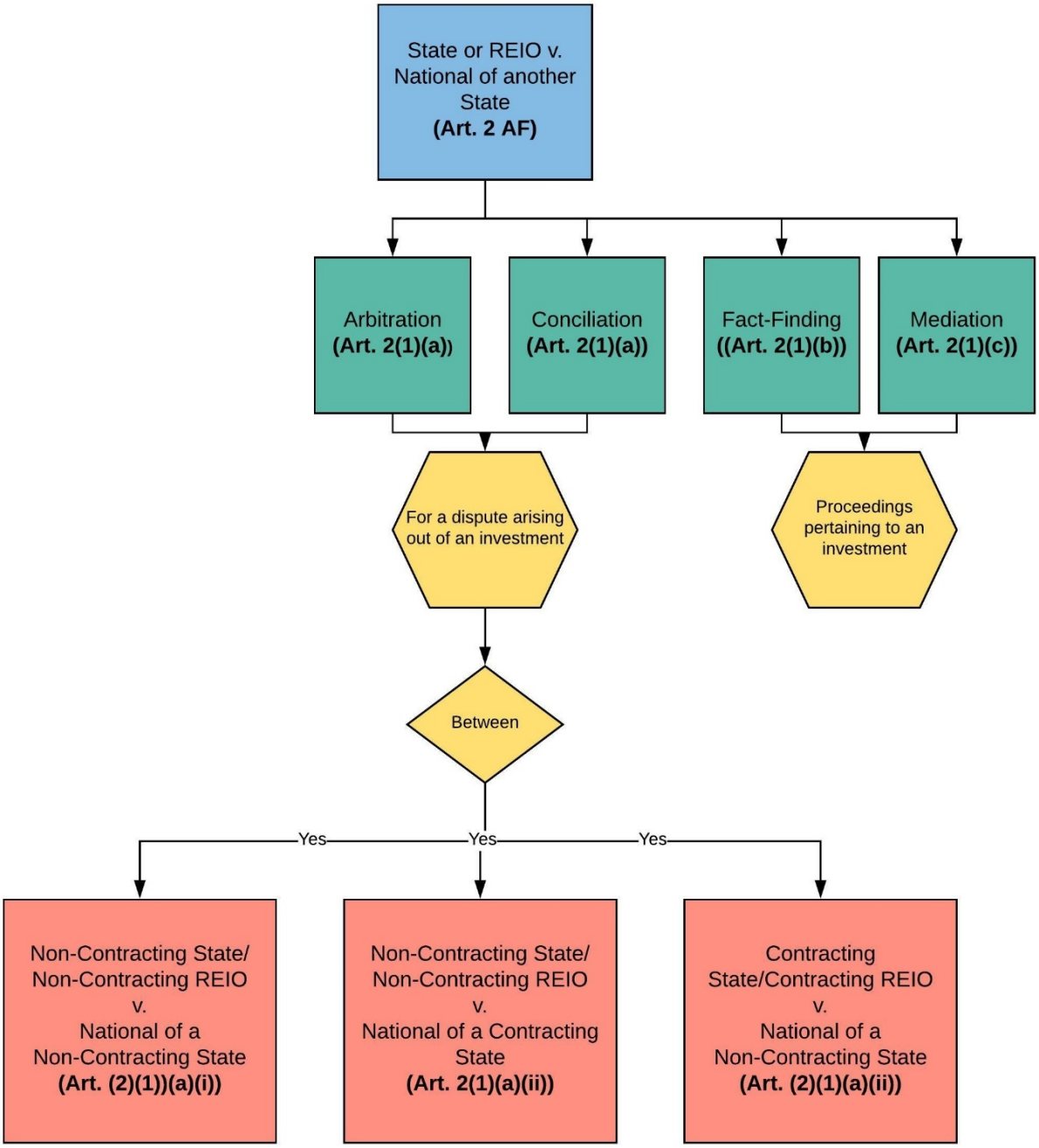
970. It is therefore also proposed to allow the Secretariat to administer mediation proceedings, that will be conducted pursuant to a new set of proposed Mediation Rules at Annex E. This would seamlessly complement the other services offered by the Centre, offering a full range of ADR services.

971. Any State, or REIO, irrespective of its membership in the ICSID Convention, and a national of another State, may agree to use the Mediation Rules, as provided by Art. 2(1)(c) of the AF Rules.

972. Mediation services would be available for proceedings pertaining to an investment. Mediation proceedings may be conducted prior to, or in parallel with, any other dispute resolution proceeding. There is no requirement for the dispute to be of a legal nature or for the dispute to have formally crystalized.

973. The chart below shows the entire scope of Art. 2(1):

Scope of Article 2(1)



974. Constituent subdivisions and agencies (proposed Art. 2(2)). Proposed Art. 2(2) makes clear that AF proceedings are open to constituent subdivisions of a State or agencies of a State or an REIO under the same scenarios as contemplated in proposed Art. 2(1). Currently, the constituent subdivisions and agencies of a State are referred to in the *chapeau* of Art. 2 but are not mentioned elsewhere, potentially giving rise to doubt as to the eligibility of such subdivisions/agencies to be a party to proceedings under those Rules. Proposed Art. 2(2) erases this doubt.

975. Proposed Art. 2(2) thus makes clear that AF proceedings are open to a proceeding between a subdivision of a State or an agency of a State or of an REIO and a national of another State. However, the subdivision or agency's consent to the AF proceedings must be approved by the State or the REIO, unless the Centre has been notified that no such approval is required. This is a safeguard for States and mirrors the condition in Art. 25(3) of the Convention. The approval of consent can predate the filing of a Request or can be given on an *ad hoc* basis.

976. Since the Convention does not apply to AF proceedings, the requirement in Art. 25(1) of the Convention that only subdivisions or agencies *designated* to the Centre by the relevant State can be a party to a proceeding does not exist.

977. Proposed Art. 2(2) would allow greater flexibility for related disputes to be heard by the same Tribunal in the case of arbitration proceedings. For example, the investor's subsidiary and an agency of the State (which has not been designated under the Convention but is eligible under the AF Rules) may have entered into a contract. That contract could refer to arbitration under the AF Rules for any dispute related to the contract. It would allow the two cases (the case against the State, and the case against the agency) to be administered in parallel by ICSID, with the same tribunal or having joint hearings (*see* Schedule 7 on Multiparty Claims and Consolidation).

978. Proposed Art. 2(3). Proposed Art. 2(3) specifies that the arbitration, conciliation, fact-finding, and mediation proceedings are conducted according to the Rules in Schedule B to E to the AF Rules. The term "*Schedule*" in English is changed to "*Annex,*" and a reference to Annex A containing the AFR applicable to AF proceedings is added.

ARTICLE 3 – CONVENTION NOT APPLICABLE

Article 3 **Convention Not Applicable** The provisions of the Convention do not apply to the conduct of Additional Facility proceedings.
Article 3 **Inapplicabilité de la Convention** Les dispositions de la Convention ne s'appliquent pas à la conduite d'instances sur le fondement du Mécanisme supplémentaire.

Artículo 3
Inaplicabilidad del Convenio

Las disposiciones del Convenio no son aplicables a la tramitación de procedimientos en virtud del Mecanismo Complementario.

979. The WP proposes to keep the substance of current Art. 3, which recalls that the Convention is not applicable or relevant to defining the application of the AF. This applies in particular, to the recognition and enforcement of AF Awards rendered in such proceedings.

ARTICLE 4 – FINAL PROVISIONS

Article 4
Final Provisions

(1) The applicable Rules are those in force on the date of filing of the Request unless the parties agree otherwise.

(2) These Rules may be cited as the "Additional Facility Rules" of the Centre.

Article 4
Dispositions finales

(1) Le Règlement applicable est celui qui est en vigueur à la date du dépôt de la requête, sauf accord contraire des parties.

(2) Le présent Règlement peut être cité comme le « Règlement du Mécanisme supplémentaire » du Centre.

Artículo 4
Disposiciones Finales

(1) El Reglamento aplicable será aquel que esté en vigor en la fecha de presentación de la solicitud, salvo acuerdo de las Partes en contrario.

(2) Este Reglamento podrá ser citado como el "Reglamento del Mecanismo Complementario" del Centro.

980. Proposed Art. 4(1) states that the applicable AF Rules are the ones in force on the date of submission of the Request. The current AF Rules do not address this expressly, although the proposed amendment would codify existing practice. A similar provision is contained in the proposed (AF) Arbitration, Conciliation, Fact-Finding and Mediation Rules. It is assumed that the proposed AF Rules and each Annex to those Rules will apply to consent already given in existing treaties, as long as the request is filed after the rules come into effect.

981. These proposed changes do not alter the consent given by the States in their existing IIAs. While the categories of proceedings and possible parties have expanded, these changes do not prejudice States that can currently be parties to AF proceedings. Indeed, such changes show the flexibility of these Rules. The biggest change in terms of scope is for arbitration and conciliation under proposed Art. 2(1)(a), where the link to the Convention has been removed. As explained, this actually reflects current practice.

982. In addition, mediation and fact-finding would require specific consent in each case, as they cannot proceed unless both parties are agreeable to the application of these rules.

DELETED PROVISIONS

CURRENT RELATED PROVISIONS: AF Rules Art. 3-6

983. The WP proposes deleting the remainder of the AF Rules, as explained below.

984. Proposed deletion of approval of access process (current Art. 4). Current Art. 4 deals with approval of access for cases brought under current Art. 2(a) and (b). Instead of maintaining this step, the WP proposes that a request for conciliation or arbitration be filed and registered by the Secretary-General under each individual set of rules (*see* (AF)AR 7)). There are four principal aspects to this proposed change.

985. ***First***, the approval of access is eliminated.

986. There is currently a two-step process to institute arbitration and conciliation proceedings: (i) the Secretary-General must first approve the agreement of the parties providing for arbitration or conciliation proceeding in respect of existing or future disputes ("approval of access"), and (ii) in a second and separate step, the Secretary-General can register the request, which the current rules envision will be filed separately, after approval of access is obtained.

987. The two-step process of approval and registration is not necessary for cases brought under a law or a treaty. In those cases, the consent of the investor is usually given, and the parties' agreement will come into existence, in conjunction with the institution of the proceedings, hence the approval step is artificial.

988. Given that fact, in practice requesting parties will often request the Secretary-General simultaneously to approve access to the AF and to register the request in the Arbitration AF Register (even though current Art. 3(1)(c) of the AF Arbitration Rules requires the request to indicate the date of approval of the agreement of the parties providing for access to the AF). Indeed, for most cases filed under NAFTA or a BIT, the date of the approval has been the date of registration of the request.

989. The purpose of a two-step process is now unclear. Its removal and the retention of the registration process is therefore proposed. Under this proposal, there would be a screening process at the registration stage (*see* below WP (AF)AR 7).

990. ***Second***, the WP proposes the elimination of the conditions of access set forth in current Art. 4(2) and 4(3) as a necessary corollary of the elimination of the approval of access.

991. Proposed deletion of current Art. 5. It is proposed to delete current Art. 5 since proposed Annex A contains the administrative and financial regulations applicable to AF proceedings.

992. Proposed deletion of current Art. 6. It is proposed to delete current Art. 6 and to insert it under proposed Art. 2(3).

VI. ANNEX A: (ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS

ANNEX A: (ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS

INTRODUCTION

993. The (Additional Facility) Administrative and Financial Regulations ((AF)AFR) will be Annex A to the proposed AF Rules. The intention is that users of the Additional Facility will be able to access all relevant administrative rules pertaining to their Additional Facility proceeding in one place, without referring back to the text of the ICSID Convention rules and regulations. Thus, the (AF)AFR replicates relevant provisions of the AFR (applicable to ICSID Convention proceedings), omitting inapplicable provisions, and making minor textual changes where required in light of differences between ICSID Convention proceedings and AF proceedings. This includes differences arising from the availability of fact-finding and mediation proceedings under the Additional Facility. The WP on Administrative and Financial Regulations explains the text from which the (AF)AFR are derived.

Introductory Note *The (Additional Facility) Administrative and Financial Regulations apply to Additional Facility proceedings. They contain provisions that apply generally in proceedings and are complementary to the Additional Facility Rules, and the (Additional Facility) Arbitration, Conciliation, Fact-Finding, and Mediation Rules.*
Note introductive *Le Règlement administratif et financier (Mécanisme supplémentaire) s'applique aux instances conduites en vertu du Mécanisme supplémentaire. Il contient des dispositions qui s'appliquent aux instances en général et complète le Règlement du Mécanisme supplémentaire ainsi que les Règlements d'arbitrage, de conciliation, de constatation des faits et de médiation (Mécanisme supplémentaire).*
Nota Introductoria *El Reglamento Administrativo y Financiero (Mecanismo Complementario) se aplica a los procedimientos del Mecanismo Complementario. Contiene las disposiciones que aplican generalmente a los procedimientos y complementa al Reglamento del Mecanismo Complementario y a las Reglas de Arbitraje, Conciliación, Comprobación de Hechos y Mediación (Mecanismo Complementario).*

994. The Introductory Note provides an overview of the proposed (AF)AFR.

CHAPTER I – APPLICATION

REGULATION 1 – APPLICATION OF THE REGULATIONS

Chapter I
General Provisions

Regulation 1
Application of these Regulations

(1) These Regulations apply to arbitration, conciliation, fact-finding and mediation proceedings which the Secretariat of the Centre is authorized to administer under Article 2 of the Additional Facility Rules.

(2) These applicable Regulations are those in force on the date of filing of the requests under the Additional Facility Rules unless the parties agree otherwise.

(3) These Regulations may be referred to as the "(Additional Facility) Administrative and Financial Regulations" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique aux instances d'arbitrage, de conciliation, de constatation des faits et de médiation que le Secrétariat du Centre est autorisé à administrer en vertu de l'article 2 du Règlement du Mécanisme supplémentaire.

(2) Le présent Règlement applicable est celui qui est en vigueur à la date du dépôt de la requête sur le fondement du Règlement du Mécanisme supplémentaire.

(3) Le présent Règlement peut être cité comme le « Règlement administratif et financier (Mécanisme supplémentaire) » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de este Reglamento

(1) El presente Reglamento se aplica a los procedimientos de arbitraje, conciliación, comprobación de hechos y mediación que el Secretariado del Centro está autorizado a administrar en virtud del Artículo 2 del Reglamento del Mecanismo Complementario.

(2) El presente Reglamento aplicable es aquel en vigor en la fecha de presentación de la solicitud de conformidad con lo dispuesto en el Reglamento del Mecanismo Complementario.

(3) Este Reglamento podrá ser citado como el "Reglamento Administrativo y Financiero (Mecanismo Complementario)" del Centro.

995. Proposed (AF)AFR 1 defines the scope of application of these Regulations, and indicates how the Regulations are referenced.

CHAPTER II – GENERAL FUNCTIONS OF THE SECRETARIAT

REGULATION 2 – SECRETARY

CURRENT RELATED PROVISIONS: AFR 25.

Chapter II
General Functions of the Secretariat

Regulation 2
Secretary

The Secretary-General of the Centre, the principal officer of the Centre pursuant to Article 11 of the Convention, shall appoint a Secretary for each Commission, Tribunal and Committee, and for Mediator(s). The Secretary may be drawn from the Secretariat, and shall be considered as a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the (Additional Facility) Arbitration, Conciliation, Fact-Finding and Mediation Rules in Annexes B to E with regard to individual proceedings and delegated to the Secretary; and

(b) assist the parties and the Commission, Tribunal, Committee or Mediator(s) with all aspects of the proceedings.

Chapitre II
Fonctions générales du Secrétariat

Article 2
Le ou la Secrétaire

Le ou la Secrétaire général(e) du Centre, le principal responsable du Centre conformément à l'article 11(1) de la Convention, désigne un ou une secrétaire pour chaque Commission, Tribunal et Comité et pour les Médiateurs(trices). Le ou la secrétaire peut appartenir au Secrétariat et est considéré(e) comme un membre de son personnel durant l'exercice de ses fonctions de secrétaire. Ce ou cette secrétaire :

(a) représente le ou la Secrétaire général(e) et peut exercer toutes fonctions qui sont confiées au ou à la Secrétaire général(e) par le présent Règlement ou par les Règlements d'arbitrage, de conciliation, de constatation des faits, et de médiation (Mécanisme supplémentaire) en annexes B à E, en ce qui concerne des instances déterminées, et déléguées au ou à la secrétaire ; et

(b) assiste les parties, ainsi que la Commission, le Tribunal, le Comité ou les Médiateurs(trices) dans tous les aspects des instances.

Capítulo II
Funciones Generales del Secretariado

Regla 2
Secretario(a)

El o la Secretario(a) General del Centro, designado(a) como el funcionario principal del Centro de conformidad con lo dispuesto en el Artículo 11 del Convenio, nombrará a un o una Secretario(a) para cada Comisión, Tribunal y Comité, así como para los o las Mediadores(as). El o la Secretario(a) podrá pertenecer al Secretariado y será considerado(a) como miembro de su personal mientras actúe como Secretario(a). El o la Secretario(a) tendrá las siguientes funciones:

(a) representar al o a la Secretario(a) General y podrá desempeñar todas las funciones que este Reglamento o las Reglas de Arbitraje, Conciliación, Comprobación de

Hechos y Mediación (Mecanismo Complementario) en los Anexos B al E asignan al o a la Secretario(a) General respecto de cada procedimiento y que se hayan delegado en el o la Secretario(a); y

(b) asistir tanto a las partes como a la Comisión, Tribunal, Comité o a los o las Mediador(es)(as) en todos los aspectos de los procedimientos.

996. Proposed (AF)AFR 2 replicates proposed AFR 25, and addresses the Secretary role. It differs from the proposed AFR in that it contemplates the appointment of a secretary for any mediators appointed in an Additional Facility mediation, as well as for Commissions, Tribunals and Committees.

REGULATION 3 – PUBLICATION

CURRENT RELATED PROVISIONS: AFR 22.

Regulation 3
Publication

With a view to furthering the development of international law in relation to investment, the Centre shall publish:

(a) information about the operation of the Centre; and

(b) documents generated in proceedings, in accordance with the applicable rules.

Article 3
Publication

Afin de contribuer au développement du droit international en matière d'investissements, le Centre publie :

(a) des informations sur les activités du Centre ; et

(b) les documents générés dans les instances, conformément aux règles applicables.

Regla 3
Publicaciones

Con el fin de fomentar el desarrollo del derecho internacional en materia de inversión, el Centro publicará:

(a) información sobre las actividades del Centro; y

(b) documentos generados en los procedimientos, de conformidad con las normas aplicables.

997. Proposed (AF)AFR 3 replicates proposed AFR 22, addressing the Centre's obligation to publish information about the operation of the Centre.

REGULATION 4 – THE REGISTERS

CURRENT RELATED PROVISIONS: AFR 23.

Regulation 4
The Registers

The Secretary-General shall maintain and publish a Register for each case containing all significant data concerning the institution, conduct and disposition of the proceeding, including the method of constitution, the membership of each Commission, Tribunal and Committee, and the names of appointed Mediators.

Article 4
Registres

Le ou la Secrétaire général(e) tient et publie un registre pour chaque affaire, dans lequel figurent toutes les informations importantes concernant l'introduction, la conduite et l'issue de l'instance, y compris la méthode de constitution et la composition de chaque Commission, Tribunal et Comité, et les noms des Médiateurs(trices) nommé(e)s.

Regla 4
Los Registros

El o la Secretario(a) General mantendrá y publicará un Registro de cada caso que contenga toda la información relevante sobre la iniciación, la tramitación y la terminación del procedimiento, lo cual incluye el método de constitución y la integración de cada Comisión, Tribunal y Comité, así como los nombres de los o las Mediadores(as) nombrados(as).

998. Proposed (AF)AFR 4 replicates proposed AFR 23, addressing the Centre's obligation to publish data about the Centre and the proceedings administered by it. It differs from proposed AFR 23 in that it contemplates the publication of details regarding persons appointed for fact-finding and Mediation.

999. One policy question that Member States may wish to consider in relation to mediation, and proposed (AF)AFR 4 in particular, is whether publication of any information regarding the mediation could be detrimental to the process. In considering this, Member States should recall that only benchmark information is published, and it could be limited to the fact of the mediation, the parties, and the mediator(s) appointed. If Member States are concerned by the prospect of such publication, this provision could be revised with respect to mediation proceedings to limit information published, either at all, or at least during the pendency of the mediation.

REGULATION 5 – DEPOSITARY FUNCTIONS

CURRENT RELATED PROVISIONS: AFR 28.

Regulation 5
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for arbitration, conciliation, fact-finding, mediation, supplementary decisions, rectification and interpretation;

(b) all written submissions, observations, supporting documents and communications filed in a proceeding;

(c) the recordings and transcripts of hearings, sessions or meetings in the proceeding; and

(d) any decision, order, recommendation, Report or Award by a Commission, Tribunal, Committee or Mediator(s).

(2) Subject to the applicable rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(b)-(d) available to the parties. Certified copies of the documents referred to in paragraph (1)(d) shall reflect any interpretation, rectification or supplementary decision.

Article 5
Conservation des documents

(1) Le ou la Secrétaire général(e) dépose dans les archives du Centre, et prend toutes dispositions utiles pour qu'il y soit conservé en permanence :

(a) toutes les requêtes d'arbitrage, de conciliation, de constatation des faits, de médiation, de décision supplémentaire, de rectification et d'interprétation ;

(b) tou(te)s les écritures, observations, documents justificatifs et communications déposé(e)s en lien avec une instance ;

(c) tous les enregistrements et toutes les transcriptions d'audiences, de sessions ou réunions d'une instance ; et

(d) tou(te)s les ordonnances, décisions, recommandations, procès-verbaux ou sentences d'une Commission, d'un Tribunal, d'un Comité ou des Médiateurs(trices).

(2) Sous réserve des règlements de procédure applicables et de l'accord des parties à une instance, et dès paiement des redevances dues au titre du barème des frais, le ou la Secrétaire général(e) met à la disposition des parties des copies certifiées conformes des documents visés au paragraphe (1)(b) - (d). Les copies certifiées conformes des documents visés au paragraphe (1)(d) reflètent toute interprétation, rectification ou décision supplémentaire.

Regla 5
Funciones del Depositario

(1) El o la Secretario(a) General depositará en los archivos del Centro y hará los arreglos necesarios para la conservación permanente de:

(a) toda solicitud de arbitraje, conciliación, comprobación de hechos, mediación, decisión suplementaria, rectificación y aclaración;

(b) todos los escritos, observaciones, documentos de respaldo y comunicaciones presentados en un procedimiento;

(c) las grabaciones y transcripciones de las audiencias, sesiones o reuniones en el procedimiento; y

(d) toda decisión, resolución, recomendación, informe o laudo de una Comisión, Tribunal, Comité o Mediador(a)(es)(as).

(2) De conformidad con las reglas aplicables y lo acordado por las partes en el procedimiento, y contra el pago de los derechos requeridos por el arancel de derechos, el o la Secretario(a) General proporcionará a las partes copias certificadas de los documentos a los que se hace referencia en el párrafo (1)(b) - (d). Las copias certificadas de los documentos a los que se hace referencia en el párrafo (1)(d) reflejarán toda aclaración, rectificación o decisión suplementaria.

1000. Proposed (AF)AFR 5 replicates proposed AFR 26, with minor textual modifications to account for fact-finding and mediation proceedings.

REGULATION 6 – CERTIFICATES OF OFFICIAL TRAVEL

CURRENT RELATED PROVISIONS: AFR 31.

Regulation 6
Certificates of Official Travel

The Secretary-General may issue certificates of official travel to members of Commissions, Tribunals or Committees and to Mediators, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Additional Facility.

Article 6
Certificats de mission officielle

Le ou la Secrétaire général(e) peut délivrer aux membres de Commissions, Tribunaux ou Comités, aux Médiateurs(trices), aux personnes les assistant, aux membres du Secrétariat, et aux parties, agents, conseillers, avocats, témoins ou experts comparaissant

au cours de l'instance, des certificats de mission officielle indiquant que leur déplacement est en rapport avec une instance dans le cadre du Mécanisme supplémentaire.

Regla 6
Certificados de Viaje Oficial

El o la Secretario(a) General podrá emitir certificados de viaje oficial a los miembros de las Comisiones, Tribunales o Comités, y a los o las Mediadores(as), a las personas que los asistan, a los miembros del Secretariado, y a las partes, agentes, consejeros(as), abogados(as), testigos o peritos que comparezcan en los procedimientos, indicando que viajan en relación con un procedimiento previsto en el Mecanismo Complementario.

1001. Proposed (AF)AFR 6 replicates the text of proposed AFR 28, addressing the issuance of certificates of travel, with some minor modifications.

1002. ***First***, while proposed AFR 28 is included in a chapter addressing privileges and immunities in the AFR, it forms part of the chapter on the general functions of the Secretariat in the (AF)AFR because privileges and immunities under the Convention are not relevant to Additional Facility proceedings.

1003. ***Second***, the text of proposed (AF)AFR 6 has been modified to remove the reference to the Convention and replace it with a reference to the Additional Facility. Additional Facility proceedings are not covered by Art. 22 of the Convention which confers certain protections on participants in proceedings traveling to attend hearings. There is no international legal protection associated with a travel certificate issued under the (AF)AFR. Nevertheless, a travel certificate stating that an individual is traveling to attend an arbitration proceeding is helpful to a number of users in applying for visas.

1004. ***Third***, there are minor textual modifications to account for mediation proceedings.

CHAPTER III – FINANCIAL PROVISIONS

REGULATION 7 – COSTS OF PROCEEDINGS

RELATED DOCUMENTS: The draft Memorandum on Fees and Expenses in ICSID Proceedings to complement proposed (AF)AFR 7 is at Schedule 1.

CURRENT RELATED PROVISIONS: AFR 14; FF(AF)R (Sch. A) Art. 15 and 18; C(AF)R (Sch. B) Art. 38 and 40; and A(AF)R (Sch. C), Art. 48-52, 58.

Chapter III
Financial Provisions

Regulation 7
Costs of Proceedings

(1) Each member of a Commission, Tribunal or Committee and each Mediator shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a hearing, session or meeting, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a hearing, session or meeting held away from the place of residence of the member or Mediator:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing, session or meeting is held; and

(iii) a *per diem* allowance for each day the member or Mediator spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the *per diem* allowance referred to in paragraph (1)(a) and (c). Any request by a member or Mediator for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the first session of the Commission, Tribunal, Committee or Mediator(s) and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties for the services of the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) members of Commissions, Tribunals and Committees, Mediators, and any assistants approved by the parties;

(b) witnesses and experts called by a Commission, Tribunal, Committee or the Mediator(s) and not by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any hearing, session or meeting held away from an ICSID facility.

(5) To enable the Centre to pay the costs referred to in paragraphs (1)-(4), the parties shall make payments to the Centre in accordance with the following:

(a) upon registration of a Request for arbitration, conciliation, fact-finding, or mediation, the Secretary-General shall ask the requesting party(ies) to make a payment to defray the estimated costs of the proceeding through the first session of the Commission, Tribunal, Committee, or the Mediator(s) which shall be considered partial payment by the requesting party(ies) of the payment referred to in paragraph (5)(b);

(b) upon constitution of a Commission, Tribunal, or Committee, or the notice of acceptance of appointment by the Mediator(s), the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding;

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding. The Centre shall provide a statement of account to the parties with any request for a supplementary payment;

(d) in conciliation, fact-finding and mediation proceedings, each party shall pay one half of the payments referred to in paragraph (5)(b) and (c), unless the parties agree on a different division. In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (5)(b) and (c) unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal's final decision on the payment of costs in accordance with the applicable rules;

(e) payments shall be payable on the date of the request from the Secretary-General. The following procedure shall apply in the event of non-payment:

(i) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(ii) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (5)(e)(i), the Secretary-General may, after notice to and as far as possible in consultation with the parties and the Commission, Tribunal, Committee, if constituted, or Mediator(s) if appointed, suspend the proceeding until payment is made; and

(iii) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may, after notice to and as far as possible in consultation with the parties and the Commission, Tribunal, or Committee, if constituted, or Mediator(s) if appointed, discontinue the proceeding.

(6) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission, Tribunal or Committee, or of any Mediator, unless the parties have made sufficient payments to defray the costs of the proceeding.

(7) For the purposes of this Regulation, "party" includes, where the context so admits, all parties acting as claimants or as respondents.

Chapitre III
Dispositions financières

Article 7
Frais des instances

(1) Chaque membre d'une Commission, d'un Tribunal ou d'un Comité et chaque Médiateur(trice) perçoit :

(a) des honoraires pour chaque heure de travail effectué se rapportant à l'instance ;

(b) lorsqu'aucun voyage n'a été entrepris pour se rendre à une audience ou une session ou une réunion, le remboursement de ses frais raisonnablement encourus aux seules fins de l'instance ; et

(c) lorsqu'un voyage a été entrepris pour se rendre à une audience, une session ou une réunion tenue en dehors du lieu de résidence du membre ou du (de la) Médiateur(trice) :

(i) le remboursement des coûts de transport terrestre entre les lieux de départ et d'arrivée ;

(ii) le remboursement des coûts de transports terrestre et aérien vers et depuis la ville dans laquelle l'audience, la session ou la réunion se tient ; et

(iii) une allocation de base pour chaque jour passé par le membre ou le ou la Médiateur(trice) hors de son lieu de résidence.

(2) Le ou la Secrétaire général(e) détermine et publie le montant des honoraires et de l'allocation de base visés au paragraphe (1)(a) et (c). Toute demande par un membre ou un(e) Médiateur(trice) d'un montant plus élevé doit être faite par l'intermédiaire

du ou de la Secrétaire général(e) et ne peut être adressée directement aux parties. Cette demande doit être présentée avant la première session de la Commission, du Tribunal, du Comité ou des Médiateurs(trices) et doit justifier l'augmentation demandée.

(3) Le ou la Secrétaire général(e) détermine et publie les droits administratifs annuels dus par les parties pour les services du Centre.

(4) Tous paiements aux personnes suivantes, y compris les remboursements de dépenses, doivent être versés par le Centre aux :

(a) membres des Commissions, Tribunaux et Comités et Médiateurs(trices) ainsi que tou(te)s assistant(e)s approuvé(e)s par les parties ;

(b) témoins et experts appelés par une Commission, un Tribunal, un Comité ou par les Médiateurs(trices) et non par une partie ;

(c) prestataires de services engagés par le Centre pour une instance ; et

(d) hôte d'une audience, session ou réunion tenue en dehors d'un établissement du CIRDI.

(5) Pour permettre au Centre de payer les frais prévus aux paragraphes (1) - (4), les parties effectuent des paiements au Centre comme il suit :

(a) dès l'enregistrement d'une requête d'arbitrage, de conciliation, de constatation des faits ou de médiation, le ou la Secrétaire général(e) demande à la ou aux partie(s) requérante(s) de procéder à un paiement pour couvrir les frais estimés de l'instance jusqu'à la première session de la Commission, du Tribunal, du Comité ou des Médiateurs(trices). Ce versement est considéré comme un règlement partiel par la ou les partie(s) requérante(s) du paiement mentionné au paragraphe (5)(b) ;

(b) dès la constitution d'une Commission, d'un Tribunal ou d'un Comité ou la notification d'acceptation des Médiateurs(trices), le ou la Secrétaire général(e) demande aux parties de procéder à un paiement pour couvrir les frais estimés de la phase ultérieure de l'instance ;

(c) le ou la Secrétaire général(e) peut demander aux parties d'effectuer des paiements supplémentaires à tout moment si nécessaire pour couvrir les frais estimés de l'instance. Le Centre fournit un état financier aux parties avec toute demande de paiement supplémentaire ;

(d) dans les instances de conciliation, de constatation des faits et de médiation, chaque partie s'acquitte de la moitié des paiements mentionnés au paragraphe (5)(b) et (c), sauf si une répartition différente est convenue par les parties. Dans

les instances d'arbitrage, chaque partie s'acquitte de la moitié des paiements mentionnés au paragraphe (5)(b) et (c), sauf si une répartition différente est convenue par les parties ou ordonnée par le Tribunal. Le paiement de ces sommes est sans préjudice de la décision finale du Tribunal sur le paiement des frais conformément à l'article 29 du Règlement d'arbitrage (Mécanisme supplémentaire) ;

(e) les paiements sont dus à la date de la demande du ou de la Secrétaire général(e). La procédure suivante s'applique en cas de non-paiement :

(i) si les sommes demandées ne sont pas payées intégralement dans les 30 jours suivant la date de la demande, le ou la Secrétaire général(e) peut notifier aux deux parties le défaut et leur donner une opportunité de procéder au paiement demandé ;

(ii) si une partie du paiement demandé reste impayée 15 jours après la date de la notification visée au paragraphe (5)(e)(i), le ou la Secrétaire général(e) peut suspendre l'instance jusqu'à ce que le paiement soit effectué, après notification aux parties et à la Commission, au Tribunal ou au Comité, s'ils sont constitués, aux Médiateurs(trices), s'ils ou si elles sont nommé(e)s, et autant que possible après les avoir consulté(e)s ; et

(iii) si une instance est suspendue pour non-paiement pendant plus de 90 jours consécutifs, le ou la Secrétaire général(e) peut mettre fin à l'instance, après notification aux parties et à la Commission, au Tribunal ou au Comité, s'ils sont constitués, ou aux Médiateurs(trices), s'ils ou si elles est sont nommé(e)s, et autant que possible après les avoir consulté(e)s.

(6) Le Centre n'est pas tenu de fournir des services se rapportant à une instance, ni de s'acquitter des honoraires, allocations et remboursements des membres d'une Commission, d'un Tribunal ou d'un Comité, ni d'un(e) Médiateur(trice), à moins que les parties n'aient effectué des paiements suffisants pour couvrir les frais de l'instance.

(7) Aux fins du présent article, « partie » inclut, quand le contexte le permet, toutes les parties intervenant comme demanderesses ou défenderesses.

Capítulo III
Disposiciones Financieras

Regla 7
Costos del Procedimiento

(1) Cada miembro de una Comisión, Tribunal o Comité y cada Mediador(a) recibirá:

(a) un honorario por cada hora de trabajo invertida en asuntos relacionados con el procedimiento;

(b) cuando no haya viajado para asistir a una audiencia, sesión o reunión, el reembolso de los gastos razonablemente incurridos al solo efecto del procedimiento; y

(c) cuando haya viajado para asistir a una audiencia, sesión o reunión celebrada en un lugar distinto del lugar de residencia del miembro o del o de la Mediador(a);

(i) un reembolso del costo de transporte terrestre entre los puntos de partida y llegada;

(ii) un reembolso del costo de transporte aéreo y terrestre hacia y desde la ciudad en la que se celebra la audiencia, sesión o reunión; y

(iii) un *per diem* por cada día que el miembro o el o la Mediador(a) pase en un lugar distinto de su lugar de residencia.

(2) El o la Secretario(a) General determinará y publicará el importe del honorario y el *per diem* a los que se hace referencia en los párrafos (1)(a) y (c). Cualquier solicitud de un importe mayor por parte de un miembro o un o una Mediador(a) deberá ser efectuada a través del o de la Secretario(a) General, y no directamente a las partes. Dicha solicitud deberá efectuarse con anterioridad a la primera sesión de la Comisión, Tribunal o Comité o del, de la, de los o de las Mediador(a)(es)(as) y deberá justificar el aumento solicitado.

(3) El o la Secretario(a) General determinará y publicará un cargo administrativo anual exigible a las partes por los servicios del Centro.

(4) El Centro realizará todos los pagos que deban efectuarse, lo cual incluye el reembolso de gastos a:

(a) los miembros de las Comisiones, Tribunales y Comités, los o las Mediadores(as), así como a los asistentes aprobados por las partes;

(b) los y las testigos y peritos(as) llamados a declarar por una Comisión, un Tribunal, un Comité o por los o las Mediador(es)(as), y no por una de las partes;

(c) proveedores de servicios que el Centro contrate para un procedimiento; y

(d) los anfitriones de audiencias, sesiones o reuniones celebradas fuera de una instalación del CIADI.

(5) Para que el Centro pueda pagar los costos a los que se hace referencia en los párrafos (1)- (4), las partes deberán realizar pagos al Centro de conformidad con lo siguiente:

(a) al registrar una solicitud de arbitraje, conciliación, comprobación de hechos o mediación, el o la Secretario(a) General solicitará a la o las parte(s) solicitante(s) que haga(n) un pago para sufragar los costos estimados del procedimiento hasta la primera sesión de la Comisión, Tribunal, Comité o los o las Mediadores(as), el cual se considerará un pago parcial por parte de la o las parte(s) solicitante(s) respecto del pago al que se hace referencia en el párrafo (5)(b);

(b) al constituirse una Comisión, Tribunal, o Comité, o al notificarse la aceptación del nombramiento de los o las Mediadores(as), el o la Secretario(a) General solicitará a las partes que hagan un pago para sufragar los costos estimados de la fase siguiente del procedimiento;

(c) el o la Secretario(a) General podrá solicitar que las partes hagan pagos adicionales en cualquier momento si fuera necesario para cubrir los costos estimados del procedimiento. El Centro les proporcionará un estado de cuenta a las partes con cualquier solicitud de pago suplementario;

(d) en los procedimientos de conciliación, comprobación de hechos y mediación, cada parte abonará la mitad de los pagos a los que se hace referencia en el párrafo (5)(b) y (c) a menos que las partes acuerden una división distinta. En los procedimientos de arbitraje, cada parte deberá abonar la mitad de los pagos a los que se hace referencia en el párrafo (5)(b) y (c) a menos que las partes acuerden o el Tribunal ordene una división distinta. El pago de estas sumas es sin perjuicio de la decisión final del Tribunal respecto al pago de costos de conformidad con la Regla 29 de las Reglas de Arbitraje (Mecanismo Complementario);

(e) los pagos serán exigibles en la fecha de la solicitud del o de la Secretario(a) General. En caso de no efectuarse el pago, se aplicará el siguiente procedimiento:

(i) si las cantidades solicitadas no fueran pagadas en su totalidad dentro de los 30 días siguientes a la fecha de la solicitud, el o la Secretario(a) General podrá notificar acerca de la omisión a ambas partes y les dará una oportunidad para que efectúen el pago requerido;

(ii) si cualquier parte del pago requerido continúa pendiente después de 15 días de la fecha de la notificación prevista en el párrafo (5)(e)(i), el o la Secretario(a) General, después de notificar tanto a las partes como a la Comisión, Tribunal, Comité, si se hubiere constituido, o los o las Mediadores(as) si hubiere(n) sido nombrados(as), y, en lo posible, de

consultar con ellos, podrá suspender el procedimiento hasta que se efectúe el pago; y

(iii) si un procedimiento se suspendiera por más de 90 días consecutivos por falta de pago, el o la Secretario(a) General después de notificar tanto a las partes como a la Comisión, Tribunal, Comité, si se hubiere constituido, o, los o las Mediadores(as), si hubiere(n) sido nombrados(as), y, en lo posible, de consultar con ellos, podrá discontinuar el procedimiento.

(6) El Centro no estará obligado a suministrar servicios en relación con cualquier procedimiento o a pagar honorarios, *per diem* o reembolsos de los miembros de cualquier Comisión, Tribunal o Comité, o de cualquier Mediador(a), a menos que las partes hayan hecho pagos suficientes para sufragar los costos del procedimiento.

(7) A los fines de este Reglamento, "parte" incluye, cuando el contexto así lo admita, a todas las partes que actúen como demandantes o como demandadas.

1005. Proposed (AF)AFR 7 replicates proposed AFR 14, and governs compensation of Tribunal, Committee and Commission members as well as Mediators, the costs that ICSID incurs in each proceeding, the advance payments that parties make to ICSID to cover these costs, and discontinuance for failure to pay advances. Only minor differences exist between the two provisions, arising from the addition of text pertaining to fact-finding and mediation proceedings, and the omission of proposed AFR 14(6) which relates to annulment proceedings (not relevant in the Additional Facility context).

REGULATION 8 – SPECIAL SERVICES

CURRENT RELATED PROVISIONS: AFR 15.

Regulation 8
Special Services

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

Article 8
Services particuliers

(1) Le Centre peut rendre des services particuliers se rapportant au règlement des différends si la partie requérante dépose à l'avance un montant suffisant pour couvrir les coûts de ces services.

(2) Les coûts des services particuliers sont normalement établis d'après un barème des frais publié par le ou la Secrétaire général(e).

Regla 8
Servicios Especiales

(1) El Centro podrá prestar servicios especiales en relación con las diferencias si el solicitante previamente deposita una cantidad suficiente para sufragar los cargos por tales servicios.

(2) Los cargos por servicios especiales serán normalmente establecidos en un arancel de derechos publicado por el o la Secretario(a) General.

1006. Proposed (AF)AFR 8 replicates proposed AFR 15.

REGULATION 9 – FEE FOR LODGING REQUESTS

CURRENT RELATED PROVISIONS: AFR 16, FF(AF)R (Sch. A) Art. 2(3), C(AF)R (Sch. B) Art. 3(3) and A(AF)R (Sch. C), Art. 3(3); ICSID Schedule of Fees

Regulation 9
Fee for Lodging Requests

The party or parties (if a request is made jointly) wishing to institute an arbitration, conciliation, fact-finding or mediation proceeding, or requesting a supplementary decision, rectification or interpretation, shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

Article 9
Droit pour le dépôt des requêtes

La partie ou les parties (en cas de requête conjointe) qui désirent introduire une instance d'arbitrage, de conciliation, de constatation des faits ou de médiation, ou qui requièrent

une décision supplémentaire, rectification ou interprétation versent au Centre un droit de dépôt non-remboursable fixé par le ou la Secrétaire général(e) et publié dans le barème des frais.

Regla 9
Derecho de Presentación de las Solicitudes

La parte o las partes (si la solicitud es conjunta) que desee(n) iniciar un procedimiento de arbitraje, conciliación, comprobación de hechos o mediación, o que solicite(n) una decisión suplementaria, rectificación o aclaración, pagará(n) al Centro el derecho de presentación no reembolsable que el o la Secretario(a) General determine y publique en el arancel de derechos.

1007. Proposed (AF)AFR 9 replicates proposed AFR 16.

CHAPTER IV – OFFICIAL LANGUAGES

REGULATION 10 – OFFICIAL LANGUAGES

CURRENT RELATED PROVISIONS: AFR 34.

Chapter IV
Official Languages

Regulation 10
Languages of Regulations

(1) These Regulations are published in English, French and Spanish.

(2) The texts of these Regulations in each of these languages are equally authentic.

Chapitre IV
Langues officielles

Article 10
Langues du Règlement

(1) Le présent Règlement est publié en anglais, en espagnol et en français.

(2) Les textes du présent Règlement dans chaque langue officielle font également foi.

Capítulo IV
Idiomas Oficiales

Regla 10
Idiomas del Reglamento

(1) Este Reglamento se publica en español, francés e inglés.

(2) Los textos de este Reglamento en cada uno de estos idiomas son igualmente auténticos.

1008. Proposed (AF)AFR 10 replicates proposed AFR 30, with some modifications to reflect the fact that the official languages of the Centre are established under the AFR and the Convention.

REGULATION 10BIS

Regulation 10BIS
Prohibition Against Testimony and Limitation of Liability

(1) Unless required by applicable law or unless the parties and the Commission, Tribunal, Committee or Mediator(s) agree otherwise in writing, no member of the Commission, Tribunal or Committee and no Mediator shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the arbitration, conciliation, fact-finding or mediation proceeding.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no member of the Commission, Tribunal or Committee and no Mediator shall be liable for any act or omission in connection with the exercise of their functions in the arbitration, conciliation, fact-finding or mediation proceeding, unless there is fraudulent or willful misconduct.

1009. Proposed (AF)AFR 10BIS is a potential provision (presently in English only) for consideration by Member States regarding prohibition against testimony by and limitation of liability of members of the Commissions, Tribunals or Committees, and Mediators.

1010. Article 21(a) of the Convention confers on conciliators, arbitrators and members of Committees operating in proceedings brought under the Convention “immunity from the

legal process with respect to acts performed [by them] in the exercise of their functions, except when the Centre waives this immunity". The effect of Art. 21(a) is that various adjudicators in Convention arbitrations and conciliations cannot be called to give testimony in a different proceeding, and also that no court action may be brought against them for acts or omissions made in the exercise of their functions within the proceeding, unless immunity is waived by the Centre.

1011. Article 21(a) of the Convention is not applicable to AF proceedings, and there is no equivalent provision in the current rules of procedure applicable to AF proceedings. However, there is a growing concern regarding the potential ramifications of an adjudicator being drawn into other legal proceedings. Indeed, in order to protect the integrity of the process, many institutional arbitration rules provide for a limitation of an arbitrator's liability, and domestic courts have routinely held that arbitrators are immune from legal action with respect to acts performed by them in the exercise of their functions.

1012. Although the Centre is unaware of any specific issue having arisen in prior AF proceedings due to the absence of a provision like Art. 21(1)(a), addressing this matter prospectively may be prudent. This WP therefore includes for the consideration of the Member States a draft provision which bring the various rules of procedure under the Additional Facility into line with the Convention, as well as with common practice as regards liability of arbitrators and mediators, including as demonstrated by the ICC Mediation Rules (Art. 10), the ICC Arbitration Rules (Art. 41), the SIMC Mediation Rules (Art. 9.3), the HKIAC Rules (Art. 43), the HKIAC Mediation Rules (Rule 15), and the ICDR Mediation Rules (Art. 10.2).

1013. The proposed language of Regulation 10BIS would preclude adjudicators in AF proceedings from giving testimony in a judicial, arbitral or similar proceeding concerning any aspect of the arbitration, conciliation, fact-finding or mediation proceeding unless required by law or unless the parties and the relevant Commission, Tribunal or Committee, or the Mediator(s) agree otherwise. The proposed provision would also exclude liability for a member of Commission, Tribunal or Committee, or a Mediator for any act or omission in connection with the exercise of their functions in the proceeding, unless such limitation of liability is prohibited by applicable law, or the act or omission reaches the level of "fraudulent or willful misconduct".

VII. ANNEX B: (ADDITIONAL FACILITY) ARBITRATION RULES

ANNEX B: (ADDITIONAL FACILITY) ARBITRATION RULES

Introductory Note

The Additional Facility Rules of Procedure for Arbitration Proceedings (the (Additional Facility) Arbitration Rules) were adopted by the Administrative Council of the Centre pursuant to Administrative and Financial Regulation 7(1).

The (Additional Facility) Arbitration Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations in Annex A, in particular by Regulation 7.

The (Additional Facility) Arbitration Rules apply from the submission of a Request for arbitration until an Award is rendered and to any proceedings arising from a request for a supplementary decision on, rectification of, or interpretation of, an Award.

Note introductive

Le Règlement de procédure relatif aux instances d'arbitrage du Mécanisme supplémentaire (Règlement d'arbitrage (Mécanisme supplémentaire)) a été adopté par le Conseil administratif du Centre conformément à l'article 7(1) du Règlement administratif et financier.

Le Règlement d'arbitrage (Mécanisme supplémentaire) est complété par le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A), en particulier par l'article 7.

Le Règlement d'arbitrage (Mécanisme supplémentaire) s'applique du dépôt d'une requête d'arbitrage jusqu'au moment où une sentence est rendue ainsi qu'à toute instance découlant d'une demande de décision supplémentaire, rectification ou interprétation d'une sentence.

Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Arbitraje del Mecanismo Complementario (Reglas de Arbitraje (Mecanismo Complementario)) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en la Regla 7(1) del Reglamento Administrativo y Financiero.

Las Reglas de Arbitraje (Mecanismo Complementario) están complementadas por el Reglamento Administrativo y Financiero (Mecanismo Complementario) en el Anexo A, en particular por la Regla 7.

Las Reglas de Arbitraje (Mecanismo Complementario) se aplican desde la presentación de una solicitud de arbitraje hasta que sea dictado el laudo, así como a cualquier procedimiento que surja de una solicitud de decisión suplementaria, rectificación o aclaración de un laudo.

1014. The Arbitration (Additional Facility) Rules (Arbitration (AF) Rules (A(AF)R)) (now re-titled the (AF) Arbitration Rules or in short form (AF)AR), were based on the ICSID Regulations and Rules in effect in 1978, but were also largely influenced by the 1976 UNCITRAL Arbitration Rules. The Arbitration (AF) Rules were revised and streamlined in 2003, when they were aligned more closely with the ICSID Arbitration Rules (AR), as well as in 2006 to reflect the amendments made to the AR at that time.

1015. The proposed modifications for the new (AF)AR follow what is proposed for the AR and general reference is made to the proposed AF Rules and the AR. This WP on the (AF)AR only provides explanations for proposed provisions that differ from the corresponding proposed AR. The reference chart at the end of this Section of the WP on (AF)AR shows where the proposed AR, IR and (AF)AR are the same or differ, along with references to the current A(AF)R.

1016. With respect to terminology, it is proposed to designate each rule in the AF(AR) as a "Rule" instead of "Article" in the English and Spanish versions. The use of "Article" was borrowed from the UNCITRAL Rules; using the term "Rule" helps avoid confusion between the AF Rules and the (AF) Arbitration Rules, and is more consistent with the ICSID Rules. The French version uses "Article" throughout and has not been modified.

CHAPTER I – GENERAL PROVISIONS

RULE 1 – APPLICATION OF RULES

CURRENT RELATED PROVISIONS: A(AF)R Art. 1

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted under the Additional Facility Rules, except to the extent that the parties agree otherwise and subject to paragraph (2).

(2) If any of these Rules, or any aspect of the parties' agreement to modify the application of these Rules, conflicts with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

(3) The applicable (Additional Facility) Arbitration Rules are those in force on the date of filing of the request for arbitration.

(4) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(5) These Rules may be cited as the "(Additional Facility) Arbitration Rules" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique à toute instance d'arbitrage conduite en vertu du Règlement du Mécanisme supplémentaire, sauf dans la mesure où les parties en conviennent autrement et sous réserve du paragraphe (2).

(2) Si l'une des dispositions du présent Règlement ou un aspect de l'accord des parties aux fins de modifier l'application du présent Règlement est en conflit avec une disposition du droit applicable à l'arbitrage à laquelle les parties ne peuvent déroger, cette dernière disposition prévaut.

(3) Le Règlement d'arbitrage (Mécanisme supplémentaire) applicable est celui qui est en vigueur à la date du dépôt de la requête d'arbitrage.

(4) Les langues officielles du Centre sont l'anglais, l'espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(5) Le présent Règlement peut être cité comme le « Règlement d'arbitrage (Mécanisme supplémentaire) » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de arbitraje tramitado en virtud del Reglamento del Mecanismo Complementario, salvo en la medida en que las partes acuerden algo distinto y sin perjuicio de lo dispuesto en el párrafo (2).

(2) Si alguna de estas Reglas, o cualquier aspecto del acuerdo de las partes para modificar la aplicación de estas Reglas, está en conflicto con una disposición legal de la que las partes no puedan apartarse, prevalecerá esa disposición.

(3) Las Reglas de Arbitraje (Mecanismo Complementario) aplicables son aquellas en vigor en la fecha de presentación de la solicitud de arbitraje.

(4) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(5) Estas Reglas podrán ser citadas como las "Reglas de Arbitraje (Mecanismo Complementario)" del Centro.

1017. Proposed (AF)AR 1, entitled "Application of Rules," corresponds to current Art. 1 entitled "Scope of Application". Its text replicates Art. 1, with a substituted paragraph (1) to address differences between ICSID Convention arbitration and AF arbitration.

1018. The principal difference stems from the fact that Art. 44 of the Convention does not apply to AF arbitration. Art. 44 provides that Convention arbitration proceedings "shall be conducted in accordance with [the Convention] and, except as the parties otherwise agree, [in accordance with] the Arbitration Rules in effect on the date on which the parties consented to arbitration". Current Art. 1 does not incorporate this concept; it simply stipulates that the Arbitration (AF) Rules will apply to the relevant dispute, without making provision for the parties to agree to the contrary. Proposed (AF)AR 1(1) incorporates the concept contained in Art. 44 of the Convention and provides that parties may agree to the non-application of any of the (AF)AR. This brings the (AF)AR in line with other institutional arbitration rules, advances the principle of party autonomy, and ensures flexibility for users of AF arbitration.

1019. Given that the arbitration laws of the place of arbitration will govern the arbitration procedure in AF arbitration, proposed (AF)AR 1(1) also makes clear that if a provision of the (AF)AR (or a party agreement to modify the application thereof) conflicts with a mandatory provision of the applicable law, the law of the arbitral *situs* prevails. This aspect of proposed (AF)AR 1 is carried over from the existing provision.

1020. Proposed (AF)AR 1(3) mirrors proposed Art. 4(1) of the AF Rules and specifies that the applicable arbitration rules are the ones in force at the time of filing the Request for arbitration. As a result, once adopted, any arbitration filed under the AF Rules would proceed under these amended Rules.

1021. Proposed (AF)AR 1(4) provides that the official languages of the Centre are English, French and Spanish and that the texts are equally authentic in the three languages.

CHAPTER II – INSTITUTION OF PROCEEDINGS

1022. The institution of the proceeding is dealt with in current Art. 2 to 5. Proposed (AF)AR 2 to 9 expands these provisions, to incorporate the proposed ICSID Institution Rules (IR) (with necessary modifications) into the (AF)AR.

RULE 2 – THE REQUEST

CURRENT RELATED PROVISIONS: A(AF)R Art. 2

Chapter II
Institution of the Proceeding

Rule 2
The Request

(1) Any party wishing to institute arbitration proceedings under the Additional Facility Rules shall file a request for arbitration together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

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

Chapitre II
Introduction de l'instance

Article 2
La requête

(1) Toute partie qui désire introduire une instance d'arbitrage sur le fondement du Règlement du Mécanisme supplémentaire dépose une requête d'arbitrage ainsi que

les documents justificatifs demandés (« requête ») auprès du ou de la Secrétaire général(e) et paie le droit de dépôt indiqué dans le barème des frais.

(2) La requête peut être déposée par une ou plusieurs parties requérantes, ou déposée conjointement par les parties au différend.

Capítulo II
Iniciación del Procedimiento

Regla 2
La Solicitud

(1) Toda parte que quiera dar inicio a un procedimiento de conformidad con lo dispuesto en el Reglamento del Mecanismo Complementario deberá presentar una solicitud de arbitraje junto con los documentos de respaldo requeridos (la "solicitud") al o a la Secretario(a) General y pagar el derecho de presentación publicado en el arancel de derechos.

(2) La solicitud podrá ser presentada por una o más partes solicitantes o presentarse en forma conjunta por las partes en la diferencia.

1023. Proposed (AF)AR 2 is similar to proposed IR 1. However, it refers to "[a]ny party" initiating proceedings (rather than "[a]ny Contracting State or any national of a Contracting State" in the corresponding IR). This reflects the fact that a requesting party in an AF arbitration can be a State, an REIO, a constituent subdivision or an agency of a State, an agency of an REIO or a national of another State, as contemplated in proposed Art. 2 of the AF Rules.

RULE 3 – CONTENTS OF THE REQUEST

CURRENT RELATED PROVISIONS: A(AF)R Art. 3

Rule 3
Contents of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of the representative's authority to act; and

(e) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations.

(2) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

(a) a description of the investment, a statement of the relevant facts, claims, and request for relief, and an indication that there is a legal dispute between the parties arising out of the investment.

(b) with respect to each party's consent to submit the dispute to arbitration under the Additional Facility:

(i) the instrument(s) in which each party's consent is recorded;

(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre;

(c) if a party is a natural person:

(i) information concerning that person's nationality both on the date of consent and on the date of the Request, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of the State party to the dispute or of any constituent State of an REIO party to the dispute on the date of consent and on the date of the Request;

(d) if a party is a juridical person:

(i) information concerning that party's nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of the consent, information identifying the agreement of the parties to treat the juridical

person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the State's approval of consent, unless the State or the REIO has notified the Centre that no such approval is required.

Article 3
Contenu de la requête

(1) La requête :

(a) est rédigée en anglais, en espagnol ou en français ;

(b) désigne chaque partie au différend et indique ses coordonnées, notamment son adresse électronique, son adresse postale et son numéro de téléphone ;

(c) est signée par chaque partie requérante ou son ou sa représentant(e) et est datée ;

(d) est accompagnée d'une preuve de l'habilitation à agir du ou de la représentant(e) ; et

(e) si la partie requérante est une personne morale, indique qu'elle a obtenu toutes les autorisations nécessaires aux fins de déposer la requête et est accompagnée de ces autorisations.

(2) En ce qui concerne l'article 2(1)(a) du Règlement du Mécanisme supplémentaire, la requête contient :

(a) une description de l'investissement, un exposé des faits pertinents, des allégations et des demandes, et une indication qu'il existe un différend d'ordre juridique entre les parties qui est en relation avec l'investissement ;

(b) s'agissant du consentement de chaque partie à soumettre le différend à l'arbitrage sur le fondement du Mécanisme supplémentaire :

(i) le ou les instrument(s) dans le(s)quel(s) le consentement de chaque partie est consigné ;

(ii) la date d'entrée en vigueur de l'instrument (ou des instruments) servant de fondement au consentement, ainsi que les documents justificatifs prouvant cette date ; et

(iii) la date du consentement, à savoir la date à laquelle les parties ont consenti par écrit à soumettre le différend au Centre ou, si les parties n'ont pas donné leur consentement à la même date, la date à laquelle la dernière partie à consentir a donné son consentement par écrit à soumettre le différend au Centre ;

(c) si une partie est une personne physique :

(i) des informations relatives à la nationalité de cette personne tant à la date du consentement qu'à la date de la requête, ainsi que les documents justificatifs prouvant cette nationalité ; et

(ii) une déclaration selon laquelle la personne n'avait la nationalité de l'État partie au différend ou d'un État membre d'une OIER partie au différend ni à la date du consentement, ni à la date de la requête ;

(d) si une partie est une personne morale :

(i) des informations relatives à la nationalité de cette partie à la date du consentement, ainsi que des documents justificatifs prouvant cette nationalité ; et

(ii) si cette partie avait la nationalité de l'État partie au différend ou d'un État membre de l'OIER partie au différend à la date du consentement, des informations identifiant l'accord des parties pour considérer cette personne morale comme ressortissante d'un autre État conformément à l'article 1(5)(b) du Règlement du Mécanisme supplémentaire, ainsi que les documents justificatifs prouvant cet accord ;

(e) si une partie est une collectivité publique d'un État ou un organisme dépendant d'un État ou d'une OIER, les documents justificatifs prouvant l'approbation par l'État du consentement, sauf si l'État ou l'OIER a notifié au Centre qu'une telle approbation n'est pas nécessaire.

Regla 3
Contenido de la Solicitud

(1) La solicitud deberá:

(a) estar redactada en español, francés o inglés;

(b) identificar a cada parte en la diferencia y proporcionar su información de contacto, lo cual incluye su dirección de correo electrónico, dirección postal y número de teléfono;

(c) estar firmada por cada parte solicitante o su representante y estar fechada;

(d) acompañar pruebas del poder de representación del representante; y

(e) si la parte solicitante es una persona jurídica, indicar que ha obtenido todas las autorizaciones necesarias para presentar la solicitud y adjuntar dichas autorizaciones.

(2) Respecto del Artículo 2(1)(a) del Reglamento del Mecanismo Complementario, la solicitud deberá incluir:

(a) una descripción de la inversión, una relación de los hechos pertinentes, alegaciones y petitorios, y una indicación de que existe una diferencia de naturaleza jurídica entre las partes que surge de la inversión;

(b) respecto del consentimiento de cada parte a someter la diferencia a arbitraje de conformidad con lo dispuesto en el Mecanismo Complementario:

(i) el o los instrumento(s) que contiene(n) el consentimiento de cada parte;

(ii) la fecha de entrada en vigor del o de los instrumento(s) en que se funda el consentimiento, junto con documentos de respaldo que demuestren esa fecha; y

(iii) la fecha del consentimiento, a saber, la fecha en que las partes hayan consentido por escrito a someter la diferencia al Centro, o bien, si las partes no consintieron en la misma fecha, la fecha en que la última parte haya consentido por escrito a someter la diferencia al Centro;

(c) si una de las partes es una persona natural:

(i) información respecto a la nacionalidad de la persona tanto a la fecha del consentimiento como a la fecha de la solicitud, junto con documentos de respaldo que demuestren dicha nacionalidad; y

(ii) una declaración de que la persona no tenía la nacionalidad del Estado que es parte en la diferencia ni de cualquier Estado que integre una ORIE que es parte en la diferencia ni en la fecha del consentimiento ni en la fecha de la presentación de la solicitud;

(d) si una parte es una persona jurídica:

(i) información respecto a la nacionalidad de esa parte a la fecha del consentimiento, junto con documentos de respaldo que demuestren dicha nacionalidad; y

(ii) si esa parte tenía la nacionalidad del Estado parte en la diferencia o de cualquier Estado que integre una ORIE que es parte en la diferencia a la fecha del consentimiento, información que identifique el acuerdo de las partes para que la persona jurídica sea tratada como si fuese nacional de otro Estado de conformidad con lo dispuesto en el Artículo 1(5)(b) del Reglamento del Mecanismo Complementario, junto con documentos de respaldo que demuestren dicho acuerdo;

(e) si una parte es una subdivisión política o un organismo público de un Estado o de una ORIE, documentos de respaldo que demuestren la aprobación del consentimiento por parte del Estado, a menos que el Estado o la ORIE haya notificado al Centro que no es necesaria dicha aprobación.

1024. Proposed (AF)AR 3 modifies current Art. 3 extensively to mirror proposed IR 2. It expands the list of requirements for a Request for arbitration to account for the fact that prior approval of access is deleted from under the proposed AF Rules (and for the same reason omits the reference in current Art. 3(1)(c) to the approval of access).

1025. The requirements stipulated differ from proposed corresponding IR 2(2) to account for the possibility of an REIO being a party to an arbitration, and the other requirements of proposed Art. 2 of the AF Rules.

1026. The current Rules do not require information to be provided as to the nationality of the requesting party. The proposed provision models proposed IR 2 and adopts the requirements of Art. 25(2).

1027. For natural persons, the relevant times for assessing nationality are the date of consent and date of the Request. Thus, proposed (AF)AR 3(2)(c)(i) requires information regarding nationality at the time of consent and at the time of the Request. Proposed (AF)AR 3(2)(c)(ii) further requires that the natural person declare that it did not have the nationality of the State party to the dispute, or of any constituent State of an REIO party to the dispute, on the date of consent and on the date of the Request.

1028. For juridical persons, the relevant time is the date of consent only. Thus, proposed (AF)AR 3(2)(d) requires information regarding nationality at the time of consent. Similarly, for juridical persons that have the nationality of the State party to the dispute or of a constituent State of an REIO, the agreement to treat them as a foreign national (usually because of foreign control) is also assessed at the date of consent, even if the foreign control has changed by the date of the Request. This mirrors Art. 25(2)(b) of the Convention.

1029. As under the Convention, dual nationals cannot bring a claim against their own States under the AF. Similarly, the nationalities of all the constituent States of an REIO are excluded when an REIO is party to the dispute (*see* proposed AF Rules, Art. 2(1)).

RULE 4 – RECOMMENDED ADDITIONAL INFORMATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 3(2)

Rule 4
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;

(c) the agreed or proposed seat of arbitration;

(d) the agreed or proposed law applicable to the dispute;

(e) the proposed procedural language(s);

(f) any other procedural proposals; and

(g) any procedural agreements between the parties.

Article 4
Informations complémentaires recommandées

Il est recommandé que la requête contienne également :

(a) une estimation du montant de la réparation pécuniaire demandée, le cas échéant ;

(b) une proposition relative au nombre et à la méthode de nomination des arbitres ;

(c) le siège de l'arbitrage convenu ou envisagé ;

(d) le droit applicable au différend convenu ou envisagé ;

(e) la ou les langue(s) de la procédure proposée(s) ;

(f) toutes autres propositions en matière de procédure ; et

(g) tous accords relatifs à la procédure conclus par les parties.

Regla 4
Información Adicional Recomendada

Se recomienda que la solicitud también contenga:

(a) una estimación del monto de la compensación pecuniaria pretendida, si la hubiera;

(b) una propuesta relativa al número y método de nombramiento de los o las árbitros;

(c) la sede del arbitraje acordado o propuesto;

(d) el derecho aplicable a la diferencia acordado o propuesto;

(e) el o los idioma(s) del procedimiento propuesto(s);

(f) cualquier otra propuesta procesal; y

(g) cualquier acuerdo procesal alcanzado por las partes.

1030. Proposed (AF)AR 4 replicates proposed IR 3. In addition to the information recommended under IR 3, the newly proposed (AF)AR 4 also recommends that parties indicate in the Request the agreed or proposed seat of arbitration and the agreed or proposed law applicable to the dispute.

RULE 5 – FILING OF THE REQUEST AND SUPPORTING DOCUMENTS

CURRENT RELATED PROVISIONS: A(AF)R Art. 3(3), 32

Rule 5
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient. The Secretary-General may require a fuller or a complete translation of the document.

Article 5
Dépôt de la requête et des documents justificatifs

(1) La requête est déposée par voie électronique. Le ou la Secrétaire général(e) peut exiger que la requête soit déposée sous une autre forme, si nécessaire.

(2) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. Le ou la Secrétaire général(e) peut exiger une version plus complète de l'extrait ou une version intégrale du document.

(3) Tout document dans une langue autre que l'anglais, l'espagnol ou le français est accompagné d'une traduction dans l'une de ces langues. Il suffit que seule soit traduite la partie pertinente du document. Le ou la Secrétaire général(e) peut demander une traduction plus complète ou intégrale du document.

Regla 5
Presentación de la Solicitud y de los Documentos de Respaldo

(1) La solicitud deberá ser presentada electrónicamente. El o la Secretario(a) General podrá requerir que la solicitud sea presentada en un formato alternativo si fuera necesario.

(2) Se podrá presentar un extracto de un documento de respaldo, siempre que la omisión del texto no altere el sentido del extracto. El o la Secretario(a) General podrá solicitar una versión más amplia del extracto o una versión completa del documento.

(3) Todo documento redactado en un idioma que no sea el español, francés o inglés deberá ser acompañado de una traducción a uno de esos idiomas. Será suficiente que se traduzcan solamente las partes pertinentes de un documento. El o la Secretario(a) General podrá solicitar una traducción más amplia o completa del documento.

1031. Proposed (AF)AR 5 is identical to proposed IR 4.

RULE 6 – RECEIPT OF THE REQUEST

CURRENT RELATED PROVISIONS: A(AF)R Art. 4

Rule 6
Receipt of the Request

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Article 6
Réception de la requête

Le ou la Secrétaire général(e) :

(a) accuse réception dans les plus brefs délais de la requête à la partie requérante ;

(b) transmet la requête à l'autre partie dès réception du droit de dépôt ; et

(c) est l'intermédiaire officiel pour les communications écrites entre les parties.

Regla 6
Recepción de la Solicitud

El o la Secretario(a) General deberá:

(a) acusar recibo de la solicitud a la parte solicitante con prontitud;

(b) transmitir la solicitud a la otra parte una vez que reciba el derecho de presentación; y

(c) actuar como intermediario(a) oficial de las comunicaciones escritas entre las partes.

1032. Proposed (AF)AR 6 is identical to proposed IR 5.

RULE 7 – REVIEW AND REGISTRATION OF THE REQUEST

CURRENT RELATED PROVISIONS: A(AF)R Art. 4

Rule 7
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(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.

Article 7
Examen et enregistrement de la requête

(1) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) enregistre la requête s'il apparaît au vu des informations fournies que la requête n'est pas manifestement en dehors du champ d'application de l'article 2(1) du Règlement du Mécanisme supplémentaire.

(2) Le ou la Secrétaire général(e) informe les parties sans délai de l'enregistrement de la requête ou du refus d'enregistrer celle-ci et des motifs de ce refus.

Regla 7
Revisión y Registro de la Solicitud

(1) Una vez recibida la solicitud y el derecho de presentación, el o la Secretario(a) General deberá registrar la solicitud si, sobre la base de la información proporcionada, pareciera que la solicitud no se encuentra manifiestamente fuera del alcance del Artículo 2(1) del Reglamento del Mecanismo Complementario.

(2) El o la Secretario(a) General deberá notificar con prontitud el registro de la solicitud a las partes, o la denegación del mismo y los motivos de dicha denegación.

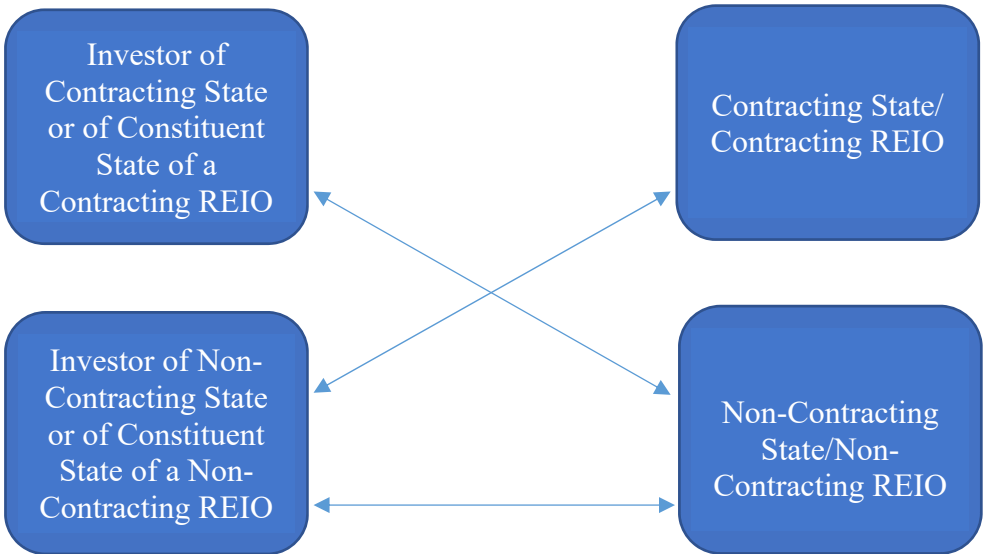
1033. Proposed (AF)AR 7 regarding the review and registration of the Request corresponds to current Art. 4. Since approval of access is deleted in the proposed AF Rules, registration

will become the filter for Requests and a threshold protection against Requests manifestly outside the requirements in Art. 2(1) of the AF Rules. It is therefore important that the applicable threshold for registration be specified in the rules. Current Art. 4 requires the Secretary-General to "be satisfied that the request conforms with the requirements" established in the AF Rules.

1034. The proposed registration threshold is that a Request be registered unless it is "manifestly outside the scope of Article 2(1)" of the AF Rules. That standard is similar to the standard in Art. 36(3) of the Convention, which provides for registration of Requests for arbitration pursuant to the Convention unless the dispute is "manifestly outside the jurisdiction of the Centre". The term "jurisdiction of the Centre" cannot be used since the Convention does not apply. The proposed standard corresponds to the Secretariat's current practice at the stage of approval of access. That standard would also apply to registration of a Request for Conciliation, Fact-Finding or Mediation.

1035. To establish that the Request "is not manifestly outside of the scope of Article 2" under Art. 2(1)(a) of the proposed AF Rules, the requesting party must demonstrate that: (i) it is either a State, an REIO on the one hand or a national of another State on the other hand, that falls within the scope of Art. 2(1)(a) (*ratione personae*), as shown in the chart below; (ii) that the parties have consented to submit the dispute to arbitration (*rationae voluntatis*); and (iii) that the dispute arises out of an investment (*ratione materiae*).

Jurisdiction *Ratione Personae* in (AF) Arbitration Proceedings



1036. Proposed (AF)AR 7(1) requires that a notice be sent to the disputing parties upon registration or refusal to register.

CURRENT RELATED PROVISIONS: A(AF)R Art. 5

Rule 8
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators, unless such information has already been provided;

(d) invite the parties to constitute a Tribunal without delay; and

(e) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal in regard to jurisdiction, competence of the Tribunal, and to the merits.

Article 8
Notification de l'enregistrement

La notification de l'enregistrement de la requête :

(a) indique que la requête a été enregistrée et précise la date de l'enregistrement ;

(b) confirme que toutes correspondances destinées aux parties dans le cadre de l'instance leur seront envoyées à l'adresse de contact figurant dans la notification, à moins que des coordonnées différentes ne soient indiquées au Centre ;

(c) invite les parties à informer le ou la Secrétaire général(e) de leur accord relatif au nombre et à la méthode de nomination des arbitres, à moins que ces informations n'aient déjà été communiquées ;

(d) invite les parties à constituer sans délai un Tribunal ; et

(e) rappelle aux parties que l'enregistrement de la requête ne porte en aucune manière atteinte aux pouvoirs et fonctions du Tribunal relatifs aux questions de compétence du Tribunal et aux questions de fond.

Regla 8
Notificación del Registro

La notificación del registro de la solicitud deberá:

(a) dejar constancia de que la solicitud ha sido registrada e indicar la fecha del registro;

(b) confirmar que toda la correspondencia dirigida a las partes en relación con el procedimiento será enviada a la dirección de contacto consignada en la notificación, a menos que se comunique otra información de contacto al Centro;

(c) invitar a las partes a que informen al o a la Secretario(a) General de su acuerdo respecto del número y método de nombramiento de los y las árbitros, salvo que dicha información ya hubiera sido proporcionada;

(d) invitar a las partes a que constituyan un Tribunal sin demora; y

(e) recordar a las partes que el registro de la solicitud es sin perjuicio de los poderes y funciones del Tribunal respecto de la jurisdicción, la competencia del Tribunal, y el fondo.

1037. Proposed (AF)AR 8, stipulating the requirements for a notice of registration, is materially the same as proposed IR 7 and corresponds to current Art. 5.

RULE 9 – WITHDRAWAL OF THE REQUEST

Rule 9
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there are several requesting parties, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 6(b).

Article 9
Retrait de la requête

À tout moment avant l'enregistrement, une partie requérante peut notifier par écrit au ou à la Secrétaire général(e) le retrait de la requête ou, s'il y a plusieurs parties requérantes, qu'elle se retire de la requête. Le ou la Secrétaire général(e) avise sans délai les autres parties de ce retrait, à moins que la requête n'ait pas encore été transmise conformément à l'article 6(b).

Regla 9
Retiro de la Solicitud

En cualquier momento antes del registro, una parte solicitante podrá notificar por escrito el retiro de la solicitud al o a la Secretario(a) General o, si hubiera varias partes solicitantes, que se retira de la solicitud. El o la Secretario(a) General notificará con prontitud a las partes dicho retiro, a menos que la solicitud aún no hubiera sido transmitida de conformidad con lo dispuesto en la Regla 6(b).

1038. Proposed (AF)AR 9 corresponds to, and is in the same terms as, proposed IR 8.

CHAPTER III – CONDUCT OF THE PROCEEDINGS

1039. Proposed (AF)AR 10 to 19 are similar to proposed AR 2 to 19.

RULE 10 – PARTY AND PARTY REPRESENTATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 26

Chapter III
Conduct of the Proceeding

Rule 10
Meaning of Party and Party Representation

(1) For the purposes of these Rules, "party" may include, where the context so admits:

(a) all parties acting as claimants or as respondents; and

(b) an authorized representative of a party.

(2) Each party may be represented or assisted by agents, counsel or advocates ("representative(s)"), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Chapitre III
Conduite de l'instance

Article 10
Sens du terme « partie » et représentation des parties

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet :

(a) toutes les parties agissant en qualité de demanderesses ou de défenderesses ; et

(b) tout(e) représentant(e) habilité(e) d'une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocats (« représentant(s) »), dont le nom et la preuve de l'habilitation à agir doivent être notifiés par cette partie au Secrétariat.

Capítulo III
Tramitación del Procedimiento

Regla 10
Significado de Parte y Representación de las Partes

(1) A los fines de estas Reglas, "parte" puede incluir, cuando el contexto así lo admite, a:

(a) todas las partes que actúen como demandantes o como demandadas; y

(b) un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) ("representante(s)"), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

1040. Proposed (AF)AR 10 is identical to proposed AR 2.

RULE 11 – METHOD OF FILING

CURRENT RELATED PROVISIONS: A(AF)R Art. 31, 32

Rule 11
Method of Filing

(1) Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal orders otherwise. They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge receipt and distribute them in accordance with Rule 12.

(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.

Article 11
Modalités de dépôt

(1) Les écritures, observations, documents justificatifs et communications sont déposés par voie électronique, sauf si les parties en conviennent ou le Tribunal en décide autrement. Leur production au cours de l'instance se fait par leur dépôt auprès du Secrétariat, qui en accuse réception et en assure la distribution conformément à l'article 12.

(2) Les documents justificatifs, notamment les déclarations de témoins, les rapports d'experts, les pièces factuelles et les sources juridiques, sont déposés avec les écritures auxquelles ils se rapportent, dans les délais fixés pour le dépôt de ces écritures.

(3) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. Le Tribunal peut exiger une version plus complète de l'extrait ou une version intégrale du document.

Regla 11
Método de Presentación

(1) Los escritos, observaciones, documentos de respaldo y comunicaciones se presentarán electrónicamente, salvo acuerdo de las partes o resolución del Tribunal en contrario. Los mismos se incorporarán al procedimiento mediante la presentación ante el Secretariado, que acusará recibo y los distribuirá de conformidad con la Regla 12.

(2) Los documentos de respaldo, lo cual incluye declaraciones testimoniales, informes periciales, anexos documentales y anexos legales, se presentarán junto con los escritos a los que se refieren, dentro del plazo fijado para la presentación de dichos escritos.

(3) Se podrá presentar un extracto de un documento de respaldo, siempre que la omisión del texto no altere el sentido del extracto. El Tribunal podrá solicitar una versión más amplia del extracto o una versión completa del documento.

1041. Proposed (AF)AR 11 is materially the same as proposed AR 3.

RULE 12 – ROUTING OF WRITTEN COMMUNICATIONS

Rule 12
Routing of Written Communications

(1) Following the registration of the Request pursuant to Rule 7(2), the Secretariat shall be the official channel of written communications among the parties and the Tribunal, except that:

(a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the proceeding;

(b) the members of the Tribunal shall communicate directly with each other; and

(c) a party may communicate directly with the Tribunal if requested to do so by the Tribunal, provided that the other party and the Secretariat are copied on the communications.

(2) The Secretariat shall acknowledge receipt of all communications filed by a party and, subject to paragraph (1)(a) and (c), distribute them to the other party and the Tribunal.

Article 12
Transmission des communications écrites

(1) Après l'enregistrement de la requête conformément à l'article 7(2), le Secrétariat est l'intermédiaire officiel pour les communications écrites entre les parties et le Tribunal, sauf dans les cas suivants :

(a) les parties peuvent communiquer directement entre elles, à condition que le Secrétariat reçoive copie de toutes communications devant être produites au cours de l'instance ;

(b) les membres du Tribunal communiquent directement entre eux ; et

(c) les parties peuvent communiquer directement avec le Tribunal si celui-ci lui en fait la demande, à condition que l'autre partie et le Secrétariat reçoivent copie de ces communications.

(2) Le Secrétariat accuse réception de toutes les communications déposées par une partie et, sous réserve du paragraphe (1)(a) et (c), les transmet à l'autre partie et au Tribunal.

Regla 12
Transmisión de Comunicaciones Escritas

(1) Con posterioridad al registro de la solicitud de conformidad con lo dispuesto en la Regla 7(2), el Secretariado será el intermediario oficial de las comunicaciones escritas entre las partes y el Tribunal, excepto que:

(a) las partes podrán comunicarse directamente entre sí, siempre que el Secretariado sea copiado en todas las comunicaciones que se presenten en el procedimiento;

(b) los miembros del Tribunal se comunicarán directamente entre sí; y

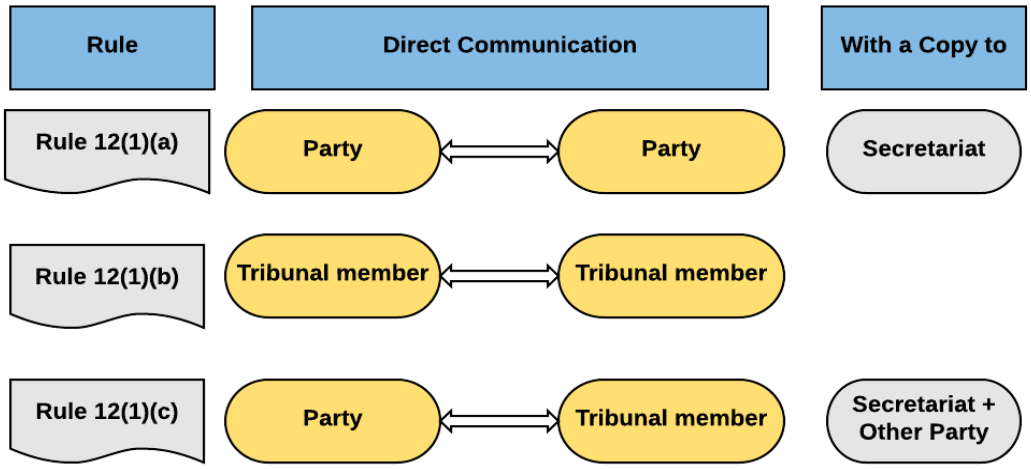
(c) a solicitud del Tribunal, una parte podrá comunicarse directamente con el Tribunal, siempre que la otra parte y el Secretariado sean copiados en las comunicaciones.

(2) El Secretariado acusará recibo de todas las comunicaciones presentadas por una parte y, sujeto a lo dispuesto en el párrafo (1)(a) y (c), las distribuirá a la otra parte y al Tribunal.

1042. Proposed (AF)AR 12 is similar to proposed AR 4. It differs in that it omits the reference to communications with the Chairman of the Administrative Council (which do not occur under the proposed (AF)AR).

1043. The chart below notes the options for routing of communications.

Routing of Written Communications – Rule 12



RULE 13 – PROCEDURAL LANGUAGES, TRANSLATION AND INTERPRETATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 30

Rule 13
Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Tribunal and the Secretariat regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Written submissions, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages.

(4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural

languages, the Tribunal may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Tribunal may require a fuller or a complete translation. If the translation is disputed, the Tribunal may require a certified translation.

(5) Any written communication from the Tribunal or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal and, where applicable the Secretary-General, shall render orders, decisions and the Award in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may require interpretation into the other procedural language. The recordings and transcripts of a hearing shall be kept in the procedural language(s) used at the hearing.

(7) The testimony of a witness or an expert in a language other than a procedural language shall be interpreted into the procedural language(s) used at the hearing.

Article 13
Langues de la procédure, traduction et interprétation

(1) Les parties peuvent convenir d'utiliser une ou deux langues pour la conduite de procédure. Les parties doivent consulter le Tribunal et le Secrétariat sur l'utilisation d'une langue qui n'est pas une langue officielle du Centre.

(2) Si les parties ne se mettent pas d'accord sur la ou les langue(s) de la procédure, chacune d'elles peut choisir l'une des langues officielles du Centre.

(3) Les écritures, observations, documents justificatifs et communications sont déposés dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger d'une partie qu'elle dépose tout document dans les deux langues de la procédure.

(4) Tout document dans une langue autre qu'une langue de la procédure est accompagné d'une traduction dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger d'une partie qu'elle traduise tout document dans les deux langues de la procédure. Il suffit que seule la partie pertinente d'un document soit traduite, étant entendu que le Tribunal peut exiger une traduction plus complète ou intégrale. Si la traduction est contestée, le Tribunal peut exiger une traduction certifiée conforme.

(5) Toute communication écrite émanant du Tribunal ou du Secrétariat est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal et, le cas échéant, le ou la Secrétaire général(e), rendent des

ordonnances, décisions et la sentence dans les deux langues de la procédure, sauf si les parties en conviennent autrement.

(6) Toute communication orale est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger une interprétation dans l'autre langue de la procédure. Les enregistrements et transcriptions d'une audience sont effectués dans la ou les langues(s) de la procédure utilisée(s) au cours de l'audience.

(7) La déclaration d'un témoin ou d'un expert dans une langue autre qu'une langue de la procédure fait l'objet d'une interprétation dans la ou les langue(s) de la procédure utilisée(s) au cours de l'audience.

Regla 13
Idiomas del Procedimiento, Traducción e Interpretación

(1) Las partes podrán acordar la utilización de uno o dos idiomas en el procedimiento. Las partes consultarán al Tribunal y al Secretariado respecto del uso de un idioma que no sea un idioma oficial del Centro.

(2) Si las partes no acordaran el o los idioma(s) del procedimiento, cada una podrá escoger uno de los idiomas oficiales del Centro.

(3) Los escritos, observaciones, documentos de respaldo y comunicaciones se presentarán en un idioma del procedimiento. En un procedimiento que tenga dos idiomas del procedimiento, el Tribunal podrá solicitar a una parte que presente cualquier documento en ambos idiomas del procedimiento.

(4) Un documento redactado en un idioma que no sea un idioma del procedimiento será acompañado de una traducción a un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, el Tribunal podrá solicitar a una parte que traduzca cualquier documento a ambos idiomas del procedimiento. Será suficiente que se traduzcan solamente las partes pertinentes de un documento; sin embargo, el Tribunal podrá solicitar una traducción más amplia o completa del documento. El Tribunal podrá solicitar una traducción certificada en caso de que se impugne la traducción.

(5) Cualquier comunicación escrita de parte del Tribunal o del Secretariado deberá estar redactada en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, el Tribunal y, cuando corresponda, el o la Secretario(a) General emitirán resoluciones, decisiones y el laudo en ambos idiomas del procedimiento, salvo acuerdo en contrario de las partes.

(6) Cualquier comunicación oral deberá realizarse en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, el Tribunal podrá solicitar la

interpretación al otro idioma del procedimiento. Las grabaciones y transcripciones de una audiencia se realizarán en el o los idioma(s) del procedimiento utilizado(s) en la audiencia.

(7) El testimonio de un o una testigo o un o una perito(a) en un idioma que no sea un idioma del procedimiento será interpretado al o a los idioma(s) del procedimiento utilizado(s) en la audiencia.

1044. Proposed (AF)AR 13 is identical to proposed AR 5.

RULE 14 – CORRECTION OF ERRORS AND DEFICIENCIES

Rule 14
Correction of Errors and Deficiencies

(1) A party may correct an accidental error in any written submission, observation, supporting document or communication at any time before the Award is rendered, with agreement of the other party or with leave of the Tribunal.

(2) The Secretariat may request that a party correct any deficiency in a filing, at the party's own cost.

Article 14
Correction des erreurs et insuffisances

(1) Une partie peut corriger une erreur accidentelle dans les écritures, observations, documents justificatifs ou communications à tout moment avant que la sentence ne soit rendue, avec l'accord de l'autre partie ou l'autorisation du Tribunal.

(2) Le Secrétariat peut demander qu'une partie remédie à une insuffisance dans un dépôt, aux frais de celle-ci.

Regla 14
Corrección de Errores y Deficiencias

(1) Una parte podrá corregir cualquier error accidental en un escrito, observación, documento de respaldo o comunicación en cualquier momento antes de que se dicte el laudo, si cuenta con el acuerdo de la otra parte o con la autorización del Tribunal.

(2) El Secretariado podrá solicitar que una parte corrija cualquier deficiencia en una presentación por cuenta propia de la parte.

1045. Proposed (AF)AR 14 is identical to proposed AR 6.

RULE 15 – CALCULATION OF TIME LIMITS

CURRENT RELATED PROVISIONS: A(AF)R Art. 33

Rule 15
Calculation of Time Limits

(1) Any time limit expressed as a period of time shall be calculated from the day after the date:

(a) of the relevant notice;

(b) on which the Tribunal announces the period; or

(c) on which the procedural step starting the period is taken.

(2) A time limit expires at 11:59 p.m. at the seat of the Centre on the relevant date. Where the end of a time limit falls on a Saturday, Sunday, or a holiday observed by the Secretariat, it shall be satisfied if the relevant step is taken or the relevant document is received by the Secretariat on the subsequent business day.

Article 15
Calcul des délais

(1) Tout délai exprimé sous la forme d'une durée est calculé à compter du lendemain de la date :

(a) de la notification concernée ;

(b) à laquelle le Tribunal annonce cette durée ; ou

(c) à laquelle l'acte d'ordre procédural qui fait courir le délai est accompli.

(2) Un délai expire à 23h59 au siège du Centre à la date concernée. Dans le cas où un délai expire un samedi, un dimanche ou un jour férié observé par le Secrétariat, il est respecté si l'acte concerné est accompli, ou si le document concerné est reçu par le Secrétariat, le jour ouvré suivant.

Regla 15
Cálculo de los Plazos

(1) Cualquier plazo expresado como período de tiempo se calculará desde el día posterior a la fecha:

(a) de la notificación pertinente;

(b) en la que el Tribunal anuncie el período; o

(c) en la que se inicie la etapa procesal que comienza el período.

(2) Un plazo vence a las 11:59 p.m. en la sede del Centro en la fecha pertinente. Cuando el final de un plazo coincida con un sábado, domingo, o un feriado observado por el Secretariado, será suficiente que la actuación pertinente se realice o el Secretariado reciba el documento pertinente el día hábil siguiente.

1046. Proposed (AF)AR 15 is identical to proposed AR 7.

RULE 16 – TIME LIMITS SPECIFIED BY THESE RULES OR FIXED BY THE SECRETARY-GENERAL

Rule 16
Time Limits Specified by these Rules or Fixed by the Secretary-General

(1) The parties may agree to extend a time limit fixed by the Secretary-General or specified by these Rules.

(2) Any step taken by the parties after expiry of a time limit fixed by the Secretary-General or specified by these Rules shall be disregarded, unless the Secretary-General or the Tribunal, as applicable, concludes that there are special circumstances justifying the delay.

(3) Where these Rules prescribe time limits for orders, decisions and the Award, the Tribunal, or the Secretary-General, where applicable, shall use best efforts to meet those time limits. If special circumstances arise which prevent the Tribunal from complying with a time limit, it shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered.

Article 16
Délais prévus par le Règlement ou fixés par le ou la Secrétaire général(e)

(1) Les parties peuvent convenir de prolonger un délai fixé par le ou la Secrétaire général(e) ou prévu par le présent Règlement.

(2) Il n'est tenu compte d'aucun acte accompli par les parties après l'expiration d'un délai fixé par le ou la Secrétaire général(e) ou prévu par le présent Règlement, sauf si le ou la Secrétaire général(e) ou le Tribunal, selon le cas, conclut que des circonstances particulières justifient le retard.

(3) Dans le cas où le présent Règlement impose des délais pour les ordonnances, les décisions et la sentence, le Tribunal, ou le ou la Secrétaire général(e), selon le cas, déploie tous les efforts possibles pour respecter ces délais. S'il survient des circonstances particulières qui empêchent le Tribunal de respecter un délai, il doit informer les parties du motif du retard et de la date à laquelle il prévoit que l'ordonnance, la décision ou la sentence sera rendue.

Regla 16
Plazos Determinados por estas Reglas o Fijados por el o la Secretario(a) General

(1) Las partes podrán acordar ampliar un plazo fijado por el o la Secretario(a) General o establecido por estas Reglas.

(2) Toda actuación de las partes después del vencimiento de un plazo fijado por el o la Secretario(a) General o establecido en estas Reglas se tendrá por no realizada, salvo que el o la Secretario(a) General o el Tribunal, según corresponda, concluya que existen circunstancias especiales que justifican la demora.

(3) Cuando estas Reglas establezcan plazos para resoluciones, decisiones y el laudo, el Tribunal, o el o la Secretario(a) General, cuando corresponda, hará lo posible para cumplir esos plazos. Si surgen circunstancias especiales que impidan al Tribunal cumplir con un plazo, este notificará a las partes el motivo de la demora y la fecha en la que prevé que se emitirá la resolución, decisión o el laudo.

1047. Proposed (AF)AR 16 is similar to proposed AR 8. Some minor differences between these two rules exist, reflecting the fact that Convention-imposed deadlines and decisions by the Chairman of the Administrative Council are not applicable in AF arbitration.

Rule 17
Time Limits Fixed by the Tribunal

(1) The Tribunal shall fix time limits for completion of each step in the proceeding, other than time limits specified by these Rules.

(2) The Tribunal may extend a time limit it fixed upon reasoned application by a party made prior to the expiry of the time limit. The Tribunal may delegate this power to its President.

(3) The Tribunal shall disregard any step taken after expiry of a time limit it fixed unless it concludes that there are special circumstances justifying the delay.

Article 17
Délais fixés par le Tribunal

(1) Le Tribunal fixe les délais pour l'accomplissement de chaque étape de l'instance, autres que les délais prévus par le présent Règlement.

(2) Le Tribunal peut prolonger un délai qu'il a fixé, sur demande motivée présentée par une partie avant l'expiration du délai. Le Tribunal peut déléguer ce pouvoir à son Président.

(3) Le Tribunal ne tient pas compte d'un acte accompli après l'expiration d'un délai qu'il a fixé, sauf s'il conclut que des circonstances particulières justifient le retard.

Regla 17
Plazos Fijados por el Tribunal

(1) El Tribunal fijará los plazos de cada etapa del procedimiento que no hayan sido establecidos por estas Reglas.

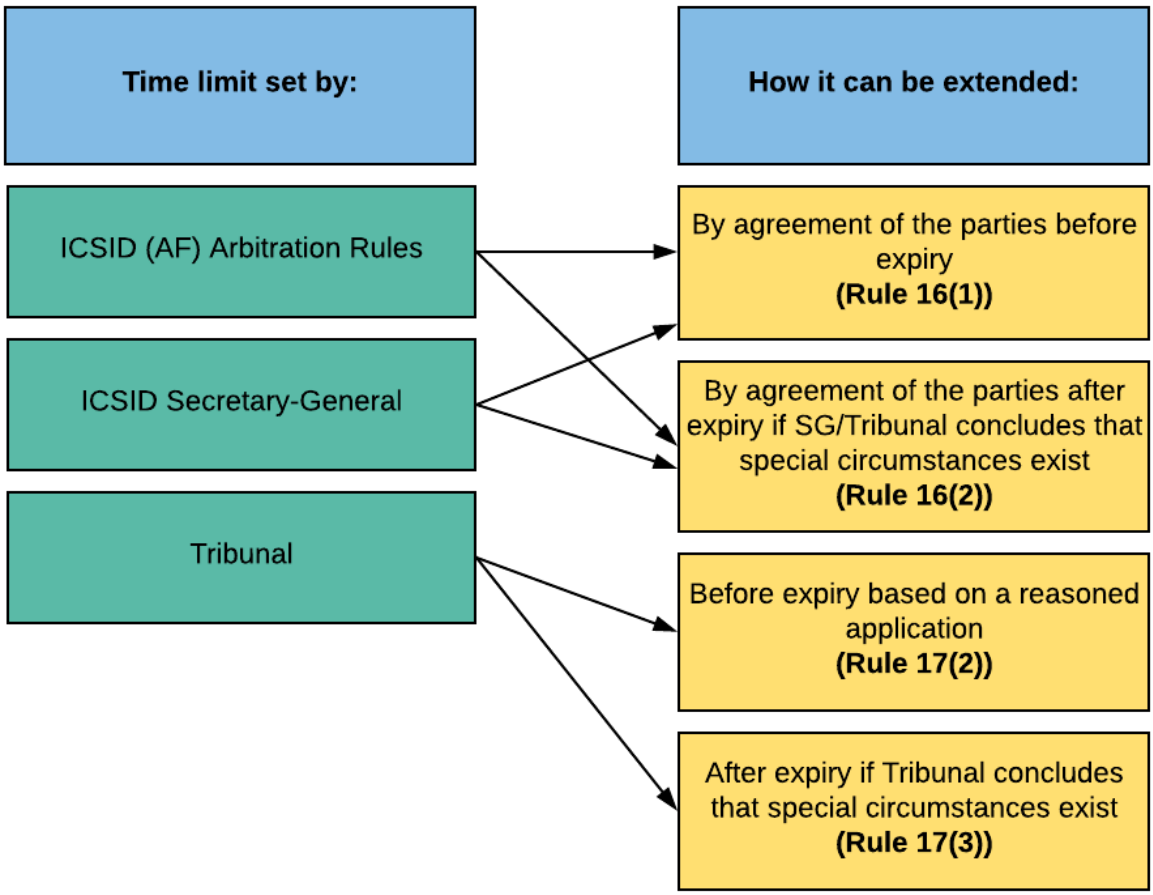
(2) El Tribunal podrá extender un plazo fijado por este, previa solicitud fundada de una parte presentada antes del vencimiento del plazo. El Tribunal podrá delegar esta facultad a su Presidente(a).

(3) El Tribunal tendrá por no hecha toda actuación realizada después de que haya vencido un plazo fijado por este, salvo que concluya que existen circunstancias especiales que justifican la demora.

1048. Proposed (AF)AR 17 is similar to proposed AR 9. It differs from proposed AR 9 only in the omission of any reference to the Convention in paragraph (1).

1049. The chart below summarizes how parties can obtain extensions of time limits in proceedings.

Extension of Time Limits – Rules 16-17



RULE 18 – WAIVER

CURRENT RELATED PROVISIONS: A(AF)R Art. 34

Rule 18
Waiver

If a party knows or should have known that an applicable rule, agreement of the parties, or any order or decision of the Tribunal or the Secretary-General has not been complied with, and does not promptly object, then that party shall be deemed to have waived its right to object to that non-compliance.

Article 18
Renonciation

Si une partie a ou devrait avoir connaissance du fait qu'une disposition applicable d'un règlement, un accord des parties ou une ordonnance ou une décision du Tribunal ou du ou de la Secrétaire général(e) n'a pas été respecté et qu'elle ne fait pas valoir d'objection dans les plus brefs délais, cette partie est réputée avoir renoncé à son droit d'objecter à ce non-respect.

Regla 18
Renuncias

Si una parte sabe, o debería haber sabido, que no se ha observado alguna regla aplicable, algún acuerdo de las partes, o alguna resolución o decisión del Tribunal o del o de la Secretario(a) General, y no objeta con prontitud, entonces se considerará que esa parte ha renunciado a su derecho a objetar a dicho incumplimiento.

1050. Proposed (AF)AR 18 is similar to proposed AR 10. It differs only in that the corresponding proposed AR is expressly stated to be subject to Art. 45 of the Convention, which is not applicable in the AF context.

RULE 19 – FILLING GAPS

CURRENT RELATED PROVISIONS: A(AF)R Art. 35

Rule 19
Filling of Gaps

If any question of procedure arises which is not covered by these Rules or by any agreement of the parties, the Tribunal shall decide the question.

Article 19
Règlement des questions non prévues

Si une question de procédure non couverte par le présent Règlement ou tout accord des parties se pose, elle est tranchée par le Tribunal.

Regla 19
Subsanación de Lagunas

Si surgiere alguna cuestión de procedimiento que no esté cubierta por estas Reglas o por cualquier acuerdo de las partes, el Tribunal deberá decidir la cuestión.

1051. Proposed (AF)AR 19 corresponds to current Art. 35 and mirrors the inherent powers of a Tribunal under Art. 44 of the Convention. No material change from current Art. 35 is proposed.

RULE 20 – GENERAL DUTIES

Rule 20
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.

Article 20
Obligations générales

(1) Le Tribunal traite les parties de manière égale et donne à chacune d'elles une possibilité raisonnable de faire valoir ses prétentions.

(2) Le Tribunal consulte les parties avant de rendre de sa propre initiative une ordonnance ou décision qu'il est autorisé à rendre par le présent Règlement.

(3) Le Tribunal et les parties conduisent l'instance avec célérité et efficacité en termes de coûts.

(4) Les parties coopèrent dans la mise en œuvre des ordonnances et des décisions du Tribunal.

Regla 20
Obligaciones Generales

(1) El Tribunal deberá tratar a las partes de manera igualitaria y brindar a cada parte una oportunidad razonable de plantear su postura.

(2) El Tribunal consultará con las partes antes de adoptar de oficio una resolución o decisión autorizada por estas Reglas.

(3) El Tribunal y las partes tramitarán el procedimiento de manera expedita y eficaz en materia de costos.

(4) Las partes cooperarán en la implementación de las resoluciones y decisiones del Tribunal.

1052. Proposed (AF)AR 20 is identical to proposed AR 11.

RULE 21 – ORDERS AND DECISIONS AND AGREEMENTS

CURRENT RELATED PROVISIONS: A(AF)R Art. 24(2), 27

Rule 21
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 (Additional Facility) Administrative and Financial Regulations.

Article 21
Ordonnances, décisions et accords

(1) Le Tribunal rend les ordonnances et les décisions requises pour la conduite de la procédure.

(2) Les ordonnances et les décisions peuvent être rendues par tous moyens de communication appropriés et peuvent être signées par le ou la Président(e) pour le compte du Tribunal, sauf si les parties en conviennent autrement.

(3) Le Tribunal applique tout accord des parties sur les questions de procédure, pour autant que celui-ci soit conforme au Règlement administratif et financier (Mécanisme supplémentaire).

Regla 21
Resoluciones, Decisiones y Acuerdos

(1) El Tribunal emitirá las resoluciones y decisiones necesarias para la tramitación del procedimiento.

(2) Las resoluciones y decisiones podrán ser emitidas por cualquier medio de comunicación apropiado y podrán estar firmadas por el o la Presidente(a) en nombre y representación del Tribunal, salvo acuerdo en contrario de las partes.

(3) El Tribunal aplicará cualquier acuerdo de las partes sobre cuestiones procesales en la medida en que cumpla con lo establecido en el Reglamento Administrativo y Financiero (Mecanismo Complementario).

1053. Proposed (AF)AR 21 is materially the same as proposed AR 12. The only substantive difference is that in proposed AR 21(3) there is no reference to making the parties' agreement subject to the Convention, which is not applicable in the context of AF arbitration.

RULE 22 – WRITTEN SUBMISSIONS AND OBSERVATIONS

CURRENT RELATED PROVISIONS: A(AF)R Art. 38

Rule 22
Written Submissions and Observations

(1) The parties shall file the following written submissions, with any supporting documents, within the time limits fixed by the Tribunal:

(a) a memorial by the requesting party, subject to paragraph (2);

(b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal finds it necessary:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

(2) The requesting party may elect to have the Request considered as the memorial.

(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.

(4) The Tribunal shall grant leave to file unscheduled written submissions, observations, or supporting documents upon a timely and reasoned application and only if these are necessary in view of all relevant circumstances.

Article 22
Écritures et observations

(1) Les parties déposent les écritures suivantes avec tous documents justificatifs dans les délais fixés par le Tribunal :

(a) un mémoire de la partie requérante, sous réserve du paragraphe (2) ;

(b) un contre-mémoire de l’autre partie ;

et, si les parties en conviennent ou le Tribunal le juge nécessaire :

(c) une réponse de la partie requérante ; et

(d) une réplique de l’autre partie.

(2) La partie requérante a la faculté de demander que la requête soit considérée comme le mémoire.

(3) Le mémoire contient un exposé des faits pertinents, du droit et des arguments, ainsi que les demandes. Le contre-mémoire contient un exposé des faits pertinents, y compris l'admission ou la contestation des faits exposés dans le mémoire, et tous faits supplémentaires nécessaires, un exposé du droit en réponse au mémoire, les arguments et les demandes. La réponse et la réplique se limitent à répondre aux écritures précédentes.

(4) Le Tribunal autorise le dépôt non prévu d'écritures, d'observations ou de documents justificatifs si une demande motivée à cet effet est présentée en temps voulu et uniquement si ceux-ci sont nécessaires au regard de l'ensemble des circonstances pertinentes.

Regla 22
Escritos y Observaciones

(1) Las partes presentarán los siguientes escritos, junto con cualquier documento de respaldo, dentro de los plazos fijados por el Tribunal:

(a) un memorial de la parte solicitante, sujeto a lo dispuesto en el párrafo (2);

(b) un memorial de contestación de la otra parte;

y si las partes lo acordaran o si el Tribunal lo estimara necesario:

(c) una réplica de la parte solicitante; y

(d) una dúplica de la otra parte.

(2) La parte solicitante podrá elegir que la solicitud de arbitraje se considere como el memorial.

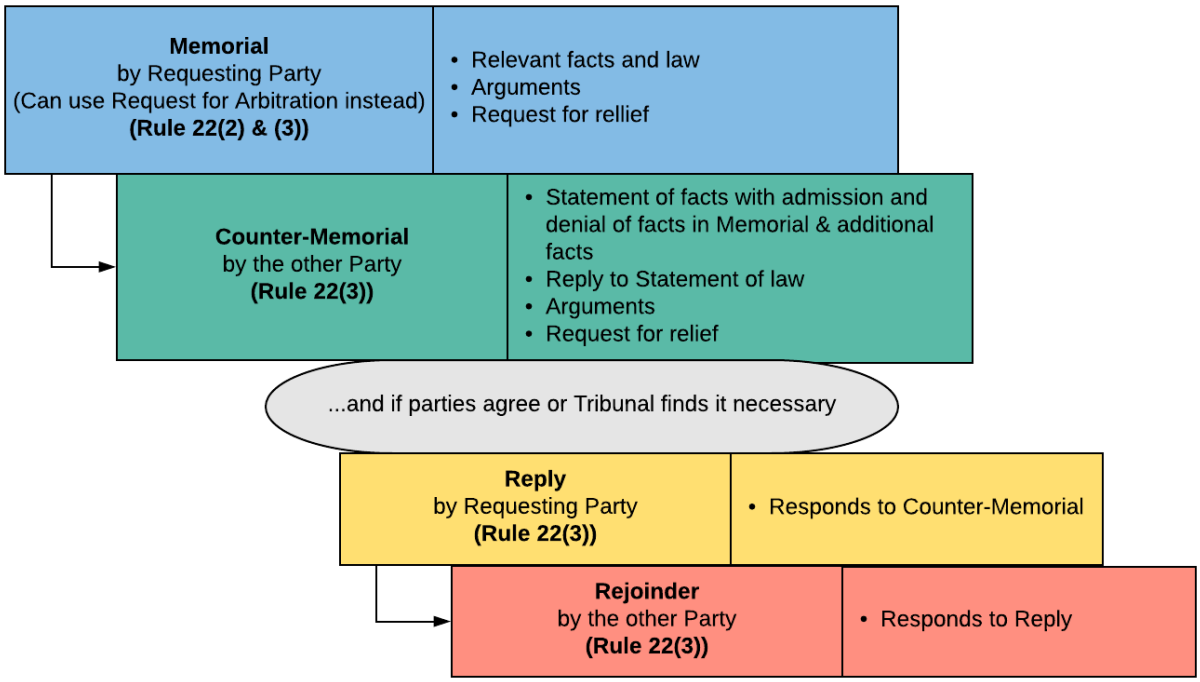
(3) El memorial deberá contener una relación de los hechos pertinentes, el derecho, los argumentos y petitorios. El memorial de contestación contendrá una relación de los hechos pertinentes, lo cual incluye la aceptación o negación de los hechos declarados en el memorial, cualesquiera hechos adicionales pertinentes, una declaración del derecho en respuesta al memorial, los argumentos y petitorios. La réplica y la dúplica se limitarán a responder al último escrito presentado.

(4) El Tribunal concederá autorización para presentar escritos, observaciones, o documentos de respaldo fuera del calendario previa solicitud oportuna y fundada, y solo si resultan necesarios en vista de todas las circunstancias pertinentes.

1054. Proposed (AF)AR 22 is materially the same as proposed AR 13.

1055. Written submissions must be responsive to the prior submission and join issue on the points in dispute. As a result, written submissions address the following:

Written Submissions and Observations – Rule 22



RULE 23 – CASE MANAGEMENT CONFERENCE

CURRENT RELATED PROVISIONS: A(AF)R Art. 29

Rule 23
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.

Article 23
Conférence sur la gestion de l'instance

En vue d'accélérer le déroulement de l'instance, le Tribunal peut convoquer à tout moment une conférence de gestion de l'instance avec les parties pour :

(a) identifier les faits dont l'existence n'est pas contestée ;

(b) circonscrire les questions faisant l'objet du différend ; et

(c) traiter toute autre question de procédure ou de fond en relation avec la résolution du différend.

Regla 23
Conferencia Relativa a la Gestión del Caso

Con miras a que el procedimiento pueda conducirse con mayor celeridad, el Tribunal podrá convocar en cualquier momento una conferencia con las partes relativa a la gestión del caso, con el fin de:

(a) identificar los hechos no controvertidos;

(b) delimitar los asuntos en disputa; y

(c) abordar cualquier otra cuestión procesal o sustantiva relacionada con la resolución de la diferencia.

1056. Proposed (AF)AR 23 is identical to proposed AR 14.

RULE 24 – SEAT OF ARBITRATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 19-20

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.

Article 24
Siège de l'arbitrage

Le siège de l'arbitrage est convenu entre les parties ou, à défaut d'accord, est déterminé par le Tribunal au regard des circonstances de l'instance et après consultation des parties.

Regla 24
Sede del Arbitraje

La sede del arbitraje será acordada por las partes o, en ausencia de acuerdo, será determinada por el Tribunal teniendo en cuenta las circunstancias del procedimiento, previa consulta a las partes.

1057. Proposed (AF)AR 24 has no corresponding provision in the proposed AR. It corresponds to Chapter IV (Art. 19 and 20) in the current Arbitration (AF) Rules. Three principal changes to the current provisions are proposed.

1058. ***First***, it is proposed to delete current Art. 19 (Limitation on Choice of Forum).

1059. Unlike ICSID Convention arbitration (which benefits from the special features of the Convention, such as the recognition and enforcement of the Award and the delocalization of arbitrations), the legal seat of arbitration has significant import in AF arbitration. As noted above, the arbitration laws of the seat of arbitration will govern the arbitration procedure in AF arbitration. They will also govern any application to set aside the Award, and may be relevant to other enforcement proceedings.

1060. Current Art. 19 contains a limitation on the choice of forum (seat of arbitration). It provides "Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards". This limitation on the seat of arbitration to New York Convention States no longer has the importance it once may have had. When this provision was first drafted in 1987, there were only 52 New York Convention states; today 159 States are members of the New York Convention. Other institutional rules do not include a similar limitation. While many parties may prefer a legal seat in a New York Convention State, there is no reason to limit party-autonomy in this manner. For this reason, the provision has been omitted from the proposed (AF)AR.

1061. ***Second***, it is proposed to modify the current provision regarding seat of arbitration to put this decision into the hands of the parties.

1062. Proposed (AF)AR 24 allows the parties to agree on the seat of arbitration. Proposed (AF)AR 24 corresponds to current Art. 20(1), and addresses the determination of the seat of arbitration. Current Art. 20 provides that "the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat".

1063. By contrast, the proposed provision allows the parties to agree on a place of arbitration. In circumstances where the parties cannot agree, the ultimate decision as to the legal seat of the proceeding rests with the Tribunal. This proposed modification, in conjunction with the removal of the limitation on choice of place of arbitration to Contracting States to the New York Convention, further advances party autonomy, and increases the flexibility of users.

1064. ***Third***, to ensure users readily perceive the difference between legal seat and the physical place where a hearing may occur, the proposed provision adopts the term "seat".

RULE 25 – HEARINGS

CURRENT RELATED PROVISIONS: A(AF)R Art. 21, 22

Rule 25
Hearings

(1) There shall be one or more hearings before the Tribunal, unless the parties agree otherwise.

(2) The President of the Tribunal shall determine the date, time and method of holding hearings, after consulting with the other members of the Tribunal and the parties.

(3) If a hearing is to be held in person, it may be held at any place agreed to by the parties after consulting with the Tribunal and the Secretariat. If the parties do not agree on the place of a hearing, it shall be held at a place determined by the Tribunal.

(4) Any member of the Tribunal may put questions to the parties and ask for explanations at any time during a hearing.

Article 25
Audiences

(1) Le Tribunal tient une ou plusieurs audiences, sauf si les parties en conviennent autrement.

(2) Le ou la Président(e) du Tribunal fixe la date, l'heure et les modalités de la tenue des audiences, après consultation des autres membres du Tribunal et des parties.

(3) Si une audience doit se tenir en personne, elle peut se tenir en tout lieu convenu entre les parties après consultation du Tribunal et du Secrétariat. Si les parties ne se

mettent pas d'accord sur le lieu d'une audience, celle-ci se tient en un lieu déterminé par le Tribunal.

(4) Tout membre du Tribunal peut poser des questions aux parties et leur demander des explications à tout moment au cours d'une audience.

Regla 25
Audiencias

(1) Se celebrarán una o más audiencias ante el Tribunal, salvo acuerdo en contrario de las partes.

(2) El o la Presidente(a) del Tribunal determinará la fecha, la hora y la modalidad de celebración de las audiencias, previa consulta a los otros miembros del Tribunal y a las partes.

(3) Si una audiencia debe celebrarse en persona, podrá celebrarse en cualquier lugar acordado por las partes previa consulta al Tribunal y al Secretariado. Si las partes no acordaran el lugar de una audiencia, la misma se celebrará en un lugar determinado por el Tribunal.

(4) Cualquier miembro del Tribunal podrá interrogar a las partes y solicitarles explicaciones en cualquier momento durante una audiencia.

1065. Proposed AF(AR) 25 is similar to proposed AR 15. The differences are in paragraph (3), which stipulates that the parties may agree to any place for a hearing (including other than at the seat of arbitration) and that absent such agreement, the Tribunal shall determine the place (*i.e.*, location) of the hearing. By contrast, corresponding proposed AR 15(3) provides that the default place for a hearing absent party agreement is the seat of Centre, a provision which is dictated by the Convention.

1066. This proposed provision also marks a departure from the current Arbitration (AF) Rules, which do not expressly contemplate a hearing taking place in a location other than at the place of arbitration. Current Art. 20(2) expressly provides for a Tribunal to "meet at any place it deems appropriate for the inspection of goods, other property or documents" and to "visit any place connected with the dispute or conduct inquiries there", but confers no such powers with respect to hearings (or even expressly acknowledges the ability of parties to reach agreement in this regard). In practice, some Tribunals have allowed parties to agree to a different legal seat of arbitration and hearing location, while other Tribunals have felt constrained by the rules and declined to do this.

1067. In practice, it can be very useful for the efficient management of a proceeding for a hearing to be held somewhere other than the seat of the arbitration (for example, because many witnesses are concentrated in one location, or the majority of arbitrators or counsel are

located somewhere other than the legal seat of the arbitration). Indeed, most institutional rules allow a different legal seat and location for a hearing for this reason. Proposed (AF)AR 25(3) adopts this approach.

RULE 26 – DELIBERATIONS

CURRENT RELATED PROVISIONS: A(AF)R Art. 23

Rule 26
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.

Article 26
Délibérations

(1) Les délibérations du Tribunal ont lieu à huis clos et demeurent confidentielles.

(2) Le Tribunal peut délibérer en tout lieu qu'il juge pratique.

(3) Seuls les membres du Tribunal prennent part à ses délibérations. Aucune autre personne n'est admise sauf si le Tribunal en décide autrement.

(4) Le Tribunal délibère sur toute question devant être tranchée immédiatement après les dernières écritures ou plaidoiries sur cette question.

Regla 26
Deliberaciones

(1) Las deliberaciones del Tribunal se realizarán en privado y serán de carácter confidencial.

(2) El Tribunal podrá deliberar en cualquier lugar que estime conveniente.

(3) Solo los miembros del Tribunal tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario del Tribunal.

(4) El Tribunal deliberará inmediatamente después del último escrito o presentación oral sobre cualquier asunto que esté sujeto a decisión.

1068. Proposed (AF)AR 26 is identical to proposed AR 16.

RULE 27 – QUORUM

CURRENT RELATED PROVISIONS: A(AF)R Art. 22(2)

Rule 27
Quorum

The participation of a majority of the 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.

Article 27
Quorum

La participation d'une majorité des membres du Tribunal est exigée lors de la première session, des audiences et des délibérations, par tous moyens de communication appropriés, sauf si les parties en conviennent autrement.

Regla 27
Quórum

La participación de la mayoría de los miembros del Tribunal será requerida tanto en la primera sesión como en las audiencias y deliberaciones, por cualquier medio de comunicación apropiado, salvo acuerdo en contrario de las partes.

1069. Proposed (AF)AR 27 is identical to proposed AR 17.

RULE 28 – DECISIONS TAKEN BY MAJORITY VOTE

CURRENT RELATED PROVISIONS: A(AF)R Art. 24(1)

Rule 28
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.

Article 28
Décisions prises à la majorité

Le Tribunal prend ses décisions à la majorité des voix de tous ses membres. L'abstention est considérée comme un vote négatif.

Regla 28
Decisiones Tomadas por Mayoría de Votos

El Tribunal adoptará decisiones por mayoría de votos de todos sus miembros. Las abstenciones se contarán como votos en contra.

1070. Proposed (AF)AR 28 is identical to proposed AR 18.

RULE 29 – PAYMENT OF ADVANCES AND COSTS OF THE PROCEEDING

CURRENT RELATED PROVISIONS: A(AF)R Art. 58; AFR 14

Rule 29
Payment of Advances and Costs of the Proceeding

(1) The Tribunal shall determine the portion of the advances payable by each party in accordance with (Additional Facility) Administrative and Financial Regulation 7(5) to defray the costs of the Tribunal and the Centre in connection with the proceeding.

(2) The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:

(a) the legal fees and expenses of the parties;

(b) the fees and expenses of the members of the Tribunal; and

(c) the administrative charges and direct costs of the Centre.

(3) The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties.

(4) In determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:

(a) the outcome of any part of the proceeding or overall;

(b) the parties' conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;

(c) the complexity of the issues; and

(d) the reasonableness of the costs claimed.

(5) The Tribunal may at any time make interim decisions on the costs of any part of a proceeding.

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

Article 29
Paiement d'avances et frais de procédure

(1) Le Tribunal détermine la quote-part des avances dues par chaque partie conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) pour couvrir les frais du Tribunal et du Centre dans le cadre de l'instance.

(2) Les frais de procédure correspondent à l'ensemble des frais exposés par les parties dans le cadre de l'instance, notamment :

(a) les honoraires et frais d'avocat exposés par les parties ;

(b) les honoraires et frais des membres du Tribunal ; et

(c) les frais administratifs et les frais directs du Centre.

(3) Le Tribunal demande à chaque partie de déposer un état des frais avant de répartir les frais de procédure entre les parties.

(4) Pour déterminer et répartir les frais de procédure, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment :

(a) l'issue de toute partie ou de l'ensemble de l'instance ;

(b) la conduite des parties au cours de l'instance, notamment la mesure dans laquelle elles ont agi avec célérité et efficacité en termes de coûts ;

(c) la complexité des questions ; et

(d) le caractère raisonnable des frais réclamés.

(5) Le Tribunal peut rendre à tout moment des décisions intérimaires sur les frais relatifs à quelque partie de l'instance que ce soit.

(6) Le Tribunal s'assure que toutes ses décisions sur les frais sont motivées et font partie intégrante de la sentence.

Regla 29
Pago de Anticipos y Costos del Procedimiento

(1) El Tribunal determinará la porción de los anticipos que debe pagar cada parte de conformidad con la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario) para sufragar los costos del Tribunal y del Centro en relación con el procedimiento.

(2) Los costos del procedimiento consisten en todos los costos incurridos por las partes en relación con el procedimiento, lo cual incluye:

(a) los honorarios y gastos legales de las partes;

(b) los honorarios y gastos de los miembros del Tribunal; y

(c) los cargos administrativos y costos directos del Centro.

(3) El Tribunal solicitará que cada parte presente una declaración sobre los costos antes de decidir la distribución de los costos del procedimiento entre las partes.

(4) Al momento de determinar y distribuir los costos del procedimiento, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) el resultado de cualquier parte del procedimiento o del procedimiento en su totalidad;

(b) la conducta de las partes durante el procedimiento, lo cual incluye la medida en la que hayan actuado de manera expedita y eficaz en materia de costos;

(c) la complejidad de las cuestiones; y

(d) la razonabilidad de los costos reclamados.

(5) El Tribunal podrá en cualquier momento adoptar decisiones provisionales respecto de los costos de cualquier parte del procedimiento.

(6) El Tribunal deberá asegurarse de que todas las decisiones sobre costos sean fundadas y formen parte del laudo.

1071. Proposed (AF)AR 29 is materially the same as proposed AR 19 and as current Art. 58.

1072. Like the corresponding proposed AR, proposed (AF)AR 29(5) provides that "[t]he Tribunal may at any time make interim decisions on the costs of any part of a proceeding". In this regard, the proposed rule expands upon the powers of the Tribunal under current Art. 58 (which does not explicitly provide for interim decisions on costs). Depending on the law applicable to the arbitration, some of those interim decisions might be immediately enforceable.

CHAPTER IV – CONSTITUTION OF TRIBUNAL

RULE 30 – GENERAL PROVISIONS REGARDING THE CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: A(AF)R Art. 6-8, 14(1)

Chapter IV
Constitution of the Tribunal

Rule 30
General Provisions Regarding the Constitution of the Tribunal

(1) The parties shall constitute a Tribunal without delay after registration of the Request.

(2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute, any constituent State of the REIO party to the dispute, and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.

(3) A party may not appoint an arbitrator who is a national of the State party to the dispute, any constituent State of the REIO party to the dispute or the State whose national is a party to the dispute without agreement of the other party.

(4) Unless otherwise agreed by the parties, arbitrators appointed by the Secretary-General shall not be nationals of the State party to the dispute, any constituent State of the REIO party to the dispute or the State whose national is a party to the dispute.

(5) A person previously involved in the resolution of the parties' dispute as a judge, mediator, conciliator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

(6) The composition of a Tribunal shall remain unchanged after it has been constituted, except as provided in Chapter V.

Chapitre IV
Constitution du Tribunal

Article 30
Dispositions générales relatives à la constitution du Tribunal

(1) Les parties constituent un Tribunal sans délai après l'enregistrement de la requête.

(2) Les arbitres composant la majorité d'un Tribunal doivent être ressortissant(e)s d'États autres que l'État partie au différend, qu'un État membre de l'OIER partie au différend et que l'État dont le ou la ressortissant(e) est partie au différend, sauf si l'arbitre unique ou chacun des membres du Tribunal est nommé par accord des parties.

(3) Une partie ne peut pas nommer un(e) arbitre qui est ressortissant(e) de l'État partie au différend, d'un État membre de l'OIER partie au différend ou de l'État dont le ou la ressortissant(e) est partie au différend, sans l'accord de l'autre partie.

(4) Sauf accord contraire des parties, les arbitres nommé(e)s par le ou la Secrétaire générale(e) ne doivent pas être des ressortissant(e)s de l'État partie au différend, d'un État membre de l'OIER partie au différend ou de l'État dont le ou la ressortissant(e) est partie au différend,

(5) Une personne ayant précédemment participé à la résolution du différend entre les parties en qualité de juge, médiateur(trice), conciliateur(trice) ou en toute qualité de nature similaire ne peut être nommée arbitre que par accord des parties.

(6) La composition d'un Tribunal demeure inchangée après sa constitution, sous réserve des dispositions du Chapitre V.

Capítulo IV
Constitución del Tribunal

Regla 30
Disposiciones Generales acerca de la Constitución del Tribunal

(1) Las partes deberán constituir un Tribunal sin demora luego del registro de la solicitud.

(2) La mayoría de los o las árbitros de un Tribunal no podrá tener la nacionalidad del Estado parte en la diferencia, la de cualquier Estado que integre la ORIE que sea parte en la diferencia, ni la del Estado al que pertenezca el nacional parte en la diferencia, salvo que el o la Árbitro Único o cada uno de los miembros del Tribunal sean nombrados de común acuerdo por las partes.

(3) Una parte no podrá nombrar a un árbitro que tenga la nacionalidad del Estado parte en la diferencia, la de cualquier Estado que integre la ORIE que sea parte en la diferencia ni la del Estado al que pertenezca el nacional parte en la diferencia sin el acuerdo de la otra parte.

(4) Salvo acuerdo en contrario de las partes, los o las árbitros nombrados(as) por el o la Secretario(a) General no podrán tener la nacionalidad del Estado parte en la diferencia, la de cualquier Estado que integre la ORIE que sea parte en la diferencia, ni la del Estado al que pertenezca el nacional parte en la diferencia.

(5) Una persona que haya participado anteriormente en la resolución de la diferencia entre las partes como juez(a), mediador(a), conciliador(a), o en una calidad similar podrá ser nombrada árbitro solo de común acuerdo por las partes.

(6) La composición de un Tribunal se mantendrá sin cambios después de que haya sido constituido, salvo lo dispuesto en el Capítulo V.

1073. Proposed (AF)AR 30 merges current Art. 6, 7 and 8 into a single provision, and corresponds to proposed AR 20 and to Art. 39 of the Convention.

1074. Proposed (AF)AR 30(2) makes clear that the arbitrators cannot be a national of the State party to the dispute or the State whose national is a party to the dispute (like under the AR).

It adds that the majority of arbitrators may not be a national of any constituent State of the REIO party of the dispute, unless otherwise agreed by the parties.

1075. Similarly, proposed (AF)AR 30(3) makes clear that a party may not appoint an arbitrator who is a national of the State or any constituent State of the REIO party to the dispute or of the State whose national is a party to the dispute without agreement of the other party. This is provided for in current Art. 7(1); again, the proposed provision is expanded to cover the REIO.

1076. The same rule applies in proposed (AF)AR 30(4) when the appointment is made by the default appointing authority, which is the Secretary-General.

1077. Proposed (AF)AR 30 retains the criteria of nationality for arbitrators. This remains an important aspect of ensuring impartiality in individual proceedings, and trust in the overall system.

1078. The proposed default appointing authority in AF arbitration proceedings is the Secretary-General of ICSID. This is consistent with a trend in many investment treaties to select the Secretary-General as appointing authority. A similar trend can be observed in *ad hoc* agreements by disputing parties to constitute Tribunals under the Arbitration (AF) Rules.

1079. Proposed (AF)AR 30(5) adds to proposed AR 30(4) that a member of a previous committee, mediator, judge or otherwise who was involved in the dispute may be appointed as a member of the Tribunal only with agreement of the parties. This is provided in current Art. 6(5).

1080. Proposed (AF)AR 30(6) provides that the composition of a Tribunal shall remain unchanged after its constitution unless otherwise provided in the Rules.

RULE 31 – QUALIFICATIONS OF ARBITRATORS

CURRENT RELATED PROVISIONS: A(AF)R Art. 8

Rule 31
Qualifications of Arbitrators

Arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who are impartial and independent.

Article 31
Qualifications des arbitres

Les arbitres doivent être des personnes jouissant d'une haute considération morale, reconnues pour leur compétence dans le domaine du droit, du commerce, de l'industrie ou de la finance, et offrant toute garantie d'impartialité et d'independance.

Regla 31
Cualidades de los o las Árbitros

Los o las árbitros serán personas imparciales e independientes, de alta consideración moral y reconocida competencia en materia de derecho, comercio, industria o finanzas.

1081. Proposed (AF)AR 31 corresponds to current Art. 8 on the qualifications of arbitrators. It differs a little from proposed AR 29 which is in line with Art. 57 of the Convention.

1082. The proposed rule brings some changes to current Art. 8. Arbitrators' qualifications are paramount as they are also grounds for disqualification. Proposed (AF)AR 31 retains the current qualifications of "high moral character and recognized competence in the fields of law, commerce, industry or finance" currently in Art. 8. However, it replaces "who may be relied upon to exercise independent judgement" with language requiring that arbitrators be "impartial and independent". These proposed modifications would bring the rules in line with generally accepted standards and the prevailing interpretation of the phrase "relied upon to exercise independent judgment" in ICSID disqualification decisions. It is also in line with the UNCITRAL Arbitration Rules. While the English and French versions of Art. 14 of the Convention refer to "independent judgment" and "*garantie d'indépendance*," the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all versions are equally authentic, it is generally accepted that arbitrators must be both impartial and independent.

RULE 32 – DISCLOSURE OF THIRD-PARTY FUNDING

Rule 32
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, 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.

Article 32
Divulgation d'un financement par un tiers

(1) « Financement par un tiers » désigne l'apport de fonds ou de tout autre soutien matériel pour la poursuite d'une instance ou la défense contre une instance, par une personne physique ou morale qui n'est pas partie au différend (« tiers financeur »), à une partie à l'instance, une affiliée de cette partie ou un cabinet d'avocats représentant cette partie. Ces fonds ou ce soutien matériel peuvent être apportés :

(a) par le biais d'un don ou d'une subvention ; ou

(b) en contrepartie d'une prime ou en échange d'une rémunération ou d'un remboursement dépendant en totalité ou en partie de l'issue de l'instance.

(2) Une partie doit déposer une notification écrite divulguant qu'elle bénéficie d'un financement par un tiers et indiquant le nom du tiers financeur. Cette notification est adressée au Secrétariat immédiatement après l'enregistrement de la requête ou dès la conclusion d'un accord de financement par un tiers après l'enregistrement.

(3) Chaque partie a une obligation continue de divulguer toute modification dans les informations visées au paragraphe (2) intervenant après la divulgation initiale, y compris la cessation de l'accord de financement.

Regla 32
Revelación de Financiamiento por Terceros

(1) El "financiamiento por terceros" es la provisión de fondos u otro apoyo sustancial a efectos de dar curso o defenderse en un procedimiento, por una persona natural o jurídica que no es parte en la diferencia ("tercero financiador") a una parte del procedimiento, una sociedad relacionada con esa parte o una firma de abogados que represente a esa parte. Dichos fondos o apoyo sustancial podrán proporcionarse:

(a) mediante una donación o un subsidio; o

(b) en contraprestación de una prima o a cambio de una remuneración o un reembolso total o parcialmente dependiente del resultado del procedimiento.

(2) Una parte deberá presentar una notificación escrita revelando que goza de financiamiento por terceros y el nombre de dicho tercero financiador. Esta notificación deberá enviarse al Secretariado inmediatamente después del registro de la solicitud de arbitraje o una vez se celebre el acuerdo de financiamiento por terceros si este ocurre con posterioridad al registro.

(3) Cada parte tendrá la obligación permanente de revelar cualquier cambio en la información a la que se hace referencia en el párrafo (2) que tenga lugar después de la revelación inicial, lo cual incluye la resolución o rescisión del acuerdo de financiamiento.

1083. Proposed (AF)AR 32 is identical to proposed AR 21.

RULE 33 – METHOD OF CONSTITUTING THE TRIBUNAL

CURRENT RELATED PROVISIONS: A(AF)R Art. 6, 9

Rule 33
Method of Constituting the Tribunal

(1) The number of arbitrators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.

Article 33
Méthode de constitution du Tribunal

(1) Le nombre d’arbitres et la méthode de leur nomination doivent être déterminés avant que le ou la Secrétaire général(e) ne puisse intervenir sur une quelconque nomination proposée par une partie.

(2) Les parties s'efforcent de se mettre d'accord sur un nombre impair d'arbitres et la méthode de leur nomination. Si les parties n'informent pas le ou la Secrétaire général(e) d'un accord dans les 60 jours suivant la date de l'enregistrement, le Tribunal comprend trois arbitres ; chaque partie nomme un arbitre et le troisième, qui est le ou la Président(e) du Tribunal, est nommé(e) par accord des parties.

Regla 33
Método de Constitución del Tribunal

(1) El número de árbitros y el método de su nombramiento deben determinarse antes de que el o la Secretario(a) General pueda pronunciarse respecto de cualquier nombramiento propuesto por una parte.

(2) Las partes procurarán acordar cualquier número impar de árbitros y el método de su nombramiento. Si las partes no informan al o a la Secretario(a) General de un acuerdo dentro de los 60 días siguientes a la fecha de registro, el Tribunal será compuesto de tres árbitros, un o una árbitro nombrado(a) por cada parte y el o la tercer(a) árbitro, que será el o la Presidente(a) del Tribunal, nombrado(a) por acuerdo de las partes.

1084. Proposed (AF)AR 33(2) specifies that the default method of constitution of a Tribunal under the (AF)AR is three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties, as provided by current Art. 6(1). This corresponds to the default method of constitution contained in Art. 37(2)(b) of the Convention (*see* AR 23).

1085. Current Art. 6(4) provides for a 90-day period after the notice of registration after which a party can opt for the default method. This has been reduced to 60 days in proposed (AF)AR 33(2), to mirror current AR 2(3) and proposed AR 22(2).

1086. The provisions of current Art. 9 are deleted given their lack of utility, as in the proposed AR.

RULE 34 – SECRETARY-GENERAL ASSISTANCE WITH APPOINTMENT

Rule 34
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

Article 34
Assistance du ou de la Secrétaire général(e) dans les nominations

Les parties peuvent demander conjointement au ou à la Secrétaire général(e) de les assister dans la nomination d'un(e) Président(e) du Tribunal ou d'un(e) arbitre unique.

Regla 34
Asistencia del o de la Secretario(a) General con los Nombramientos

Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una Presidente(a) del Tribunal o de un o una Árbitro Único.

1087. Proposed (AF)AR 34 is new in the AF system, even if common in practice, and is identical to proposed AR 24.

RULE 35 – APPOINTMENT OF ARBITRATORS BY THE SECRETARY-GENERAL

CURRENT RELATED PROVISIONS: A(AF)R Art. 6(4), 10

Rule 35
Appointment of Arbitrators by the Secretary-General

(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Secretary-General appoint the arbitrator(s) who have not yet been appointed.

(2) The Secretary-General shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.

(3) The Secretary-General shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

Article 35
Nomination des arbitres par le ou la Secrétaire général(e)

(1) Si le Tribunal n'a pas été constitué dans un délai de 90 jours suivant la date de l'enregistrement, ou tout autre délai convenu entre les parties, l'une ou l'autre des

parties peut demander au ou à la Secrétaire général(e) de nommer l'arbitre ou les arbitres non encore nommé(e)(s).

(2) Le ou la Secrétaire général(e) nomme le ou la Président(e) du Tribunal après avoir nommé tous membres non encore nommés.

(3) Dans la mesure du possible, le ou la Secrétaire général(e) consulte les parties avant de nommer un(e) arbitre et il ou elle déploie tous les efforts possibles pour nommer tout(e) arbitre ou tou(te)s arbitres dans un délai de 30 jours à compter de la réception de la demande de nomination.

Regla 35
Nombramiento de los o las Árbitros por el o la Secretario(a) General

(1) Si el Tribunal no se hubiese constituido dentro de los 90 días siguientes a la fecha de registro, o dentro del plazo que las partes hubieran acordado, cualquiera de las partes podrá solicitar que el o la Secretario(a) General nombre al/a la o a los/a las árbitro(s) que aún no haya(n) sido nombrado(a)(os)(as).

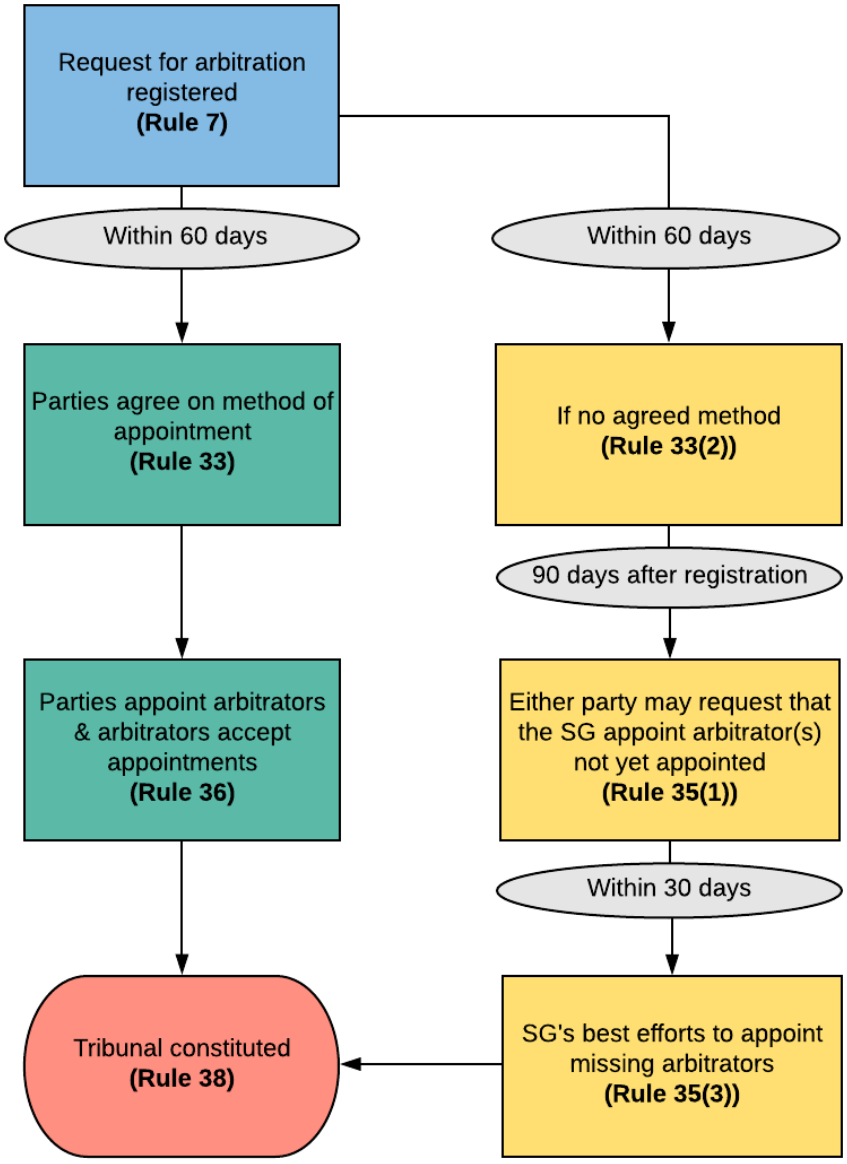
(2) El o la Secretario(a) General nombrará al o a la Presidente(a) del Tribunal luego de nombrar a los miembros que aún no hayan sido nombrados.

(3) El o la Secretario(a) General deberá consultar a las partes en la medida de lo posible antes de nombrar a un o una árbitro y hará lo posible para nombrar al/ a la o a los/a las árbitro(s) dentro de los 30 días siguientes a la fecha de la recepción de la solicitud de nombramiento.

1088. Proposed (AF)AR 35 corresponds to current Art. 6(4) and 10. The Secretary-General is the defaulting appointing authority under the (AF)AR.

1089. The basic steps in constitution of a Tribunal are shown below:

Constitution of the Tribunal – Rules 33-38



RULE 36 – ACCEPTANCE OF APPOINTMENT

CURRENT RELATED PROVISIONS: A(AF)R Art. 11

Rule 36
Acceptance of Appointment

(1) A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) and contact information.

(2) The Secretariat shall request an acceptance from the appointee upon receipt of the notice referred to in paragraph (1). The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

(3) Within 20 days after the receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

(b) 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.

(4) The Secretariat shall notify the parties of the acceptance of appointment by each arbitrator and provide their signed declaration.

(5) The Secretariat shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.

(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

Article 36
Acceptation des nominations

(1) Une partie qui nomme un(e) arbitre notifie au Secrétariat la nomination et indique le nom, la ou les nationalité(s) et les coordonnées de la personne nommée.

(2) Dès réception de la notification visée au paragraphe (1), le Secrétariat demande à la personne nommée si elle accepte sa nomination. Le Secrétariat transmet également à chaque personne nommée les informations reçues des parties pertinentes pour l'établissement de la déclaration visée au paragraphe (3)(b).

(3) Dans les 20 jours suivant la réception de la demande d'acceptation d'une nomination, toute personne nommée doit :

(a) accepter sa nomination ; et

(b) remettre une déclaration signée conforme au modèle publié par le Centre, qui porte sur certaines questions telles que l'indépendance, l'impartialité, la disponibilité de l'arbitre et son engagement à préserver le caractère confidentiel de l'instance.

(4) Le Secrétariat notifie aux parties l'acceptation de chaque nomination et fournit la déclaration signée de chaque arbitre.

(5) Le Secrétariat notifie aux parties si un(e) arbitre n'accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe (3), et une autre personne est nommée en qualité d'arbitre conformément à la méthode suivie pour la précédente nomination.

(6) Chaque arbitre a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3)(b).

Regla 36
Aceptación del Nombramiento

(1) La parte que nombre a un o una árbitro notificará al Secretariado el nombramiento y proporcionará el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada.

(2) El Secretariado solicitará la aceptación de la persona nombrada una vez recibida la notificación a la que se hace referencia en el párrafo (1). El Secretariado también transmitirá a cada persona nombrada la información recibida de las partes que sea relevante para completar la declaración a la que se hace referencia en el párrafo (3)(b).

(3) Dentro de los 20 días siguientes a la recepción de la solicitud de aceptación de un nombramiento, la persona nombrada deberá:

(a) aceptar el nombramiento; y

(b) proporcionar una declaración firmada en la forma publicada por el Centro, en la que indique cuestiones tales como la independencia, imparcialidad y disponibilidad del o de la árbitro y su compromiso de mantener la confidencialidad del procedimiento.

(4) El Secretariado notificará a las partes la aceptación de cada nombramiento y distribuirá la declaración firmada por cada árbitro.

(5) El Secretariado notificará a las partes si un o una árbitro no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada como árbitro de conformidad con el método seguido para el nombramiento anterior.

(6) Cada árbitro tendrá la obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3)(b).

1090. Proposed (AF)AR 36 is identical to proposed AR 26 and contains the provisions of current Art. 11.

RULE 37 – REPLACEMENT OF ARBITRATORS PRIOR TO CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: A(AF)R Art. 12

Rule 37
Replacement of Arbitrators Prior to Constitution of the Tribunal

(1) At any time before the Tribunal is constituted:

(a) an arbitrator may withdraw an acceptance;

(b) a party may replace an arbitrator whom it appointed; or

(c) the parties may agree to replace any arbitrator.

(2) A replacement arbitrator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced arbitrator was appointed.

Article 37
Remplacement d'arbitres avant la constitution du Tribunal

(1) À tout moment avant que le Tribunal ne soit constitué :

(a) un(e) arbitre peut retirer son acceptation ;

(b) une partie peut remplacer un(e) arbitre qu'elle a nommé(e) ; ou

(c) les parties peuvent convenir du remplacement de tout(e) arbitre.

(2) Un(e) arbitre remplaçant(e) est nommé(e) dès que possible, selon la même méthode de nomination que celle utilisée pour l'arbitre ayant retiré son acceptation ou l'arbitre remplacé(e).

Regla 37
Reemplazo de Árbitros con Anterioridad a la Constitución del Tribunal

(1) En cualquier momento antes de que se constituya el Tribunal:

(a) Un o una árbitro podrá retirar su aceptación;

(b) una parte podrá reemplazar a cualquier árbitro que haya nombrado; o

(c) las partes podrán acordar reemplazar a cualquier árbitro.

(2) Se nombrará a un o una árbitro sustituto(a) lo antes posible, de conformidad con el método utilizado para el nombramiento del o de la árbitro que se haya retirado o reemplazado.

1091. Proposed (AF)AR 37 is identical to proposed AR 27.

RULE 38 – CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: A(AF)R Art. 13

Rule 38
Constitution of the Tribunal

(1) The Tribunal shall be deemed to be constituted on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointments.

(2) As soon as the Tribunal is constituted, the Secretary-General shall transmit the Request, the supporting documents, the notice of registration and communications with the parties to each member.

Article 38
Constitution du Tribunal

(1) Le Tribunal est réputé constitué à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que tou(te)s les arbitres ont accepté leur nomination.

(2) Dès que le Tribunal est constitué, le ou la Secrétaire général(e) transmet à chaque membre la requête, les documents justificatifs, la notification d'enregistrement et toutes communications avec les parties.

Regla 38
Constitución del Tribunal

(1) Se entenderá que se ha constituido el Tribunal en la fecha en que el o la Secretario(a) General notifique a las partes que todos los o las árbitros han aceptado sus nombramientos.

(2) Tan pronto como se haya constituido el Tribunal, el o la Secretario(a) General transmitirá la solicitud, los documentos de respaldo y la notificación del registro y las comunicaciones con las partes a cada uno de los miembros del Tribunal.

1092. Proposed (AF)AR 38 is identical to proposed AR 28. The provisions of current Art. 13 on Constitution of the Tribunal are now contained in proposed (AF)AR 38. The arbitrators' declaration form for AF arbitration will be substantively the same as for arbitrations under the AR (*see* Schedule 2 – Arbitrator Declaration).

CHAPTER V – DISQUALIFICATION OF ARBITRATORS AND VACANCIES

RULE 39 – DISQUALIFICATION OF ARBITRATORS

CURRENT RELATED PROVISIONS: A(AF)R Art. 15

Chapter V
Disqualification of Arbitrators and Vacancies

Rule 39
Proposal for Disqualification of Arbitrators

(1) A party may propose the disqualification of one or more arbitrators ("proposal") on the following grounds:

(a) that the arbitrator was ineligible for appointment to the Tribunal under Rule 30(2), (3) or (4); or

(b) that circumstances exist that give rise to justifiable doubts as to the arbitrator's qualities required by Rule 31.

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Tribunal and within 20 days after the later of:

(i) the constitution of the Tribunal; or

(ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based;

(b) the party proposing the disqualification shall file a written submission, specifying the grounds on which it is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file its response and supporting documents within seven days after receipt of the written submission;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. This statement shall be filed within five days after receipt of the written submissions referred to in paragraph (2)(c); and

(e) the parties may file final written submissions on the proposal within seven days after expiry of the time limit referred to in paragraph (2)(d).

(3) If the other party agrees to the proposal prior to the dispatch of the decision referred to in Rule 40, the arbitrator shall resign in accordance with Rule 42.

(4) The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued by the Tribunal while the proposal was pending, be reconsidered by the reconstituted Tribunal.

Chapitre V
Récusation d'arbitres et vacances

Article 39
Proposition de récusation d'arbitres

(1) Une partie peut proposer la récusation d'un(e) ou plusieurs arbitre(s) (« proposition ») pour les motifs suivants :

(a) l'arbitre ne remplissait pas les conditions indiquées à l'article 30(2), (3) ou (4) pour sa nomination au Tribunal ; ou

(b) il existe des circonstances de nature à susciter des doutes légitimes quant aux qualités requises d'un arbitre par l'article 31.

(2) La procédure suivante s'applique :

(a) une proposition est soumise après la constitution du Tribunal et dans un délai de 20 jours suivant la plus tardive des dates suivantes :

(i) la date de constitution du Tribunal ; ou

(ii) la date à laquelle la partie qui propose la récusation a pris connaissance ou aurait dû avoir connaissance des faits sur lesquels est fondée la proposition ;

(b) la partie proposant la récusation dépose des écritures précisant les motifs sur lesquels elle est fondée et comprenant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ;

(c) l'autre partie dépose sa réponse et ses documents justificatifs dans un délai de sept jours à compter de la réception des écritures ;

(d) l'arbitre qui fait l'objet de la proposition peut déposer une déclaration limitée à des informations factuelles pertinentes au regard de la proposition. Cette déclaration est déposée dans un délai de cinq jours à compter de la réception des écritures visées au paragraphe (2)(c) ; et

(e) les parties peuvent déposer des écritures finales relatives à la proposition dans un délai de sept jours à compter de l'expiration du délai visé au paragraphe (2)(d).

(3) Si l'autre partie accepte la proposition avant l'envoi de la décision visée à l'article 40, l'arbitre démissionne conformément à l'article 42.

(4) L'instance se poursuit pendant que la proposition est pendante, sauf si elle est suspendue, en tout ou partie, par accord des parties. Si la proposition se solde par une récusation, l'une ou l'autre des parties peut demander que toute ordonnance ou décision rendue par le Tribunal alors que la proposition était pendante soit réexaminée par le Tribunal reconstitué.

Capítulo V
Recusación de Árbitros y Vacantes

Regla 39
Propuesta de Recusación de los o las Árbitros

(1) Una parte podrá proponer la recusación de uno o más árbitros ("propuesta") por las siguientes causales:

(a) que el árbitro no fuera apto para ser nombrado en el Tribunal en virtud de la Regla 30(2), (3) o (4); o

(b) que existieran circunstancias que den lugar a dudas justificables en cuanto a las cualidades del árbitro requeridas por la Regla 31.

(2) Se aplicará el siguiente procedimiento:

(a) cualquier propuesta deberá presentarse después de la constitución del Tribunal y dentro de los 20 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal; o

(ii) la fecha en la que la parte que propone la recusación tuvo conocimiento o debería haber adquirido conocimiento de los hechos en los que se funda la propuesta;

(b) la parte que proponga la recusación deberá presentar un escrito especificando las causales en que se funda la propuesta e incluir una relación de los hechos

pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(c) la otra parte deberá presentar su respuesta y documentos de respaldo dentro de los siete días siguientes a la recepción del escrito;

(d) el o la árbitro a quien se refiera la propuesta podrá presentar una explicación que se limite a información de hecho relevante para la propuesta. Esta explicación se presentará dentro de los cinco días siguientes a la recepción de los escritos a los que se hace referencia en el párrafo (2)(c); y

(e) las partes podrán presentar escritos finales acerca de la propuesta dentro de los siete días siguientes al vencimiento del plazo al que se hace referencia en el párrafo (2)(d).

(3) Si la otra parte está de acuerdo con la propuesta con anterioridad al envío de la decisión a la que se hace referencia en la Regla 40, el o la árbitro deberá renunciar a su cargo de conformidad con la Regla 42.

(4) A menos que el procedimiento sea suspendido, total o parcialmente, de común acuerdo por las partes, este continuará mientras la propuesta de recusación se encuentre en curso. Si la propuesta tiene como consecuencia la recusación del o de la árbitro, cualquiera de las partes podrá solicitar que el Tribunal, una vez que sea reconstituido, reconsidere cualquier resolución o decisión emitida por el Tribunal mientras la propuesta de recusación se encontraba en curso.

1093. Proposed (AF)AR 39 is similar to proposed AR 29, and corresponds to current Art. 15. The grounds to propose a disqualification of arbitrators remain two-fold as in current Art. 15(1).

1094. The grounds relating to nationality requirements are maintained in proposed (AF)AR 39(1)(a), as in current Art. 15(1).

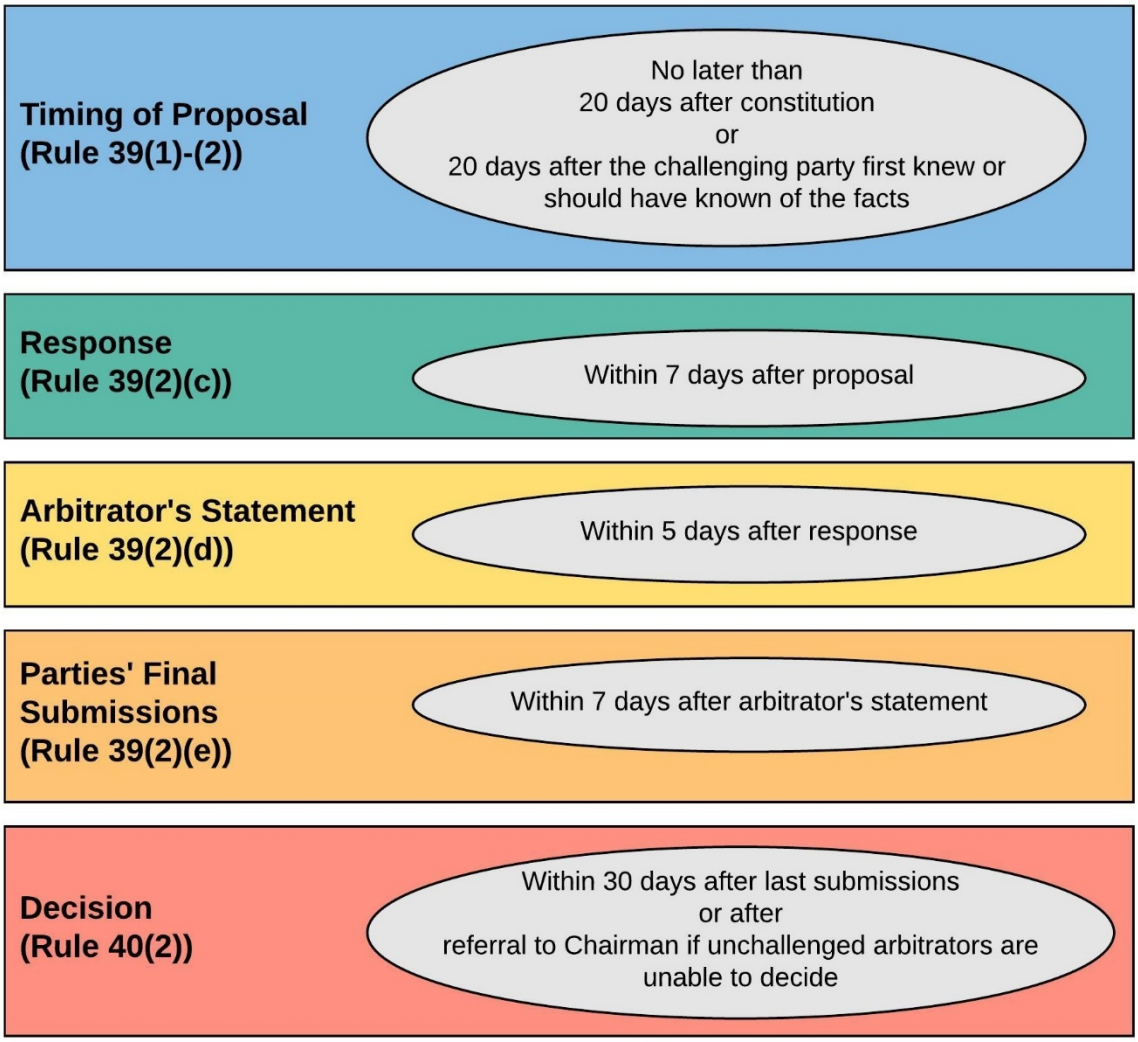
1095. However, in proposed (AF)AR 39(1(b), the ground based on "a manifest lack of the qualities required by Article 8" is replaced by the ground that there exist "circumstances that give rise to justifiable doubts as to the arbitrator's qualities required by Rule 31". This follows the change made under the qualifications of arbitrators in proposed (AF)AR 31.

1096. Proposed (AF)AR 39(2) spells out the procedure for a disqualification proposal in the same terms as proposed AR 29.

1097. Proposed (AF)AR 39(3) allows the other party to agree to the disqualification proposal, leading to the arbitrator's resignation. This gives flexibility to the parties that does not currently exist in proposed AR 29, in light of the provisions of the Convention. Ultimately, Member States may want to amend the Convention in this respect.

1098. The procedure for disqualification is summarized below:

Disqualification of Arbitrators – Rules 39 – 40



RULE 40 – DECISION OF THE PROPOSAL FOR DISQUALIFICATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 15

Rule 40
Decision on the Proposal for Disqualification

(1) The Secretary-General shall take the decision on the proposal.

(2) The decision on any proposal shall be made within 30 days after the expiry of the time limit referred to in Rule 39(2)(e).

Article 40
Décision sur la proposition de récusation

(1) Le ou la Secrétaire général(e) prend la décision sur la proposition.

(2) La décision relative à une proposition est prise dans les 30 jours suivant l'expiration du délai visé à l'article 39(2)(e).

Regla 40
Decisión sobre la Propuesta de Recusación

(1) El o la Secretario(a) General adoptará la decisión sobre la propuesta.

(2) La decisión sobre cualquier propuesta se adoptará dentro de los 30 días siguientes al vencimiento del plazo al que se hace referencia en la Regla 39(2)(e).

1099. Proposed (AF)AR 40 corresponds to current Art. 15(5) and differs significantly from the existing AF system and the proposed corresponding AR 30. (AF)AR 40 proposes that the Secretary-General decide disqualification proposals, instead of the co-arbitrators or the Chairman of the Administrative Council. Proposed (AF)AR 40, like proposed AR 30, also simplifies the process and, in this manner, answers some of these concerns.

RULE 41 – INCAPACITY OR FAILURE TO PERFORM DUTIES

CURRENT RELATED PROVISIONS: A(AF)R Art. 14(1), 14(2)

Rule 41
Incapacity or Failure to Perform Duties

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 39 and 40 shall apply.

Article 41
Incapacité ou défaillance dans l'exercice des fonctions

Si un(e) arbitre devient incapable d'exercer ou n'exerce pas ses fonctions d'arbitre, la procédure prévue par les articles 39 et 40 s'applique.

Regla 41
Incapacidad o Imposibilidad de Desempeñar Funciones

Si un o una árbitro se incapacitara o no pudiera desempeñar las funciones de su cargo, se aplicará el procedimiento establecido en las Reglas 39 y 40.

1100. Proposed (AF)AR 41 corresponds to current Art. 14(1) and (2) and parallels proposed AR 31.

RULE 42 – RESIGNATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 14(3)

Rule 42
Resignation

An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal.

Article 42
Démission

Un(e) arbitre peut démissionner en adressant une notification à cet effet au ou à la Secrétaire général(e) et aux autres membres du Tribunal.

Regla 42
Renuncia

Un o una árbitro podrá renunciar a su cargo notificando al o a la Secretario(a) General y a los otros miembros del Tribunal.

1101. Proposed (AF)AR 42 is similar to proposed AR 32 and corresponds to current Art. 14(3). However, unlike proposed AR 32, proposed (AF)AR 42 no longer requires the consent of the co-arbitrators to another arbitrator's resignation. That consent was needed to determine how the replacing arbitrator would be appointed. While that requirement is maintained in the proposed AR (necessitated by Art. 56(2) of the Convention), requiring the consent of a resigning arbitrator's co-arbitrators is cumbersome in practice. The resulting potential for delay in making the replacement appointment does not seem justified. For this reason, the requirement has been omitted in the proposed (AF)AR. Given that the Secretary-General takes the decision under proposed (AF)AR 43 on Vacancy (current Art. 17), that issue is now simplified as explained in the next proposed (AF)AR.

RULE 43 – VACANCY ON THE TRIBUNAL

CURRENT RELATED PROVISIONS: A(AF)R Art. 16-18

Rule 43
Vacancy on the Tribunal

(1) The Secretary-General shall notify the parties of any vacancy on the Tribunal.

(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.

(3) A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. A newly appointed arbitrator may require that any portion of a hearing be recommenced if necessary to decide a pending matter.

Article 43
Vacance au sein du Tribunal

(1) Le ou la Secrétaire général(e) notifie aux parties toute vacance au sein du Tribunal.

(2) L'instance est suspendue de la date de la notification de la vacance jusqu'à ce que la vacance ait été remplie.

(3) Une vacance au sein du Tribunal est remplie selon la méthode utilisée pour procéder à la nomination initiale, étant toutefois entendu que le ou la Secrétaire

général(e) remplit toute vacance qui n'a pas été remplie dans un délai de 45 jours à compter de la notification de la vacance.

(4) Dès qu'une vacance a été remplie et que le Tribunal a été reconstitué, l'instance reprend au point où elle était arrivée au moment où la vacance a été notifiée. Un(e) arbitre nouvellement nommé(e) peut requérir que toute partie d'une audience soit recommencée, si cela est nécessaire à la détermination d'une question pendante.

Regla 43
Vacante en el Tribunal

(1) El o la Secretario(a) General notificará a las partes cualquier vacante en el Tribunal.

(2) El procedimiento se suspenderá desde la fecha de notificación de la vacante hasta suplir la vacante.

(3) Cualquier vacante en el Tribunal se suplirá siguiendo el método utilizado para realizar el nombramiento original, excepto que el o la Secretario(a) General suplirá cualquier vacante que no se ha suplido dentro de los 45 días siguientes a la notificación de la vacante.

(4) Una vez que se haya suplido una vacante y el Tribunal se haya reconstituido, el procedimiento continuará a partir de la etapa a que se había llegado cuando se notificó la vacante. El o la nuevo árbitro podrá solicitar que cualquier parte de una audiencia se reinicie en caso de que fuera necesario para decidir algún asunto pendiente.

1102. Proposed (AF)AR 43 merges current Art. 16, 17 and 18, and is materially similar to proposed AR 33. The principal differences is that under proposed (AF)AR 42, the Secretary-General now fills any vacancy not filled within 45 days of the notice, in place of the Chairman, and vacancy caused by a resignation shall be filled by the method used to make the original appointment with no need to consider whether there was consent to resignation (*see* above). This streamlines the vacancy process.

1103. The provisions of current Art. 14 on replacement of arbitrators after constitution of the Tribunal are now contained in proposed (AF)AR 41 and 42.

CHAPTER VI – INITIAL PROCEDURES

RULE 44 – FIRST SESSION

CURRENT RELATED PROVISIONS: A(AF)R Art. 21(1), 28

Chapter VI
Initial Procedures

Rule 44
First Session

(1) Subject to paragraph (2), the Tribunal shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).

(2) The first session shall be held within 60 days after the Tribunal's constitution or such other period as the parties may agree. If the President of the Tribunal determines that it is not possible to convene the parties and the other members within this period, the first session shall be held solely among the Tribunal members after consulting with the parties in writing on the matters listed in paragraph (4).

(3) The first session may be held in person or remotely, by any means that the Tribunal deems appropriate. The agenda, method and date of the first session shall be determined by the President of the Tribunal after consulting with the other members and the parties.

(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;

(c) the division of advances payable pursuant to the (Additional Facility) Administrative and Financial Regulations 7(5);

(d) the procedural language(s), translation and interpretation;

(e) the method of filing and routing of written communications;

(f) the number, type and format of written submissions;

(g) the seat of arbitration;

(h) the place of hearings;

(i) the scope, timing and procedure for requests for production of documents between the parties, if any;

(j) the procedural calendar, including written submissions, hearings, the Tribunal's orders, decisions and the Award;

(k) the manner of keeping the recordings and transcripts of hearings;

(l) the publication of documents and recordings; and

(m) the protection of confidential information.

(5) The Tribunal shall issue an order recording the parties' agreements and any Tribunal decisions on the procedure within 15 days after the later of the first session or the last written submission on procedural matters addressed at the first session.

Chapitre VI
Procédures initiales

Article 44
Première session

(1) Sous réserve du paragraphe (2), le Tribunal tient sa première session avec les parties pour traiter des questions de procédure, notamment celles qui sont énumérées au paragraphe (4).

(2) La première session se tient dans les 60 jours suivant la constitution du Tribunal ou tout autre délai convenu entre les parties. Si le ou la Président(e) du Tribunal estime qu'il n'est pas possible de convoquer les parties et les autres membres dans ce délai, la première session se tient uniquement entre les membres du Tribunal après consultation des parties par écrit sur les questions énumérées au paragraphe (4).

(3) La première session peut se tenir en personne ou à distance, par tous moyens que le Tribunal juge appropriés. L'ordre du jour, les modalités et la date de la première session sont déterminés par le ou la Président(e) du Tribunal après consultation des autres membres et des parties.

(4) Préalablement à la première session, le Tribunal communique un ordre du jour aux parties et les invite à lui faire part de leurs observations sur les questions de procédure, notamment :

(a) le règlement d'arbitrage applicable ;

(b) le nombre de membres requis pour constituer le quorum au sein du Tribunal ;

(c) la répartition des avances devant être payées conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) ;

(d) la ou les langue(s) de la procédure, la traduction et l'interprétation ;

(e) les modalités de dépôt et de transmission des communications écrites ;

(f) le nombre, la nature et le format des écritures ;

(g) le siège de l'arbitrage ;

(h) le lieu des audiences ;

(i) la portée des éventuelles demandes de production de documents entre les parties, ainsi que les délais et la procédure qui leur sont applicables ;

(j) le calendrier de la procédure, notamment les écritures, les audiences, les ordonnances, les décisions et la sentence du Tribunal ;

(k) les modalités d'enregistrement et de transcription des audiences ;

(l) la publication de documents et enregistrements ; et

(m) la protection des informations confidentielles.

(5) Le Tribunal rend une ordonnance prenant acte des accords des parties et de toutes décisions du Tribunal sur la procédure dans un délai de 15 jours à compter de la plus tardive des dates suivantes, soit la date de la première session, soit celle des dernières écritures relatives aux questions de procédure traitées lors de la première session.

Capítulo VI
Actuaciones Iniciales

Regla 44
Primera Sesión

(1) Sujeto a lo dispuesto en el párrafo (2), el Tribunal celebrará una primera sesión con las partes para abordar cuestiones procesales, lo cual incluye las cuestiones enumeradas en el párrafo (4).

(2) La primera sesión se celebrará dentro de los 60 días siguientes a la constitución del Tribunal, o cualquier otro plazo acordado por las partes. Si el o la Presidente(a) del Tribunal determina que no es posible convocar a las partes y a los otros miembros dentro de este plazo, la primera sesión se celebrará exclusivamente entre los miembros del Tribunal después de consultar a las partes por escrito respecto de la lista de cuestiones referidas en el párrafo (4).

(3) La primera sesión podrá celebrarse en persona o a distancia, por cualquier medio que el Tribunal estime apropiado. La agenda, la modalidad y la fecha de la primera sesión serán determinadas por el o la Presidente(a) del Tribunal luego previa consulta a los otros miembros y a las partes.

(4) Antes de la primera sesión, el Tribunal circulará una agenda a las partes y las invitará a presentar sus observaciones sobre cuestiones procesales, lo cual incluye:

(a) las reglas de arbitraje aplicables;

(b) el número de miembros necesario para constituir el quórum del Tribunal;

(c) la división de los anticipos que deban pagarse de conformidad con lo dispuesto en la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario);

(d) el(los) idioma(s) del procedimiento, traducción e interpretación;

(e) el método de presentación y transmisión de las comunicaciones escritas;

(f) el número, tipo y formato de los escritos;

(g) la sede del arbitraje;

(h) el lugar de las audiencias;

(i) el alcance, los plazos y el procedimiento aplicables a las solicitudes de exhibición de documentos entre las partes, si las hubiera;

(j) el calendario procesal, lo cual incluye los escritos, audiencias, y las resoluciones, decisiones y el laudo del Tribunal;

(k) la modalidad de las grabaciones y transcripciones de las audiencias;

(l) la publicación de los documentos y las grabaciones; y

(m) la protección de información confidencial.

(5) El Tribunal emitirá una resolución mediante la cual se deje constancia de los acuerdos de las partes y las decisiones del Tribunal sobre el procedimiento dentro de los 15 días siguientes a lo que suceda de último, sea la primera sesión o el último escrito sobre cuestiones procesales abordadas en la primera sesión.

1104. Proposed (AF)AR 44 is virtually identical to proposed AR 34 except that proposed (AF)AR 44(4)(g) provides for the seat of arbitration to also be discussed at the first session.

RULE 45 – MANIFEST LACK OF LEGAL MERIT

CURRENT RELATED PROVISIONS: A(AF)R Art. 45(6)

Rule 45
Manifest Lack of Legal Merit

(1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim or the competence of the Tribunal.

(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;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the objection;

(c) if a party files the objection before constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the objection within 60 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the objection; or

(iii) the last oral submission on the objection.

(3) The decision of the Tribunal shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 46 or to argue subsequently in the proceeding that a claim is without legal merit.

(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.

Article 45
Défaut manifeste de fondement juridique

(1) Une partie peut soulever une objection selon laquelle une demande est manifestement dénuée de fondement juridique. L'objection peut porter sur le fond de la demande ou la compétence du Tribunal.

(2) La procédure suivante s'applique :

(a) une partie dépose des écritures dans un délai maximum de 30 jours après la constitution du Tribunal, en indiquant précisément les motifs sur lesquels l'objection est fondée, et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ;

(b) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l'objection ;

(c) si une partie soulève une objection avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais relatifs aux écritures concernant l'objection, de telle sorte que le Tribunal puisse l'examiner dès sa constitution ; et

(d) le Tribunal rend sa décision concernant l'objection dans un délai de 60 jours à compter de la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à l'objection ; ou

(iii) la date de la dernière plaidoirie relative à l'objection.

(3) La décision du Tribunal ne porte en aucune manière atteinte au droit d'une partie de soulever une objection préliminaire conformément à l'article 46 ou de soutenir ultérieurement au cours de l'instance qu'une demande est dénuée de fondement juridique.

(4) Si le Tribunal décide que toutes les demandes sont manifestement dénuées de fondement juridique, il rend une sentence dans ce sens. Dans le cas contraire, le

Tribunal rend une décision sur l'objection et fixe tout délai nécessaire à la poursuite de l'instance.

Regla 45
Manifiesta Falta de Mérito Jurídico

(1) Una parte podrá oponer una excepción relativa a la manifiesta falta de mérito jurídico de una reclamación. La excepción podrá referirse al fondo de la reclamación o la competencia del Tribunal.

(2) Se aplicará el siguiente procedimiento:

(a) una parte deberá presentar un escrito a más tardar 30 días después de la constitución del Tribunal, especificando las causales en que se funda la excepción, e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción;

(c) si una parte opone la excepción antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la excepción, de tal forma que el Tribunal pueda considerar la excepción con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la excepción dentro de los 60 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la excepción; o

(iii) la última presentación oral sobre la excepción.

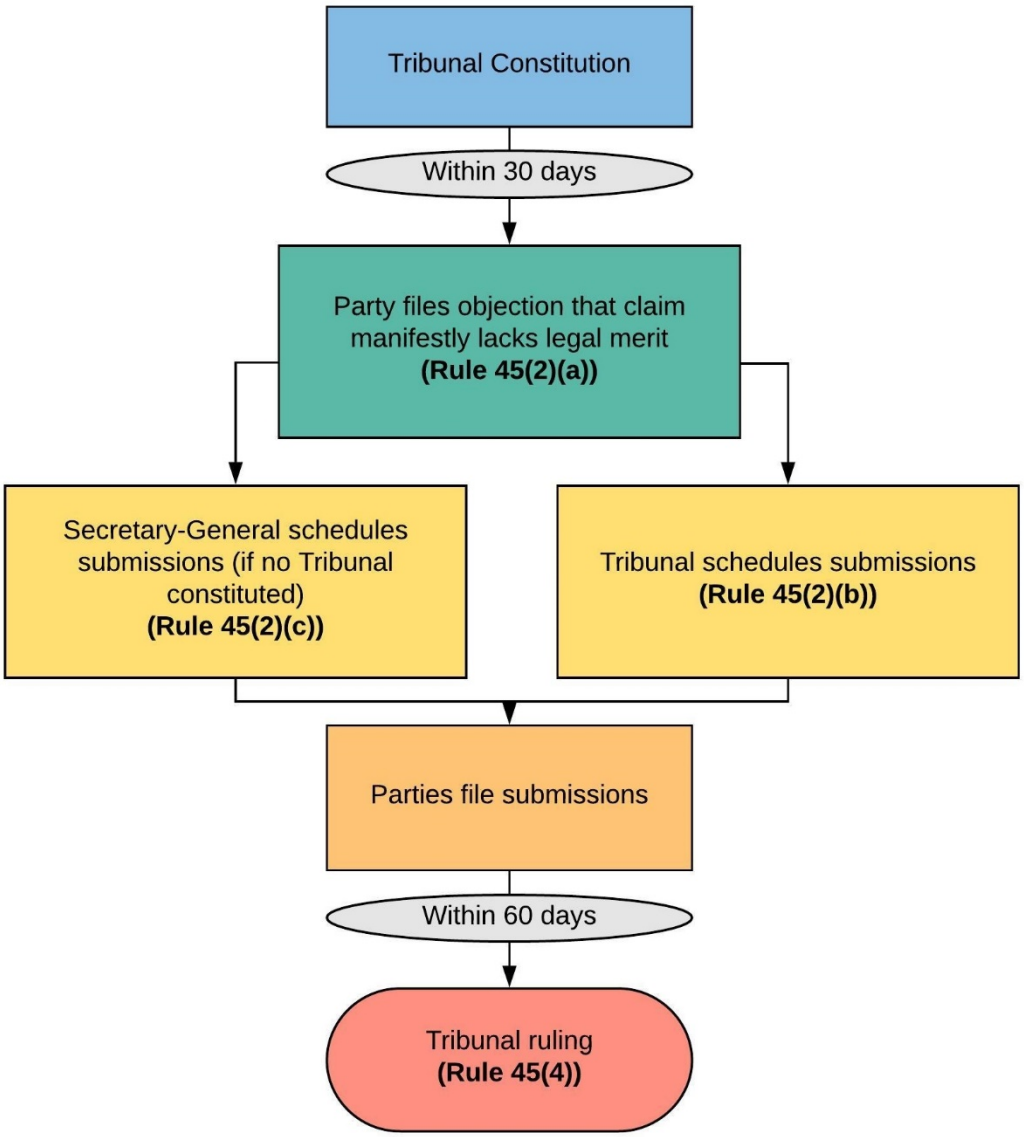
(3) La decisión del Tribunal será sin perjuicio del derecho de una parte a oponer una excepción preliminar de conformidad con lo dispuesto en la Regla 46 o a argumentar posteriormente en el procedimiento que una reclamación carece de mérito jurídico.

(4) Si el Tribunal decide que todas las reclamaciones carecen manifiestamente de mérito jurídico, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión sobre la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

1105. Proposed (AF)AR 45 is identical to proposed AR 35.

1106. The basic steps in an application to dismiss a claim for manifest lack of legal merit are shown below.

Manifest Lack of Legal Merit Objection – Rule 45



RULE 46 – PRELIMINARY OBJECTION

CURRENT RELATED PROVISIONS: A(AF)R Art. 45(1)-(5), 45(7)

Rule 46
Preliminary Objections

(1) The Tribunal shall have the power to rule on its competence. For the purposes of this Rule, an agreement providing for arbitration under the Additional Facility Rules shall be severable from the other terms of the contract in which it may have been included.

(2) A party may file a preliminary objection that the dispute or any ancillary claim is not within the competence of the Tribunal.

(3) The following procedure shall apply:

(a) a preliminary objection shall be made as soon as possible. Unless the facts on which the objection is based are unknown to the party at the relevant time, the objection shall be made no later than:

(i) the date to file the counter-memorial if the objection relates to the main claim; or

(ii) the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim;

(b) the party shall file a written submission, specifying the grounds on which the preliminary objection is based and including a statement of relevant facts, law and arguments, with any supporting documents; and

(c) the Tribunal shall fix time limits for written or oral submissions, as required, on the preliminary objection.

(4) The Tribunal may address a preliminary objection in a separate phase of the proceeding pursuant to Rule 47, or join the objection to the merits. If the Tribunal decides to address the preliminary objection in a separate phase, it may suspend the proceeding on the merits.

(5) If a party files a preliminary objection it shall also file its counter-memorial on the merits, or file its next written submission after an ancillary claim is raised if the objection relates to the ancillary claim, unless the Tribunal has ordered otherwise.

(6) The Tribunal may at any time on its own initiative consider whether the claim is within its own competence.

(7) the Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.

(8) If the Tribunal decides that the dispute is not within its competence, 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.

Article 46
Objections préliminaires

(1) Le Tribunal est juge de sa compétence. Aux fins du présent article, un accord prévoyant l'arbitrage au titre du Règlement du Mécanisme supplémentaire est considéré comme séparable des autres clauses du contrat dans lequel il figure.

(2) Une partie peut soulever une objection préliminaire fondée sur le motif que le différend ou toute demande accessoire ne ressortit pas à la compétence du Tribunal.

(3) La procédure suivante s'applique :

(a) une objection préliminaire est soulevée aussitôt que possible. Sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré, l'objection est soulevée au plus tard :

(i) à la date fixée pour le dépôt du contre-mémoire si l'objection se rapporte à la demande principale ; ou

(ii) à la date fixée pour le dépôt des écritures suivantes après qu'une demande accessoire soit soulevée, si l'objection se rapporte à la demande accessoire ;

(b) la partie dépose des écritures indiquant précisément les motifs sur lesquels l'objection préliminaire est fondée et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ; et

(c) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l'objection préliminaire.

(4) Le Tribunal peut traiter l'objection préliminaire au cours d'une phase distincte de l'instance conformément à l'article 47 ou l'examiner avec les questions de fond. Si le Tribunal décide de traiter l'objection préliminaire au cours d'une phase distincte, il peut suspendre la procédure sur le fond.

(5) Si une partie soulève une objection préliminaire, elle dépose également son contre-mémoire sur le fond, ou ses écritures suivantes après qu'une demande accessoire soit soulevée, si l'objection se rapporte à la demande accessoire, sauf instructions contraires du Tribunal.

(6) Le Tribunal peut, à tout moment et de sa propre initiative, examiner si le différend ou une demande accessoire ressortit à sa propre compétence.

(7) Le Tribunal rend sa décision concernant l'objection préliminaire dans un délai de 180 jours à compter des dernières écritures ou plaidoiries relatives à l'objection.

(8) Si le Tribunal décide que le différend ne ressortit pas à sa compétence, il rend une sentence dans ce sens. Dans le cas contraire, le Tribunal rend une décision sur l'objection et fixe tout délai nécessaire à la poursuite de l'instance.

Regla 46
Excepciones Preliminares

(1) El Tribunal tendrá la facultad de pronunciarse sobre su competencia. A los fines de esta Regla, un acuerdo que prevea arbitraje en virtud del Reglamento del Mecanismo Complementario será divisible de las demás disposiciones del contrato en el cual figure.

(2) Una parte podrá oponer una excepción preliminar según la cual la diferencia, o una demanda subordinada, no es de la competencia del Tribunal.

(3) Se aplicará el siguiente procedimiento:

(a) una excepción preliminar deberá oponerse lo antes posible. A menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción, la excepción deberá oponerse a más tardar:

(i) en la fecha de presentación del memorial de contestación si la excepción se refiere a la reclamación principal; o

(ii) en la fecha de presentación del escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere a la demanda subordinada;

(b) la parte deberá presentar un escrito, especificando las causales en las cuales se funda la excepción preliminar e incluir una relación de los hechos pertinentes, el derecho y los argumentos junto con cualquier documento de respaldo; y

(c) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción preliminar.

(4) El Tribunal podrá pronunciarse sobre una excepción preliminar en una fase separada del procedimiento de conformidad con lo dispuesto en la Regla 47 o conjuntamente con las cuestiones de fondo. Si el Tribunal decide pronunciarse sobre la excepción preliminar en una fase separada, podrá suspender el procedimiento sobre las cuestiones de fondo.

(5) Si una parte opone una excepción preliminar, también deberá presentar su memorial de contestación sobre el fondo, o presentar el escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere a la demanda subordinada, salvo resolución en contrario del Tribunal.

(6) El Tribunal podrá en cualquier momento considerar de oficio si la reclamación es de su propia competencia.

(7) El Tribunal emitirá su decisión relativa a la excepción preliminar dentro de los 180 días siguientes a lo que suceda de último, sea la presentación de un escrito, o bien, una presentación oral sobre la excepción.

(8) Si el Tribunal decide que la diferencia no es de su propia competencia, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión relativa a la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

1107. Proposed (AF)AR 46 is identical to proposed AR 36. Proposed (AF)AR 46 specifies that the Tribunal has the power to rule on its own competence and that the AF arbitration clause is severable from the agreement that contains it, as currently provided in Art. 45(1).

RULE 47 – BIFURCATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 45(4), 45(5)

Rule 47
Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").

(2) The following procedure shall apply:

(a) if the request for bifurcation relates to a preliminary objection, a party shall file the request within 30 days after the filing of the memorial on the merits or, if the objection relates to an ancillary claim, within 30 days after the filing of the written submission containing the ancillary claim, unless the facts on which the objection is based are unknown to the party at the relevant time;

(b) the request for bifurcation shall specify the questions to be bifurcated;

(c) the Tribunal shall fix time limits for written or oral submissions, as required, on the request for bifurcation; and

(d) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the last written or oral submission on the request.

(3) The Tribunal may at any time on its own initiative decide whether a question is to be addressed in a separate phase of the proceeding.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether bifurcation would materially reduce the time and cost of the proceeding.

Article 47
Bifurcation

(1) Une partie peut demander qu'une question soit traitée au cours d'une phase distincte de l'instance (« demande de bifurcation »).

(2) La procédure suivante s'applique :

(a) si la demande de bifurcation se rapporte à une objection préliminaire, une partie présente la demande dans un délai de 30 jours suivant le dépôt du mémoire sur le fond ou, si le l'objection se rapporte à une demande accessoire dans un délai de 30 jours suivant le dépôt des écritures contenant la demande accessoire, sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré ;

(b) la demande de bifurcation précise les questions devant faire l'objet de la bifurcation ;

(c) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant la demande de bifurcation ; et

(d) le Tribunal rend sa décision concernant une demande de bifurcation dans un délai de 30 jours à compter des dernières écritures ou plaidoiries relatives à la demande.

(3) Le Tribunal peut, à tout moment et de sa propre initiative, décider si une question doit être traitée au cours d'une phase distincte de l'instance.

(4) Pour déterminer s'il se prononce en faveur de la bifurcation, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment il examine si la bifurcation réduirait de manière significative la durée et le coût de l'instance.

Regla 47
Bifurcación

(1) Una parte podrá solicitar que una cuestión sea abordada en una fase separada del procedimiento ("solicitud de bifurcación").

(2) Se aplicará el siguiente procedimiento:

(a) si la solicitud de bifurcación se refiere a una excepción preliminar, una parte presentará la solicitud dentro de los 30 días siguientes a la presentación del memorial sobre el fondo o, si la excepción se refiere a una demanda subordinada, dentro de los 30 días siguientes a la presentación del escrito que contenga la demanda subordinada, a menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción;

(b) la solicitud de bifurcación deberá especificar las cuestiones que deben bifurcarse;

(c) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de bifurcación; y

(d) el Tribunal emitirá su decisión sobre una solicitud de bifurcación dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.

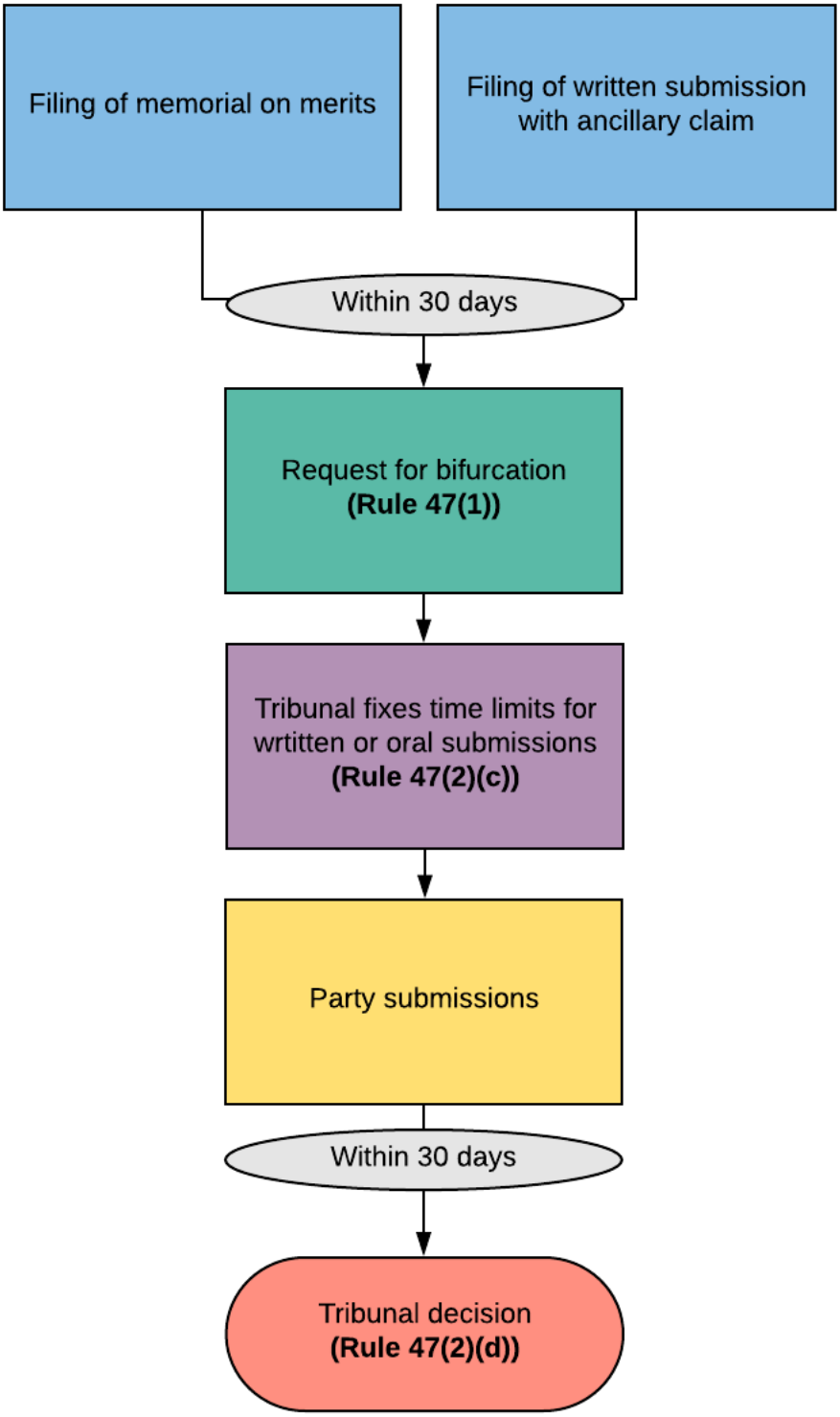
(3) El Tribunal podrá en cualquier momento decidir de oficio si una cuestión debe abordarse en una fase separada del procedimiento.

(4) Al momento de determinar si corresponde bifurcar, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye si la bifurcación reduciría sustancialmente el tiempo y costo del procedimiento.

1108. Proposed (AF)AR 47 is identical to proposed AR 37. This is a new provision (*see* for more details, proposed AR 37).

1109. The main steps in an application to bifurcate are as follows:

Bifurcation – Rule 47



Rule 48
Consolidation or Coordination on Consent of Parties

(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.

(2) The parties referred to in paragraph (1) shall provide the Secretary-General with written terms of reference, specifying the terms of consolidation or coordination to which they would consent.

(3) The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties if the consolidation or coordination requested would promote a fair and efficient resolution of all or any claims asserted in the arbitrations.

Article 48
Consolidation ou coordination consentie par les parties

(1) Les parties à un ou plusieurs arbitrages pendants et administrés par le Centre peuvent convenir de consolider ou coordonner ces arbitrages.

(2) Les parties mentionnées au paragraphe (1) doivent fournir au ou à la Secrétaire général(e) un acte de mission précisant les conditions de la consolidation ou de la coordination à laquelle elles consentiraient.

(3) Si le ou la Secrétaire général(e) considère que la consolidation ou la coordination demandée contribuera au règlement juste et efficace de toutes les demandes formulées dans les arbitrages, il ou elle prend toutes les mesures administratives nécessaires à la mise en œuvre de l'accord des parties.

Regla 48
Acumulación o Coordinación con el Consentimiento de las Partes

(1) Las partes de dos o más arbitrajes en curso administrados por el Centro podrán acordar acumular o coordinar estos arbitrajes.

(2) Las partes a las que se hace referencia en el párrafo (1) proporcionarán al o a la Secretario(a) General los términos de referencia escritos, especificando los términos de la acumulación o coordinación que aceptarían.

(3) El o la Secretario(a) General realizará todas las actuaciones administrativas que sean necesarias para implementar el acuerdo de las partes si la acumulación o coordinación solicitada promoviera una resolución justa y eficiente de la totalidad o algunas de las reclamaciones planteadas en los arbitrajes.

1110. Proposed (AF)AR 48 is identical to proposed AR 38 (*see* for more details, proposed AR 38 and Schedule 7 on Multiparty Claims and Consolidation.)

CHAPTER VII – EVIDENCE

RULE 49 – EVIDENCE: GENERAL PRINCIPLE

CURRENT RELATED PROVISIONS: A(AF)R 41(1)

Chapter VII
Evidence

Rule 49
Evidence: General Principle

The Tribunal shall determine the admissibility and probative value of the evidence adduced.

Chapitre VII
La preuve

Article 49
La preuve : principe général

Le Tribunal est juge de la recevabilité et de la valeur probatoire de tous moyens de preuve invoqués.

Capítulo VII
Prueba

Regla 49
La Prueba: Principio General

El Tribunal determinará la admisibilidad y el valor probatorio de los medios de prueba invocados.

1111. Proposed (AF)AR 49 is identical to proposed AR 39.

RULE 50 – TRIBUNAL ORDER TO PRODUCE DOCUMENTS AND OTHER EVIDENCE

CURRENT RELATED PROVISIONS: A(AF)R Art. 40, 41(2)

Rule 50
Tribunal Order to Produce Documents or Other Evidence

(1) The Tribunal shall decide any dispute arising out of a party's request for production of documents or other evidence. In doing so, it shall consider all relevant circumstances including the scope and timeliness of the request, the relevance of the documents and evidence requested, the time and burden of production and any objections raised by the other party.

(2) The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.

Article 50
Ordonnance du Tribunal aux fins de produire des documents ou autres moyens de preuve

(1) Le Tribunal statue sur tout différend découlant de la demande de production de documents ou d'autres moyens de preuve présentée par une partie. À cet effet, il tient compte de l'ensemble des circonstances pertinentes, notamment l'étendue et la ponctualité de la demande, la pertinence des documents et preuves demandés, les délais de production et le fardeau que représente une telle production ainsi que toutes objections soulevées par l'autre partie.

(2) Le Tribunal peut, à tout moment et de sa propre initiative, ordonner à une partie de produire tous documents ou autres moyens de preuve.

Regla 50
Resolución del Tribunal sobre Exhibición de Documentos u Otros Medios de Prueba

(1) El Tribunal decidirá cualquier diferencia que surja a partir de la solicitud de exhibición de documentos u otros medios de prueba presentada por una parte. Al hacerlo, considerará todas las circunstancias pertinentes lo cual incluye el alcance y la prontitud de la solicitud, la relevancia de los documentos y los medios de prueba solicitados, el momento y la carga de proporcionar los documentos, así como las excepciones opuestas por la otra parte.

(2) El Tribunal podrá en cualquier momento ordenar de oficio a una parte que exhiba documentos u otros medios de prueba.

1112. Proposed (AF)AR 49, which corresponds to current Art. 41(2), is identical to proposed AR 40. It is proposed to delete current Art. 40 on marshalling of evidence as a stand-alone provision, and to incorporate it in proposed (AF)AR 50.

RULE 51 – WITNESSES AND EXPERTS

CURRENT RELATED PROVISIONS: A(AF)R Art. 42, 43

Rule 51
Witnesses and Experts

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.

(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(7) Each witness shall make the following declaration before giving evidence:

"I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth."

(8) Each expert shall make the following declaration before giving evidence:

"I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief."

Article 51
Témoins et experts

(1) Une partie qui entend se fonder sur des preuves fournies par un témoin soumet une déclaration écrite de ce témoin. La déclaration identifie le témoin, contient son témoignage et est signée et datée.

(2) Un témoin qui a soumis une déclaration écrite peut être appelé en vue d'être interrogé lors d'une audience.

(3) Le Tribunal détermine la manière dont l'interrogatoire est conduit.

(4) Tout témoin est interrogé devant le Tribunal, par les parties et sous le contrôle du ou de la Président(e). Tout membre du Tribunal peut lui poser des questions.

(5) L'interrogatoire d'un témoin se déroule en personne, à moins que le Tribunal ne décide que d'autres modalités d'interrogatoire sont appropriées compte tenu des circonstances.

(6) Les paragraphes (1) - (5) s'appliquent, avec les modifications qui s'imposent, aux moyens de preuve fournis par un expert.

(7) Avant de témoigner, tout témoin fait la déclaration suivante :

« Je m'engage solennellement, sur mon honneur et sur ma conscience, à dire la vérité, toute la vérité et rien que la vérité ».

(8) Avant de témoigner, tout expert fait la déclaration suivante :

« Je m'engage solennellement, sur mon honneur et sur ma conscience, à faire ma déposition en toute sincérité ».

Regla 51
Testigos y Peritos(as)

(1) La parte que pretenda invocar prueba aportada por un o una testigo deberá presentar una declaración escrita de ese(a) testigo. La declaración deberá identificar al o a la testigo, contener su testimonio, estar firmada y fechada.

(2) Un o una testigo que haya presentado una declaración escrita podrá ser interrogado(a) durante una audiencia.

(3) El Tribunal determinará la manera en que se lleve a cabo el interrogatorio.

(4) Un o una testigo será interrogado(a) por las partes ante el Tribunal, bajo el control del o de la Presidente(a). Cualquier miembro del Tribunal podrá formularle preguntas al o a la testigo.

(5) Un o una testigo podrá ser interrogado(a) en persona salvo que el Tribunal determine que otro medio para conducir el interrogatorio es apropiado en las circunstancias del caso.

(6) Los párrafos (1)-(5) serán aplicables a la prueba aportada por un o una perito(a) con las modificaciones necesarias.

(7) Antes de su interrogatorio, cada testigo hará la siguiente declaración:

"Declaro solemnemente, por mi honor y conciencia, que diré la verdad, toda la verdad y solo la verdad".

(8) Antes de ser interrogado(a), cada perito(a) hará la siguiente declaración:

"Declaro solemnemente, por mi honor y conciencia, que lo que manifestaré estará de acuerdo con lo que sinceramente creo".

1113. Proposed (AF)AR 51 is identical to proposed AR 41.

1114. Proposed (AF)AR 51 now contains the language for declarations to be made by witnesses and experts when giving testimony, similar to the language in the AR. In practice, witnesses and experts made the same declarations as in ICSID arbitration proceedings, notwithstanding the silence of the current Arbitration (AF) Rules on this matter.

CURRENT RELATED PROVISIONS: A(AF)R Art. 43(c)

Rule 52
Tribunal-appointed Experts

(1) The Tribunal may appoint one or more independent experts to report to it on specific matters.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.

(3) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.

(4) The parties shall have the right to make written or oral submissions on the report of the Tribunal-appointed expert.

(5) Rule 51(1)-(6) and (8) shall apply, with necessary modifications, to the Tribunal-appointed expert.

Article 52
Experts nommés par le Tribunal

(1) Le Tribunal peut nommer un ou plusieurs experts indépendants chargés de lui présenter un rapport sur des questions particulières.

(2) Le Tribunal consulte les parties sur la nomination d'un expert, y compris sur sa mission.

(3) Les parties communiquent à l'expert nommé par le Tribunal toutes informations, tous documents ou toutes autres preuves que l'expert peut demander. Le Tribunal statue sur tout différend relatif aux preuves demandées par l'expert nommé par le Tribunal.

(4) Les parties ont le droit de déposer des écritures ou de plaider sur le rapport de l'expert nommé par le Tribunal.

(5) L'article 51(1) - (6) et (8) s'applique, avec les modifications qui s'imposent, à l'expert nommé par le Tribunal.

Regla 52
Peritos(as) Nombrados(as) por el Tribunal

(1) El Tribunal podrá nombrar a uno(a) o más peritos(as) independientes para que lo informen acerca de cuestiones específicas.

(2) El Tribunal consultará a las partes respecto del nombramiento de un o una perito(a), lo cual incluye respecto de los términos de referencia del o de la perito(a).

(3) Las partes le proporcionarán al o a la perito(a) nombrado(a) por el Tribunal cualquier información, documento u otra prueba que el o la perito(a) pueda solicitar. El Tribunal decidirá cualquier diferencia relativa a la prueba requerida por el o la perito(a) nombrado(a) por el Tribunal.

(4) Las partes tendrán derecho a presentar escritos o realizar presentaciones orales sobre el informe del o de la perito(a) nombrado(a) por el Tribunal.

(5) La Regla 51(1)-(6) y (8) se aplica al o a la perito(a) nombrado(a) por el Tribunal con las modificaciones necesarias.

1115. Proposed (AF)AR 52 is identical to proposed AR 42 and further clarifies that Tribunals can appoint their own experts, as provided in current Art. 43(c).

RULE 53 – VISITS AND INQUIRIES

Rule 53
Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party's request, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.

Article 53
Transports sur les lieux et enquêtes

(1) Le Tribunal peut ordonner un transport sur les lieux ayant un lien avec le différend, de sa propre initiative ou à la demande d'une partie, s'il estime ce transport nécessaire, et il peut procéder à des enquêtes sur place si nécessaire.

(2) L'ordonnance définit la portée du transport sur les lieux et l'objet de l'enquête, la procédure à suivre, les délais applicables et autres conditions.

(3) Les parties ont le droit de participer à tout transport sur les lieux ou à toute enquête.

Regla 53
Visitas e Investigaciones

(1) El Tribunal podrá ordenar, de oficio o a solicitud de parte, una visita a cualquier lugar relacionado con la diferencia si estima la visita necesaria y, una vez en el lugar podrá realizar investigaciones según corresponda.

(2) La resolución definirá el alcance de la visita y el objeto de cualquier investigación, el procedimiento que se deberá seguir, los plazos aplicables y demás términos.

(3) Las partes tendrán derecho a participar en cualquier visita o investigación.

1116. Proposed (AF)AR 53 is identical to proposed AR 43 and now contains the possibility of site visits by the Tribunal (currently provided for in Art. 20(2)).

1117. Current Art. 41(3) on NDP submission is transferred into proposed (AF)AR 57.

CHAPTER VIII – PUBLICATION, ACCESS TO PROCEEDINGS AND NON-DISPUTING PARTY PARTICIPATION

1118. Schedule 8 to this WP is a detailed overview of the transparency provisions proposed for the ICSID rules amendment. It explains the current provisions, the proposals made, and the rationale for such proposals. Proposed (AF)AR 54-58 should be read in conjunction with this Schedule to understand the broader scheme for transparency proposed in these amendments.

CURRENT RELATED PROVISIONS: A(AF)R Art. 53(3)

Chapter VIII
Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 54
Publication of Awards, Orders and Decisions

(1) The Centre shall publish Awards, orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.

(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on redactions, the Centre shall refer the Award, order or decision to the Tribunal to determine any redactions, and shall publish the Award, order or decision with the redactions approved by the Tribunal.

Chapitre VIII
Publication, accès à l'instance et écritures des parties non contestantes

Article 54
Publication des sentences, ordonnances et décisions

(1) Le Centre publie les sentences, les ordonnances et les décisions dans les 60 jours suivant la date à laquelle elles ont été rendues, avec tous caviardages convenus entre les parties et notifiés conjointement au Centre dans ce délai de 60 jours.

(2) Si l'une des parties notifie au Centre, dans le délai de 60 jours visé au paragraphe (1), que les parties ne sont pas d'accord sur les caviardages, le Centre soumet la sentence, l'ordonnance ou la décision au Tribunal qui détermine le caviardage à effectuer, et publie la sentence, l'ordonnance ou la décision avec les caviardages approuvés par le Tribunal.

Capítulo VIII
Publicación, Acceso al Procedimiento y Presentaciones de Partes No Contendientes

Regla 54
Publicación de Laudos, Resoluciones y Decisiones

(1) El Centro publicará laudos, resoluciones y decisiones dentro de los 60 días siguientes a su emisión, con cualquier supresión de texto que haya sido acordada por las partes y notificada conjuntamente al Centro dentro del plazo de 60 días.

(2) Si cualquiera de las partes notificara al Centro dentro del plazo de 60 días al que se hace referencia en el párrafo (1) que las partes no están de acuerdo respecto de las supresiones de texto, el Centro remitirá la resolución o decisión al Tribunal quien determinará las supresiones a realizar, y publicará el laudo, la resolución o decisión con las supresiones de texto aprobadas por el Tribunal.

1119. Proposed (AF)AR 54 contains new provisions on the publication of Awards, orders and decisions. It is similar to proposed AR 45.

1120. Awards, decisions and orders may be published by either party to an AF arbitration, subject to any confidentiality undertakings in the arbitration, and by the Centre.

1121. Proposed AR(AF) 54 recognizes that parties are free to publish Awards, orders and decisions under the Additional Facility, but that there may well be legitimate claims to confidentiality in some of the contents. As a result, proposed AR (AF) 54 establishes a 60-day period after dispatch of the decision or order for the parties to agree on publication and to provide the Centre with the document, jointly redacted if necessary. The fact that parties must jointly redact the document should ensure that redactions are properly limited.

1122. If parties fail to provide any notice within the 60-day period after dispatch, ICSID will automatically publish the decision or Award in full.

RULE 55 – PUBLICATION OF DOCUMENTS FILED BY A PARTY

CURRENT RELATED PROVISIONS: A(AF)R Art. 53(3)

Rule 55
Publication of Documents Filed by a Party

Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.

Article 55
Publication des documents déposés par une partie

À la demande d'une partie, le Centre publie toutes écritures, observations, ou tous autres documents que cette partie a déposés au cours de l'instance, avec les caviardages convenus entre les parties.

Regla 55
Publicación de Documentos Presentados por una Parte

A solicitud de una de las partes, el Centro publicará cualquier escrito, observación u otro documento que esa parte haya presentado en el marco del procedimiento, con las supresiones de texto acordadas por las partes.

1123. Proposed (AF)AR 55 is identical to proposed AR 46. It allows parties to provide ICSID a copy of other documents for publication (*e.g.*, memorials, witness statements, expert opinions), with mutually agreed redaction. This ensures that ICSID can publish a document which does not breach any confidences of either party.

1124. Further discussion of this proposal can be found in Schedule 8.

RULE 56 – OBSERVATION OF HEARINGS

CURRENT RELATED PROVISIONS: A(AF)R Art. 39(2)

Rule 56
Observation of Hearings

(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal to observe hearings, unless either party objects.

(2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.

(3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.

Article 56
Observation des audiences

(1) Le Tribunal permet à des personnes, outre les parties, leurs représentants, les témoins et experts au cours de leur déposition, et les autres personnes assistant le Tribunal, d'observer les audiences, sauf si l'une des parties s'y oppose.

(2) Le Tribunal met en place des procédures pour empêcher la divulgation d'informations confidentielles aux personnes qui observent les audiences.

(3) Le Centre publie les enregistrements et les transcriptions des audiences, sauf si l'une des parties s'y oppose.

Regla 56
Observación de las Audiencias

(1) El Tribunal permitirá que otras personas además de las partes, sus representantes, testigos y peritos(as) durante su testimonio, así como las personas que asistan al Tribunal observen las audiencias, a menos que cualquiera de las partes se oponga.

(2) El Tribunal establecerá procedimientos para prevenir la revelación de información de carácter confidencial a las personas que observen las audiencias.

(3) El Centro publicará las grabaciones y transcripciones de las audiencias, a menos que cualquiera de las partes se oponga.

1125. Proposed (AF)AR 56 is identical to proposed AR 47.

1126. Proposed (AF)AR 56(1) maintains the current rule allowing public access to hearings unless either party objects in current Art. 39(2).

1127. Proposed (AF)AR 56(2) requires the Tribunal to take necessary steps to preserve confidentiality during a hearing.

1128. Proposed (AF)AR 56(3) is a new provision, and requires publication of recordings (video or audio) or transcripts of a hearing unless either party objects. This mirrors proposed AR 47(1) and provides a further method of allowing access to hearings. The Centre maintains a library of hearing videos on its public website and these are also accessible through the relevant case webpage.

RULE 57 – SUBMISSION OF NON-DISPUTING PARTIES

CURRENT RELATED PROVISIONS: A(AF)R Art. 41(3)

Rule 57
Submission of Non-disputing Parties

(1) Any person or entity that is not a disputing party ("non-disputing party") may apply for permission to file a written submission in the proceeding.

(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

(a) whether the submission would address a matter within the scope of the dispute;

(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(c) whether the non-disputing party has a significant interest in the proceeding;

(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and

(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on the conditions for filing such a submission, if any.

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to:

(a) the format, length or scope of the submission;

(b) the date of filing; and

(c) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation.

(5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.

(6) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

Article 57
Écritures des parties non contestantes

(1) Toute personne ou entité qui n'est pas partie au différend (« partie non contestante ») peut demander l'autorisation de déposer des écritures dans le cadre de l'instance.

(2) Afin de déterminer s'il autorise les écritures d'une partie non contestante, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment :

(a) si les écritures aborderaient une question qui s'inscrit dans le cadre du différend ;

(b) comment les écritures aideraient le Tribunal à trancher une question de fait ou de droit relative à l'instance en y apportant un point de vue, une connaissance ou un éclairage particulier distincts de ceux présentés par les parties au différend ;

(c) si la partie non contestante porte à l'instance un intérêt significatif ;

(d) l'identité, les activités, l'organisation et les propriétaires de la partie non contestante, y compris toute affiliation directe ou indirecte entre la partie non contestante, une partie ou une Partie à un Traité non contestante ; et

(e) si une personne ou une entité apportera à la partie non contestante une assistance financière ou autre pour déposer les écritures.

(3) Les parties ont le droit de présenter leurs observations sur la question de savoir si une partie non contestante doit être autorisée à déposer des écritures dans le cadre de l'instance et sur les conditions éventuelles du dépôt de telles écritures.

(4) Le Tribunal s'assure que la participation de la partie non contestante ne perturbe pas l'instance ou qu'elle n'impose pas une charge excessive à l'une des parties ou lui cause injustement un préjudice. À cette fin, le Tribunal peut imposer des conditions à la partie non contestante, notamment en ce qui concerne :

(a) la forme, la longueur ou l'étendue des écritures ;

(b) la date de dépôt ; et

(c) le versement de fonds pour couvrir les frais supplémentaires de la procédure imputables à la participation de la partie non contestante.

(5) Le Tribunal peut donner à la partie non contestante accès aux documents pertinents déposés dans le cadre de l'instance, sauf si l'une des parties s'y oppose.

(6) Si le Tribunal autorise une partie non contestante à déposer des écritures, les parties ont le droit de présenter des observations sur ces écritures.

Regla 57
Escritos de Partes No Contendientes

(1) Cualquier persona o entidad que no sea parte en la diferencia ("parte no contendiente") podrá solicitar permiso para presentar un escrito en el marco del procedimiento.

(2) Al determinar si permite la presentación de un escrito de una parte no contendiente, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) si el escrito se referiría a una cuestión dentro del ámbito de la diferencia;

(b) de qué manera el escrito ayudaría al Tribunal en la determinación de las cuestiones de hecho o de derecho relacionadas con el procedimiento al aportar una perspectiva, un conocimiento o una visión particulares distintos a aquéllos de las partes en la diferencia;

(c) si la parte no contendiente tiene un interés significativo en el procedimiento;

(d) la identidad, actividades, organización y los propietarios de la parte no contendiente, lo cual incluye toda afiliación directa o indirecta entre la parte no contendiente, una parte o una parte no contendiente del tratado; y

(e) si alguna persona o entidad le proporcionara a la parte no contendiente asistencia financiera u otro tipo de asistencia para efectuar la presentación.

(3) Las partes tendrán derecho a formular observaciones respecto de si debería permitirse a una parte no contendiente presentar un escrito en el marco del procedimiento y, en su caso, respecto de las condiciones para la presentación de dicho escrito, si se presentara.

(4) El Tribunal deberá asegurarse de que la participación de la parte no contendiente no perturbe el procedimiento, o genere una carga indebida, o perjudique injustamente a cualquiera de las partes. A tal fin, el Tribunal podrá imponer condiciones a la parte no contendiente, lo cual incluye con respecto a lo siguiente:

(a) el formato, extensión o alcance del escrito;

(b) a fecha de la presentación; y

(c) el desembolso de fondos para sufragar el aumento de costos del procedimiento que sean atribuibles a la participación de la parte no contendiente.

(5) El Tribunal le podrá proporcionar a la parte no contendiente acceso a los documentos pertinentes presentados en el marco del procedimiento, a menos que cualquiera de las partes se oponga.

(6) Si el Tribunal le permitiera a una parte no contendiente presentar un escrito, las partes tendrán derecho a formular observaciones sobre el mismo.

1129. Proposed (AF)AR 57 is identical to proposed AR 48. Proposed (AF)AR 57 addresses non-disputing party (NDP) participation, currently in Art. 41(3). These AF(AR) apply only to the extent that a treaty-specific or case-specific provision does not apply.

1130. Schedule 8 addresses NDP participation and describes the history, practice and rationale for these proposals in detail.

1131. Proposed (AF)AR 57(2)(a)-(c) retain the criteria for obtaining permission to file an NDP submission found in the 2006 Rules. In addition, it adds two criteria which arise out of case law and some new treaties.

1132. Proposed (AF)AR 57(2)(d) requires further information about the entity applying to file the submission. Proposed (AF)AR 57(2)(e) requires a proposed NDP to state whether it is receiving financial or other assistance in filing the submission. While such assistance is not a bar to participation, it bears on the perspective which that NDP might have.

1133. Proposed (AF)AR 57(4)(c) gives the Tribunal discretion to order the NDP to contribute funds as a pre-condition to filing an NDP submission. This is a new provision, and reflects

the comments of many parties and of several tribunals on the extent to which an NDP submission may significantly increase costs in the case. The proposed AR gives the Tribunal discretion to do so as it may be appropriate not to order such a pre-condition given the financial capacity of an NDP or their public mandate.

1134. Proposed (AF)AR 57(5) allows the Tribunal to order that documents be given to the NDP, but either party may object to such production. As a result, parties are not faced with the prospect of having to provide an NDP with a confidential document.

RULE 58 – SUBMISSION OF NON-DISPUTING TREATY PARTY

CURRENT RELATED PROVISIONS: A(AF)R Art. 41(3)

Rule 58
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.

(2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 57.

(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.

Article 58
Participation d'une Partie à un Traité non contestante

(1) Le Tribunal doit autoriser une partie à un traité qui n'est pas partie au différend (« Partie à un Traité non contestante ») à présenter des écritures sur l'application ou l'interprétation d'un traité en cause dans le différend.

(2) Un Tribunal peut autoriser une Partie à un Traité non contestante à présenter des écritures sur toute autre question dans le cadre du différend, conformément à la procédure prévue à l'article 57.

(3) Les parties ont le droit de présenter des observations sur les écritures de la Partie à un Traité non contestante.

Regla 58
Participación de una Parte No Contendiente del Tratado

(1) El Tribunal permitirá que una parte de un tratado que no sea parte en la diferencia ("parte no contendiente del tratado") presente un escrito sobre la aplicación o interpretación de un tratado objeto de la diferencia.

(2) Un Tribunal podrá permitir que una parte no contendiente del tratado presente un escrito sobre cualquier otra cuestión dentro del ámbito de la diferencia, de conformidad con el procedimiento establecido en la Regla 57.

(3) Las partes tendrán derecho a presentar observaciones sobre el escrito de la parte no contendiente del tratado.

1135. Proposed (AF)AR 58 is a new provision. It is identical to proposed AR 49. It allows a non-disputing Treaty Party (NDTP) to make a submission on a question of interpretation or application of a treaty as a matter of right. It is inspired by various modern investment treaties which specifically confer this right on non-disputing State parties and REIO signatories to the treaty.

CHAPTER IX – SPECIAL PROCEDURES

RULE 59– PROVISIONAL MEASURES

RELATED PROVISIONS: A(AF)R Art. 46

Chapter IX
Special Procedures

Rule 59
Provisional Measures

(1) A party may at any time request that the Tribunal order provisional measures to preserve that party's rights, including measures to:

(a) prevent action that is likely to cause:

(i) current or imminent harm to the other party; or

(ii) prejudice to the arbitral process;

(b) maintain or restore the *status quo* pending determination of the dispute; and

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(3) In deciding whether to order provisional measures, the Tribunal shall consider all relevant circumstances. The Tribunal shall only order provisional measures if it determines that they are urgent and necessary.

(4) The Tribunal may order provisional measures on its own initiative. The Tribunal may also order provisional measures different from those requested by a party.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party's request.

(7) A party may request any judicial or other authority to order interim or conservatory measures. Such a request shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Chapitre IX
Procédures particulières

Article 59
Mesures conservatoires

(1) Une partie peut à tout moment requérir du Tribunal qu'il ordonne des mesures conservatoires pour préserver les droits de cette partie, notamment des mesures destinées à :

(a) empêcher un acte susceptible de :

(i) causer un dommage réel ou imminent à l'autre partie ; ou

(ii) porter préjudice au processus arbitral ;

(b) maintenir ou rétablir le *statu quo* en attendant que le différend soit tranché ; et

(c) préserver des moyens de preuve susceptibles d'être pertinents pour le règlement du différend.

(2) La procédure suivante s'applique :

(a) la requête spécifie les droits devant être préservés, les mesures sollicitées et les circonstances qui rendent ces mesures nécessaires ;

(b) le Tribunal fixe les délais dans lesquels les écritures ou plaidoiries, le cas échéant, relatives à la requête doivent être présentées ;

(c) si une partie sollicite des mesures conservatoires avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais dans lesquels les écritures relatives à la requête doivent être présentées, de sorte que le Tribunal puisse examiner la requête dans les plus brefs délais après sa constitution ; et

(d) le Tribunal rend sa décision sur la requête dans les 30 jours suivant la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à la requête ; ou

(iii) la date des dernières plaidoiries relatives à la requête.

(3) Afin de décider s'il ordonne des mesures conservatoires, le Tribunal tient compte de l'ensemble des circonstances pertinentes. Le Tribunal n'ordonne des mesures conservatoires que s'il détermine qu'elles sont urgentes et nécessaires.

(4) Le Tribunal peut ordonner des mesures conservatoires de sa propre initiative. Il peut également ordonner des mesures conservatoires différentes de celles sollicitées par une partie.

(5) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a ordonné des mesures conservatoires.

(6) Le Tribunal peut à tout moment modifier ou révoquer les mesures conservatoires, de sa propre initiative ou à la demande d'une partie.

(7) Une partie peut demander à toute autorité judiciaire ou autre d'ordonner des mesures provisoires ou conservatoires. Une telle demande ne sera pas réputée être incompatible avec la convention d'arbitrage, ni constituer une renonciation à cette convention.

Capítulo IX
Procedimientos Especiales

Regla 59
Medidas Provisionales

(1) En cualquier momento, cualquiera de las partes puede solicitar que el Tribunal ordene la adopción de medidas provisionales para salvaguardar sus derechos, lo cual incluye medidas para:

(a) impedir acciones que probablemente ocasionen:

(i) un daño actual o inminente a la otra parte; o

(ii) un menoscabo al proceso de arbitral;

(b) mantener o restablecer el *status quo* hasta que se decida la diferencia; y

(c) preservar los medios de prueba que pudieran ser relevantes para la resolución de la diferencia.

(2) Se aplicará el siguiente procedimiento:

(a) la solicitud deberá especificar los derechos que se salvaguardarán, las medidas solicitadas, y las circunstancias que requieren la adopción de tales medidas;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de medidas provisionales;

(c) si una parte solicita medidas provisionales antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la solicitud, de tal forma que el Tribunal pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(3) Al momento de decidir si ordena medidas provisionales, el Tribunal deberá considerar todas las circunstancias pertinentes. El Tribunal solamente ordenará que se adopten medidas provisionales si determina que estas son urgentes y necesarias.

(4) El Tribunal podrá ordenar medidas provisionales de oficio. El Tribunal también podrá ordenar medidas provisionales distintas de aquellas solicitadas por una parte.

(5) Una parte deberá revelar con prontitud cualquier cambio sustancial en las circunstancias en las que el Tribunal ordenó las medidas provisionales.

(6) El Tribunal podrá modificar o revocar las medidas provisionales en cualquier momento, de oficio o a solicitud de una de las partes.

(7) Una parte podrá solicitar a cualquier autoridad judicial o de otra naturaleza que adopte medidas provisionales o conservatorias. Dicha solicitud no será considerada incompatible con el acuerdo de las partes al arbitraje, ni como una renuncia a dicho acuerdo.

1136. Proposed (AF)AR 59 parallels proposed AR 50, except that the word "*order*" replaces the word "*recommend*". This distinction partially exists in the current rules; current Art. 46 allows for the Tribunal to order provisional measures at a party's request, and to recommend them on its own initiative. Under proposed (AF)AR 59, however, the Tribunal may also order provisional measures on its own initiative. This responds to the concerns of some States raised with regard to current AR 39 and issues as to the enforceability of Tribunals' recommendations. The orders for provisional measures so issued under proposed (AF)AR 59 will be enforceable as procedural orders if the law of the place of arbitration allow it. The sanction for non-compliance with such orders will be at the discretion of the Tribunal.

1137. Proposed (AF)AR 59(7) is specific to AF arbitration. Parties can have recourse to judicial or other authority to obtain interim or conservatory measures even if their instrument of consent does not specify it. This is not incompatible with the arbitration agreement or as a waiver of this agreement, as currently indicated in current Art. 46(4) (from which the provision is derived) and as stated in UNCITRAL Rule 26(9) (which wording is adopted).

RULE 60 – SECURITY FOR COSTS

RELATED PROVISIONS: AFR 14; Art. 24, 44, 46

Rule 60
Security for Costs

(1) A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.

(2) The following procedure shall apply:

(a) the request shall specify the circumstances that require security for costs;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party's ability to comply with an adverse decision on costs and any other relevant circumstances.

(4) If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended

for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party's request.

Article 60
Garantie du paiement des frais

(1) Une partie peut requérir du Tribunal qu'il ordonne à l'autre partie de fournir une garantie relative aux frais de la procédure et de déterminer les conditions appropriées pour qu'une telle garantie soit fournie.

(2) La procédure suivante s'applique :

(a) la requête précise les circonstances exigeant la garantie pour le paiement des frais ;

(b) le Tribunal fixe les délais dans lesquels les écritures ou plaidoiries, le cas échéant, relatives à la requête doivent être présentées ;

(c) si une partie sollicite une garantie pour le paiement des frais avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais dans lesquels les écritures relatives à la requête doivent être présentées, afin que le Tribunal puisse examiner la requête dans les plus brefs délais après sa constitution ; et

(d) le Tribunal rend sa décision concernant la requête dans les 30 jours suivant la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à la requête ; ou

(iii) la date des dernières plaidoiries relatives à la requête.

(3) Afin de déterminer s'il ordonne à une partie de fournir une garantie pour le paiement des frais, le Tribunal tient compte de la capacité de cette partie à se conformer à une décision la condamnant à payer les frais ainsi que de toutes autres circonstances pertinentes.

(4) Si une partie ne se conforme pas à une ordonnance lui imposant de fournir une garantie pour le paiement des frais, le Tribunal peut suspendre la procédure jusqu'à

ce que cette garantie soit fournie. Si la procédure est suspendue pendant plus de 90 jours, le Tribunal peut, après consultation des parties, ordonner la fin de l'instance.

(5) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a ordonné que la garantie pour le paiement des frais soit fournie.

(6) Le Tribunal peut à tout moment modifier ou révoquer son ordonnance imposant que la garantie pour le paiement des frais soit fournie, de sa propre initiative ou à la demande d'une partie.

Regla 60
Garantía por Costos

(1) Una parte podrá solicitar que el Tribunal ordene que la otra parte otorgue una garantía por costos del procedimiento y determine los términos adecuados para el otorgamiento de dicha garantía.

(2) Se aplicará el siguiente procedimiento:

(a) la solicitud especificará las circunstancias que requieran una garantía por costos;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud;

(c) si una parte solicita una garantía por costos antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la solicitud, de tal forma que el Tribunal pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(3) Al determinar si le ordena a una parte que otorgue una garantía por costos, el Tribunal deberá considerar la capacidad que tiene dicha parte para cumplir con una decisión adversa en materia de costos y cualquier otra circunstancia relevante.

(4) Si una parte incumpliera una orden de garantía por costos, el Tribunal podrá suspender el procedimiento hasta que se otorgue la garantía. Si el procedimiento se

suspendiera durante más de 90 días, el Tribunal podrá, previa consulta a las partes, ordenar la discontinuación del procedimiento.

(5) Una parte deberá revelar con prontitud cualquier cambio sustancial en las circunstancias en las que el Tribunal ordenó la garantía por costos.

(6) El Tribunal podrá en cualquier momento modificar o revocar la orden de garantía por costos de oficio o a solicitud de una de las partes.

1138. Proposed (AF)AR 60 is identical to proposed AR 51. This is a new provision (*see* for more details, proposed AR 51).

RULE 61 – ANCILLARY CLAIMS

CURRENT RELATED PROVISIONS: A(AF)R Art. 47

Rule 61
Ancillary Claims

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counter-claim ("ancillary claim"), provided that such ancillary claim is within the scope of the agreement of the parties.

(2) An incidental or additional claim shall be presented no later than the date to file the reply, and a counter-claim shall be presented no later than the date to file the counter-memorial, unless the Tribunal decides otherwise.

Article 61
Demandes accessoires

(1) Sauf accord contraire des parties, une partie peut déposer une demande incidente, additionnelle ou reconventionnelle (« demande accessoire »), à condition que cette demande accessoire soit couverte par l'accord des parties.

(2) Une demande incidente ou additionnelle est présentée au plus tard à la date prévue pour le dépôt de la réponse, et une demande reconventionnelle est présentée au plus tard à la date prévue pour le dépôt du contre-mémoire, sauf si le Tribunal en décide autrement.

Regla 61
Demandas Subordinadas

(1) Salvo acuerdo en contrario de las partes, cualquiera de ellas podrá presentar una demanda incidental o adicional o una demanda reconvencional ("demanda subordinada"), siempre que la demanda subordinada esté dentro del ámbito del acuerdo de las partes.

(2) Toda demanda incidental o adicional se presentará a más tardar en la fecha de presentación de la réplica, y toda reconvención se presentará a más tardar en la fecha de presentación del memorial de contestación, salvo decisión en contrario del Tribunal.

1139. Proposed (AF)AR 61 is identical to proposed AR 52.

RULE 62 – DEFAULT

CURRENT RELATED PROVISIONS: A(AF)R Art. 48

Rule 62
Default

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.

(4) If the default relates to a first session or hearing, the Tribunal may set the grace period as follows:

(a) reschedule the first session or hearing to a date within 60 days after the original date;

(b) proceed with the first session or hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the first session or hearing; or

(c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the first session or hearing.

(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).

(6) A party's default shall not be deemed an admission of the assertions made by the other party.

(7) The Tribunal may invite the party appearing to file observations, produce evidence or make oral submissions.

(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine whether the dispute is within its competence before deciding the questions submitted to it and rendering an Award.

Article 62
Défaut

(1) Une partie est en défaut si elle ne comparaît pas ou s'abstient de faire valoir ses prétentions ou qu'elle fait savoir qu'elle ne comparaîtra pas ou s'abstiendra de faire valoir ses prétentions.

(2) Si une partie est en défaut à une quelconque étape de l'instance, l'autre partie peut demander au Tribunal de considérer les questions qui lui sont soumises et de rendre une sentence.

(3) Dès réception de la requête visée au paragraphe (2), le Tribunal la notifie à la partie en défaut et lui accorde un délai de grâce pour remédier au défaut, sauf s'il considère que celle-ci n'a pas l'intention de comparaître ou de faire valoir ses prétentions. Le délai de grâce ne doit pas excéder 60 jours, sauf consentement de l'autre partie.

(4) Si le défaut concerne une première session ou audience, le Tribunal peut fixer le délai de grâce de la manière suivante :

(a) reporter la première session ou audience à une date devant se situer dans les 60 jours de la date initiale ;

(b) tenir la première session ou audience en l'absence de la partie en défaut et fixer un délai pour le dépôt par celle-ci d'écritures dans les 60 jours suivant la première session ou audience ; ou

(c) annuler l'audience et fixer un délai pour que les parties déposent des écritures dans les 60 jours suivant la date initiale de la première session ou audience.

(5) Si le défaut concerne une autre étape prévue de la procédure, le Tribunal peut fixer le délai de grâce pour remédier au défaut en fixant un nouveau délai permettant à la partie en défaut de procéder à cette étape dans les 60 jours suivant la date de la notification de défaut visée au paragraphe (3).

(6) Le défaut d'une partie ne vaut pas acquiescement par celle-ci aux allégations de l'autre partie.

(7) Le Tribunal peut inviter la partie qui comparaît à déposer des observations, à produire des moyens de preuve ou à fournir des explications orales.

(8) Si la partie en défaut n'agit pas dans le délai de grâce ou si un tel délai n'est pas accordé, le Tribunal examine si le différend ressortit à sa compétence avant de se prononcer sur les questions qui lui sont soumises et de rendre une sentence.

Regla 62
Rebeldía

(1) Una parte se encuentra en rebeldía si no compareciera, o se abstuviera de presentar sus argumentos y reclamaciones, o indicara que no comparecerá ni presentará sus argumentos y reclamaciones.

(2) Si una de las partes se encuentra en rebeldía en cualquier etapa del procedimiento, la otra parte podrá solicitarle al Tribunal que aborde las cuestiones que se han sometido a su consideración y dicte un laudo.

(3) Inmediatamente después de que reciba la solicitud a la que se hace referencia en el párrafo (2), el Tribunal notificará tal solicitud a la parte en rebeldía y le otorgará un período de gracia para que subsane la rebeldía, a menos que considere que esa parte no tiene la intención de comparecer o de presentar sus argumentos y reclamaciones. El período de gracia no excederá 60 días sin el consentimiento de la otra parte.

(4) Si la rebeldía estuviera relacionada con una primera sesión o audiencia, el Tribunal podrá fijar el período de gracia de la siguiente manera:

(a) reprogramar la primera sesión o audiencia para una fecha dentro de los 60 días siguientes a la fecha original;

(b) seguir adelante con la primera sesión o audiencia en ausencia de la parte en rebeldía y fijar un plazo para que la parte en rebeldía presente un escrito dentro de los 60 días siguientes a la primera sesión o audiencia; o

(c) cancelar la audiencia y fijar un plazo para que las partes presenten escritos dentro de los 60 días siguientes a la fecha original de la primera sesión o audiencia.

(5) Si la rebeldía estuviere relacionada con otra etapa procesal programada, el Tribunal podrá establecer el período de gracia fijando un nuevo plazo para que la parte en rebeldía cumpla con esa etapa procesal dentro de los 60 días siguientes a la fecha de notificación de la rebeldía a la que se hace referencia en el párrafo (3).

(6) La rebeldía de una parte no supondrá la admisión de las alegaciones de la otra parte.

(7) El Tribunal podrá invitar a la parte que haya comparecido, a que presente observaciones, medios de prueba o argumentos orales.

(8) Si la parte en rebeldía se abstuviese de llevar a cabo un acto procesal dentro del período de gracia o si no se hubiera otorgado período de gracia alguno, el Tribunal examinará si la diferencia es de su competencia antes de decidir las cuestiones que le han sido sometidas y dictar el laudo.

1140. Proposed (AF)AR 62 is identical to proposed AR 53.

CHAPTER X – SUSPENSION, SETTLEMENT AND DISCONTINUANCE

1141. Proposed (AF)AR 63 to 67 corresponds to proposed AR 54 to 58.

RULE 63 – SUSPENSION

CURRENT RELATED PROVISIONS: AFR 14(3)(d)

Chapter X
Suspension and Discontinuance

Rule 63
Suspension

(1) Except as otherwise provided in the (Additional Facility) Administrative and Financial Regulations or these Rules, the Tribunal may suspend the proceeding on:

(a) agreement of the parties;

(b) request of a party; or

(c) its own initiative.

(2) The Tribunal shall give the parties the opportunity to make observations before ordering the suspension of the proceeding pursuant to paragraph (1)(b) or (c).

(3) In its order recording the suspension of the proceeding the Tribunal shall specify:

(a) the period of the suspension;

(b) any appropriate conditions; and

(c) a modified procedural calendar to take effect on resumption of the proceeding.

(4) The Tribunal may extend the period of the suspension prior to its expiry, on its own initiative or upon a party's request.

(5) The Secretary-General shall suspend the proceedings pursuant to paragraph (1)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any conditions agreed to by the parties.

Chapitre X
Suspension et désistement

Article 63
Suspension

(1) Sauf disposition contraire du Règlement administratif et financier (Mécanisme supplémentaire) ou du présent Règlement, le Tribunal peut suspendre l'instance :

(a) par accord des parties ;

(b) à la demande d'une partie ; ou

(c) de sa propre initiative.

(2) Le Tribunal donne aux parties la possibilité de faire part de leurs observations avant d'ordonner la suspension de l'instance conformément au paragraphe (1)(b) ou (c).

(3) Dans son ordonnance prenant acte de la suspension de l'instance, le Tribunal indique :

(a) la durée de la suspension ;

(b) toutes conditions appropriées ; et

(c) un calendrier de la procédure modifié devant prendre effet dès la reprise de l'instance.

(4) Le Tribunal peut prolonger la durée de la suspension avant son expiration, de sa propre initiative ou à la demande d'une partie.

(5) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) suspend l'instance conformément au paragraphe (1)(a). Les parties informent le ou la Secrétaire général(e) de la durée de la suspension et de toutes conditions convenues entre les parties.

Capítulo X
Suspensión y Discontinuación

Regla 63
Suspensión

(1) Salvo disposición en contrario establecida en el Reglamento Administrativo y Financiero (Mecanismo Complementario) o en estas Reglas, el Tribunal podrá suspender el procedimiento en las siguientes circunstancias:

(a) por acuerdo de las partes;

(b) a solicitud de una de las partes; o

(c) de oficio.

(2) El Tribunal brindará a las partes la oportunidad de formular observaciones antes de ordenar la suspensión del procedimiento de conformidad con lo dispuesto en el párrafo (1)(b) o (c).

(3) En su resolución suspendiendo el procedimiento, el Tribunal deberá especificar lo siguiente:

(a) el período de la suspensión;

(b) cualquier condición pertinente; y

(c) un calendario procesal modificado que surtirá efecto con la reanudación del procedimiento.

(4) El Tribunal podrá prorrogar el período de suspensión con anterioridad a su vencimiento, de oficio o a solicitud de una de las partes.

(5) El o la Secretario(a) General suspenderá el procedimiento de conformidad con lo dispuesto en el párrafo (1)(a) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal. Las partes informarán al o a la Secretario(a) General sobre el período de suspensión y cualquier condición acordada por las partes.

1142. Proposed (AF)AR 63 is identical to proposed AR 54.

RULE 64 – SETTLEMENT AND DISCONTINUANCE

CURRENT RELATED PROVISIONS: A(AF)R Art. 49

Rule 64
Settlement and Discontinuance

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.

(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or

(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) An Award rendered pursuant to paragraph (2)(b) does not need to include the reasons on which it is based.

(4) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Article 64
Règlement amiable et désistement

(1) Si les parties notifient au Tribunal qu'elles sont convenues de se désister, le Tribunal rend une ordonnance prenant acte de la fin de l'instance.

(2) Si les parties sont d'accord pour régler le différend à l'amiable avant que la sentence ne soit rendue, le Tribunal :

(a) rend une ordonnance prenant acte de la fin de l'instance, si les parties le demandent ; ou

(b) peut procéder à l'incorporation du règlement amiable dans une sentence, si les parties déposent le texte complet et signé de leur règlement amiable et demandent au Tribunal de l'incorporer dans une sentence.

(3) Une sentence rendue conformément au paragraphe 2(b) n'a pas à être motivée.

(4) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) rend l'ordonnance visée aux paragraphes (1) et (2)(a).

Regla 64
Avenencia y Discontinuación

(1) Si las partes notificaran al Tribunal que han acordado discontinuar el procedimiento, el Tribunal emitirá una resolución que deje constancia de la discontinuación.

(2) Si las partes acordaran avenirse respecto de la diferencia antes de que se dicte el laudo, el Tribunal:

(a) deberá emitir una resolución que deje constancia de la discontinuación del procedimiento, si las partes así lo solicitaran; o

(b) podrá plasmar la avenencia en la forma de un laudo, si las partes presentan el texto completo y firmado de su avenimiento y solicitan al Tribunal que incorpore dicho avenimiento en un laudo.

(3) No es necesario que el laudo dictado de conformidad con lo dispuesto en el párrafo (2)(b) incluya las razones en las que se funda.

(4) El o la Secretario(a) General emitirá la resolución a la que se hace referencia en los párrafos (1) y (2)(a) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

1143. Proposed (AF)AR 64 is identical to proposed AR 55.

1144. Current Art. 49(2) provides that the Tribunal is not obliged to give reasons for a consent Award. This has been kept in proposed (AF)AR 64(3) which states that an Award rendered pursuant to (AF)AR 64(2)(b) does not need to contain the reasons on which it is based.

RULE 65 – DISCONTINUANCE AT REQUEST OF A PARTY

CURRENT RELATED PROVISIONS: A(AF)R Art. 50

Rule 65
Discontinuance at Request of a Party

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Article 65
Désistement sur requête d'une partie

(1) Si une partie requiert le désistement de l'instance, le Tribunal fixe un délai dans lequel l'autre partie peut s'opposer à ce désistement. Si aucune objection n'est soulevée par écrit dans ce délai, l'autre partie est réputée avoir accepté le désistement et le Tribunal rend une ordonnance prenant acte de la fin de l'instance. Si une objection est soulevée par écrit dans ce délai, l'instance continue.

(2) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) fixe le délai et rend l'ordonnance visée au paragraphe (1).

Regla 65
Discontinuación a Solicitud de una de las Partes

(1) Si una de las partes solicita la discontinuación del procedimiento, el Tribunal fijará el plazo dentro del cual la otra parte podrá oponerse a la discontinuación. Si no se formula objeción alguna por escrito dentro del plazo fijado, se entenderá que la otra parte ha consentido a la discontinuación y el Tribunal emitirá una resolución que deje constancia de la discontinuación del procedimiento. Si se formula alguna objeción escrita dentro del plazo fijado, el procedimiento continuará.

(2) El o la Secretario(a) General fijará el plazo y emitirá la resolución a la que se hace referencia en el párrafo (1) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

1145. Proposed (AF)AR 65 is identical to proposed AR 56.

RULE 66 – DISCONTINUANCE FOR FAILURE OF PARTIES TO ACT

CURRENT RELATED PROVISIONS: A(AF)R Art. 51

Rule 66
Discontinuance for Failure of Parties to Act

(1) If the parties fail to take any steps in the proceeding for more than 150 days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.

(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal may issue an order taking note of the discontinuance.

(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.

(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Article 66
Désistement pour cause d'inactivité des parties

(1) Si les parties n'accomplissent aucune démarche relative à l'instance pendant 150 jours, le Tribunal leur adresse une notification les informant du délai écoulé depuis la dernière démarche accomplie dans l'instance.

(2) Si les parties n'accomplissent aucune démarche dans les 30 jours suivant la notification visée au paragraphe (1), elles sont réputées s'être désistées et le Tribunal peut rendre une ordonnance prenant acte de la fin de l'instance.

(3) Si l'une ou l'autre des parties accomplit une démarche dans les 30 jours suivant la notification visée au paragraphe (1), l'instance continue.

(4) Si le Tribunal n'a pas encore été constitué ou qu'il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) adresse la notification et rend l'ordonnance visée aux paragraphes (1) et (2).

Regla 66
Discontinuación por Inacción de las Partes

(1) Si las partes omiten realizar cualquier acto procesal durante más de 150 días, el Tribunal notificará a las partes que dicho tiempo ha transcurrido desde el último acto procesal.

(2) Si las partes omiten actuar dentro de los 30 días siguientes a la notificación a la que se hace referencia en el párrafo (1), se entenderá que las partes han discontinuado el procedimiento, y el Tribunal podrá emitir una resolución dejando constancia de la discontinuación.

(3) Si cualquiera de las partes realiza un acto procesal dentro de los 30 días siguientes a la notificación a la que se hace referencia en el párrafo (1), el procedimiento continuará.

(4) El o la Secretario(a) General emitirá la notificación y la resolución a las que se hace referencia en los párrafos (1) y (2) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

1146. Proposed (AF)AR 66 is identical to proposed AR 57.

RULE 67 – DISCONTINUANCE FOR FAILURE TO PAY

CURRENT RELATED PROVISIONS: AFR 14

Rule 67
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by (Additional Facility) Administrative and Financial Regulation 7, the proceeding may be discontinued pursuant to that Regulation.

Article 67
Fin de l'instance pour défaut de paiement

Si les parties ne procèdent pas, comme l'exige l'article 7 du Règlement administratif et financier (Mécanisme supplémentaire), au paiement des montants destinés à couvrir les frais de la procédure, la fin de l'instance peut être prononcée conformément à cet article.

Regla 67
Discontinuación por Falta de Pago

Si las partes no realizan los pagos para sufragar los costos del procedimiento tal como lo exige la Regla 7 del Reglamento Administrativo y Financiero (Mecanismo Complementario), podrá discontinuarse el procedimiento de conformidad con lo dispuesto en dicha Regla.

1147. Proposed (AF)AR 67 is identical to proposed AR 58 and refers to the (AF)AFR 7(5) now attached to the AF Rules at Annex A.

CHAPTER XI – THE AWARD

RULE 68 – APPLICABLE LAW

CURRENT RELATED PROVISIONS: A(AF)R Art. 54

Chapter XI
The Award

Rule 68
Applicable Law

(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply:

(a) the law which it determines to be applicable; and

(b) the rules of international law as it considers applicable.

(2) The Tribunal may decide *ex aequo et bono* if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.

Chapitre XI
La sentence

Article 68
Droit applicable

(1) Le Tribunal applique les règles de droit désignées par les parties comme applicables au fond du différend. À défaut d'une telle indication par les parties, le Tribunal applique :

(a) le droit qu'il juge applicable ; et

(b) les règles de droit international qu'il juge applicables.

(2) Le Tribunal peut statuer *ex aequo et bono* s'il y a été expressément autorisé par les parties et si la loi applicable à l'arbitrage le permet.

Capítulo XI

El Laudo

Regla 68
Derecho Aplicable

(1) El Tribunal aplicará las normas del derecho que las partes hayan indicado como aplicables al fondo de la diferencia. En ausencia de dicha indicación de las partes, el Tribunal aplicará:

(a) el derecho que considere aplicable; y

(b) las normas del derecho internacional que considere aplicables.

(2) El Tribunal podrá decidir *ex aequo et bono* si las partes lo han autorizado a hacerlo en forma expresa y si el derecho aplicable al arbitraje lo permite.

1148. Proposed (AF)AR 68 on applicable law reprises the wording of current Art. 54.

RULE 69 – TIMING OF THE AWARD

CURRENT RELATED PROVISIONS: A(AF)R Art. 52(4)

Rule 69
Timing of the Award

(1) The Tribunal shall render the Award as soon as possible and in any event no later than:

(a) 60 days after the last written or oral submission if the Award is rendered pursuant to Rule 45(4);

(b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 46(8); or

(c) 240 days after the last written or oral submission on all other matters.

(2) A statement of costs filed in accordance with Rule 29(3) shall not be considered a submission for the purposes of calculating the time limits referred to in paragraph (1).

(3) The parties waive any time limits for rendering the Award which may be provided for by the law of the seat of arbitration.

Article 69
Délai pour rendre la sentence

(1) Le Tribunal rend la sentence dès que possible et, en tout état de cause, au plus tard :

(a) 60 jours après la dernière écriture ou la dernière plaidoirie si la sentence est rendue conformément à l'article 45(4) ;

(b) 180 jours après la dernière écriture ou la dernière plaidoirie si la sentence est rendue conformément à l'article 46(8) ; ou

(c) 240 jours après la dernière écriture ou la dernière plaidoirie relative à toutes autres questions.

(2) Un état des frais déposé conformément à l'article 29(3) n'est pas considéré comme une écriture aux fins du calcul des délais visés au paragraphe (1).

(3) Les parties renoncent à invoquer tout délai pour le prononcé de la sentence prévu par la loi du siège de l'arbitrage.

Regla 69
Plazos para el Laudo

(1) El Tribunal dictará el laudo lo antes posible y, en cualquier caso, a más tardar:

(a) 60 días después del último escrito o presentación oral si el laudo se dictara de conformidad con lo dispuesto en la Regla 45(4);

(b) 180 días después del último escrito o presentación oral si el laudo se dictara de conformidad con lo dispuesto en la Regla 46(8); o

(c) 240 días después del último escrito o presentación oral sobre cualquier otra cuestión.

(2) Cualquier declaración sobre los costos presentada de conformidad con la Regla 29(3) no será considerada una presentación a efectos de calcular los plazos a los que se hace referencia en el párrafo (1).

(3) Las partes renuncian a cualquier plazo para el dictado del laudo que pudiera estar dispuesto por la ley de la sede del arbitraje.

1149. Proposed (AF)AR 69 is identical to proposed AR 59 and is new in AF arbitration. Under the current Rules, Tribunals are not subject to any deadlines to issue Awards. Proposed (AF)AR 69 introduces time limits to render Awards. Proposed (AF)AR 69 requires the Award to be rendered as soon as possible, and in any event within 60 days (two months) if the Award is rendered pursuant to proposed (AF)AR 45(4) on Manifest Lack of Legal Merit, within 180 days (six months) if the Award is rendered pursuant to proposed (AF)AR 46(7) on Preliminary Objection, or within 240 days (eight months) after the last written or oral submission on all other matters (*e.g.*, hearing on the merits, post-hearing briefs, additional evidence, answering Tribunal questions, etc). (*see* for more details, proposed AR 59).

1150. This answers numerous comments from parties, States and the public to the effect that Tribunals can take too long to render Awards. The proposal in (AF)AR 69 sets clear expectations on Tribunal members to render the Award in a timely manner while maintaining flexibility.

1151. Current Art. 52(4) is maintained in proposed (AF)AR 69(3) to the effect that the parties waive any time limits for rendering the Award imposed by the law of the place of arbitration.

1152. Current Art. 44, which contains a procedure for the formal closure of the proceeding in advance of the issuance of an Award (and a mechanism for the reopening of the proceeding), has been deleted. As with current AR 38 (also proposed to be deleted), the provision serves no practical purpose in modern practice.

RULE 70 – CONTENTS OF THE AWARD

CURRENT RELATED PROVISIONS: A(AF)R Art. 52

Rule 70
Contents of the Award

(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Tribunal was established under these Rules, and a description of the method of its constitution;

(d) the name of each member of the Tribunal and the appointing authority of each;

(e) the seat of arbitration, the dates and place(s) of the first session and the hearings;

(f) a brief summary of the proceeding;

(g) a statement of the relevant facts as found by the Tribunal;

(h) a brief summary of the submissions of the parties, including the relief sought;

(i) the reasons on which the Award is based, unless the parties have agreed that no reasons are to be given; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision regarding the allocation of the costs of the proceeding.

(2) The Award shall be signed by the members of the Tribunal who voted for it. It may be signed by electronic means if the parties agree and if allowed by the law of the seat of arbitration.

(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.

(4) The Award shall be final and binding on the parties.

Article 70
Contenu de la sentence

(1) La sentence est rendue par écrit et contient :

(a) la désignation précise de chaque partie ;

(b) les noms des représentants des parties ;

(c) une déclaration selon laquelle le Tribunal a été constitué en vertu du présent Règlement, et la description de la façon dont il a été constitué ;

(d) le nom de chaque membre du Tribunal et l'autorité ayant nommé chacun d'eux ;

(e) la siège de l'arbitrage, les dates et le(s) lieu(x) de la première session et des audiences ;

(f) un bref résumé de la procédure ;

(g) un exposé des faits pertinents, tels qu'ils sont établis par le Tribunal ;

(h) un bref résumé des prétentions des parties, y compris des demandes présentées ;

(i) les motifs sur lesquels la sentence est fondée, à moins que les parties ne soient convenues que la sentence n'a pas à être motivée ; et

(j) un état des frais de la procédure, y compris les honoraires et frais de chaque membre du Tribunal et une décision motivée relative à la répartition des frais de la procédure.

(2) La sentence est signée par les membres du Tribunal qui se sont prononcés en sa faveur. Elle peut être signée par voie électronique, si les parties sont d'accord et si le droit du siège de l'arbitrage le permet.

(3) Tout membre du Tribunal peut joindre à la sentence son opinion individuelle ou une mention de son dissentiment avant que la sentence ne soit rendue.

(4) La sentence est définitive et a force obligatoire pour les parties.

Regla 70
Contenido del Laudo

(1) El laudo deberá dictarse por escrito y deberá incluir:

(a) la identificación de cada parte de manera precisa;

(b) el nombre de los representantes de las partes;

(c) una declaración de que el Tribunal ha sido constituido de conformidad con lo dispuesto en estas Reglas, y una descripción del método de su constitución;

(d) el nombre de cada miembro del Tribunal y de la persona que designó a cada uno;

(e) la sede del arbitraje, la o las fechas y el o los lugar(es) de la primera sesión y de las audiencias;

(f) un breve resumen del procedimiento;

(g) una relación de los hechos pertinentes, tal como hayan sido establecidos por el Tribunal;

(h) un breve resumen de los argumentos de las partes, lo cual incluye sus petitorios;

(i) las razones en que se funda el laudo, salvo que las partes hayan acordado que no se deben exponer dichas razones; y

(j) una declaración de los costos del procedimiento, lo que incluye de los honorarios y gastos de cada uno de los miembros del Tribunal, y una decisión razonada respecto de la distribución de los costos del procedimiento.

(2) El laudo deberá estar firmado por los miembros del Tribunal que se hayan pronunciado a favor del mismo. Podrá ser firmado a través de medios electrónicos si las partes lo acordaren y si estuviere permitido por la legislación de la sede del arbitraje.

(3) Antes de que se dicte el laudo, cualquier miembro del Tribunal podrá adjuntar al laudo su opinión individual o disidencia al laudo.

(4) El laudo será definitivo y obligatorio para las partes.

1153. Proposed (AF)AR 70 is identical to proposed AR 60, except that it specifies under paragraph (e) that the seat of arbitration is to be mentioned in Awards.

1154. Proposed (AF)AR 70(1)(i) requires that the Tribunal provide the reasons on which the Award is based unless the parties agree that no such reasons need to be given. This is a new concept departing from the prior requirement (as contained in Art. 47(i) of the Convention) that the Tribunal must decide on every question submitted to it.

1155. Current Art. 52(3), which provides that a Tribunal must comply with the requirements of the place of arbitration to file or register an Award is deleted. This requirement is implicit and does not need to be provided for explicitly. It falls to Tribunals to determine (with the help of the parties) if they are subject to domestic filing or registration requirements. The parallel provision in Art. 32(7) of the UNCITRAL Rules was also deleted in the 2010 version for redundancy.

1156. Current Art. 52(4) is maintained in proposed (AF)AR 70(4) to the effect that the Award is final and binding on the parties.

RULE 71 – RENDERING OF THE AWARD

CURRENT RELATED PROVISIONS: A(AF)R Art. 53

Rule 71
Rendering of the Award

(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.

(2) Upon request of the parties that the original text of the Award be filed or registered by the Tribunal pursuant to the law of the seat of arbitration, the Secretary-General shall do so on behalf of the Tribunal.

(3) The Award shall be deemed to have been made at the seat of arbitration and deemed to have been rendered on the date of dispatch.

(4) The Secretary-General shall provide additional certified copies of the Award to a party upon request.

Article 71
Prononcé de la sentence

(1) Après signature de la sentence par les membres du Tribunal qui se sont prononcés en sa faveur, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) envoyer à chaque partie une copie certifiée conforme de la sentence, ainsi que de toute opinion individuelle et mention du dissentiment, en indiquant la date d'envoi sur la sentence ; et

(b) déposer la sentence aux archives du Centre, en y joignant toute opinion individuelle et toute mention de dissentiment.

(2) Si les parties demandent que le texte original de la sentence soit déposé ou enregistré par le Tribunal conformément au droit du siège de l'arbitrage, le ou la Secrétaire général(e) y procèdera pour le compte du Tribunal.

(3) La sentence est réputée avoir été rendue au siège de l'arbitrage et à la date d'envoi.

(4) Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires de la sentence.

Regla 71
Comunicación del Laudo

(1) Una vez que el laudo haya sido firmado por los miembros del Tribunal que votaron en su favor, el o la Secretario(a) General deberá, a la brevedad:

(a) enviar una copia certificada del laudo a cada una de las partes, junto con las opiniones individuales y disidencias, indicando la fecha del envío del laudo; y

(b) depositar el laudo en los archivos del Centro, junto con las opiniones individuales y disidencias.

(2) A solicitud de las partes de que el texto original del laudo sea archivado o registrado por el Tribunal de conformidad con lo dispuesto en la legislación de la sede del arbitraje, el o la Secretario(a) General deberá hacerlo en nombre y representación del Tribunal.

(3) Se considerará que el laudo ha sido dictado en la sede del arbitraje y en la fecha de envío.

(4) El o la Secretario(a) General proporcionará copias certificadas adicionales del laudo a una parte a petición de esta.

1157. Proposed (AF)AR 71 is identical to proposed AR 61.

1158. Proposed (AF)AR 71(2) envisages the possibility, presently contained in current Art. 53(1), that the law of the seat of arbitration could require that the Award be filed or registered by the Tribunal. In such case, upon the request of a party, the Secretary-General would substitute for the Tribunal and file the Award. It is suggested that the parties expressly address this possibility in the first session, and in any confidentiality agreement they might enter into. The filing or registering of an Award pursuant to this rule would not breach any confidentiality requirement as it is agreed to by the parties.

RULE 72 – SUPPLEMENTARY DECISION, RECTIFICATION AND INTERPRETATION

CURRENT RELATED PROVISIONS: A(AF)R Art. 55-57

Rule 72
Supplementary Decision, Rectification and Interpretation of an Award

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 30 days after rendering the Award.

(2) A party may request a supplementary decision, rectification or interpretation of an Award by filing a request with the Secretary-General within 30 days after the Award was rendered and pay the lodging fee published in the schedule of fees.

(3) The request referred to in paragraph (2) shall:

(a) identify the Award to which it relates;

(b) be in a procedural language used in the proceeding;

(c) be signed by each requesting party or its representative and be dated; and

(d) specify:

(i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award;

(ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award; and

(iii) with respect to a request for interpretation, the points in dispute concerning the meaning or scope of the Award.

(4) The last date for filing a request under this Rule shall be determined in accordance with Rule 15. A complete request and evidence of payment of the lodging fee must be filed by such date.

(5) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request to the other party;

(b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (2); and

(c) notify the parties of the registration or refusal to register.

(6) As soon as the request is registered, the Secretariat shall transmit the request and the notice of registration to each member of the Tribunal.

(7) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(8) Rules 70-71 shall apply to any decision of the Tribunal pursuant to this Rule.

(9) The Tribunal shall issue the supplementary decision, rectification or interpretation within 60 days after the last written or oral submission on the request.

(10) A supplementary decision, rectification or interpretation under this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.

Article 72
Décision supplémentaire, rectification et interprétation d'une sentence

(1) Un Tribunal peut rectifier de sa propre initiative toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence dans les 30 jours suivant le prononcé de la sentence.

(2) Une partie peut demander une décision supplémentaire, la rectification ou l'interprétation d'une sentence en déposant une requête à cet effet auprès du ou de la Secrétaire général(e) dans les 30 jours suivant le prononcé de la sentence et s'acquitte du droit de dépôt publié dans le barème des frais.

(3) La requête visée au paragraphe (2) :

(a) identifie la sentence visée ;

(b) est établie dans une langue de procédure utilisée au cours de l'instance ;

(c) est signée par chaque partie requérante ou son représentant et est datée ; et

(d) indique précisément :

(i) s'agissant d'une requête aux fins d'obtention d'une décision supplémentaire, toute question sur laquelle le Tribunal a omis de se prononcer dans sa sentence ; et

(ii) s'agissant d'une requête aux fins de rectification, toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence ; et

(iii) s'agissant d'une requête aux fins d'interprétation, les points en litige concernant le sens ou la portée de la sentence.

(4) La date butoir pour le dépôt d'une requête sur le fondement du présent article sera déterminée conformément à l'article 15. Une requête complète et la preuve du paiement du droit de dépôt doivent être déposées au plus tard à cette date.

(5) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre la requête à l'autre partie ;

(b) enregistrer la requête ou refuser de l'enregistrer si elle n'est pas présentée dans le délai visé au paragraphe (2) ; et

(c) aviser les parties de l'enregistrement ou du refus d'enregistrement.

(6) Dès que la requête est enregistrée, le Secrétariat la transmet à chaque membre du Tribunal avec la notification de l'enregistrement.

(7) Le ou la Président(e) du Tribunal détermine la procédure à suivre pour l'examen de la requête, après consultation des autres membres du Tribunal et des parties.

(8) Les articles 70 - 71 s'appliquent à toute décision du Tribunal rendue en vertu du présent article.

(9) Le Tribunal rend la décision supplémentaire, la rectification ou l'interprétation dans les 60 jours suivant les dernières écritures ou plaidoiries sur la requête.

(10) La décision supplémentaire, la rectification ou l'interprétation en vertu du présent article fait partie intégrante de la sentence et figure sur toutes les copies certifiées conformes de la sentence.

Regla 72
Decisión Suplementaria, Rectificación y Aclaración de un Laudo

(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 30 días siguientes a la fecha en que se haya dictado el laudo.

(2) Una parte podrá solicitar una decisión suplementaria, o una rectificación o aclaración de un laudo mediante la presentación de una solicitud al o a la Secretario(a) General dentro de los 30 días siguientes a la fecha en que se haya dictado el laudo y después del pago del derecho de registro publicado en el arancel de derechos.

(3) La solicitud a la que se hace referencia en el párrafo (2) deberá:

(a) identificar el laudo de que se trata;

(b) estar en un idioma procesal utilizado en el procedimiento;

(c) estar fechada y firmada por cada una de las partes solicitantes o su(s) representante(s);

(d) especificar:

(i) con respecto a una solicitud de decisión suplementaria, toda cuestión que el Tribunal hubiere omitido decidir en el laudo;

(ii) con respecto a una solicitud de rectificación, errores de forma, aritméticos o similares en el laudo; y

(iii) con respecto a una solicitud de aclaración, los puntos controvertidos relativos al sentido o alcance del laudo.

(4) La última fecha para la presentación de una solicitud en virtud de esta Regla se determinará de conformidad con la Regla 15. Deberá presentarse una solicitud completa y la prueba del pago del derecho de registro a más tardar en esa fecha.

(5) Inmediatamente después de recibir la solicitud y el derecho de registro, el o la Secretario(a) General deberá, con prontitud:

(a) enviar la solicitud a la otra parte;

(b) registrar la solicitud, o rechazar el registro si la solicitud no se realiza dentro del plazo al que se hace referencia en el párrafo (2); y

(c) notificar a las partes el registro o la denegación del registro.

(6) En cuanto se registre la solicitud, el Secretariado enviará la solicitud y la notificación del registro a cada uno(a) de los o las miembros del Tribunal.

(7) El o la Presidente(a) del Tribunal determinará el procedimiento para considerar la solicitud, previa consulta a los otros miembros del Tribunal y a las partes.

(8) Las Reglas 70-71 serán aplicables a cualquier decisión del Tribunal de conformidad con lo dispuesto en esta Regla.

(9) El Tribunal emitirá la decisión suplementaria, rectificación o aclaración dentro de los 60 días siguientes a lo que suceda de último, sea el último escrito o bien la última presentación oral sobre la solicitud.

(10) Una decisión suplementaria, rectificación o aclaración en virtud de esta Regla formará parte del laudo y se reflejará en todas las copias certificadas del laudo.

1159. Under the current Arbitration (AF) Rules, a disputing party may ask the Tribunal that rendered the Award to: (i) correct any clerical, arithmetical or similar error; (ii) issue a supplementary decision deciding any issue omitted in the Award; or (iii) interpret the Award. Procedures for revision and annulment of an Award like those specified in the ICSID Convention are not available. Instead, Awards rendered under the Arbitration (AF) Rules, as UNCITRAL awards, are potentially subject to review by domestic courts in the place of arbitration on the basis of the setting aside provisions or provisions governing non-recognition of international arbitral awards in the local law, which in many jurisdictions correspond to the procedure for set aside under the UNCITRAL Model Law. Subject to these provisions, Awards are generally enforced pursuant to the States' obligations under the New York Convention.

1160. Requests for a supplementary decision, rectification or interpretation of an Award are currently subject to the same time-limit. For that reason, current Art. 55-57 are now merged into a single provision, proposed (AF)AR 72.

1161. Proposed (AF)AR 72(1) maintains the possibility for the Tribunal to rectify its Award for any clerical, arithmetical or similar error on its own initiative within 30 days after rendering the Award.

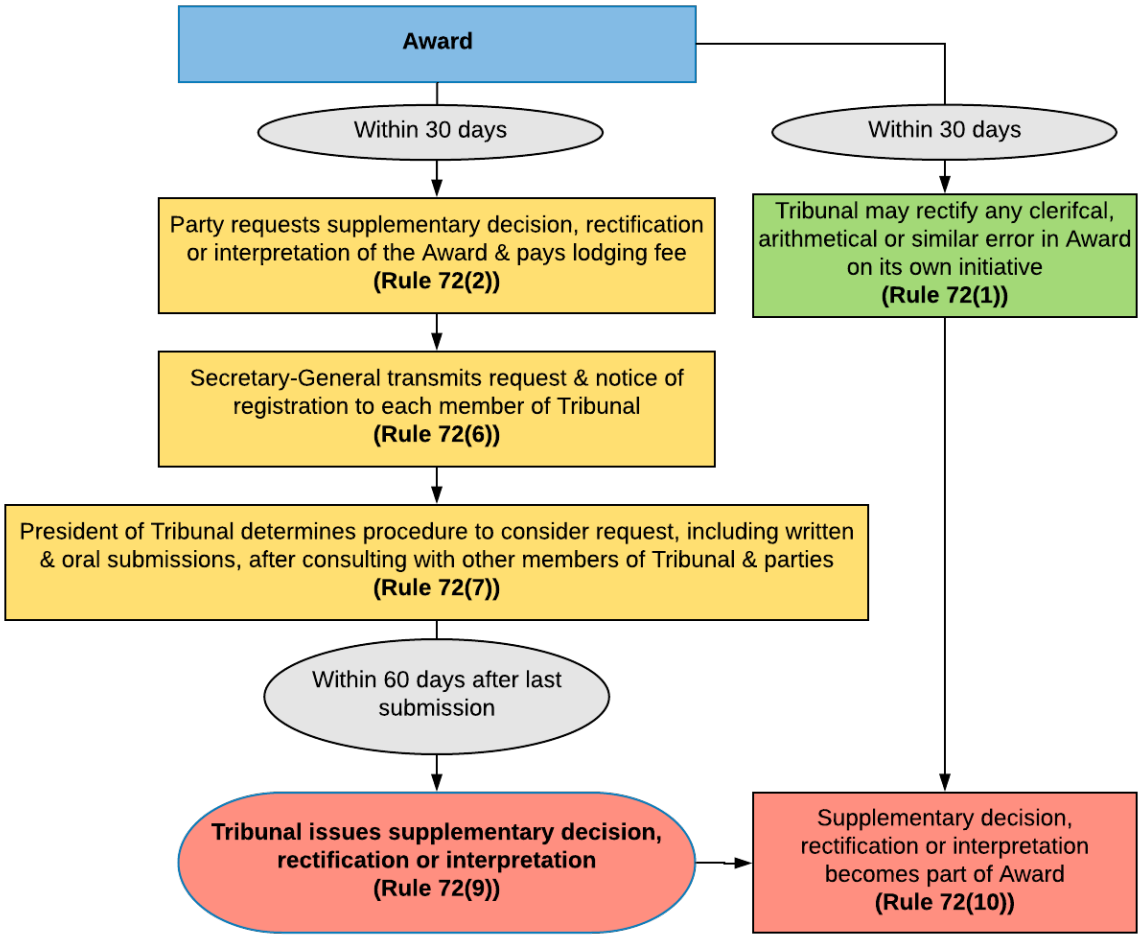
1162. When a party requests a supplementary decision, rectification or interpretation of an Award, each of these requests follows the same procedure now set out in proposed (AF)AR 72(5). Proposed (AF)AR 72(6) introduce the concept of registration of the request for a supplementary decision, rectification or interpretation of an Award in the AF system. This mirrors the process under the AR. Such registration is expedited and allows the Secretariat to verify that the 30-day limit has been complied with.

1163. The time limit to file such a request has been reduced from 45 days in current Art. 55, 56 and 57 to 30 days in proposed (AF)AR 72(2). In addition, the Tribunal now has a 60-day deadline to issue its decision in (AF)AR 72(9).

1164. The word in current Art. 56 "*correction*" is renamed "*rectification*", as the current English version of the A(AF)R is the only one to use "correction" following the model of the UNCITRAL Rules.

1165. The basic steps are described in the chart below:

Supplementary Decision, Rectification and Interpretation – Rule 72



CHAPTER XII – EXPEDITED ARBITRATION

1166. Proposed (AF)AR 73 to (AF)AR 81 are new provisions. They are identical to proposed AR 69 to 79, save for the reference to revision or annulment, and have been modified to fit the proposed (AF)AR expedited arbitration provisions.

1167. The following table shows the basic steps in the process and the time line for an EA with a Sole Arbitrator. As can be seen from this table, the parties are able to complete all briefing and get to a hearing on merits and jurisdiction within one year.

Day No. (Cumulative No. of Days)	Step in the Proceeding	No. of Days for Step	Rule Reference (Proposed Provision)
Day 1	Registration		
Day 20	Agreement on EA	20 after registration	Rule 73(2)
Day 30	Agreement on number of arbitrators and method	30 after registration	Rule 74(2)
Day 50	Parties appoint Sole Arbitrator (SA)	20	Rule 75(a)
Day 60	SA accepts appointment / constitution of Tribunal	10	Rule 75(b)
Day 90	First session	30	Rule 78(1)
Day 150	Claimant(s)' memorial	60	Rule 79(1)(a)
Day 210	Respondent(s)' counter-memorial	60	Rule 79(a)(b)
Day 250	Claimant(s)' reply	40	Rule 79(1)(d)
Day 290	Respondent(s)' rejoinder	40	Rule 79(1)(e)
Day 350	Hearing (no. of days determined between SA and parties)	60	Rule 79(1)(g)
Day 360 (+ no. of hearing days)	Parties' statements of costs	10	Rule 79(1)(h)
Day 470	Award	120	Rule 79(1)(i)

RULE 73 – CONSENT OF PARTIES TO EXPEDITED ARBITRATION

Chapter XII
Expedited Arbitration

Rule 73
Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted under the Additional Facility Rules may consent to expedite the arbitration in accordance with this Chapter ("expedited arbitration") by following the procedure in paragraph (2).

(2) The parties shall jointly notify the Secretariat in writing of their consent to an expedited arbitration in accordance with this Chapter. Such notice must be received within 20 days after the date of registration of the Request.

(3) Chapters I-XI of the (Additional Facility) Arbitration Rules shall apply to an expedited arbitration except that:

(a) Rules 45, 47, 48, 52, and 53 do not apply in an expedited arbitration pursuant to this Chapter; and

(b) Rules 36, 40, 44, 46, 50, 62, 69, and 72, as modified by Rules 74-81, apply in an expedited arbitration pursuant to this Chapter.

Chapitre XII
Arbitrage accéléré

Article 73
Consentement des parties à un arbitrage accéléré

(1) Les parties à un arbitrage conduit sur le fondement du Règlement du Mécanisme supplémentaire peuvent consentir à accélérer l'arbitrage conformément au présent chapitre (« arbitrage accéléré ») en suivant la procédure indiquée au paragraphe (2).

(2) Les parties notifient conjointement par écrit au Secrétariat leur consentement à un arbitrage accéléré conformément au présent chapitre. Cette notification doit être reçue dans un délai de 20 jours à compter de la date de l'enregistrement de la requête.

(3) Les chapitres I à XI du Règlement d'arbitrage (Mécanisme supplémentaire) s'appliquent à un arbitrage accéléré, étant toutefois entendu que:

(a) les articles 45, 47, 48, 52 et 53 ne s'appliquent pas à un arbitrage accéléré sur le fondement du présent chapitre ; et

(b) les articles 36, 40, 44, 46, 50, 59, 62, 69 et 72, modifiés par les articles 74 - 81, s'appliquent à un arbitrage accéléré sur le fondement du présent chapitre.

Capítulo XII
Arbitraje Expedito

Regla 73
Consentimiento de las Partes a un Arbitraje Expedito

(1) Las partes de un arbitraje tramitado en virtud del Reglamento del Mecanismo Complementario pueden consentir a que dicho arbitraje sea conducido con mayor rapidez de conformidad con este Capítulo ("arbitraje expedito") siguiendo el procedimiento descrito en el párrafo (2).

(2) Las partes notificarán al Secretariado en forma conjunta y por escrito su consentimiento a un arbitraje expedito de conformidad con este Capítulo. Dicha notificación debe recibirse dentro de los 20 días siguientes a la fecha de registro de la solicitud.

(3) Los Capítulos I-XI de las Reglas de Arbitraje (Mecanismo Complementario) serán de aplicación a un arbitraje expedito salvo que:

(a) Las Reglas 45, 47, 48, 52 y 53 no son aplicables en un arbitraje expedito de conformidad con lo dispuesto en este Capítulo; y

(b) Las Reglas 36, 40, 44, 46, 50, 62, 69 y 72, según fueran modificadas por las Reglas 74-81, son aplicables en un arbitraje expedito de conformidad con lo dispuesto en este Capítulo.

1168. Proposed (AF)AR 73(1) is similar to proposed AR 69. However, it refers to the AF Rules, not the Convention. Proposed (AF)AR 73(3) likewise does not refer to the Convention.

RULE 74 – NUMBER OF ARBITRATORS AND METHOD OF CONSTITUTING THE TRIBUNAL FOR EXPEDITED ARBITRATION

Rule 74
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 75 or a three-member Tribunal appointed pursuant to Rule 76.

(2) The parties shall jointly notify the Secretariat in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of registration of the Request.

(3) If the parties do not notify the Secretariat of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed in accordance with Rule 75.

(4) An appointment under Rules 75-76 shall be deemed an appointment in accordance with a method agreed by the parties.

Article 74
Nombre d'arbitres et méthode de constitution du Tribunal dans un arbitrage accéléré

(1) Le Tribunal dans un arbitrage accéléré comprend un(e) arbitre unique nommé(e) conformément à l'article 75 ou trois membres nommés conformément à l'article 76.

(2) Dans les 30 jours suivant la date de l'enregistrement de la requête, les parties notifient conjointement par écrit au Secrétariat si elles ont choisi un(e) arbitre unique ou un Tribunal composé de trois membres.

(3) Si les parties ne notifient pas leur choix au Secrétariat dans le délai visé au paragraphe (2), le Tribunal comprend un(e) arbitre unique devant être nommé(e) conformément à l'article 75.

(4) Toute nomination effectuée en application des articles 75 - 76 est réputée constituer une nomination selon la méthode convenue entre les parties.

Regla 74
Número de Árbitros y Método de Constitución del Tribunal para el Arbitraje Expedito

(1) El Tribunal en un arbitraje expedito estará compuesto por un o una Árbitro Único nombrado de conformidad con lo dispuesto en la Regla 75 o de un Tribunal de tres miembros nombrados de conformidad con lo dispuesto en la Regla 76.

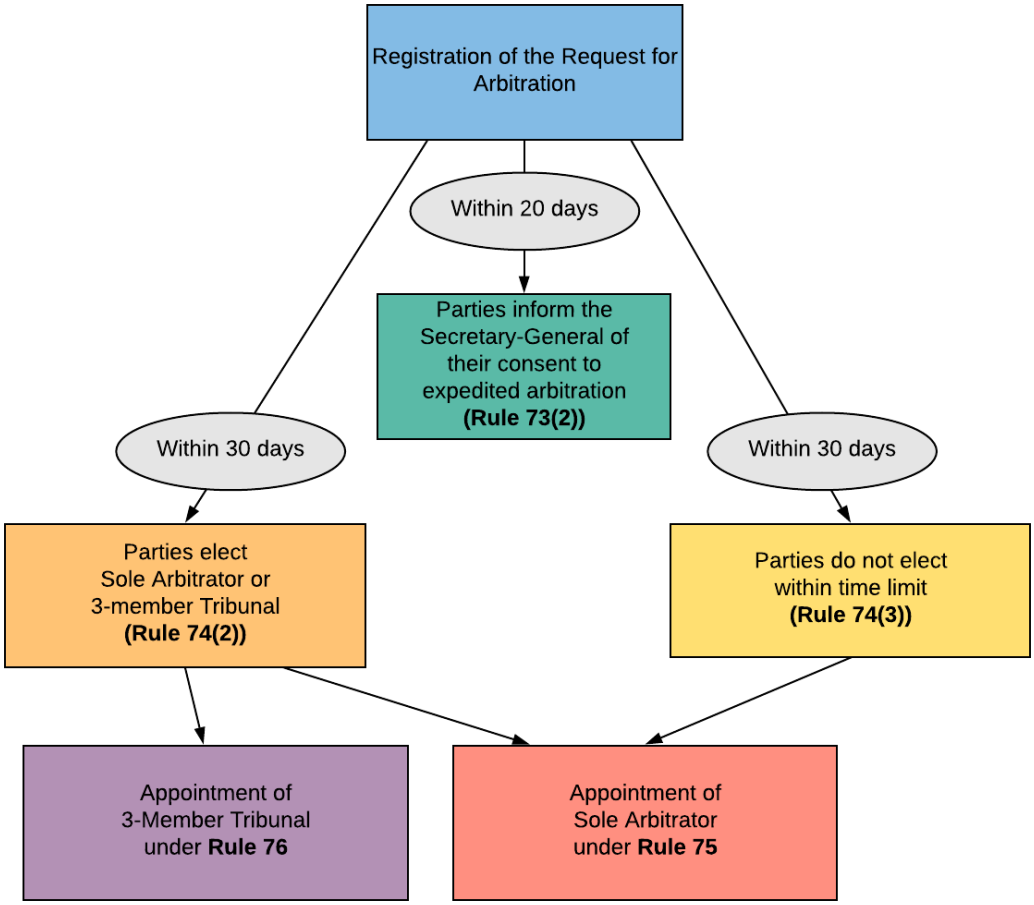
(2) Las partes notificarán en forma conjunta y por escrito al Secretariado de su elección de un o una Árbitro Único o de un Tribunal de tres miembros dentro de los 30 días siguientes a la fecha de registro de la solicitud.

(3) Si las partes no notificaran al Secretariado su elección dentro del plazo al que se hace referencia en el párrafo (2), el Tribunal estará compuesto por un o una Árbitro Único que será nombrado de conformidad con la Regla 75.

(4) Un nombramiento de conformidad con lo dispuesto en las Reglas 75-76 será considerado un nombramiento en virtud de un método acordado por las partes.

1169. Proposed (AF)AR 74 is identical to proposed AR 70. Proposed (AF)AR 74(4) does not contain any reference to Art. 37(2)(a) of the Convention.

Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration – Rule 73 & 74



RULE 75 – APPOINTMENT OF SOLE ARBITRATOR FOR EXPEDITED ARBITRATION

Rule 75
Appointment of Sole Arbitrator for Expedited Arbitration

(1) A Sole Arbitrator in an expedited arbitration shall be appointed in accordance with the following procedure:

(c) the parties shall jointly advise the Secretary-General in writing of their agreement on the Sole Arbitrator and shall provide the appointee's name, nationality(ies) and contact information within 20 days after the notice referred to in Rule 74(2); and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77;

(2) The Secretary-General shall appoint the Sole Arbitrator if:

(a) the parties do not agree on the Sole Arbitrator within the time limit referred to in paragraph (1)(a);

(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator;

(c) the appointee does not accept the appointment within the time limit referred to in Rule 77; or

(d) the appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77; and

(e) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.

Article 75
Nomination d'un(e) arbitre unique dans un arbitrage accéléré

(1) Un(e) arbitre unique dans un arbitrage accéléré est nommé(e) conformément à la procédure suivante :

(a) les parties notifient conjointement par écrit au ou à la Secrétaire général(e) leur accord sur l'arbitre unique et indiquent le nom, la ou les nationalité(s) et les coordonnées de la personne nommée, dans les 20 jours suivant la notification visée à l'article 74(2) ; et

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 77 ;

(2) Le ou la Secrétaire général(e) nomme l'arbitre unique si :

(a) les parties ne se mettent pas d'accord sur l'arbitre unique dans le délai visé au paragraphe (1)(a) ;

(b) les parties notifient au ou à la Secrétaire général(e) qu'elles ne parviennent pas à se mettre d'accord sur l'arbitre unique ;

(c) la personne nommée n'accepte pas sa nomination dans le délai visé à l'article 77 ; ou

(d) la personne nommée refuse sa nomination.

(3) La procédure suivante s'applique à la nomination par le ou la Secrétaire général(e) de l'arbitre unique en application du paragraphe (2) :

(a) le ou la Secrétaire général(e) transmet aux parties une liste de cinq candidat(e)s en vue de la nomination d'un(e) arbitre unique, dans les 10 jours suivant l'événement pertinent visé au paragraphe (2) ;

(b) chaque partie peut rayer un seul nom de la liste et classe les autres candidat(e)s par ordre de préférence, puis transmet ce classement au ou à la Secrétaire général(e) dans les 10 jours suivant la réception de la liste ;

(c) le ou la Secrétaire général(e) informe les parties du résultat des classements le jour ouvré suivant la réception des classements et nomme le ou la candidat(e) le (la) mieux classé(e). Si plusieurs candidat(e)s obtiennent le premier rang, le ou la Secrétaire général(e) choisit l'un(e) d'entre eux (elles) ;

(d) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 77 ; et

(e) si le ou la candidat(e) retenu(e) n'accepte pas sa nomination, le ou la Secrétaire général(e) choisit le ou la candidat(e) le (la) mieux classé(e) suivant(e).

Regla 75
Nombramiento de un o una Árbitro Único para el Arbitraje Expedito

(1) Un o una Árbitro Único en un arbitraje expedito será nombrado de conformidad con el siguiente procedimiento:

(a) las partes notificarán en forma conjunta y por escrito al o a la Secretario(a) General su acuerdo sobre el o la Árbitro Único y le proporcionarán el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada dentro de los 20 días siguientes a la notificación a la que se hace referencia en la Regla 74(2); y

(b) el o la Secretario(a) General enviará inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 77;

(2) El o la Secretario(a) General nombrará al o la Árbitro Único si:

(a) las partes no se ponen de acuerdo sobre el o la Árbitro Único a ser nombrado dentro del plazo al que se hace referencia en el párrafo (1)(a);

(b) las partes le notifican al o a la Secretario(a) General que no pueden llegar a un acuerdo sobre el o la Árbitro Único a ser nombrado;

(c) la persona nombrada no acepta el nombramiento dentro del plazo al que se hace referencia en la Regla 77; o

(d) la persona nombrada rechaza el nombramiento.

(3) El siguiente procedimiento será aplicable al nombramiento del o de la Árbitro Único por el o la Secretario(a) General de conformidad con lo dispuesto en el párrafo (2):

(a) el o la Secretario(a) General enviará a las partes dentro de los 10 días siguientes al hecho relevante al que se hace referencia en el párrafo (2), una lista de cinco candidatos(as) para el nombramiento del o de la Árbitro Único;

(b) cada una de las partes podrá tachar un nombre de la lista, y calificará a los o las candidatos(as) restantes por orden de preferencia y enviará dicha calificación al o a la Secretario(a) General dentro de los 10 días siguientes a la recepción de la lista;

(c) el o la Secretario(a) General informará a las partes del resultado de las calificaciones el día hábil inmediatamente posterior a la recepción de las calificaciones y nombrará al candidato que tenga la calificación más alta. Si dos

o más candidatos(as) obtienen la calificación más alta, el o la Secretario(a) General seleccionará a uno o una de ellos(as);

(d) el o la Secretario(a) General transmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 77; y

(e) si el o la candidato(a) seleccionado(a) no aceptara el nombramiento, el o la Secretario(a) General seleccionará al o a la candidato(a) que haya obtenido la siguiente mejor calificación.

1170. Proposed (AF)AR 75 is identical to proposed AR 71.

RULE 76 – APPOINTMENT OF THREE-MEMBER TRIBUNAL FOR EXPEDITED ARBITRATION

Rule 76
Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator ("co-arbitrators") within 20 days after the notice referred to in Rule 74(2) and shall notify the Secretary-General of the appointees' names, nationalities and contact information within such time;

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77;

(c) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of acceptance of both appointments made pursuant to paragraph (1)(a) and shall notify the Secretary-General of the appointee's name, nationality(ies) and contact information within such time; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the time limits referred to in paragraph (1)(a) or (c);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal;

(c) an appointee does not accept the appointment within the time limit referred to in Rule 77; or

(d) an appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators not yet appointed pursuant to paragraphs (1) and (2):

(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed, after consulting as far as possible with the parties. The Secretary-General shall use best efforts to make the co-arbitrator appointment(s) within 15 days after the relevant event in paragraph (2);

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77;

(c) as soon as both co-arbitrators have accepted their appointment, or within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(d) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(e) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(f) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77; and

(g) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.

Article 76
Nomination d'un Tribunal composé de trois membres dans un arbitrage accéléré

(1) Un Tribunal composé de trois membres est nommé conformément à la procédure suivante :

(a) chaque partie nomme un(e) arbitre (« co-arbitres ») dans les 20 jours suivant la notification visée à l'article 74(2) et notifie au ou à la Secrétaire général(e) le nom, la ou les nationalité(s) et les coordonnées de chacune des personnes nommées, dans ce même délai ;

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 77 ;

(c) les parties nomment conjointement le ou la Président(e) du Tribunal dans les 20 jours suivant la réception de l'acceptation des deux nominations effectuées conformément au paragraphe (1)(a) et notifient au ou à la Secrétaire général(e) le nom, la ou les nationalité(s) et les coordonnées de la personne nommée, dans ce même délai ; et

(d) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 77.

(2) Le ou la Secrétaire général(e) nomme les arbitres non encore nommé(e)s si :

(a) une nomination n'est pas effectuée dans les délais visés au paragraphe (1)(a) ou (c) ;

(b) les parties notifient au ou à la Secrétaire général(e) qu'elles ne parviennent pas à se mettre d'accord sur le ou la Président(e) du Tribunal ;

(c) une personne nommée n'accepte pas sa nomination dans le délai visé à l'article 77 ; ou

(d) une personne nommée refuse sa nomination.

(3) La procédure suivante s'applique à la nomination par le ou la Secrétaire général(e) de tou(te)s arbitres non encore nommé(e)s conformément aux paragraphes (1) et (2) :

(a) le ou la Secrétaire général(e) nomme en premier lieu le(s) co-arbitre(s) non encore nommé(e)(s), après consultation des parties dans la mesure du possible. Il ou elle déploie tous les efforts possibles pour procéder à la (aux) nomination(s)

du (de la) ou des co-arbitre(s) dans un délai de 15 jours suivant l'événement pertinent visé au paragraphe (2) ;

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 77 ;

(c) dès que les deux co-arbitres ont accepté leur nomination ou dans un délai de 10 jours suivant l'événement pertinent visé au paragraphe (2), le ou la Secrétaire général(e) transmet aux parties une liste de cinq candidat(e)s en vue de la nomination d'un ou d'une Président(e) du Tribunal ;

(d) chaque partie peut rayer un seul nom de la liste et classe les autres candidat(e)s par ordre de préférence, puis transmet ce classement au ou à la Secrétaire général(e) dans les 10 jours suivant la réception de la liste ;

(e) le ou la Secrétaire général(e) informe les parties du résultat des classements le jour ouvré suivant la réception des classements et nomme le ou la candidat(e) le (la) mieux classé(e). Si plusieurs candidat(e)s obtiennent le premier rang, le ou la Secrétaire général(e) choisit l'un(e) d'entre eux (elles) ;

(f) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l'article 77 ; et

(g) si le ou la candidat(e) retenu(e) n'accepte pas sa nomination, le ou la Secrétaire général(e) choisit le ou la candidat(e) le (la) mieux classé(e) suivant(e).

Regla 76
Nombramiento de un Tribunal de Tres Miembros para el Arbitraje Expedito

(1) Un Tribunal de tres miembros será nombrado de conformidad con el siguiente procedimiento:

(a) cada una de las partes nombrará a un árbitro ("coárbitros") dentro de los 20 días siguientes a la notificación a la que se hace referencia en la Regla 74(2) y notificará al o a la Secretario(a) General los nombres, la(s) nacionalidad(es) y la información de contacto de las personas nombradas dentro de dicho plazo;

(b) el o la Secretario(a) General transmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 77;

(c) las partes nombrarán en forma conjunta al o a la Presidente(a) del Tribunal dentro de los 20 días siguientes a la recepción de la aceptación de ambos nombramientos realizados de conformidad con lo dispuesto en el párrafo (1)(a) y notificarán al o a la Secretario(a) General el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada dentro de dicho plazo; y

(d) el o la Secretario(a) General transmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 77.

(2) El o la Secretario(a) General nombrará a los árbitros que aún no hayan sido nombrados si:

(a) un nombramiento no se realiza dentro de los plazos a los que se hace referencia en el párrafo (1)(a) o (c);

(b) las partes notifican al o a la Secretario(a) General que no pueden llegar a un acuerdo sobre el o la Presidente(a) del Tribunal;

(c) una de las personas nombradas no acepta el nombramiento dentro del plazo al que se hace referencia en la Regla 77; o

(d) una de las personas nombradas rechaza el nombramiento.

(3) El siguiente procedimiento será aplicable al nombramiento por parte del o de la Secretario(a) General de los árbitros que aún no hayan sido nombrados de conformidad con lo dispuesto en los párrafos (1) y (2):

(a) el o la Secretario(a) General nombrará en primer lugar al o a los coárbitro(s) que aún no hayan sido nombrados, previa consulta, en la medida de lo posible, a las partes. El o la Secretario(a) General hará lo posible para realizar el o los nombramiento(s) del o de los coárbitro(s) dentro de los 15 días siguientes al hecho relevante al que se hace referencia en el párrafo (2);

(b) el o la Secretario(a) General enviará inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 77;

(c) tan pronto como ambos coárbitros hayan aceptado sus nombramientos, o dentro de los 10 días siguientes al hecho relevante al que se hace referencia en el párrafo (2), el o la Secretario(a) General enviará a las partes una lista de cinco candidatos(as) para su nombramiento como Presidente(a) del Tribunal;

(d) cada una de las partes podrá tachar un nombre de la lista, y clasificará a los o las candidatos(as) restantes por orden de preferencia y enviará dicha clasificación al o a la Secretario(a) General dentro de los 10 días siguientes a la recepción de la lista;

(e) el o la Secretario(a) General informará a las partes del resultado de las clasificaciones el día hábil inmediatamente posterior a la recepción de las clasificaciones y nombrará al o a la candidato(a) que tenga la mejor clasificación. Si dos o más candidatos(as) obtienen la mejor clasificación, el o la Secretario(a) General seleccionará a uno o una de ellos;

(f) el o la Secretario(a) General transmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 77; y

(g) si el o la candidato(a) seleccionado no aceptara el nombramiento, el o la Secretario(a) General seleccionará al o a la candidato(a) que haya obtenido la siguiente clasificación más alta.

1171. Proposed (AF)AR 76 is identical to proposed AR 72.

RULE 77 – ACCEPTANCE OF APPOINTMENT IN EXPEDITED ARBITRATION

Rule 77
Acceptance of Appointment in Expedited Arbitration

An arbitrator appointed in an expedited arbitration shall accept the appointment and provide a declaration pursuant to Rule 36(3) within 10 days after receipt of the request for acceptance.

Article 77
Acceptation des nominations dans un arbitrage accéléré

Un(e) arbitre nommé(e) dans un arbitrage accéléré doit accepter sa nomination et remettre une déclaration conformément à l'article 36(3) dans les 10 jours suivant la réception de la demande d'acceptation.

Regla 77
Aceptación del Nombramiento en el Arbitraje Expedito

Un o una árbitro nombrado(a) en un arbitraje expedito deberá aceptar el nombramiento y proporcionar una declaración de conformidad con lo dispuesto en la Regla 36(3) dentro de los 10 días siguientes a la recepción de la solicitud de aceptación.

1172. Proposed (AF)AR 77 is identical to proposed AR 73.

RULE 78 – FIRST SESSION IN EXPEDITED ARBITRATION

Rule 78
First Session in Expedited Arbitration

(1) The Tribunal shall hold a first session pursuant to Rule 44 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication unless both parties and the Tribunal agree it shall be held in person.

Article 78
Première session dans un arbitrage accéléré

(1) Le Tribunal tient une première session conformément à l'article 44 dans les 30 jours suivant la constitution du Tribunal.

(2) La première session se tient par téléphone ou par tous moyens de communication électroniques, à moins que les deux parties et le Tribunal ne conviennent de la tenir en personne.

Regla 78
Primera Sesión en el Arbitraje Expedito

(1) El Tribunal celebrará una primera sesión de conformidad con lo dispuesto en la Regla 44 dentro de los 30 días siguientes a la constitución del Tribunal.

(2) La primera sesión se celebrará por vía telefónica o a través de medios electrónicos de comunicación salvo que ambas partes y el Tribunal acuerden que deberá celebrarse en persona.

1173. Proposed (AF)AR 78 is identical to proposed AR 74.

RULE 79 – THE PROCEDURAL SCHEDULE IN EXPEDITED ARBITRATION

Rule 79
The Procedural Schedule in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply in the expedited arbitration:

(a) the requesting party shall file a memorial within 60 days after the first session, unless the Request is to be considered the memorial pursuant to Rule 22(2);

(b) the other party shall file a counter-memorial within 60 days after the date of filing of the memorial, or within 60 days after the first session if the requesting party has elected to use the Request as its memorial pursuant to Rule 22(2);

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;

(d) the requesting party shall file a reply within 40 days after the date of filing of the counter-memorial;

(e) the other party shall file a rejoinder within 40 days after the date of filing of the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counter-claim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents or other evidence pursuant to Rule 50(1). The Tribunal shall

decide such applications based on written submissions and without an in-person hearing.

(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule in paragraph (1), unless the Tribunal determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.

Article 79
Calendrier de la procédure dans un arbitrage accéléré

(1) Le calendrier suivant relatif aux écritures et à l'audience est applicable dans un arbitrage accéléré :

(a) la partie requérante dépose un mémoire dans les 60 jours suivant la première session, sauf si la requête doit être considérée comme le mémoire conformément à l'article 22(2) ;

(b) l'autre partie dépose un contre-mémoire dans les 60 jours suivant la date de dépôt du mémoire, ou dans les 60 jours suivant la première session si la partie requérante a choisi d'utiliser la requête comme son mémoire conformément à l'article 22(2) ;

(c) le mémoire et le contre-mémoire visés au paragraphe (1)(a) et (b) ne doivent pas dépasser 200 pages;

(d) la partie requérante dépose une réponse dans les 40 jours suivant la date de dépôt du contre-mémoire ;

(e) l'autre partie dépose une réplique dans les 40 jours suivant la date de dépôt de la réponse ;

(f) la réponse et la réplique visées au paragraphe (1)(d) et (e) ne doivent pas dépasser 100 pages ;

(g) l'audience se tient dans les 60 jours suivant le dépôt des dernières écritures ;

(h) les parties déposent chacune un état des frais dans les 10 jours suivant le dernier jour de l'audience visée au paragraphe (1)(g) ; et

(i) le Tribunal rend une sentence dès que possible et, en tout état de cause, au plus tard 120 jours après l'audience visée au paragraphe (1)(g).

(2) Toute objection préliminaire ou toute demande reconventionnelle, incidente ou additionnelle est jointe au calendrier principal visé au paragraphe (1). Le Tribunal

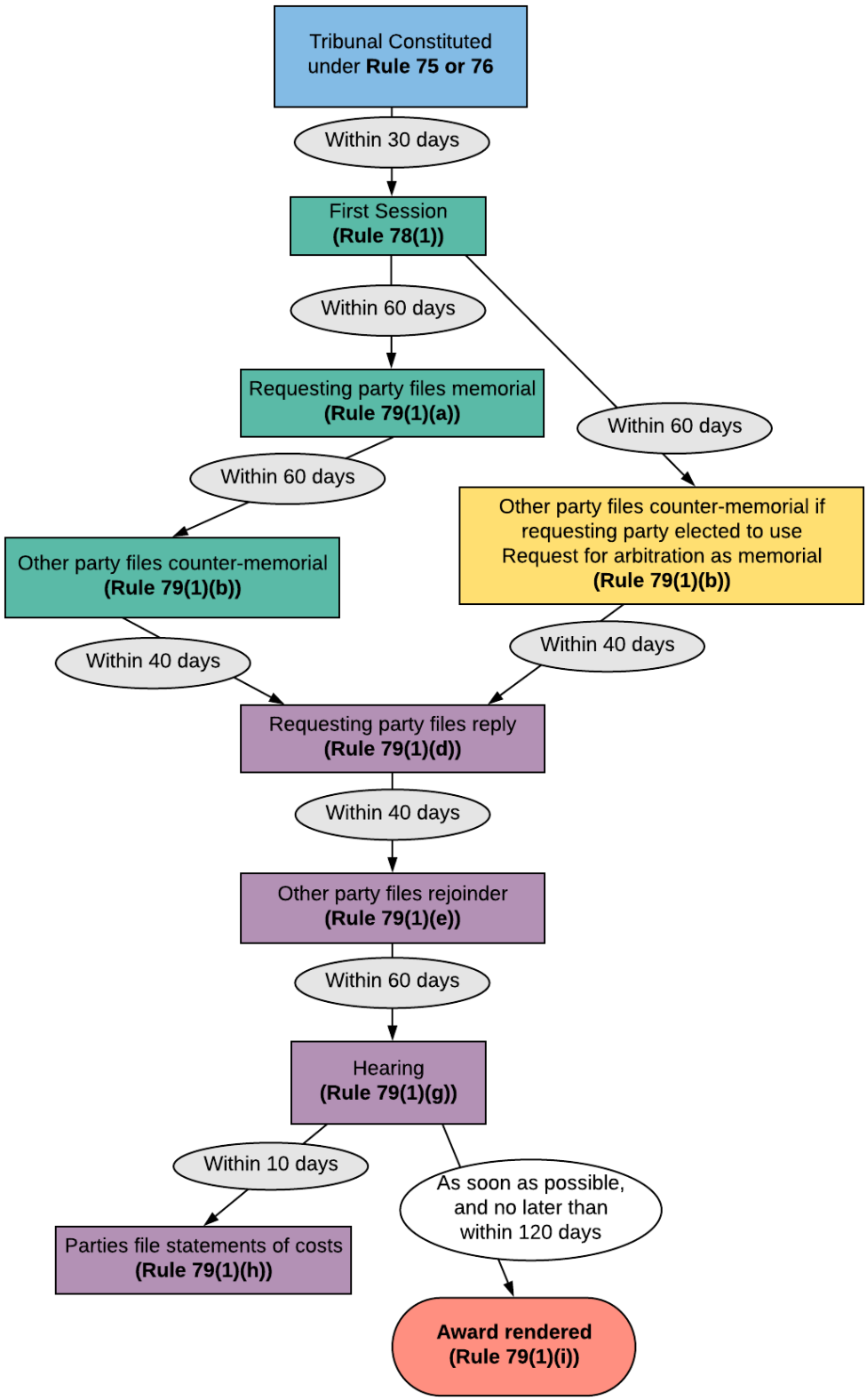
ajuste le calendrier si une partie soulève une telle question, en tenant compte de la nature accélérée de la procédure.

(3) Le Tribunal peut prolonger les délais indiqués au paragraphe (1)(a) et (b) d'une durée maximale de 30 jours si une partie demande au Tribunal de statuer sur un différend découlant d'une demande de production de documents ou d'autres moyens de preuve conformément à l'article 50(1). Le Tribunal statue sur une telle demande sur le fondement d'écritures et sans tenir d'audience en personne.

(4) Les délais applicables aux écritures autres que celles visées aux paragraphes (1) - (3) courent parallèlement à ceux du calendrier principal visé au paragraphe (1), à moins que le Tribunal ne décide que des circonstances exceptionnelles justifient la suspension du calendrier principal. Pour fixer les délais pour ces écritures, le Tribunal tient compte de la nature accélérée de la procédure.

1174. Proposed (AF)AR 79 is identical to proposed AR 75.

Procedural Schedule in an Expedited Arbitration – Rule 78-79



RULE 80 – DEFAULT DURING EXPEDITED ARBITRATION

Rule 80
Default during Expedited Arbitration

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 62.

Article 80
Défaut au cours d'un arbitrage accéléré

Le Tribunal peut accorder à une partie en défaut un délai de grâce ne devant pas excéder 30 jours, conformément à l'article 62.

Regla 80
Rebeldía durante el Arbitraje Expedito

Un Tribunal podrá otorgarle a una parte en rebeldía un período de gracia que no supere los 30 días de conformidad con lo dispuesto en la Regla 62.

1175. Proposed (AF)AR 80 is identical to proposed AR 76.

RULE 81 – THE PROCEDURAL SCHEDULE FOR SUPPLEMENTARY DECISION, RECTIFICATION AND INTERPRETATION IN EXPEDITED ARBITRATION

Rule 81
The Procedural Schedule for Supplementary Decision, Rectification and Interpretation in Expedited Arbitration

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) A request for a supplementary decision, rectification or interpretation of an Award made pursuant to Rule 72 shall be filed within 15 days after the Award was rendered.

(3) The Tribunal shall issue a supplementary decision, rectification or interpretation of an Award pursuant to Rule 72 within 30 days after the last written or oral submission on the request.

Article 81
Calendrier de la procédure applicable à une décision supplémentaire, la rectification et l'interprétation dans une procédure accélérée

(1) Un Tribunal peut rectifier de sa propre initiative toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence dans les 15 jours suivant le prononcé de la sentence.

(2) Une requête aux fins d'obtention d'une décision supplémentaire, de la rectification ou de l'interprétation d'une sentence présentée conformément à l'article 72 est déposée dans les 15 jours suivant le prononcé de la sentence.

(3) Le Tribunal rend une décision supplémentaire, la rectification ou l'interprétation d'une sentence conformément à l'article 72 dans les 30 jours suivant les dernières écritures ou plaidoiries sur la requête.

Regla 81
El Calendario Procesal para la Decisión Suplementaria, Rectificación y Aclaración en el Arbitraje Expedito

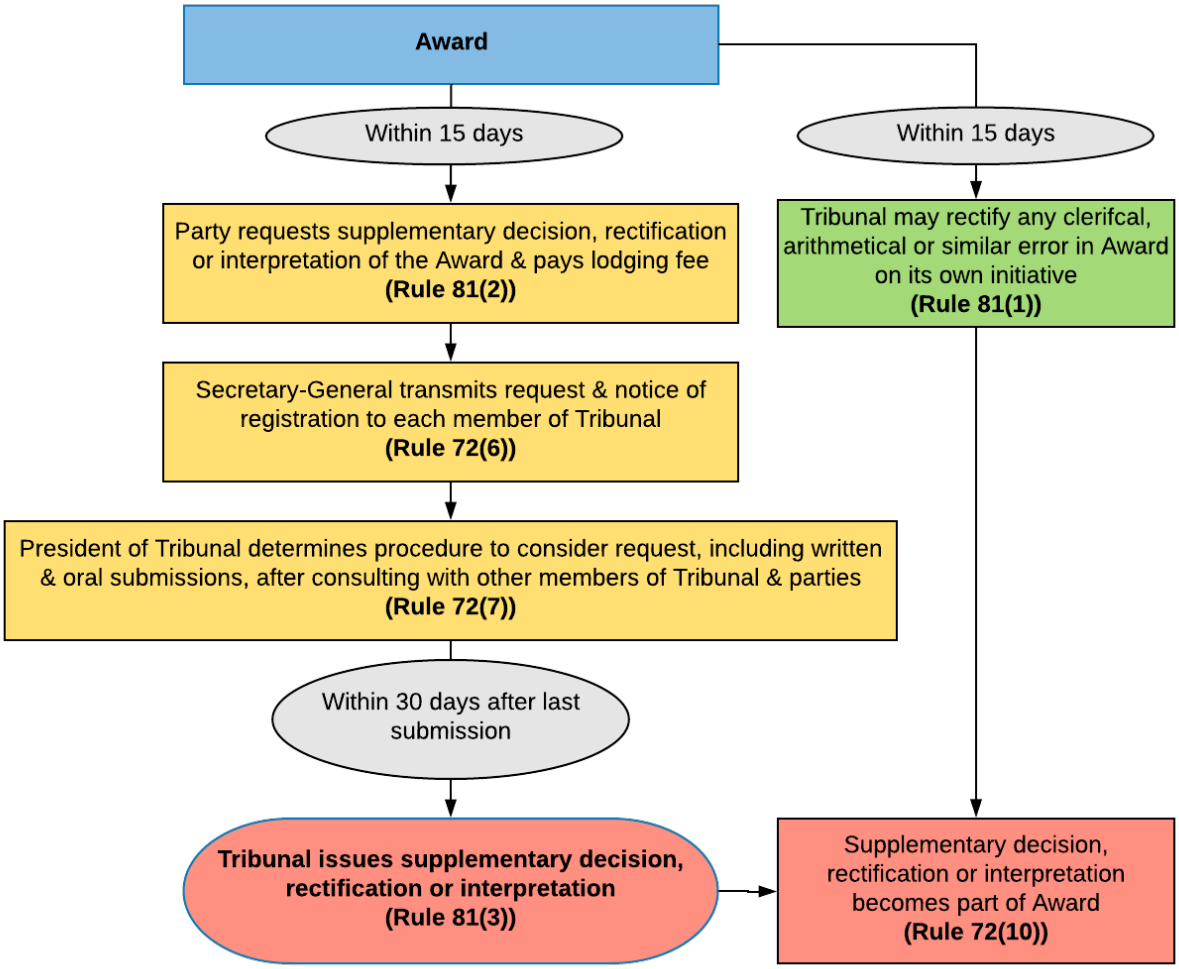
(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 15 días siguientes a la fecha en que se haya dictado el laudo.

(2) Toda solicitud de decisión suplementaria, rectificación o aclaración de un laudo, realizada de conformidad con lo dispuesto en la Regla 72 deberá presentarse dentro de los 15 días siguientes al dictado del laudo.

(3) El Tribunal emitirá una decisión suplementaria, rectificación o aclaración del laudo, de conformidad con lo dispuesto en la Regla 72 dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.

1176. Proposed (AF)AR 81 is similar to proposed AR 77 and 78. Like proposed (AF)AR 72 above, it addresses supplementary decision, rectification and interpretation of an Award in a single rule. The Tribunal can also rectify its Award on its own initiative. The time limit for a party to file a request has been reduced to 15 days in proposed (AF)AR 80(2). In addition, the Tribunal now has a 30-day deadline to issue its decision in proposed (AF)AR 80(3), half of the time provided for under proposed (AF)AR 72.

Procedural Schedule for an Supplementary Decision, Rectification and Interpretation in Expedited Arbitration – Rule 81



VIII. ANNEX C: ADDITIONAL FACILITY RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS ((ADDITIONAL FACILITY) CONCILIATION RULES)

ANNEX C: (ADDITIONAL FACILITY) CONCILIATION RULES

Introductory Note

The Additional Facility Rules of Procedure for Conciliation Proceedings (the (Additional Facility) Conciliation Rules) were adopted by the Administrative Council of the Centre pursuant to Administrative and Financial Regulation 7(1).

The (Additional Facility) Conciliation Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations in Annex A, in particular by Regulation 7.

The (Additional Facility) Conciliation Rules apply from the submission of a Request for conciliation until a Report is issued.

Note introductive

Le Règlement de procédure relatif aux instances de conciliation du Mécanisme supplémentaire (Règlement de conciliation (Mécanisme supplémentaire)) a été adopté par le Conseil administratif du Centre conformément à l'article 7(1) du Règlement administratif et financier.

Le Règlement de conciliation (Mécanisme supplémentaire) est complété par le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A), en particulier par l'article 7.

Le Règlement de conciliation (Mécanisme supplémentaire) s'applique du dépôt d'une requête de conciliation jusqu'au moment où un procès-verbal est établi.

Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Conciliación del Mecanismo Complementario (Reglas de Conciliación (Mecanismo Complementario)) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en la Regla 7(1) del Reglamento Administrativo y Financiero.

Las Reglas de Conciliación (Mecanismo Complementario) están complementadas por el Reglamento Administrativo y Financiero (Mecanismo Complementario) en el Anexo A, en particular por la Regla 7.

Las Reglas de Conciliación (Mecanismo Complementario) se aplican desde la presentación de una solicitud de conciliación hasta la emisión de un informe.

1177. The Additional Facility Rules of Procedure for Conciliation Proceedings ("(AF) Conciliation Rules" or "(AF)CR") apply from registration of the Request for conciliation under the Additional Facility Rules to communication of the Report.

1178. When first drafted in 1978, the rules (then named the "Conciliation (Additional Facility) Rules" or "C(AF)R") were based on certain provisions of the Convention suitable for inclusion in a contractual instrument and based on appropriate portions of the ICSID Conciliation Rules then in effect. The Conciliation (AF) Rules were revised and streamlined in 2003, when they were aligned more closely with the ICSID Conciliation Rules (CR), as well as in 2006 to reflect the amendments made at that time to the CR.

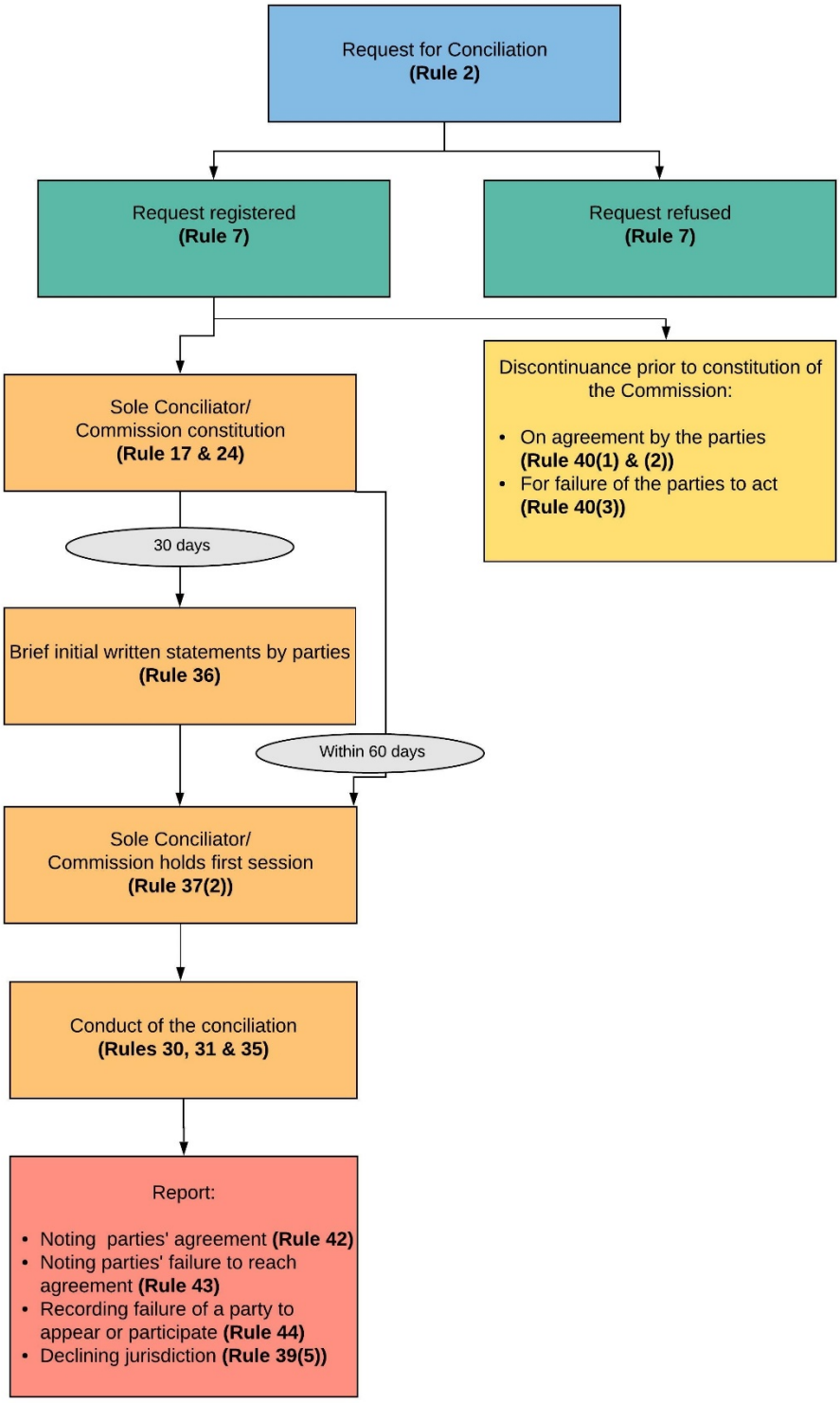
1179. The proposed modifications for the new (AF)CR follow what is proposed for the CR and general reference is made to the WP on the proposed CR (*see* generally WP Section on Conciliation). The revisions to the CR, and the (AF)CR, are intended to clarify and simplify the process while providing the parties greater flexibility. This WP only provides explanations for proposed provisions that differ from the corresponding proposed CR.

1180. With respect to terminology, it is proposed to designate each rule in the (AF)CR as a "Rule" instead of "Article" in the English and Spanish versions. Using the term "Rule" helps avoid confusion between the Articles in the AF Rules and the (AF) Conciliation Rules, and is more consistent with the ICSID Rules applicable to proceedings under the Convention. The French version of the (AF)CR uses "Article" throughout and has not been modified.

1181. ICSID supports efforts by parties to resolve investment disputes through alternate mechanisms and offers its staff and facilities for such processes. In recent years, ICSID has provided its good offices to assist with settlement discussions between investors and States (for more information regarding these activities please visit ICSID's website. A set of investment-specific mediation rules is also proposed for adoption by the Administrative Council. The (Additional Facility) Mediation Rules ("(AF)MR") will be Annex E to the proposed revised AF Rules.

1182. This WP explains the newly proposed amendments to the conciliation framework. The overall conciliation process is shown in the chart below:

Overview of Conciliation Process



CHAPTER I – GENERAL PROVISIONS

1183. Proposed new Chapter I contains general provisions relating to the application of the (AF)CR.

RULE 1 – APPLICATION OF RULES

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any conciliation proceeding conducted under the Additional Facility Rules, except to the extent that the parties agree otherwise and subject to paragraph (2).

(2) If any of these Rules, or any aspect of the parties' agreement to modify the application of these Rules, conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(3) The applicable (Additional Facility) Conciliation Rules are those in force on the date of filing of the request for conciliation.

(4) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(5) These Rules may be cited as the "(Additional Facility) Conciliation Rules" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique à toute instance de conciliation conduite en vertu du Règlement du Mécanisme supplémentaire, sauf dans la mesure où les parties en conviennent autrement et sous réserve du paragraphe (2).

(2) Si l'une des dispositions du présent Règlement ou un aspect de l'accord des parties aux fins de modifier l'application du présent Règlement est en conflit avec une disposition du droit à laquelle les parties ne peuvent déroger, cette dernière disposition prévaut.

(3) Le Règlement de conciliation (Mécanisme supplémentaire) applicable est celui qui est en vigueur à la date du dépôt de la requête de conciliation.

(4) Les langues officielles du Centre sont l'anglais, l'espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(5) Le présent Règlement peut être cité comme le « Règlement de conciliation (Mécanisme supplémentaire) » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de conciliación tramitado en virtud del Reglamento del Mecanismo Complementario, salvo en la medida en que las partes acuerden algo distinto y sin perjuicio de lo dispuesto en el párrafo (2).

(2) Si alguna de estas Reglas, o cualquier aspecto del acuerdo de las partes para modificar la aplicación de estas Reglas, está en conflicto con una disposición legal de la que las partes no puedan apartarse, prevalecerá esa disposición.

(3) Las Reglas de Conciliación (Mecanismo Complementario) aplicables son aquellas en vigor en la fecha de presentación de la solicitud de conciliación.

(4) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(5) Estas Reglas podrán ser citadas como las "Reglas de Conciliación (Mecanismo Complementario)" del Centro.

1184. Proposed (AF)CR 1, entitled "Application of Rules," corresponds to current Art. 1 entitled "Scope of Application". The proposed text is similar to that in proposed CR 1, with two substantive differences.

1185. The first difference stems from the fact that Art. 33 of the Convention does not apply to AF conciliation. Article 33 provides that ICSID Convention conciliation proceedings "shall be conducted in accordance with [the Convention] and, except as the parties otherwise agree, [in accordance with] the Conciliation Rules in effect on the date on which the parties consented to conciliation." Current Art. 1 does not incorporate this concept; it simply stipulates that the Conciliation (AF) Rules will apply to the relevant dispute, without making provision for the parties to make an agreement to the contrary. Proposed

(AF)CR 1(1) incorporates the concept contained in Art. 33 and provides that parties may agree to the non-application of any of the (AF)CR. This brings the (AF)CR in line with other institutional rules (including the proposed (AF)AR), advances the principle of party autonomy, and ensures flexibility for users of AF conciliation.

1186. The second difference is that proposed (AF)CR 1(4) mirrors proposed Art. 4(1) of the AF Rules and specifies that the applicable conciliation rules are the ones in force at the time of filing the Request for conciliation. As a result, once adopted, any conciliation filed under the AF would proceed under these amended Rules.

CHAPTER II – INSTITUTION OF THE PROCEEDINGS

1187. The institution of the proceeding is dealt with in current Art. 2 to 5. Proposed (AF)CR 2 to 9 expand these provisions, to incorporate the proposed ICSID Institution Rules (IR) (with necessary modifications for the (AF)CR). These provisions are substantively the same as the corresponding provisions in the proposed (AF)AR.

RULE 2 – THE REQUEST

CURRENT RELATED PROVISIONS: C(AF)R Art. 2

Chapter II
Institution of the Proceeding

Rule 2
The Request

(1) Any party wishing to institute conciliation proceedings under the Additional Facility Rules shall file a request for conciliation together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

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

Chapitre II
Introduction de l'instance

Article 2
La requête

(1) Toute partie qui désire introduire une instance de conciliation sur le fondement du Règlement du Mécanisme supplémentaire dépose une requête de conciliation ainsi que les documents justificatifs demandés (« requête ») auprès du ou de la Secrétaire général(e) et paie le droit de dépôt indiqué dans le barème des frais.

(2) La requête peut être déposée par une ou plusieurs parties requérantes, ou déposée conjointement par les parties au différend.

Capítulo II
Iniciación del Procedimiento

Regla 2
La Solicitud

(1) Toda parte que quiera dar inicio a un procedimiento de conciliación de conformidad con lo dispuesto en el Reglamento del Mecanismo Complementario deberá presentar una solicitud de conciliación junto con los documentos de respaldo requeridos (la "solicitud") al o a la Secretario(a) General y pagar el derecho de presentación publicado en el arancel de derechos.

(2) La solicitud podrá ser presentada por una o más partes solicitantes o presentarse en forma conjunta por las partes en la diferencia.

1188. Proposed (AF)CR 2 is similar to proposed IR 1. However, it refers to "[a]ny party" initiating proceedings (rather than "[a]ny Contracting State or any national of a Contracting State" in the corresponding IR). This reflects the fact that a requesting party in an AF proceeding can be a State, an REIO, a constituent subdivision or an agency of a State, an agency of an REIO, or a national of another State, as contemplated in proposed Art. 2 of the AF Rules.

RULE 3 – CONTENTS OF THE REQUEST

Rule 3
Contents of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of the representative's authority to act; and

(e) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations.

(2) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

(a) a description of the investment, a statement of the relevant facts, claims, and request for relief, and an indication that there is a legal dispute between the parties arising out of the investment.

(b) with respect to each party's consent to submit the dispute to conciliation under the Additional Facility:

(i) the instrument(s) in which each party's consent is recorded;

(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre;

(c) if a party is a natural person:

(i) information concerning that person's nationality both on the date of consent and on the date of the Request, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of the State party to the dispute or of any constituent State of an REIO party to the dispute on the date of consent and on the date of the Request;

(d) if a party is a juridical person:

(i) information concerning that party's nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of the consent, information identifying the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the State's approval of consent, unless the State or the REIO has notified the Centre that no such approval is required.

Article 3
Contenu de la requête

(1) La requête :

(a) est rédigée en anglais, en espagnol ou en français ;

(b) désigne chaque partie au différend et indique ses coordonnées, notamment son adresse électronique, son adresse postale et son numéro de téléphone ;

(c) est signée par chaque partie requérante ou son ou sa représentant(e) et est datée ;

(d) est accompagnée d'une preuve de l'habilitation du ou de la représentant(e) à agir ; et

(e) si la partie requérante est une personne morale, indique qu'elle a obtenu toutes les autorisations nécessaires aux fins de déposer la requête, et est accompagnée de ces autorisations.

(2) En ce qui concerne l'article 2(1)(a) du Règlement du Mécanisme supplémentaire, la requête contient :

(a) une description de l'investissement, un exposé des faits pertinents, des allégations et des demandes, et une indication qu'il existe un différend d'ordre juridique entre les parties qui est en relation avec l'investissement ;

(b) s'agissant du consentement de chaque partie à soumettre le différend à la conciliation sur le fondement du Mécanisme supplémentaire :

(i) le ou les instrument(s) dans le(s)quel(s) le consentement de chaque partie est consigné ;

(ii) la date d'entrée en vigueur de l'instrument (ou des instruments) servant de fondement au consentement, ainsi que les documents justificatifs prouvant cette date ; et

(iii) la date du consentement, à savoir la date à laquelle les parties ont consenti par écrit à soumettre le différend au Centre ou, si les parties n'ont pas donné leur consentement à la même date, la date à laquelle la dernière partie à consentir a donné son consentement par écrit à soumettre le différend au Centre ;

(c) si une partie est une personne physique :

(i) des informations relatives à la nationalité de cette personne tant à la date du consentement qu'à la date de la requête, ainsi que les documents justificatifs prouvant cette nationalité ; et

(ii) une déclaration selon laquelle la personne n'avait la nationalité de l'État partie au différend ou d'un État membre d'une OIER partie au différend ni à la date du consentement, ni à la date de la requête ;

(d) si une partie est une personne morale :

(i) des informations relatives à la nationalité de cette partie à la date du consentement, ainsi que des documents justificatifs prouvant cette nationalité ; et

(ii) si cette partie avait la nationalité de l'État partie au différend ou d'un État membre de l'OIER partie au différend à la date du consentement, des informations identifiant l'accord des parties pour considérer cette personne morale comme ressortissante d'un autre État conformément à l'article 1(5)(b) du Règlement du Mécanisme supplémentaire, ainsi que les documents justificatifs prouvant cet accord ;

(e) si une partie est une collectivité publique d'un État ou un organisme dépendant d'un État ou d'une OIER, les documents justificatifs prouvant l'approbation par l'État du consentement, sauf si l'État ou l'OIER a notifié au Centre qu'une telle approbation n'est pas nécessaire.

Regla 3
Contenido de la Solicitud

(1) La solicitud deberá:

(a) estar redactada en español, francés o inglés;

(b) identificar a cada parte en la diferencia y proporcionar su información de contacto, lo cual incluye su dirección de correo electrónico, dirección postal y número de teléfono;

(c) estar firmada por cada parte solicitante o su representante y estar fechada;

(d) acompañar pruebas del poder de representación del representante; y

(e) si la parte solicitante es una persona jurídica, indicar que ha obtenido todas las autorizaciones necesarias para presentar la solicitud y adjuntar dichas autorizaciones.

(2) Respecto del Artículo 2(1)(a) del Reglamento del Mecanismo Complementario, la Solicitud deberá incluir:

(a) una descripción de la inversión, una relación de los hechos pertinentes, alegaciones y petitorios, y una indicación de que existe una diferencia de naturaleza jurídica entre las partes que surge de la inversión;

(b) respecto del consentimiento de cada parte a someter la diferencia a conciliación de conformidad con lo dispuesto en el Mecanismo Complementario:

(i) el o los instrumento(s) que contiene(n) el consentimiento de cada parte;

(ii) la fecha de entrada en vigor del o de los instrumento(s) en que se funda el consentimiento, junto con documentos de respaldo que demuestren esa fecha; y

(iii) la fecha del consentimiento, a saber, la fecha en que las partes hayan consentido por escrito a someter la diferencia al Centro, o bien, si las partes no consintieron en la misma fecha, la fecha en que la última parte haya consentido por escrito a someter la diferencia al Centro;

(c) si una de las partes es una persona natural:

(i) información respecto a la nacionalidad de esa persona tanto a la fecha del consentimiento como a la fecha de la solicitud, junto con documentos de respaldo que demuestren dicha nacionalidad; y

(ii) una declaración de que la persona no tenía la nacionalidad del Estado que es parte en la diferencia ni de cualquier Estado que integre una ORIE que es parte en la diferencia ni en la fecha del consentimiento ni en la fecha de la presentación de la solicitud;

(d) si una parte es una persona jurídica:

(i) información respecto a la nacionalidad de esa parte a la fecha del consentimiento, junto con documentos de respaldo que demuestren dicha nacionalidad; y

(ii) si esa parte tenía la nacionalidad del Estado parte en la diferencia o de cualquier Estado que integre la ORIE que es parte en la diferencia a la fecha del consentimiento, información que identifique el acuerdo de las partes para que la persona jurídica sea tratada como si fuese nacional de otro Estado de conformidad con lo dispuesto en el Artículo 1(5)(b) del Reglamento del Mecanismo Complementario, junto con documentos de respaldo que demuestren dicho acuerdo;

(e) si una parte es una subdivisión política o un organismo público de un Estado o de una ORIE, documentos de respaldo que demuestren la aprobación del consentimiento por parte del Estado, salvo que el Estado o la ORIE haya notificado al Centro que no es necesaria dicha aprobación.

1189. Proposed (AF)CR 3 modifies current Art. 3 extensively to mirror proposed IR 2. It expands the list of requirements for a Request for conciliation to account for the fact that approval of access is deleted under the proposed AF Rules (and for the same reason omits the reference in current Art. 3(1)(d) to the approval of access). The requirements stipulated in the (AF)CR differ from those stipulated in the proposed corresponding IR (*see* proposed IR 2(2)) to account for the possibility of an REIO being a party to a conciliation, and the other requirements of proposed Art. 2 of the AF Rules.

1190. The current Rules do not contain any requirement regarding information to be provided as to the nationality of the requesting party. The proposed provision models proposed IR 2 and adopts the requirements of Art. 25(2) of the Convention.

1191. For natural persons, the relevant times for assessing nationality are the date of consent and date of the Request. Thus, proposed (AF)CR 3(2)(c)(i) requires information regarding nationality at the time of consent and at the time of the Request. Proposed (AF)CR 3(2)(c)(ii) further requires that the Request state that the natural person did not have the nationality of the State party to the dispute, or of any constituent State of an REIO party to the dispute, on the date of consent and on the date of the Request.

1192. For juridical persons, the relevant time is the date of consent only. Thus, proposed (AF)CR 3(2)(d) requires information regarding nationality at the time of consent. Similarly, for juridical persons that have the nationality of the State party to the dispute or of a constituent State of an REIO, the agreement to treat them as a foreign national (usually because of foreign control) is also assessed at the date of consent, even if the foreign control has changed by the date of the Request. This mirrors Art. 25(2)(b) of the Convention.

1193. As under the Convention, dual nationals cannot bring a claim against their own State under the AF or vice-versa. Similarly, in arbitration and conciliation proceedings under the Additional Facility, no national of a constituent State of an REIO may be a party to a dispute involving that REIO (*see* proposed (AF)AR 3).

RULE 4 – RECOMMENDED ADDITIONAL INFORMATION

CURRENT RELATED PROVISIONS: C(AF)R Art. 3(2)

Rule 4
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 conciliators;

(c) the proposed procedural language(s);

(d) any other procedural proposals; and

(e) any procedural agreements between the parties.

Article 4
Informations complémentaires recommandées

Il est recommandé que la requête contienne également :

(a) une estimation du montant de la réparation pécuniaire demandée, le cas échéant ;

(b) une proposition relative au nombre et à la méthode de nomination des conciliateurs(trices) ;

(c) la ou les langue(s) de la procédure proposée(s) ;

(d) toutes autres propositions en matière de procédure ; et

(e) tous accords relatifs à la procédure conclus par les parties.

Regla 4
Información Adicional Recomendada

Se recomienda que la solicitud también contenga:

(a) una estimación del monto de la compensación pecuniaria pretendida, si la hubiera;

(b) una propuesta relativa al número y método de nombramiento de los o las conciliadores(as);

(c) el o los idioma(s) del procedimiento propuesto(s);

(d) cualquier otra propuesta procesal; y

(e) cualquier acuerdo procesal alcanzado por las partes.

1194. Proposed (AF)CR 4 replicates proposed IR 3.

RULE 5 – FILING OF THE REQUEST AND SUPPORTING DOCUMENTS

CURRENT RELATED PROVISIONS: C(AF)R Art. 3(3), 32

Rule 5
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient. The Secretary-General may require a fuller or a complete translation of the document.

Article 5
Dépôt de la requête et des documents justificatifs

(1) La requête est déposée par voie électronique. Le ou la Secrétaire général(e) peut exiger que la requête soit déposée sous une autre forme, si nécessaire.

(2) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. Le ou la Secrétaire général(e) peut exiger une version plus complète de l'extrait ou une version intégrale du document.

(3) Tout document dans une langue autre que l'anglais, le français ou l'espagnol est accompagné d'une traduction dans l'une de ces langues. Il suffit que seule soit traduite la partie pertinente du document. Le ou la Secrétaire général(e) peut demander une traduction plus complète ou intégrale du document.

Regla 5
Presentación de la Solicitud y de los Documentos de Respaldo

(1) La solicitud deberá ser presentada electrónicamente. El o la Secretario(a) General podrá requerir que la solicitud sea presentada en un formato alternativo si fuera necesario.

(2) Se podrá presentar un extracto de un documento de respaldo, siempre que la omisión del texto no altere el sentido del extracto. El o la Secretario(a) General podrá solicitar una versión más amplia del extracto o una versión completa del documento.

(3) Todo documento redactado en un idioma que no sea el español, francés o inglés deberá ser acompañado de una traducción a uno de esos idiomas. Será suficiente que se traduzcan solamente las partes pertinentes de un documento. El o la Secretario(a) General podrá requerir una traducción más amplia o completa del documento.

1195. Proposed (AF)CR 5 is identical to proposed IR 4.

RULE 6 – RECEIPT OF THE REQUEST

CURRENT RELATED PROVISIONS: C(AF)R Art. 4

Rule 6
Receipt of the Request

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Article 6
Réception de la requête

Le ou la Secrétaire général(e) :

(a) accuse réception sans délai d'une requête à la partie requérante ;

(b) transmet la requête à l'autre partie dès réception du droit de dépôt ; et

(c) est l'intermédiaire officiel pour les communications écrites entre les parties.

Regla 6
Recepción de la Solicitud

El o la Secretario(a) General deberá:

(a) acusar recibo de la solicitud a la parte solicitante con prontitud;

(b) transmitir la solicitud a la otra parte una vez que reciba el derecho de presentación; y

(c) actuar como intermediario(a) oficial de las comunicaciones escritas entre las partes.

1196. Proposed (AF)CR 6 is identical to proposed IR 5.

Rule 7
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(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.

Article 7
Examen et enregistrement de la requête

(1) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) enregistre la requête s'il apparaît au vu des informations fournies que la requête n'est pas manifestement en dehors du champ d'application de l'article 2(1) du Règlement du Mécanisme supplémentaire.

(2) Le ou la Secrétaire général(e) informe les parties sans délai de l'enregistrement de la requête ou du refus d'enregistrer celle-ci et des motifs de ce refus.

Regla 7
Revisión y Registro de la Solicitud

(1) Una vez recibida la solicitud y el derecho de presentación, el o la Secretario(a) General deberá registrar la solicitud si, sobre la base de la información proporcionada, pareciera que la solicitud no se encuentra manifiestamente fuera del alcance del Artículo 2(1) del Reglamento del Mecanismo Complementario.

(2) El o la Secretario(a) General deberá notificar con prontitud el registro de la solicitud a las partes, o la denegación del mismo y los motivos de dicha denegación.

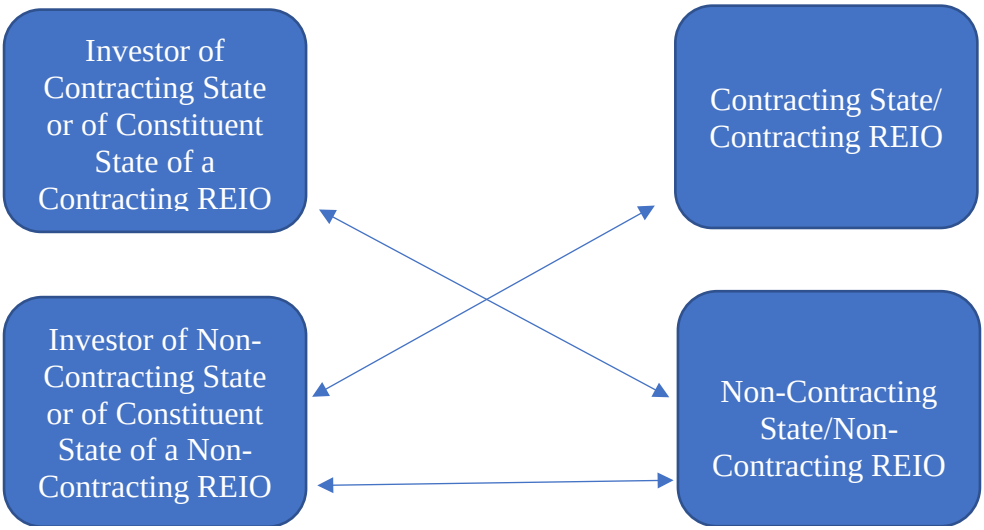
1197. Proposed (AF)CR 7 regarding the review and registration of the Request corresponds to current Art. 4. Since the approval of access is deleted in the proposed AF Rules, registration will become the filter for Requests and a threshold protection against Requests manifestly outside the requirements in Art. 2(1) of the AF Rules. It is therefore important that the applicable threshold for registration be specified in the rules. Current wording regarding this stage of registration requires that the Secretary-General "be satisfied that the request conforms with the requirements" in the AF Rules. Under the corresponding IR, no standard

is stipulated; rather the IR refers to the Convention for the standard to be applied in registration of the Request by the Secretary-General.

1198. The proposed registration threshold is that a Request be registered unless it is "manifestly outside the scope of Article 2(1)" of the AF Rules. That standard is similar to the standard in Art. 28(3) of the Convention, which provides for registration of requests for conciliation pursuant to the ICSID Convention unless the dispute is "manifestly outside the jurisdiction of the Centre." The term "jurisdiction of the Centre" cannot apply in the AF context since the Convention does not apply. The proposed standard corresponds to the Secretariat's current practice at the stage of the approval of access. That standard would also apply to registration of a Request for arbitration, fact-finding or mediation.

1199. To establish that the Request for conciliation "is not manifestly outside of the scope of Article 2," the requesting party must demonstrate that: (i) it is either a State, an REIO on the one hand or a national of another State on the other hand, that falls within the scope of Art. 2(1)(a) (ratione personae); (ii) that the parties have consented to submit the dispute to conciliation (rationae voluntatis); and (iii) that the dispute arises out of an investment (ratione materiae).

Jurisdiction *Ratione Personae* in (AF) Conciliation Proceedings



1200. Proposed (AF)CR 7(1) requires that a notice be sent to the disputing parties upon registration (or refusal to register).

Rule 8
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of conciliators, unless such information has already been provided;

(d) invite the parties to constitute a Commission without delay; and

(e) remind the parties that registration of the Request is without prejudice to the powers and functions of the Commission in regard to jurisdiction and competence of the Commission, and the issues in dispute.

Article 8
Notification de l'enregistrement

La notification de l'enregistrement de la requête :

(a) indique que la requête a été enregistrée et précise la date de l'enregistrement ;

(b) confirme que toutes correspondances destinées aux parties dans le cadre de l'instance leur seront envoyées à l'adresse de contact figurant dans la notification, à moins que des coordonnées différentes ne soient indiquées au Centre ;

(c) invite les parties à informer le ou la Secrétaire général(e) de leur accord relatif au nombre et à la méthode de nomination des conciliateurs(trices), à moins que ces informations n'aient déjà été communiquées ;

(d) invite les parties à constituer sans délai une Commission ; et

(e) rappelle aux parties que l'enregistrement de la requête ne porte en aucune manière atteinte aux pouvoirs et fonctions de la Commission relatifs aux questions de compétence de la Commission, et aux points en litige.

Regla 8
Notificación del Registro

La notificación del registro de la solicitud deberá:

(a) dejar constancia de que la solicitud ha sido registrada e indicar la fecha del registro;

(b) confirmar que toda la correspondencia dirigida a las partes en relación con el procedimiento será enviada a la dirección de contacto consignada en la notificación, a menos que se comunique otra información de contacto al Centro;

(c) invitar a las partes a que informen al o a la Secretario(a) General de su acuerdo respecto del número y método de nombramiento de los y las conciliadores(as), salvo que dicha información ya hubiera sido proporcionada;

(d) invitar a las partes a que constituyan una Comisión sin demora; y

(e) recordar a las partes que el registro de la solicitud es sin perjuicio de los poderes y funciones de la Comisión respecto de la jurisdicción del Centro, la competencia de la Comisión y el fondo.

1201. Proposed (AF)CR 8, stipulating the requirements for a notice of registration, is materially the same as proposed IR 7 and corresponds to current Art. 5. The only difference of note is that the words 'the merits' have been replaced by the phrase 'the issues in dispute' in proposed (AF)CR 8, in light of the different nature of a conciliation proceeding and the Commission's function.

RULE 9 –WITHDRAWAL OF THE REQUEST

Rule 9
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there are several requesting parties, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 6(b).

Article 9
Retrait de la requête

À tout moment avant l'enregistrement, une partie requérante peut notifier par écrit au ou à la Secrétaire général(e) le retrait de la requête ou, s'il y a plusieurs parties requérantes, qu'elle se retire de la requête. Le ou la Secrétaire général(e) avise sans délai les parties de ce retrait, à moins que la requête n'ait pas encore été transmise conformément à l'article 6(b).

Regla 9
Retiro de la Solicitud

En cualquier momento antes del registro, una parte solicitante podrá notificar por escrito el retiro de la solicitud al o a la Secretario(a) General o, si hubiera varias partes solicitantes, que se retira de la solicitud. El o la Secretario(a) General notificará con prontitud a las partes de dicho retiro, a menos que la solicitud aún no hubiera sido transmitida de conformidad con lo dispuesto en la Regla 6(b).

1202. Proposed (AF)CR 9 corresponds to, and is in the same terms as, proposed IR 8.

CHAPTER III – GENERAL PROCEDURAL PROVISIONS

1203. Proposed (AF)CR 10-16 are similar to proposed CR 2-8.

RULE 10 – MEANING OF PARTY AND PARTY REPRESENTATION

CURRENT RELATED PROVISIONS: C(AF)R Art. 25

Chapter III
General Procedural Provisions

Rule 10
Meaning of Party and Party Representation

(1) For the purposes of these Rules, "party" may include, where the context so admits:

(a) all parties acting as claimants or as respondents; and

(b) an authorized representative of a party.

(2) Each party may be represented or assisted by agents, counsel or advocates ("representative(s)"), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Chapitre III
Dispositions générales d'ordre procédural

Article 10
Sens du terme « partie » et représentation des parties

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet :

(c) toutes les parties agissant en qualité de demanderesses ou de défenderesses ; et

(d) tout(e) représentant(e) habilité(e) d'une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocats (« représentant(s) »), dont le nom et la preuve de l'habilitation à agir du représentant doivent être notifiés par cette partie au Secrétariat.

Capítulo III
Disposiciones Procesales Generales

Regla 10
Significado de Parte y Representación de las Partes

(1) A los fines de estas Reglas, "parte" puede incluir, cuando el contexto así lo admite, a:

(a) todas las partes que actúen como demandantes o como demandadas; y

(b) un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) ("representante(s)"), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

1204. Proposed (AF)CR 10 mirrors proposed CR 2 with minor language modifications.

CURRENT RELATED PROVISIONS: AFR 24, 28, 30; C(AF)R Art. 29

Rule 11
Method of Filing

(1) Written statements, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Commission orders otherwise. They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge their receipt and distribute them in accordance with Rule 12.

(2) Supporting documents shall be filed together with the written statements to which they relate, within the time limit fixed to file such written statements.

(3) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Commission may require a fuller extract or a complete version of the document.

Article 11
Modalités de dépôt

(1) Les exposés écrits, observations, documents justificatifs et communications sont déposés par voie électronique, sauf si les parties en conviennent ou sauf si la Commission en décide autrement. Leur production au cours de l'instance se fait par leur dépôt auprès du Secrétariat, qui en accuse réception et en assure la distribution conformément à l'article 12.

(2) Les documents justificatifs sont déposés avec les exposés écrits auxquels ils se rapportent, dans le délai fixé pour le dépôt de ces exposés écrits.

(3) Un extrait d'un document justificatif peut être déposé si l'omission du texte n'altère pas le sens de l'extrait. La Commission peut exiger une version plus complète de l'extrait ou une version intégrale du document.

Regla 11
Método de Presentación

(1) Las presentaciones escritas, observaciones, documentos de respaldo y comunicaciones se presentarán electrónicamente, salvo acuerdo de las partes o

resolución de la Comisión en contrario. Las mismas se incorporarán al procedimiento mediante su presentación ante el Secretariado, que acusará recibo de ellas y las distribuirá de conformidad con la Regla 12.

(2) Los documentos de respaldo se presentarán junto con las presentaciones escritas a las que se refieren, dentro del plazo fijado para dicha presentación.

(3) Se podrá presentar un extracto de un documento de respaldo siempre que la omisión del texto no altere el sentido del extracto. La Comisión podrá solicitar una versión más amplia del extracto o una versión completa del documento.

1205. Proposed (AF)CR 11 is materially the same as proposed CR 3.

RULE 12 – ROUTING OF WRITTEN COMMUNICATIONS

CURRENT RELATED PROVISIONS: AFR 24, 28

Rule 12
Routing of Written Communications

(1) Following the registration of the Request pursuant to Rule 7(2), the Secretariat shall be the official channel of written communications among the parties and the Commission, except that:

(a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the conciliation;

(b) the members of the Commission shall communicate directly with each other; and

(c) a party may communicate directly with the Commission if requested to do so by the Commission, provided that the Secretariat is copied on all communications.

(2) The Secretariat shall acknowledge receipt of all communications filed by a party and, subject to paragraph (1)(a) and (c), distribute them to the other party and the Commission.

Article 12
Transmission des communications écrites

(1) Après l'enregistrement de la requête conformément à l'article 7(2), le Secrétariat est l'intermédiaire officiel pour les communications écrites entre les parties et la Commission, sauf dans les cas suivants :

(a) les parties peuvent communiquer directement entre elles, à condition que le Secrétariat reçoive copie de toutes communications devant être produites au cours de la conciliation ;

(b) les membres de la Commission communiquent directement entre eux ; et

(c) une partie peux communiquer directement avec la Commission si celle-ci le requiert, à condition que le Secrétariat reçoive copie de toutes ces communications.

(2) Le Secrétariat accuse réception de toutes les communications déposées par une partie et, sous réserve du paragraphe (1)(a) et (c), les transmet à l'autre partie et à la Commission.

Regla 12
Transmisión de Comunicaciones Escritas

(1) Con posterioridad al registro de la solicitud de conformidad con lo dispuesto en la Regla 7(2), el Secretariado será el intermediario oficial de toda comunicación escrita entre las partes y la Comisión, excepto que:

(a) las partes podrán comunicarse directamente entre sí, siempre que el Secretariado sea copiado en todas las comunicaciones que se presenten en la conciliación;

(b) los miembros de la Comisión se comunicarán directamente entre sí; y

(c) a solicitud de la Comisión, una parte podrá comunicarse directamente con la Comisión, siempre que el Secretariado esté copiado en todas las comunicaciones.

(2) El Secretariado acusará recibo de todas las comunicaciones presentadas por una parte y, sujeto a lo dispuesto en el párrafo (1)(a) y (c), las distribuirá a la otra parte y a la Comisión.

1206. Proposed (AF)CR 12 is similar to proposed CR 4. It differs in that it omits the reference to communications with the Chairman of the Administrative Council (which do not occur under the proposed (AF)CR).

RULE 13 – PROCEDURAL LANGUAGES, TRANSLATION AND INTERPRETATION

CURRENT RELATED PROVISIONS: AFR 30; C(AF)R Art. 28

Rule 13
Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the conciliation. The parties shall consult with the Commission and the Secretariat regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Written statements, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Commission may require a party to file any document in both procedural languages.

(4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Commission may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Commission may require a fuller or a complete translation. If the translation is disputed, the Commission may require a certified translation.

(5) Any written communication from the Commission or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Commission and, where applicable the Secretary-General, shall issue orders, decisions, recommendations and the Report in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Commission may require interpretation into the other procedural language.

Article 13
Langues de la procédure, traduction et interprétation

(1) Les parties peuvent convenir d'utiliser une ou deux langues pour la conduite de la conciliation. Les parties doivent consulter la Commission et le Secrétariat sur l'utilisation d'une langue qui n'est pas une langue officielle du Centre.

(2) Si les parties ne se mettent pas d'accord sur la ou les langue(s) de la procédure, chacune d'elles peut choisir l'une des langues officielles du Centre.

(3) Les exposés écrits, observations, documents justificatifs et communications sont déposés dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission peut exiger d'une partie qu'elle dépose tout document dans les deux langues de la procédure.

(4) Tout document dans une langue autre qu'une langue de la procédure est accompagné d'une traduction dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission peut exiger d'une partie qu'elle traduise tout document dans les deux langues de la procédure. Il suffit que seule la partie pertinente d'un document soit traduite, étant entendu que la Commission peut exiger une traduction plus complète ou intégrale. Si la traduction est contestée, la Commission peut exiger une traduction certifiée conforme.

(5) Toute communication écrite émanant de la Commission ou du Secrétariat est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission et, le cas échéant, le ou la Secrétaire général(e), rendent des ordonnances, des décisions et des recommandations et établissent le procès-verbal dans les deux langues de la procédure, sauf si les parties en conviennent autrement.

(6) Toute communication orale est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, la Commission peut exiger une interprétation dans l'autre langue de la procédure.

Regla 13
Idiomas del Procedimiento, Traducción e Interpretación

(1) Las partes podrán acordar la utilización de uno o dos idiomas en la conciliación. Las partes consultarán a la Comisión y al Secretariado respecto del uso de un idioma que no sea un idioma oficial del Centro.

(2) Si las partes no acordaran el o los idioma(s) del procedimiento, cada una podrá escoger uno de los idiomas oficiales del Centro.

(3) Las presentaciones escritas, observaciones, documentos de respaldo y comunicaciones se presentarán en un idioma del procedimiento. En un procedimiento que tenga dos idiomas del procedimiento, la Comisión podrá solicitar a una parte que presente cualquier documento en ambos idiomas del procedimiento.

(4) Un documento redactado en un idioma que no sea un idioma del procedimiento será acompañado de una traducción a un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, la Comisión podrá solicitar a una parte que traduzca cualquier documento a ambos idiomas del procedimiento. Será suficiente con que se traduzcan solamente las partes pertinentes de un documento, sin embargo, la Comisión podrá solicitar una traducción más amplia o completa del documento. La Comisión podrá solicitar una traducción certificada en caso de que se impugne la traducción.

(5) Cualquier comunicación escrita de parte de la Comisión o del Secretariado deberá estar redactada en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, la Comisión y, cuando corresponda, el o la Secretario(a) General emitirán resoluciones, decisiones, recomendaciones y el informe en ambos idiomas del procedimiento, salvo acuerdo en contrario de las partes.

(6) Cualquier comunicación oral deberá realizarse en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, la Comisión podrá solicitar interpretación al otro idioma del procedimiento.

1207. Proposed (AF)CR 13 is identical to proposed CR 5.

RULE 14 – PAYMENT OF ADVANCES AND COSTS OF THE PROCEEDING

CURRENT RELATED PROVISIONS: Convention Art. 61; AFR 14

Rule 14
Payment of Advances and Costs of the Proceeding

(1) Each party shall pay one half of the advances payable in accordance with (Additional Facility) Administrative and Financial Regulation 7(5), unless a different division is agreed to by the parties.

(2) The fees and expenses of the members of the Commission and the administrative charges and direct costs of the Centre incurred in connection with the proceeding shall be borne equally by the parties.

(3) Each party shall bear its own costs and expenses incurred in connection with the proceeding.

Article 14
Paiement d'avances et frais de procédure

(1) Chaque partie s'acquitte de la moitié des avances dues conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire), sauf si une répartition différente est convenue par les parties.

(2) Les honoraires et frais des membres de la Commission ainsi que les frais administratifs et les frais directs du Centre exposés dans le cadre de l'instance sont supportés à parts égales par les parties.

(3) Chaque partie supporte les frais et dépenses exposés par elle dans le cadre de l'instance.

Regla 14
Pago de Anticipos y Costos del Procedimiento

(1) Cada parte abonará la mitad de los anticipos exigibles de conformidad con la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario), salvo que las partes acuerden una división distinta.

(2) Las partes soportarán por partes iguales los honorarios y gastos de los miembros de la Comisión, así como los cargos administrativos y costos directos del Centro, incurridos en relación con la conciliación.

(3) Cada parte soportará sus propios costos y gastos incurridos en relación con el procedimiento.

1208. Proposed (AF)CR 14 is essentially the same as proposed CR 6.

RULE 15 – CONFIDENTIALITY

CURRENT RELATED PROVISIONS: C(AF)R Art. 35; CR 27(2), 33(3)

Rule 15
Confidentiality

Documents generated in the conciliation shall be confidential. The parties to a conciliation may consent to:

(a) disclosure of any document generated in the conciliation to a non-party;

(b) disclosure by one party of any document obtained from the other party in the conciliation; and

(c) publication by the Centre of documents generated in connection with the proceeding.

Article 15
Confidentialité

Les documents générés au cours de la conciliation sont confidentiels. Les parties à une conciliation peuvent consentir à:

(a) la divulgation à une personne autre qu'une partie de tout document généré au cours de la conciliation ;

(b) la divulgation par une partie de tout document obtenu de l'autre partie au cours de la conciliation ; et

(c) la publication par le Centre de tous documents générés en relation avec l'instance.

Regla 15
Confidencialidad

Los documentos que se originen durante la conciliación serán de carácter confidencial. Las partes de una conciliación podrán consentir a:

(a) la revelación a quien no sea parte de cualquier documento que se origine durante la conciliación;

(b) la revelación por una parte de cualquier documento obtenido de la otra parte durante la conciliación; y

(c) la publicación por parte del Centro de los documentos que se originen en relación con el procedimiento.

1209. Proposed (AF)CR 15 is identical to proposed CR 7.

RULE 16 – USE OF INFORMATION IN OTHER PROCEEDINGS

CURRENT RELATED PROVISIONS: C(AF)R Art. 35; CR32(2)

Rule 16
Use of Information in Other Proceedings

Unless the parties to the dispute agree otherwise, neither party shall rely on any of the following in other dispute settlement proceedings:

(a) any views expressed, statements, admissions, or offers of settlement made, or positions taken by the other party in the conciliation;

(b) the Report, order, decision, or any recommendation made by the Commission in the conciliation; or

(c) documents generated in connection with the proceeding.

Article 16
Utilisation d'informations dans d'autres instances

Sauf accord contraire entre les parties au différend, aucune d'elles ne peut, à l'occasion d'autres procédures de règlement du différend, se fonder sur :

(a) toutes opinions exprimées, déclarations, admissions ou offres de règlement faites, ou positions prises, par l'autre partie au cours de la conciliation ;

(b) le procès-verbal établi, toute ordonnance ou décision rendue ou toute recommandation faite par la Commission au cours de la conciliation ; ou

(c) tous documents générés en relation avec l'instance.

Regla 16
Utilización de Información en el Marco de Otros Procedimientos

Salvo acuerdo en contrario de las partes de la diferencia, ninguna de ellas podrá invocar lo siguiente en cualquier otro procedimiento de arreglo de diferencias:

(a) las consideraciones, declaraciones, admisiones, u ofertas de avenencia realizadas, o posiciones adoptadas por la otra parte durante la conciliación;

(b) el informe, la resolución, la decisión o cualquier recomendación formulada por la Comisión durante la conciliación; o

(c) los documentos originados en relación con el procedimiento.

1210. Proposed (AF)CR 16 is the same as proposed CR 8, except that the reference to Art. 35 of the Convention is omitted.

CHAPTER IV – CONSTITUTION OF THE COMMISSION

1211. Proposed (AF)CR 17-25 are similar to proposed CR 9-17. The main differences from the proposed CR relate to the default provisions as explained below.

RULE 17 – GENERAL PROVISIONS, NUMBER OF CONCILIATORS AND METHOD OF CONSTITUTION

CURRENT RELATED PROVISIONS: C(AF)R Art. 6, 8; IR 3

Chapter IV
Constitution of the Commission

Rule 17
General Provisions, Number of Conciliators and Method of Constitution

(1) The parties shall constitute a Commission without delay after registration of the Request.

(2) The number of conciliators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.

(3) The parties shall endeavor to agree on a Sole Conciliator, or any uneven number of conciliators, and the method of appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Commission shall consist of a Sole Conciliator, appointed by agreement of the parties.

(4) The composition of a Commission shall remain unchanged after it has been constituted, except as provided in Chapter V.

(5) References in these Rules to a Commission or a President of a Commission shall include a Sole Conciliator.

Chapitre IV
Constitution de la Commission

Article 17
Dispositions générales, nombre de conciliateurs(trices) et méthode de constitution

(1) Les parties constituent une Commission sans délai après l'enregistrement de la requête.

(2) Le nombre de conciliateurs(trices) et la méthode de leur nomination doivent être déterminés avant que le ou la Secrétaire général(e) ne puisse intervenir sur une quelconque nomination proposée par une partie.

(3) Les parties s'efforcent de se mettre d'accord sur un(e) conciliateur(trice) unique, ou un nombre impair de conciliateurs(trices), et la méthode de nomination. Si les parties n'informent pas le ou la Secrétaire général(e) d'un accord dans les 60 jours suivant la date de l'enregistrement, la Commission est constituée d'un(e) conciliateur(trice) unique nommé(e) par accord des parties.

(4) La composition d'une Commission demeure inchangée après sa constitution, sous réserve des dispositions du Chapitre V.

(5) Les références dans ce Règlement à une Commission ou à un ou une Président(e) de Commission incluent un(e) conciliateur(trice) unique.

Capítulo IV
Constitución de la Comisión

Regla 17
Disposiciones Generales, Número de Conciliadores y Método de Constitución

(1) Las partes deberán constituir una Comisión sin demora luego del registro de la solicitud de conciliación.

(2) El número de conciliadores(as) y el método de su nombramiento deben determinarse antes de que el o la Secretario(a) General pueda pronunciarse respecto de cualquier nombramiento propuesto por una parte.

(3) Las partes procurarán ponerse de acuerdo sobre un(a) Conciliador(a) Único(a), o cualquier número impar de conciliadores(as), y el método de su nombramiento. Si las partes no informan al o a la Secretario(a) General de un acuerdo dentro de los 60

días siguientes a la fecha de registro, la Comisión se compondrá de un(a) Conciliador(a) Único(a), nombrado(a) por acuerdo de las partes.

(4) La composición de una Comisión se mantendrá sin cambios después de que haya sido constituida, salvo de conformidad con lo dispuesto en el Capítulo V.

(5) Las referencias en estas Reglas a una Comisión o a un o una Presidente(a) de una Comisión incluirán a un(a) Conciliador(a) Único(a).

1212. Proposed (AF)CR 17 is similar to proposed CR 9 except that proposed (AF)CR 17(3) envisions the appointment of a Sole Conciliator as the default method. This change allows for a time and cost-efficient procedure and reflects feedback received from facility users who consider the appointment of a Sole Conciliator more effective.

1213. Proposed (AF)CR 17 adds, as paragraph (4), the stipulation that the Commission shall remain unchanged after it has been constituted; this stipulation is contained in current Art. 14(1).

1214. The provisions of current Art. 8(1) and (2) are deleted given their limited utility, as in the proposed corresponding CR.

1215. It is further proposed to clarify in (AF)CR 17(5) that references in the (AF)CR to a Commission include a Sole Conciliator.

RULE 18 – QUALIFICATIONS OF CONCILIATORS

Rule 18
Qualifications of Conciliators

Conciliators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who are impartial and independent.

Article 18
Qualifications des conciliateurs(trices)

Les conciliateurs(trices) doivent être des personnes jouissant d'une haute considération morale, reconnues pour leur compétence dans le domaine du droit, du commerce, de l'industrie ou de la finance, et offrant toute garantie d'impartialité et d'indépendance.

Regla 18
Cualidades de los o las Conciliadores(as)

Los o las conciliadores(as) serán personas imparciales e independientes, de alta consideración moral y reconocida competencia en materia de derecho, comercio, industria o finanzas.

1216. Proposed (AF)CR 18 corresponds to current Art. 7 on the qualifications of conciliators There is no equivalent provision in the CR, because qualifications of conciliators under those rules is addressed in the Convention.

1217. The proposed rule brings some changes to the current Conciliation (AF) Rules. Conciliators' qualifications are paramount as they are also grounds for disqualification. Proposed (AF)CR 18 retains the current qualifications of "high moral character and recognized competence in the fields of law, commerce, industry or finance" currently in Art. 7. However, it replaces "who may be relied upon to exercise independent judgement" with language requiring that conciliators to be "impartial and independent." These proposed modifications would bring the rules in line with generally accepted standards and the prevailing interpretation of the phrase "relied upon to exercise independent judgment" in the context of ICSID arbitrator disqualification decisions. The relevant corresponding provision in the Arbitration Rules uses the same formulation and, since no proposal for the disqualification of a conciliator has been filed to date, it is instructive to consider that jurisprudence. While the English and French versions of Art. 14 of the Convention refer to "independent judgment" and "garantie d'indépendance," the Spanish version requires "imparcialidad de juicio" (impartiality of judgment). Given that all versions of the Convention are equally authentic, it is generally accepted that conciliators must be both impartial and independent.

RULE 19 – ASSISTANCE OF THE SECRETARY-GENERAL WITH APPOINTMENT

CURRENT RELATED PROVISIONS: Convention Art. 29, 30

Rule 19
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a Sole Conciliator, or any uneven number of conciliators.

Article 19
Assistance du ou de la Secrétaire général(e) dans les nominations

Les parties peuvent demander conjointement au ou à la Secrétaire général(e) de les assister dans la nomination d'un(e) conciliateur(trice) unique ou d'un nombre impair de conciliateurs(trices).

Regla 19
Asistencia del o de la Secretario(a) General con los Nombramientos

Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una Conciliador(a) Único(a) (o cualquier número impar de conciliadores(as)).

1218. Proposed (AF)CR 19 is new in the AF system and is identical to proposed CR 11.

RULE 20 – APPOINTMENT OF CONCILIATORS BY THE SECRETARY-GENERAL

CURRENT RELATED PROVISIONS: C(AF)R Art. 10

Rule 20
Appointment of Conciliators by the Secretary-General

(1) If a Commission has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Secretary-General appoint the conciliator(s) who have not yet been appointed.

(2) The Secretary-General shall appoint the President of the Commission after appointing any other members who have not yet been appointed.

(3) The Secretary-General shall consult with the parties as far as possible before appointing a conciliator and shall use best efforts to appoint any conciliator(s) within 30 days after receipt of the request to appoint.

Article 20
Nomination des conciliateurs(trices) par le ou la Secrétaire général(e)

(1) Si une Commission n'a pas été constituée dans un délai de 90 jours suivant la date de l'enregistrement, ou tout autre délai convenu entre les parties, l'une ou l'autre des parties peut demander au ou à la Secrétaire général(e) de nommer le ou les conciliateur(trice)(s) non encore nommé(e)(s).

(2) Le ou la Secrétaire général(e) nomme le ou la Président(e) de la Commission après avoir nommé tous autres membres non encore nommés.

(3) Dans la mesure du possible, le ou la Secrétaire général(e) consulte les parties avant de nommer un(e) conciliateur(trice) et il ou elle déploie tous les efforts possibles pour nommer tout(e) conciliateur(trice) ou tou(te)s conciliateurs(trices) dans un délai de 30 jours à compter de la réception de la demande de nomination.

Regla 20
Nombramiento de los o las Conciliadores(as) por el o la Secretario(a) General

(1) Si una Comisión no se hubiese constituido dentro de los 90 días siguientes a la fecha de registro, o dentro del plazo que las partes hubieran acordado, cualquiera de las partes podrá solicitar que el o la Secretario(a) General nombre al/a la o a los/las conciliador(a)(es)(as) que aún no haya(n) sido nombrado(a)(os)(as).

(2) El o la Secretario(a) General nombrará al o a la Presidente(a) de la Comisión luego de nombrar a los miembros que aún no hayan sido nombrados.

(3) El o la Secretario(a) General deberá consultar a las partes en la medida de lo posible antes de nombrar a un(a) conciliador(a) y hará lo posible para nombrar a cualquiera de los o las conciliador(es)(as) dentro de los 30 días siguientes a la fecha de la recepción de la solicitud de nombramiento.

1219. Proposed (AF)CR 20 is similar to proposed CR 12. However, under that provision, the Chairman of the Administrative Council is charged with making appointments (as prescribed in Art. 30 of the Convention), while under proposed (AF)CR 20 the Secretary-General makes such appointments. This marks a departure from current Art. 10 and is consistent with the proposed amendments to (AF)AR 25. It also parallels the decision-making process for disqualification.

Rule 21
Disclosure of Third-party Funding

(1) "Third-party funding" is the provision of funds or other material support to a party in a conciliation, by a natural or juridical person that is not a party to the dispute ("third-party funder"), 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, 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 its initial disclosure, including termination of the funding arrangement.

Article 21
Divulgation d'un financement par un tiers

(1) « Financement par un tiers » désigne l'apport de fonds ou de tout autre soutien matériel, par une personne physique ou morale qui n'est pas partie au différend (« tiers financeur »), à une partie à la conciliation, une affiliée de cette partie ou un cabinet d'avocats représentant cette partie. Ces fonds ou ce soutien matériel peuvent être apportés :

(a) par le biais d'un don ou d'une subvention ; ou

(b) en contrepartie d'une prime ou en échange d'une rémunération ou d'un remboursement dépendant en totalité ou en partie de l'issue de l'instance.

(2) Une partie doit déposer une notification écrite divulguant qu'elle bénéficie d'un financement par un tiers et indiquant le nom du tiers financeur. Cette notification est adressée au Secrétariat immédiatement après l'enregistrement de la requête ou dès la conclusion d'un accord de financement par un tiers après l'enregistrement.

(3) Chaque partie a une obligation continue de divulguer toute modification dans les informations visées au paragraphe (2) intervenant après leur divulgation initiale, y compris la cessation de l'accord de financement.

Regla 21
Declaración de Financiamiento por Terceros

(1) El "financiamiento por terceros" es la provisión de fondos u otro apoyo sustancial por una persona natural o jurídica que no es parte de la diferencia (el "tercero financiador"), a una parte en una conciliación, a una sociedad relacionada con esa parte o a una firma de abogados que represente a esa parte. Dichos fondos o apoyo sustancial podrán proporcionarse:

(a) mediante una donación o un subsidio; o

(b) en contraprestación de una prima o a cambio de una remuneración o un reembolso total o parcialmente dependiente del resultado del procedimiento.

(2) Una parte deberá presentar una notificación escrita revelando que goza de financiamiento por terceros y el nombre de dicho tercero financiador. Esta notificación deberá enviarse al Secretariado inmediatamente después del registro de la solicitud o una vez se celebre el acuerdo de financiamiento por terceros si este ocurre con posterioridad al registro.

(3) Cada parte tendrá la obligación permanente de revelar cualquier cambio en la información a la que se hace referencia en el párrafo (2) que tenga lugar después de la revelación inicial, lo cual incluye la resolución o rescisión del acuerdo de financiamiento.

1220. Proposed (AF)CR 21 is identical to proposed CR 13.

RULE 22 – ACCEPTANCE OF APPOINTMENT

CURRENT RELATED PROVISIONS: C(AF)R Art. 11

Rule 22
Acceptance of Appointment

(1) A party appointing a conciliator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) and contact information.

(2) The Secretariat shall request an acceptance from the appointee upon receipt of the notice referred to in paragraph (1). The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

(3) Within 20 days after receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

(b) provide a signed declaration in the form published by the Centre, addressing matters including the conciliator's independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.

(4) The Secretariat shall notify the parties of each acceptance of appointment by the conciliator(s) and provide the signed declaration.

(5) The Secretariat shall notify the parties if a conciliator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as conciliator in accordance with the method followed for the previous appointment.

(6) Each conciliator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the conciliator agree otherwise, a conciliator may not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to the dispute that is the subject of the conciliation.

Article 22
Acceptation des nominations

(1) Une partie qui nomme un(e) conciliateur(trice) notifie au Secrétariat la nomination et indique le nom, la ou les nationalité(s) et les coordonnées de la personne nommée.

(2) Dès réception de la notification visée au paragraphe (1), le Secrétariat demande à la personne nommée si elle accepte sa nomination. Le Secrétariat transmet également à chaque personne nommée les informations reçues des parties, pertinentes pour l'établissement de la déclaration visée au paragraphe (3)(b).

(3) Dans les 20 jours suivant la réception de la demande d'acceptation d'une nomination, toute personne nommée doit :

(a) accepter sa nomination ; et

(b) remettre une déclaration signée conforme au modèle publié par le Centre, qui porte sur certaines questions telles que l'indépendance, l'impartialité, la disponibilité du ou de la conciliateur(trice) et son engagement à préserver le caractère confidentiel de l'instance.

(4) Le Secrétariat notifie aux parties l'acceptation des conciliateurs(trices) et fournit la déclaration signée.

(5) Le Secrétariat notifie aux parties si un(e) conciliateur(trice) n'accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe (3), et une autre personne est nommée en qualité de conciliateur(trice) conformément à la méthode suivie pour la précédente nomination.

(6) Chaque conciliateur(trice) a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3)(b).

(7) Sauf si les parties et le ou la conciliateur(trice) en conviennent autrement, le ou la conciliateur(trice) ne peut pas intervenir en qualité d'arbitre, de conseil, d'expert, de témoin, de juge, ni en aucune autre qualité dans une quelconque autre instance relative au différend qui fait l'objet de la conciliation.

Regla 22
Aceptación del Nombramiento

(1) La parte que nombre a un o una conciliador(a) notificará al Secretariado el nombramiento y proporcionará el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada.

(2) El Secretariado solicitará la aceptación de la persona nombrada una vez recibida la notificación a la que se hace referencia en el párrafo (1). El Secretariado también transmitirá a cada persona nombrada la información recibida de las partes que sea relevante para completar la declaración a la que se hace referencia en el párrafo (3)(b).

(3) Dentro de los 20 días siguientes a la recepción de la solicitud de aceptación de un nombramiento, la persona nombrada deberá:

(a) aceptar el nombramiento; y

(b) proporcionar una declaración firmada en la forma publicada por el Centro, en la que indique cuestiones tales como la independencia, imparcialidad y disponibilidad del o de la conciliador(a) y su compromiso de mantener la confidencialidad del procedimiento.

(4) El Secretariado notificará a las partes la aceptación de cada nombramiento y distribuirá la declaración firmada por cada conciliador(a).

(5) El Secretariado notificará a las partes si un o una conciliador(a) no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada como conciliador(a) de conformidad con el método seguido para el nombramiento anterior.

(6) Cada conciliador(a) tendrá la obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3)(b).

(7) Salvo acuerdo en contrario de las partes y del o de la conciliador(a), el o la conciliador(a) no podrá desempeñarse como árbitro, consejero(a), perito(a), testigo, o juez(a), ni en ninguna otra capacidad, en ningún otro procedimiento relacionado con la diferencia objeto de la conciliación.

1221. Proposed (AF)CR 22 is identical to proposed CR 14.

RULE 23 – REPLACEMENT OF CONCILIATORS PRIOR TO CONSTITUTION OF THE COMMISSION

CURRENT RELATED PROVISIONS: C(AF)R Art. 12

Rule 23
Replacement of Conciliators Prior to Constitution of the Commission

(1) At any time before the Commission is constituted:

(a) a conciliator may withdraw an acceptance;

(b) a party may replace a conciliator whom it appointed; or

(c) the parties may agree to replace any conciliator.

(2) A replacement conciliator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced conciliator was appointed.

Article 23
Remplacement de conciliateurs(trices) avant la constitution de la Commission

(1) À tout moment avant que la Commission ne soit constituée :

(a) un(e) conciliateur(trice) peut retirer son acceptation ;

(b) une partie peut remplacer un(e) conciliateur(trice) qu'elle a nommé(e) ; ou

(c) les parties peuvent convenir du remplacement de tout(e) conciliateur(trice).

(2) Un(e) conciliateur(trice) remplaçant(e) est nommé(e) dès que possible, selon la méthode utilisée pour le ou la conciliateur(trice) ayant retiré son acceptation ou le ou la conciliateur(trice) remplacé(e).

Regla 23
Reemplazo de Conciliadores(as) con Anterioridad a la Constitución de la Comisión

(1) En cualquier momento antes de que se constituya la Comisión:

(a) un o una conciliador(a) podrá retirar su aceptación;

(b) una parte podrá reemplazar a cualquier conciliador(a) que haya nombrado; o

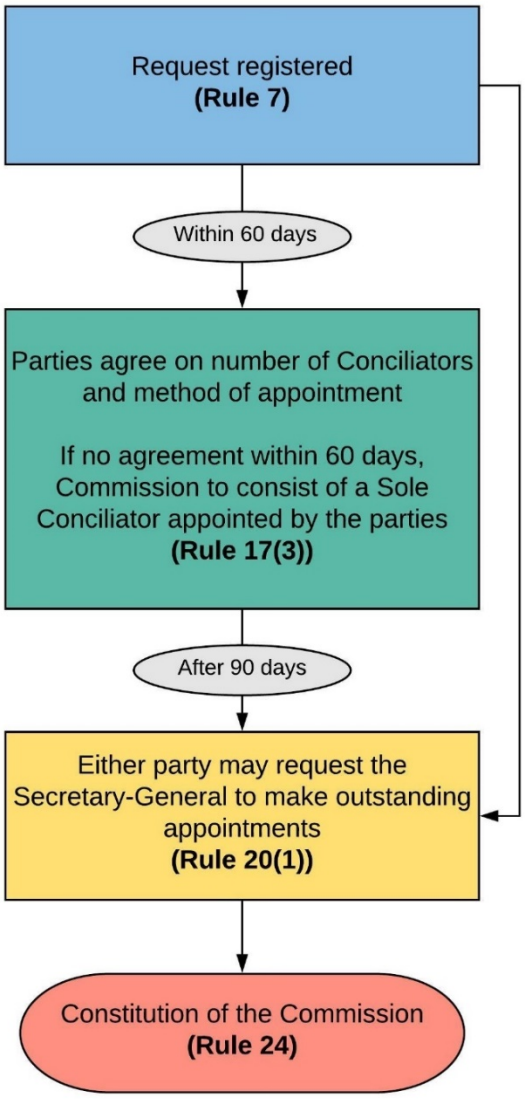
(c) las partes podrán acordar reemplazar a cualquier conciliador(a).

(2) Se nombrará a un o una conciliador(a) sustituto lo antes posible, de conformidad con el método utilizado para el nombramiento del o de la conciliador(a) que se haya retirado o reemplazado.

1222. Proposed (AF)CR 23 is identical to proposed CR 15.

1223. The basic steps for constitution of a Commission are shown in the chart below:

Constitution of the Commission – Rules 17-24



RULE 24 – CONSTITUTION OF THE COMMISSION

CURRENT RELATED PROVISIONS: C(AF)R Art. 13

Rule 24
Constitution of the Commission

(1) The Commission shall be deemed to be constituted on the date the Secretary-General notifies the parties that each conciliator has accepted the appointment.

(2) As soon as the Commission is constituted, the Secretary-General shall transmit the Request, the supporting documents, the notice of registration and communications with the parties to each conciliator.

Article 24
Constitution de la Commission

(1) La Commission est réputée constituée à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que chaque conciliateur(trice) a accepté sa nomination.

(2) Dès que la Commission est constituée, le ou la Secrétaire général(e) transmet à chaque conciliateur(trice) la requête, les documents justificatifs, la notification d'enregistrement et toutes communications avec les parties.

Regla 24
Constitución de la Comisión

(1) Se entenderá que se ha constituido la Comisión en la fecha en que el o la Secretario(a) General notifique a las partes que todos los o las conciliadores(as) han aceptado sus nombramientos.

(2) Tan pronto como se haya constituido la Comisión, el o la Secretario(a) General transmitirá la solicitud, los documentos de respaldo, la notificación del registro y las comunicaciones con las partes, a cada conciliador(a).

1224. Proposed (AF)CR 24 is identical to proposed CR 16.

CHAPTER V – DISQUALIFICATION OF CONCILIATORS AND VACANCIES

1225. Proposed (AF)CR 25-29 are similar to proposed CR 17-21.

RULE 25 – PROPOSAL FOR DISQUALIFICATION OF CONCILIATORS

CURRENT RELATED PROVISIONS: C(AF)R Art. 15

Chapter V
Disqualification of Conciliators and Vacancies

Rule 25
Proposal for Disqualification of Conciliators

(1) A party may propose the disqualification of one or more conciliators ("proposal") on the ground that circumstances exist that give rise to justifiable doubts as to the conciliator's qualities required by Rule 18.

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Commission and within 20 days after the later of:

(i) the constitution of the Commission; or

(ii) the date on which the party proposing the disqualification first knew or first should have known of the facts upon which the proposal is based;

(b) the party proposing the disqualification shall file a written submission, specifying the grounds on which the proposal is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file its response and supporting documents within seven days after receipt of the written submission;

(d) the conciliator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. This statement shall be filed within five days after receipt of the written submissions referred to in paragraph (2)(c); and

(e) the parties may file final written submissions on the proposal within seven days after expiry of the time limit referred to in paragraph (2)(d).

(3) If the other party agrees to the proposal prior to the dispatch of the decision referred to in Rule 26, the conciliator shall resign in accordance with Rule 28.

(4) The proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties. If the proposal results in a disqualification, either party may request that any order or decision issued, or recommendation made by the Commission while the proposal was pending, be reconsidered by the reconstituted Commission.

Chapitre V
Récusation de conciliateurs(trices) et vacances

Article 25
Proposition de récusation de conciliateurs(trices)

(1) Une partie peut proposer la récusation d'un(e) ou plusieurs conciliateur(trice)(s) (« proposition ») au motif qu'il existe des circonstances de nature à susciter des doutes légitimes quant aux qualités requises d'un(e) conciliateur(trice) par l'article 18.

(2) La procédure suivante s'applique :

(a) une proposition est soumise après la constitution de la Commission et dans un délai de 20 jours suivant la plus tardive des dates suivantes :

(i) la date de constitution de la Commission ; ou

(ii) la date à laquelle la partie qui propose la récusation a pris connaissance ou aurait dû avoir connaissance des faits sur lesquels est fondée la proposition ;

(b) la partie proposant la récusation dépose des écritures précisant les motifs sur lesquels la proposition est fondée et comprenant un exposé des faits pertinents, du droit et des arguments, accompagné de tous documents justificatifs ;

(c) l'autre partie dépose sa réponse et ses documents justificatifs dans un délai de sept jours à compter de la réception des écritures ;

(d) le ou la conciliateur(trice) qui fait l'objet de la proposition peut déposer une déclaration limitée à des informations factuelles pertinentes au regard de la proposition. Cette déclaration est déposée dans un délai de cinq jours à compter de la réception des écritures visées au paragraphe (2)(c) ; et

(e) les parties peuvent déposer des écritures finales sur la proposition dans un délai de sept jours à compter de l'expiration du délai visé au paragraphe (2)(d).

(3) Si l'autre partie accepte la proposition avant l'envoi de la décision visée à l'article 26, le ou la conciliateur(trice) démissionne conformément à l'article 28.

(4) L'instance se poursuit pendant que la proposition est pendante, sauf si elle est suspendue, en tout ou partie, par accord des parties. Si la proposition se solde par une récusation, l'une ou l'autre des parties peut demander que toute ordonnance ou décision rendue ou recommandation faite par la Commission, alors que la proposition était pendante, soit réexaminée par la Commission reconstituée.

Capítulo V
Recusación de Conciliadores(as) y Vacantes

Regla 25
Propuesta de Recusación de los o las Conciliadores(as)

(1) Una parte podrá proponer la recusación de uno(a) o más conciliadores(as) ("propuesta") en razón de que existen circunstancias que dan lugar a dudas justificadas en cuanto a las cualidades del o de la conciliador(a) requeridas por la Regla 18.

(2) Se aplicará el siguiente procedimiento:

(a) cualquier propuesta deberá presentarse después de la constitución de la Comisión y dentro de los 20 días siguientes a lo que suceda de último, sea:

(i) la constitución de la Comisión; o

(ii) la fecha en la que la parte que propone la recusación tuvo conocimiento o debería haber adquirido conocimiento de los hechos en los que se funda la propuesta;

(b) la parte que proponga la recusación deberá presentar un escrito especificando las causales en que se funda la propuesta e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(c) la otra parte deberá presentar su respuesta y documentos de respaldo dentro de los siete días siguientes a la recepción del escrito;

(d) el o la conciliador(a) a quien se refiera la propuesta podrá presentar una explicación que se limite a información de hecho relevante para la propuesta. Esta explicación se presentará dentro de los cinco días siguientes a la recepción de los escritos a los que se hace referencia en el párrafo (2)(c); y

(e) las partes podrán presentar escritos finales acerca de la propuesta dentro de los siete días siguientes al vencimiento del plazo al que se hace referencia en el párrafo (2)(d).

(3) Si la otra parte está de acuerdo con la propuesta con anterioridad al envío de la decisión a la que se hace referencia en la Regla 26, el o la conciliador(a) deberá renunciar a su cargo de conformidad con la Regla 28.

(4) A menos que el procedimiento sea suspendido, total o parcialmente, de común acuerdo por las partes, este continuará mientras la propuesta de recusación se

encuentre en curso. Si la propuesta tiene como consecuencia la recusación del o de la conciliador(a), cualquiera de las partes podrá solicitar que la Comisión, una vez que sea reconstituida, reconsidere cualquier resolución o decisión emitida, o recomendación efectuada, por la Comisión mientras la propuesta de recusación se encontraba en curso.

1226. Proposed (AF)CR 25 is similar to proposed CR 17, except for two differences.

1227. ***First***, proposed (AF)CR 25(1) specifies that the grounds for a proposal are that circumstances exist that give rise to justifiable doubts as to the conciliator's qualities required by proposed (AF)CR 17 (by contrast, the corresponding proposed CR refers to Art. 57 of the Convention).

1228. ***Second***, proposed (AF)CR 25(3) is a provision not contained in the equivalent CR. It enables both parties to agree to the proposal, in which case the conciliator shall resign. Such an agreement would not be permissible under the Convention (and hence the CR).

RULE 26 – DECISION ON THE PROPOSAL FOR DISQUALIFICATION

CURRENT RELATED PROVISIONS: C(AF)R Art. 15

Rule 26
Decision on the Proposal for Disqualification

(1) The Secretary-General shall take the decision on the proposal.

(2) The decision on any proposal shall be made within 30 days after the expiry of the time limit referred to in Rule 25(2)(e).

Article 26
Décision sur la proposition de récusation

(1) Le ou la Secrétaire général(e) prend la décision sur la proposition.

(2) La décision relative à une proposition est prise dans les 30 jours suivant l'expiration du délai visé à l'article 25(2)(e).

Regla 26
Decisión sobre la Propuesta de Recusación

(1) El o la Secretario(a) General adoptará la decisión sobre la propuesta.

(2) La decisión sobre cualquier propuesta se adoptará dentro de los 30 días siguientes al vencimiento del plazo al que se hace referencia en la Regla 25(2)(e).

1229. Proposed (AF)CR 26 corresponds to current Art. 15 and differs significantly from the existing AF system and the proposed corresponding CR 18. Under proposed (AF)CR 26, the Secretary-General decides disqualification proposals, instead of the co-conciliators or the Chairman of the Administrative Counsel. The current proposal, which mirrors that made in proposed (AF)AR 40, addresses concerns expressed in the context of arbitration regarding other members of the Tribunal or Commission being tasked to take these decisions.

RULE 27 – INCAPACITY OR FAILURE TO PERFORM DUTIES

CURRENT RELATED PROVISIONS: C(AF)R Art. 14.

Rule 27
Incapacity or Failure to Perform Duties

If a conciliator becomes incapacitated or fails to perform the duties required of a conciliator, the procedure in Rules 25 and 26 shall apply.

Article 27
Incapacité ou défaillance dans l'exercice des fonctions

Si un(e) conciliateur(trice) devient incapable d'exercer ou n'exerce pas ses fonctions de conciliateur(trice), la procédure prévue par les articles 25 et 26 s'applique.

Regla 27
Incapacidad o Imposibilidad de Desempeñar Funciones

Si un o una conciliador(a) se incapacitara o no pudiera desempeñar las funciones de su cargo, se aplicará el procedimiento establecido en las Reglas 25 y 26.

1230. Proposed (AF)CR 27 is identical to proposed CR 19.

RULE 28 – RESIGNATION

CURRENT RELATED PROVISIONS: C(AF)R Art. 14(3)

Rule 28
Resignation

(1) A conciliator may resign by notifying the Secretary-General and the other members of the Commission.

(2) A conciliator shall resign upon the joint request of the parties.

Article 28
Démission

(1) Un(e) conciliateur(trice) peut démissionner en adressant une notification à cet effet au ou à la Secrétaire général(e) et aux autres membres de la Commission.

(2) Un(e) conciliateur(trice) doit démissionner à la demande conjointe des parties.

Regla 28
Renuncia

(1) Un o una conciliador(a) podrá renunciar a su cargo notificando al o a la Secretario(a) General y a los o las otros(as) miembros de la Comisión.

(2) Un o una conciliador(a) deberá renunciar al recibir una solicitud conjunta de las partes.

1231. Proposed (AF)CR 28 is similar to proposed CR 20. However, it differs from that proposed Rule, and from its existing formulation in current Art. 14(3), in that it no longer requires a resigning conciliator to provide reasons for the resignation, nor does it require the remaining members to determine whether they consent to the resignation. That consent was needed to determine how the replacement conciliator would be appointed. While that requirement is maintained in the proposed CR (necessitated by Art. 56(2) of the Convention), requiring the consent of a resigning conciliator's co-conciliators is cumbersome in practice. The resulting potential for delay in making the replacement appointment does not seem justified. For this reason, the requirement has been omitted in

the proposed (AF)CR. These modifications match the proposals in corresponding proposed (AF)AR.

1232. Proposed (AF)CR 28(2) also introduces the possibility for the parties to agree on the resignation of a conciliator. This change reflects the importance of the parties' continuing confidence in the conciliator(s).

RULE 29 – VACANCY ON THE COMMISSION

CURRENT RELATED PROVISIONS: C(AF)R Art. 16, 17

Rule 29
Vacancy on the Commission

(1) The Secretary-General shall notify the parties of any vacancy on the Commission.

(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.

(3) A vacancy on the Commission shall be filled by the method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Commission has been reconstituted, the conciliation shall continue from the point it had reached at the time the vacancy was notified.

Article 29
Vacance au sein de la Commission

(1) Le ou la Secrétaire général(e) notifie aux parties toute vacance au sein de la Commission.

(2) L'instance est suspendue de la date de la notification de la vacance jusqu'à ce que la vacance ait été remplie.

(3) Une vacance au sein de la Commission est remplie selon la méthode utilisée pour procéder à la nomination initiale, étant toutefois entendu que le ou la Secrétaire général(e) remplit toute vacance qui n'a pas été remplie dans un délai de 45 jours à compter de la notification de la vacance.

(4) Dès qu'une vacance a été remplie et que la Commission a été reconstituée, la conciliation reprend au point où elle était arrivée au moment où la vacance a été notifiée.

Regla 29
Vacante en la Comisión

(1) El o la Secretario(a) General notificará a las partes de cualquier vacante en la Comisión

(2) El procedimiento se suspenderá desde la fecha de notificación de la vacante hasta suplir la vacante.

(3) Cualquier vacante en la Comisión se suplirá siguiendo el método utilizado para realizar el nombramiento original, excepto que el o la Secretario(a) General suplirá cualquier vacante que no se haya suplido dentro de los 45 días siguientes a la notificación de la vacante.

(4) Una vez que se haya suplido una vacante y la Comisión se haya reconstituido, la conciliación continuará a partir de la etapa a la que se había llegado cuando se notificó la vacante.

1233. Proposed (AF)CR 29 is similar to proposed CR 21. It proposes that: (i) the Secretary-General fill any vacancy not filled within 45 days of the notice of vacancy; and (ii) a vacancy caused by a resignation be filled by the method used to make the original appointment without requiring consent to resignation. This streamlines the replacement process, and is consistent with the changes to proposed (AF)CR 28 described above. It is also consistent with the corresponding proposed (AF)AR 43.

CHAPTER VI – CONDUCT OF THE CONCILIATION

1234. Proposed (AF)CR 30-39 corresponds to proposed CR 22-31.

RULE 30 – FUNCTIONS OF THE COMMISSION

CURRENT RELATED PROVISIONS: C(AF)R Art. 30

Chapter VI
Conduct of the Conciliation

Rule 30
Functions of the Commission

(1) The Commission shall clarify the issues in dispute and assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) In order to bring about agreement between the parties, the Commission may, at any stage of the proceeding, after consulting with the parties, recommend:

(a) specific terms of settlement to the parties; or

(b) that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.

(3) Recommendations may be made orally or in writing. Either party may request that the Commission provide reasons for any recommendation. The Commission may invite each party to provide observations concerning any recommendation made.

(4) At any stage of the proceeding, the Commission may:

(a) request explanations, documents or other information from either party or other persons;

(b) communicate with the parties jointly or separately; or

(c) visit any place connected with the dispute or conduct inquiries with the consent and participation of the parties.

Chapitre VI
Conduite de la conciliation

Article 30
Fonctions de la Commission

(1) La Commission éclaircit les points en litige et aide les parties à parvenir à une résolution mutuellement acceptable de la totalité ou d’une partie du différend.

(2) En vue d’amener les parties à un accord, la Commission peut, à une étape quelconque de l’instance, et après consultation de celles-ci, recommander :

(a) les termes particuliers d’un règlement aux parties; ou

(b) aux parties de s’abstenir de certains actes spécifiques susceptibles d’aggraver le différend alors que la conciliation est en cours.

(3) Les recommandations peuvent être formulées par oral ou par écrit. Chacune des parties peut demander à la Commission de motiver toute recommandation. La Commission peut inviter chaque partie à faire part de ses observations sur toute recommandation présentée.

(4) À tout moment de l’instance, la Commission peut :

(a) requérir de l’une ou l’autre des parties ou d’autres personnes des explications, des documents ou toutes autres informations ;

(b) communiquer avec les parties ensemble ou séparément ; ou

(c) avec le consentement et la participation des parties, se transporter sur les lieux ayant un lien avec le différend ou procéder à des enquêtes.

Capítulo VI
Tramitación de la Conciliación

Regla 30
Funciones de la Comisión

(1) La Comisión aclarará los asuntos en disputa y asistirá a las partes para que lleguen a una resolución mutuamente aceptable de la totalidad o de parte de la diferencia.

(2) A fin de lograr el acuerdo de las partes, la Comisión podrá, en cualquier etapa del procedimiento, previa consulta a las partes, recomendar:

(a) términos de solución específicos a dichas partes; o

(b) que las partes se abstengan de realizar actos específicos que pudieran agravar la diferencia mientras la conciliación se encuentre en curso.

(3) Las recomendaciones podrán formularse oralmente o por escrito. Cualquiera de las partes podrá solicitar que la Comisión exponga los fundamentos para cualquier recomendación. La Comisión podrá invitar a cada una de las partes a formular observaciones respecto de cualquier recomendación efectuada.

(4) En cualquier etapa del procedimiento, la Comisión podrá:

(a) solicitar explicaciones, documentos u otro tipo de información de cualquiera de las partes u otras personas;

(b) comunicarse con las partes en forma conjunta o por separado; o

(c) visitar cualquier lugar relacionado con la diferencia o realizar investigaciones con el consentimiento y participación de las partes.

1235. Proposed (AF)CR 30 is identical to proposed CR 22.

RULE 31– GENERAL DUTIES OF THE COMMISSION

Rule 31
General Duties of the Commission

(1) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.

(2) The Commission shall conduct the proceeding in an expeditious and cost-effective manner.

Article 31
Obligations générales de la Commission

(1) La Commission traite les parties de manière égale et donne à chacune d'elles une possibilité raisonnable de comparaître et de participer à l'instance.

(2) La Commission conduit la procédure avec célérité et efficacité en termes de coûts.

Regla 31
Obligaciones Generales de la Comisión

(1) La Comisión deberá tratar a las partes de manera igualitaria y brindar a cada parte una oportunidad razonable de comparecer y participar en el procedimiento.

(2) La Comisión tramitará el procedimiento de manera expedita y eficaz en materia de costos.

1429. Proposed (AF)CR 31 is identical to proposed CR 23.

RULE 32 – ORDERS, DECISIONS AND PROCEDURAL AGREEMENTS

CURRENT RELATED PROVISIONS: C(AF)R Art. 26

Rule 32
Orders, Decisions and Procedural Agreements

(1) The Commission shall make the orders and decisions required for the conduct of the conciliation.

(2) The Commission shall take decisions by a majority of the votes of all its members. Abstentions shall count as a negative vote.

(3) Orders and decisions may be taken by any appropriate means of communication and may be signed by the President on behalf of the Commission, unless the parties agree otherwise.

(4) The Commission shall apply any agreement between the parties on procedural matters, to the extent it conforms with the (Additional Facility) Administrative and Financial Regulations.

Article 32
Ordonnances, décisions et accords sur la procédure

(1) La Commission rend les ordonnances et les décisions requises pour la conduite de la conciliation.

(2) La Commission prend ses décisions à la majorité des voix de tous ses membres. L'abstention est considérée comme un vote négatif.

(3) Les ordonnances et les décisions peuvent être rendues par tous moyens de communication appropriés et peuvent être signées par le ou la Président(e) pour le compte de la Commission, sauf si les parties en conviennent autrement.

(4) La Commission applique tout accord entre les parties sur les questions de procédure, pour autant que celui-ci soit conforme au Règlement administratif et financier (Mécanisme supplémentaire).

Regla 32
Resoluciones, Decisiones y Acuerdos

(1) La Comisión emitirá las resoluciones y decisiones requeridas para la tramitación de la conciliación.

(2) La Comisión adoptará decisiones por mayoría de votos de todos sus miembros. Las abstenciones se contarán como votos en contra.

(3) Las resoluciones y decisiones podrán ser emitidas por cualquier medio de comunicación apropiado y podrán estar firmadas por el o la Presidente(a) en nombre y representación de la Comisión, salvo acuerdo en contrario de las partes.

(4) La Comisión aplicará cualquier acuerdo de las partes sobre cuestiones procesales en la medida en que cumpla con lo establecido en el Reglamento Administrativo y Financiero (Mecanismo Complementario).

1236. Proposed (AF)CR 32 is materially the same as proposed CR 24.

RULE 33 – QUORUM

CURRENT RELATED PROVISIONS: C(AF)R Art. 21

Rule 33
Quorum

The participation of a majority of the members of the Commission shall be required at the first session, meetings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.

Article 33
Quorum

La participation d'une majorité des membres de la Commission est exigée lors de la première session, des réunions et des délibérations, par tous moyens de communication appropriés, sauf si les parties en conviennent autrement.

Regla 33
Quórum

La participación de la mayoría de los miembros de la Comisión será requerida tanto en la primera sesión como en las reuniones y deliberaciones, por cualquier medio de comunicación apropiado, salvo acuerdo en contrario de las partes.

1237. Proposed (AF)CR 33 is identical to proposed CR 25.

RULE 34 – DELIBERATIONS

CURRENT RELATED PROVISIONS: C(AF)R Art. 22

Rule 34
Deliberations

(1) The deliberations of the Commission shall take place in private and remain confidential.

(2) The Commission may deliberate at any place it considers convenient.

(3) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

Article 34
Délibérations

(1) Les délibérations de la Commission ont lieu à huis clos et demeurent confidentielles.

(2) La Commission peut délibérer en tout lieu qu'elle juge pratique.

(3) Seuls les membres de la Commission prennent part à ses délibérations. Aucune autre personne n'est admise sauf si la Commission en décide autrement.

Regla 34
Deliberaciones

(1) Las deliberaciones de la Comisión se realizarán en privado y serán de carácter confidencial.

(2) La Comisión podrá deliberar en cualquier lugar que estime conveniente.

(3) Sólo los miembros de la Comisión tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario de la Comisión.

1238. Proposed (AF)CR 34 is identical to proposed CR 26.

RULE 35 – COOPERATION OF THE PARTIES

CURRENT RELATED PROVISIONS: C(AF)R Art. 31

Rule 35
Cooperation of the Parties

(1) The parties shall cooperate with the Commission and with one another and shall conduct the conciliation in good faith.

(2) The parties shall provide all relevant explanations, documents or other information. The parties shall also facilitate visits to any place connected with the dispute and the participation of other persons as requested by the Commission.

(3) The parties shall comply with any time limit agreed upon or fixed by the Commission.

(4) The parties shall give their most serious consideration to the Commission's recommendations.

Article 35
Collaboration des parties

(1) Les parties collaborent avec la Commission et l'une avec l'autre et conduisent la conciliation de bonne foi.

(2) Les parties fournissent toutes explications, tous documents ou toutes autres informations pertinent(e)s. Elles facilitent également les transports sur les lieux ayant un lien avec le différend et la participation d'autres personnes conformément aux demandes de la Commission.

(3) Les parties respectent tous délais convenus avec la Commission ou fixés par elle.

(4) Les parties doivent tenir le plus grand compte des recommandations de la Commission.

Regla 35
Cooperación de las Partes

(1) Las partes cooperarán con la Comisión y entre sí, y tramitarán la conciliación de buena fe.

(2) Las partes proporcionarán todas las explicaciones, los documentos u otra información que sea pertinente. Las partes facilitarán también las visitas a cualquier lugar relacionado con la diferencia y la participación de otras personas a solicitud de la Comisión.

(3) Las partes respetarán todos los plazos acordados o fijados por la Comisión.

(4) Las partes deberán prestar la máxima consideración a las recomendaciones de la Comisión.

1239. Proposed (AF)CR 35 is materially the same as proposed CR 27.

RULE 36 – WRITTEN STATEMENTS

CURRENT RELATED PROVISIONS: C(AF)R Art. 33

Rule 36
Written Statements

(1) Each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views on these issues 30 days after the constitution of the Commission, or such longer time as the Commission may fix, but in any event before the first session.

(2) Either party may file further written statements at any stage of the conciliation within time limits fixed by the Commission.

Article 36
Exposés écrits

(1) Chaque partie dépose simultanément un bref exposé écrit initial qui décrit les questions faisant l'objet du différend ainsi que sa position sur ces questions, dans un délai de 30 jours suivant la constitution de la Commission ou dans tout délai plus long que celle-ci peut fixer, mais en tout état de cause avant la première session.

(2) À tout moment de la conciliation, chaque partie peut déposer tous autres exposés écrits dans les délais fixés par la Commission.

Regla 36
Presentaciones Escritas

(1) Cada parte realizará de manera simultánea una breve presentación escrita inicial describiendo los asuntos en disputa y sus posiciones respecto de esos asuntos 30 días después de la constitución de la Comisión u otro plazo más largo que la Comisión fije, pero, en cualquier caso, antes de la primera sesión.

(2) Cualquiera de las partes podrá presentar presentaciones escritas adicionales en cualquier etapa de la conciliación dentro de los plazos fijados por la Comisión.

1240. Proposed (AF)CR 36 is identical to proposed CR 28.

RULE 37 – FIRST SESSION

CURRENT RELATED PROVISIONS: C(AF)R Art. 13, 20

Rule 37
First Session

(1) Subject to paragraph (2), the Commission shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).

(2) The first session shall be held within 60 days of the Commission's constitution or such other period as the parties may agree.

(3) The first session may be held in person or remotely, by any means that the Commission deems appropriate. The agenda, method and date of the first session shall be determined by the Commission after consulting with the parties.

(4) Before the first session, the Commission shall invite the views of the parties on procedural matters, including:

(a) the applicable conciliation rules;

(b) the number of members required to constitute a quorum of the Commission;

(c) the division of advances payable pursuant to (Additional Facility) Administrative and Financial Regulation 7(5);

(d) the procedural language(s), translation and interpretation;

(e) the method of filing and routing of written communications;

(f) a schedule for further written statements and meetings;

(g) the place and format of meetings between the Commission and the parties;

(h) the manner of recording or keeping minutes of meetings, if any;

(i) the protection of confidential information;

(j) the publication of documents; and

(k) any agreement between the parties:

(i) concerning the treatment of information disclosed by one party to the Commission by way of separate communication pursuant to Rule 30(4)(b);

(ii) not to initiate or pursue during the conciliation any other proceeding in respect of the dispute;

(iii) concerning the application of prescription or limitation periods; and

(iv) pursuant to Rule 16.

(5) At the first session or within any other period as the Commission may determine, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

(6) The Commission shall issue summary minutes recording the parties' agreements and the Commission's decisions on the procedure within 15 days after the later of the first session or the last written statement on procedural matters addressed at the first session.

Article 37
Première Session

(1) Sous réserve du paragraphe (2), la Commission tient sa première session avec les parties pour traiter des questions de procédure, notamment celles qui sont énumérées au paragraphe (4).

(2) La première session se tient dans les 60 jours suivant la constitution de la Commission ou tout autre délai convenu par les parties.

(3) La première session peut se tenir en personne ou à distance, par tous moyens que la Commission juge appropriés. L'ordre du jour, les modalités et la date de la première session sont déterminés par la Commission après consultation des parties.

(4) Préalablement à la première session, la Commission invite les parties à lui faire part de leurs observations sur les questions de procédure, notamment :

(a) le règlement de conciliation applicable ;

(b) le nombre de membres requis pour constituer le quorum au sein de la Commission ;

(c) la répartition des avances devant être payées conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) ;

(d) la ou les langue(s) de la procédure, la traduction et l'interprétation ;

(e) les modalités de dépôt et de transmission des communications écrites ;

(f) un calendrier des autres exposés écrits et des réunions ;

(g) le lieu et la forme des réunions entre la Commission et les parties ;

(h) les modalités éventuelles d'enregistrement et de rédaction des comptes rendus des réunions ;

(i) la protection des informations confidentielles ;

(j) la publication de documents ; et

(k) tout accord entre les parties :

(i) relatif au traitement des informations divulguées par une partie à la Commission par le biais d'une communication séparée conformément à l'article 30(4)(b) ;

(ii) de ne pas engager ni poursuivre pendant la conciliation une autre instance en rapport avec le différend ;

(iii) relatif à l'application de délais de prescription ou de déchéance ; et

(iv) conformément à l'article 16.

(5) Lors de la première session ou dans tout délai déterminé par la Commission, chaque partie doit :

(a) désigner un représentant habilité à résoudre le différend pour son compte ; et

(b) décrire le processus à suivre pour mettre en œuvre le règlement.

(6) La Commission établit un procès-verbal sommaire prenant acte des accords des parties et des décisions de la Commission sur la procédure de conciliation dans un délai de 15 jours à compter de la plus tardive des dates suivantes, soit la date de la première session, soitcelle du dernier exposé écrit relatif aux questions de procédure traitées lors de la première session.

Regla 37
Primera Sesión

(1) Sujeto a lo dispuesto en el párrafo (2), la Comisión celebrará una primera sesión con las partes para abordar cuestiones procesales, lo cual incluye las cuestiones enumeradas en el párrafo (4)

(2) La primera sesión se celebrará dentro de los 60 días siguientes a la constitución de la Comisión, o cualquier otro plazo que las partes pudieran acordar.

(3) La primera sesión podrá celebrarse en persona o a distancia, por cualquier medio que la Comisión estime apropiado. La agenda, la modalidad y la fecha de la primera sesión serán determinadas por la Comisión previa consulta a las partes.

(4) Antes de la primera sesión, la Comisión invitará a las partes a presentar sus observaciones sobre cuestiones procesales, lo cual incluye:

(a) las reglas de conciliación aplicables;

(b) el número de miembros necesario para constituir el quórum de la Comisión;

(c) la división de los anticipos que deban pagarse de conformidad con lo dispuesto en la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario);

(d) el(los) idioma(s) del procedimiento, traducción e interpretación;

(e) el método de presentación y transmisión de comunicaciones escritas;

(f) un cronograma para presentaciones escritas y reuniones adicionales;

(g) el lugar y formato de las reuniones entre la Comisión y las partes;

(h) la modalidad de las grabaciones o levantamiento de actas de las reuniones, si las hubiera;

(i) la protección de información confidencial;

(j) la publicación de los documentos; y

(k) cualquier acuerdo entre las partes:

(i) respecto del tratamiento de la información revelada por una parte a la Comisión mediante una comunicación separada de conformidad con lo dispuesto en la Regla 30(4)(b);

(ii) de no iniciar ni promover, durante la conciliación, ningún otro procedimiento con respecto a la diferencia;

(iii) respecto de la aplicación de plazos de prescripción; y

(iv) de conformidad con lo dispuesto en la Regla 16.

(5) En la primera sesión o dentro de cualquier otro plazo fijado por la Comisión, cada parte deberá:

(a) identificar a un representante que esté autorizado para llegar a un acuerdo con respecto a la diferencia, en su nombre y representación, y

(b) describir el proceso que deberá seguirse para dar aplicación a un acuerdo.

(6) La Comisión emitirá actas resumidas mediante las cuales se deje constancia de los acuerdos de las partes y las decisiones de la Comisión sobre el procedimiento de

conciliación dentro de los 15 días siguientes a lo que suceda de último, sea la primera sesión o bien la última presentación escrita sobre cuestiones procesales abordadas durante la primera sesión.

1241. Proposed (AF)CR 37 is materially the same as proposed CR 29. It has some minor alterations to account for the different types of procedural agreements which may be reached in a conciliation proceeding (for example, the reference to agreements under proposed (AF)CR 16, which prohibits use of information obtained through conciliation in subsequent proceedings, unless otherwise agreed).

RULE 38 – MEETINGS

CURRENT RELATED PROVISIONS: C(AF)R Art. 20

Rule 38
Meetings

(1) The Commission may meet with the parties jointly or separately.

(2) The Commission shall determine the date, time and method of holding meetings, after consulting with the parties.

(3) If a meeting is to be held in person, it may be held at any place agreed to by the parties after consulting with the Commission and the Secretariat. If the parties do not agree on the place of a meeting, it shall be held at a place determined by the Commission.

(4) Meetings shall remain confidential. The parties may consent to observation of meetings by persons in addition to the parties and the Commission.

Article 38
Réunions

(1) La Commission peut tenir des réunions avec les parties ensemble ou séparément.

(2) La Commission fixe la date, l'heure et les modalités de la tenue des réunions, après consultation des parties.

(3) Si une réunion doit se tenir en personne, elle peut se tenir en tout lieu convenu entre les parties après consultation de la Commission et du Secrétariat. Si les parties ne se

mettent pas d'accord sur le lieu d'une réunion, celle-ci se tient en un lieu fixé par la Commission.

(4) Les réunions demeurent confidentielles. Les parties peuvent consentir à ce que des personnes, autres que les parties et la Commission, observent les réunions.

Regla 38
Reuniones

(1) La Comisión podrá reunirse con las partes en forma conjunta o por separado.

(2) La Comisión determinará la fecha, la hora y la modalidad de celebración de las reuniones, previa consulta a las partes.

(3) Si una reunión debe celebrarse en persona, podrá celebrarse en cualquier lugar acordado por las partes previa consulta a la Comisión y al Secretariado. Si las partes no acordaran el lugar de una reunión, la misma se celebrará en un lugar a ser determinado por la Comisión.

(4) Las reuniones serán de carácter confidencial. Las partes podrán consentir en que otras personas además de las partes y la Comisión observen las reuniones.

1242. Proposed (AF)CR 38 is similar to proposed CR 30. The only difference is that the Commission determines the place of the meetings if the parties cannot agree. Proposed (AF)CR 38(3) replaces current Art. 19, which left determination of the place of the conciliation to the Secretary-General. It is proposed to allow the parties to agree on the meeting place.

RULE 39 – PRELIMINARY OBJECTIONS

CURRENT RELATED PROVISIONS: C(AF)R Art. 36

Rule 39
Preliminary Objections

(1) A party may file a preliminary objection that the dispute is not within the competence of the Commission.

(2) A preliminary objection shall be made as soon as possible. The objection shall be made no later than the date of the initial written statement referred to in Rule 36(1),

unless the facts on which the objection is based are unknown to the party at the relevant time.

(3) The Commission may address a preliminary objection separately or with other issues in dispute. If the Commission decides to address the objection separately, it may suspend the conciliation on the other issues in dispute to the extent necessary to address the preliminary objection.

(4) The Commission may at any time on its own initiative consider whether the dispute is within its own competence.

(5) If the Commission decides that the dispute is not within its competence, it shall issue a Report to that effect, in which it shall state its reasons. Otherwise, the Commission shall issue a decision on the objection with brief reasons and fix any time limit necessary for the further conduct of the conciliation.

Article 39
Objections préliminaires

(1) Une partie peut soulever une objection préliminaire fondée sur le motif que le différend ne ressortit pas à la compétence de la Commission.

(2) Une objection préliminaire est soulevée aussitôt que possible. Sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré, l'objection est soulevée au plus tard à la date de l'exposé écrit initial visé à l'article 36(1).

(3) La Commission peut traiter une objection préliminaire de manière distincte ou avec d'autres questions faisant l'objet du différend. Si la Commission décide de traiter l'objection de manière distincte, elle peut suspendre la conciliation sur les autres questions faisant l'objet du différend dans la mesure nécessaire pour traiter l'objection préliminaire.

(4) La Commission peut, à tout moment et de sa propre initiative, examiner si le différend ressortit à sa propre compétence.

(5) Si la Commission décide que le différend ne ressortit pas à sa propre compétence, elle établit un procès-verbal motivé à cet effet. Dans le cas contraire, la Commission rend une décision sur l'objection, qu'elle motive brièvement, et fixe tout délai nécessaire à la poursuite de la conciliation.

Regla 39
Excepciones Preliminares

(1) Una parte podrá oponer una excepción preliminar según la cual la diferencia no es de la competencia de la Comisión.

(2) Una excepción preliminar deberá oponerse lo antes posible. La excepción deberá oponerse a más tardar en la fecha de la presentación escrita inicial al que se hace referencia en la Regla 36(1), a menos que la parte no haya tenido conocimiento de los hechos en que se funda la excepción, en el momento pertinente.

(3) La Comisión podrá pronunciarse sobre una excepción preliminar en forma separada o junto con otros asuntos en disputa. Si la Comisión decide pronunciarse sobre la excepción en forma separada, podrá suspender la conciliación respecto de los demás asuntos en disputa en la medida que sea necesario para pronunciarse sobre la excepción preliminar.

(4) La Comisión podrá en cualquier momento considerar de oficio si la diferencia es de su propia competencia.

(5) Si la Comisión decide que la diferencia no es de su competencia, emitirá un informe a tal efecto en el que expresará los motivos en que se funda. De lo contrario, la Comisión emitirá una decisión relativa a la excepción con una breve exposición de motivos y fijará cualquier plazo necesario para la continuación de la conciliación.

1243. Proposed (AF)CR 39 is materially the same as proposed CR 31.

CHAPTER VII – TERMINATION OF THE CONCILIATION

1244. Proposed (AF)CR 40-46 correspond to proposed CR 32-38.

RULE 40 – DISCONTINUANCE PRIOR TO THE CONSTITUTION OF THE COMMISSION

Chapter VII
Termination of the Conciliation

Rule 40
Discontinuance Prior to the Constitution of the Commission

(1) If the parties notify the Secretary-General prior to the constitution of the Commission that they have agreed to discontinue the proceeding, the Secretary-General shall issue an order taking note of the discontinuance.

(2) If a party requests the discontinuance of the proceeding prior to the constitution of the Commission, the Secretary-General shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(3) If, prior to the constitution of the Commission, the parties fail to take any steps in the proceeding for more than 150 days, the Secretary-General shall notify them of the time elapsed since the last step taken in the proceeding. If the parties fail to take a step within 30 days after the notice, they shall be deemed to have discontinued the proceeding and the Secretary-General shall issue an order taking note of the discontinuance. If either party takes a step within 30 days after the Secretary-General's notice, the proceeding shall continue.

Chapitre VII
Fin de la conciliation

Article 40
Désistement avant la constitution de la Commission

(1) Si les parties notifient au ou à la Secrétaire général(e) avant la constitution de la Commission qu'elles sont convenues de se désister de l'instance, le ou la Secrétaire général(e) rend une ordonnance prenant acte de la fin de l'instance.

(2) Si une partie requiert le désistement de l'instance avant la constitution de la Commission, le ou la Secrétaire général(e) fixe un délai dans lequel l'autre partie peut s'opposer à ce désistement. Si aucune objection n'est soulevée par écrit dans ce délai, l'autre partie est réputée avoir accepté le désistement et le ou la Secrétaire général(e) rend une ordonnance prenant acte de la fin de l'instance. Si une objection est soulevée par écrit pendant ce délai, l'instance se poursuit.

(3) Si, avant la constitution de la Commission, les parties n'accomplissent aucune démarche relative à l'instance pendant 150 jours, le ou la Secrétaire général(e) leur adresse une notification les informant du délai écoulé depuis la dernière démarche accomplie dans l'instance. Si les parties n'accomplissent aucune démarche dans les 30 jours suivant la notification, elles sont réputées s'être désistées de l'instance et le ou la Secrétaire général(e) rend une ordonnance prenant acte de la fin de la conciliation. Si l'une ou l'autre des parties accomplit une démarche dans les 30 jours suivant la notification du ou de la Secrétaire général(e), l'instance continue.

Capítulo VII
Conclusión de la Conciliación

Regla 40
Discontinuación con Anterioridad a la Constitución de la Comisión

(1) Si las partes notificaran al o a la Secretario(a) General con anterioridad a la constitución de la Comisión que han acordado discontinuar el procedimiento, el o la Secretario(a) General emitirá una resolución que deje constancia de la discontinuación.

(2) Si una de las partes solicita la discontinuación del procedimiento con anterioridad a la constitución de la Comisión, el o la Secretario(a) General fijará el plazo dentro del cual la otra parte podrá oponerse a la discontinuación. Si no se formula objeción alguna por escrito dentro del plazo fijado, se entenderá que la otra parte ha consentido a la discontinuación, y el o la Secretario(a) General emitirá una resolución que deje constancia de la discontinuación del procedimiento. Si se formula una objeción escrita dentro del plazo fijado, el procedimiento continuará.

(3) Si con anterioridad a la constitución de la Comisión, las partes omiten realizar cualquier acto procesal durante más de 150 días, el o la Secretario(a) General notificará a las partes que dicho tiempo ha transcurrido desde el último acto procesal. Si las partes omiten actuar dentro de los 30 días siguientes a la notificación, se entenderá que las partes han discontinuado el procedimiento, y el o la Secretario(a) General emitirá una resolución dejando constancia de la discontinuación. Si cualquiera de las partes realiza un acto procesal dentro de los 30 días siguientes a la notificación del o de la Secretario(a) General, el procedimiento continuará.

1245. Proposed (AF)CR 40 is identical to proposed CR 32.

RULE 41 – DISCONTINUANCE FOR FAILURE TO PAY

CURRENT RELATED PROVISIONS: AFR 14

Rule 41
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by (Additional Facility) Administrative and Financial Regulation 7, the proceeding may be discontinued pursuant to that Regulation.

Article 41
Fin de l'instance pour défaut de paiement

Si les parties ne procèdent pas, comme l'exige l'article 7 du Règlement administratif et financier (Mécanisme supplémentaire), au paiement des montants destinés à couvrir les frais de la procédure, la fin de l'instance peut être prononcée conformément à cet article.

Regla 41
Discontinuación por Falta de Pago

Si las partes no realizan los pagos para sufragar los costos del procedimiento tal como lo exige la Regla 7 del Reglamento Administrativo y Financiero (Mecanismo Complementario), podrá discontinuarse el procedimiento de conformidad con lo dispuesto en dicha Regla.

1246. Proposed (AF)CR 41 is materially the same as proposed CR 33.

RULES 42 TO 44 – REPORT NOTING THE PARTIES' AGREEMENT, THE PARTIES' FAILURE TO REACH AGREEMENT OR THE FAILURE OF A PARTY TO APPEAR OR PARTICIPATE

CURRENT RELATED PROVISIONS: C(AF)R Art. 37

Rule 42
Report Noting the Parties' Agreement

(1) If the parties reach agreement on some or all of the issues in dispute, the Commission shall issue its Report noting the issues in dispute and recording the issues upon which the parties have agreed.

(2) The parties may provide the Commission with the complete and signed text of their settlement agreement and may request that the Commission embody such settlement in the Report.

Article 42
Procès-verbal prenant acte de l'accord des parties

(1) Si les parties se mettent d'accord sur certains ou sur l'ensemble des points en litige, la Commission établit son procès-verbal prenant note des points en litige et prenant acte des points sur lesquels les parties sont parvenues à un accord.

(2) Les parties peuvent remettre à la Commission le texte complet et signé de leur accord de règlement amiable et lui demander de l'incorporer dans son procès-verbal.

Regla 42
Informe que Deja Constancia del Acuerdo entre las Partes

(1) Si las partes logran un acuerdo sobre la totalidad o algunos de los asuntos en disputa, la Comisión emitirá un informe en el que dejará constancia de los asuntos en disputa y de las cuestiones en que las partes han logrado llegar a un acuerdo.

(2) Las partes podrán proporcionarle a la Comisión el texto completo y firmado de su acuerdo de avenencia y podrán solicitar que la Comisión refleje dicha avenencia en el informe.

Rule 43
Report Noting the Failure of the Parties to Reach Agreement

At any stage of the proceeding, and after notice to the parties, the Commission shall issue its Report noting the issues in dispute and recording that the parties have not reached agreement if:

(a) it appears to the Commission that there is no likelihood of agreement between the parties; or

(b) the parties advise the Commission that they have agreed to discontinue the conciliation.

Article 43
Procès-verbal prenant acte de l'impossibilité pour les parties de parvenir à un accord

Á une étape quelconque de l'instance et après en avoir donné notification aux parties, la Commission établit son procès-verbal prenant note des points en litige et prenant acte de l'impossibilité pour les parties de parvenir à un accord si :

(a) la Commission estime qu'il n'y a aucune possibilité d'accord entre les parties; ou

(b) les parties informent la Commission qu'elles sont convenues de mettre fin à la conciliation.

Regla 43
Informe que Deja Constancia de la Falta de Acuerdo entre las Partes

En cualquier etapa del procedimiento, y después de notificar a las partes, la Comisión emitirá un informe en el que tomará nota de los asuntos en disputa y dejará constancia de que las partes no han logrado llegar a un acuerdo, si:

(a) la Comisión estima que no hay probabilidades de lograr un acuerdo entre las partes, o

(b) las partes le informan a la Comisión que han acordado discontinuar la conciliación.

Rule 44
Report Recording the Failure of a Party to Appear or Participate

If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, issue its Report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Article 44
Procès-verbal prenant acte du défaut de comparution ou de participation d'une partie

Si l'une des parties fait défaut ou s'abstient de participer à l'instance, la Commission, après en avoir donné notification aux parties, établit son procès-verbal constatant que le différend a été soumis à la conciliation et que la partie en question a fait défaut ou s'est abstenue de participer à l'instance.

Regla 44
Informe que Deja Constancia de que Una de las Partes No Compareció o Participó

Si una de las partes no compareciera o participara en el procedimiento, la Comisión, previa notificación a las partes, emitirá un informe en el que tomará nota de que la diferencia fue sometida a conciliación y dejará constancia de que dicha parte no compareció o participó.

1247. Proposed (AF)CR 42-44 are identical to proposed CR 34-36.

RULE 45 – THE REPORT

CURRENT RELATED PROVISIONS: C(AF)R Art. 38

Rule 45
The Report

(1) The Report shall be in writing and shall contain, in addition to the information specified in Rules 42-44:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Commission was established under these Rules and a description of the method of its constitution;

(d) the name of each member of the Commission and of the appointing authority of each;

(e) the dates and place(s) of the first session and of meetings of the Commission with the parties;

(f) a brief summary of the proceeding;

(g) the complete and signed text of the parties' settlement agreement if requested by the parties pursuant to Rule 42(2);

(h) a statement of the costs of the proceeding, including the fees and expenses of each member of the Commission and the costs to be paid by each party pursuant to Rule 14(2); and

(i) any agreement of the parties pursuant to Rule 16.

(2) The Report shall be signed by the members of the Commission. It may be signed by electronic means if the parties agree. If a member does not sign the Report, such fact shall be recorded.

Article 45
Le procès-verbal

(1) Le procès-verbal est écrit et contient, outre les informations spécifiées aux articles 42 -44 :

(a) la désignation précise de chaque partie ;

(b) les noms des représentants des parties ;

(c) une déclaration selon laquelle la Commission a été constituée en vertu de ce Règlement, et la description de la façon dont elle a été constituée ;

(d) le nom de chaque membre de la Commission et de l'autorité ayant nommé chacun d'eux ;

(e) les dates et le(s) lieu(x) de la première session et des réunions de la Commission avec les parties ;

(f) un bref résumé de la procédure ;

(g) le texte complet et signé de l'accord de règlement des parties si les parties le demandent conformément à l'article 42(2) ;

(h) un état des frais de la procédure, y compris les honoraires et frais de chaque membre de la Commission et des frais incombant à chaque partie conformément à l'article 14(2) ; et

(i) tout accord des parties conformément à l'article 16.

(2) Le procès-verbal est signé par les membres de la Commission. Il peut être signé par voie électronique, si les parties sont d'accord. Si l'un des membres ne signe pas le procès-verbal, il en fait mention dans celui-ci.

Regla 45
El Informe

(1) El informe deberá dictarse por escrito y deberá incluir, además de la información identificada en las Reglas 42-44:

(a) la identificación de cada parte de manera precisa;

(b) el nombre de los representantes de las partes;

(c) una declaración de que la Comisión ha sido constituida de conformidad con lo dispuesto en estas Reglas, y una descripción del método de su constitución;

(d) el nombre de cada miembro de la Comisión y de la persona que designó a cada uno(a);

(e) las fechas y el o los lugar(es) de la primera sesión y de las reuniones de la Comisión con las partes;

(f) un breve resumen del procedimiento;

(g) el texto completo y firmado del acuerdo de avenencia de las partes, si esto es solicitado por las partes de conformidad con lo dispuesto en la Regla 42(2);

(h) una declaración de los costos del procedimiento, lo que incluye de los honorarios y gastos de cada uno de los miembros de la Comisión y de los costos que debe pagar cada una de las partes de conformidad con lo dispuesto en la Regla 14(2); y

(i) cualquier acuerdo de las partes de conformidad con lo dispuesto en la Regla 16.

(2) El informe deberá estar firmado por los miembros de la Comisión. Podrá ser firmado a través de medios electrónicos si las partes así lo acordaran. Si un miembro no lo firmara, se dejará constancia de ese hecho en el informe.

1248. Proposed (AF)CR 45 is materially the same as proposed CR 37.

RULE 46 – ISSUANCE OF THE REPORT

CURRENT RELATED PROVISIONS: C(AF)R Art. 39

Rule 46
Issuance of the Report

(1) Once the Report has been signed by the members of the Commission, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.

Article 46
Communication du procès-verbal

(1) Après signature du procès-verbal par les membres de la Commission, le ou la Secrétaire général(e) doit, dans les plus brefs délais:

(a) envoyer à chaque partie une copie certifiée conforme du procès-verbal, en indiquant la date d'envoi sur le procès-verbal ; et

(b) déposer le procès-verbal aux archives du Centre.

(2) Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires du procès-verbal.

Regla 46
Emisión del Informe

(1) Una vez que el informe haya sido firmado por los miembros de la Comisión, el o la Secretario(a) General deberá, a la brevedad:

(a) enviar una copia certificada del informe a cada una de las partes, indicando la fecha del envío en el informe; y

(b) depositar el informe en los archivos del Centro.

(2) El o la Secretario(a) General proporcionará copias certificadas adicionales del informe a una parte a petición de esta.

1249. Proposed (AF)CR 46 is identical to proposed CR 38.

IX. ANNEX D: (ADDITIONAL FACILITY) FACT-FINDING RULES

ANNEX D: (ADDITIONAL FACILITY) FACT-FINDING RULES

INTRODUCTION

1250. The Fact-Finding (Additional Facility) Rules (FF(AF)R) (now re-named the (AF) Fact-Finding Rules or in short form (AF)FFR)), were introduced in 1978 with the other AF rules, as a process to prevent, rather than settle, legal disputes. They were meant to answer a perceived need for preventive mechanisms at the pre-dispute stage and to provide for an impartial assessment of facts, which, if accepted by the parties, would prevent differences of view from escalating into a legal dispute. The Fact-Finding (AF) Rules were revised and streamlined in 2003 to reflect the amendments made to the AR at that time.

1251. The ICSID Fact-Finding Rules have never been invoked. This is likely because fact-finding is rarely used in ISDS and it remains a little known-process. The Secretariat has completely streamlined these Rules with a view to facilitating and increasing their use in apt circumstances.

1252. This complements the assumption that has motivated this amendment process throughout: all disputes are different, no "one size fits all", and having the option to resort to different types of settlement tools, including pre-dispute tools, at different stages, in parallel or for different cases, best meets user needs.

1253. What is fact-finding? As its name suggests, it is a process to determine facts that may be relevant to an on-going or future dispute. The fact-finder is tasked specifically with the fact-finding and will not intervene in the larger dispute, if any. The results of the fact-finding process will determine a contentious factual issue that may resolve the entire piece, but also can allow the settlement of a larger dispute to move forward.

1254. The fact-finder must be impartial. The fact-finder may be a dispute resolution professional, or if the fact in issue is a technical one, they may be an expert who has the technical/scientific/ professional expertise to make an informed factual conclusion.

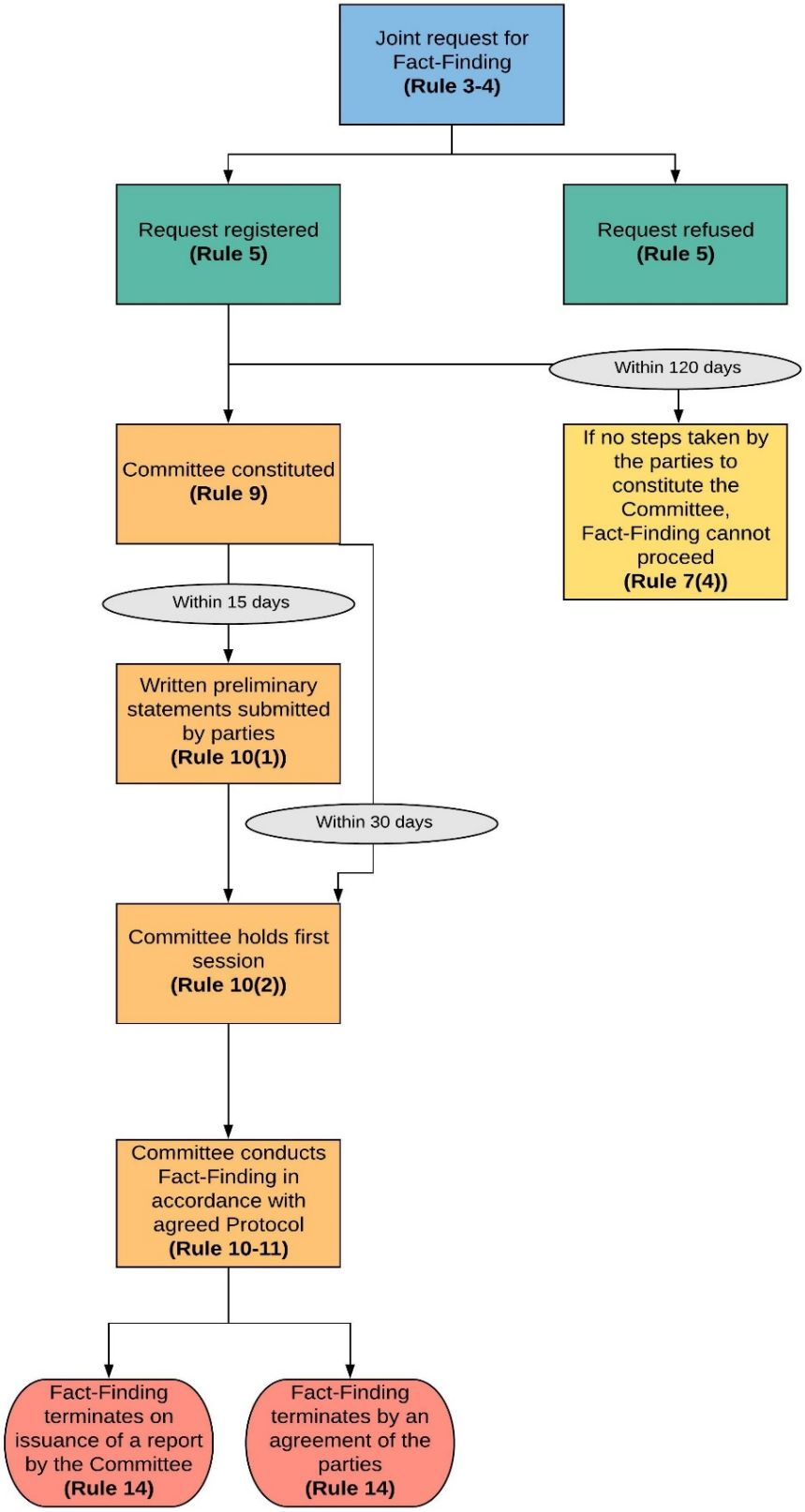
1255. Fact-finders use a variety of techniques for their inquiry, again tailored to their task. Most fact-finders will review relevant documents, interview relevant persons (witnesses or experts) with knowledge of the question to be determined, observe any relevant processes and may make site visits if this assists in the fact-finding.

1256. Fact-finding can be binding or non-binding, and this is a criterion which the parties will negotiate when entering a fact-finding process.

1257. The fact-finder may also make recommendations based on the facts, if the parties ask them to do so. Usually parties simply ask the fact-finder to make the relevant finding of fact, but there may be circumstances where it is useful to have them also make recommendations based on the facts as found.

1258. This WP explains the newly minted provisions. The overall fact-finding is as follows:

Fact-Finding Process – Overview



Introductory Note

The Additional Facility Rules of Procedure for Fact-Finding Proceedings (the (Additional Facility) Fact-Finding Rules) were adopted by the Administrative Council of the Centre pursuant to Administrative and Financial Regulation 7(1).

The (Additional Facility) Fact-Finding Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations (Annex A), in particular by Regulation 7.

The (Additional Facility) Fact-Finding Rules apply from the submission of a Request for fact-finding until the termination of the proceeding.

Note introductive

Le Règlement de procédure relatif aux instances de constatation des faits du Mécanisme supplémentaire (Règlement de constatation des faits (Mécanisme supplémentaire)) a été adopté par le Conseil administratif du Centre conformément à l'article 7(1) du Règlement administratif et financier.

Le Règlement de constatation des faits (Mécanisme supplémentaire) est complété par le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A), en particulier par l'article 7.

Le Règlement de constatation des faits (Mécanisme supplémentaire) s'applique du dépôt d'une requête de constatation des faits jusqu'à la fin de l'instance.

Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Comprobación de Hechos del Mecanismo Complementario (Reglas de Comprobación de Hechos (Mecanismo Complementario)) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en la Regla 7(1) del Reglamento Administrativo y Financiero.

Las Reglas de Comprobación de Hechos (Mecanismo Complementario) están complementadas por el Reglamento Administrativo y Financiero (Mecanismo Complementario) (Anexo A), en particular por la Regla 7.

Las Reglas de Comprobación de Hechos (Mecanismo Complementario) se aplican desde la presentación de una solicitud de comprobación de hechos hasta la conclusión del procedimiento.

1259. The introductory note recalls that the (AF)AFR apply to ICSID fact-finding proceedings.

1260. With respect to terminology, it is proposed to designate each rule in the AF(FFR) as a "Rule" instead of "Article" as in the English and Spanish versions, to be consistent with other rules. The French version uses "Article" throughout and has not been modified.

CHAPTER I – GENERAL PROVISIONS

RULE 1 – APPLICATION OF RULES

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any fact-finding proceeding conducted under the Additional Facility Rules, except to the extent the parties agree to modify or exclude their application.

(2) The applicable (Additional Facility) Fact-Finding Rules are those in force on the date of filing of the request for fact-finding.

(3) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(4) These Rules may be cited as the "(Additional Facility) Fact-Finding Rules" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique à toute instance de constatation des faits conduite conformément au Règlement du Mécanisme supplémentaire, sauf dans la mesure où les parties conviennent d'en modifier ou exclure l'application.

(2) Le Règlement de constatation des faits (Mécanisme supplémentaire) applicable est celui qui est en vigueur à la date du dépôt de la requête de constatation des faits.

(3) Les langues officielles du Centre sont l'anglais, l'espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(4) Le présent Règlement peut être cité comme le « Règlement de constatation des faits (Mécanisme supplémentaire) » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de comprobación de hechos tramitado en virtud del Reglamento del Mecanismo Complementario, salvo en la medida que las partes acuerden modificar o excluir su aplicación.

(2) Las Reglas de Comprobación de Hechos (Mecanismo Complementario) aplicables son aquellas en vigor en la fecha de presentación de la solicitud de comprobación de hechos.

(3) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(4) Estas Reglas podrán ser citadas como las "Reglas de Comprobación de Hechos (Mecanismo Complementario)" del Centro.

1261. Proposed (AF)FFR 1, entitled "Application of Rules," is new. The (AF)FFR apply to fact-finding proceedings filed pursuant to the AF Rules, subject to the parties' agreement.

1262. Proposed (AF)FFR 1(2) specifies that the applicable fact-finding rules are the ones in force at the time of the filing of the Request for fact-finding. As a result, once adopted, any fact-finding filed under the AF Rules would proceed under these amended Rules.

1263. Proposed (AF)FFR 1(3) recalls that the official languages of the Centre are English, French and Spanish. Accordingly, the Request can be presented in any of these languages.

CHAPTER II – INSTITUTION OF FACT-FINDING

1264. The institution of the fact-finding is dealt with in current Art. 2. Proposed (AF)FFR 2 to 5 expand these provisions to incorporate into the (AF)FFR the necessary provisions for instituting a fact-finding proceeding, modelled on the proposed IR.

RULE 2 – MEANING OF PARTY AND PARTY REPRESENTATION

Rule 2
Meaning of Party and Party Representation

(1) For the purposes of these Rules, "party" may include, where the context so admits, all parties to the fact-finding and an authorized representative of a party.

(2) Each party may be represented or assisted by agents, counsel or advocates ("representative(s)"), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Article 2
Sens du terme « partie » et représentation des parties

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet, toutes les parties à la constatation des faits et tout(e) représentant(e) habilité(e) d'une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocats (« représentant(s) »), dont le nom et la preuve de l'habilitation à agir doivent être notifiés par cette partie au Secrétariat.

Regla 2
Significado de Parte y Representación de las Partes

(1) A los fines de estas Reglas, "parte" puede incluir, cuando el contexto así lo admite, a todas las partes en la comprobación de hechos y a un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) ("representante(s)"), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

1265. Proposed (AF)FFR is similar to (AF)AR 10.

RULE 3 – THE REQUEST

CURRENT RELATED PROVISIONS: FF(AF)R Art. 2

Chapter II
Institution of the Fact-Finding

Rule 3
The Request

Parties wishing to institute a fact-finding proceeding under the Additional Facility Rules shall file a joint request for fact-finding together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

Chapitre II
Introduction de la constatation des faits

Article 3
La requête

Les parties qui désirent introduire une instance de constatation des faits sur le fondement du Règlement du Mécanisme supplémentaire déposent une requête conjointe de constatation des faits ainsi que tous documents justificatifs demandés (« requête ») auprès du ou de la Secrétaire général(e) et paient le droit de dépôt indiqué dans le barème des frais.

Capítulo II
Iniciación de la Comprobación de Hechos

Regla 3
La Solicitud

Las partes que quieran iniciar un procedimiento de comprobación de hechos de conformidad con lo dispuesto en el Reglamento del Mecanismo Complementario deberán presentar en forma conjunta una solicitud de comprobación de hechos junto con los documentos de respaldo necesarios ("solicitud") al o a la Secretario(a) General y pagar el derecho de presentación publicado en el arancel de derechos.

1266. Proposed (AF)FFR 3 departs from current Art. 2 as it now proposes that both parties file a joint request for fact-finding. Given that fact-finding is an entirely consensual process, it is proposed to offer it to joint requestors only. The current Rules contain a convoluted process to determine whether the other party agrees to participate in the proceeding once the Request has been registered. To save time and costs, it is proposed to ascertain the shared willingness to participate in fact-finding at the beginning of the process and before registration. Hence, both parties would file a joint request.

1267. The parties can be a State, an REIO, a constituent subdivision or an agency of a State, an agency of an REIO, or a national of another State, as contemplated in proposed Art. 2 of the AF Rules.

1268. The lodging fee is as indicated in the Centre's schedule of fees.

RULE 4 – CONTENTS AND FILING OF THE REQUEST

CURRENT RELATED PROVISIONS: FF(AF)R Art. 2

Rule 4
Contents and Filing of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the proceeding and its nationality and provide their contact information (including electronic mail address, street address and telephone number);

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of each representative's authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;

(f) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations;

(g) with regard to Article 2(1)(b) of the Additional Facility Rules, indicate that the fact-finding is between a State or an REIO on the one hand and a national of another State on the other hand, describe the investment to which the fact-finding pertains, and indicate the facts to be examined and the relevant circumstances;

(h) attach a copy of the agreement between the parties providing for recourse to fact-finding; and

(i) contain any provisions agreed to by the parties regarding the constitution of a Fact-Finding Committee ("Committee"), the qualifications of its members, its mandate and the procedure to be followed.

Article 4
Contenu et dépôt de la requête

(1) La requête :

(a) est rédigée en anglais, en espagnol ou en français ;

(b) désigne chaque partie à l'instance et sa nationalité et fournit ses coordonnées (notamment son adresse électronique, son adresse postale et son numéro de téléphone) ;

(c) est signée par chaque partie requérante ou son représentant et est datée ;

(d) est accompagnée d'une preuve de l'habilitation à agir de chaque représentant ;

(e) est déposée par voie électronique, à moins que le ou la Secrétaire général(e) n'autorise le dépôt de la requête sous une autre forme ;

(f) si la partie requérante est une personne morale, indique qu'elle a obtenu toutes les autorisations nécessaires aux fins de déposer la requête et est accompagnée de ces autorisations ;

(g) en ce qui concerne l'article 2(1)(b) du Règlement du Mécanisme supplémentaire, indique que la constatation des faits est entre un État ou une OIER, d'une part, et un(e) ressortissant(e), d'un autre État, d'autre part, contient une description de l'investissement en rapport avec la constatation des faits, et indique les faits à examiner et les circonstances pertinentes ;

(h) est accompagnée d'une copie de l'accord des parties prévoyant le recours à une constatation des faits ; et

(i) contient toutes dispositions convenues entre les parties en ce qui concerne la constitution d'un Comité de constatation des faits (« Comité »), les qualifications de ses membres, son mandat et la procédure à respecter.

Regla 4
Contenido y Presentación de la Solicitud

(1) La solicitud deberá:

(a) estar redactada en español, francés o inglés;

(b) identificar a cada parte del procedimiento indicando su nacionalidad y proporcionar su información de contacto (lo cual incluye su dirección de correo electrónico, dirección postal y número de teléfono);

(c) estar firmada por cada parte solicitante o su representante y estar fechada;

(d) acompañar prueba del poder de representación de cada representante;

(e) ser presentada electrónicamente, salvo que el o la Secretario(a) General autorice la presentación de la solicitud en un formato alternativo;

(f) si la parte solicitante es una persona jurídica, indicar que ha obtenido todas las autorizaciones necesarias para presentar la solicitud y adjuntar dichas autorizaciones;

(g) respecto del Artículo 2(1)(b) del Reglamento del Mecanismo Complementario, indicar que la comprobación de hechos es entre un Estado o una ORIE, por una parte, y un nacional de otro Estado, por la otra, describir la inversión a la que se refiere la comprobación de hechos, e indicar los hechos que han de examinarse y las circunstancias relevantes para el procedimiento de comprobación de hechos;

(h) adjuntar una copia del acuerdo de las partes que prevé el recurso a la comprobación de hechos; y

(i) contener cualquier disposición acordada por las partes respecto de la constitución de un Comité de Comprobación de Hechos ("Comité"), las cualidades de sus miembros, su mandato y el procedimiento que ha de seguirse.

1269. Proposed (AF)FFR 4 modernizes current Art. 2. The Request can be filed electronically. The usual information is required such as identifying the parties to the proceeding, their nationalities, contact details, signature, dates, and power of attorney.

1270. The requesting parties must also indicate that the Request pertains to an investment and is in accordance with Art. 2(1)(b) of the AF Rules. Pursuant to this provision, the parties should address not only whether the fact-finding pertains to an investment, but also whether the parties are a State or REIO on the one hand and an investor of another State on the other, and, if one party is a constituent subdivision of a State or an agency of a State or an REIO, whether the additional consent requirements in proposed Art. 2(2) of the AF Rules are satisfied. The parties also need to indicate the facts to be examined and the relevant circumstances, and provide a copy of the instrument of consent and any provisions agreed to by the parties regarding the Fact-Finding Committee and its work.

CURRENT RELATED PROVISIONS: FF(AF)R Art. 3(1)

Rule 5
Receipt and Registration of the Request

(1) The Secretary-General shall promptly acknowledge receipt of the Request, and act as the official channel of written communications between the parties.

(2) Upon receipt of the Request and the lodging fee, the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(3) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(4) The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre; and

(c) invite the parties to constitute a Committee without delay.

Article 5
Réception et enregistrement de la requête

(1) Le ou la Secrétaire général(e) accuse réception dans les plus brefs délais de la requête et est l'intermédiaire officiel pour les communications écrites entre les parties.

(2) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) enregistre la requête s'il apparaît au vu des informations fournies que la requête n'est pas manifestement en dehors du champ d'application de l'article 2(1) du Règlement du Mécanisme supplémentaire.

(3) Le ou la Secrétaire général(e) informe les parties de l'enregistrement de la requête ou du refus d'enregistrer celle-ci et des motifs de ce refus.

(4) La notification de l'enregistrement de la requête :

(a) indique que la requête a été enregistrée et précise la date de l'enregistrement ;

(b) confirme que toutes correspondances destinées aux parties dans le cadre de l'instance leur seront envoyées à l'adresse de contact figurant dans la notification, à moins que des coordonnées différentes ne soient indiquées au Centre ; et

(c) invite les parties à constituer sans délai un Comité.

Regla 5
Recepción y Registro de la Solicitud

(1) El o la Secretario(a) General deberá acusar recibo de la solicitud con prontitud y deberá actuar como intermediario(a) oficial de las comunicaciones escritas entre las partes.

(2) Una vez recibida la solicitud y el derecho de presentación, el o la Secretario(a) General deberá registrar la solicitud si, sobre la base de la información proporcionada, pareciera que la solicitud no se encuentra manifiestamente fuera del alcance del Artículo 2(1) del Reglamento del Mecanismo Complementario.

(3) El o la Secretario(a) General deberá notificar el registro de la solicitud a las partes, o la denegación del mismo y los motivos de dicha denegación.

(4) La notificación del registro de la solicitud deberá:

(a) dejar constancia de que la solicitud ha sido registrada e indicar la fecha del registro;

(b) confirmar que toda la correspondencia dirigida a las partes en relación con el procedimiento será enviada a la dirección de contacto consignada en la notificación, a menos que se le comunique otra información de contacto al Centro; e

(c) invitar a las partes a que constituyan un Comité sin demora.

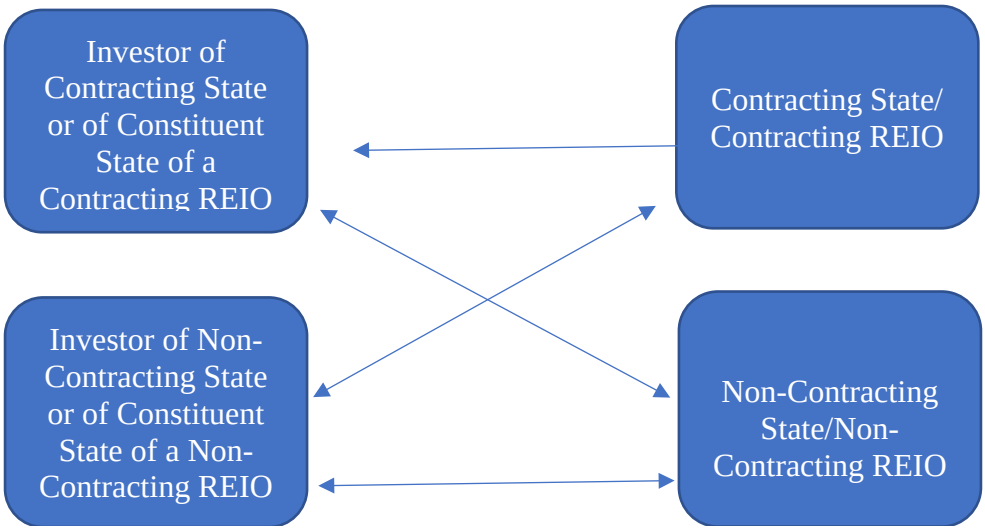
1271. Proposed (AF)FFR 5(1) provides that the Secretary-General shall acknowledge receipt of the Request to the parties and act as the official channel of written communications between the parties.

1272. Proposed (AF)FFR 5(2) requires the Secretary-General to register the Request unless it is "manifestly outside the scope of Article 2(1)" of the AF Rules. The current standard

requires the Secretary-General to be "satisfied that the request conforms in form and substance to the provision of Art. 2" of the AF Rules. This standard has been modified in all the AF rules. The proposed standard is similar to the standard in the (AF)AR, (AF)CR and the (AF)MR as well as Art. 36(3) of the Convention.

1273. To establish that the Request "is not manifestly outside of the scope of Art. 2" under Art. 2(1)(b) of the proposed AF Rules, the parties will have to show that: (i) they are either a State or an REIO on the one hand, or a national of another State on the other hand, within the scope of Art. 2(1) (*ratione personae*), as shown in the chart below, (ii) they have consented or consent fact-finding in the Request (*rationae voluntatis*); and (iii) the proceeding pertains to an investment (*ratione materiae)*. There is no jurisdictional requirement *ratione materiae* in the current FF(AR)R. There is certainly no requirement for a dispute to have arisen, as the fact-finding can be instituted at the pre-dispute stage. However, limiting the scope of the fact-finding to an investment context is within the expertise of the Centre and seems to be a practical proposal. The screening will be a light one and it is not expected that the registration will take more than a few days, depending on the information provided in the joint Request.

Scope *Ratione Personae* in Fact-Finding Proceedings



1274. Proposed (AF)FFR 5(3) and (4) require that a notice be sent to the parties upon registration of or refusal to register the Request.

1275. If the Request is registered, the notice will invite the parties to constitute a Committee.

1276. The process in the current FF(AF)R for ascertaining whether the fact-finding process can be held is complex and time-consuming. Current Art. 3(2)(c) provides that the Secretary-General must ask the other party whether it agrees with or objects to the request. If it agrees to it, current Art. 3(3) provides that the other party may add circumstances to be examined, to which the requesting party needs to agree. Current Art. 4 further provides for the process if the other party objects to the request. Under current Art. 5, upon receiving the objection, the Secretary-General shall try to resolve the objections. If no resolution is found, the

parties appoint a Special Commissioner to rule on the objections and to decide whether the fact-finding can continue or not. The fact that a Special Commissioner could override the objections of a party in a purely consensual process, and decide that a proceeding could continue, seems impractical. If the parties do not designate a Special Commissioner within a certain period of time, they can ask the Chairman of the Administrative Council to designate the Special Commissioner. If no Special Commissioner is appointed, the Secretary-General informs the parties that the fact-find proceeding cannot be held due to the parties' failure to cooperate. It is proposed simply to delete current Art. 3(3) to 6.

1277. The above process seems overly convoluted. It is not needed in the proposed (AF)FFR since the Request is made jointly by the parties. Under the proposed Rules, the goal is to register quickly and the parties will advance their views in a preliminary statement prior to the first session with the Committee.

CHAPTER III – THE FACT-FINDING COMMITTEE

1278. It is proposed to call the members of a committee "members" and not "commissioners" in order to avoid confusion with titles of adjudicators in other ICSID rules. Indeed, conciliation Commission members are not called commissioners and *ad hoc* Committee members are called members.

RULE 6 – QUALIFICATIONS OF MEMBERS OF THE COMMITTEE

Chapter III
The Fact-Finding Committee

Rule 6
Qualifications of Members of the Committee

(1) Any member of a Committee shall be impartial and independent of the parties.

(2) The parties may agree that a member of a Committee shall have particular qualifications or expertise relevant to the subject-matter of the Request.

Chapitre III
Le Comité de constatation des faits

Article 6
Qualifications des membres du Comité

(1) Tout membre d'un Comité doit être impartial et indépendant à l'égard des parties.

(2) Les parties peuvent convenir qu'un membre d'un Comité doit disposer de qualifications ou d'une expertise particulières en rapport avec l'objet de la requête.

Capítulo III
El Comité de Comprobación de Hechos

Regla 6
Cualidades de los o las Miembros del Comité

(1) Todo miembro de un Comité deberá ser imparcial e independiente de las partes.

(2) Las partes podrán acordar que un o una miembro de un Comité tenga experiencia o cualidades específicas que sean relevantes para el objeto de la solicitud.

1279. Proposed (AF)FFR 6(1) confirms the obligation of the members of a Committee to be impartial and independent. The members will sign the declaration mentioned in proposed (AF)FFR 7 that would include such obligations (*see* Schedule 5 – Declaration of Fact-Finder).

1280. Proposed (AF)FFR 6(2) makes it clear that the parties can agree that fact-finders have particular qualifications or expertise relevant to the subject matter of the Request. This is usually done if the mandate relates to technical, scientific or other specialized fields and requires such knowledge to make a reasoned assessment.

RULE 7– NUMBER OF MEMBERS AND METHOD OF CONSTITUTING THE COMMITTEE

CURRENT RELATED PROVISIONS: FF(AF)R Art. 7-8

Rule 7
Number of Members and Method of Constituting the Committee

(1) The parties shall endeavor to agree on a sole or any uneven number of Committee members, and the method of appointment. If the parties do not advise the Secretary-General of an agreement on the number of members and method of appointment within 30 days after the date of registration, the Committee shall consist of a sole member, appointed by agreement of the parties.

(2) The parties may jointly request that the Secretary-General assist with the appointment of a sole member or any other members at any time.

(3) If the parties are unable to appoint a sole member or any member of a Committee within 60 days after the date of registration, either party may request that the Secretary-General appoint the member(s) not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the member(s) and shall use best efforts to appoint any Committee member(s) within 30 days after receipt of the request to appoint.

(4) If no step is taken by the parties to constitute the Committee pursuant to this Rule within 120 days after the date of registration, or such other period as the parties may agree, the Secretary-General shall inform the parties that the fact-finding cannot proceed.

Article 7
Nombre de membres et méthode de constitution du Comité

(1) Les parties s'efforcent de se mettre d'accord sur un membre unique ou un nombre impair de membres du Comité et la méthode de leur nomination. Si les parties n'informent pas le ou la Secrétaire général(e) d'un accord sur le nombre de membres et la méthode de leur nomination dans les 30 jours suivant la date de l'enregistrement, le Comité est constitué d'un membre unique nommé par accord des parties.

(2) Les parties peuvent à tout moment demander conjointement au ou à la Secrétaire général(e) de les assister dans la nomination d'un membre unique ou de tous autres membres.

(3) Si les parties ne parviennent pas à nommer un membre unique ou un quelconque membre d'un Comité dans les 60 jours suivant la date de l'enregistrement, l'une ou l'autre des parties peut demander au ou à la Secrétaire général(e) de nommer le ou les membre(s) non encore nommé(s). Dans la mesure du possible, le ou la Secrétaire général(e) consulte les parties sur les qualifications, l'expertise, la nationalité et la disponibilité du ou des membre(s) et il ou elle déploie tous les efforts possibles pour nommer tout ou tous membre(s) du Comité dans un délai de 30 jours à compter de la réception de la demande de nomination.

(4) Si les parties n'accomplissent aucune démarche pour constituer le Comité conformément au présent article dans les 120 jours suivant la date de l'enregistrement ou tout autre délai convenu entre les parties, le ou la Secrétaire général(e) informera les parties que la constatation des faits ne peut pas se poursuivre.

Regla 7
Número de Miembros y Método de Constitución del Comité

(1) Las partes procurarán ponerse de acuerdo sobre un o una miembro único(a) o cualquier número impar de miembros del Comité, y el método de su nombramiento. Si las partes no informan al o a la Secretario(a) General de un acuerdo sobre el número de miembros y el método de su nombramiento dentro de los 30 días siguientes a la fecha de registro, el Comité se compondrá de un o una miembro único(a), nombrado(a) por acuerdo de las partes.

(2) Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una miembro único(a) o cualquier otro u otra miembro en cualquier momento.

(3) Si las partes no pudieran nombrar a un o una miembro único(a) o a cualquier miembro de un Comité dentro de los 60 días siguientes a la fecha de registro, cualquiera de las partes podrá solicitar que el o la Secretario(a) General nombre al/a la los/las miembro(s) que aún no hayan sido nombrados(as). El o la Secretario(a) General deberá consultar a las partes en la medida de lo posible sobre las cualidades, experiencia, nacionalidad y disponibilidad del/de la, los/las miembro(s) y hará lo posible por realizar el nombramiento dentro de los 30 días siguientes a la fecha de la recepción de la solicitud de nombramiento.

(4) Si las partes no realizan acto alguno para constituir el Comité de conformidad con lo dispuesto en esta Regla, dentro de los 120 días siguientes a la fecha de registro o cualquier otro plazo que las partes pudieran acordar, el o la Secretario(a) General deberá informar a las partes que la comprobación de hechos no puede proceder.

1281. Current Art. 7 provides that the Committee consists of a sole commissioner or of any uneven number of commissioners. This is entirely to be agreed upon by the parties. No default provisions are provided, in keeping with the consensual nature of the process.

1282. Proposed (AF)FFR proposes a default method for the number of fact-finders and method of their appointment.

1283. Proposed (AF)FFR 7(1) provides that a Committee consists of a sole member or any uneven number of members. The number of members on a Committee and the method of their appointment is determined either by agreement of the parties or by recourse to a default formula. Proposed (AF)FFR 7(1) further specifies that if the parties do not advise the Secretary-General of an agreement on the number of members within 30 days after registration of the Request, the default is a sole member.

1284. Proposed (AF)FFR 7(2) recalls that the Secretary-General's assistance in identifying a member of a Committee can be requested by the parties at any time.

1285. Proposed (AF)FFR 7(3) deals with default appointments made by the Secretary-General. The parties have 60 days from the registration to appoint a sole member or any uneven number of members. If they do not do so within that period, each party can request that the Secretary-General make the appointment(s). The proposed default appointing authority is the Secretary-General in all AF proceedings. The Secretary-General will consult the parties in making a default appointment, including with respect to the qualifications, expertise and nationality of the member(s) to be appointed.

1286. Finally, under proposed (AF)FFR 7(4), if the parties do not take any steps towards constitution of the Committee within 120 days after the registration of the Request, or any other agreed period, the Secretary-General will inform the parties that the fact-finding cannot proceed. This prevents the proceeding from being held in limbo due to the inactivity of the parties.

RULE 8 – ACCEPTANCE OF APPOINTMENT

Rule 8
Acceptance of Appointment

(1) The parties shall notify the Secretariat of the appointment and provide the name, and contact information of the appointee.

(2) The Secretariat shall request an acceptance from the appointee as soon as the appointee is selected.

(3) An appointee shall accept the appointment and provide a signed declaration in the form published by the Centre within 20 days after the receipt of the request for acceptance.

(4) The Secretariat shall notify the parties of the acceptance of appointment by each member and provide their signed declaration.

(5) The Secretariat shall notify the parties if a member fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed in accordance with the method followed for the previous appointment.

(6) Each member shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3).

(7) Unless the parties and the Committee agree otherwise, the member(s) may not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to circumstances examined during the fact-finding.

Article 8
Acceptation des nominations

(1) Les parties notifient au Secrétariat la nomination et indiquent le nom et les coordonnées de la personne nommée.

(2) Le Secrétariat demande à la personne nommée, dès qu'elle a été choisie, si elle accepte sa nomination.

(3) Toute personne nommée doit accepter sa nomination et remettre une déclaration signée conforme au modèle publié par le Centre dans les 20 jours suivant la réception de la demande d'acceptation.

(4) Le Secrétariat notifie aux parties l'acceptation de la nomination de chaque membre et fournit leur déclaration signée.

(5) Le Secrétariat notifie aux parties si un membre n'accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe (3), et une autre personne est nommée conformément à la méthode suivie pour la précédente nomination.

(6) Chaque membre a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3).

(7) Sauf si les parties et le Comité en conviennent autrement, le(s) membre(s) ne peu(ven)t pas intervenir en qualité d'arbitre, de conseil, d'expert, de témoin, de juge, ni en aucune autre qualité dans une quelconque autre instance relative aux circonstances examinées au cours de la constatation des faits.

Regla 8
Aceptación del Nombramiento

(1) Las partes notificarán al Secretariado el nombramiento y proporcionarán el nombre e información de contacto de la persona nombrada.

(2) El Secretariado solicitará la aceptación de la persona nombrada tan pronto como esta haya sido seleccionada.

(3) Toda persona nombrada deberá aceptar el nombramiento y proporcionar una declaración firmada en la forma publicada por el Centro dentro de los 20 días siguientes a la recepción de la solicitud de aceptación.

(4) El Secretariado notificará a las partes la aceptación del nombramiento de cada miembro y distribuirá su declaración firmada

(5) El Secretariado notificará a las partes si un o una miembro no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada de conformidad con el método seguido para el nombramiento anterior.

(6) Cada miembro del Comité tendrá una obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3).

(7) Salvo acuerdo en contrario de las partes y el Comité, el/la, los/las miembro(s) no podrá(n) desempeñarse como árbitro(s), consejero(a)(s)(as), perito(a)(s)(as), testigo(s) o juez(a), ni en ninguna otra capacidad, en ningún otro procedimiento relacionado con las circunstancias examinadas durante la comprobación de hechos.

1287. Proposed (AF)FFR 8 deals with obtaining a member's acceptance to act as a fact-finder.

1288. Proposed (AF)FFR 8(3) specifies that the appointee has 20 days from the Secretary-General's request to accept the appointment and to send a signed declaration (and any statement of disclosure). This is consistent with the other AF and Convention rules. The declaration form must address matters including the member's independence, impartiality, availability and commitment to the confidentiality of the proceeding. The declaration will provide parties with information to assist in determining whether there is a reasonable concern as to conflict of interest and that the fact-finder is independent and impartial. Pursuant to proposed (AF)FFR 8(2), the form of the declaration to be signed will be published from time to time by ICSID (*see* Schedule 6 – Fact-Finder Member's Declaration). This introduces flexibility to adapt the contents of the declaration.

1289. Proposed (AF)FFR 8(4) provides that the Secretary-General will provide the declaration to the parties and proposed (AF)FFR 8(5) provides a mechanism if the member fails to accept.

1290. Proposed (AF)FFR 8(6) recalls that the members are under a continuing obligation to disclose any change of circumstances relevant to the declaration. This is consistent with current practice for arbitration and conciliation proceedings.

1291. Proposed (AF)FFR 8(7) recalls that the member(s) should not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to circumstances examined during the fact-finding, unless agreed otherwise. This reinforces the independence of the fact-finder and gives parties confidence that the fact-finder cannot side with one or the other party in a subsequent process. This provision has been incorporated for consistency with the corresponding provision in the (AF)MR 7(8), and reflects current practice in ADR processes such as conciliation and mediation.

RULE 9 –CONSTITUTION OF THE COMMITTEE

CURRENT RELATED PROVISIONS: FF(AF)R Art. 8

Rule 9
Constitution of the Committee

The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that each member has accepted the appointment. As soon as the Committee is constituted, the Secretary-General shall transmit the Request, any supporting documents, and the notice of registration to each member.

Article 9
Constitution du Comité

Le Comité est réputé constitué à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que chaque membre a accepté sa nomination. Dès que le Comité est constitué, le ou la Secrétaire général(e) transmet à chaque membre la requête, les documents justificatifs et la notification d'enregistrement.

Regla 9
Constitución del Comité

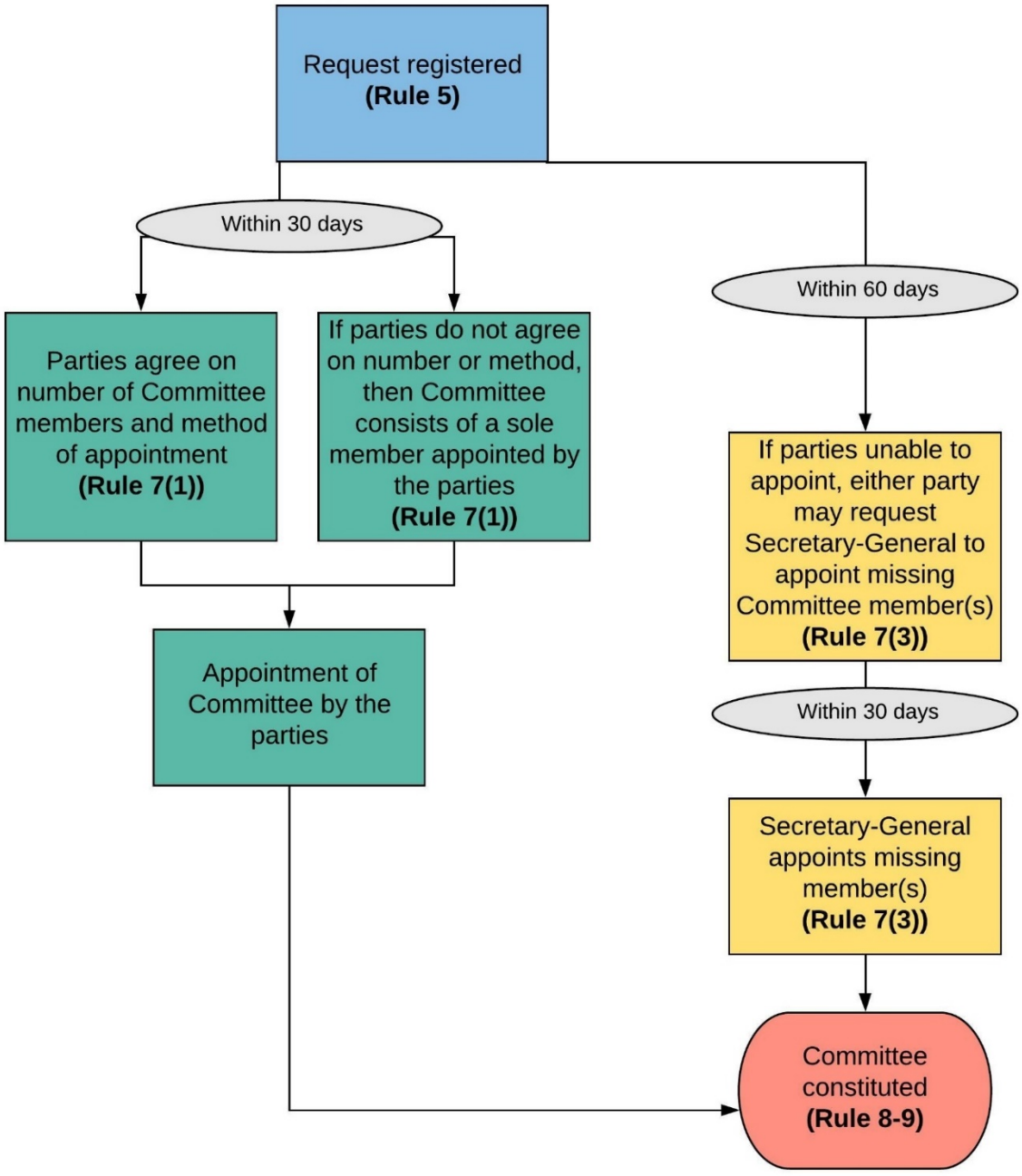
Se entenderá que se ha constituido el Comité en la fecha en que el o la Secretario(a) General notifique a las partes que cada miembro ha aceptado su nombramiento. Tan pronto como se haya constituido el Comité, el o la Secretario(a) General transmitirá la solicitud, cualquier documento de respaldo y la notificación del registro a cada uno o una de sus miembros.

1292. Proposed (AF)FFR 9 specifies that the date on which the Committee is deemed to be constituted is the date on which the Secretary-General notifies the parties that each member has accepted their appointment. This is consistent with all the other rules. The first step after the constitution of the Committee is the Secretariat's transmission of all documents received from the parties to the members of the Committee.

1293. It is expected that all the issues regarding changes in the Committee (such as resignation, replacement, disqualification, filling of vacancy, and resumption of proceeding thereafter) will be addressed by the parties with the Committee in the Protocol of the first session, or by agreement of the parties, again reflecting the consensual nature of the process.

1294. Under the proposed (AF)FFR, the constitution process is as follows:

Constitution of Fact-Finding Committee – (AF)FFR 6-9



CHAPTER IV – CONDUCT OF THE FACT-FINDING

1295. It is proposed to merge the current Articles on the Committee sessions and decision making under (AF)FFR 10, to provide for general duties of members and parties in (AF)FFR 11, on costs in (AF)FFR 12, and to add a specific provision on confidentiality in (AF)FFR 13.

RULE 10 – SESSIONS AND WORK OF THE COMMITTEE

CURRENT RELATED PROVISIONS: FF(AF)R Art. 6, 9, 10, 11, 12, 13

Chapter IV
Conduct of the Fact-Finding

Rule 10
Sessions and Work of the Committee

(1) Each party shall file a written preliminary statement of not more than 50 pages with the Secretariat within 15 days after the date of constitution of the Committee. The preliminary statement shall address the party's view on the mandate of the Committee, the scope of the inquiry, relevant documents, persons to be interviewed, site visits and any other relevant matters. The Secretary-General shall transmit the preliminary statements to the Committee and the other party.

(2) The Committee shall hold a first session with the parties within 30 days after its constitution or such other period as the parties may agree.

(3) At the first session, the Committee shall determine the protocol for the fact-finding ("Protocol") after consulting with the parties on procedural matters, including:

(a) the Committee's mandate;

(b) the procedure for the conduct of the proceeding, such as the procedural languages, method of communication, place of sessions, the next steps in the proceeding, confidentiality arrangements, documents to be provided, persons to be interviewed, site visits and any other procedural and administrative matters;

(c) whether the Report to be issued will be binding on the parties;

(d) whether the Committee shall make any recommendations in the Report; and

(e) any other relevant matters.

(4) The Committee shall conduct the fact-finding in accordance with the Protocol and take all steps necessary to discharge its mandate. To that end, it shall make all decisions required for the conduct of the proceeding.

(5) Any matters not provided for in these Rules or not previously agreed to by the parties shall be determined by agreement of the parties or, failing such agreement, by the Committee.

Chapitre IV
Conduite de la constatation des faits

Article 10
Sessions et travaux du Comité

(1) Chaque partie dépose auprès du Secrétariat un exposé préliminaire écrit n'excédant pas 50 pages dans un délai de 15 jours après la date de constitution du Comité. L'exposé préliminaire présente le point de vue de la partie concernée sur le mandat du Comité, l'objet de l'enquête, les documents pertinents, les personnes devant être interrogées, le transport sur les lieux et toutes autres questions pertinentes. Le ou la Secrétaire général(e) transmet les exposés préliminaires au Comité et à l'autre partie.

(2) Le Comité tient sa première session avec les parties dans les 30 jours suivant sa constitution ou tout autre délai dont les parties peuvent convenir.

(3) Lors de la première session, le Comité détermine le protocole de la constatation des faits (« protocole ») après consultation des parties sur les questions de procédure, notamment :

(a) le mandat du Comité ;

(b) la procédure applicable à la conduite de l'instance, notamment les langues de la procédure, les modalités de communication, le lieu des réunions, les étapes suivantes de l'instance, les dispositions prises en matière de confidentialité, les documents à fournir, les personnes à interroger, le transport sur les lieux et toutes autres questions d'ordre procédural ou administratif ;

(c) la question de savoir si le rapport devant être établi aura force obligatoire pour les parties ;

(d) la question de savoir si le Comité formulera des recommandations dans son rapport ; et

(e) toutes autres questions pertinentes.

(4) Le Comité conduit la constatation des faits conformément au protocole et prend toutes mesures nécessaires à l'exécution de son mandat. À cette fin, il prend toutes décisions requises pour la conduite de l'instance.

(5) Toutes questions non prévues par le présent Règlement, ou n'ayant pas fait l'objet d'un accord préalable entre les parties, sont tranchées d'un commun accord entre les parties ou, à défaut d'accord, par le Comité.

Capítulo IV
Tramitación de la Comprobación de Hechos

Regla 10
Sesiones y Labor del Comité

(1) Cada parte presentará un escrito preliminar de no más de 50 páginas al Secretariado dentro de los 15 días siguientes a la fecha de constitución del Comité. El escrito preliminar abordará la opinión de cada parte sobre el mandato del Comité, el alcance de la investigación, los documentos relevantes, las personas que han de entrevistarse, las visitas a cualquier lugar relacionado con la diferencia y cualquier otra cuestión relevante. El o la Secretario(a) General transmitirá los escritos preliminares al Comité y a la otra parte.

(2) El Comité celebrará una primera sesión con las partes dentro de los 30 días siguientes a su constitución o cualquier otro plazo que las partes pudieran acordar.

(3) En la primera sesión, el Comité determinará el protocolo de la comprobación de hechos ("protocolo") previa consulta a las partes sobre cuestiones procesales, lo cual incluye:

(a) el mandato del Comité;

(b) el proceso para la tramitación del procedimiento y abordará aspectos tales como los idiomas del procedimiento, el método de comunicación, el lugar de las sesiones, las siguientes etapas del procedimiento, los acuerdos de confidencialidad, los documentos que han de proporcionarse, las personas que han de entrevistarse, las visitas a cualquier lugar relacionado con la diferencia y cualquier otro asunto procesal o administrativo;

(c) si el informe que ha de emitirse será obligatorio para las partes;

(d) si el Comité efectuará recomendaciones en el informe; y

(e) cualquier otra cuestión relevante.

(4) El Comité tramitará la comprobación de hechos de conformidad con el protocolo y realizará todas las actuaciones necesarias para cumplir su mandato. A tal fin, adoptará todas las decisiones necesarias para la tramitación del procedimiento.

(5) Cualquier cuestión no prevista en estas Reglas o no acordada previamente por las partes será determinada por acuerdo de las partes o, en ausencia de dicho acuerdo, por el Comité.

1296. Proposed (AF)FFR 10(1) requires each party to file preliminary statements on the facts to be determined before the Committee meets with them, so that the Committee can determine a Protocol to be followed with the parties. The purpose of these statements is to allow the parties to frame the question(s) before the Committee, and to explain their respective positions on the facts to be found and on the appropriate investigations to be undertaken to find such facts. Then, under proposed (AF)FFR 10(2), the Committee will hold its first session with the parties within 30 days of its constitution, rather than 60 days as in current Art. 9(1). At that point the Committee will have had the benefit of reading the parties preliminary statements, and can pursue a more detailed discussion at the first session.

1297. Under proposed (AF)FFR 10(3)(a), a Protocol is established at the first session to address the mandate of the Committee (namely the scope of its functions, investigations and examinations).

1298. Proposed (AF)FFR 9(3)(b) makes clear that the Protocol shall also address the procedure for the conduct of the proceedings. Those procedures relate *inter alia* to:

- procedural languages;
- the method of communication between the Committee and the parties;
- the location of the sessions (current Art. 9(2) and (3));
- the next step in the proceeding;
- confidentiality arrangements
- the documents to be examined;
- the persons to be interviewed;
- any protocol regarding site visits; and
- any procedural and administrative arrangements, *i.e.* quorum, majority of the votes for decisions and report (current Art. 11 and Art. 15(1)), replacement of members, resignation, disqualification (currently mentioned in Art. 6(3)), Secretary to the Committee, payment of advances and allocation, record of the proceeding, duration of the fact-finding.

1299. Proposed (AF)FFR 10 lets the Committee and the parties decide how to conduct the fact-finding in the Protocol. This is preferable to current Art. 6 which refers to the conciliation process by default (current Art. 6(3)) or to the arbitration process (current Art. 6(4)) upon the decision of the Chairman of the Administrative Council.

1300. Finally, proposed (AF)FFR 10(3)(c) and (d) suggests that the parties discuss the effect to be given to the Report, *i.e.* whether they want a Report to conclude the proceeding, whether that Report shall be binding and whether they would like the Committee to make any recommendations. Current Art. 15(4) provides that the Report shall not contain any recommendations unless the parties agree otherwise.

1301. Proposed (AF)FFR 10(4) clarifies that the Committee will implement the Protocol and take all necessary steps to discharge its mandate.

1302. By default, under proposed (AF)FFR 10(5), the Committee will determine any issues not provided for by the Rules or by the parties. This is currently in Art. 13.

RULE 11 – GENERAL DUTIES

CURRENT RELATED PROVISIONS: FF(AF)R Art. 17

Rule 11
General Duties

(1) The Committee shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding. It shall conduct the fact-finding in an expeditious and cost-effective manner and shall consult with the parties regularly on the conduct of the proceeding.

(2) The parties shall cooperate with the Committee and with one another and shall conduct the proceeding in good faith. The parties shall provide all relevant explanations, documents or other information requested by the Committee and participate in the sessions of the Committee. The parties shall use all available means to facilitate the Committee's inquiry.

Article 11
Obligations générales

(1) Le Comité traite les parties de manière égale et donne à chacune d'elles une possibilité raisonnable de participer à l'instance. Il conduit la constatation des faits avec célérité et efficacité en termes de coûts et consulte régulièrement les parties sur la conduite de l'instance.

(2) Les parties collaborent avec le Comité et l'une avec l'autre et conduisent l'instance de bonne foi. Elles fournissent toutes explications, tous documents ou toutes autres informations pertinent(e)s demandé(e)s par le Comité et participent aux sessions du Comité. Elles mettent en œuvre tous moyens disponibles pour faciliter l'enquête du Comité.

Regla 11
Obligaciones Generales

(1) El Comité deberá tratar a las partes de manera igualitaria y brindarle a cada parte una oportunidad razonable de participar en el procedimiento. Tramitará la comprobación de hechos de manera expedita y eficaz en materia de costos y consultará regularmente a las partes sobre la tramitación del procedimiento.

(2) Las partes cooperarán con el Comité y entre sí y tramitarán el procedimiento de buena fe. Las partes proporcionarán todas las explicaciones, los documentos u otra información que sean pertinentes solicitados por el Comité y participarán en las sesiones del Comité. Las partes utilizarán todos los medios disponibles para facilitar la investigación del Comité.

1303. Proposed (AF)FFR 11(1) confirms the application of certain fundamental duties under the (AF)FFR: equality of treatment of the parties and the parties' right to participate, including the right to be heard. It also introduces a general duty to act in an expeditious and cost-effective manner and for the Committee to consult with the parties regularly on the conduct of the fact-finding.

1304. Proposed (AF)FFR 11(2) sets out the general duties of the parties. It reflects the duty of the parties to cooperate in good faith with the Committee, but also vis-à-vis the other party and the process generally, given that the parties' cooperation is the cornerstone of the fact-finding process. More specifically, this concerns: (i) the duty of the parties to comply with requests from the Committee to provide explanations, documents, or other information; (ii) the duty to participate in the sessions, and (iii) the duty to facilitate the Committee's inquiry, the participation of other persons such as witnesses and experts as well as the conduct of site visits. This is currently in Art. 17.

RULE 12 – PAYMENT OF ADVANCES AND COSTS OF THE FACT-FINDING

CURRENT RELATED PROVISIONS: FF(AF)R Art. 18

Rule 12
Payment of Advances and Costs of the Proceeding

Unless the parties agree otherwise, each party shall:

(a) pay one half of the advances payable in accordance with (Additional Facility) Administrative and Financial Regulation 7(5);

(b) pay one half of the fees and expenses of the Committee, as well as the administrative fee for the use of the facilities of the Centre, in accordance with (Additional Facility) Administrative and Financial Regulation 7(5); and

(c) bear any other expenses it incurs in connection with the proceeding.

Article 12
Paiement d'avances et frais de procédure

Sauf accord contraire des parties, chaque partie :

(a) s'acquitte de la moitié des avances dues conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) ;

(b) s'acquitte de la moitié des honoraires et frais du Comité ainsi que des frais administratifs afférents à l'utilisation des installations du Centre, conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) ; et

(c) supporte tous autres frais exposés par elle dans le cadre de l'instance.

Regla 12
Pago de Anticipos y Costos del Procedimiento

Salvo acuerdo en contrario de las partes, cada parte deberá:

(a) abonar la mitad de los anticipos exigibles de conformidad con la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario).

(b) abonar la mitad de los honorarios y gastos de los o las miembros del Comité, así como los cargos administrativos por la utilización de las instalaciones del Centro, de conformidad con la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario); y

(c) soportar cualquier otro gasto incurrido en relación con el procedimiento.

1305. Proposed (AF)FFR 12 sets out that, unless the parties otherwise agree: (a) advance payments are paid by the parties to cover the costs of the proceeding, including the Committee members' fees and expenses, the Centre's administrative charges and other direct costs (*see* (AF)AFR 7); (b) the fees and expenses of the members well as the charges for the use of the facilities of the Centre are borne by the parties in equal parts, and (c) each party shall bear its own costs and expenses incurred in connection with the fact-finding. The parties can agree on a different costs allocation if they wish. The Committee will not decide on the allocation of costs.

RULE 13 – CONFIDENTIALITY OF THE FACT-FINDING AND USE OF INFORMATION IN OTHER PROCEEDINGS

CURRENT RELATED PROVISIONS: FF(AF)R Art. 9(4)

Rule 13
Confidentiality of the Fact-Finding and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the fact-finding, other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential.

(2) The parties shall not make any use of information or documents obtained in the fact-finding, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the Committee during the fact-finding in other proceedings.

Article 13
Confidentialité de la constatation des faits et utilisation d'informations dans d'autres instances

(1) Sauf accord contraire des parties, toutes les questions relatives à la constatation des faits, autres que les informations publiées par le Centre en vertu de l'article 4 du Règlement financier et administratif (Mécanisme supplémentaire), demeurent confidentielles.

(2) Les parties ne doivent pas, à l'occasion d'autres instances, utiliser des informations ou des documents obtenu(e)s dans le cadre de la constatation des faits, ni se fonder sur des positions prises, des admissions faites ou des opinions exprimées par l'autre partie ou le Comité au cours de la constatation des faits.

Regla 13
Confidencialidad de la Comprobación de Hechos y Utilización de Información en el Marco de Otros Procedimientos

(1) Salvo acuerdo en contrario de las partes, todas las cuestiones relacionadas con la comprobación de hechos, con la salvedad de la información a ser publicada por el Centro de conformidad con la Regla 4 del Reglamento Administrativo y Financiero (Mecanismo Complementario), serán de carácter confidencial.

(2) Las partes no utilizarán en el marco de otros procedimientos, ninguna información ni ningún documento obtenido en la comprobación de hechos, y no invocarán ninguna postura adoptada, admisión realizada u opinión expresada por la otra parte o el Comité durante la comprobación de hechos.

1306. Proposed (AF)FFR 13(1) provides for the confidentiality of the fact-finding unless the parties otherwise agree, except with regard to the Centre's disclosure obligations pursuant to (AF)AFR current Art. 9(4) which provides that the sessions are not public.

1307. To reflect the "without prejudice" principle, proposed (AF)FFR 13(2) provides that neither party may use the information or documents obtained in the fact-finding proceeding and shall not rely on any positions taken, admissions or views made by the other party in other proceedings.

CHAPTER V – TERMINATION OF THE FACT-FINDING

RULE 14 – MANNER OF TERMINATING THE FACT-FINDING

CURRENT RELATED PROVISIONS: FF(AF)R Art. 14

Chapter V
Termination of the Fact-Finding

Rule 14
Manner of Terminating the Fact-Finding

The fact-finding shall terminate upon:

(a) the issuance of a Report by the Committee; or

(b) an agreement of the parties to conclude the proceeding.

Chapitre V
Fin de la constatation des faits

Article 14
Manière de mettre fin à la constatation des faits

La constatation des faits prend fin par :

(a) l'émission d'un procès-verbal par le Comité ; ou

(b) un accord des parties de mettre fin à l'instance.

Capítulo V
Conclusión de la Comprobación de Hechos

Regla 14
Manera de Concluir la Comprobación de Hechos

La comprobación de hechos concluirá con:

(a) la emisión de un informe por parte del Comité; o

(b) un acuerdo de las partes de concluir el procedimiento.

1308. Proposed (AF)FFR 13 indicates that after a Committee has been constituted, a fact-finding will terminate upon: (a) the issuance of a Report that can record the necessary fact found, consistent with (AF)FFR 16, or a Report as described in proposed (AF)FFR 15 that records that the Committee could not discharge its mandate because a party failed to participate or cooperate; or (b) an agreement of the parties to conclude the fact-finding proceeding.

1309. The parties can agree at any time that the fact-finding is to terminate. The request will be addressed to the Committee, and the Committee will take note of the request. The Committee has no discretion as to whether to terminate the proceeding once the parties have requested termination.

1310. The (AF)FFR proposes to delete the step of closure of the proceeding as in current Art. 14(1), as it has been deleted elsewhere in the proposed rules and would serve no useful function in the fact-finding.

RULE 15 – FAILURE OF A PARTY TO PARTICIPATE OR COOPERATE

CURRENT RELATED PROVISIONS: FF(AF)R Art. 14(2)

Rule 15
Failure of a Party to Participate or Cooperate

If a party fails to participate in the fact-finding or cooperate with the Committee, and the Committee determines that it is unable to discharge its mandate, the Committee shall, after notice to the parties, record in its Report the failure of that party to participate or cooperate.

Article 15
Défaut de participation ou de collaboration d'une partie

Si une partie ne participe pas à la constatation des faits ou ne collabore pas avec le Comité, et que le Comité estime qu'il n'est pas en mesure d'exécuter son mandat, il doit, après en avoir informé les parties, prend acte dans son procès-verbal du défaut de participation ou de collaboration de cette partie.

Regla 15
Falta de Participación o Cooperación de una Parte

Si una parte no participara en la comprobación de hechos ni cooperara con el Comité y el Comité determinara que no puede cumplir su mandato, este deberá, previa notificación a las partes, dejar constancia en su informe de la falta de participación o cooperación de esa parte.

1311. Because the fact-finding process is consensual, if a party does not participate or cooperate, the Committee will not be able to discharge its mandate. In those circumstances, proposed (AF)FFR 15 provides that the Committee will record that failure. This provision prevents the proceeding from falling into limbo and is currently addressed in Art. 14(2).

RULE 16 – REPORT OF THE COMMITTEE

CURRENT RELATED PROVISIONS: FF(AF)R Art. 15

Rule 16
Report of the Committee

(1) The Report shall be in writing and shall contain:

(a) the mandate of the Committee;

(b) the Protocol followed;

(c) a brief summary of the proceeding; and

(d) the facts established by the Committee and the reasons why certain facts may not be considered as having been established; or

(e) an indication of the failure of a party to participate or cooperate pursuant to Rule 15.

(2) The Report shall be adopted by a majority of the members and signed by them. If a member does not sign the Report, such fact shall be recorded.

(3) Any member may attach a statement to the Report if the member disagrees on any of the facts found and explain the reasons for any such disagreement.

(4) Unless the parties agree otherwise, the Report of the Committee shall not be binding upon the parties, and the parties shall be free to give any effect to it.

Article 16
Procès-verbal du Comité

(1) Le procès-verbal est écrit et contient les informations suivantes :

(a) le mandat du Comité ;

(b) le protocole suivi ;

(c) un bref résumé de la procédure ; et

(d) les faits constatés par le Comité et les raisons pour lesquelles certains faits ne peuvent pas être considérés comme constatés ; ou

(e) une indication du défaut de participation ou de collaboration d'une partie conformément à l'article 15.

(2) Le procès-verbal est adopté à la majorité des membres et signé par eux. Si un membre ne signe par le rapport, il en est fait mention dans celui-ci.

(3) Tout membre peut joindre au procès-verbal une déclaration s'il est en désaccord sur certains des faits constatés et expliquer les raisons de son désaccord.

(4) Sauf accord contraire des parties, le procès-verbal du Comité n'a pas force obligatoire pour les parties, qui sont libres de lui donner ou non effet.

Regla 16
Informe del Comité

(1) El informe deberá dictarse por escrito y deberá incluir:

(a) el mandato del Comité;

(b) el protocolo aplicado;

(c) un breve resumen del procedimiento; y

(d) los hechos establecidos por el Comité y las razones por las cuales no puede considerarse que determinados hechos hayan sido establecidos; o

(e) una indicación de la falta de participación o cooperación de una parte de conformidad con lo dispuesto en la Regla 15.

(2) El informe será adoptado por una mayoría de los o las miembros y estará firmado por ellos(as). Si un o una miembro no firmara el informe, se dejará constancia de ese hecho.

(3) Cualquier miembro podrá adjuntar una declaración al informe si el o la miembro no estuviera de acuerdo con alguno de los hechos comprobados y explicará las razones de dicho desacuerdo.

(4) Salvo acuerdo en contrario de las partes, el informe del Comité no será obligatorio para las partes, y queda a discreción de las partes el efecto que haya que darle al informe.

1312. Proposed (AF)FFR 16(1) lists the contents of the written Report to be rendered by a majority of the members. Given that the Report of a Committee is in principle not binding on the parties, the requirements as to the form and contents of the Report are not detailed. A mention of the mandate of the Committee and the Protocol together with a brief summary of the proceeding is expected, in addition to: (i) an indication that the Committee could not discharge its mandate because a party failed to participate or cooperate or (ii) the facts as

established by the Committee, or (iii) the reasons why certain facts could not be established.

1313. Proposed (AF)FFR 16(2) reprises the content of current Art. 15(2).

1314. Proposed (AF)FFR 16(3) reprises the content of current Art. 15(3).

RULE 17 – ISSUANCE OF THE REPORT

Rule 17
Issuance of the Report

(1) Once the Report has been signed by the members of the Committee, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.

Article 17
Communication du procès-verbal

(1) Après signature du procès-verbal par les membres du Comité, le ou la Secrétaire général(e) doit, dans les meilleurs délais :

(a) envoyer à chaque partie une copie certifiée conforme du procès-verbal, en indiquant la date d'envoi sur le procès-verbal ; et

(b) déposer le rapport aux archives du Centre.

(2) Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires du procès-verbal.

Regla 17
Emisión del Informe

(1) Una vez que el informe haya sido firmado por los o las miembros del Comité, el o la Secretario(a) General deberá, a la brevedad:

(a) enviar una copia certificada del informe a cada una de las partes, indicando la fecha del envío en el informe; y

(b) depositar el informe en los archivos del Centro.

(2) El o la Secretario(a) General proporcionará copias certificadas adicionales del informe a una parte a petición de esta.

1315. Proposed (AF)FFR 17 provides for the Secretariat to issue the Report following the same method used for the rendering and issuance of Awards and Reports under the other ICSID and AF rules.

X. ANNEX E: (ADDITIONAL FACILITY) MEDIATION RULES

ANNEX E: (ADDITIONAL FACILITY) MEDIATION RULES

INTRODUCTION

1316. Over the past decade, the concept of resolving investment disputes through mediation has been widely discussed in the ISDS community, among States, practitioners and academics.

1317. Indeed, Member States have acknowledged the suitability of mediation for the resolution of investment disputes and have included mediation provisions in bilateral and multilateral treaties (*see e.g.,* Art. 10.15 of the Dominican Republic-Central America FTA (CAFTA-DR) (2006-7)). In some new treaties, mediation has been introduced as a pre-condition to the commencement of investor-State arbitration. For example, Art. 26 of the Investment Agreement for the COMESA Common Investment Area (not yet in force) requires a six-month amicable settlement period, during which the parties "shall seek the assistance of a mediator", unless an alternative method of dispute settlement is agreed upon (*see also* Ch. 10, and Art. 9.18 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (not yet in force). In other treaties, mediation has been introduced as a stand-alone mechanism for dispute resolution, providing an alternative to arbitration or conciliation (*see e.g.*, Annex 29-C on Mediation in the CETA (not yet in force), Chap. 8(II)(3)(2), Art. 5 of the EU-Vietnam FTA (not yet in force), Chap. 3, Art. 3.4, and Annex 6 of the EU-Singapore FTA (not yet in force).

1318. In addition, a multilateral international framework for the recognition and enforcement of mediated settlements will soon be adopted. This framework will be created by the Draft Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation) and a corresponding Draft Model Law. The draft texts were adopted by UNCITRAL in June 2018, and the Convention is expected to be open for signature in August 2019. The Draft Convention creates an international regime to enforce mediated settlements broadly akin to the 1958 New York Convention for the enforcement of arbitral awards. Pursuant to Art. 13 of the Draft Convention, the Convention will apply to settlements reached in the context of investment disputes.

1319. Finally, in July 2016, the Energy Charter Conference, the members of which are in large part also ICSID Member States, adopted a Guide on Investment Mediation, recognizing mediation as a helpful instrument to facilitate the amicable resolution of investment dispute. The Energy Charter Conference also encouraged its 53 Contracting Parties to consider mediation as a possible option at any stage of the dispute to facilitate an amicable resolution.

1320. As the world's leading institution devoted to international investment dispute settlement, ICSID has significant process expertise in investment arbitration and conciliation. In addition, ICSID supports efforts by parties to resolve investment disputes through mediation and makes its facilities available for this purpose. ICSID has also organized numerous events on investment mediation, including a series of trainings for investor-State mediators, aimed at developing the skills necessary to mediate investment disputes. It also provides an array of information on investment mediation on its website.

1321. The (Additional Facility) Mediation Rules ((AF)MR) respond to the increased demand for mediation of investment disputes generally, ICSID's activities in this sphere, and requests by facility users and Member States for ICSID mediation.

1322. The (AF)MR will be Annex E to the proposed revised AF Rules and will be the first set of institutional mediation rules designed specifically for investment disputes. The expansion of the Additional Facility Rules and the introduction of the (AF)MR will add to the array of dispute resolution services currently offered by ICSID.

1323. The new (AF)MR will assist Member States to implement their IIA provisions offering investment mediation. They provide an investment dispute-specific mediation framework, apt for use either independently of, or in conjunction with, arbitration or conciliation proceedings.

1324. The WP provides an explanation of how the mediation framework fits into the ICSID system, as well as an overview of the process contemplated under the proposed (AF)MR, before explaining the specific proposed provisions of the (AF)MR.

MEDIATION IN THE ICSID SYSTEM

1325. Mediation is an entirely voluntary process, often defined as a form of assisted negotiation. The mediator, an independent and impartial third party, assists the disputing parties in reaching a mutually acceptable resolution of all or part of their dispute. To that end, the mediator may meet or communicate with the parties together or separately, and ask the parties to provide relevant information or explanations. Unlike an arbitrator, the mediator does not issue a binding decision prescribing how the dispute between the parties is to be resolved on the basis of the applicable law. Instead, the parties remain in control of the process and outcome of the mediation, including the decision on whether to settle and the terms of any settlement agreement.

1326. The mediation process is extremely flexible and adapts to the needs of the parties and the circumstances of the dispute. With the consent of the disputing parties, the process can include non-disputing parties should this be desired.

1327. The flexibility of the process provides ample choice to the parties with respect to the timing of a mediation. As noted above, a mediation procedure is required by some multilateral treaties prior to the institution of an arbitration. However, mediation may also be conducted in parallel with an ICSID arbitration proceeding, provided that the parties agree in writing. In practice, any arbitration is likely to be suspended by party agreement while the mediation is ongoing. If the parties reach an amicable settlement through mediation during an arbitration under the ICSID Convention, such settlement may then be embodied in an Award pursuant to current AR 43(2) (proposed AR 55). The settlement agreement would then benefit from the simplified enforcement mechanism that is unique to the ICSID Convention.

1328. While there are some similarities between the ICSID conciliation framework and the proposed (AF)MR, the (AF)MR differ in terms of: (i) the institution of the proceeding; (ii) the appointment of the mediator; (iii) the role of the mediator; (iv) the conduct of the proceeding; and (v) the fact that mediation under the proposed (AF)MR is an entirely voluntary process, allowing a party to withdraw at any time. (*see* WP on the proposed Conciliation Rules, Section IV, for a detailed description of conciliation).

1329. The Secretariat's administrative assistance to mediation proceedings conducted under the (AF)MR will resemble the services currently offered. This includes identifying qualified mediators for the parties' consideration, facilitating communications between the parties and the mediator, handling all aspects related to the organization of joint or separate mediation sessions, and managing the finances of the process.

PROCESS OVERVIEW

1330. Initiation of the Mediation. The proposed mediation framework commences with the filing of a Request for mediation based on a written agreement to mediate. In the absence of a pre-existing agreement to mediate, the requesting party may ask the Secretary-General to submit the requesting party's offer to mediate to the other party. If the other party accepts this offer, the Secretary-General will review the Request and register it, if it is not manifestly outside the scope of Art. 2(1)(c) of the AF Rules.

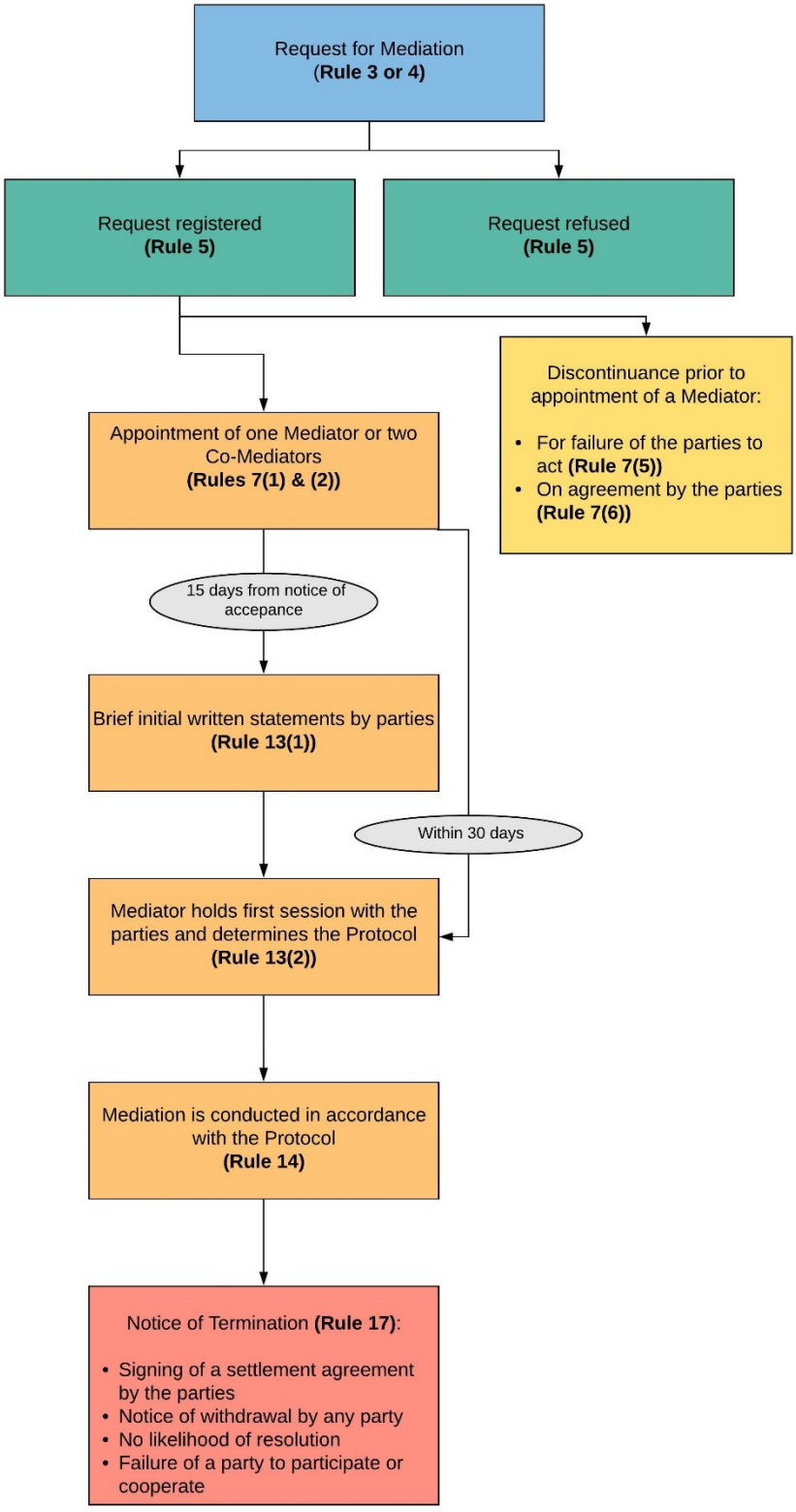
1331. Appointment of the Mediator(s). Following registration, the parties appoint one mediator or two co-mediators by agreement. If the parties fail to make an appointment, a sole mediator will be appointed by the Secretary-General in consultation with the parties.

1332. Conduct of the Mediation. A joint first session will be held within 30 days of the mediator's appointment to establish the ground rules of the process, the procedure for the conduct of the mediation, and any other relevant procedural and administrative matters. To facilitate the initial discussion between the mediator and the parties, the parties will each provide the mediator with a brief initial statement describing the issues in dispute and their positions or views on these issues prior to the first session. The mediator shall conduct the mediation on the basis of the Protocol for the mediation as determined at the first session.

1333. Termination of the Mediation. The mediation terminates on the signing of a settlement agreement, withdrawal by one party, or failure by any party to participate in the mediation or cooperate with the mediator.

1334. The basic steps of the process are shown in the chart below.

Overview of Mediation Process



THE (ADDITIONAL FACILITY) MEDIATION RULES

Introductory Note

The Additional Facility Rules of Procedure for Mediation Proceedings (the (Additional Facility) Mediation Rules) were adopted by the Administrative Council of the Centre pursuant to Administrative and Financial Regulation 7(1).

The (Additional Facility) Mediation Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations (Annex A), in particular by Regulation 7.

The (Additional Facility) Mediation Rules apply from the submission of a Request for mediation until conclusion of the proceeding.

Note introductive

Le Règlement de procédure relatif aux instances de médiation du Mécanisme supplémentaire (Règlement de médiation (Mécanisme supplémentaire)) a été adopté par le Conseil administratif du Centre conformément à l'article 7(1) du Règlement administratif et financier.

Le Règlement de médiation (Mécanisme supplémentaire) est complété par le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A), en particulier par l'article 7.

Le Règlement de médiation (Mécanisme supplémentaire) s'applique du dépôt d'une requête de médiation jusqu'à la fin de l'instance.

Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Mediación del Mecanismo Complementario (Reglas de Mediación (Mecanismo Complementario)) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en la Regla 7(1) del Reglamento Administrativo y Financiero.

Las Reglas de Mediación (Mecanismo Complementario) están complementadas por el Reglamento Administrativo y Financiero (Mecanismo Complementario) (Anexo A), en particular por la Regla 7.

Las Reglas de Mediación (Mecanismo Complementario) se aplican desde la presentación de una solicitud de mediación hasta la conclusión del procedimiento.

1335. The Introductory Note provides an overview of the proposed (AF)MR.

CHAPTER I – GENERAL PROVISIONS

RULE 1 - APPLICATION OF RULES

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any mediation proceeding conducted under the Additional Facility Rules, except to the extent the parties agree otherwise and subject to paragraph (2).

(2) If any of these Rules, or any aspect of the parties' agreement to modify the application of these Rules, conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(3) The applicable (Additional Facility) Mediation Rules are those in force on the date of filing of the request for mediation.

(4) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(5) These Rules may be cited as the "(Additional Facility) Mediation Rules" of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s'applique à toute instance de médiation conduite conformément au Règlement du Mécanisme supplémentaire, sauf dans la mesure où les parties en conviennent autrement et sous réserve du paragraphe (2).

(2) Si l'une des dispositions du présent Règlement ou un aspect de l'accord des parties aux fins de modifier l'application du présent Règlement est en conflit avec une disposition du droit à laquelle les parties ne peuvent déroger, cette dernière disposition prévaut.

(3) Le Règlement de médiation (Mécanisme supplémentaire) applicable est celui qui est en vigueur à la date du dépôt de la requête de médiation.

(4) Les langues officielles du Centre sont l'anglais, l'espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(5) Le présent Règlement peut être cité comme le « Règlement de médiation (Mécanisme supplémentaire) » du Centre.

Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de mediación tramitado en virtud del Reglamento del Mecanismo Complementario, salvo en la medida en que las partes acuerden algo distinto y sin perjuicio de lo dispuesto en el párrafo (2).

(2) Si alguna de estas Reglas, o cualquier aspecto del acuerdo de las partes para modificar la aplicación de estas Reglas, está en conflicto con una disposición legal de la que las partes no puedan apartarse, prevalecerá esa disposición.

(3) Las Reglas de Mediación (Mecanismo Complementario) aplicables son aquellas en vigor en la fecha de presentación de la solicitud de mediación.

(4) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(5) Estas Reglas podrán ser citadas como las "Reglas de Mediación (Mecanismo Complementario)" del Centro.

1336. Proposed (AF)MR 1 sets forth general provisions regarding the application of the (AF)MR.

1337. Proposed (AF)MR 1(1) establishes that the (AF)MR apply to mediation proceedings conducted under the Additional Facility Rules.

1338. Proposed (AF)MR 1(1) makes clear that the parties can modify any provision of the proposed (AF)MR by agreement at any time. This ensures the maximum flexibility to users with regards to the procedure of their mediation. This provision, in conjunction with proposed (AF)MR 1(2), makes the (AF)MR and any agreement to modify these Rules subject to any applicable mandatory law. This is consistent with the rules governing all types of Additional Facility proceedings.

1339. Proposed (AF)MR 1(3) specifies that the applicable mediation rules are the ones in force at the time of filing the Request for mediation. While this is the first set of mediation rules to be adopted by ICSID (such that disputes regarding which version of rules apply are unlikely), this provision has been included to maintain structural consistency with the (AF)AR, (AF)CR and (AF)FFR.

1340. Finally, proposed (AF)MR 1(4) and 1(5) set forth the official languages of the Centre and stipulate the citation format that may be used when referencing the (AF)MR.

RULE 2 - MEANING OF PARTY AND PARTY REPRESENTATION

Rule 2
Meaning of Party and Party Representation

For the purposes of these Rules, "party" may include, where the context so admits, all parties to the mediation and an authorized representative of a party.

Each party may be represented or assisted by agents, counsel or advocates ("representative(s)"), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Article 2
Sens du terme « partie » et représentation des parties

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet, toutes les parties à la médiation et tout(e) représentant(e) habilité(e) d'une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocats (« représentant(s) »), dont le nom et la preuve de l'habilitation à agir doivent être notifiés par cette partie au Secrétariat.

Regla 2
Significado de Parte y Representación de las Partes

(1) A los fines de estas Reglas, "parte" puede incluir, cuando el contexto así lo admite, a todas las partes en la mediación y a un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) ("representante(s)"), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

1341. Proposed (AF)MR 2 specifies that the expression "party" may include, where the context so admits, all parties to the mediation and any authorized representatives of the parties. This accommodates multiparty proceedings.

1342. Second, proposed (AF)MR 2(2) addresses party representation. It reflects the fact that parties may represent themselves in mediation or may authorize someone to represent them. A representative need not be an attorney and may be an officer of the company or government entity or another duly authorized individual. Typically, either a party itself or its counsel informs the Secretariat of its legal representation and attaches a power of attorney. If new counsel notifies the Secretariat of its involvement without providing a power of attorney, the Secretariat requests that the authorization be provided before transmitting files to the new representative. The authorization may take the form of a simple letter.

CHAPTER II – INSTITUTION OF THE MEDIATION

1343. Two options are envisioned to commence the mediation under the proposed (AF)MR. A party may file a Request for mediation together with a copy of an existing agreement to mediate under the AF Rules (proposed (AF)MR 3). In the absence of a pre-existing agreement, the requesting party may file an offer to mediate its Request for mediation and ask that the Secretary-General invite the other party to accept this offer (proposed (AF)MR 4). Such initiation process is consistent with rules adopted by other institutions administering mediations in different contexts.

RULE 3 - INSTITUTION OF MEDIATION BASED ON PRIOR PARTY AGREEMENT

Chapter II
Institution of the Mediation

Rule 3
Institution of Mediation Based on Prior Party Agreement

(1) If the parties have agreed in writing to refer the dispute to mediation under the (Additional Facility) Mediation Rules, any party wishing to institute a mediation proceeding shall file a request for mediation together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

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

(3) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the proceeding and its nationality and provide their contact information (including electronic mail address, street address and telephone number);

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of each representative's authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;

(f) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations;

(g) with regard to Article 2(1)(c) of the Additional Facility Rules, indicate that the mediation is between a State or an REIO on the one hand and a national of another State on the other hand, describe the investment to which the mediation pertains, and include a brief statement of the issues in dispute;

(h) contain any provisions agreed to by the parties regarding the appointment and qualifications of the mediator and any procedural proposals or agreements reached between the parties; and

(i) attach a copy of the agreement of the parties to refer the dispute to mediation under the (Additional Facility) Mediation Rules.

(4) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party; and

(b) transmit the Request to the other party upon receipt of the lodging fee.

(5) The Secretary-General shall act as the official channel of written communications between the parties.

Chapitre II
Introduction de la médiation

Article 3
Introduction de la médiation sur la base d'un accord préalable des parties

(1) Si les parties sont convenues par écrit de soumettre le différend à la médiation sur le fondement du Règlement de médiation (Mécanisme supplémentaire), toute partie qui désire introduire une instance de médiation dépose une requête de médiation ainsi

que tous documents justificatifs demandés (« requête ») auprès du ou de la Secrétaire général(e) et paie le droit de dépôt publié dans le barème des frais.

(2) La requête peut être déposée par une ou plusieurs parties requérantes, ou déposée conjointement par les parties à l'instance.

(3) La requête :

(a) est rédigée en anglais, en espagnol ou en français ;

(b) désigne chaque partie à l'instance et sa nationalité et fournit ses coordonnées (notamment son adresse électronique, son adresse postale et son numéro de téléphone) ;

(c) est signée par chaque partie requérante ou son représentant et est datée ;

(d) est accompagnée d'une preuve de l'habilitation à agir de chaque représentant ;

(e) est déposée par voie électronique, à moins que le ou la Secrétaire général(e) n'autorise le dépôt de la requête sous une autre forme ;

(f) si la partie requérante est une personne morale, indique que celle-ci a obtenu toutes les autorisations nécessaires aux fins de déposer la requête et est accompagnée de ces autorisations ;

(g) en ce qui concerne l'article 2(1)(c) du Règlement du Mécanisme supplémentaire, indique que la médiation est entre un État ou une OIER, d'une part, et un(e) ressortissant(e) d'un autre État, d'autre part, contient une description de l'investissement en rapport avec la médiation, ainsi qu'un exposé sommaire des questions faisant l'objet du différend ;

(h) contient toutes dispositions convenues entre les parties en ce qui concerne la nomination et les qualifications du ou de la médiateur(trice) et toutes propositions ou tous accords conclus entre les parties en matière de procédure ; et

(i) est accompagnée d'une copie de l'accord des parties prévoyant de soumettre le différend à la médiation sur le fondement du Règlement de médiation (Mécanisme supplémentaire).

(4) Dès réception de la requête, le ou la Secrétaire général(e) :

(a) accuse réception dans les plus brefs délais de la requête à la partie requérante ; et

(b) transmet la requête à l'autre partie dès réception du droit de dépôt.

(5) Le ou la Secrétaire général(e) est l'intermédiaire officiel pour les communications écrites entre les parties.

Capítulo II
Iniciación de la Mediación

Regla 3
Iniciación de la Mediación sobre la Base de un Acuerdo Anterior de las Partes

(1) Si las partes acuerdan por escrito remitir la diferencia a mediación en virtud del las Reglas de Mediación (Mecanismo Complementario), la parte que quiera dar inicio a un procedimiento de mediación deberá presentar una solicitud de mediación junto con los documentos de respaldo requeridos (la "solicitud") al o a la Secretario(a) General y pagar el derecho de presentación publicado en el arancel de derechos.

(2) La solicitud podrá ser presentada por una o más partes solicitantes o presentarse en forma conjunta por las partes en la diferencia.

(3) La solicitud deberá:

(a) estar redactada en español, francés o inglés;

(b) identificar a cada parte del procedimiento indicando su nacionalidad y proporcionar su información de contacto (lo cual incluye su dirección de correo electrónico, dirección postal y número de teléfono);

(c) estar firmada por cada parte solicitante o su representante y estar fechada;

(d) acompañar pruebas del poder de representación de cada representante;

(e) ser presentada electrónicamente, salvo que el o la Secretario(a) General autorice la presentación de la solicitud en un formato alternativo;

(f) si la parte solicitante es una persona jurídica, indicar que ha obtenido todas las autorizaciones necesarias para presentar la solicitud y adjuntar dichas autorizaciones;

(g) respecto del Artículo 2(1)(c) del Reglamento del Mecanismo Complementario, indicar que la mediación es entre un Estado o una ORIE, por una parte, y un nacional de otro Estado, por la otra, describir la inversión a la que se refiere la mediación, e incluir una breve explicación de los asuntos en disputa;

(h) contener cualquier disposición acordada por las partes respecto del nombramiento y las calificaciones del o de la mediador(a), así como las propuestas o acuerdos procesales alcanzados por las partes;

(i) adjuntar una copia del acuerdo de las partes que prevé que se remita la diferencia a mediación en virtud de las Reglas de Mediación (Mecanismo Complementario).

(4) Una vez recibida la solicitud, el o la Secretario(a) General deberá:

(a) acusar recibo de la solicitud a la parte solicitante con prontitud; y

(b) transmitir la solicitud a la otra parte una vez recibido el derecho de presentación.

(5) El o la Secretario(a) General deberá actuar como intermediario(a) oficial de las comunicaciones escritas entre las partes.

1344. Proposed (AF)MR 3 addresses the procedure for initiating a mediation if there is an existing agreement to mediate. The requirements as to form of a Request for mediation are similar to those in proposed (AF)CR 2 and 3, and reflect the requirements in proposed Art. 2(1)(c) of the AF Rules authorizing the Secretariat to administer mediation proceedings pertaining to an investment between qualifying parties. The requirement in proposed (AF)MR 3(3)(g) to state that the mediation pertains to an investment reflects proposed Art. 2(1)(c) of the AF Rules and is broadly drafted. Pursuant to proposed (AF)MR 3(3), the Request for mediation should address, among other matters, whether the mediation pertains to an investment, whether the parties to the dispute are a State or REIO, on the one hand, and a national of another State on the other, whether there is consent to mediation in writing and, if one party is a constituent subdivision of a State or an agency of a State or an REIO, whether the additional consent requirements in proposed Art. 2(2) of the AF Rules are satisfied.

RULE 4 - INSTITUTION OF MEDIATION ABSENT A PRIOR PARTY AGREEMENT

Rule 4
Institution of Mediation Absent a Prior Party Agreement

(1) If the parties have no prior agreement to refer the dispute to mediation under the (Additional Facility) Mediation Rules, any party wishing to institute a mediation proceeding shall file a Request with the Secretary-General, pay the lodging fee published in the schedule of fees and make an offer to mediate to the other party in accordance with paragraphs (2)-(5).

(2) The Request shall:

(a) comply with the requirements in Rule 3(3)(a)-(i);

(b) include an offer to refer the dispute to mediation under these Rules; and

(c) request that the Secretary-General invite the other party to accept the offer to mediate referred to in paragraph (b).

(3) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) invite the other party to inform the Secretary-General within 30 days of transmittal of the Request pursuant to paragraph (3)(b) whether it accepts the offer to mediate referred to in paragraph (2)(b).

(4) If the other party informs the Secretary-General that it accepts the offer to mediate referred to in paragraph (2)(b), the Secretary-General shall acknowledge receipt and transmit the acceptance of the offer to mediate to the requesting party.

(5) If the other party fails to accept or rejects the offer to mediate referred to in paragraph (2)(b) within the 30-day period referred to in paragraph (3)(c), the Secretary-General shall acknowledge receipt and transmit any communication received to the requesting party and inform the parties that no further action will be taken on the Request.

Article 4
Introduction de la médiation en l'absence d'accord préalable des parties

(1) Si les parties ne sont pas convenues au préalable de soumettre le différend à la médiation sur le fondement du Règlement de médiation (Mécanisme supplémentaire), toute partie qui désire introduire une instance de médiation dépose une requête auprès du ou de la Secrétaire général(e), paie le droit de dépôt publié dans le barème des frais et fait une offre aux fins de médiation à l'autre partie conformément aux paragraphes (2) - (5).

(2) La requête :

(a) est conforme aux exigences précisées à l'article 3(3)(a) - (e) ;

(b) contient une offre aux fins de soumettre le différend à la médiation sur le fondement du présent Règlement ; et

(c) demande au ou à la Secrétaire général(e) d'inviter l'autre partie à accepter l'offre de médiation visée au paragraphe (b).

(3) Dès réception de la requête, le ou la Secrétaire général(e) :

(a) accuse réception dans les plus brefs délais de la requête à la partie requérante ;

(b) transmet la requête à l'autre partie dès réception du droit de dépôt ; et

(c) invite l'autre partie à informer le ou la Secrétaire général(e), dans un délai de 30 jours de la transmission de la requête conformément au paragraphe (3)(b), si elle accepte l'offre de médiation visée au paragraphe (2)(b).

(4) Si l'autre partie informe le ou la Secrétaire général(e) qu'elle accepte l'offre de médiation visée au paragraphe (2)(b), le ou la Secrétaire général(e) accuse réception de l'acceptation de l'offre de médiation et la transmet à la partie requérante.

(5) Si l'autre partie n'accepte pas l'offre de médiation visée au paragraphe (2)(b) ou la rejette dans le délai de 30 jours visé au paragraphe (3)(c), le ou la Secrétaire général(e) accuse réception de toute communication reçue et la transmet à la partie requérante, et informe les parties qu'il ne sera donné aucune suite à la requête.

Regla 4
Iniciación de la Mediación en Ausencia de Acuerdo Previo de las Partes

(1) Si las partes no han acordado previamente remitir la diferencia a mediación en virtud de las Reglas de Mediación (Mecanismo Complementario), la parte que quiera iniciar un procedimiento de mediación deberá presentar una solicitud al o a la Secretario(a) General, pagar el derecho de presentación publicado en el arancel de derechos y proponer a la otra parte referir la diferencia a mediación de conformidad con lo dispuesto en los párrafos (2)-(5).

(2) La solicitud deberá:

(a) cumplir con los requisitos de la Regla 3(3)(a)-(i);

(b) incluir una propuesta a la otra parte para referir la diferencia a mediación de conformidad con estas Reglas; y

(c) solicitar que el o la Secretario(a) General invite a la otra parte a aceptar la propuesta de mediación a la que se hace referencia en el párrafo (b).

(3) Una vez recibida la solicitud, el o la Secretario(a) General deberá:

(a) acusar recibo de la solicitud a la parte solicitante con prontitud;

(b) transmitir la solicitud a la otra parte una vez que reciba el derecho de presentación; e

(c) invitar a la otra parte a informar al o a la Secretario(a) General si acepta la propuesta de mediación a la que se hace referencia en el párrafo (2)(b), dentro de los 30 días siguientes a la transmisión de la solicitud de conformidad con el párrafo (3)(b).

(4) Si la otra parte informa al o a la Secretario(a) General que acepta la propuesta de mediación a la que se hace referencia en el párrafo (2)(b), el o la Secretario(a) General deberá acusar recibo y transmitir la aceptación de la propuesta de mediación a la parte solicitante.

(5) Si la otra parte rechaza o no acepta la propuesta a la que se hace referencia en el párrafo (2)(b) dentro del plazo de 30 días al que se hace referencia en el párrafo 3(c), el o la Secretario(a) General deberá acusar recibo y transmitir a la parte solicitante toda comunicación recibida e informar a las partes que no se realizará ninguna otra actuación respecto de la solicitud.

1345. Proposed (AF)MR 4 addresses the procedure for initiating a mediation when there is no existing agreement to mediate.

1346. Proposed (AF)MR 4 is similar to proposed (AF)MR 3, except that it adds a requirement that the Request for mediation include an offer to the other party to refer the dispute to mediation under the (AF)MR and a request that the Secretary-General invite the other party to accept that offer. Proposed (AF)MR 4 gives the party to whom the offer was extended 30 days to accept such offer. If it fails to do so, or rejects the offer, no further action will be taken on the Request and the Secretary-General will inform the parties accordingly.

RULE 5 - REGISTRATION OF THE REQUEST

Rule 5
Registration of the Request

(1) Upon receipt of:

(a) the lodging fee; and

(b) a Request pursuant to Rule 3; or

(c) a Request and an agreement to mediate pursuant to Rule 4;

the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(2) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(3) The notice of registration of the Request shall:

(d) record that the Request is registered and indicate the date of registration;

(e) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre; and

(f) invite the parties to appoint the mediator without delay.

Article 5
Enregistrement de la requête

(1) Dès réception

(a) du droit de dépôt ; et

(b) d'une requête conformément à l'article 3 ; ou

(c) d'une requête et d'un accord de médiation conformément à l'article 4 ;

le ou la Secrétaire général(e) enregistre la requête s'il apparaît au vu des informations fournies que la requête n'est pas manifestement en dehors du champ d'application de l'article 2(1) du Règlement du Mécanisme supplémentaire.

(2) Le ou la Secrétaire général(e) informe les parties de l'enregistrement de la requête ou du refus d'enregistrer celle-ci et des motifs de ce refus.

(3) La notification de l'enregistrement de la requête :

(a) indique que la requête a été enregistrée et précise la date de l'enregistrement ;

(b) confirme que toutes correspondances destinées aux parties dans le cadre de l'instance leur seront envoyées à l'adresse de contact figurant dans la notification, à moins que des coordonnées différentes ne soient indiquées au Centre ; et

(c) invite les parties à nommer sans délai le ou la médiateur(trice).

Regla 5
Registro de la Solicitud

(1) Una vez recibido:

(a) el derecho de presentación; y

(b) una solicitud de conformidad con lo dispuesto en la Regla 3; o

(c) una solicitud y un acuerdo de mediación de conformidad con lo dispuesto en la Regla 4;

el o la Secretario(a) General deberá registrar la solicitud si, sobre la base de la información proporcionada, pareciera que la solicitud no se encuentra manifiestamente fuera del alcance del Artículo 2(1) del Reglamento del Mecanismo Complementario.

(2) El o la Secretario(a) General deberá notificar el registro de la solicitud a las partes, o la denegación del mismo y los motivos de dicha denegación.

(3) La notificación del registro de la solicitud deberá:

(a) dejar constancia de que la solicitud ha sido registrada e indicar la fecha del registro;

(b) confirmar que toda la correspondencia dirigida a las partes en relación con el procedimiento será enviada a la dirección de contacto consignada en la notificación, a menos que se comunique otra información de contacto al Centro; e

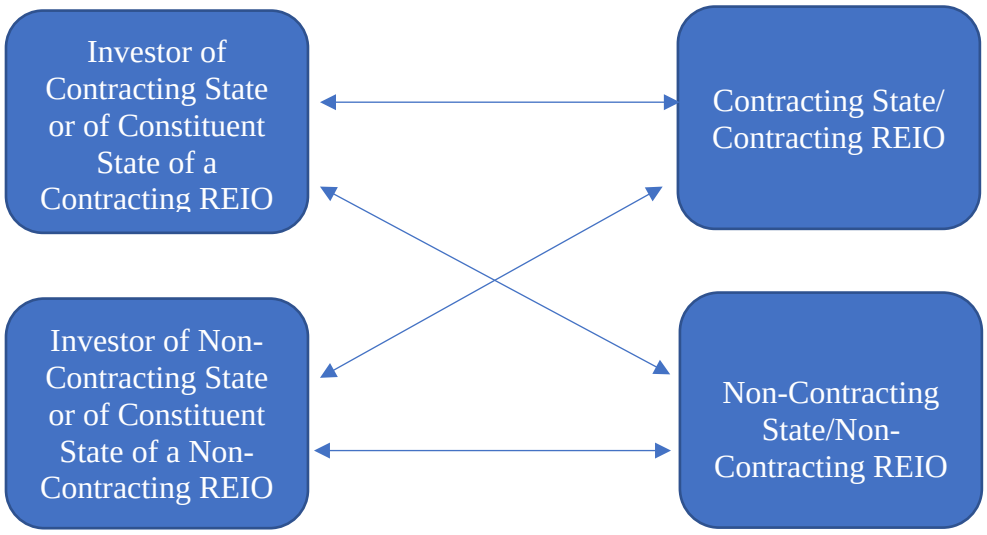
(c) invitar a las partes a nombrar al o a la mediador(a) sin demora.

1347. Proposed (AF)MR 5(1) requires the Secretary-General to register a Request unless it is "manifestly outside the scope of Article 2(1)" of the AF Rules (provided the lodging fee is also received). The proposed review standard is similar to that employed in the (AF)AR, (AF)CR and the (AF)FFR as well as Art. 36(3) of the Convention.

1348. To establish that the Request "is not manifestly outside of the scope of Article 2" under proposed Art. 2(1)(c) of the proposed AF Rules, the parties will have to show that: (i) they are either a State, an REIO on the one hand or a national of another State on the other hand, within the scope of Art. 2(1) (*ratione personae*), as shown in the chart below; (ii) there is a prior agreement to mediate (or the responding party has notified its agreement to mediate pursuant to proposed (AF)MR 4 (*rationae voluntatis*); and (iii) the mediation pertains to an investment (*ratione materiae*). The screening will be a light one and it is not expected

that the registration will take more than a few days, depending on the information provided in the Request.

Scope of proposed Art. 2(1) of the AF Rules *Ratione Personae* in Mediation Proceedings



1349. Proposed (AF)MR 5(3) and (4) require that a notice be sent to the parties upon registration of (or refusal to register) the Request.

1350. If the Request is registered, the notice will invite the parties to appoint mediator(s).

CHAPTER III – THE MEDIATOR

RULE 6 - QUALIFICATIONS OF THE MEDIATOR

Chapter III
The Mediator

Rule 6
Qualifications of the Mediator

(1) The mediator shall be impartial and independent of the parties.

(2) The parties may agree that the mediator shall have particular qualifications or expertise relevant to the subject-matter of the Request.

Chapitre III
Le ou la médiateur(trice)

Article 6
Qualifications du ou de la médiateur(trice)

(1) Le ou la médiateur(trice) doit être impartial(e) et indépendant(e) à l'égard des parties.

(2) Les parties peuvent convenir que le ou la médiateur(trice) doit disposer de qualifications ou d'une expertise particulières en rapport avec l'objet de la requête.

Capítulo III
El o la Mediador(a)

Regla 6
Cualidades del o de la Mediador(a)

(1) El o la mediador(a) deberá ser imparcial e independiente de las partes.

(2) Las partes podrán acordar que el o la mediador(a) tenga experiencia o cualidades específicas que sean relevantes para el objeto de la solicitud.

1351. Proposed (AF)MR 6(1) confirms the obligation of the mediator to be impartial and independent. The mediator will sign the declaration mentioned in proposed (AF)MR 8 that would include such obligations (see also Schedule 6 – Declaration of Mediator).

1352. Proposed (AF)MR 6(2) makes it clear that the parties can agree that the mediator should have particular qualifications or expertise relevant to the subject matter of the Request. This is usually done where the mediation relates to technical, scientific or other specialized fields and requires specific knowledge to aptly facilitate discussions. Parties may also wish to consult: (i) Appendix B to the International Bar Association's Investor-State Mediation Rules, which sets out qualifications that may be taken into account when considering mediators; or (ii) the International Mediation Institute's Competency Criteria for Investor-State Mediators; or (iii) the Guide on Investment Mediation, adopted by the Energy Charter Conference in 2016, which contains practical insights on mediator selection.

Rule 7
Number of Mediators and Method of Appointment

(1) There shall be one mediator or two co-mediators. Each mediator shall be appointed by agreement of the parties. All references to "mediator" in these Rules shall include co-mediators, where the context so admits.

(2) If the parties do not advise the Secretary-General of an agreement on the number of mediators within 30 days after the date of registration, there shall be one mediator appointed by agreement of the parties.

(3) The parties may jointly request that the Secretary-General assist with the appointment of a mediator at any time.

(4) If the parties are unable to appoint the mediator within 60 days after the date of registration, either party may request that the Secretary-General appoint the mediator not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the mediator and shall use best efforts to appoint any mediator within 30 days after receipt of the request to appoint.

(5) If no step is taken by the parties to appoint the mediator pursuant to this Rule within 120 days after the date of registration, or such other period as the parties may agree, the Secretary-General shall inform the parties that the mediation cannot proceed.

(6) If the parties notify the Secretary-General prior to the appointment of a mediator that they have agreed to terminate the mediation, the Secretary-General shall notify the parties that the mediation cannot proceed.

Article 7
Nombre de médiateurs(trices) et méthode de nomination

(1) Il est nommé un ou une médiateur(trice) ou deux co-médiateurs(trices). Chaque médiateur(trice) est nommé par accord des parties. Toutes références à « médiateur(trice) » dans le présent Règlement s'appliquent également aux co-médiateurs(trices) si le contexte le permet.

(2) Si les parties n'informent pas le ou la Secrétaire général(e) d'un accord sur le nombre de médiateurs(trices) dans les 30 jours suivant la date de l'enregistrement, il est procédé à la nomination d'un(e) médiateur(trice) par accord des parties.

(3) Les parties peuvent demander conjointement au ou à la Secrétaire général(e) de les assister à tout moment dans la nomination d'un(e) médiateur(trice).

(4) Si les parties ne parviennent pas à nommer le ou la médiateur(trice) dans les 60 jours suivant la date de l'enregistrement, l'une ou l'autre des parties peut demander au ou à la Secrétaire général(e) de nommer le ou la médiateur(trice) non encore nommé(e). Dans la mesure du possible, le ou la Secrétaire général(e) consulte les parties sur les qualifications, l'expertise, la nationalité et la disponibilité du ou de la médiateur(trice) et il ou elle déploie tous les efforts possibles pour nommer un(e) médiateur(trice) dans un délai de 30 jours à compter de la réception de la demande de nomination.

(5) Si les parties n'accomplissent aucune démarche pour nommer le ou la médiateur(trice) conformément au présent article dans les 120 jours suivant la date de l'enregistrement ou tout autre délai convenu entre les parties, le ou la Secrétaire général(e) informe les parties que la médiation ne peut pas se poursuivre.

(6) Si les parties informent le ou la Secrétaire général(e), avant la nomination du ou de la médiateur(trice), qu'elles sont convenues de mettre fin à la médiation, le ou la Secrétaire général(e) notifie aux parties que la médiation ne peut pas se poursuivre.

Regla 7
Número de Mediadores(as) y Método de Nombramiento

(1) Habrá un o una mediador(a) o dos co-mediadores(as). Cada mediador(a) será nombrado(a) por acuerdo de las partes. Toda referencia al o a la "mediador(a)" en estas Reglas incluirá a los o las co-mediadores(as) cuando el contexto así lo admita.

(2) Si las partes no informan al o a la Secretario(a) General de un acuerdo sobre el número de mediadores(as) dentro de los 30 días siguientes a la fecha de registro, habrá un o una mediador(a) nombrado(a) por acuerdo de las partes.

(3) Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una mediador(a) en cualquier momento.

(4) Si las partes no pudieran nombrar al o a la, mediador(a) dentro de los 60 días siguientes a la fecha de registro, cualquiera de las partes podrá solicitar que el o la Secretario(a) General nombre al o a la mediador(a) que aún no haya sido nombrado(a). El o la Secretario(a) General deberá consultar a las partes en la medida de lo posible sobre las cualidades, experiencia, nacionalidad y disponibilidad del o de la mediador(a) y hará lo posible por realizar el nombramiento dentro de los 30 días siguientes a la fecha de recepción de la solicitud de nombramiento.

(5) Si las partes no realizan acto alguno para nombrar al o a la mediador(a) de conformidad con lo dispuesto en esta Regla dentro de los 120 días siguientes a la

fecha de registro, o cualquier otro plazo que las partes pudieran acordar, el o la Secretario(a) General deberá informar a las partes que la mediación no puede proceder.

(6) Si las partes notificaran al o a la Secretario(a) General con anterioridad al nombramiento de un(a) mediador(a) que han acordado concluir la mediación, el o la Secretario(a) General deberá notificar a las partes de que la mediación no puede proceder.

1353. Proposed (AF)MR 7 stipulates that there shall be either a sole mediator or two co-mediators. Proposed (AF)MR 7(1) also makes clear that each mediator is to be appointed by agreement of the parties. In this sense, the proposed framework reflects common practice in mediation and highlights a difference from arbitration where Tribunals typically consist of three members, one arbitrator appointed by each party and the third, presiding arbitrator appointed by agreement of the parties,

1354. If the parties do not notify the Secretary-General within 30 days of registration of their agreement on the number of mediators, proposed (AF)MR 7(2) provides that there shall be only one mediator, appointed by agreement of the parties.

1355. Proposed (AF)MR 7(3) recalls that the Secretary-General's assistance in identifying a mediator can be requested by the parties at any time. Such assistance could include identification of candidates for appointment to be considered by the parties, the administration of a list procedure to assist the parties in agreeing on a particular candidate, or the appointment of a mediator in consultation with the parties.

1356. Proposed (AF)MR 7(4) deals with default appointments made by the Secretary-General. If the parties do not appoint a mediator within 60 days from the date of registration, either party can request that the Secretary-General make the appointment(s). The proposed default appointing authority is the Secretary-General in all AF proceedings. The Secretary-General will consult the parties in making a default appointment, including with respect to the qualifications, expertise and nationality of the mediator(s) to be appointed. Given the nature of mediation proceedings and the role of the mediator, such consultations could take the form of a joint meeting by any means of communication, including telephone or video conferencing.

1357. Under proposed (AF)MR 7(5), if the parties do not take any steps towards the appointment of the mediator(s) within 120 days after the registration of the Request, or any other agreed period, the Secretary-General will inform the parties that the mediation cannot proceed. This prevents the proceeding from being held in limbo due to the inactivity of the parties.

1358. Finally, proposed (AF)MR 7(6) stipulates how the parties can agree to end the mediation prior to the appointment of the mediators(s) (in which case proposed (AF)MR 17 would not apply). In such circumstances the Secretary-General shall inform the parties that the mediation cannot proceed.

Rule 8
Acceptance of Appointment

(1) The parties shall notify the Secretariat of the appointment and provide the name, and contact information of the appointee.

(2) The Secretariat shall request an acceptance from the appointee as soon as the appointee is selected.

(3) An appointee shall accept the appointment and provide a signed declaration in the form published by the Centre within 20 days after the receipt of the request for acceptance.

(4) The Secretariat shall notify the parties of the acceptance of appointment by the mediator and provide the signed declaration.

(5) The Secretariat shall notify the parties if a mediator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed in accordance with the method followed for the previous appointment.

(6) The mediator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3).

(7) Unless the parties and the mediator agree otherwise, the mediator may not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to the dispute that is the subject of the mediation.

Article 8
Acceptation des nominations

(1) Les parties notifient au Secrétariat la nomination et indiquent le nom et les coordonnées de la personne nommée.

(2) Le Secrétariat demande à la personne nommée, dès qu'elle a été choisie, si elle accepte sa nomination.

(3) Toute personne nommée doit accepter sa nomination et remettre une déclaration signée conforme au modèle publié par le Centre dans les 20 jours suivant la réception de la demande d'acceptation.

(4) Le Secrétariat notifie aux parties l'acceptation de la nomination du ou de la médiateur(trice) et fournit la déclaration signée.

(5) Le Secrétariat notifie aux parties si un(e) médiateur(trice) n'accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe (3), et une autre personne est nommée conformément à la méthode suivie pour la précédente nomination.

(6) Tout(e) médiateur(trice) a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3).

(7) Sauf si les parties et le ou la médiateur(trice) en conviennent autrement, le ou la médiateur(trice) ne peut pas intervenir en qualité d'arbitre, de conseil, d'expert, de témoin, de juge, ni en aucune autre qualité dans une quelconque autre instance relative au différend qui fait l'objet de la médiation.

Regla 8
Aceptación del Nombramiento

(1) Las partes notificarán al Secretariado el nombramiento y proporcionarán el nombre e información de contacto de la persona nombrada.

(2) El Secretariado solicitará la aceptación de la persona nombrada tan pronto como esta haya sido seleccionada.

(3) Toda persona nombrada deberá aceptar el nombramiento y proporcionar una declaración firmada en la forma publicada por el Centro dentro de los 20 días siguientes a la recepción de la solicitud de aceptación.

(4) El Secretariado notificará a las partes la aceptación del nombramiento por el mediador(a) y distribuirá la declaración firmada.

(5) El Secretariado notificará a las partes si un o una mediador(a) no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada de conformidad con el método seguido para el nombramiento anterior.

(6) Todo mediador(a) tendrá la obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3).

(7) Salvo acuerdo en contrario de las partes y del o de la mediador(a), el o la mediador(a) no podrá desempeñarse como árbitro, consejero(a), perito(a), testigo, juez(a), ni en ninguna otra capacidad, en ningún otro procedimiento relacionado con la diferencia objeto de la mediación.

1359. Proposed (AF)MR 8 deals with obtaining a mediator's acceptance of appointment.

1360. Proposed (AF)MR 8 specifies that the appointee has 20 days from the Secretary-General's request to accept the appointment and to provide an executed declaration (along with any statement of disclosure). This is consistent with the other AF and Convention rules. The declaration must address matters including the mediator's independence, impartiality, availability and commitment to the confidentiality of the proceeding. The declaration will provide parties with information to assist in determining whether there is a reasonable concern as to conflict of interest and that the mediator is independent and impartial. Pursuant to proposed (AF)MR 8(3), the form of the declaration to be signed will be published from time to time by ICSID (*see* Schedule 6 – Mediator's Declaration).

1361. Proposed (AF)MR 8(5) provides that the Secretary-General will send the declaration to the parties. If the appointee fails to accept the appointment within the time limit specified in proposed (AF)MR 8(3), proposed (AF)MR 8(5) stipulates the mechanism to appoint another mediator.

1362. Mediators are under a continuing obligation to disclose any change of circumstances relevant to the declaration pursuant to proposed (AF)MR 8(6). This is consistent with current practice for arbitration and conciliation proceedings.

1363. Proposed (AF)MR 8(7) prohibits a mediator from acting in a different capacity with respect to the dispute, unless there is agreement to the contrary. This provision reflects current practice in alternative dispute resolution processes such as conciliation and mediation.

RULE 9 - NOTICE OF ACCEPTANCE

Rule 9 **Notice of Acceptance** As soon as the mediator has, or both co-mediators have, accepted the appointment(s), the Secretary-General shall notify the parties of such acceptance ("notice of acceptance") and transmit the Request, any supporting documents, and the notice of registration to each mediator.
Article 9 **Notification d'acceptation** Dès que le ou la médiateur(trice) ou les deux co-médiateur(trice)s ont accepté la ou les nomination(s), le ou la Secrétaire général(e) notifie aux parties cette acceptation (« notification d'acceptation ») et transmet à chaque médiateur(trice) la requête, tous documents justificatifs et la notification d'enregistrement.

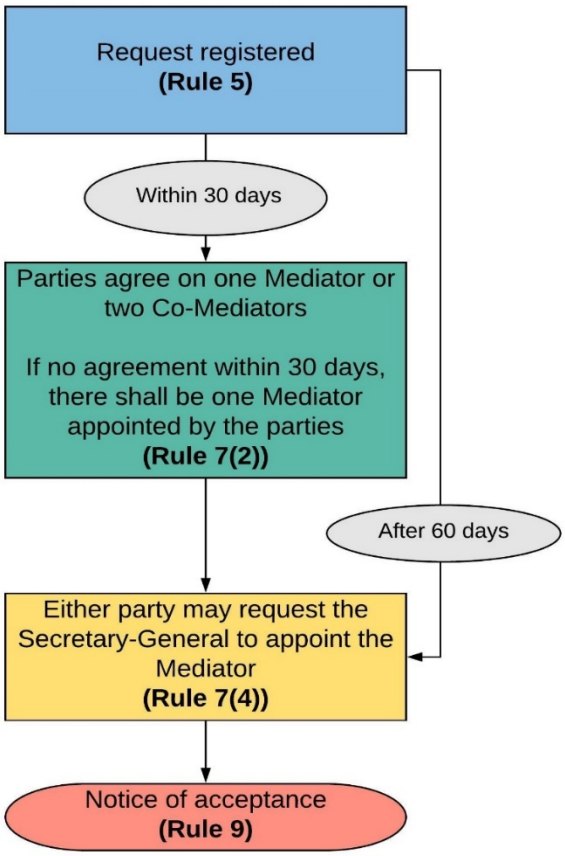
Regla 9
Notificación de Aceptación

Tan pronto como el mediador(a) o ambos co-mediadores hayan aceptado los nombramiento(s), el o la Secretario(a) General notificará a las partes dicha aceptación ("notificación de aceptación") y transmitirá a cada mediador(a) la solicitud, cualquier documento de respaldo y la notificación de registro.

1364. Proposed (AF)MR 9 stipulates that once the mediator has or, where there are two co-mediators, once both co-mediators have accepted the appointment, the Secretary-General shall notify the parties of such acceptance and transmit all documents received from the parties to each mediator. Proposed (AF)MR 9 is the starting point for the calculation of certain time periods relevant to the first session (*see* proposed (AF)MR 13 below), and the payment of advances to cover the cost of the mediation (*see* proposed (AF)MR 15 and (AF)AFR 7).

1365. The basic steps for the appointment of the mediator or two co-mediators are shown in the chart below:

Appointment of the Mediator – Rules 5-9



Rule 10
Resignation and Replacement of Mediator

(1) A mediator may resign by notifying the Secretary-General and the parties.

(2) A mediator shall resign:

(a) on the joint request of the parties; or

(b) if the mediator becomes incapacitated or is unable to perform the duties required of a mediator.

(3) Following the resignation of a mediator, a new mediator shall be appointed by the same method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of the vacancy, or such other period as agreed by the parties.

(4) Following the resignation of a co-mediator, the parties may agree to continue the mediation with the remaining co-mediator acting as a sole mediator. The parties shall notify the Secretary-General of such agreement within 45 days after the notice of the vacancy or such other period as agreed by the parties pursuant to paragraph (2).

Article 10
Démission et remplacement d'un(e) médiateur(trice)

(1) Un(e) médiateur(trice) peut démissionner en adressant une notification à cet effet au ou à la Secrétaire général(e) et aux parties.

(2) Un(e) médiateur(trice) doit démissionner :

(a) à la demande conjointe des parties ; ou

(b) si le ou la médiateur(trice) devient incapable ou est dans l'impossibilité d'exercer ses fonctions de médiateur(trice).

(3) À la suite de la démission d'un(e) médiateur(trice), un nouveau médiateur ou une nouvelle médiatrice est nommé(e) selon la méthode utilisée pour procéder à la nomination initiale, étant toutefois entendu que le ou la Secrétaire général(e) remplit toute vacance qui n'a pas été remplie dans un délai de 45 jours à compter de la notification de la vacance ou tout autre délai convenu entre les parties.

(4) A la suite de la démission d'un(e) co-médiateur(trice), les parties peuvent convenir que la médiation continue avec le ou la co-médiateur(trice) restant agissant en tant que seul(e) médiateur(trice). Les parties notifient au ou à la Secrétaire général(e) un tel accord dans un délai de 45 jours à compter de la notification de la vacance ou tout autre délai convenu entre les parties conformément au paragraphe (2).

Regla 10
Renuncia y Sustitución de un o una Mediador(a)

(1) Un o una mediador(a) podrá renunciar a su cargo notificando al o a la Secretario(a) General y a las partes.

(2) Un o una mediador(a) deberá renunciar:

(a) al recibir una solicitud conjunta de las partes; o

(b) si el o la mediador(a) se incapacitara o no pudiera desempeñar las funciones de su cargo.

(3) Tras la renuncia de un(a) mediador(a) a su cargo, se deberá nombrar a un o una nuevo(a) mediador(a) de conformidad con el método seguido para el nombramiento anterior, excepto que el o la Secretario(a) General suplirá cualquier vacante que no se haya suplido dentro de los 45 días siguientes a la notificación de la vacante, o cualquier otro plazo acordado por las partes.

(4) Tras la renuncia de un co-mediador(a), las partes podrán ponerse de acuerdo para continuar la mediación con el o la co-mediador(a) restante, quien se desempañará como Mediador(a) Único(a). Las partes notificarán al o a la Secretario(a) General dicho acuerdo dentro de los 45 días siguientes a la notificación de la vacante o cualquier otro plazo acordado por las partes de conformidad con el párrafo (2).

1366. Proposed (AF)MR 10 sets forth the provisions governing the resignation and replacement of a mediator.

1367. Proposed (AF)MR 10(1) provides for resignation in the discretion of the mediator.

1368. Given the nature of mediation proceedings, the role of the mediator and the importance of the parties' trust in the mediator, proposed (AF)MR 10(2)(a) stipulates that a mediator must resign on the parties' joint request. Proposed (AF)MR 10(2)(b) provides for the mediator's resignation if the mediator becomes incapacitated or is unable to perform the duties required of a mediator.

1369. Following a resignation, a replacement mediator will be appointed pursuant to the originally agreed method. Any vacancy left open for more than 45 days shall be filled by the Secretary-General unless the parties agree on a different time period.

1370. Proposed (AF)MR 10(4) addresses the resignation of one co-mediator. In such circumstances, the parties may either choose to fill the vacancy or agree to continue the mediation with the remaining co-mediator acting as sole mediator.

CHAPTER IV – CONDUCT OF THE MEDIATION

RULE 11 - ROLE AND DUTIES OF THE MEDIATOR

Chapter IV
Conduct of the Mediation

Rule 11
Role and Duties of the Mediator

(1) The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) The mediator shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding.

Chapitre IV
Conduite de la médiation

Article 11
Rôle et obligations du ou de la médiateur(trice)

(1) Le ou la médiateur(trice) aide les parties à parvenir à une résolution mutuellement acceptable de l'ensemble ou d'une partie du différend.

(2) Le ou la médiateur(trice) traite les parties de manière égale et donne à chacune d'elles une possibilité raisonnable de participer à l'instance.

Capítulo IV
Tramitación de la Mediación

Regla 11
Rol y Obligaciones del Mediador

(1) El o la mediador(a) ayudará a las partes a encontrar una solución mutuamente aceptable de la totalidad o de parte de la diferencia.

(2) El o la mediador(a) deberá tratar a las partes de manera igualitaria y brindarle a cada parte una oportunidad razonable de participar en el procedimiento.

1371. Proposed (AF)MR 11(1) confirms the role to be played by the mediator: to assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

1372. Proposed (AF)MR 11(2) confirms the application of certain fundamental duties under the (AF)MR: equal treatment of the parties and ensuring the parties' right to participate (which includes the right to be heard).

1373. The provisions on the role of the mediator are supplemented by the provisions regarding the conduct of the mediation as set out in proposed (AF)MR 14 below.

RULE 12 - DUTIES OF THE PARTIES

Rule 12
Duties of the Parties

(1) The parties shall cooperate with the mediator and with one another and shall conduct the mediation in good faith.

(2) The parties shall provide all relevant explanations, documents or other information requested by the mediator.

Article 12
Obligations des parties

(1) Les parties collaborent avec le ou la médiateur(trice) et l'une avec l'autre et conduisent la médiation de bonne foi.

(2) Les parties fournissent toutes explications, tous documents ou toutes autres informations pertinent(e)s demandé(e)s par le ou la médiateur(trice).

Regla 12
Obligaciones de las Partes

(1) Las partes cooperarán con el o la mediador(a) y entre sí y tramitarán la mediación de buena fe.

(2) Las partes proporcionarán todas las explicaciones, los documentos u otra información que sean pertinentes solicitadas por el o la mediador(a).

1374. Proposed (AF)MR 12 sets out the duties of the parties.

1375. Proposed (AF)MR 12(1) reflects the importance of the parties' cooperation with the mediation process: without it, the mediation will not succeed. The duty to cooperate in good faith exists towards the mediator, but also vis-à-vis the other party and the process generally. This duty encompasses the parties' obligation to prepare for and engage in a meaningful and productive mediation process.

1376. Proposed (AF)MR 12(2) clarifies that the parties are under a duty to comply with requests from the mediator to provide explanations, documents or other information.

RULE 13 - FIRST SESSION

Rule 13
First Session

(1) Each party shall file a brief, initial written statement describing the issues in dispute and its views on these issues and on the procedure to be followed. Such statement shall be filed simultaneously with the Secretariat 15 days after the date of the notice of acceptance, or such other period as the mediator may determine, but in any event before the first session. The Secretary-General shall transmit the initial statements to the mediator and the other party.

(2) The mediator shall hold a first session with the parties within 30 days after the date of the notice of acceptance or such other period as the parties may agree.

(3) At the first session, the mediator shall determine the protocol for the mediation ("Protocol") after consulting with the parties on procedural matters, including:

(a) the procedure for the conduct of the mediation, such as the procedural languages, method of communication, place of meetings, the next steps in the proceeding, confidentiality arrangements, participation of other persons in the mediation and any other procedural and administrative matters;

(b) any agreement between the parties not to initiate or pursue other proceedings in respect of the dispute during the mediation;

(c) any agreement between the parties concerning the application of prescription or limitation periods; and

(d) any other relevant matters.

(4) At the first session or within any other period as the mediator may determine, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

Article 13
Première session

(1) Chaque partie dépose un bref exposé écrit initial qui décrit les points en litige et ses vues sur ces points et la procédure à suivre. Ces exposées sont déposées simultanément auprès du Secrétariat dans un délai de 15 jours suivant la date de la notification d'acceptation ou dans tout autre délai que le ou la médiateur(trice) peut fixer, mais en tout état de cause avant la première session. Le ou la Secrétaire général(e) transmet les exposés initiaux au ou à la médiateur(trice) et à l'autre partie.

(2) Le ou la médiateur(trice) tient une première session avec les parties dans les 30 jours suivant la date de la notification d'acception ou tout autre délai dont les parties peuvent convenir.

(3) Lors de la première session, le ou la médiateur(trice) détermine le protocole de la médiation (« protocole »), après consultation des parties sur les questions de procédure, notamment :

(a) la procédure applicable à la conduite de la médiation, notamment les langues de la procédure, les modalités de communication, le lieu des réunions, les étapes suivantes de l'instance, les dispositions prises en matière de confidentialité et toutes autres questions d'ordre procédural et administratif ;

(b) tout accord des parties de ne pas engager ni poursuivre d'autres instances en rapport avec le différend pendant la médiation ;

(c) tout accord des parties relatif à l'application de délais de prescription ou de déchéance ; et

(d) toutes autres questions pertinentes.

(4) Lors de la première session ou dans tout délai fixé par le ou la médiateur(trice), chaque partie doit :

(a) désigner un(e) représentant(e) habilité(e) à résoudre le litige pour son compte ; et

(b) décrire le processus à suivre pour mettre en œuvre le règlement.

Regla 13
Primera Sesión

(1) Cada parte hará una breve presentación escrita inicial describiendo los asuntos en disputa y sus posiciones respecto de esos asuntos y del proceso a seguir. Dichas presentaciones escritas se realizarán de manera simultánea ante el Secretariado, dentro de los 15 días siguientes a la fecha de la notificación de aceptación o cualquier otro plazo que el o la mediador(a) determine, pero en cualquier caso antes de la primera sesión. El o la Secretario(a) General transmitirá las presentaciones escritas iniciales al o a la mediador(a) y a la otra parte.

(2) El o la mediador(a) celebrará una primera sesión con las partes dentro de los 30 días siguientes a la fecha de la notificación de aceptación o cualquier otro plazo que las partes pudieran acordar.

(3) En la primera sesión, el o la mediador(a) determinará el protocolo de la mediación ("protocolo") previa consulta a las partes sobre cuestiones procesales, lo cual incluye:

(a) el proceso para la tramitación de la mediación, y abordará aspectos tales como los idiomas del procedimiento, el método de comunicación, el lugar de las reuniones, las siguientes etapas del procedimiento, los acuerdos de confidencialidad, la participación de otras personas en la mediación y cualquier otro asunto procesal o administrativo;

(b) cualquier acuerdo entre las partes de no iniciar ni promover, durante la mediación, ningún otro procedimiento con respecto a la diferencia;

(c) cualquier acuerdo entre las partes respecto de la aplicación de plazos de prescripción u otros límites; y

(d) cualquier otra cuestión relevante.

(4) En la primera sesión, o dentro de cualquier otro plazo fijado por el o la mediador(a), cada parte deberá:

(c) identificar a un representante que esté autorizado para llegar a un acuerdo con respecto a la diferencia, en su nombre y representación, y

(d) describir el proceso que deberá seguirse para dar aplicación a un acuerdo.

1377. Proposed (AF)MR 13(1) requires for each party to file a brief initial written statement describing the issues in dispute, its views on these issues and on the procedure to be followed in the mediation. Such statements are to be filed 15 days after the notice of acceptance (proposed (AF)MR 9), and will assist the mediator to prepare for the procedural discussions at the first session and to determine the mediation protocol on the basis of which the mediation will be conducted (*see* also proposed (AF)MR 14).

1378. Proposed (AF)MR 13(2) specifies that the first session between the parties and the mediator is to be held within 30 days of the notice of acceptance pursuant to proposed (AF)MR 9).

1379. A list of the issues the mediator and the parties will address at the first session is set out in proposed (AF)MR 13(3). These issues include:

(a) the procedure for the conduct of the mediation (such as the procedural languages, method of communication, place of meetings, the next steps in the proceeding, confidentiality arrangements, participation of other persons in the mediation) and any other procedural and administrative matters (such as the division of the payment of advances (*see* proposed (AF)MR 15 and (AF)AFR 7), the appointment of a Secretary to the mediator (*see* proposed (AF)AFR 2)

(b) any agreement between the parties not to initiate or pursue other proceedings in respect of the dispute during the mediation;

(c) any agreement between the parties concerning the application of prescription or limitation periods; and

(d) any other matters that the parties or the mediator wish to address.

1380. Proposed (AF)MR 13 reflects the nature of the mediation as a party-driven process. The mediator will address the parties' views on procedural issues with a view to reaching mutually acceptable determinations regarding procedural arrangements taking into account the particular circumstances.

1381. Following the discussions with the parties, the mediator will memorialize these arrangements in the form of a Protocol that will guide the mediator in conducting the further mediation process (proposed (AF)MR 13(3); *see also* proposed (AF)MR 14(1)). This approach offers the parties ample opportunity to shape the mediation process.

1382. Finally, proposed (AF)MR 13(4) envisions that each party identify, either at the first session or within any other time period determined by the mediator, a representative who

is authorized to settle the dispute and that each party will also describe the process that would be followed to implement a settlement.

RULE 14 - CONDUCT OF THE MEDIATION

Rule 14
Conduct of the Mediation

(1) The mediator shall conduct the mediation in accordance with the Protocol and shall take into account the views of the parties and the circumstances of the dispute.

(2) The mediator shall conduct the mediation in an expeditious and cost-effective manner.

(3) The mediator may meet and communicate with the parties jointly or separately. Such communications may be in person or in writing, and by any appropriate means of communication.

(4) The mediator may request that the parties provide additional information or written statements.

(5) If requested by the parties, the mediator may make oral or written recommendations for the resolution of all or part of the dispute.

(6) The mediator may obtain expert advice with the agreement of the parties.

Article 14
Conduite de la médiation

(1) Le ou la médiateur(trice) conduit la médiation conformément au protocole et prend en compte les points de vue des parties et les circonstances du différend.

(2) Le ou la médiateur(trice) conduit la médiation avec célérité et efficacité en termes de coûts.

(3) Le ou la médiateur(trice) peut rencontrer et communiquer avec les parties ensemble ou séparément. Ces communications peuvent se faire en personne ou par écrit, par tous moyens de communication appropriés.

(4) Le ou la médiateur(trice) peut demander aux parties de lui fournir des informations ou des exposés écrits supplémentaires.

(5) À la demande des parties, le ou la médiateur(trice) peut formuler des recommandations orales ou écrites pour la résolution de tout ou partie du différend.

(6) Le ou la médiateur(trice) peut, avec l'accord des parties, obtenir les conseils d'un expert.

Regla 14
Tramitación de la Mediación

(1) El o la mediador(a) tramitará la mediación de conformidad con el protocolo y deberá tener en cuenta las opiniones de las partes y las circunstancias de la diferencia.

(2) El o la mediador(a) tramitará la mediación de manera expedita y eficaz en materia de costos.

(3) El o la mediador(a) podrá reunirse personalmente y comunicarse con las partes en forma conjunta o por separado. Dichas comunicaciones podrán ser en persona o por escrito, o por cualquier medio de comunicación apropiado.

(4) El o la mediador(a) podrá solicitar que las partes proporcionen información adicional o presentaciones escritas.

(5) Si las partes lo solicitaran, el o la mediador(a) podrá formular recomendaciones orales o escritas para la resolución de la totalidad o parte de la diferencia.

(6) El o la mediador(a) podrá obtener asistencia pericial con el acuerdo de las partes.

1383. Proposed (AF)MR 14 addresses the conduct of the mediation and identifies various process tools available to the mediator. The provision also imposes some further duties on the mediator specific to the conduct of the proceeding, namely to conduct the mediation in accordance with the Protocol adopted at the first session, and with due regard to the parties' views and the circumstances of the dispute (proposed (AF)MR 14(1)). The mediator shall conduct the mediation expeditiously and in a cost-effective manner (proposed (AF)MR 14(2)).

1384. Unlike in arbitrations administered by ICSID, an important element of mediation is that the mediator may meet and communicate individually with each party as part of the mediation process. This process, often referred to as "caucus", is enshrined in proposed (AF)MR 14(3). Proposed (AF)MR 14(3) also makes clear that such communications and meetings may be in person or by any other appropriate means of communications such as email, telephone or video conferencing.

1385. Proposed (AF)MR 14(4) and (6) stipulate certain other actions a mediator may take to better understand each party's views on the issues in dispute and to facilitate the settlement options. A mediator may request additional information or written statements. With

consent of the parties, the mediator may also obtain expert advice including technical assistance, which might be helpful to the mediator to better assist the parties.

1386. As specified in proposed (AF)MR 11, the mediator's role is to assist the parties in reaching a settlement. The mediator may not impose any binding solution on the parties. However, some parties may consider it helpful for the mediator to make recommendations for the resolution of all or part of the dispute. Proposed (AF)MR 14(5) provides for such possibility at the parties' request.

RULE 15 - PAYMENT OF ADVANCES AND COSTS OF THE PROCEEDING

Rule 15
Payment of Advances and Costs of the Proceeding

Unless the parties agree otherwise, each party shall:

(a) pay one half of the advances payable in accordance with (Additional Facility) Administrative and Financial Regulation 7(5);

(b) pay one half of the fees and expenses of the mediator, as well as the administrative fee for the use of the facilities of the Centre, in accordance with (Additional Facility) Administrative and Financial Regulation 7(5); and

(c) bear any other expenses it incurs in connection with the proceeding.

Article 15
Paiement d'avances et frais de procédure

Sauf accord contraire des parties, chaque partie :

(a) s'acquitte de la moitié des avances dues conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) ;

(b) s'acquitte de la moitié des honoraires et frais du ou de la médiateur(trice) ainsi que des frais administratifs afférents à l'utilisation des installations du Centre, conformément à l'article 7(5) du Règlement administratif et financier (Mécanisme supplémentaire) ; et

(c) supporte tous autres frais exposés par elle dans le cadre de l'instance.

Regla 15
Pago de Anticipos y Costos del Procedimiento

Salvo acuerdo en contrario de las partes, cada parte deberá:

(a) abonar la mitad de los anticipos exigibles de conformidad con la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario);

(b) abonar la mitad de los honorarios y gastos del o de la mediador(a), así como los cargos administrativos por la utilización de las instalaciones del Centro, de conformidad con la Regla 7(5) del Reglamento Administrativo y Financiero (Mecanismo Complementario); y

(c) soportar cualquier otro gasto incurrido en relación con el procedimiento.

1387. Proposed (AF)MR 15 is substantially the same as proposed (AF)FFR 12.

1388. Proposed (AF)MR 15(a) stipulates that, unless the parties agree otherwise, advance payments to cover the costs of the proceeding (including the fees and expenses of the mediator, the Centre's administrative charges and other direct costs (*see* proposed (AF)AFR 7)) are to be paid by the parties in equal shares.

1389. Proposed (AF)MR 15(b) addresses the final cost allocation once the mediation is concluded. Absent an agreement by the parties, the costs of the mediation are to be borne by the parties equally.

1390. Finally, proposed (AF)MR 15(c) clarifies that each party shall bear its own costs and expenses incurred in connection with the mediation, unless the parties agree to a different arrangement.

RULE 16 - CONFIDENTIALITY OF THE MEDIATION AND USE OF INFORMATION IN OTHER PROCEEDINGS

Rule 16
Confidentiality of the Mediation and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the mediation other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential, except to the extent that disclosure may be required by law or for purposes of implementation and enforcement.

(2) The parties may consent to the publication by the Centre of documents generated in connection with the mediation.

(3) The parties shall not make any use of information or documents obtained in the mediation, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in other proceedings.

Article 16
Confidentialité de la médiation et utilisation d'informations dans d'autres instances

(1) Sauf accord contraire des parties, toutes les questions relatives à la médiation, autres que les informations publiées par le Centre en vertu du Règlement financier et administratif (Mécanisme supplémentaire), demeurent confidentielles, sauf dans la mesure où leur divulgation peut être exigée légalement ou aux fins de mise en œuvre et d'exécution.

(2) Les parties peuvent consentir à la publication par le Centre de documents générés en relation avec la médiation.

(3) Les parties ne doivent pas, à l'occasion d'autres instances, utiliser des informations ou des documents obtenu(e)s dans le cadre de la médiation, ni se fonder sur des positions prises, des admissions faites ou des opinions exprimées par l'autre partie ou le ou la médiateur(trice) au cours de la médiation.

Regla 16
Confidencialidad de la Mediación y Utilización de Información en el Marco de otros Procedimientos

(1) Salvo acuerdo en contrario de las partes, todas las cuestiones relacionadas con la mediación, con la salvedad de la información a ser publicada por el Centro de conformidad con la Regla 4 del Reglamento Administrativo y Financiero (Mecanismo Complementario), serán de carácter confidencial, salvo en la medida que la revelación pueda ser requerida por ley o a los fines de implementación y ejecución de la misma.

(2) Las partes podrán consentir a la publicación por el Centro de documentos que se originen en relación con la mediación.

(3) Las partes no utilizarán en el marco de otros procedimientos, ninguna información ni ningún documento obtenido en la mediación, y no invocarán ninguna postura adoptada, admisión realizada u opinión expresada por la otra parte o el o la mediador(a) durante la mediación.

1391. Proposed (AF)MR 16 sets forth principles regarding confidentiality of mediation proceedings, and limitations on the use of information from mediations in other proceedings. Such provisions are common in mediation rules; confidentiality of mediation proceedings assists parties in engaging in the process in good faith and with candor.

1392. Proposed (AF)MR 16(1) stipulates that, unless the parties agree otherwise, all matters relating to the mediation shall remain confidential. Two exceptions to this principle are stipulated to account for: (i) any required disclosure required by law or for purposes of enforcing a settlement agreement resulting from the mediation; and (ii) the Centre's disclosure obligation pursuant to proposed (AF)AFR 4. Regarding the latter, Member States may wish to consider a policy question with regard to proposed (AF)AFR 4, namely whether publication of any information regarding the mediation could be detrimental to the process and outcome. As explained in the context of proposed (AF)AFR 4, Member States may recall that only benchmark information is published by ICSID and could be limited to the fact of the mediation, the identity of the parties and the mediator(s) appointed. If Member States are concerned by the prospect of such publication, proposed (AF)AFR 4 could be revised with respect to mediation proceedings to limit information published, either at all, or at least during the pendency of the mediation.

1393. Proposed (AF)MR 16(2) explains how the confidentiality requirement is implemented with respect to the publication of documents generated in the proceeding. It stipulates that publication shall be by consent of the parties only. In this regard, reference is made to the WP explanation of the proposed (AF)AFR, and the text of proposed (AF)AFR 3 and 4.

1394. Finally, proposed (AF)MR 16(3) applies the "without prejudice" principle to mediation proceedings, with a provision similar to that in Art. 35 of the Convention, proposed CR 8 and proposed (AF)CR 16. The effect of this rule is that any statement made by a party in the conciliation is without prejudice to the legal positions it takes in any other dispute settlement proceeding. This allows the parties to consent to and participate freely in the mediation. In other words, the fact that a party participated in a mediation conducted pursuant to proposed Art. 2(1)(c) of the AF Rules may not later be invoked in the context of an ICSID arbitration as an admission of jurisdiction. Similar "without prejudice" provisions can also be found in a number of recent treaties providing for conciliation or mediation of investor-State disputes, such as the EU-Singapore FTA (Annex 6, Art 6(1)).

CHAPTER V – TERMINATION OF THE MEDIATION

RULE 17 - NOTICE OF TERMINATION OF THE MEDIATION

Chapter V
Termination of the Mediation

Rule 17
Notice of Termination of the Mediation

(1) The mediation shall be terminated upon:

(a) the signing of a settlement agreement by the parties;

(b) a notice of withdrawal by any party, unless the remaining parties agree to continue the mediation;

(c) a determination by the mediator that there is no likelihood of resolution through this mediation; or

(d) a determination by the mediator that a party failed to participate in the mediation or cooperate with the mediator.

(2) The mediator shall take note of the termination in writing. The notice of termination shall contain a brief summary of the proceeding and the reason for termination of the mediation pursuant to paragraph (1). The notice shall be signed by the mediator.

(3) The Secretary-General shall promptly dispatch a certified copy of the notice of termination to each party, indicating the date of dispatch; and deposit the notice in the archives of the Centre. The Secretary-General shall provide additional certified copies of the notice to a party upon request.

Chapitre V
Fin de la médiation

Article 17
Notification de la fin de la médiation

(1) La médiation prend fin par :

(a) la signature d’un accord de règlement par les parties ;

(b) une notification de retrait par une partie, sauf si les autres parties conviennent de poursuivre la médiation ;

(c) la constatation par le ou la médiateur(trice) qu'il n'y a aucune possibilité de résolution par le biais de cette médiation ; ou

(d) la constatation par le ou la médiateur(trice) du défaut de participation ou de collaboration d'une partie avec le ou la médiateur(trice).

(2) Le ou la médiateur(trice) prend acte de la fin de la médiation par écrit. La notification de fin contient un bref résumé de l'instance et la raison pour laquelle la médiation a pris fin conformément au paragraphe (1). La notification est signée par le ou la médiateur(trice).

(3) Le ou la Secrétaire général(e) envoie dans les plus brefs délais à chaque partie une copie certifiée conforme de la notification de fin, indiquant la date d'envoi ; et dépose la notification aux archives du Centre. Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires de la notification.

Capítulo V
Conclusión de la Mediación

Regla 17
Notificación de la Conclusión de la Mediación

(1) La mediación concluirá con:

(a) la firma de un acuerdo de avenencia por las partes;

(b) una notificación de retiro de una parte, salvo que las partes restantes acuerden continuar la mediación;

(c) una determinación por parte del o de la mediador(a) de que no hay probabilidad de resolución a través de esta mediación; o

(d) una determinación por parte del o de la mediador(a) de que una parte no participó en la mediación ni cooperó con el o la mediador(a).

(2) El o la mediador(a) dejará constancia escrita de la conclusión de la mediación. La notificación de la conclusión deberá contener un breve resumen del procedimiento y el motivo de la conclusión de la mediación de conformidad con lo dispuesto en el párrafo (1). La notificación deberá estar firmada por el o la mediador(a).

(3) El o la Secretario(a) General deberá enviar, con prontitud, una copia certificada de la notificación de la conclusión a cada una de las partes, indicando la fecha del envío, y depositar la notificación en los archivos del Centro. El o la Secretario(a) General

proporcionará copias certificadas adicionales de la notificación a una parte a petición de esta.

1395. Proposed (AF)MR 17 stipulates how a mediation proceeding can terminate once a mediator has been appointed.

1396. Under the proposed rule, the mediation shall be terminated upon: (i) the signing of a settlement agreement; (ii) the withdrawal of one party (unless two or more parties remain and wish to continue); (iii) a determination by the mediator that there is no likelihood of resolution through the mediation; or (iv) a determination by the mediator that a party failed to participate in the mediation or cooperate with the mediator.

1397. Proposed (AF)MR 17(2) requires the mediator to take note of the termination in writing, and stipulates what information that note shall include.

1398. The formal notice of termination is intended to facilitate the enforcement of any settlement agreement reached as a result of the mediation, allowing for such settlement to benefit from the future framework for recognition and enforcement pursuant to the Draft Convention on International Settlement Agreements Resulting from Mediation. Pursuant to Art. 13 of the Draft Convention, the Convention will apply to settlements reached in the context of investment disputes. In the event of a termination of the mediation on other grounds, the notice of termination may assist the parties to evidence their participation in a mediation should such be required prior to the institution of arbitration proceedings.

1399. Finally, proposed (AF)MR 17(3) sets forth the Secretary-General's duties regarding the certification and dispatch of a notice of termination.

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SCHEDULE 1: MEMORANDUM ON FEES AND EXPENSES IN ICSID PROCEEDINGS

1. Members of Commissions, Tribunals, *ad hoc* Committees, Fact-Finding Committees and mediators in ICSID proceedings (referred to as "members" below) are entitled to receive an hourly fee, *per diem* allowance, and travel and other expense reimbursements referred to in Administrative and Financial Regulation 14(1) or Additional Facility Administrative and Financial Regulation 7(1). This memorandum explains those entitlements and how they are calculated, claimed and paid.

I. FEES

2. Members receive a fee for each hour of work performed in connection with the proceeding, including each hour spent participating in hearings, sessions and meetings.

3. When traveling for hearings, sessions or meetings held away from the member's city of residence, the member receives a fee for each hour spent traveling, either by air or by ground, to and from the location of the hearing, session or meeting.

4. The amount of the hourly fee is USD 375 per hour.

II. *PER DIEM* ALLOWANCE

5. Members are entitled to receive the flat-rate per diem allowances in paragraphs five and six below for each day they spend away from their city of residence while traveling in connection with a proceeding.

6. When overnight lodging is required, the amount of the *per diem* allowance is USD 800 for each day. The allowance covers all personal expenses, including lodging, tax on lodging and service charges, if any, meals, gratuities, in-city transportation (taxis, other means of transportation), laundry, personal communications and internet.

7. For day trips not requiring overnight lodging, the amount of the per diem allowance is USD 200.

8. Members are entitled to claim the USD 200 *per diem* allowance for each of day of travel to and from the hearing, session or meeting, and for the day of return to their city of residence.

III. TRAVEL EXPENSES

9. When members are required to attend a hearing, session or meeting held away from their city of residence, they are entitled to claim reimbursement for the costs of air and ground

transportation to and from the city where the hearing, session or meeting is held. Travel must be arranged by the most direct route.

10. Members are authorized to travel at one class above economy. Reimbursement will be made based on the actual expenses incurred. Receipts and the passenger copy of the transport ticket or electronic boarding pass must be submitted with the claim for reimbursement.

11. Members may claim reimbursement for the costs of taxis to and from the points of departure and arrival, both at the city of residence and the city where the hearing, session or meeting is held. Receipts must be submitted with the claim for reimbursement.

12. If travel is undertaken in a privately-owned automobile, a "mileage allowance" will be paid at the rate of USD 0.535 per mile/USD 0.33 per km.

IV. OTHER REIUMBURSABLE EXPENSES

13. Members are entitled to receive reimbursement for expenses reasonably incurred for the sole purpose of the proceeding. Such expenses may include, for example, courier costs and shredding case-related documents.

14. Claims for reimbursement of all expenses must be accompanied by receipts or other supporting documents.

V. CLAIMS AND PAYMENT

15. Claims for fees, *per diem* allowances and expenses should be submitted electronically to icsidpayments@worldbank.org using the Centre's Claim for Fees and Expenses form.

16. Claims must be submitted on a quarterly basis or more frequently. Final claims must be submitted prior to the conclusion of the case.

17. A detailed breakdown of the work performed must be provided in the Claim form, and receipts or supporting documents for all expenses claimed must be attached.

18. A financial statement of the case account containing the fees and expenses of the Commission, Tribunal, *ad hoc* Committee, Fact-Finding Committee or mediator will be available to the parties at any time during the proceeding.

19. A detailed breakdown of each member's fees and expenses will be included in the Report, Award or Decision on Annulment.

20. Members are encouraged to share copies of their claim forms with one another during proceedings to ensure it is conducted on a cost-effective basis.

21. Amounts paid to members do not include value added tax (VAT) or any other taxes and charges that might be applicable to members' fees and expenses.

22. Claims are reviewed, processed and approved by the Secretariat, and payments are made by wire transfer to the bank accounts of the members.

ANNEXE 1 : MEMORANDUM SUR LES HONORAIRES ET FRAIS DANS LES INSTANCES CIRDI

1. Les membres de Commissions, Tribunaux, Comités ad hoc, Comités de constatation des faits et les médiateurs(trices) dans les instances CIRDI (ci-après "les membres") sont en droit de percevoir des honoraires, des allocations journalières de subsistance, et le remboursement des frais de voyage et autres dépenses visées à l'article 14(1) du Règlement administratif et financier du Centre ou de l'article 7(1) du Règlement administratif et financier du Mécanisme supplémentaire. Ce mémorandum explique ces prestations et la manière dont elles sont calculées, réclamées et versées.

I. HONORAIRES

2. Les membres reçoivent des honoraires pour chaque heure de travail effectué en lien avec l'instance, y compris chaque heure de participation aux audiences, sessions et réunions.

3. Lors de déplacements effectués pour des audiences, sessions ou réunions ayant lieu hors de la résidence habituelle du membre, ledit membre reçoit des honoraires pour chaque heure passée à voyager, par voie aérienne ou terrestre, vers et à partir du lieu de l'audience, de la session ou de la réunion.

4. Le montant des honoraires est de USD 375 par heure.

II. ALLOCATIONS JOURNALIÈRES DE SUBSISTANCE

5. Les membres sont en droit de percevoir les allocations journalières de subsistance forfaitaires visées aux paragraphes cinq et six ci-dessous, par jour passé hors de leur résidence habituelle, lors de déplacements liés à une instance.

6. Lorsqu'un déplacement requiert un hébergement de nuit, le montant de l'allocation journalière de subsistance est de USD 800 par jour. Cette allocation couvre toutes les dépenses personnelles y compris les frais de logement, les taxes de séjour, les frais de service le cas échéant, les pourboires, les repas, le transport urbain (taxis, autres moyens de transport), la blanchisserie, les communications personnelles et l'accès à internet.

7. Pour les déplacements d'une journée ne requérant pas d'hébergement de nuit, le montant de l'allocation journalière de subsistance s'élève à USD 200.

8. Les membres sont en droit de réclamer l'allocation journalière de subsistance de USD 200 pour chaque jour de déplacement à destination et en provenance du lieu d'audience, de session ou de réunion, ainsi que pour le jour du retour vers leur lieu de résidence.

III. FRAIS DE VOYAGE

9. Lorsque les membres doivent se rendre à une audience, une session ou une réunion en dehors de leur ville de résidence, ils sont en droit de réclamer le remboursement des frais

de transport par voie aérienne ou terrestre effectué à partir du lieu de résidence vers le lieu de l'audience, de la session ou de la réunion et inversement. Le voyage doit être effectué en empruntant le chemin le plus direct.

10. Les membres sont autorisés à voyager dans une classe supérieure à la classe économique. Le remboursement sera effectué dans chaque cas en fonction des frais de transport réellement engagés. Les reçus et la copie du titre de transport du membre ou la carte d'embarquement électronique doivent être soumis avec la demande de remboursement.

11. Les membres peuvent demander le remboursement des frais de taxi en provenance et à destination des points de départ et d'arrivée, dans la ville de résidence ainsi que là où se tient l'audience, la session ou la réunion.

12. En cas de déplacement effectué en véhicule personnel, une « allocation kilométrique » sera versée à un taux de USD 0.535 par mile, soit USDD 0.33 par km.

IV. AUTRES FRAIS REMBOURSABLES

13. Les membres ont droit au remboursement de toutes dépenses raisonnablement engagées exclusivement liés à l'instance. Il peut s'agir, par exemple, de frais postaux et de frais engagés dans la destruction de documents liés à l'instance.

14. Les demandes de remboursement de toutes dépenses doivent être accompagnées de reçus ou de pièces justificatives.

V. DEMANDES DE PAIEMENT

15. Les demandes de paiement d'honoraires, d'allocations journalières de substance et de frais doivent être soumises par voie électronique à l'adresse icsidpayments@worldbank.org en remplissant le formulaire de réclamation de frais et de dépenses du centre.

16. Les réclamations doivent être soumises à une fréquence trimestrielle ou supérieure. Les réclamations finales doivent être soumises avant la clôture de l'instance.

17. Le formulaire de réclamation rempli doit inclure une ventilation détaillée du travail effectué, et les reçus et pièces justificatives doivent être joints.

18. Un bilan financier du compte de l'affaire contenant les frais et dépenses de la Commission, du Tribunal, du Comité *ad hoc*, du Comité de constatation des faits ou du ou de la médiateur(trice) sera à la disposition des parties à tout moment au cours de l'instance.

19. Une ventilation détaillée des frais et dépenses de chaque membre sera incluse dans le rapport, la sentence, ou la décision en annulation.

20. Les membres sont encouragés à partager des copies de leurs formulaires de réclamation entre eux au cours de l'instance afin de s'assurer que cette dernière est menée de manière économe.

21. Les sommes versées aux membres n’incluent pas la taxe sur la valeur ajoutée (TVA) ni d’autres taxes et charges applicables aux frais et dépenses des membres.

22. Les réclamations sont examinées, traitées et approuvées par le Secrétariat et les paiements sont effectués par virement bancaire vers les comptes en banque des membres.

APÉNDICE 1: MEMORANDO DE HONORARIOS Y GASTOS EN LOS PROCEDIMIENTOS ANTE EL CIADI

1. Los o las miembros de las Comisiones, Tribunales, Comités ad hoc, Comités de Comprobación de Hechos y Mediadores(as) en los procedimientos del CIADI (a los que en adelante se hace referencia como "miembros") tienen derecho a recibir honorarios por hora, pagos por gastos de desplazamiento y otros gastos ("per diem"), y reembolsos de gastos de viaje y otros, a los que se hace referencia en la Regla 14(1) del Reglamento Administrativo y Financiero o en la Regla 7(1) del Reglamento Administrativo y Financiero del Mecanismo Complementario. Este memorando explica estos beneficios y la manera en que se calculan, reclaman y pagan.

I. HONORARIOS

2. Todo miembro recibe un honorario por cada hora de trabajo invertida en asuntos relacionados con el procedimiento, lo cual incluye cada hora invertida en audiencias, sesiones y reuniones.

3. Cuando realicen viajes que tengan como propósito asistir a audiencias, sesiones o reuniones celebradas fuera de la ciudad de residencia del o de la miembro, este(a) último(a) recibe un honorario por cada hora invertida en el viaje hacia y desde el lugar en el que se celebre la audiencia, sesión o reunión, sea por aire o por tierra.

4. El monto del honorario por hora asciende a USD 375 por hora.

II. PER DIEM

5. Todo miembro tiene derecho a recibir el importe fijo establecido en los párrafos cinco y seis *infra* relacionado con el *per diem* correspondiente a cada día que dicho miembro se encuentre fuera de su ciudad de residencia mientras realiza un viaje en relación con un procedimiento.

6. Cuando sea necesario pasar la noche en un lugar, el monto del *per diem* asciende a USD 800 por cada día. El *per diem* cubre la totalidad de los gastos personales, los cuales incluyen el alojamiento, el impuesto por alojamiento y cargos por servicios, si los hubiera, comidas, propinas, transporte dentro de la ciudad (taxis, otros medios de transporte), servicios de lavandería, comunicaciones personales e internet.

7. Para los viajes durante el día que no requieran alojamiento en otro lugar, el monto del *per diem* asciende a USD 200.

8. Todo miembro tiene derecho a reclamar un *per diem* de USD 200 por cada día de viaje hacia y desde la audiencia, sesión o reunión, y para el día de regreso a su ciudad de residencia.

III. GASTOS DE VIAJE

9. Cuando se requiera que los o las miembros asistan a una audiencia, sesión o reunión celebrada fuera de su ciudad de residencia, tienen derecho a reclamar un reembolso por los costos de transporte aéreo y terrestre hacia y desde la ciudad donde se celebra la audiencia, la sesión o reunión. El viaje debe organizarse por la ruta más directa.

10. Todo miembro está autorizado a viajar en una clase superior a la clase económica. El reembolso se basará en los gastos reales incurridos. Los recibos y la copia del billete de transporte o de la tarjeta de embarque del pasajero deberán ser presentados con la solicitud de reembolso.

11. Todo miembro puede reclamar el reembolso de los costos de taxis hacia y desde los puntos de partida y llegada, tanto en la ciudad de residencia como en la ciudad donde se celebra la audiencia, sesión o reunión. Los recibos deben ser presentados con la solicitud de reembolso.

12. Si se realizan viajes en un automóvil de propiedad privada, se pagará un "cargo de millaje" de USD 0,535 por milla/USD 0,33 por km.

IV. OTROS GASTOS REEMBOLSABLES

13. Todo miembro tiene derecho a recibir un reembolso por los gastos razonables incurridos con el único propósito de participar en el procedimiento. Estos gastos podrán incluir, por ejemplo, costos de mensajería internacional y destrucción de documentos relacionados con el caso.

14. Las solicitudes de reembolso de la totalidad de los gastos deben estar acompañadas de recibos u otros documentos de respaldo.

V. RECLAMOS Y PAGOS

15. Los reclamos por honorarios, *per diem* y gastos deberán ser presentadas electrónicamente a icsidpayments@worldbank.org utilizando el formulario de Solicitud de Honorarios y Gastos del Centro.

16. Los reclamos finales deben ser presentados cada trimestre o en intervalos menores. Las solicitudes finales deben ser presentados antes que concluya el caso.

17. El formulario del Centro debe contener un desglose detallado del trabajo desempeñado, y deben adjuntarse los recibos o documentos de respaldo de la totalidad de los gastos reclamados.

18. Un estado financiero de la cuenta del caso que contenga los honorarios y gastos de la Comisión, Tribunal, Comité *ad hoc*, Comité de Comprobación o mediador se pondrá a disposición de las partes en cualquier momento durante el procedimiento.

19. Se incluirá un desglose detallado de los honorarios y gastos de cada miembro en el informe, laudo o decisión sobre anulación.

20. Se invita a los o las miembros a compartir copias de los formularios de reclamos entre sí durante el procedimiento a fin de garantizar que este se lleve a cabo de manera efectiva en materia de costos.

21. Los montos abonados a los o las miembros no incluyen el impuesto al valor agregado (IVA) ni ningún otro impuesto o cargo que pudiera ser aplicable a los honorarios y gastos de los o las miembros.

22. Los reclamos son revisados, procesados y aprobados por el Secretariado, y los pagos se realizan mediante transferencia electrónica a las cuentas bancarias de los o las miembros.

SCHEDULE 2: ARBITRATOR DECLARATION

Case Name and No.:

Arbitrator name:

Arbitrator nationality(ies):

I accept my appointment as arbitrator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Tribunal constituted by the International Centre for Settlement of Investment Disputes ("the Centre") in this proceeding.

2. I am impartial and independent of the parties, and shall judge fairly, according to the applicable law.

3. I shall not accept any instruction or compensation with regard to the arbitration from any source except as provided in the ICSID [Convention/ Additional Facility Rules and Regulations].

4. I understand that I am required to disclose:

    a. my professional, business and other significant relationships, within the past five years with:
        i. the parties;
        ii. counsel for the parties;
        iii. other members of the Tribunal (presently known); and
        iv. any third-party funder disclosed pursuant to [Rule 21(2) of the Arbitration Rules/ Rule 32(2) of the (Additional Facility) Arbitration Rules].
    b. investor-State cases in which I have been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert; and
    c. other circumstances that might reasonably cause my independence or impartiality to be questioned.

    [**Select one**]:

    ☐ A statement is attached.

    ☐ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this arbitration, as well as the contents of any Award made by the Tribunal.

7. I will not engage in any unilateral communication concerning this arbitration with a party or their counsel.

8. I have sufficient availability to perform my duties as arbitrator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules.

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this arbitration.

10. I will adhere to the Memorandum of Fees and Expenses published by the Centre.

11. I attach my current curriculum vitae.

Signed [form to allow electronic signature] 

Date 

ANNEXE 2 : DÉCLARATION D'ARBITRE

Affaire :

Nom de l'arbitre :

Nationalité(s) de l'arbitre :

J'accepte ma nomination en qualité d'arbitre dans cette affaire et je fais les déclarations suivantes :

1. À ma connaissance, il n'existe aucune raison susceptible de m'empêcher de faire partie du Tribunal constitué par le Centre international pour le règlement des différends relatifs aux investissements (le « Centre ») dans cette instance.

2. Je suis impartial(e) et indépendant(e) des parties, et je m'engage à les juger de façon équitable, conformément au droit applicable.

3. Je m'engage à ne pas accepter d'instructions ni de rémunération relatives à l'instance, quelle qu'en soit l'origine, à l'exception de celles prévues dans [la Convention CIRDI/le Règlement du Mécanisme supplémentaire du CIRDI].

4. Je comprends que je suis tenu(e) de divulguer :

    a. mes relations professionnelles, relations d'affaires et autres relations significatives, au cours des cinq dernières années, avec :
        i. les parties ;
        ii. les conseils des parties ;
        iii. les autres membres du Tribunal (connus actuellement) ; et
        iv. tout tiers financeur dont l'identité est divulguée conformément à [l'article 21(2) du Règlement d'arbitrage/l'article 32(2) du Règlement d'arbitrage (Mécanisme supplémentaire)] ;
    b. toutes affaires opposant un investisseur à un État auxquelles j'ai participé en qualité de conseil, de conciliateur(trice), d'arbitre, de membre de Comité *ad hoc*, de membre de Comité de constatation des faits, de médiateur(trice), ou d'expert ; et
    c. toutes autres circonstances qui pourraient raisonnablement conduire à la remise en cause de mon indépendance ou de mon impartialité.

    [**Cochez une case**] :

    ☐ Une déclaration à cet effet est jointe.

    ☐ Je n'ai aucune divulgation de cette nature à faire et je ne joins aucune déclaration.

5. Je reconnais que j'ai une obligation continue de divulguer tout changement dans les circonstances qui pourrait conduire une partie à mettre en cause mon indépendance ou mon impartialité et je notifierai au ou à la Secrétaire général(e), dans les plus brefs délais, toute circonstance de cette nature.

6. Je m’engage à tenir confidentielle toute information portée à ma connaissance du fait de ma participation à la présente instance, ainsi que le contenu de toute sentence prononcée par le Tribunal.

7. Je ne communiquerai pas de manière unilatérale au sujet de cette affaire avec une partie ou son conseil.

8. Je suis suffisamment disponible pour exercer ma fonction d’arbitre avec célérité et efficacité en termes de coûts et dans le respect des délais imposés par le Règlement d’arbitrage applicable.

9. Je confirme que je n’accepterai pas de nouveaux engagements qui seraient en conflit avec ou porteraient atteinte à ma capacité à exercer ma fonction d’arbitre dans la présente instance.

10. Je me conformerai au Mémorandum sur les honoraires et frais publié par le Centre.

11. Je joins mon curriculum vitae à jour.

Signature [formulaire permettant une signature électronique]

Date

APÉNDICE 2: DECLARACIÓN DEL O DE LA ÁRBITRO

Nombre y No. de Caso:

Nombre del o de la Árbitro:

Nacionalidad(es) del o de la Árbitro:

Acepto mi nombramiento como árbitro en este procedimiento y realizo las siguientes declaraciones:

1. A mi leal saber y entender, no hay razón alguna por la que no deba desempeñarme en el Tribunal constituido por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones ("el Centro") en este procedimiento.

2. Soy imparcial e independiente de las partes, y juzgaré de manera justa, de conformidad con la ley aplicable.

3. No aceptaré instrucción o compensación de ninguna fuente con respecto al arbitraje, salvo de conformidad con lo dispuesto en [el Convenio del CIADI / las Reglas y Reglamentos del Mecanismo Complementario].

4. Entiendo que es necesario que revele:

    a. mis relaciones profesionales, comerciales y otras relaciones significativas, dentro de los últimos cinco años, con:
        i. las partes;
        ii. los o las abogados(as) de las partes;
        iii. otros miembros del Tribunal (de los que tenga conocimiento actualmente); y
        iv. cualquier tercero financiador que haya sido revelado de conformidad con lo dispuesto en la [Regla 21(2) de las Reglas de Arbitraje / Regla 32(2) de las Reglas de Arbitraje (Mecanismo Complementario)].
    b. los casos entre inversionistas y Estados en los que he estado involucrado en calidad de abogado(a), conciliador(a), árbitro, miembro de un Comité *ad hoc*, miembro de un Comité de Comprobación de Hechos, mediador(a) o perito(a); y
    c. otras circunstancias que pudieran ocasionar que se cuestione razonablemente mi independencia o imparcialidad.

    [**Optar por una**]:

    ☐ Se adjunta una declaración.

    ☐ No tengo información que revelar y no adjunto declaración alguna.

5. Reconozco que asumo una obligación permanente de revelar cualquier cambio de circunstancias que pudiera ocasionar que se cuestione mi independencia o imparcialidad,

y notificaré con prontitud al o a la Secretario(a) General si cualquiera de dichas circunstancias ocurriera.

6. Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en este arbitraje, así como el contenido de cualquier laudo que el Tribunal dicte.

7. No mantendré comunicaciones unilaterales respecto de este arbitraje con ninguna de las partes ni sus abogados(as).

8. Cuento con suficiente disponibilidad para desempeñar mis obligaciones como árbitro de manera expedita y eficaz en materia de costos y de conformidad con los plazos establecidos en las reglas de arbitraje aplicables.

9. Confirmo que no aceptaré compromisos nuevos que entrarían en conflicto o interferirían con mi capacidad para desempeñar mis obligaciones en el presente arbitraje.

10. Cumpliré con el Memorando de Honorarios y Gastos publicado por el Centro.

11. Adjunto mi curriculum vitae actual.

Firmada [impreso para permitir la firma electrónica] 

Fecha 

SCHEDULE 3: CONCILIATOR DECLARATION

Case Name and No.:

Conciliator name:

Conciliator nationality(ies):

I accept my appointment as conciliator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Conciliation Commission constituted by the International Centre for Settlement of Investment Disputes ("the Centre") in this proceeding.

2. I am impartial and independent of the parties, and shall act fairly according to the applicable rules.

3. I shall not accept any instruction or compensation with regard to the conciliation from any source except as provided in the ICSID [Convention/ Additional Facility Rules and Regulations].

4. I understand that I am required to disclose:

    a. my professional, business and other significant relationships, within the past five years with:
        i. the parties;
        ii. counsel for the parties;
        iii. other members of the Commission (presently known); and
        iv. any third-party funder disclosed pursuant to [Rule 10(2) of the Conciliation Rules/ Rule 21(2) of the (Additional Facility) Conciliation Rules].
    b. investor-State cases in which I have been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert; and
    c. other circumstances that might reasonably cause my independence or impartiality to be questioned.

    [**Select one**]:

    ☐ A statement is attached.

    ☐ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change in circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this conciliation, as well as the contents of any Report made by the Commission.

7. I will not have any unilateral communication concerning this conciliation with a party or their counsel during the conciliation except as contemplated by the Minutes of the First Session, the applicable rules or any party agreement.

8. I have sufficient availability to perform my duties as conciliator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable conciliation rules.

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this conciliation.

10. I will adhere to the Memorandum of Fees and Expenses published by the Centre.

11. I attach my current curriculum vitae.

Signed [form to allow electronic signature]

Date

ANNEXE 3 : DÉCLARATION DE CONCILIATEUR(TRICE)

Affaire :

Nom du ou de la conciliateur(trice) :

Nationalité(s) du ou de la conciliateur(trice) :

J'accepte ma nomination en qualité de conciliateur(trice) dans cette affaire et je fais les déclarations suivantes :

1. À ma connaissance, il n'existe aucune raison susceptible de m'empêcher de faire partie de la Commission de conciliation constituée par le Centre international pour le règlement des différends relatifs aux investissements (le « Centre ») dans cette instance.

2. Je suis impartial(e) et indépendant(e) des parties, et je m'engage à agir de façon équitable, conformément aux règles applicables.

3. Je m'engage à ne pas accepter d'instructions ni de rémunération relatives à l'instance, quelle qu'en soit l'origine, à l'exception de celles prévues dans [la Convention CIRDI/le Règlement du Mécanisme supplémentaire du CIRDI].

4. Je comprends que je suis tenu(e) de divulguer :

    a. mes relations professionnelles, relations d'affaires et autres relations significatives, au cours des cinq dernières années, avec :
        i. les parties ;
        ii. les conseils des parties ;
        iii. les autres membres de la Commission (connus actuellement) ; et
        iv. tout tiers financeur dont l'identité est divulguée conformément à [l'article 10(2) du Règlement de conciliation/l'article 21(2) du Règlement de conciliation (Mécanisme supplémentaire)].
    b. toutes affaires opposant un investisseur à un État auxquelles j'ai participé en qualité de conseil, de conciliateur(trice), d'arbitre, de membre de Comité *ad hoc*, de membre de Comité de constatation des faits, de médiateur(trice) ou d'expert ; et
    c. toutes autres circonstances qui pourraient raisonnablement conduire à la remise en cause de mon indépendance ou de mon impartialité.

    [**Cochez une case**] :

    ☐ Une déclaration à cet effet est jointe.

    ☐ Je n'ai aucune divulgation de cette nature à faire et je ne joins aucune déclaration.

5. Je reconnais que j'ai une obligation continue de divulguer tout changement dans les circonstances qui pourrait conduire une partie à mettre en cause mon indépendance ou

mon impartialité et je notifierai au ou à la Secrétaire général(e), dans les plus brefs délais, toute circonstance de cette nature.

6. Je m'engage à tenir confidentielle toute information portée à ma connaissance du fait de ma participation à la présente conciliation, ainsi que le contenu de tout rapport rédigé par le Comité.

7. Je ne communiquerai pas de manière unilatérale au sujet de cette affaire avec une partie ou son conseil durant la conciliation à l'exception de ce qui est prévu par les procès-verbaux de la Première session, des règles applicables ou de tout accord des parties.

8. Je suis suffisamment disponible pour exercer ma fonction de conciliateur(trice) avec célérité et efficacité en termes de coûts et dans le respect des délais imposés par le Règlement de conciliation applicable.

9. Je confirme que je n'accepterai pas de nouveaux engagements qui seraient en conflit avec ou porteraient atteinte à ma capacité à exercer ma fonction de conciliateur(trice) dans la présente conciliation.

10. Je me conformerai au Mémorandum sur les honoraires et frais publié par le Centre.

11. Je joins mon curriculum vitae à jour.

Signature [formulaire permettant une signature électronique]

Date

APÉNDICE 3: DECLARACIÓN DEL O DE LA CONCILIADOR(A)

Nombre y No. de Caso:

Nombre del o de la Conciliador(a):

Nacionalidad(es) del o de la Conciliador(a):

Acepto mi nombramiento como conciliador(a) en este procedimiento y realizo las siguientes declaraciones:

1. A mi leal saber y entender, no hay razón alguna por la que no deba desempeñarme en la Comisión de Conciliación constituida por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones ("el Centro") en este procedimiento.

2. Soy imparcial e independiente de las partes, y actuaré de manera justa de conformidad con las reglas aplicables.

3. No aceptaré instrucción o compensación alguna de ninguna fuente con respecto a la conciliación, salvo de conformidad con lo dispuesto en el [Convenio del CIADI / las Reglas y Reglamentos del Mecanismo Complementario].

4. Entiendo que es necesario que revele:

    a. mis relaciones profesionales, comerciales y otras relaciones significativas, dentro de los últimos cinco años, con:
        i. las partes;
        ii. los o las abogados(as) de las partes;
        iii. otros miembros de la Comisión (de los que tenga conocimiento actualmente); y
        iv. cualquier tercero financiador que haya sido revelado de conformidad con lo dispuesto en [la Regla 10(2) de las Reglas de Conciliación / la Regla 21(2) de las Reglas de Conciliación (Mecanismo Complementario)].
    b. los casos entre inversionistas y Estados en los que he estado involucrado en calidad de abogado(a), conciliador(a), árbitro, miembro de un Comité *ad hoc*, miembro de un Comité de Comprobación de Hechos, mediador(a) o perito(a); y
    c. otras circunstancias que pudieran ocasionar que se cuestione razonablemente mi independencia o imparcialidad.

    [**Optar por una**]:

    ☐ Se adjunta una declaración.

    ☐ No tengo información que revelar y no adjunto declaración alguna.

5. Reconozco que asumo una obligación permanente de revelar cualquier cambio de circunstancias que pudiera ocasionar que se cuestione mi independencia o imparcialidad,

y notificaré con prontitud al o a la Secretario(a) General de cualquiera de dichas circunstancias ocurriera.

6. Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en esta conciliación, así como el contenido de cualquier informe que la Comisión emita.

7. No mantendré comunicaciones unilaterales respecto de esta conciliación con ninguna de las partes ni sus abogados(as) durante la conciliación, salvo de acuerdo a lo contemplado en el Acta de la Primera Sesión, las reglas aplicables o cualquier acuerdo entre las partes.

8. Cuento con suficiente disponibilidad para desempeñar mis obligaciones como conciliador(a) de manera expedita y eficaz en materia de costos y de conformidad con los plazos establecidos en las reglas de conciliación aplicables.

9. Confirmo que no aceptaré compromisos nuevos que entrarían en conflicto o interferirían con mi capacidad para desempeñar mis obligaciones en la presente conciliación.

10. Cumpliré con el Memorando de Honorarios y Gastos publicado por el Centro.

11. Adjunto mi curriculum vitae actual.

Firmada [impresa para permitir la firma electrónica] 

Fecha 

SCHEDULE 4: *AD HOC* COMMITTEE MEMBER DECLARATION

Case Name and No.:

Committee member name:

Committee member nationality(ies):

I accept my appointment as a Committee member in this annulment proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Committee constituted by the International Centre for Settlement of Investment Disputes ("the Centre") in this proceeding.

2. I am impartial and independent of the parties, and shall judge fairly according to the applicable law.

3. I shall not accept any instruction or compensation with regard to the annulment proceeding from any source except as provided in the ICSID Convention and applicable rules.

4. I understand that I am required to disclose:

    a. my professional, business and other significant relationships, within the past five years with:
        i. the parties;
        ii. counsel for the parties;
        iii. other members of the Committee (presently known); and
        iv. any third-party funder disclosed pursuant to Rule 21(2) of the Arbitration Rules.
    b. investor-State cases in which I have been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert; and
    c. other circumstances that might reasonably cause my independence or impartiality to be questioned.

    [**Select one**]:

    ☐ A statement is attached.

    ☐ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this annulment proceeding, as well as the contents of any Decision on Annulment made by the Committee.

7. I will not engage in any unilateral communication concerning this case with a party or their counsel.

8. I have sufficient availability to perform my duties as a Committee member in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules.

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this annulment proceeding.

10. I will adhere to the Memorandum of Fees and Expenses published by the Centre.

11. I attach my current curriculum vitae.

Signed [form to allow electronic signature] 

Date 

ANNEXE 4 : DÉCLARATION DE MEMBRE DU COMITÉ AD HOC

Affaire :

Nom du membre du Comité :

Nationalité(s) du membre du Comité :

J'accepte ma nomination en qualité de membre du Comité dans cette instance d'annulation et je fais les déclarations suivantes :

1. À ma connaissance, il n'existe aucune raison susceptible de m'empêcher de faire partie du Comité constitué par le Centre international pour le règlement des différends relatifs aux investissements (le « Centre ») dans cette instance.

2. Je suis impartial(e) et indépendant(e) des parties, et je m'engage à les juger de façon équitable, conformément au droit applicable.

3. Je m'engage à ne pas accepter d'instructions ni de rémunération relatives et à l'instance d'annulation, quelle qu'en soit l'origine, à l'exception de celles prévues dans la Convention CIRDI et les règles applicables.

4. Je comprends que je suis tenu(e) de divulguer :

    a. mes relations professionnelles, relations d'affaires et autres relations significatives, au cours des cinq dernières années, avec :
        i. les parties ;
        ii. les conseils des parties ;
        iii. les autres membres du Comité (connus actuellement) ; et
        iv. tout tiers financeur dont l'identité est divulguée conformément à l'article 21(2) du Règlement d'arbitrage ;
    b. toutes affaires opposant un investisseur à un État auxquelles j'ai participé en qualité de conseil, de conciliateur(trice), d'arbitre, de membre de Comité *ad hoc*, de membre de Comité de constatation des faits, de médiateur(trice) ou d'expert; et
    c. toutes autres circonstances qui pourraient raisonnablement conduire à la remise en cause mon indépendance ou de mon impartialité.

    [**Cochez une case**] :

    ☐ Une déclaration à cet effet est jointe.

    ☐ Je n'ai aucune divulgation de cette nature à faire et je ne joins aucune déclaration.

5. Je reconnais que j'ai une obligation continue de divulguer tout changement dans les circonstances qui pourrait conduire une partie à mettre en cause mon indépendance ou mon impartialité et je notifierai au ou à la Secrétaire général(e), dans les plus brefs délais, toute circonstance de cette nature.

6. Je m'engage à tenir confidentielle toute information portée à ma connaissance du fait de ma participation à la présente instance d'annulation, ainsi que le contenu de toute décision en annulation prononcée par le Comité.

7. Je ne communiquerai pas de manière unilatérale au sujet de cette affaire avec une partie ou son conseil.

8. Je suis suffisamment disponible pour exercer ma fonction de membre du Comité avec célérité et efficacité en termes de coûts et dans le respect des délais imposés par le Règlement d'arbitrage applicable.

9. Je confirme que je n'accepterai pas de nouveaux engagements qui seraient en conflit avec ou porteraient atteinte à ma capacité à exercer ma fonction d'arbitre dans la présente instance d'annulation.

10. Je me conformerai au Mémorandum sur les honoraires et frais publié par le Centre.

11. Je joins mon curriculum vitae à jour.

Signature [formulaire permettant une signature électronique]

Date

APÉNDICE 4: DECLARACIÓN DEL O DE LA MIEMBRO DEL COMITÉ AD HOC

Nombre y No. de Caso:

Nombre del o de la Miembro del Comité:

Nacionalidad(es) del o de la Miembro del Comité:

Acepto mi nombramiento como miembro de un Comité en este procedimiento de anulación y realizo las siguientes declaraciones:

1. A mi leal saber y entender, no hay razón alguna por la que no deba desempeñarme en el Comité constituido por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones ("el Centro") en este procedimiento.

2. Soy imparcial e independiente de las partes, y juzgaré de manera justa, de conformidad con la ley aplicable.

3. No aceptaré instrucción o compensación de ninguna fuente con respecto al procedimiento de anulación, salvo de conformidad con lo dispuesto en el Convenio del CIADI y las reglas aplicables.

4. Entiendo que es necesario que revele:

    a. mis relaciones profesionales, comerciales y otras relaciones significativas, dentro de los últimos cinco años, con:
        i. las partes;
        ii. los o las abogados(as) de las partes;
        iii. otros miembros del Comité (de los que tenga conocimiento actualmente); y
        iv. cualquier tercero financiador que haya sido revelado de conformidad con lo dispuesto en la Regla 21(2) de las Reglas de Arbitraje.
    b. los casos entre inversionistas y Estados en los que he estado involucrado en calidad de abogado(a), conciliador(a), árbitro, miembro de un Comité *ad hoc*, miembro de un Comité de Comprobación de Hechos, mediador(a), o perito(a); y
    c. otras circunstancias que pudieran ocasionar que se cuestione razonablemente mi independencia o imparcialidad.

    [**Optar por una**]:

    ☐ Se adjunta una declaración.

    ☐ No tengo información que revelar y no adjunto declaración alguna.

5. Reconozco que asumo una obligación permanente de revelar cualquier cambio de circunstancias que pudiera ocasionar que se cuestione mi independencia o imparcialidad,

y notificaré con prontitud al o a la Secretario(a) General si cualquiera de dichas circunstancias ocurriera.

6. Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en este procedimiento de anulación, así como el contenido de cualquier decisión sobre anulación que este Comité emita.

7. No mantendré comunicaciones unilaterales respecto del presente caso con ninguna de las partes ni sus abogados(as).

8. Cuento con suficiente disponibilidad para desempeñar mis obligaciones como miembro de un Comité de manera expedita y eficaz en materia de costos y de conformidad con los plazos establecidos en las reglas de arbitraje aplicables.

9. Confirmo que no aceptaré compromisos nuevos que entrarían en conflicto o interferirían con mi capacidad para desempeñar mis obligaciones en este procedimiento de anulación.

10. Cumpliré con el Memorando de Honorarios y Gastos publicado por el Centro.

11. Adjunto mi curriculum vitae actual.

Firmada [impresa para permitir la firma electrónica] 

Fecha 

SCHEDULE 5: FACT-FINDING COMMITTEE MEMBER DECLARATION

Case Name and No.: [redacted]

Committee member name: [redacted]

Committee member nationality(ies): [redacted]

I accept my appointment as a Committee member in this fact-finding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Committee constituted by the International Centre for Settlement of Investment Disputes ("the Centre") in this fact-finding.

2. I am impartial and independent of the parties, and shall discharge my mandate fairly.

3. I shall not accept any instruction or compensation with regard to the fact-finding from any source except as provided in the ICSID Additional Facility Rules and applicable rules.

4. I understand that I am required to disclose:

    a. my professional, business and other significant relationships, within the past five years with:
        i. the parties;
        ii. counsel for the parties;
        iii. other members of the Committee (presently known); and
    b. other circumstances that might reasonably cause my independence or impartiality to be questioned.

[**Select one**]:

☐ A statement is attached.

☐ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this fact-finding, as well as the contents of any Report made by the Committee.

7. I will not engage in any unilateral communication concerning this fact-finding with a party or their counsel.

8. I have sufficient availability to perform my duties as a Committee member in an expeditious and cost-effective manner.

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this fact-finding.

10. I will adhere to the Memorandum of Fees and Expenses published by the Centre.

11. I attach my current curriculum vitae.

Signed [form to allow electronic signature]

Date

ANNEXE 5 : DÉCLARATION DE MEMBRE DE COMITE DE CONSTATATION DES FAITS

Affaire :

Nom du membre du Comité :

Nationalité(s) du membre du Comité :

J'accepte ma nomination en qualité de membre du Comité dans cette constatation des faits et je fais les déclarations suivantes :

1. À ma connaissance, il n'existe aucune raison susceptible de m'empêcher de faire partie du Comité constitué par le Centre international pour le règlement des différends relatifs aux investissements (le « Centre ») dans cette constatation des faits.

2. Je suis impartial(e) et indépendant(e) des parties, et je m'engage à remplir mon mandat de manière équitable.

3. Je m'engage à ne pas accepter d'instructions ni de rémunération relatives à la constatation des faits, quelle qu'en soit l'origine, à l'exception de celles prévues dans le Règlement du Mécanisme supplémentaire du CIRDI et aux règles applicables.

4. Je comprends que je suis tenu(e) de divulguer :

   a. mes relations professionnelles, relations d'affaires et autres relations significatives, au cours des cinq dernières années, avec :
      i. les parties ;
      ii. les conseils des parties ;
      iii. les autres membres du comité (connus actuellement) ; et
   b. toutes autres circonstances qui pourraient raisonnablement conduire à la remise en cause mon indépendance ou de mon impartialité.

   [**Cochez une case**] :

   ☐ Une déclaration à cet effet est jointe.

   ☐ Je n'ai aucune divulgation de cette nature à faire et je ne joins aucune déclaration.

5. Je reconnais que j'ai une obligation continue de divulguer tout changement dans les circonstances qui pourrait conduire une partie à mettre en cause mon indépendance ou mon impartialité et je notifierai au ou à la Secrétaire général(e), dans les plus brefs délais, toute circonstance de cette nature.

6. Je m'engage à tenir confidentielle toute information portée à ma connaissance du fait de ma participation à la présente constatation des faits, ainsi que le contenu de tout rapport rédigé par le Comité.

7. Je ne communiquerai pas de manière unilatérale au sujet de cette constatation des faits avec une partie ou son conseil.

8. Je suis suffisamment disponible pour exercer ma fonction de membre de Comité avec célérité et efficacité en termes de coûts.

9. Je confirme que je n'accepterai pas de nouveaux engagements qui seraient en conflit avec ou porteraient atteinte à ma capacité à exercer ma fonction dans cette constatation de faits.

10. Je me conformerai au Mémorandum sur les honoraires et frais publié par le Centre.

11. Je joins mon curriculum vitae à jour.

Signature [formulaire permettant une signature électronique]

Date

APÉNDICE 5: DECLARACIÓN DEL O DE LA MIEMBRO DEL COMITÉ DE COMPROBACIÓN DE HECHOS

Nombre y No. de Caso:

Nombre del o de la Miembro del Comité:

Nacionalidad(es) del o de la miembro del Comité:

Acepto mi nombramiento como miembro de un Comité en la presente comprobación de hechos y realizo las siguientes declaraciones:

1. A mi leal saber y entender, no hay razón alguna por la que no deba desempeñarme en el Comité constituido por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones ("el Centro") en la presente comprobación de hechos;

2. Soy imparcial e independiente de las partes, y llevaré a cabo mi mandato con equidad.

3. No aceptaré instrucción o compensación de ninguna fuente con respecto a la comprobación de hechos, salvo de conformidad con lo dispuesto en el Convenio del CIADI y las reglas aplicables.

4. Entiendo que es necesario que revele:

    a. mis relaciones profesionales, comerciales y otras relaciones significativas, dentro de los últimos cinco años, con:
        i. las partes;
        ii. los o las abogados(as) de las partes;
        iii. otros miembros del Comité (de los que tenga conocimiento actualmente); y
    b. otras circunstancias que pudieran ocasionar que se cuestione razonablemente mi independencia o imparcialidad.

    [**Optar por una**]:

    ☐ Se adjunta una declaración.

    ☐ No tengo información que revelar y no adjunto declaración alguna.

5. Reconozco que asumo una obligación permanente de revelar cualquier cambio de circunstancias que pudiera ocasionar que se cuestione mi independencia o imparcialidad, y notificaré con prontitud al o a la Secretario(a) General si cualquiera de dichas circunstancias ocurriera.

6. Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en la presente comprobación de hechos, así como el contenido de cualquier informe que este Comité emita.

7. No mantendré comunicaciones unilaterales respecto de la presente comprobación de hechos con ninguna de las partes ni sus abogados(as).

8. Cuento con suficiente disponibilidad para desempeñar mis obligaciones como miembro de un Comité de manera expedita y eficaz en materia de costos.

9. Confirmo que no aceptaré compromisos nuevos que entrarían en conflicto o interferirían con mi capacidad para desempeñar mis obligaciones en la presente comprobación de hechos.

10. Cumpliré con el Memorando de Honorarios y Gastos publicado por el Centro.

11. Adjunto mi curriculum vitae actual.

Firmada [impresa para permitir la firma electrónica] 

Fecha 

SCHEDULE 6: MEDIATOR DECLARATION

Case Name and No.:

Mediator name:

Mediator nationality(ies):

I accept my appointment as mediator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the mediation proceeding by the International Centre for Settlement of Investment Disputes ("the Centre") in this proceeding.

2. I am impartial and independent of the parties, and shall act fairly according to the applicable rules.

3. I shall not accept any instruction or compensation with regard to the mediation from any source except as provided in the ICSID Additional Facility Rules and applicable rules.

4. I understand that I am required to disclose:

    a. my professional, business and other significant relationships, within the past five years with:
        i. the parties;
        ii. counsel for the parties;
        iii. other co-mediator, if any.
    b. investor-State cases in which I have been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert; and
    c. other circumstances that might reasonably cause my independence or impartiality to be questioned.

    [**Select one**]:

    ☐ A statement is attached.

    ☐ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change in circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this mediation, as well as the contents of any Notice of Termination made by the mediator.

7. I will not have any unilateral communication concerning this mediation with a party or their counsel during the mediation except as contemplated by the Protocol, the applicable rules or any party agreement.

8. I have sufficient availability to perform my duties as mediator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable mediation rules.

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this mediation.

10. I will adhere to the Memorandum of Fees and Expenses published by the Centre.

11. I attach my current curriculum vitae.

Signed [form to allow electronic signature]

Date

ANNEXE 6 : DÉCLARATION DE MEDIATEUR(TRICE)

Affaire :

Nom du ou de la médiateur(trice) :

Nationalité(s) du ou de la médiateur(trice) :

J'accepte ma nomination en qualité de médiateur(trice) dans cette affaire et je fais les déclarations suivantes :

1. À ma connaissance, il n'existe aucune raison susceptible de m'empêcher de faire partie à l'instance de médiation constituée par le Centre international pour le règlement des différends relatifs aux investissements (le « Centre ») dans cette affaire.

2. Je suis impartial(e) et indépendant(e) des parties, et je m'engage à agir de façon équitable, conformément aux règles applicables.

3. Je m'engage à ne pas accepter d'instructions ni de rémunération relatives à la médiation, quelle qu'en soit l'origine, à l'exception de celles prévues dans le Règlement du Mécanisme supplémentaire du CIRDI et conformément aux règles applicables.

4. Je comprends que je suis tenu(e) de divulguer :

   a. mes relations professionnelles, relations d'affaires et autres relations significatives, au cours des cinq dernières années, avec :
      i. les parties ;
      ii. les conseils des parties ;
      iii. le ou la co-médiateur(trice), le cas échéant ; et
   b. toutes affaires opposant un investisseur à un État auxquelles j'ai participé en qualité de conseil, de conciliateur(trice), d'arbitre, de membre de Comité *ad hoc*, de membre de Comité de constatation des faits, de médiateur(trice) ou d'expert ; et
   c. toutes autres circonstances qui pourraient raisonnablement conduire à la remise en cause de mon indépendance ou de mon impartialité.

   [**Cochez une case**] :

   ☐ Une déclaration à cet effet est jointe.

   ☐ Je n'ai aucune divulgation de cette nature à faire et je ne joins aucune déclaration.

5. Je reconnais que j'ai une obligation continue de divulguer tout changement dans les circonstances qui pourrait conduire une partie à mettre en cause mon indépendance ou mon impartialité et je notifierai au ou à la Secrétaire général(e), dans les plus brefs délais, toute circonstance de cette nature.

6. Je m’engage à tenir confidentielle toute information portée à ma connaissance du fait de ma participation à la présente médiation, ainsi que le contenu de toute notification de fin rédigée par le ou la médiateur(trice).

7. Je ne communiquerai pas de manière unilatérale au sujet de cette affaire avec une partie ou son conseil durant la médiation à l’exception de ce qui est prévu par le protocole, des règles applicables ou de tout accord des parties.

8. Je suis suffisamment disponible pour exercer ma fonction de médiateur(trice) avec célérité et efficacité en termes de coûts et dans le respect des délais imposés par le Règlement de médiation applicable.

9. Je confirme que je n’accepterai pas de nouveaux engagements qui seraient en conflit avec ou porteraient atteinte à ma capacité à exercer ma fonction de médiateur(trice) dans la présente médiation.

10. Je me conformerai au Mémorandum sur les honoraires et frais publié par le Centre.

11. Je joins mon curriculum vitae à jour.

Signature [formulaire permettant une signature électronique]

Date

APÉNDICE 6: DECLARACIÓN DEL O DE LA MEDIADOR(A)

Nombre y No. de Caso:

Nombre del o de la Mediador(a):

Nacionalidad(es) del o de la Mediador(a):

Acepto mi nombramiento como mediador(a) en este procedimiento y realizo las siguientes declaraciones:

1. A mi leal saber y entender, no hay razón alguna por la que no deba desempeñarme en el procedimiento de mediación del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones ("el Centro") en este procedimiento.

2. Soy imparcial e independiente de las partes, y actuaré de manera justa de conformidad con las reglas aplicables.

3. No aceptaré instrucción o compensación alguna de ninguna fuente con respecto a la mediación, salvo de conformidad con lo dispuesto en las Reglas y Reglamentos del Mecanismo Complementario.

4. Entiendo que es necesario que revele:

    a. mis relaciones profesionales, comerciales y otras relaciones significativas, dentro de los últimos cinco años, con:
        i. las partes;
        ii. los o las abogados(as) de las partes;
        iii. otro co-mediador(a), si lo hubiera.
    b. los casos entre inversionistas y Estados en los que he estado involucrado en calidad de abogado(a), conciliador(a), árbitro, miembro de un Comité *ad hoc*, miembro de un Comité de Comprobación de Hechos, mediador(a) o perito(a); y
    c. otras circunstancias que pudieran ocasionar que se cuestione razonablemente mi independencia o imparcialidad.

    [**Optar por una**]:

    ☐ Se adjunta una declaración.

    ☐ No tengo información que revelar y no adjunto declaración alguna.

5. Reconozco que asumo una obligación permanente de revelar cualquier cambio de circunstancias que pudiera ocasionar que se cuestione mi independencia o imparcialidad, y notificaré con prontitud al o a la Secretario(a) General de cualquiera de dichas circunstancias ocurriera.

6. Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en esta mediación, así como el contenido de cualquier notificación de la conclusión de la mediación que el o la mediador(a) tramite.

7. No mantendré ninguna comunicación unilateral respecto de esta mediación con ninguna de las partes ni sus abogados(as) durante la mediación, salvo de acuerdo a lo contemplado en el protocolo, las reglas aplicables o cualquier acuerdo entre las partes.

8. Cuento con suficiente disponibilidad para desempeñar mis obligaciones como mediador(a) de manera expedita y eficaz en materia de costos y de conformidad con los plazos establecidos en las reglas de mediación aplicables.

9. Confirmo que no aceptaré compromisos nuevos que entrarían en conflicto o interferirían con mi capacidad para desempeñar mis obligaciones en la presente mediación.

10. Cumpliré con el Memorando de Honorarios y Gastos publicado por el Centro.

11. Adjunto mi curriculum vitae actual.

Firmada [impresa para permitir la firma electrónica] 

Fecha 

SCHEDULE 7: MULTIPARTY CLAIMS AND CONSOLIDATION

I. INTRODUCTION

1. The complexity of investment vehicles, the numerous investment instruments available, and the multiple forum options offered by States for the same or related investment claims raise the question of how to ensure that like cases are decided in a like manner and as cost-effectively as possible.

2. Three procedural mechanisms in ICSID practice specifically address this concern: first, the registration and adjudication of like claims in a single multiparty claim; second, full or partial consolidation of like claims initiated separately by multiple parties; and third, ancillary claims, especially counter-claims, before the same Tribunal hearing the main claim. These are distinct mechanisms, but they all involve some degree of joint determination of closely connected claims.

3. This Schedule addresses multiparty claims and consolidation. Ancillary claims, including counter-claims, are discussed in Chapter VIII of the AR.

4. The ICSID Convention, AR and A(AF)R already permit multiparty claims and ancillary claims, including counter-claims. As a result, the proposed amendments to the Rules related to these mechanisms are minimal.

5. The ICSID Convention and the current AR and A(AF)R do not address consolidation of claims. Proposed AR 38 and proposed A(AF)R Art. 48 propose a new rule for voluntary consolidation and coordination of proceedings. In addition, this Schedule includes a draft of a potential mandatory consolidation provision (proposed Rule 38BIS) for consideration by Member States.

II. MULTIPARTY CLAIMS

6. "Multiparty claims" are claims brought by two or more claimants that initiate a single proceeding by jointly filing a single Request for arbitration.

7. The ICSID Convention and AR do not expressly address multiparty claims. However, the *travaux préparatoires* show that multiparty claims were anticipated by the drafters (*see e.g.*, History of the ICSID Convention, Vol. II-1, 400, 413). In practice, Tribunals have consistently found that the ICSID Convention and AR, and the A(AF)R, allow multiparty proceedings and current procedural rules have accommodated such claims.

8. Most multiparty cases have been brought by multiple claimants (as opposed to cases involving multiple respondents). About 40% of all ICSID cases have involved multiple claimants. Although the number of claimants in one case exceeded 180,000 (*Abaclat and others v. Argentina* (ARB/07/5), Decision on Jurisdiction and Admissibility (August 4, 2011)), the great majority of cases have involved no more than two or three claimants and have not posed difficulties from a procedural or case management perspective.

9. Examples of multi-claimant cases include claims regarding joint investments made by investors affiliated through family ties (*see e.g., von Pezold and others v. Zimbabwe*

(ARB/10/15), Award (July 28, 2015), ¶¶118 *et seq*), by investors in a joint corporate structure (*e.g.*, holding company and subsidiary as in *Noble Energy and Machala Power v. Ecuador and Conelec* (ARB/05/12), Decision on Jurisdiction (March 5, 2008)), unrelated joint venture partners as in *Suez et al v. Argentina*, ARB/03/17, Decision on Liability, July 30, 2010; or various shareholders in the same local company as in *Goetz and others v. Burundi* (ARB/95/3), Award (10 February 1999) ¶89;). Other multiparty claims have been brought by unaffiliated investors challenging the same measures. For example, in *Funnekotter and others v. Zimbabwe* (ARB/05/6), Award (April 22, 2009), 14 apparently unrelated investors brought a claim alleging expropriation due to land acquisition legislation of Zimbabwe.

10. Some multiparty claims invoke a single instrument of consent (a treaty, law or contract), but many rely on multiple sources of consent, including different BITs (*see e.g.*, *OKO Pankki Oyj and others v. Estonia* (ARB/04/6), Award (November 19, 2007) or combine a BIT claim with a claim based on contract or legislation (*see e.g.*, *Goetz and others v. Burundi* (ARB/01/2), Award (June 21, 2012)).

11. Consistent with Art. 36(3) of the Convention, ICSID's practice has been to register a claim submitted by two or more claimants in a single Request for arbitration if the claims are not manifestly outside the jurisdiction of the Centre. Refusals to register a multiparty request are uncommon, although there have been some. For example, a multiparty request would be rejected where the multiple claims submitted have no factual connection whatsoever, or where joint submission is barred by the relevant instrument(s) of consent.

12. As registration by the Centre is without prejudice to the powers of the Tribunal to decide jurisdiction, competence and merits, a Tribunal can review whether a multiparty claim is within the jurisdiction of the Centre or is otherwise within its competence. This includes whether the claims are amenable to joint determination or whether a sufficient nexus exists between the claims of multiple claimants in the proceeding.

13. Tribunals considering whether a multiparty claim can be maintained have considered various factors, including whether: (i) a single dispute exists; (ii) the investment is the same or was made jointly by the claimants; (iii) the underlying facts or the overall economic transaction are the same; (iv) the investors or the claims are affiliated; (v) the challenged measures are the same; (vi) the same respondents are named; or (vi) the remedies sought are aligned. The more related the cases are, the more likely a Tribunal is to treat them together - even over a party's objection (*see e.g.*, *Noble Energy and Machala Power v. Ecuador and Conelec* (ARB/05/12), Decision on Jurisdiction (March 5, 2008), ¶¶186-207).

14. An objection to a multiparty claim can also be raised using special procedures available under the current AR or A(AF)R. For example, an objection might be made that the Tribunal does not have jurisdiction or competence under current AR 41(1)-(2) (proposed AR 36 and (AF)AR 46) or that the multiple claims are manifestly lacking in legal merit under current AR 41(5) (proposed AR 35 and (AF)AR 45).

15. Yet in practice respondents have rarely objected to the institution of a single proceeding by multiple claimants (*see e.g.*, *Goetz and others v. Burundi* (ARB/95/3), Award (10 February

1999); *LG&E Energy Corp. and others v. Argentina* (ARB/02/1), Decision on Objections to Jurisdiction (April 30, 2004); *Funnekotter and others v. Zimbabwe* (ARB/05/6), Award (April 22, 2009)). In the few cases in which an objection was raised, it has been rejected (*see e.g., Noble Energy and Machala Power v. Ecuador and Conelec* (ARB/05/12), Decision on Jurisdiction (March 5, 2008), ¶¶186-207; *Ambiente Ufficio and others v. Argentina* (ARB/08/9), Decision on Jurisdiction and Admissibility (February 8, 2013); *Flughafen Zürich and Gestión e Ingeniería v. Venezuela* (ARB/10/19), Award (November 18, 2014)).

16. At the same time, Tribunals have stressed that addressing claims jointly does not mean merging the disputes, applicable laws, or remedies. Rather, each case must still be assessed on its own facts and merits (*see e.g., Flughafen Zürich and Gestión e Ingeniería v. Venezuela* (ARB/10/19), Award (November 18, 2014), ¶¶397-411).

17. Tribunals have also emphasized that a multiparty or mass claim is not a representative or class claim, in which designated claimants pursue the litigation on behalf of a larger group who fall within the definition of the class (*e.g., Ambiente Ufficio and others v. Argentina* (ARB/08/9), Decision on Jurisdiction and Admissibility (February 8, 2013), ¶574).

18. Few comments were received by ICSID from States or the public with respect to multiparty claims. Apart from general suggestions for more detailed regulation of multiparty claims, only one State made a specific proposal. It suggested that a limit be set on the maximum number of claimants permitted in a multiparty claim. This has not been incorporated in the proposed Rules because it is difficult to identify the "right" number of claimants in a joint claim without reference to the specific facts on which the claim is based.

19. Two law firms submitted comments suggesting that further work be done to craft suitable procedures for mass claims and to specify when mass claims would be considered by a Tribunal. The Centre will do further research on procedural techniques that could be used to address cases with many claimants, including mass claims, and publish a set of "best practices" in this regard.

20. Given that to date the current Rules have worked well for multiparty cases, few amendments are proposed. The proposed rules that address the topic have clarified current practice in multiparty cases and reaffirm that the rules apply in the same manner to a single claimant or respondent as they do to multiple claimants or respondents. For instance, IR 1 now specifies that a request can be made by two or more requesting parties; IR 8 states that any requesting party may withdraw before a request is registered, contemplating the withdrawal of one claimant from a multiparty claim, and AR 2(1)(a) defines a party as including several claimants or respondents, depending on the context (*see also* proposed (AF)AR 10, CR 2, (AF)CR 10, (AF)FFR 2 and (AF)MR 2).

III. CONSOLIDATION

21. Consolidation is the joinder of two or more ongoing proceedings that were commenced separately. Consolidation differs from multiparty claims mainly in respect of timing: consolidation brings together two or more pending claims, whereas multiparty claims are

initiated by multiple claimants or against multiple respondents from the start (*see* generally, Chrysoula Mavromati and Meg Kinnear, "Consolidation of Cases at ICSID" in Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum, Michael Pryles, edited by Neil Kaplan and Michael Moser (Kluwer Law International, 2018).

22. The arguments for and against consolidation are relatively clear, although not simple to reconcile. In many respects, these arguments oppose systemic interests with individual case interests.

23. The policy arguments most often raised in favor of consolidation include the following:

- Avoidance of inconsistent or contradictory awards: a single Tribunal deciding cases on a consolidated basis will apply similar logic and outcomes will be consistent;
- Avoidance of parallel proceedings: consolidation avoids parallel proceedings, at least among cases where there is no jurisdictional bar to consolidation;
- The time and cost of consolidated proceedings should be less than for multiple, individual proceedings, assuming the cases are sufficiently connected;
- By reducing time and cost, consolidation can enhance access to justice, especially for small and medium sized investors and developing States;
- Consolidation may promote better decision-making because the arbitrators have a more complete set of facts as context for their Award; and
- An ICSID consolidation rule could facilitate the joinder of proceedings based on different instruments of consent (*i.e.*, different treaties, contracts and legislation) and relying on different sets of procedural rules (*i.e.*, ICSID, Additional Facility, UNCITRAL). Consolidation provisions in a single investment treaty usually cannot accomplish this result.

24. The main arguments made against consolidation are that:

- Consolidation, especially mandatory consolidation, limits a party's autonomy to decide how and with whom to arbitrate a dispute (for a discussion on the role of consent in a consolidation proceeding under NAFTA, *see Canfor Corp. v. United States of America and Terminal Forest Products v. United States of America* (UNCITRAL), Order of the Consolidation Tribunal (September 7, 2005); and *Corn Products International v. Mexico* (ARB/(AF)/04/1) and *Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico* (ARB/(AF)/04/5), Order of the Consolidation Tribunal (May 20, 2005));
- Consolidation may put parties at a strategic disadvantage by having to agree on common rules, strategy, arbitrators, schedules, witnesses, and legal argument. Both claimants and respondents are concerned that consolidation limits their ability to

pursue review of an Award. Claimants may also worry that the presentation of their case will be weakened by co-claimants. Some respondents have insisted that each claimant individually defend their claim rather than consolidating related cases. A well-known example is the refusal of the Czech Republic to consolidate an arbitration commenced by Central European Media (CME) and an arbitration commenced by CME's ultimate majority shareholder, Ronald S. Lauder (*CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Final Award (March 14, 2003), 2001, ¶427; *Ronald S. Lauder v. The Czech Republic* (UNCITRAL), Final Award (September 3, 2001), ¶173). The *CME* and *Lauder* arbitrations resulted in irreconcilable findings, and have frequently been criticized for rendering inconsistent Awards based on the same fact situation;

- Consolidation may raise other complex case management issues, especially where numerous cases are consolidated. These include scheduling, how to hear the evidence of numerous parties, and how to assess damages and liability on an individual basis;

- Parties may have concerns about maintaining confidentiality in a consolidated case. In *Corn Products*, the Consolidation Tribunal refused to consolidate in part due to concern about protecting sensitive commercial information of the co-claimants, who were market competitors. On the other hand, in *Canfor* the Tribunal held that confidentiality should not be 'in and of itself a reason not to consolidate', and that confidential information could be protected through other means such as protective orders;

- Consolidation can slow the progress of cases, especially at the beginning when the terms of consolidation are being established. However, once established, consolidation ought to reduce the time and cost overall of deciding the claims;

- It is virtually impossible to include every relevant party in any single consolidated case. Parties may select different rules, initiate claims at different times or under different treaties. While a consolidation mechanism under the ICSID Rules could best mitigate these obstacles, no consolidation mechanism can avoid them entirely.

25. Consolidation can take various forms depending on the manner and extent to which proceedings are joined. Full consolidation refers to consolidating two or more claims in all respects. It combines multiple cases into one case, with one set of pleadings, a common Tribunal, a common hearing and a single Award.

26. Partial consolidation refers to the situation where only some claims are brought together in a consolidated proceeding, while the remaining claims stay with the individual Tribunals.

27. Some cases align only certain aspects of related cases, other aspects for individual determination in each of the related proceedings. While these are sometimes called partial consolidation, they might more accurately be termed as procedural alignment or case coordination.

28. Case coordination is used most frequently in practice. It involves a case-specific combination of: (i) a single Tribunal deciding the related cases; (ii) joint hearing(s) on the common issues in the related cases; (iii) a single set of pleadings for the claimant and respondent positions; and (iv) a single Award (or the same Award) in each of the like cases.

29. Consolidation may be either voluntary (*i.e.*, agreed to by the parties), or mandatory (*i.e.*, imposed on related cases by operation of law).

30. This Schedule uses "consolidation" both for consolidation of all claims (full consolidation) and consolidation of only some claims (partial consolidation). It uses the term "coordination" where claims are not technically consolidated, but the parties agree to some joint presentation of related cases.

31. The ICSID Convention, AR and A(AF)R currently do not have express provisions on consolidation. Most commentators agree that absent an express consolidation rule, an ICSID Tribunal cannot consolidate against the wishes of the parties (Christoph Schreuer *et al, The ICSID Convention: A Commentary* (CUP, 2nd ed, 2009), ¶131). Of course, ICSID cases may be consolidated voluntarily by agreement of the parties.

32. The proposed ICSID Rules could incorporate a voluntary consolidation rule, a mandatory consolidation rule, or both. Proposed AR 38 suggests a voluntary consolidation provision that also allows for coordination of cases. A mandatory consolidation provision for discussion is provided in this schedule, but is not incorporated in the draft rule texts. A Member State should first consider whether they want to include mandatory consolidation in the ICSID Rules and if so, what approach should be taken to a mandatory consolidation rule.

IV. VOLUNTARY CONSOLIDATION WITH PARTY CONSENT

33. The absence of an express consolidation rule has not prevented ICSID cases from being consolidated by consent of the parties. The ICSID Secretariat has encouraged voluntary consolidation in like cases and has coordinated such consolidation.

34. The scope of consolidation at ICSID has varied, with the nature of the joint procedures tailored to the specific case. A variety of procedural tools have been used, including appointing the same arbitrators, joint pleadings, joint hearings, common witnesses or experts, or rendering one Award. Sometimes parties use all of these techniques and sometimes they elect to use only some of these techniques in a case.

35. Most often, consolidation has been achieved by constituting Tribunals of the same composition in cases that share a common legal and factual background. *See*, for example:

- *Alcoa Minerals of Jamaica, Inc. v. Jamaica* (ARB/74/2), Decision on Jurisdiction and Competence (July 6, 1975), YB Comm. Arb. (1979) 206; *Kaiser Bauxite v Jamaica* (ARB/03/22), Award (6 July 1975), 1 ICSID Rep. 296 (1993), and *Reynolds Jamaica Mines Ltd and Reynolds Metals co v Jamaica*, (ARB/74/4), Order taking note of the discontinuance of the proceedings (October 12, 1977);

- *Salini Costruttori and Italstrade v. Morocco* (ARB/00/4), Decision on Jurisdiction (July 23, 2001), 42 ILM 609 (2003) and *Consortium RFCC v Kingdom of Morocco* (ARB/00/6), Award (December 22, 2003);

- *Sempra Energy International v. Argentina* (ARB/02/16), Award (September 28, 2007) and *Camuzzi International v. Argentina* (ARB/03/7), Decision of the Arbitral Tribunal on Objections to Jurisdiction (June 10, 2005);

- *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina* (ARB/03/13) Decision on Preliminary Objections (July 27, 2006), ¶16;

- *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina* (ARB/03/17), Decision on Jurisdiction (May 16, 2006) and *Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentina* (ARB/03/18);

- *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* (ARB/03/19), Decision on Jurisdiction (August 3, 2006); and *AWG Group Ltd. v. The Argentina* (UNCITRAL), Award (August 3, 2006);

- *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. Mexico* (ARB(AF)/04/3) and *Talsud, S.A. v. Mexico* (ARB(AF)/04/4), Award (June 16, 2010);

- *Kardassopoulos v. Georgia* (ARB/05/18) and *Fuchs v. Georgia* (ARB/07/15), Award (March 3, 2010);

- *von Pezold and others v. Zimbabwe* (ARB/10/15) Award (July 28, 2015) and *Border Timbers Limited v. Republic of Zimbabwe* (ARB/10/25);

- *Electricidad Argentina S.A. and EDF International S.A. v. Argentina* (ARB/03/22) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina* (ARB/03/23), Award (June 11, 2012) FN 1;

- *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ARB/12/14 and 12/40), Award (December 6, 2016);

- *Sanum Investments Limited v. Lao People's Democratic Republic* (ADHOC/17/1) and *Lao Holdings N.V. v. Lao People's Democratic Republic* (ARB(AF)/16/2), Procedural Order No. 1 (May 16, 2017), ¶25.1.)

36. Some parties have effectively consolidated by agreeing to discontinue an existing case and joining the claims into another, consolidated, proceeding (*BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea* (ARB/14/22), Procedural Order No. 5 (February 14, 2016), ¶¶1.2.1-1.2.2).

37. In most of these cases, claimants were not related to each other but alleged harm caused by similar measures of the same State. For example, in *Alcoa Minerals of Jamaica*, *Kaiser Bauxite*, and *Reynolds Jamaica Mines Ltd and Reynolds Metals co v. Jamaica* each investor had a mining concession contract with Jamaica, and claimed that the imposition of additional taxes by Jamaica breached the contracts. In *Salini v. Morocco* and *Consortium R.F.C.C v. Morocco* the claimants made claims arising out of highway construction agreements each had entered with Morocco. In *Sempra Energy International v. Argentina* and *Camuzzi International S.A. v. Argentina* the claimants were shareholders of the same gas distribution company allegedly harmed by the Respondent's measures.

38. Many consolidated claims at ICSID have relied on different investment instruments of consent (*e.g.*, *Aloca*, *Kaiser* and *Reynolds Metals v. Jamaica*; *Salini* and *Consortium R.F.C.C. v. Morocco*; *Sempra* and *Camuzzi v. Argentina*). Although most have been based on the same set of procedural rules, in particular the ICSID Convention AR, consolidation of cases under different rules is also possible. Generally, this has been done by aligning the composition of Tribunals and coordinating the proceedings. For example, in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentina* (ARB/03/19), and *AWG Group Ltd. v. The Argentine Republic* (UNCITRAL) the parties consented to have ICSID administer a related UNCITRAL case and to appoint the same arbitrators in the ICSID and UNCITRAL proceeding. In *Sanum Investments Limited v. Lao People's Democratic Republic* (ADHOC/17/1) and *Lao Holdings N.V. v. Lao People's Democratic Republic* (ARB(AF)/16/2), the parties consented to have ICSID administer the related *ad hoc* proceeding and appointed the same arbitrators in the two cases.

39. In most cases, the written and oral phase of the joined proceedings were coordinated, if not consolidated, and Tribunals issued a single Award (*i.e.*, in a single document). Finally, in most consolidated cases, claimants were represented by same counsel.

40. As can be seen from the above, each consolidation requires tailor-made procedures for the constitution of Tribunals, handling of evidence, legal argument, jurisdictional objections, schedules, confidentiality, and the issuance of Awards. This is usual case management. While it may be challenging with multiple cases or cases with numerous parties, it is certainly achievable, especially where the parties cooperate in these decisions.

V. PROPOSED RULE ON VOLUNTARY CONSOLIDATION

41. Several States and practitioners suggested that a rule be added addressing coordination of proceedings and voluntary consolidation, given their prevalence in practice. While an express rule is not strictly required, such a provision is proposed for the sake of clarity.

42. The proposed Rule suggests a voluntary consolidation and coordination process. Proposed AR 38 and (AF)AR 48 read as follows:

AR 38 / (AF)AR 48
Consolidation or Coordination on Consent of Parties

(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.

(2) The parties referred to in paragraph (1) shall provide the Secretary-General with written terms of reference, specifying the terms of consolidation or coordination to which they would consent.

(3) The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties if the consolidation or coordination requested would promote a fair and efficient resolution of all or any claims asserted in the arbitrations.

AR Article 38 / (AF)AR Article 48
Consolidation ou coordination consentie par les parties

(1) Les parties à un ou plusieurs arbitrages pendants et administrés par le Centre peuvent convenir de consolider ou coordonner ces arbitrages.

(2) Les parties mentionnées au paragraphe (1) doivent fournir au ou à la Secrétaire général(e) un acte de mission précisant les conditions de la consolidation ou de la coordination à laquelle elles consentiraient.

(3) Si le ou la Secrétaire général(e) considère que la consolidation ou la coordination demandée contribuera au règlement juste et efficace de toutes les demandes formulées dans les arbitrages, il ou elle prendra toutes les mesures administratives nécessaires à la mise en œuvre de l'accord des parties.

AR Regla 38 / (AF)AR Regla 48
Acumulación o Coordinación con el Consentimiento de las Partes

(1) Las partes de dos o más arbitrajes en curso administrados por el Centro podrán acordar acumular o coordinar estos arbitrajes.

(2) Las partes a las que se hace referencia en el párrafo (1) le proporcionarán al o a la Secretario(a) General términos de referencia escritos, especificando los términos de acumulación o coordinación que aceptarían.

(3) El o la Secretario(a) General realizará todas las actuaciones administrativas que sean necesarias para implementar el acuerdo de las partes si la acumulación o coordinación

solicitada promoviera una resolución justa y eficiente de la totalidad o de algunas de las reclamaciones planteadas en los arbitrajes.

43. The intent of this provision is to enable parties to consolidate or otherwise coordinate related proceedings to the fullest extent possible. It is intended to apply to all arbitrations "administered by the Centre", whether under the ICSID Convention Arbitration Rules, the Additional Facility Arbitration Rules or other arbitral rules including UNCITRAL and *ad hoc* arbitration, subject to applicable jurisdictional limitations.

44. Under the proposed rule, parties could consolidate two or more arbitrations under the ICSID Convention. This involves joining all or some claims under the ICSID Convention Rules. Similarly, they could consolidate an ICSID Convention case with an UNCITRAL or an *ad hoc* arbitration administered by the Centre. An UNCITRAL or an *ad hoc* arbitration may also be consolidated into an ICSID Convention proceeding if the applicable jurisdictional requirements are met.

45. If full or partial consolidation are not possible, parties can agree to case coordination. This could include constituting Tribunals composed of the same arbitrator, establishing a common timetable, providing for a single set of pleadings, holding joint hearings on common issues in the related cases, simplifying the presentation of evidence, or having a single Award. Any differences in the procedures required by the applicable rules would have to be respected to the extent that the parties do not or cannot agree otherwise.

46. Proposed AR 38(2) asks the parties to submit their proposed terms of consolidation or coordination in writing to the Secretary-General. This is to ensure that the parties' proposal addresses all the necessary aspects of the proposed arrangement (*e.g.*, effect of previous orders and decisions, if any; constitution or reconstitution of Tribunals, etc.), including the steps to be taken by the Secretary-General (*e.g.*, future case number and termination of arbitrations, etc.). It is intended to avoid a voluntary agreement that does not anticipate all necessary elements of coordination and could subsequently lead to delay or procedural difficulty.

47. The motivation for proposed AR 38(3) is not to second-guess the parties' decision to consolidate or otherwise coordinate their proceedings, but to ensure that the terms of reference can be properly implemented.

48. If proposed AR 38 is approved by Member States, ICSID will issue a practice note to assist parties in considering potential terms of consolidation and drafting sufficiently detailed terms of consolidation or coordination.

VI. MANDATORY CONSOLIDATION

49. The advantages and disadvantages of mandatory consolidation are the same as for voluntary consolidation, with the obvious difference that a party cannot refuse a mandatory

order of consolidation and hence cannot avoid any perceived adverse effects of consolidation.

50. At least 100 existing investment treaties, out of more than roughly 3,400 concluded to date, include consolidation provisions that may impose consolidation of all or part of a case if the relevant test is met. Some arbitration rules also contain mandatory consolidation provisions.

51. Article 1126 of NAFTA was among the first investment treaties to include a consolidation provision (*see* Meg N. Kinnear, Andrea K. Bjorklund and John F.G. Hannaford, 'Article 1126 – Consolidation', in *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (OUP 2009); Bernardo M. Cremades and Ignacio Madalena, *Parallel Proceedings in International Arbitration*, (2008) 24(4) Arb. Int. 507).

52. Consolidation under NAFTA Article 1126 does not require the specific consent of the parties to the dispute. Instead, parties are considered to have consented to consolidation under Article 1126 by initiating their claim under NAFTA Chapter 11 (*Canfor Consolidation Order*, paras 78-80; Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, (2014) 16(4) Arb. Int. 393, 414-415).

53. The purpose of Article 1126 is to ensure procedural economy and avoid inconsistent results (*Canfor Consolidation Order*). It is most likely to be invoked in situations where a single NAFTA State measure has given rise to multiple claims by multiple investors.

54. The procedure under Article 1126 is relatively simple, and typical of most treaty consolidation provisions. If one or more NAFTA Chapter 11 claims have a question of law or fact in common, any disputing party can ask the Secretary-General of ICSID to establish a Consolidation Tribunal. The Consolidation Tribunal must be appointed within 60 days after the request. It is composed of arbitrators from the NAFTA roster, or to the extent not available from that roster, from the ICSID Panel of Arbitrators. The President of the Consolidation Tribunal may not be a national of either disputing party, but the co-arbitrators must be nationals of the parties.

55. The Consolidation Tribunal can stay the individual proceedings while considering whether to consolidate. It has discretion to consolidate claims that have a question of law or fact in common if consolidation is in the interests of fair and efficient resolution of the claims. The Consolidation Tribunal must hear the parties before making its decision on consolidation. It can also assume jurisdiction over all or part of the claims or may determine one or more of the claims if this would assist in the resolution of the others.

56. Article 1126 requires the consolidated claims to be conducted pursuant to the UNCITRAL Arbitration Rules (presumably because Canada and Mexico were not ICSID members when NAFTA was signed; although Canada is now a member and Mexico will be a member effective August 26, 2018.

57. Once claims are consolidated, the original proceedings are stayed to the extent that they will be addressed by the Consolidated Tribunal.

58. A disputing party that was not involved in the consolidation application may apply to join the consolidated case.

59. Three NAFTA cases to date have addressed Article 1126. The first was the *Corn Products* case. Mexico applied to consolidate the claims of three American producers of high-fructose corn syrup concerning the imposition of a 20 per cent excise tax on soft drinks (Confirmation of Agreement of the Disputing Parties Regarding Consolidation, dated April 8, 2005. *See Corn Products*, Consolidation Order). Corn Products International requested arbitration on October 21, 2003, while Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. filed a request almost a year later, on August 4, 2004. On September 8, 2004, Mexico submitted a detailed request for consolidation. Subsequently Mexico and the claimants agreed on the composition and mandate of the Consolidation Tribunal. The Consolidation Agreement also stipulated that should consolidation be ordered, the disputing parties would agree on the composition of the Tribunal to hear the consolidated cases, and that the consolidated proceedings would be governed by the ICSID Additional Facility Arbitration Rules.

60. A Consolidation Tribunal was constituted on April 8, 2005 by the Secretary-General, in consultation with the parties. The Consolidation Tribunal refused to consolidate the two cases. Although it found that the claims shared questions of law or fact in common, it ruled that consolidation would not be in the interests of a fair and efficient resolution of the claims. The Consolidation Tribunal was especially concerned that complex confidentiality measures would be required to protect sensitive business information of the three applicants.

61. The second NAFTA request for consolidation was filed by the United States on March 7, 2005, with respect to three separate cases submitted by Canadian investors Canfor Corp., Terminal Forest Products Ltd, and Tembec Inc. The claimants were softwood lumber producers alleging losses from American countervailing duty and antidumping measures imposed on their products. In its request for consolidation, the United States contended that common issues of law and fact called for consolidation.

62. The Consolidation Tribunal was constituted by the ICSID Secretary-General and held a hearing on June 16, 2005. On September 7, 2005, the Tribunal granted the request for consolidation (*Canfor*, Consolidation Order). After determining that the claims shared many questions of law and fact, the Tribunal considered whether consolidation was 'in the interests of fair and efficient resolution of the claims'. In doing so, the Tribunal focused on three factors: (i) time; (ii) cost; and (iii) avoidance of conflicting decisions. With respect to time, the Consolidation Tribunal observed that no tribunal had yet issued a decision on jurisdiction and so the consolidation was timely. As to cost, it concluded that consolidated proceedings would be less costly for the U.S. than undertaking three separate arbitrations, and that the cost for each of the claimants would increase, "but not excessively". Finally, the Consolidation Tribunal held that in light of the numerous common questions of law and fact, there was a risk of conflicting awards if the cases were not consolidated.

63. The *Canfor* Consolidation Tribunal was not hindered by confidentiality concerns or the absence of consent to consolidation. It found that consent to Chapter 11 arbitration included

consent to consolidation. It also held that confidentiality is not a factor to be taken into account when considering the interests of fair and efficient resolution of the claims, save for exceptional cases where consolidation would defeat efficiency of process or would infringe on due process.

64. The third NAFTA request for consolidation was in *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL), Award on Jurisdiction (January 28, 2008)). Between March 16, 2005 and June 2, 2005, Canadian nationals in the beef and cattle business filed 109 different notices of arbitration alleging that US measures applied to Canadian-origin livestock and beef products as a result of bovine spongiform encephalopathy breached NAFTA Chapter 11. The Claimants organized themselves into a group called "Canadian Cattlemen for Fair Trade" and agreed with the respondent US to informal consolidation of their claims before a single tribunal. The consolidation agreement was memorialized in Procedural Order No. 1. The case was eventually dismissed for lack of jurisdiction.

VII. TREATY CONSOLIDATION PROVISIONS

65. About 100 investment treaties negotiated since NAFTA have provisions similar or identical to NAFTA Article 1126.

66. Like Article 1126, most of these treaties do not require that the disputing parties specifically consent to consolidation. Instead, they allow any party or all the disputing parties to apply for consolidation and a Consolidation Tribunal determines whether to grant the order based on criteria in the investment treaty. Only a small number of treaties require specific consent to consolidation. Examples of treaty consolidation provisions are included in: New-Zealand-China FTA (2008); China-Mexico BIT (2008); Malaysia-New Zealand FTA (2009); Japan-Peru FTA (2011); Mexico-Bahrain BIT (2012); New Zealand- Taiwan FTA ECA (2013); CETA (not yet in force); EU-Singapore FTA, Art. 3.24 (not yet in force); CPTPP (not yet in force).

67. Under most treaty provisions, either disputing party can move for consolidation. No specific cut-off date is set, although many treaties provide that consolidation should only be ordered if it is in the interest of the efficient resolution of the cases. In practice, if the cases to be consolidated are significantly advanced or on very different timelines, consolidation arguably might not be in the interest of efficient resolution. Some treaties allow parties to submit a joint application for consolidation (*see e.g.*, EU-Singapore).

68. Most of the treaty consolidation provisions require that the claims to be consolidated share a 'question of law or fact in common'. They may impose further criteria, such as the claims arising 'out of the same events or circumstances' or that consolidation serves the 'interest of fair and efficient resolution of the claims' (*see e.g.*, US Model BIT (2012), Art. 33(6); CPTPP (not yet in force)). Some treaties, especially those concluded by Mexico, also require that the claims are 'in relation to the same investment' and an absence of 'harm' or 'serious harm' caused by consolidating (*see* Mexico-Switzerland BIT (1995), Art. 6(2) and 6(3); Mexico-Netherlands BIT (1995), Art. 7(2) and 7(3); Mexico-Argentina BIT (1996), Art. 4(2) and 4(3); Mexico-Germany BIT (1998), Art. 15(2) and 15(3); Mexico-Italy BIT

(1999), Art. 5(2) and (3); Mexico-Korea BIT (2000), Art. 11(2) and (3); Mexico-Czech Republic BIT (2002), Arts 13(2) and (3); Mexico-Bahrain BIT (2012), Art. 14(2)).

69. Most of these treaties stipulate that the request for consolidation be made to the Secretary-General of ICSID, who must establish a Consolidation Tribunal, generally 30 or 60 days after receipt of the request. The new investment agreements concluded by the European Union require that the consolidation request be submitted to the President of the Tribunal, reflecting the investment court model adopted in these treaties (CETA, Art. 8.43.4. *See also* EU-Vietnam FTA (agreed text as of January 2016), Chapter II, Section III, Art. 33(2).; EU-Singapore).

70. A number of recent investment treaties vest the appointing authority (generally the Secretary-General) with screening powers over the request for consolidation. The applicable test for screening is that the consolidation request is not 'manifestly unfounded' (US Model BIT (2012), Art. 33(3); CPTPP (not yet in force)) The consolidation provision in the Chile-Japan EPA also grants the ICSID Secretary-General additional screening powers to consider whether the consolidation requirements in the treaty are met (Chile-Japan EPA (2007), Art. 101(3)).

71. There are two main approaches with respect to the nomination of arbitrators to the Consolidation Tribunal. The first approach requires all arbitrators to be appointed by a neutral authority, usually the ICSID Secretary-General (*see e.g.*, Chile-Japan EPA (2007), Art. 101(3)). In several cases, treaties identify a specifically established FTA-roster or the ICSID Panel of Arbitrators from which the arbitrators or at least the presiding arbitrator must be selected (*see e.g.*, Chile-Republic of Korea FTA (2003), Art. 10.28(4) and 10.30(5); Panama-Taiwan FTA (2003), Art. 10.25(4) and 10.27(5); Canada-Chile FTA (1996), Art. G-25(4) and G-27(5); NAFTA, Art. 1124(4) and 1126(5). Generally, there must be one national from each party, but the presiding arbitrator cannot be a national of either party.

72. The second approach, which is found mainly in investment treaties concluded by the US, requires that each party appoint one arbitrator and that the Secretary-General of ICSID appoint the presiding arbitrator and any other arbitrator not appointed by a party (*see e.g.* US Model BIT (2012), Art. 33; US-Republic of Korea FTA (2007), Art. 11.25(4) and 11.25(5); US-Singapore FTA (2003), Art. 15.24(4) and 15.24(5). The parties are free to select a co-national, but the presiding arbitrator must not be a national of either party.

73. Most treaties stipulate that the Consolidation Tribunal be established and conduct its proceedings under the UNCITRAL Arbitration Rules, likely to account for circumstances where one or more of the disputing parties cannot meet the requirements of the ICSID Convention (CPTPP (not yet in force)). This provision can be modified with consent of the disputing parties (assuming jurisdiction otherwise exists) (EU-Singapore FTA (not yet in force)).

74. Most treaties allow Consolidation Tribunals to assume jurisdiction over 'all or part of the claims' or, alternatively, to 'determine one or more of the claims if such determination

would assist in the resolution of others' (EU-Singapore FTA (not yet in force); CPTPP (not yet in force)).

75. These treaties usually give the Consolidation Tribunal power to stay the individual proceedings pending a decision on consolidation.

76. As to the scope of consolidation, it may be full or partial. Some treaties also give the Consolidation Tribunal the power to instruct a previously constituted tribunal to assume jurisdiction over all or any part of the claim, provided that Tribunal is reconstituted with the same composition except for the claimants' appointee who shall be nominated by agreement of all claimants or otherwise by the appointing authority (US Model BIT (2012), Art. 33(6)(c); US-Uruguay BIT (2005), Art. 33(6)(c); US-Peru FTA (2006), Art. 10.25(6)(c); Nicaragua-Taiwan FTA, Art. 10.25(6)(c); US-Colombia FTA (2006), Art. 10.25(6)(c); Australia-Chile FTA (2008), Art. 10.26(6)(c); Colombia-Panama FTA (2013), Art. 14.25(6)(c); New Zealand-Republic of Korea FTA, Art. 10.29(6)(c)).

77. Finally, most treaties allow a claimant not named in a consolidation request to apply to join the consolidated proceedings.

VIII. CONSOLIDATION PROVISIONS IN ARBITRAL RULES

78. Some arbitral rules have adopted consolidation provisions or similar joinder provisions. Article 31 of the CIETAC Investment Arbitration Rules includes a consolidation provision which allows a party to request consolidation, the arbitral institution to appoint a Consolidation Tribunal, and the Consolidation Tribunal to consolidate all or part of the case or to decide one of the claims. It states:

> Article 31 Consolidation of Arbitrations
>
> 1. Where two or more disputes have been submitted separately to arbitration under these Rules involving common questions of law or fact, and such disputes arise out of the same events or circumstances, any party may submit a request to consolidate the arbitrations.
>
> 2. A party seeking consolidation of arbitrations shall submit in writing such request to the IDSC or the CIETAC Hong Kong Arbitration Center that administers the case, the arbitral tribunal and all other parties, which shall specify: (a) the names and addresses of all parties to the arbitrations; and (b) the facts and grounds on which the consolidation request is based.
>
> 3. Where CIETAC considers the request for consolidation of arbitrations is justified, it shall, within thirty (30) days from the date of receipt of such request, constitute an arbitral tribunal pursuant to Chapter III of these Rules unless otherwise agreed by all parties to the arbitrations.

> 4. Where an arbitral tribunal constituted by virtue of this Article 31 is satisfied that two or more disputes submitted to arbitration involve common questions of law or fact arising out of the same events or circumstances, the arbitral tribunal may, in the interest of fair and efficient resolution of the disputes, and after consultation with the parties to the arbitrations, decide: (a) to consolidate the arbitrations and to render the award on all or part of the claims; or (b) to hear and render the award on one or more claims, but such award shall be made in the belief that it would facilitate the resolution of the other claim(s).
>
> 5. Where an arbitral tribunal constituted by virtue of this Article 31 has commenced to hear the consolidated arbitration, unless otherwise determined by such arbitral tribunal, the original arbitral tribunal of the cases before consolidation shall cease to have jurisdiction over the claim(s) which the arbitral tribunal constituted by virtue of Article 31 has assumed jurisdiction.
>
> 6. Upon application of a party, where an arbitral tribunal constituted by virtue of this Article 31 makes a decision under Paragraph 4 of this Article, the arbitral tribunal has the power to request that the proceedings of the original arbitral tribunal be stayed, unless the original arbitral tribunal has already suspended its proceedings.

79. Many commercial arbitration rules also include consolidation provisions. To the extent that they are available for ISDS, they may offer a vehicle to consolidate investment cases. (*see e.g.*, Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (2013), Art. 28; International Centre for Dispute Resolution (ICDR) Arbitration Rules (2014), Art.8; International Chamber of Commerce (ICC) Arbitration Rules (2017), Art. 10; Stockholm Chamber of Commerce (SCC) Arbitration Rules (2017), Art. 15.).

80. Usually, these rules allow consolidation if the parties agree. In addition, they typically allow a Tribunal or appointing authority to order consolidation where the claims are made under the same arbitration agreement, or under different but compatible arbitration agreements, if the arbitrations raise common questions of fact or law, and the relief arises out of the same transaction or legal relationship.

81. As a general rule, either party can move for consolidation. There is no time limit but progress of the proceedings and whether an arbitrator has been appointed must be considered in assessing whether to consolidate. Under most rules, the institution itself makes the decision. Few of these rules provide for the possibility of ordering a stay of the proceedings pending a request for consolidation. Some rules also require the appointing authority to consider whether consolidation would serve the expedition of the proceedings.

IX. COMMENTS RECEIVED BY ICSID

82. Several States and legal practitioners suggested an express rule on voluntary consolidation given its prevalence in practice.

83. In addition, numerous States and some organizations suggested that the ICSID Rules adopt a mandatory consolidation procedure along the lines of NAFTA Art. 1126. These comments supported mandatory consolidation in accordance with criteria to be listed in the rules. Some also suggested such a provision to expressly address procedural issues such as how to ensure confidentiality in a consolidated case.

84. One State suggested that instead of consolidation, Tribunals ought to be given discretion to stay cases raising the same facts or law pending decision on the first filed case, making consolidation unnecessary. In fact, proposed AR 54 and (AF)AR 63 allow a Tribunal to suspend the proceeding upon agreement of the parties, the request of a party or on its own initiative. Presumably if parties to a proceeding agreed it should be stayed pending a decision in a related proceeding, they could invoke the suspension rule.

X. OPTIONS FOR A MANDATORY CONSOLIDATION RULE

85. Any proposal on mandatory consolidation in the ICSID Rules will have to address a number of considerations. The chart below lists the usual options for each of these considerations.

HOW IS CONSENT TO CONSOLIDATION GIVEN?	• consent to consolidation is assumed from the fact of submitting the case under the ICSID Convention AR or (AF)AR; or • specific consent could be required for mandatory consolidation
WHO CAN REQUEST CONSOLIDATION?	• any disputing party may apply for consolidation order; • some, but not necessarily all, disputing parties affected by consolidation may apply jointly for a consolidation order; or • all disputing parties affected by consolidation must apply jointly for a consolidation order
TIMING OF APPLICATION	• at any time; or • before Tribunal established in any case to be consolidated
CONTENTS OF APPLICATION TO CONSOLIDATE	• sent to SG of ICSID, appointing authority, President of Court, or other person named to establish consolidation Tribunal; • in writing; • identify applicant(s), relevant cases, relevant facts, basis for consolidation and order requested; • provided to parties in all cases sought to be consolidated and includes their contact information

WHAT IS THE TEST FOR CONSOLIDATION? (CRITERIA CAN BE CUMULATIVE OR INDIVIDUAL)	• question of law or fact in common; • arise out of same events; • in the interest of fair and efficient resolution of the claims; • relate to same investment; • consolidation will not cause serious harm to any party affected by consolidation order; • potential for inconsistent awards exists absent consolidation; and/or • potential for double recovery exists absent consolidation
SCREENING POWER FOR CONSOLIDATION APPLICATION	• no screening powers; • SG or authority appointing for Consolidation Tribunal may screen application for consolidation – can refuse if application is manifestly unfounded or does not meet test
CONSTITUTING A TRIBUNAL TO DECIDE WHETHER TO CONSOLIDATE	• Could identify a person to make the decision and not have consolidating Tribunal (*e.g.*: SG of ICSID, Appointing Authority; President of ICJ) • If a Tribunal, consider: • Standing or *ad hoc*; • Number - one or three persons; • Nationality – may require they have different nationality than disputing parties, that only President of Tribunal have different nationality than all parties, or allow them to share nationality of any party; • Appointed by: – could be by SG of ICSID or other appointing authority, parties jointly, each party appoints an arbitrator and appointing authority appoints President; ensure appointing authority can appoint in default of party appointment or party agreement • Source of Arbitrators – anyone, ICSID Panel of Arbitrators, ICSID Panels of Arbitrators and Conciliators, another roster; • Time for Decision – decide within XX days
PROCESS OF CONSOLIDATING TRIBUNAL	• Allow all parties to make submissions in writing, orally, or both; • Time within which to require submissions and hearing
POWER OF CONSOLIDATING TRIBUNAL	• Decide on consolidation within X days; • Stay cases subject to consolidation order until decision to consolidate made; • Order full or partial consolidation – if partial, determine which aspects are to be consolidated; • Assume jurisdiction over and decide claims in full (with resignation of Tribunals in pending cases);

	• Assume jurisdiction over and decide consolidated portion of claims (automatic stay of other Tribunals with respect to consolidated portion); • Instruct one of Tribunals previously seized of a case to assume jurisdiction over consolidated cases (require consolidated claimants to name claimant nominee jointly, if any); • Order a single case to proceed and stay related cases pending determination; and/or • Issue a reasoned decision on consolidation within X days of last written or oral submission, or issue a consolidation order without reasons
ARBITRAL RULES APPLICABLE TO CONSOLIDATING TRIBUNAL	• Applicable rules if all cases were commenced under the same rules; • Combination of rules agreed to by parties in cases to be consolidated; • Additional Facility Rules; • UNCITRAL Rules • Consider which can be consolidated or coordinate (jurisdiction issue)
APPOINTMENT OF TRIBUNAL TO DECIDE CONSOLIDATED CASE	• Number - one or three persons; • Nationality – may require arbitrators have different nationality than disputing parties, that only President of Tribunal have different nationality than all parties, or allow them to share nationality of any party; • Appointed by: - SG or other appointing authority, parties jointly, each party appoints an arbitrator and appointing authority appoints President; ensure appointing authority can appoint in default of party appointment or party agreement; • Timing – appointment within X days of consolidation order; • Rules Applicable – as above: applicable rules if all cases commenced under the same rules, rules agreed to by parties, AF rules, UNCITRAL rules
SUBSEQUENT ADDITION OF PARTIES TO CONSOLIDATED CLAIM	• Party can apply to join consolidated portion of claim at any time – must prove it meets test for consolidation and that its addition would not disrupt consolidated claim

86. The following is a potential consolidation provision for discussion. This example provides:

- Consolidation under a single set of rules, rather than multiple rules. This is to ensure there is consent to the consolidation, given that it would be ordered on a mandatory basis (paragraph 1);

- A tripartite test for consolidating, looking at whether the cases arise out of the same circumstances, share a common question of law or fact, and would provide for a fair and efficient resolution of cases (paragraph 2);

- Is initiated by written request to Secretary-General with necessary information (paragraph 3);

- Secretary-General sends application to all affected parties and gives them 45 days to make submissions (paragraph 4);

- Secretary-General also sends application to affected Tribunals – this is so they can consider a stay or other relevant scheduling matters (paragraph 5);

- A single arbitrator is selected – this is intended to reduce cost (paragraph 6).

Rule 38BIS
Consolidation by Order

(1) A party may request full or partial consolidation of two or more arbitrations ("the individual arbitrations") pending under the ICSID Convention Arbitration Rules.

(2) The individual arbitrations proposed for consolidation shall:

(a) arise out of the same circumstances;

(b) have a question of law or fact in common; and

(c) if consolidated, promote a fair and efficient resolution of all or any of the claims asserted in the individual arbitrations.

(3) A party requesting consolidation shall file a written request with the Secretary-General specifying:

(a) the arbitrations proposed for consolidation;

(b) the grounds for consolidation;

(c) the relevant facts and evidence relied on, attaching supporting documents;

(d) observations on why consolidation is warranted; and

(e) the terms of consolidation sought in the order.

(4) The Secretary-General shall transmit the request for consolidation referred to in paragraph (1) to all parties named in the request and invite them to:

(a) submit their observations on the request with any supporting documents within 45 days after the date of receipt of the request; and

(b) indicate whether a hearing is requested or whether they consent to the order being made on the basis of the written submissions filed.

(5) The Secretary-General shall also transmit a copy of the request for consolidation to all arbitrators appointed in the individual arbitrations.

(6) The request for consolidation shall be decided by a single Consolidating Arbitrator who shall:

(a) be selected by the Secretary-General from the ICSID Panel of Arbitrators, after consulting as far as possible with the parties named in the request for consolidation;

(b) not have the nationality of any of the parties to the individual arbitrations;

(c) not be appointed in any of the individual arbitrations;

(d) be appointed as soon as possible, and no later than 60 days after the Secretary-General receives the request for consolidation referred to in paragraph (3); and

(e) set a date for a hearing on the request for consolidation, if required, to take place no later than 30 days after the Consolidating Arbitrator accepts the appointment.

(7) Pending the order on consolidation, each arbitration sought to be consolidated may be suspended by the Tribunal established for that individual arbitration, or suspended by the Secretary-General if no Tribunal has been constituted for the individual arbitration.

(8) The Consolidating Arbitrator may order consolidation of the individual arbitrations in full or in part, or may reject the request for consolidation. The Consolidating Arbitrator shall give brief reasons for the order within 45 days after the last written or oral submissions.

(9) If the Consolidating Arbitrator orders consolidation in full, the Tribunals constituted to hear the individual arbitrations shall be deemed discontinued pursuant to AR 53. If the Consolidating Arbitrator orders consolidation in part, the Tribunals constituted to hear the individual arbitrations shall continue only with respect to those parts that were not consolidated.

(10) If the Consolidating Arbitrator orders consolidation in full or in part, a Tribunal shall be constituted to hear and decide the Consolidated Arbitration.

(11) The Tribunal for the Consolidated Arbitration shall consist of three members, with one selected by the claimants jointly, one selected by the respondents jointly, and

the Presiding arbitrator selected by agreement of the claimants and the respondent. If the Tribunal for the Consolidated Arbitration has not been constituted within 45 days after dispatch of the order on consolidation, the Chairman shall appoint the arbitrators not yet appointed in accordance with the procedure in AR 25.

(12) The Tribunal for the Consolidated Arbitration may consider requests by other parties to join the Consolidated Arbitration. In so doing, the Tribunal shall consider the stage of the proceedings, the costs incurred to date by the existing parties, and whether the criteria referred to in paragraph (2) are met.

XI. NOTE ON CLASS CLAIMS

87. Several comments from States and the public suggested the creation of rules for class claims in ISDS. The concept of a class claim derives from class actions, where a group of representative claimants is certified to pursue litigation on behalf of all people similarly affected by the measure in question. This results in a single or few claimants, a single set of counsel and a single proceeding, but the outcome benefits the entire class of affected persons. As a result, it avoids multiple separate claims addressing the same conduct.

88. Class actions are available in numerous jurisdictions, including the U.S., Canada, Australia, New Zealand, Chile, and various European States. However, class actions are not available in the domestic jurisdictions of many ICSID member States. As a result, the proposed amendments to the Rules do not currently address this possibility.

SCHEDULE 8: TRANSPARENCY – ACCESS TO DOCUMENTS, ACCESS TO HEARINGS, AND NON-DISPUTING PARTY PARTICIPATION IN ICSID PROCEEDINGS

I. INTRODUCTION – SCOPE OF SCHEDULE 8

1. This Schedule considers: (1) the extent to which information about, and generated in, proceedings is publicly accessible; (2) public access to ICSID hearings; and (3) whether third parties (neither the claimant nor the respondent) can participate in a proceeding. Collectively, these topics are often referred to as transparency. The proposals address transparency in arbitration, conciliation, fact-finding, and mediation under the Convention and the Additional Facility. The provisions for arbitration and conciliation under the Convention and the Additional Facility are largely similar, except with respect to publication of Awards.

A. GENERAL POLICY CONSIDERATIONS

2. The current ICSID Rules balance openness and confidentiality in proceedings. The policy question for Member States in this amendment process is whether the ICSID Rules should mandate further transparency or remain as they are presently configured.

3. The arguments usually made in favor of increased transparency can be summarised as follows:

- Increased transparency will foster greater consistency, cohesiveness, and predictability in case outcomes: when case materials are publicly available, parties can better understand the law, focus their arguments more precisely, and predict likely outcomes more accurately. In turn, arbitrators can ensure their rulings consider interpretation of like provisions in other cases. While there is no formal precedent system in ISDS, Tribunals generally try to create a "jurisprudence constante", and they require access to caselaw to do so. Over time, greater predictability in ISDS should reduce the number and cost of cases.

- Increased transparency allows disputing parties to better comprehend the ISDS process and more effectively prepare litigation: parties can assess the procedural and substantive arguments available to them by referring to past cases. Parties can also make more informed decisions about arbitrator selection if they have access to prior orders, decisions and Awards.

- Increased transparency supports investment promotion and dispute avoidance: knowledge of prior decisions will help States draft more precise treaties and adopt policies that comply with their investment obligations. Investors equally benefit from increased predictability about investment obligations when they decide where to locate or expand their investments.

- Increased transparency enhances the public legitimacy of ISDS: access to documents, hearings, decisions and Awards enhances public understanding and confidence in ISDS.

4. The arguments usually made in favor of maintaining the current approach can be summarized as follows:

- The current ICSID Rules and Regulations provide an appropriate and established balance between transparency and confidentiality and are suitable for the broad range of parties and cases under those Rules.

- Greater consistency, cohesiveness and predictability can best be attained through more precise drafting of substantive obligations in individual treaties, laws and contracts.

- States have different views on transparency of proceedings, which can be individually accommodated by addressing transparency in specific investment treaties or by accession to the United Nations Convention on Transparency in Treaty Based Investor-State Arbitration (2017) (Mauritius Convention). Similarly, individual disputing parties can agree to enhanced transparency on a case-by-case basis. It is preferable to approach transparency in this fashion rather than impose the policy choices of some Member States through the ICSID Rules on other Member State which prefer different policies.

- Greater transparency may increase the cost and length of proceedings, especially due to third party participation. This includes the cost and time for a third party to develop its submission, for disputing parties to respond to the third-party petition and for the Tribunal to address the points raised by the third party. Increased time and cost may also be associated with redaction of documents, identification of *in camera* portions of hearings, and arrangements for public access to hearings.

B. EVOLUTION OF TRANSPARENCY IN ISDS

5. When the ICSID Convention came into effect on October 14, 1966, few of its provisions expressly addressed transparency of proceedings. Notably, Art. 48(5) of the Convention stated that Awards could only be published with consent of the parties, while current AFR 23 required that case registers for conciliation and arbitration be open to the public.

6. A focus on transparency in ISDS arose in the late-1990s, when the number of investor-State arbitrations began to increase. The discussion was raised primarily in the context of Chapter 11 of the North American Free Trade Agreement (NAFTA) (1994). In July 2001, the NAFTA Parties issued a binding note of interpretation (NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 2001)) confirming that there was no general duty of confidentiality in NAFTA cases and undertaking to publish all documents submitted to or issued by a Chapter 11 Tribunal, subject to redaction of confidential and privileged information. This was followed by statements of the NAFTA Free Trade Commission in October 2003 allowing non-disputing party participation in NAFTA arbitration (NAFTA Free Trade Commission, Statement of Free Trade Commission on non-disputing party participation (October 2003)) and an undertaking to consent to open hearings in NAFTA arbitration (NAFTA Free Trade

Commission, Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations (October 2003-2004)).

7. ICSID was the first arbitral institution to adopt rules governing public access to documents, open hearings and non-disputing party participation. In 2006, the ICSID Convention and Additional Facility rules were amended to increase transparency. These provisions govern transparency in proceedings based on party consent given after April 2006 (assuming the parties do not have treaty-specific transparency provisions and the Mauritius Convention is inapplicable) and apply to most pending cases at the Centre. The 2006 amendments related to:

- Publication of Awards and Other Documents: ICSID was required to publish excerpts of the legal reasoning in an Award if the parties did not consent to publication (current AR 48(4), A(AF)R Art. 53(3)). The Centre also published all other documents in the proceeding with consent of the parties and substantial benchmark information about each case;

- Public Attendance at Hearings: Unless either party objected, Tribunals could allow the public to attend hearings, subject to appropriate logistical arrangements. The Tribunal could also impose procedures to protect proprietary or privileged information during a hearing (current AR 32(2), A(AF)R Art. 39(2)); and

- Non-disputing party participation: After consulting with the parties, Tribunals could allow a non-disputing party to file a written submission addressing an issue within the scope of the arbitration if it assisted the Tribunal in deciding a relevant factual or legal issue (current AR 37(2), A(AF)R Art. 41(3)).

8. Older investment treaties often do not address transparency specifically or may mandate confidential proceedings. However, many investment treaties concluded in the last decade have included treaty-specific transparency provisions. The extent of transparency varies among these treaties. For example, Art. 10.20 and 10.21 of the Dominican Republic-Central America FTA (CAFTA-DR) (2006-7) require respondents to make case documents publicly available, including notices of intent, notices of arbitration, pleadings, memorials, minutes, transcripts of hearings, orders, decisions and Awards, except where these documents relate to protected information. Articles 9.16 and 9.17 of the investment chapter in the China-Australia Free Trade Agreement (ChAFTA) (2015) require requests for consultation, notices of arbitration, and orders, decisions and Awards to be public, but give the Treaty Parties discretion to make pleadings, submissions and transcripts public. Article 15 of the Agreement between Japan and the Republic of Kenya for the Promotion and Protection of Investment (Japan-Kenya BIT) (2016) gives the disputing Treaty Party the right to publish all documents submitted to or issued by a Tribunal, subject to redaction of confidential and privileged information. Article 8.36 of the Comprehensive Economic and Trade Agreement (CETA) (not yet in force), incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (UNCITRAL Rules on Transparency (2014)) and additionally requires public access to agreements to mediate, decisions on arbitrator challenges, and requests for consolidation. Article 9.24 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (not

yet in force) requires the parties to make public all notices of intent, notices of arbitration, pleadings, memorials, briefs, transcripts of hearings, orders, decisions and Awards, and to open hearings to the public subject to appropriate logistical arrangements for protected information.

9. Disputing parties can also agree on specific transparency arrangements on a case by case basis. For example, in *BSG Resources Ltd v. Republic of Guinea* (ARB/14/22), Procedural Order No. 1 (May 13, 2015) the disputing parties agreed to apply the UNCITRAL Rules on Transparency (2014) in an ICSID case.

10. On April 1, 2014, the UNCITRAL Rules on Transparency (2014) were adopted. The UNCITRAL Rules on Transparency apply to ISDS cases commenced under the UNCITRAL Arbitration Rules, including UNCITRAL cases administered by ICSID.

11. The main features of the UNCITRAL Rules on Transparency are:

- Application (Art. 1): the UNCITRAL Rules on Transparency apply to cases initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded after April 1, 2014, unless the Treaty Parties agree otherwise. Disputing parties or the Treaty Parties can agree to apply the UNCITRAL Rules on Transparency to cases initiated pursuant to treaties concluded before or after April 1, 2014, including cases initiated under rules other than the UNCITRAL rules;

- Publication of Benchmark Information (Art. 2): the UNCITRAL repository publishes names of the disputing parties, the economic sector involved, and the treaty at issue in a case;

- Public Documents in Proceedings (Art. 3): notices of application and responses to notices, statements of claim and defence, further written statements, lists of exhibits, reports and witness statements, non-disputing party submissions, transcripts, decisions, orders and Awards are published;

- Non-disputing party Submissions (Art. 4) can be filed with Tribunal permission;

- Non-disputing Treaty Party Submissions (Art. 5) can be filed as of right by a Party to the Treaty and a Tribunal can invite a Treaty Party to make a submission;

- Public hearings (Art. 6) shall be held, with provision to go *in camera* where necessary; and

- Exceptions to transparency (Art. 7) are listed, including confidential business information, information protected under the treaty or applicable law, information that would impede law enforcement, information the disclosure of which is contrary to national security interests, and if publication of the information would jeopardize the integrity of the arbitral process.

12. On October 18, 2017, the Mauritius Convention came into force. States ratifying the Mauritius Convention undertake to apply the UNCITRAL Rules on Transparency to all arbitrations initiated pursuant to investment treaties concluded before April 1, 2014. The Mauritius Convention can be ratified with or without reservations. Only 23 States had signed the Mauritius Convention as of July 1, 2018, of which four had ratified the Convention (Cameroon, Canada, Mauritius and Switzerland).

13. The UNCITRAL Rules on Transparency and the Mauritius Convention apply to treaty-based cases. They do not apply to cases based on consent in a contract or investment law.

C. CURRENT TRANSPARENCY REGIME IN ICSID CASES

14. The transparency measures currently applied to an ICSID case depend on a combination of: (i) the applicable investment instruments (treaty, contract, law); (ii) the applicable procedural rules; and (iii) party agreement in each case.

15. Few investment treaties have conciliation, fact-finding, or mediation provisions, and so transparency in these cases is usually governed by the ICSID Rules. In general, these Rules provide for confidentiality in conciliation, fact-finding and mediation, unless the parties agree otherwise.

16. The situation is more complex in arbitration because several different instruments may apply to the same case. The net effect of the applicable investment instruments, procedural rules and party agreement must be considered in each ICSID arbitration. The process to determine the applicable transparency regime in any given case can be summarized as follows:

- Specific Transparency Provisions are in the Investment Instrument: if the treaty, contract or investment law has specific provisions addressing transparency, these take precedence in an ICSID arbitration. Usually such provisions are found in BITs and MITs. Normally they increase transparency, although theoretically they could reduce transparency;

- Mauritius Convention is in Effect: if an ICSID case involves a BIT or a MIT and both the investor's home State and the respondent State have ratified the Mauritius Convention, the UNCITRAL Rules on Transparency will apply;

- No Instrument-Specific Provisions in Effect: if neither the Mauritius Convention nor specific transparency provisions in the applicable investment instrument apply, the relevant provisions of the ICSID Rules will govern transparency in ICSID cases;

- Party Agreement: disputing parties can consensually vary non-mandatory provisions in international investment instruments and procedural rules. Again, such agreements usually increase transparency, although theoretically they could reduce transparency.

17. Currently the ICSID Rules addressing transparency in an ICSID Convention or Additional Facility arbitration are as follows:

- Extensive information about the Centre and its operations is published online and in hard copy pursuant to current AFR 22(1);

- Extensive benchmark data on each case is published on the ICSID website pursuant to current AFR 23. This includes the names of the disputing parties, counsel and Tribunal members, the method of their appointment, the economic sector and subject matter involved, the instrument of consent invoked, applicable rules, and the stage of proceedings;

- Tribunal members must maintain the confidentiality of information obtained in the proceeding and deliberate in confidence. A Tribunal may authorize another person to attend the deliberation, and usually Tribunals authorize the Tribunal Secretary and the Tribunal Assistant to attend the deliberation so they can assist the Tribunal (current AR 6, 15; A(AF)R Art. 13, 23);

- Pleadings and Supporting Documents: Parties may consent to publish pleadings and supporting documents filed in a proceeding. However, they may refuse to do so, or may agree to publish redacted versions of these documents. This includes materials such as memorials, submissions, observations, statements by fact and expert witnesses, and exhibits. The extent of such consent is usually addressed at the first session. Documents are published on the ICSID website under the case name. ICSID also publishes bibliographic links to documents published on other websites;

- Tribunals may allow third parties to file a non-disputing party (NDP) submission. In considering whether to allow an NDP submission, the Tribunal must consider, among other things, the criteria listed in current AR 37(2) or A(AF)R Art. 41(3);

- Non-disputing State Parties may request permission to make an NDP submission under current AR 37(2) or A(AF)R Art. 41(3) or be asked to do so voluntarily by a Tribunal or disputing party. If the case is closed to the public, the non-disputing State Party can attend hearings only if the disputing parties agree or the applicable treaty confers this right;

- Parties are encouraged to make hearings accessible to the public, generally through web-casting, however they may refuse to do so (current AR 32(2); A(AF)R Art. 39(2)). Public hearings go *in camera* when confidential information is being addressed;

- Numerous interlocutory orders and decisions are issued by Tribunals during an arbitration. These may address significant questions such as the basis for upholding jurisdiction, the merits of a claim, availability of provisional measures, the scope of documents to be produced, evidentiary rulings, deciding an arbitrator challenge, or whether a non-disputing party may file a submission. Other orders and decisions address routine matters such as the schedule for filing pleadings, hearing dates, and logistical directions for the parties. Orders and decisions are made public by the Centre with consent of the parties, and may include redactions agreed to by the parties. Publication of orders and decisions is usually addressed

by the disputing parties in the first procedural order and ICSID requests permission to publish orders and decisions when they are issued and again at the end of each case;

- The final document deciding an ICSID case is the Award (or a decision on annulment in annulment proceedings). There is only one Award in every ICSID case, and it catalogues the facts, issues, interlocutory decisions, final ruling on all pertinent matters, and determination of costs (current AR 48). Publication of Awards in arbitration is treated differently by the ICSID Convention and the AF arbitration rules.

    - ICSID Convention Arbitration Awards are published by the Centre with consent of the parties. This reflects the prohibition in Art. 48(5) of the Convention on publishing Awards without party consent. An amendment to the ICSID Convention would be required to modify Art. 48(5). If a party objects to publication, the Centre publishes excerpts of the legal reasoning in the Award pursuant to current AR 48(4);

    - ICSID Additional Facility Arbitration Awards are not subject to the prohibition in Art. 48(5) of the Convention. Instead, these Awards are reviewed in accordance with the law of the seat of arbitration. To facilitate this, current A(AF)R Art. 52(3) and 53(4) permit publication of the Award to the extent required by law where the Award is made. AF Awards are published with consent of the parties and ICSID publishes excerpts of AF Awards if the parties do not consent to publication.

18. In recent years, disputing parties have increasingly consented to publication of Awards and some decisions or orders. Publication of other types of case materials is less frequent.

19. The text below explains the proposals on transparency in detail.

II. PROPOSALS ON TRANSPARENCY MEASURES FOR THE CENTRE

CURRENT RELATED PROVISIONS: AFR 22, 23

AFR 22 / (AF)AFR 3
Publication

With a view to furthering the development of international law in relation to investment, the Centre shall publish:

(a) information about the operation of the Centre; and

(b) documents generated in proceedings, in accordance with the applicable rules.

AFR Article 22 / (AF)AFR Article 3
Publication

Afin de contribuer au développement du droit international en matière d'investissements, le Centre publie :

(a) des informations sur les activités du Centre ; et

(b) les documents générés dans les instances, conformément aux règles applicables.

AFR Regla 22 / (AF)AFR Regla 3
Publicaciones

Con el fin de fomentar el desarrollo del derecho internacional en materia de inversión, el Centro publicará:

(a) información sobre las actividades del Centro; y

(b) documentos generados en los procedimientos, de conformidad con las normas aplicables.

AFR 23 / (AF)AFR 4
The Registers

The Secretary-General shall maintain and publish a Register for each case containing all significant data concerning the institution, conduct and disposition of the proceeding, including the method of constitution and the membership of each Commission, Tribunal and Committee.

AFR Article 23 / (AF)AFR Article 4
Registres

Le ou la Secrétaire général(e) tient et publie un registre pour chaque affaire, dans lequel figurent toutes les informations importantes concernant l'introduction, la conduite et l'issue de l'instance, y compris la méthode de constitution de chaque Commission, Tribunal et Comité, et sa composition.

AFR Regla 23 / (AF)AFR Regla 4
Los Registros

El o la Secretario(a) General mantendrá y publicará un Registro de cada caso que contenga toda la información relevante sobre la iniciación, la tramitación, y terminación del procedimiento, lo cual incluye el método de constitución y la integración de cada Comisión, Tribunal y Comité.

20. The Centre has a tradition of transparency with respect to its own operations, and the provisions governing this aspect of transparency continue the established approach. Proposed AFR 22 and (AF)AFR 3 simplify current AFR 22(1), while maintaining the obligation to publish information about the Centre.

21. Proposed AFR 22(b) and (AF)AFR 3(b) affirm that the Centre publishes case documents "in accordance with the applicable rules". This ensures that publication is consistent with any specific transparency rules in a treaty or other investment instrument.

III. PROPOSALS ON TRANSPARENCY IN CONCILIATION

CURRENT RELATED PROVISIONS: Convention Art. 35; CR 33(3); C(AF)R Art. 39

CR 7 / (AF)CR 15
Confidentiality

Documents generated in the conciliation shall be confidential. The parties to a conciliation may consent to:

(a) disclosure of any document generated in the conciliation to a non-party;

(b) disclosure by one party of any document obtained from the other party in the conciliation; and

(c) publication by the Centre of documents generated in connection with the proceeding.

CR Article 7 / (AF)CR Article 15
Confidentialité

Les documents générés au cours de la conciliation sont confidentiels. Les parties à une conciliation peuvent consentir à :

(a) la divulgation à une personne autre qu'une partie de tout document généré au cours de la conciliation ;

(b) la divulgation par une partie de tout document obtenu de l'autre partie au cours de la conciliation ; et

(c) la publication par le Centre de tous documents générés en relation avec l'instance.

CR Regla 7 / (AF)CR Regla 15
Confidencialidad

Los documentos que se originen durante la conciliación serán de carácter confidencial. Las partes de una conciliación podrán consentir a:

(a) la revelación a quien no sea parte de cualquier documento que se origine durante la conciliación;

(b) la revelación por una parte de cualquier documento obtenido de la otra parte durante la conciliación; y

(c) la publicación por parte del Centro de los documentos que se originen en relación con el procedimiento.

CR 8 / (AF)CR 16
Use of Information in Other Proceedings

Unless the parties to the dispute agree otherwise pursuant to Article 35 of the Convention, neither party shall rely on any of the following in other dispute settlement proceedings:

(a) any views expressed, statements, admissions, or offers of settlement made, or positions taken by the other party in the conciliation;

(b) the Report, order, decision, or any recommendation made by the Commission in the conciliation; or

(c) documents generated in connection with the proceeding.

CR Article 8 / (AF)CR Article 16
Utilisation d'informations dans d'autres instances

Sauf accord contraire entre les parties au différend conformément à l'article 35 de la Convention, aucune d'elles ne peut, à l'occasion d'une autre procédure de règlement du différend, se fonder sur :

(a) toutes opinions exprimées, déclarations, admissions ou offres de règlement faites, ou positions prises, par l'autre partie au cours de la conciliation ;

(b) le procès-verbal établi, toute ordonnance ou décision rendue ou toute recommandation faite par la Commission au cours de la conciliation ; ou

(c) tous documents générés en relation avec l'instance.

CR Regla 8 / (AF)CR Regla 16
Utilización de Información en el Marco de Otros Procedimientos

Salvo acuerdo en contrario de las partes de la diferencia de conformidad con lo dispuesto en el Artículo 35 del Convenio, ninguna de ellas podrá invocar lo siguiente en cualquier otro procedimiento de arreglo de diferencias:

(a) las consideraciones, declaraciones, admisiones, u ofertas de avenencia realizadas, o posiciones adoptadas por la otra parte durante la conciliación;

(b) el informe, la resolución, la decisión o cualquier recomendación formulada por la Comisión durante la conciliación; o

(c) los documentos originados en relación con el procedimiento.

22. The proposals on publication of documents and observation of proceedings in conciliation allow the parties to consent to publication of any document. However, given the non-binding and consensual nature of these processes, publication is not mandatory.

23. Proposed CR 8 and (AF)CR 16 reiterate the prohibition on using statements, admissions, settlement offers, positions taken by a party, recommendations or the Report from the conciliation process in a different proceeding. This provides parties with assurance that their communications in the conciliation are made "without prejudice", giving them confidence to make *bona fide* efforts to resolve the dispute.

IV. PROPOSALS ON TRANSPARENCY IN ADDITIONAL FACILITY FACT-FINDING

(AF)FFR 13
Confidentiality of the Fact-Finding and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the fact-finding, other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential.

(2) The parties shall not make any use of information or documents obtained in the fact-finding, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the Committee during the fact-finding in other proceedings.

(AF)FFR Article 13
Confidentialité de la constatation des faits et utilisation d'informations dans d'autres instances

(1) Sauf accord contraire des parties, toutes les questions relatives à la constatation des faits, autres que les informations publiées par le Centre en vertu du Règlement financier et administratif (Mécanisme supplémentaire), demeurent confidentielles.

(2) Les parties ne doivent pas, à l'occasion d'autres instances, utiliser des informations ou des documents obtenu(e)s dans le cadre de la constatation des faits, ni se fonder sur des positions prises, des admissions faites ou des opinions exprimées par l'autre partie ou le Comité au cours de la constatation des faits.

(AF)FFR Regla 13
Confidencialidad de la Comprobación de Hechos y Utilización de Información en el Marco de Otros Procedimientos

(1) Salvo acuerdo en contrario de las partes, todas las cuestiones relacionadas con la comprobación de hechos, con la salvedad de la información a ser publicada por el Centro de conformidad con la Regla 4 del Reglamento Administrativo y Financiero (Mecanismo Complementario), serán de carácter confidencial.

(2) Las partes no utilizarán en el marco de otros procedimientos, ninguna información ni ningún documento obtenido en la comprobación de hechos, y no invocarán ninguna postura adoptada, admisión realizada u opinión expresada por la otra parte o el Comité durante la comprobación de hechos.

24. Proposed (AF)FFR 13(1) addresses confidentiality in fact-finding and collateral use of materials obtained in the fact-finding process. The essential rule is that all matters related to fact-finding are confidential unless the parties otherwise agree. The exception to this is that the Centre may publish benchmark information about the proceeding pursuant to the Administrative and Financial Regulations of the Additional Facility. This rule is intended to ensure the parties are able to share information freely with the fact-finders, unconstrained by concern that it will be publicly disclose. It also helps to ensure that the fact-finder operates solely on the basis of the inquiries made and information accumulated in the fact-finding process.

25. Proposed (AF)FFR 13(2) borrows from the Conciliation Rules and provides that parties may not use information obtained through the fact-finding in any other proceeding. This prohibition on collateral use of such information is intended to give parties further confidence that the fact-finding will not be prejudicial to it in a related proceeding and encourages full sharing of information.

V. PROPOSALS ON TRANSPARENCY IN ADDITIONAL FACILITY MEDIATION

(AF)MR 16
Confidentiality of the Mediation and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the mediation other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential, except to the extent that disclosure may be required by law or for purposes of implementation and enforcement.

(2) The parties may consent to the publication by the Centre of documents generated in connection with the mediation.

(3) The parties shall not make any use of information or documents obtained in the mediation, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in other proceedings.

(AF)MR Article 16
Confidentialité de la médiation et utilisation d'informations dans d'autres instances

(1) Sauf accord contraire des parties, toutes les questions relatives à la médiation, autres que les informations publiées par le Centre en vertu du Règlement financier et administratif (Mécanisme supplémentaire), demeurent confidentielles, sauf dans la mesure où leur divulgation peut être exigée légalement ou aux fins de mise en œuvre et d'exécution.

(2) Les parties peuvent consentir à la publication par le Centre de documents générés en relation avec la médiation.

(3) Les parties ne doivent pas, à l'occasion d'autres instances, utiliser des informations ou des documents obtenu(e)s dans le cadre de la médiation, ni se fonder sur des positions prises, des admissions faites ou des opinions exprimées par l'autre partie ou le ou la médiateur(trice) au cours de la médiation.

(AF)MR Regla 16
Confidencialidad de la Mediación y Utilización de Información en el Marco de otros Procedimientos

(1) Salvo acuerdo en contrario de las partes, todas las cuestiones relacionadas con la mediación, con la salvedad de la información a ser publicada por el Centro de conformidad con la Regla 4 del Reglamento Administrativo y Financiero (Mecanismo Complementario), serán de carácter confidencial, salvo en la medida que la revelación pueda ser requerida por ley o a los fines de implementación y ejecución de la misma.

(2) Las partes podrán consentir a la publicación por el Centro de documentos que se originen en relación con la mediación.

(3) Las partes no utilizarán en el marco de otros procedimientos, ninguna información ni ningún documento obtenido en la mediación, y no invocarán ninguna postura adoptada, admisión realizada u opinión expresada por la otra parte o el o la mediador(a) durante la mediación.

26. Proposed (AF)MR 16 is identical to proposed (AF)FFR 13, and motivated by the same policy goals. It provides that mediation is confidential except for the benchmark publication of materials by the Centre in accordance with the Administrative and Financial Regulations. It also prohibits collateral use of information obtained in the course of mediation.

VI. COMMENTS RECEIVED ON PUBLICATION OF DOCUMENTS

27. ICSID received approximately 20 submissions on matters related to publication of documents in arbitration proceedings. These were primarily from Member States, but also from several organizations and individuals. Every submission supported greater transparency in principle, although States expressed a wide variety of positions on which documents should be public.

28. Several submissions suggested that the Mauritius Convention/UNCITRAL Rules approach would be an appropriate model for ICSID. One organization commented that States desiring the level of transparency prescribed by the Mauritius Convention should ratify that treaty, but that similar provisions in the ICSID Rules would implement transparency more quickly and broadly.

29. Some States emphasized the importance of publishing Awards, orders and decisions, but were less concerned about publication of case submissions and other supporting documents. Other States suggested that submissions and supporting documents should be public, except where either party expressly objected. One State suggested that witness statements and expert reports should remain confidential.

30. Several States suggested that increased publication of documents should be accompanied by express provisions allowing for redaction of confidential information. Multiple categories of confidential information were suggested, including professional confidence, commercial and business confidences, industrial and trade secrets, personal information, information affecting essential security interests, and confidences established by domestic legislation.

31. ICSID received one comment proposing increased transparency in conciliation, relating to publication of the Report and observation of meetings. These matters are addressed in proposed CR 7 and 8 and (AF)CR 15 and 16.

32. No comments were received concerning transparency in fact-finding or mediation.

VII. PROPOSALS ON PUBLICATION OF DOCUMENTS IN ARBITRATION

33. The proposals concerning publication of documents relate to arbitration under the ICSID Convention and ICSID Additional Facility. They are similar except that ICSID Convention Art. 48(5) prohibits publication of Awards without consent of the parties. The Convention Arbitration Rules address this particularity through current AR 48(4).

34. In summary, the proposals on publication of documents in arbitration would: (i) increase the number of Awards published in ICSID Convention arbitration; (ii) maintain the requirement for ICSID to publish extracts of Awards in ICSID Convention arbitration, absent party consent to publish; (iii) require publication of Awards in ICSID AF arbitration; (iv) require publication of orders and decisions in both ICSID Convention and AF arbitrations; (v) include a process for redaction of Awards, orders and decisions, and to obtain a Tribunal decision on disputed redactions; and (vi) allow parties to publish other documents they filed in an arbitration, with agreed upon redactions. This is summarized in the following chart:

Publication of Awards, Orders and Decisions in Arbitration (AR 44-46) and (AF)AR 54-55

35. In assessing this proposal, Member States should recall the various options available to States to calibrate the level of public access to documents in ICSID cases: they can ratify the Mauritius Convention, add specific transparency provisions to their individual investment instruments or endeavour to reach consensus on the level of transparency in individual cases.

36. The approach proposed for the amended Rules tries to accommodate the varying positions of Member States and accounts for the fact that there is no potential for "opt out" or ratification with reservations under the ICSID Rules (unlike under the Mauritius Convention). Hence the proposal must be workable for a sufficient number of Member States that may have different positions on this question.

37. Member States should also recall that ICSID cases arise out of investment contracts and laws, and not just treaties. The transparency regime adopted should be suitable to cases based on all of these different types of instrument.

A. ICSID CONVENTION ARBITRATION

CURRENT RELATED PROVISIONS: Convention Art. 48(5); AR 48(4)

Chapter VII
Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 44
Publication of Awards and Decisions on Annulment

(1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.

(2) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the date of dispatch of the document.

(3) Absent consent of the parties referred to in paragraphs (1) or (2), the Centre shall publish excerpts of the legal reasoning in such documents ("excerpts"). The following procedure shall apply to publication of excerpts:

(a) the Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to publication of a document referred to in paragraph (1);

(b) the parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt; and

(c) the Centre shall publish excerpts within 30 days after receipt of the parties' comments on the proposed excerpts, if any.

Chapitre VII
Publication, accès à l'instance et écritures des parties non contestantes

Article 44
Publication des sentences et des décisions sur l'annulation

(1) Avec le consentement des parties, le Centre publie toute sentence, décision supplémentaire d'une sentence, rectification, interprétation et révision d'une sentence, et toute décision sur l'annulation.

(2) Le consentement à publier les documents visés au paragraphe (1) est réputé avoir été donné si aucune partie ne s'oppose par écrit à une telle publication dans les 60 jours suivant la date d'envoi du document.

(3) À défaut du consentement des parties visé aux paragraphes (1) ou (2), le Centre publie des extraits du raisonnement juridique contenu dans ces documents (« extraits »). La procédure suivante s'applique à la publication d'extraits :

(a) le Centre propose des extraits aux parties dans les 30 jours suivant la réception d'une notification par laquelle une partie refuse son consentement à la publication d'un document visé au paragraphe (1) ;

(b) les parties peuvent faire part au Centre de leurs commentaires sur les extraits proposés dans les 30 jours suivant leur réception ; et

(c) le Centre publie des extraits dans les 30 jours suivant la réception des éventuels commentaires des parties sur les extraits proposés.

Capítulo VII
Publicación, Acceso al Procedimiento y Presentaciones de Partes No Contendientes

Regla 44
Publicación de Laudos y Decisiones sobre Anulación

(1) El Centro publicará todo laudo, decisión suplementaria sobre un laudo, rectificación, aclaración, y revisión de un laudo y decisión sobre anulación, con el consentimiento de las partes.

(2) Si ninguna de las partes objeta por escrito a la publicación de los documentos a los que se hace referencia en el párrafo (1) dentro de los 60 días siguientes a la fecha de envío del documento, se considerará que esta ha otorgado su consentimiento para publicarlos.

(3) En ausencia del consentimiento de las partes al que se hace referencia en los párrafos (1) o (2), el Centro publicará extractos del razonamiento jurídico de dichos documentos ("extractos"). El siguiente procedimiento será aplicable a la publicación de extractos:

(a) el Centro les propondrá extractos a las partes dentro de los 30 días siguientes a la recepción de la notificación de que una parte se niega a consentir a la publicación de uno de los documentos a los que se hace referencia en el párrafo (1);

(b) las partes podrán enviar comentarios al Centro sobre los extractos propuestos, dentro de los 30 días siguientes a su recepción; y

(c) el Centro publicará los extractos dentro de los 30 días siguientes a la recepción de los comentarios de las partes sobre los extractos propuestos, si los hubiera.

Rule 45
Publication of Orders and Decisions

(1) The Centre shall publish orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.

(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on the redactions, the Centre shall refer the order or decision to the Tribunal to determine any redactions, and shall publish the order or decision with the redactions approved by the Tribunal.

Article 45
Publication des ordonnances et des décisions

(1) Le Centre publie les ordonnances et les décisions dans les 60 jours suivant la date à laquelle elles ont été rendues, avec tous caviardages convenus entre les parties et notifiés conjointement au Centre dans ce délai de 60 jours.

(2) Si l'une des parties notifie au Centre, dans le délai de 60 jours visé au paragraphe (1), que les parties ne sont pas d'accord sur les caviardages, le Centre soumet l'ordonnance ou la décision au Tribunal qui détermine le caviardage à effectuer, et publie l'ordonnance ou la décision avec les caviardages approuvés par le Tribunal.

Regla 45
Publicación de Resoluciones y Decisiones

(1) El Centro publicará resoluciones y decisiones dentro de los 60 días siguientes a su emisión, con cualquier supresión de texto que haya sido acordada por las partes y notificada conjuntamente al Centro dentro del plazo de 60 días.

(2) Si cualquiera de las partes notificara al Centro dentro del plazo de 60 días al que se refiere el párrafo (1) que las partes no están de acuerdo respecto de las supresiones de texto, el Centro remitirá la resolución o decisión al Tribunal quien determinará las supresiones de texto que deban ser realizadas, y publicará la resolución o decisión con las supresiones de texto que sean aprobadas por el Tribunal.

Rule 46
Publication of Documents Filed by a Party

Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.

Article 46
Publication des documents déposés par une partie

À la demande d'une partie, le Centre publie toutes écritures, observations, ou tous autres documents que cette partie a déposés au cours de l'instance, avec les caviardages convenus entre les parties.

Regla 46
Publicación de Documentos Presentados por una Parte

A solicitud de una de las partes, el Centro publicará cualquier escrito, observación u otro documento que esa parte haya presentado en el marco del procedimiento, con las supresiones de texto acordadas por las partes.

B. ICSID Additional Facility Arbitration

CURRENT RELATED PROVISIONS: A(AF)R Art. 53(3)

Chapter VIII
Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 54
Publication of Awards, Orders and Decisions

(1) The Centre shall publish Awards, orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.

(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on redactions, the Centre shall refer the Award, order or decision to the Tribunal to determine any redactions, and shall publish the Award, order or decision with the redactions approved by the Tribunal.

Chapitre VIII
Publication, accès à l'instance et écritures des parties non contestantes

Article 54
Publication des sentences, ordonnances et décisions

(1) Le Centre publie les sentences, les ordonnances et les décisions dans les 60 jours suivant la date à laquelle elles ont été rendues, avec tous caviardages convenus entre les parties et notifiés conjointement au Centre dans ce délai de 60 jours.

(2) Si l'une des parties notifie au Centre, dans le délai de 60 jours visé au paragraphe (1), que les parties ne sont pas d'accord sur les caviardages, le Centre soumet la sentence, l'ordonnance ou la décision au Tribunal qui détermine le caviardage à effectuer, et publie la sentence, l'ordonnance ou la décision avec les caviardages approuvés par le Tribunal.

Capítulo VIII
Publicación, Acceso al Procedimiento y Presentaciones de Partes No Contendientes

Regla 54
Publicación de Laudos, Resoluciones y Decisiones

(1) El Centro publicará laudos, resoluciones y decisiones dentro de los 60 días siguientes a su emisión, con cualquier supresión de texto que haya sido acordada por las partes y notificada conjuntamente al Centro dentro del plazo de 60 días.

(2) Si cualquiera de las partes notificara al Centro dentro del plazo de 60 días al que se hace referencia en el párrafo (1) que las partes no están de acuerdo respecto de las supresiones de texto, el Centro remitirá la resolución o decisión al Tribunal quien determinará las supresiones a realizar, y publicará el laudo, la resolución o decisión con las supresiones de texto aprobadas por el Tribunal.

Rule 55
Publication of Documents Filed by a Party

Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.

Article 55
Publication des documents déposés par une partie

À la demande d'une partie, le Centre publie toutes écritures, observations, ou tous autres documents que cette partie a déposés au cours de l'instance, avec les caviardages convenus entre les parties.

Regla 55
Publicación de Documentos Presentados por una Parte

A solicitud de una de las partes, el Centro publicará cualquier escrito, observación u otro documento que esa parte haya presentado en el marco del procedimiento, con las supresiones de texto acordadas por las partes.

38. The provisions concerning publication of documents in ICSID Convention and Additional Facility arbitration are proposed AR 44, 45 and 46, and (AF)AR 54 and 55.

39. ***First***, proposed AR 44(1) reiterates that Awards will be published with party consent. In this respect, "Award" includes supplementary decisions on an Award, rectification, interpretation, or revision of the Award, as well as decisions on annulment. As always, parties may consent to publication in full or with redaction for confidential information.

40. ***Second***, proposed AR 44(2) and AR 44(3) accommodate the constraints imposed by Convention Art. 48(5) (no publication of an Award without consent of the parties), which cannot be changed without amendment of the ICSID Convention.

41. Proposed AR 44(2) adds a new provision. It states that consent to publish an Award shall be deemed to have been given if a party has not objected in writing to publication of the Award within 60 days of its dispatch. Thus, if neither party objects to publication within the 60-day period, the Award will automatically be published in full. If either party objects to publication within the 60-day period, the Award will not be published other than in extract, as is currently the case.

42. Proposed AR 44(2) would require a decision on publication within a reasonable time after dispatch of the Award. The proposed rule imposes relatively short time limits on both the Centre and the parties to the dispute. It also puts the Centre on notice that excerpts should be prepared.

43. Proposed AR 44(2) does not preclude the parties from giving consent to publication earlier in the process or with redaction. Nor does it prevent the parties from agreeing to publication with mutually agreed redactions at any subsequent time.

44. ***Third***, if a party refuses consent to publish a Convention Arbitration Award, the Centre would follow the current practice of publishing excerpts of the legal reasoning. The Centre prepares such excerpts and requests party input on the proposed extracted Award before publication. Proposed AR 44(3) sets out a procedure and time frame for publication of excerpts, which should ensure that excerpts are published rapidly.

45. ***Fourth***, proposed AR 45 addresses publication of orders and decisions other than Awards in Convention arbitration proceedings. This would include all rulings issued by the Tribunal and any decision on challenge issued by the Chairman of the Administrative Council. Such publication is not constrained by Art. 48(5) of the Convention.

46. Proposed AR 45(1) addresses publication of orders and decisions issued in a proceeding. Proposed AR 45(1) requires publication of each order or decision within 60 days of its dispatch. If the parties notify the Centre of agreed upon redactions before the expiry of the 60-day period, the order or decision will be published with such redactions. If the parties say nothing before the expiry of the 60-day period, the Centre will publish the order or decision without redaction. If either party notifies the Centre before the end of the 60-day period that there is no agreement on redaction, the Centre will refer the matter to the issuing

Tribunal for appropriate redaction. The Tribunal is in the best position to address appropriate redaction, and can request submissions from the parties if needed to determine such questions. The Centre would then publish the decision as redacted by the Tribunal.

47. The goal of proposed AR 45(1) is to expedite the release of orders and decisions, while allowing the parties to make reasonable, consensual redactions. It also provides a mechanism for determination of disputes on publication or redaction by having the Centre refer the order or decision to the issuing body. By establishing the 60-day review and redaction period, it balances the interests of parties in ensuring appropriate confidentiality is maintained with the public interest in making orders and decisions accessible.

48. Proposed AR 46 addresses publication by a party of its own documents filed in the arbitration. There is no prohibition on such publication, nor is there a requirement to publish such documents. Rather, parties may publish during or after the proceeding as they wish, subject to their confidentiality order (during the proceeding), confidentiality agreements with one another (if any), and the relevant IIAs. The proposed rule states that the Centre will publish documents of the parties if a copy of the redacted version agreed to by the parties is provided to the Centre.

49. The same text is proposed for the Additional Facility Arbitration Rules in proposed (AF)AR 54 and (AF)AR 55 with one exception. Given that the (AF)AR are not constrained by the Convention prohibition on making Awards public, Awards under the Additional Facility are proposed to be treated in the same manner as orders and decisions in proposed AR 45. The proposed text of (AF)AR 54 would also replace current (AF)AR 53(3).

VIII. PROPOSALS ON ACCESS TO HEARINGS IN ARBITRATION

CURRENT RELATED PROVISIONS: AR 32; A(AF)R Art. 39

AR 47 / (AF)AR 56
Observation of Hearings

(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal to observe hearings, unless either party objects.

(2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.

(3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.

AR Article 47 / (AF)AR Article 56
Observation des audiences

(1) Le Tribunal permet à des personnes, outre les parties, leurs représentants, les témoins et experts au cours de leurs dépositions, et les autres personnes assistant le Tribunal, d'observer les audiences, sauf si l'une des parties s'y oppose.

(2) Le Tribunal met en place des procédures pour empêcher la divulgation d'informations confidentielles aux personnes qui observent les audiences.

(3) Le Centre publie les enregistrements et les transcriptions des audiences, sauf si l'une des parties s'y oppose.

AR Regla 47 / (AF)AR Regla 56
Observación de las Audiencias

(1) El Tribunal permitirá que otras personas además de las partes, sus representantes, testigos y peritos(as) durante su testimonio, así como las personas que asistan al Tribunal observen las audiencias, a menos que cualquiera de las partes se oponga.

(2) El Tribunal establecerá procedimientos para prevenir la revelación de información de carácter confidencial a las personas que observen las audiencias.

(3) El Centro publicará las grabaciones y transcripciones de las audiencias, a menos que cualquiera de las partes se oponga.

50. Proposed AR 47 and (AF)AR 56 are identical Rules for observation of hearings in ICSID Convention arbitration and ICSID Additional Facility arbitration respectively.

51. Current AR 32(2) and A(AF)R Art. 39(2) provide that the Tribunal may allow third persons to attend or observe arbitral hearings unless either party objects, and after consultation with the Secretary-General. This is subject to the establishment of appropriate procedures to protect confidential information and the availability of appropriate logistical arrangements.

52. Current AR 32 and A(AF)R Art. 39(1) were part of the 2006 amendments. The initial proposal in the 2006 amendments was to give the Tribunal discretion to open hearings, but this did not garner consensus (Aurelia Antonietti, 'The 2006 Amendments of the ICSID Rules and Regulations', (2006) 21 ICSID Rev.-FILJ 427, 430).

53. Many recent treaties have included provisions requiring that hearings be open to the public (*see e.g.*, CAFTA-DR (2006-7) Art. 10.21(2); CETA (not yet in force) Art. 8.36(5); CPTPP (not yet in force) Chap. 9, Art. 9.24(2); *see* also UNCITRAL Rules on Transparency (2014) Art. 6). Other treaties have addressed public access to hearings differently. For example,

Art. 9.17(3) of the China-Australia Free Trade Agreement (ChAFTA) (2015) allows hearings to be open to the public with consent of the respondent in the arbitration.

54. Most procedural rules require hearings to be confidential unless otherwise agreed by the disputing parties (*see e.g.*, Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules (2017) (SIAC Investment Arbitration Rules (2017)) Rule 21.4; Stockholm Chamber of Commerce (SCC) Arbitration Rules (2017) (SCC Arbitration Rules (2017) Rule 32).

55. To date, public access to ICSID hearings has been based on express consent in treaty provisions such as Art. 10.21 of the CAFTA-DR (2006-7), or on case-specific agreement of the parties, for example as in *BSG v. Guinea* (ARB/14/22), Procedural Order No. 2 (September 17, 2015).

56. The ICSID Secretariat has developed significant experience with public hearings, having held them in over 30 cases. When a hearing is open to the public, ICSID publishes an announcement on its website providing all relevant information to access the hearing.

57. There are different ways to open a hearing to the public. For example, the hearing can be broadcast through closed-circuit television to a separate room for the public. When the public is allowed on-site attendance at the hearing, the separate room avoids disruption of the proceeding. A hearing can also be broadcast to the public by internet. This gives access to anyone with internet access, and reaches a broader audience. The feed for either of these two methods can be live or time-delayed. A third way of opening a hearing is to prepare a video-recording that is posted online after the hearing.

58. Protecting confidential information is a necessary corollary of making hearings open to the public. If a hearing is broadcast by closed-circuit television, web stream or video recording, portions of the hearing during which confidential information is divulged are not shown. Instead, the image from the hearing room is replaced by the message "closed session" with no sound. When the confidential portion of the hearing concludes, the image and sound feed from the hearing resume. A short time delay in broadcast (usually 1-4 hours) ensures that the parties can avoid accidental broadcast of confidential information. The procedures used by the Centre in open hearings are highly effective and do not disrupt the proceedings.

59. ICSID estimates that the costs of a webcast or closed-circuit hearing for five days, including all technical support, is about USD 20,000-30,000. This cost is charged to the case account, and so it is divided equally between the parties.

60. Proposed AR 47 and (AF)AR 56 make four changes to current AR 32(2) and (AF)AR 39(2) concerning observation of hearings.

61. ***First***, as drafted, current AR 32(2) and A(AF)R Art. 39(2) could mistakenly be read as giving the Secretary-General input on whether a hearing should be open. This is inaccurate. Rather, the Secretariat makes appropriate logistical arrangements when an open hearing is requested by the parties. The proposed rule deletes consultation with the Secretary-General. As a matter of practice, the Tribunal and parties consult the Tribunal Secretary in advance of setting a location for hearing to ensure that it is equipped with the necessary technology.

62. ***Second***, the proposed rule refers to "observation" and not "attendance or observation". In practice, public access is through observation in a separate viewing room or by broadcast, and non-parties normally do not have access to the hearing room.

63. ***Third***, proposed AR 47 and (AF)AR 56 maintain the obligation of the Tribunal to arrange for the protection or redaction of confidential information during open hearings. The draft replaces the language "proprietary or privileged" with "confidential" to accommodate a broad range of information. The determination of what falls within this category depends on the facts of the case, the applicable law and procedural orders, and is agreed by the parties or decided by the Tribunal.

64. ***Fourth***, the proposed Rule simplifies the syntax in current AR 32(3) and A(AF)R Art. 39(3), and adds witnesses and experts to the list of persons allowed in a hearing. This would not affect witness sequestration, which would take precedence with respect to a witness or expert. This reflects established practice.

IX. PROPOSALS ON ACCESS TO MEETINGS IN CONCILIATION

CURRENT RELATED PROVISIONS: CR 27; C(AF)R Art. 20

CR 30 / (AF)CR 38
Meetings

(1) The Commission may meet with the parties jointly or separately.

(2) The Commission shall determine the date, time and method of holding meetings, after consulting with the parties.

(3) If a meeting is to be held in person, it may be held at any place agreed to by the parties after consulting with the Commission and the Secretariat. If the parties do not agree on the place of a meeting, it shall be held at the seat of the Centre pursuant to Article 62 of the Convention.

(4) Meetings shall remain confidential. The parties may consent to observation of meetings by persons in addition to the parties and the Commission.

CR Article 30 / (AF)CR Article 38
Réunions

(1) La Commission peut tenir des réunions avec les parties ensemble ou séparément.

(2) La Commission fixe la date, l'heure et les modalités de la tenue des réunions, après consultation des parties.

(3) Si une réunion doit se tenir en personne, elle peut se tenir en tout lieu convenu entre les parties après consultation de la Commission et du Secrétariat. Si les parties ne se mettent pas d'accord sur le lieu d'une réunion, celle-ci se tient au siège du Centre, conformément à l'article 62 de la Convention.

(4) Les réunions demeurent confidentielles. Les parties peuvent consentir à ce que des personnes, autres que les parties et la Commission, observent les réunions.

CR Regla 30 / (AF)CR Regla 38
Reuniones

(1) La Comisión podrá reunirse con las partes en forma conjunta o por separado.

(2) La Comisión determinará la fecha, la hora y la modalidad de celebración de las reuniones, previa consulta a las partes.

(3) Si una reunión debe celebrarse en persona, podrá celebrarse en cualquier lugar acordado por las partes previa consulta a la Comisión y al Secretariado. Si las partes no acordaran el lugar de una reunión, la misma se celebrará en la sede del Centro de conformidad con lo dispuesto en el Artículo 62 del Convenio.

(4) Las reuniones serán de carácter confidencial. Las partes podrán consentir en que otras personas además de las partes y la Comisión observen las reuniones.

65. The proposed CR 30 and (AF)CR 38 contain identical provisions on observation of conciliation meetings. Not surprisingly given the nature of the process, meetings are to remain confidential. However, the parties may consent to observation of meetings by persons other than the parties and the Commission. This might be done generally, on a meeting-by-meeting basis, or for specific persons. The same rules allow the Commission to meet with the parties jointly or separately. This reflects a technique used by many conciliators of using individual meetings with parties to better understand an issue or to explore ways to resolve differences of views prior to returning to the collective session.

XII. PROPOSALS ON ACCESS TO SESSIONS IN FACT-FINDING AND MEETINGS IN MEDIATION

66. There are no proposals on attendance of third parties at fact-finding and mediation sessions. In both cases the rules governing use of information generated during the proceeding would mean that third persons could not attend such sessions without approval of the parties.

X. PROPOSALS ON NON-DISPUTING PARTY (NDP) AND NON-DISPUTING STATE PARTY (NDSP) PARTICIPATION

A. ICSID CONVENTION ARBITRATION AND ICSID ADDITIONAL FACILITY ARBITRATION

CURRENT RELATED PROVISIONS: AR 37(2); A(AF)R Art. 41(3)

AR 48 / (AF)AR 57
Submission of Non-disputing Parties

(1) Any person or entity that is not a disputing party ("non-disputing party") may apply for permission to file a written submission in the proceeding.

(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

(a) whether the submission would address a matter within the scope of the dispute;

(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(c) whether the non-disputing party has a significant interest in the proceeding;

(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and

(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on the conditions for filing such a submission, if any.

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to:

(a) the format, length or scope of the submission;

(b) the date of filing; and

(c) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation.

(5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.

(6) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

AR Article 48 / (AF)AR Article 57
Écritures des parties non contestantes

(1) Toute personne ou entité qui n'est pas partie au différend (« partie non contestante ») peut demander l'autorisation de déposer des écritures dans le cadre de l'instance.

(2) Afin de déterminer s'il autorise les écritures d'une partie non contestante, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment :

(a) si les écritures aborderaient une question qui s'inscrit dans le cadre du différend ;

(b) comment les écritures aideraient le Tribunal à trancher une question de fait ou de droit relative à l'instance en y apportant un point de vue, une connaissance ou un éclairage particulier distincts de ceux présentés par les parties au différend ;

(c) si la partie non contestante porte à l'instance un intérêt significatif ;

(d) l'identité, les activités, l'organisation et les propriétaires de la partie non contestante, y compris toute affiliation directe ou indirecte entre la partie non contestante, une partie ou une Partie à un Traité non contestante ; et

(e) si une personne ou une entité apportera à la partie non contestante une assistance financière ou autre pour déposer les écritures.

(3) Les parties ont le droit de présenter leurs observations sur la question de savoir si une partie non contestante doit être autorisée à déposer des écritures dans le cadre de l'instance et sur les conditions éventuelles du dépôt de telles écritures.

(4) Le Tribunal s'assure que la participation de la partie non contestante ne perturbe pas l'instance ou qu'elle n'impose pas une charge excessive à l'une des parties ou lui cause injustement un préjudice. À cette fin, le Tribunal peut imposer des conditions à la partie non contestante, notamment en ce qui concerne :

(a) la forme, la longueur ou l'étendue des écritures;

(b) la date de dépôt ; et

(c) le versement de fonds pour couvrir les frais supplémentaires de la procédure imputables à la participation de la partie non contestante.

(5) Le Tribunal peut donner à la partie non contestante accès aux documents pertinents déposés dans le cadre de l'instance, sauf si l'une des parties s'y oppose.

(6) Si le Tribunal autorise une partie non contestante à déposer des écritures, les parties ont le droit de présenter des observations sur ces écritures.

AR Regla 48 / (AF)AR Regla 57
Escritos de Partes No Contendientes

(1) Cualquier persona o entidad que no sea parte en la diferencia ("parte no contendiente") podrá solicitar permiso para presentar un escrito en el marco del procedimiento.

(2) Al determinar si permite la presentación de un escrito de una parte no contendiente, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) si el escrito se referiría a una cuestión dentro del ámbito de la diferencia;

(b) de qué manera el escrito ayudaría al Tribunal en la determinación de las cuestiones de hecho o de derecho relacionadas con el procedimiento al aportar una perspectiva, un conocimiento o una visión particulares distintos a aquéllos de las partes en la diferencia;

(c) si la parte no contendiente tiene un interés significativo en el procedimiento;

(d) la identidad, actividades, organización y los propietarios de la parte no contendiente, lo cual incluye toda afiliación directa o indirecta entre la parte no contendiente, una parte o una parte no contendiente del tratado; y

(e) si alguna persona o entidad le proporcionara a la parte no contendiente asistencia financiera u otro tipo de asistencia para efectuar la presentación.

(3) Las partes tendrán derecho a formular observaciones respecto de si debería permitirse a una parte no contendiente presentar un escrito en el marco del procedimiento y, en su caso, respecto de las condiciones para la presentación de dicho escrito, si se presentara.

(4) El Tribunal deberá asegurarse de que la participación de la parte no contendiente no perturbe el procedimiento, o genere una carga indebida, o perjudique injustamente a

cualquiera de las partes. A tal fin, el Tribunal podrá imponer condiciones a la parte no contendiente, lo cual incluye con respecto a lo siguiente:

(a) el formato, extensión o alcance del escrito;

(b) la fecha de la presentación; y

(c) el desembolso de fondos para sufragar el aumento de costos del procedimiento que sean atribuibles a la participación de la parte no contendiente.

(5) El Tribunal le podrá proporcionar a la parte no contendiente acceso a los documentos pertinentes presentados en el marco del procedimiento, a menos que cualquiera de las partes se oponga.

(6) Si el Tribunal le permitiera a una parte no contendiente presentar un escrito, las partes tendrán derecho a formular observaciones sobre el mismo.

AR 49 / (AF)AR 58
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.

(2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 48.

(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.

AR Article 49 / (AF)AR Article 58
Participation d'une Partie à un Traité non contestante

(1) Le Tribunal doit autoriser une partie à un traité qui n'est pas partie au différend (« Partie à un Traité non contestante ») à présenter des écritures sur l'application ou l'interprétation d'un traité en cause dans le différend.

(2) Un Tribunal peut autoriser une Partie à un Traité non contestante à présenter des écritures sur toute autre question dans le cadre du différend, conformément à la procédure prévue à l'article 48.

(3) Les parties ont le droit de présenter des observations sur les écritures de la Partie à un Traité non contestante.

AR Regla 49 / (AF)AR Regla 58
Participación de una Parte No Contendiente del Tratado

(1) El Tribunal permitirá que una parte de un tratado que no sea parte en la diferencia ("parte no contendiente del tratado") presente un escrito sobre la aplicación o interpretación de un tratado objeto de la diferencia.

(2) Un Tribunal podrá permitir que una parte no contendiente del tratado presente un escrito sobre cualquier otra cuestión dentro del ámbito de la diferencia, de conformidad con el procedimiento establecido en la Regla 48.

(3) Las partes tendrán derecho a presentar observaciones sobre el escrito de la parte no contendiente del tratado.

B. BACKGROUND TO NON-DISPUTING PARTY (NDP) PARTICIPATION

67. Some domestic legal systems allow third parties to participate in litigation. This is often called "amicus curiae" or "friend of the court" participation. The criteria for allowing such participation varies among domestic jurisdictions.

68. Third party participation was absent from international investment arbitration until the early 2000s, when the issue was raised in several cases (*see e.g.*, *Methanex Corp. v. US*, (UNCITRAL/NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amicus Curiae" (Jan. 15, 2001); *Suez v. Argentina* (ARB/03/19), Order in Response to a Petition for Transparency and *Amicus Curiae* (May 19, 2005); *Aguas del Tunari S.A. v. Bolivia*, (ARB/02/3), Tribunal's Letter in Response to Non-Disputing Parties' Petition (Jan. 29, 2003). In 2003, the NAFTA States adopted a Free Trade Commission Statement on non-disputing party participation. This established a two-step process and criteria for Tribunals to determine whether to allow non-disputing parties to participate in an arbitration.

69. Many subsequent treaties and procedural rules have included specific provisions governing participation by non-disputing parties. *See e.g.*, Morocco-US Free Trade Agreement (MAFTA) (2006), Art. 10.19 ; CAFTA-DR (2006-7) Art. 10.20.1-2; Canada-Peru Free Trade Agreement (Canada-Peru FTA) (2009) Art. 836; Australia-Singapore Free Trade Agreement (SAFTA) (2017) Chap. 8, Art. 28(2), (3); CETA (not yet in force) Art. 8.36, 8.38; EU-Mexico Global Agreement (not yet in force) Section on Resolution of Investment Disputes, Art. 24 ; CPTPP (not yet in force) Chap. 9, Art. 9.24; EU-Singapore Investment Protection Agreement (not yet in force) Chap. 3, Annex 8, Art. 3; *see also*, UNCITRAL Rules on Transparency (2014) Art. 4).

70. ICSID cases decided before 2006 diverged on whether non-disputing parties could participate in arbitrations. Such participation was refused in *Aguas del Tunari v. Bolivia* (ARB 02/3) Tribunal's Letter in Response to Non-Disputing Parties' Petition (January 29, 2003) as beyond the power of the Tribunal. However, in *Suez v. Argentina* (ARB 03/19) Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005) the Tribunal found it had authority to allow third party participation under Art. 44 of the ICSID Convention.

71. The debate was resolved in the 2006 ICSID rule amendments regarding third party participation in ICSID Convention and AF arbitrations (*see* ICSID Secretariat, *Possible Improvements of the Framework of ICSID Arbitration* (October 2004) and ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (May 2005.) This led to the adoption of current AR 37(2) and A(AF)R Art. 41(3) on non-disputing party (NDP) participation. The ICSID Convention and AF provisions are identical in content.

72. In 2014, the UNCITRAL Rules on Transparency (Art. 4) adopted provisions for third party participation. The UNCITRAL provision will apply in an ICSID case if the Mauritius Convention governs the proceeding.

C. BACKGROUND TO NON-DISPUTING STATE/ NON-DISPUTING TREATY PARTY (NDSP/NDTP) PARTICIPATION

73. Many modern investment treaties have specific provisions allowing the non-disputing State Party to the treaty (NDSP) (or non-disputing Treaty Party – NDTP) to make submissions on a question of treaty application or interpretation (*see e.g.*, NAFTA (1994) Art. 1128; CAFTA-DR (2006-7) Art. 10.20(2); CETA (not yet in force) Art. 8.38, Korea-Australia Free Trade Agreement (KAFTA) (2014) Art. 11.20(4); CPTPP (not yet in force) Art. 9.23.2). Numerous ICSID cases have involved NDSP participation pursuant to such treaty-specific provisions (*see e.g.*, *Al Tamimi v. Oman* (ARB/11/33), Submission of the United States of America (Sept. 24, 2014); *Bear Creek Mining Corp. v. Peru* (ARB/14/21), Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement, (June 9, 2016).

74. Some new procedural rules have incorporated NDSP/NDTP provisions as well. Article 5 of the UNCITRAL Rules on Transparency (2014) include participation by the non-disputing State Party to the treaty. This provision will apply in an ICSID case if the Mauritius Convention governs the proceeding. Some other procedural rules have followed suit (*see e.g.*, SCC Arbitration Rules (2017), App. 3, Art. 4).

D. NDP AND NDSP/ NDTP PRACTICE IN ICSID CASES

75. The Rules on NDP and NDSP/ NDTP participation in an ICSID case depend on the applicable provisions of relevant instruments. If a BIT or MIT has specific provisions on NDP, NDSP or NDTP participation, these will take precedence in the ICSID case. If the Mauritius Convention is in effect between the home State of the investor and the respondent State, the UNCITRAL Transparency provisions on NDP and NDSP

participation will apply to the ICSID arbitration. If no treaty-specific provisions apply, such participation is currently addressed under AR 37(2) or A(AF)R Art. 41(3).

76. The current ICSID Rules do not have a specific provision for NDSP or NDTP participation. Instead, such applications have been addressed under the ICSID rules governing NDP participation generally. As a result, ICSID Tribunals have allowed submissions by non-disputing States (*see e.g., Siemens AG v. Argentina* (ARB/02/8), Submission by the United States of America, (May 1, 2008) and by REIOs (*see e.g,. Electrabel S.A. v. Hungary*, (ARB/07/19) Procedural Order No. 4 (April 28, 2009); *Micula v. Romania* (ARB/05/20) Award (December 11, 2013). ICSID Tribunals have also exercised their inherent authority to ask a non-disputing State to make a submission if they believe it would be useful (*see e.g., Aguas del Tunari S.A. v. Bolivia*, (ARB/02/3), Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005.)

77. There have been over 60 examples of NDP or NDSP/ NDTP participation in ICSID cases since 2006. ICSID has published every decision addressing such a request where the parties consented to publication. These cases can be found on the ICSID website under Decisions on Non-disputing Party Participation in ICSID Cases.

78. The practice under current AR 37(2) is for an NDP to apply for leave to file its submission from the Tribunal. The disputing parties can make observations on whether to allow the NDP to participate. Before giving permission to file a submission, the Tribunal must consider, among other things, whether the NDP submission: (i) would assist the Tribunal in the determination of a factual or legal issue by bringing a different perspective than that of the parties; (ii) is within the scope of the dispute; and (iii) was filed by an NDP that has a significant interest in the dispute. The Tribunal must also ensure that such participation would not disrupt the proceeding or unfairly burden either party.

79. In practice, Tribunals have also considered whether the NDP has an affiliation with any of the disputing parties, or whether any government, person or entity has provided financial or other assistance in preparing the submission (*see e.g., Philip Morris Brand Sàrl and others v. Uruguay* (ARB/10/7), Award (July 8, 2016) ¶55).

80. The Tribunal has discretion to fix a schedule for the disputing parties to make observations on an NDP submission, which may be filed separately or as part of the pleadings. The Tribunal should address the modalities of NDP, NDSP or NDTP participation as soon as possible, ideally in Procedural Order No. 1. The timing of such applications may vary; however, they are frequently submitted after the first exchange of pleadings on the merits. Normally the Tribunal will limit the page count for an NDP submission and it may require like-minded NDPs to file a joint submission (*see e.g., Eli Lilly and Company v. Canada* (UNCT/14/2), Procedural Order No. 4 (February 23, 2016) and Procedural Order No. 6 (May 27, 2016); *Infinito Gold Ltd. v. Republic of Costa Rica* (ARB/14/5), Procedural Order No. 2 (June 1, 2016).

81. Tribunals also have discretion to address corollary issues such as the timing of the submissions, the format and scope of submissions, and access to documents and hearings

for non-disputing parties. The WP proposes that Tribunals retain broad discretion to address such issues when allowing non-disputing party participation.

82. The right to file an NDP submission does not give the NDP any other procedural rights in the case. For example, the NDP does not get automatic access to documents. However, some Tribunals have asked the disputing parties to provide the NDP with redacted versions of relevant documents to ensure the NDP submission is focused (*see e.g., Piero Foresti v. South Africa* (ARB (AF)/07/01), Further Decision Concerning the Applications of the Non-Disputing Parties (Sept. 25, 2009); *Infinito Gold v. Costa Rica*, (ARB/14/5), Procedural Order No. 2 (June 1, 2016)). Other cases have denied NDPs access to documents (*see e.g., Gabriel Resources Ltd. v. Romania* (ARB/15/31), Procedural Order No. 5 (June 16, 2017) and *Suez v. Argentina* (ARB/03/17), Order in Response to a Petition for Participation as *Amicus Curie* (March 17, 2006)). Similarly, the right to file a written submission does not grant an NDP the right to attend hearings. However, there have been cases where both disputing parties consented to the NDP attending part of the hearing.

E. COMMENTS RECEIVED ON NDP AND NDSP/ NDTP PARTICIPATION

83. ICSID received numerous comments on NDP and NDSP participation. Some comments suggested giving the Tribunal discretion to allow an NDP submission without first consulting the disputing parties on whether the criteria for participation in the Rules are met – in other words, turning the two-step process into a single step. This would allow the Tribunal to decide whether to permit NDP participation based solely on the application filed by the NDP. In turn, the disputing parties could address both eligibility of the NDP and the merits of its submission once the NDP is given permission to participate.

84. This suggestion would reduce the time and cost of non-disputing party submissions by allowing disputing parties to comment after (and only if) NDP participation is allowed by the Tribunal. However, despite the time and cost savings of a one-step process, the WP does not propose to make this change. It is likely that most disputing parties will want to retain the right to make observations on whether a potential NDP meets the criteria for public interest participation before the NDP addresses the merits.

85. Other suggestions received have been incorporated in the provisions addressing NDP and NDTP participation. These are explained below.

86. ***First***, several comments suggested that Tribunal decisions on whether to allow NDP participation should be publicly available so third parties and States could better understand how the criteria in the Rules are applied. These suggestions are adopted through the proposals on publication of Awards, orders and decisions (*see* above). If adopted, decisions on NDP and NDSP/NDTP participation would always be published.

87. ***Second***, some suggested that NDPs be given greater access to case documents and hearings. These suggestions are addressed through the general proposals on access to documents and hearings (*see* above). It also proposes that Tribunals may order that the NDPs receive relevant documents unless either party objects.

88. ***Third***, one comment suggested elaboration of the criteria for NDP participation to require potential NDPs to disclose their identity in detail (corporate structure and affiliation), to disclose their connection with a disputing party, and to advise whether they would receive financial or other consideration for preparing a non-disputing party submission. These have been considered by some Tribunals. Similar provisions are also found in the SCC Arbitration Rules (2017) and Art. 4(2) of the UNCITRAL Rules on Transparency (2014) and in several treaties (*see e.g.* SAFTA (2017), Chap. 8, Art. 28(3)). This is included in the proposal.

89. ***Fourth***, some comments suggested giving the Tribunal discretion to condition NDP participation on their contribution to the costs of the case (*see e.g.*, SCC Arbitration Rules (2017), Art. 3(10); and Art. 3(5) UNCITRAL Rules on Transparency (2014) regarding cost to access documents). To date, NDPs have borne their own cost of preparing submissions, while the disputing parties individually bear their own costs of responding to NDP submissions and share the costs of Tribunal time to address NDP submissions. Concern about costs resulting from NDP participation has increasingly been voiced by Tribunals and commentators (*see e.g.*, *Philip Morris Brand SARL (Switzerland) v. Uruguay* (ARB/10/7), Procedural Order No. 3 (Feb. 17, 2015) and Procedural Order No. 4 (March 24, 2015)*; Infinito Gold Ltd. v. Costa Rica* (ARB/14/5), Procedural Order No. 2 (June 1, 2016); *Electrabel S.A. v. Hungary* (ARB/07/19), Award (Nov. 25, 2015) ¶234; *Eiser v. Spain* (ARB/13/36), Award (May 4, 2017) ¶65).

90. This raises a policy question for Member States: should a Tribunal have discretion to require NDPs to contribute to the costs of the case? Allowing Tribunals to condition NDP participation on a contribution to costs addresses the cost burden borne by the disputing parties. However, there is a valid question as to whether Member States want to add potential financial hurdles to participation that could be in the public interest.

91. The wording proposed for consideration gives Tribunals discretion to condition NDP participation on contributing toward case costs, but such a condition is not mandatory. This would allow a Tribunal to consider the NDP's capacity to contribute to costs. Tribunals could decide not to make such an order if the circumstances suggested this would have adverse effects on the NDP or more generally on the public interest.

92. ***Fifth***, Tribunals can reduce the cost of NDP participation, for example, by limiting the length and scope of their submission and requiring them to make joint submissions with other like-minded applicants.

93. ***Sixth***, one comment suggested that the Rules expressly allow the European Commission to intervene and submit written observations in all proceedings. Another comment suggested an express rule on NDSP/NDTP participation where the State Parties did not have a specific provision in their treaty allowing such participation. The current ICSID Rules have allowed REIOs and States without specific treaty provisions to act as NDPs if they meet the relevant NDP criteria. Thus, it is debatable whether a specific NDSP/NDTP rule is required. Nonetheless, proposed AR 49 and (AF)AR 58 are included for consideration. The proposed rule applies to "any Party to a treaty", and hence would apply both to States and to REIOs that have ratified the treaty at issue in the arbitration.

94. Proposed AR 49(1) and (AF)AR 58 would allow a non-disputing Treaty Party to participate as of right with respect to a question of treaty application or interpretation, but would require the State or REIO to meet the usual NDP criteria to participate on a matter other than treaty application or interpretation (proposed AR 49(2) and (AF)AR 58(2)). This is consistent with the relevant provisions in most treaties.

XI. PROPOSALS ON CONFIDENTIALITY IN DELIBERATIONS

AR 16 / (AF)AR 26
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.

AR Article 16 / (AF)AR Article 16
Délibérations

(1) Les délibérations du Tribunal ont lieu à huis clos et demeurent confidentielles.

(2) Le Tribunal peut délibérer en tout lieu qu'il juge pratique.

(3) Seuls les membres du Tribunal prennent part à ses délibérations. Aucune autre personne n'est admise sauf si le Tribunal en décide autrement.

(4) Le Tribunal délibère sur toute question devant être tranchée immédiatement après les dernières écritures ou plaidoiries sur cette question.

AR Regla 16 / (AF)AR 16
Deliberaciones

(1) Las deliberaciones del Tribunal se realizarán en privado y serán de carácter confidencial.

(2) El Tribunal podrá deliberar en cualquier lugar que estime conveniente.

(3) Solo los miembros del Tribunal tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario del Tribunal.

(4) El Tribunal deliberará inmediatamente después del último escrito o presentación oral sobre cualquier asunto que esté sujeto a decisión.

CR 26 / (AF)CR 34
Deliberations

(1) The deliberations of the Commission shall take place in private and remain confidential.

(2) The Commission may deliberate at any place it considers convenient.

(3) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

CR Article 26 / (AF)CR Article 34
Délibérations

(1) Les délibérations de la Commission ont lieu à huis clos et demeurent confidentielles.

(2) La Commission peut délibérer en tout lieu qu'elle juge pratique.

(3) Seuls les membres de la Commission prennent part à ses délibérations. Aucune autre personne n'est admise sauf si la Commission en décide autrement.

CR Regla 26 / (AF)CR Regla 34
Deliberaciones

(1) Las deliberaciones de la Comisión se realizarán en privado y serán de carácter confidencial.

(2) La Comisión podrá deliberar en cualquier lugar que estime conveniente.

(3) Sólo los miembros de la Comisión tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario de la Comisión.

95. Proposed AR 16 and (AF)AR 26 do not introduce any changes concerning the Tribunal's deliberations. Tribunal members cannot disclose any part of the deliberations (proposed AR 16(1) and (AF)AR 26(1)). This assures their independence.

96. The conciliation rules contain a similar provision requiring deliberations to be private (proposed CR 26, (AF)CR 34).

XII. CONFIDENTIALITY AND TRANSPARENCY

97. The ICSID system does not have a general confidentiality rule. Rather, Tribunals address confidentiality in each case in Procedural Order No. 1, or under their inherent power to decide questions not otherwise covered by the Convention and Rules pursuant to Article 44 of the Convention and current AR 19 and Art. 27 of the AR(AF). They may also issue confidentiality orders under the rubric of provisional measures pursuant to Article 47 of the ICSID Convention and current AR 39 and AR(AF) 46.

98. When issuing confidentiality orders, Tribunals generally look to applicable international law; the relevant governing law concerning protected information; the scope of protection required; and how to preserve the integrity of the proceeding. Parties may also agree to confidentiality undertakings as between themselves.

99. The rules note that parties should address confidentiality and confidentiality in orders in their first sessions (proposed AR 34(4), (AF)AR 44(4), CR 29(4), (AF)CR 37(4)).

SCHEDULE 9: ADDRESSING TIME AND COST IN ICSID ARBITRATION

I. INTRODUCTION

1. There is growing concern about the length and cost of the investment arbitration process. Recent studies have shown that the average duration of investment disputes is close to four years and the average cost per party is between USD 4-6 million (Jeffery P. Commission, How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years, Kluwer Arbitration Blog, February 29 2016; Allen & Overy, Investment Treaty Arbitration: Cost, duration and size of claims all show steady increase (May 31, 2017). The users of ISDS recognize that the complexity of investor-State disputes may require a longer process at higher cost than commercial arbitration cases, and some are reluctant to impose hard time limits or other provisions that make the process less flexible and constrain party autonomy.

2. At the same time, comments received from Member States and the public show that most users consider efficiency vital to the success of the system. Many of the comments received focused on arbitrator delay in issuing decisions and rendering the Award (*see* Chapter X – The Award); others suggested more pro-active case management by Tribunals; or focused on time limits for pleadings and reducing the number and type of pleadings (*see* Chapter II – Conduct of the Proceeding, and Chapter V – Initial Procedures). In view of these comments, one of the main goals in this rule amendment process has been to reduce the time and cost of proceedings through a variety of approaches.

3. The Centre has sought to identify the areas where time and cost can be reduced by examining trends and practices and the duration and costs of recently concluded cases. To identify the main issues affecting case duration, the Secretariat reviewed 63 cases which concluded with an Award in the period January 1, 2015 to June 30, 2017 (*see* below Section II). The average length of these cases was 1,336 days (3 years and 7 months) from the Tribunal constitution to an Award.

4. In addition to showing large discrepancies in duration between different type of proceedings (bifurcated and non-bifurcated), the study identified three main areas of concern: (i) the length of time to appoint arbitrators and constitute the Tribunal; (ii) the length of time for the written process; and (iii) the length of time to render the Tribunal's Award. The study shows that improving efficiency will require coordinated effort from parties, counsel, arbitrators and the Centre alike throughout the various stages of an arbitration.

5. The Centre has endeavored to maintain flexibility of the process while proposing appropriate rule amendments addressing efficiency in the AR and (AF)AR (*see* Section III below). In doing so, it has taken into account the special characteristics of investment disputes, and the desirability of tailoring the process to the particular needs of each case. The AR and (AF)AR are therefore complemented by a set of rules for an expedited arbitration (Chapter XII - Expedited Arbitration) (*see* Section IV below), which the parties can agree to apply if they want a fully expedited process from registration to post-Award remedies. Parties may agree to apply Expedited Arbitration ("EA") in advance in treaties or investment contracts or they may agree to apply them after a dispute has arisen. The EA can be particularly useful for investment contracts entered into by SMEs (*see e.g.*, focus

on SMEs under the CETA Art. 8.19(3), 8.23(5), 8.27(9)). The EA thus provide parties wishing to proceed with a rule-based expedited process with an option to do so.

6. Finally, the Centre also proposes to develop best practice notes and guidelines to complement the AR and (AF)AR (*see* Section V). This provides practical information to parties, counsel and arbitrators on how to best address time and cost.

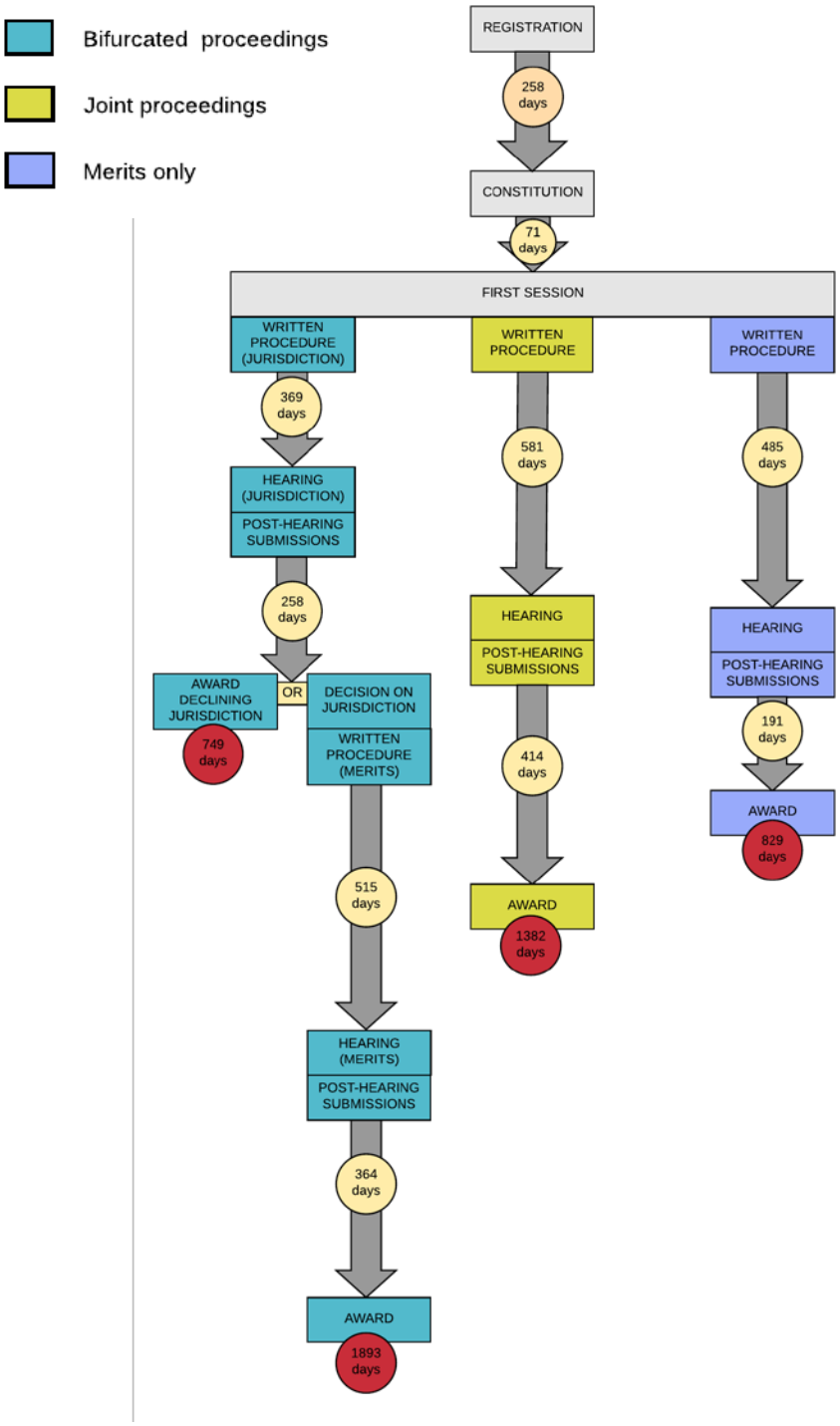
II. REVIEW OF CASE DURATION

7. The Centre reviewed 63 cases which concluded with an Award in the period January 1, 2015 to June 30, 2017 to better understand the duration of cases (excluding any post-award remedy proceedings). The 63 cases were sorted into similar types of proceedings: (i) one proceeding was a proceeding on the merits only ("merits only"); (ii) 29 proceedings were bifurcated to deal with jurisdictional and admissibility issues first before the merits ("bifurcated proceedings"); and (iii) 33 proceedings were joint proceedings on jurisdiction and the merits ("joint proceedings").

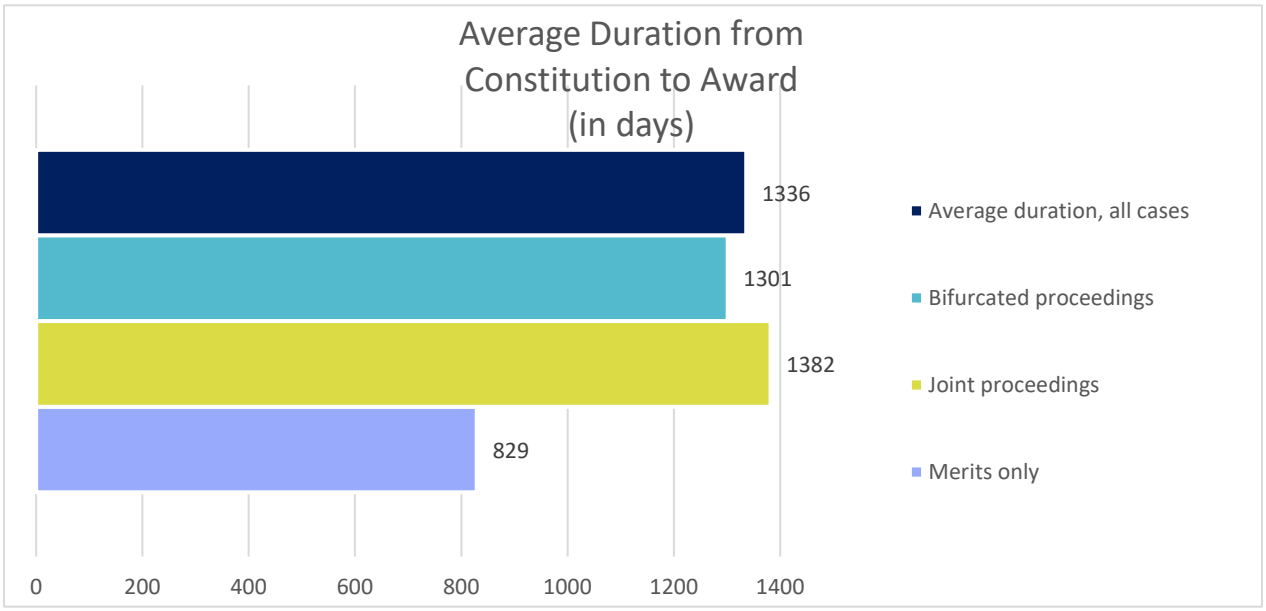
8. The majority of these cases (53 cases) asserted ICSID jurisdiction on the basis of investment treaties, eleven cases were brought on the basis of investment laws, and seven cases relied on investment contracts between the investor and the host-State to assert the Centre's jurisdiction. Five cases relied on two bases for jurisdiction, and two cases relied on three bases for jurisdiction.

Time Line of Cases Reviewed and Overall Duration

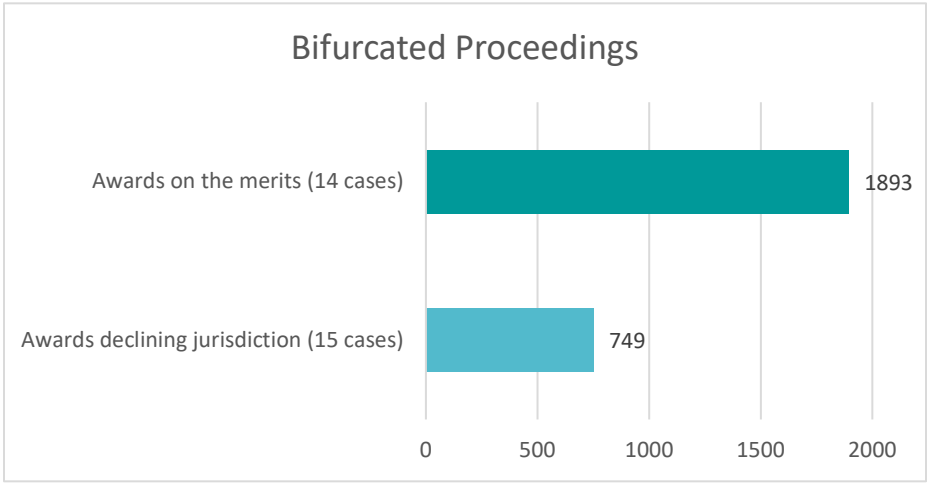
(Cases concluding with Award: January 1, 2015 – June 30, 2017)



9. The study shows that the average length from the constitution of the Tribunal to the dispatch of the Award of all 63 cases was 1,336 days (3 years and 7 months). When broken down by the type of proceeding, the average length was: (i) 1,382 days (3 years 9 months) for a joint proceeding; (ii) 1,301 days (3 years 6 months) for a bifurcated proceeding; and (iii) 829 days for the merits only proceeding.



10. The bifurcated proceedings were further classified based on the Tribunal declining jurisdiction after hearing the case on jurisdiction (Awards on jurisdiction); and the Tribunal upholding jurisdiction and hearing the case on the merits in a further stage of the proceeding, rendering a final Award on the merits. In the bifurcated proceedings that led to an Award on jurisdiction, the average length from the constitution of the Tribunal to the dispatch of the Award was 749 days (corresponding to 15 cases, including two awards on manifest lack of legal merit). In the bifurcated proceedings that led to an Award on the merits, the average length was 1,893 days (corresponding to 14 cases).



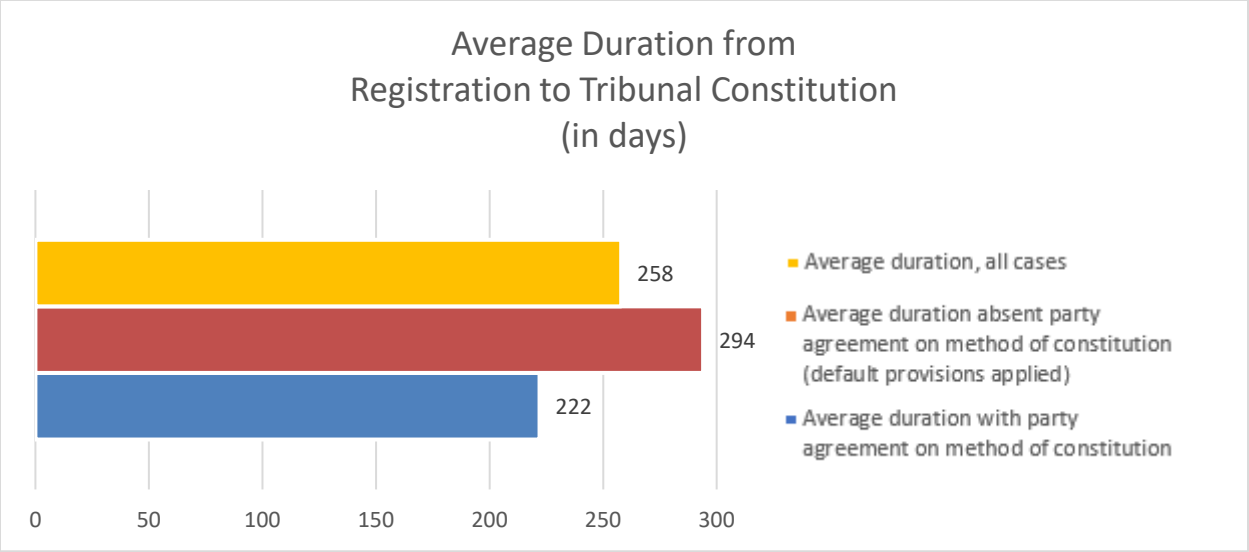
11. These numbers show significant discrepancies between a joint proceeding and a bifurcated proceeding that led to an Award declining jurisdiction, on the one hand, and an Award on the merits, on the other hand. Where jurisdiction was upheld in bifurcated proceedings and there was an Award on the merits, the proceedings were over 550 days longer than the general average. Where the bifurcated proceeding led to an award declining jurisdiction, it was almost 600 days shorter than the average.

12. From the perspective of duration, this indicates that bifurcation is not the best option for all cases with jurisdictional objections. Parties and Tribunals should therefore carefully consider whether to bifurcate jurisdictional objections or join them to the merits (including whether to raise an objection that a claim manifestly lacks legal merit under current AR 41(5)) to address case length.

A. LENGTH OF TRIBUNAL CONSTITUTION

13. The 63 cases were also reviewed for data on the time to appoint arbitrators, from registration of the Request for arbitration to the Tribunal constitution.

14. Under the AR and (AF)AR, the parties may agree on a method to appoint the Tribunal, or the Tribunal may be established under a default method. The review of cases showed that there was a slight difference in duration based on whether the parties agreed on a method of appointment or whether the default applied. The average for cases where the parties agreed on a method was 222 days, whereas the average for cases where the default method applied was 294 days. Recent data for Tribunals constituted in FY2017 confirm this conclusion, but show a reduction of time to 200 days where parties agree on the method and 246 days where the default method applied. The average duration of all 63 Tribunal constitutions was 258 days (whereas the average duration for Tribunal constitutions in all ICSID original arbitrations concluded during FY2017 was 234 days).



15. The data shows that it takes much longer to constitute Tribunals than the intended 60 days after the date of registration in the AR and (AF)AR (*see* current AR 2 and A(AF)R Art. 4), or the default of 90 days for invoking Art. 38 of the Convention (*see* current AR 4).

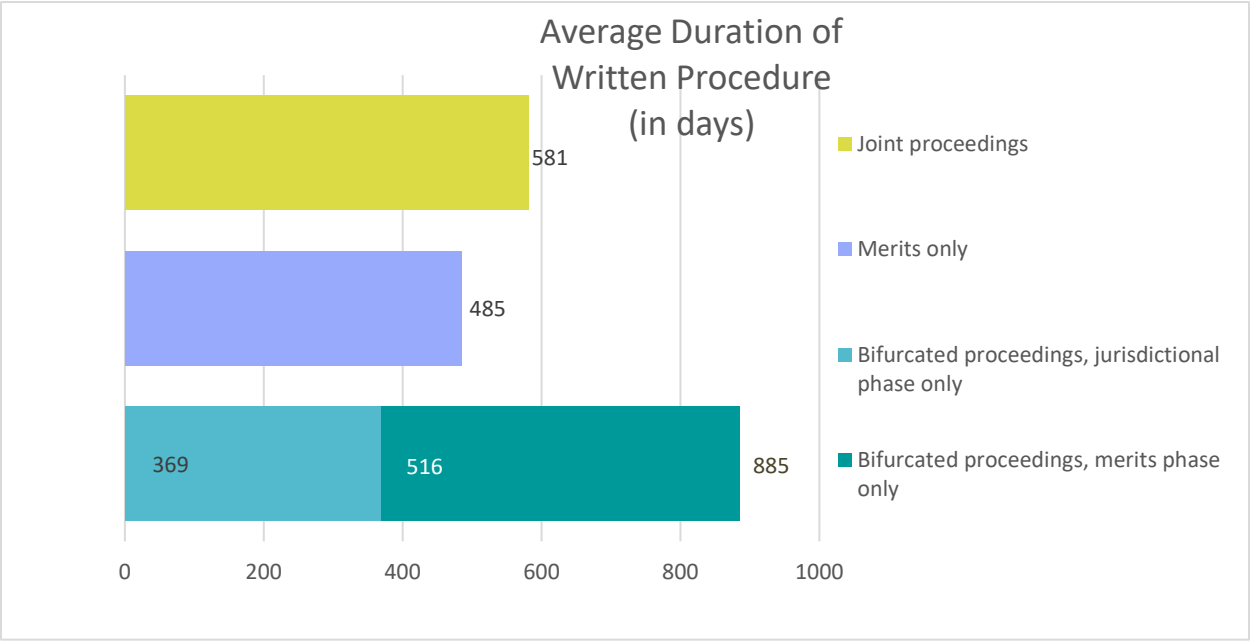
16. The reasons for delay include: (i) settlement negotiations between the parties; (ii) no initial participation by the respondent due to delay in organizing its defense; (iii) methods that provide for a long appointment process; (iv) no immediate request by a party for the Chairman of the Administrative Council to appoint a missing arbitrator after the expiry of the 90-day period provided in Art. 38 of the Convention; and (v) agreed methods that eventually lead to default.

17. The Secretariat has observed a trend for parties to agree on methods to constitute the Tribunal that are complex and sometimes lead to a lengthy appointment process.

B. LENGTH OF WRITTEN PROCESS

18. The written process is the time from the first session (to be held within 60 days after the date of registration in accordance with current AR 13(1)) until the final written pleading before the hearing.

19. In the cases reviewed, the average duration of the written process on jurisdiction for the bifurcated proceedings was 369 days (after deducting any days of suspension and excluding any proceedings on manifest lack of legal merit). Where the bifurcated proceedings continued on the merits and led to an Award on the merits, the written process on the merits took 516 days on average (326 days for first round submissions and 190 days for second round submissions). In proceedings dealing jointly with the merits and jurisdiction, the average duration of the written process was 581 days (308 days for first round submissions and 273 days for second round submissions). The written process in the merits only proceeding was 485 days long.



20. Almost 60% of the cases experienced some delay in the written schedule. The average length of the delay was 90 days.

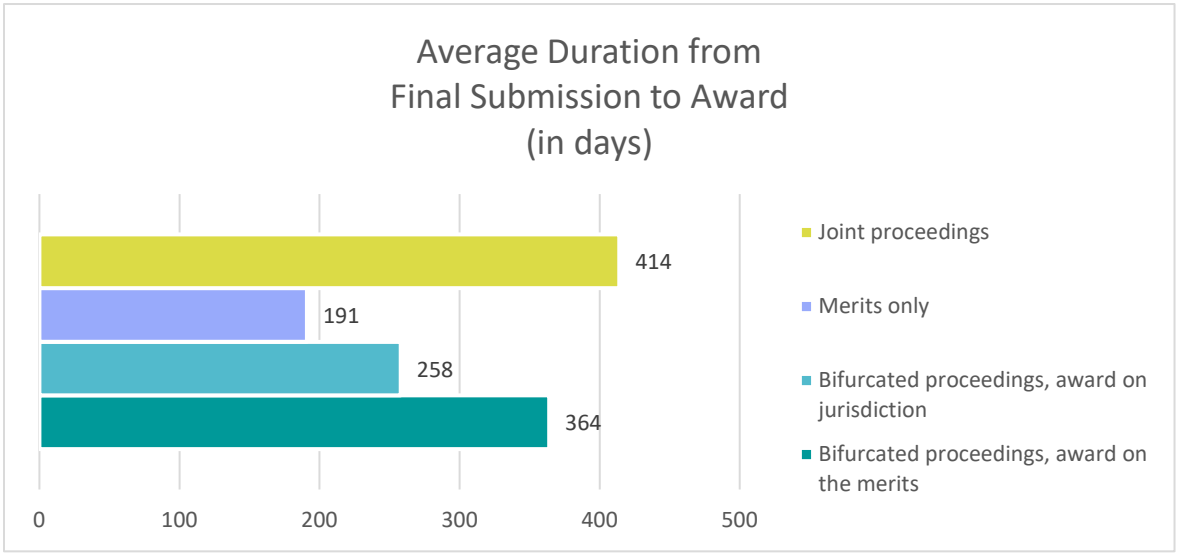
21. The reasons for the delay included: (i) suspension of the proceeding (due to agreement of the parties, a proposal to disqualify an arbitrator or resignation of an arbitrator); (ii) longer than expected preparation times; (iii) requests for production of documents that led to an extension of time limits (in 41 cases, either party or both parties requested documents from the other party); (iv) requests for bifurcation of the proceeding (in 28 cases it took on average 47 days to deal with any disagreement between the parties on whether preliminary objections should be heard as a preliminary question); and (v) consecutive written schedules on an objection that a claim manifestly lacks legal merit, followed by a bifurcated proceeding on jurisdiction, followed by a proceeding on the merits. Current AR 41(5) objections were raised in 10 cases: two led to a dismissal of all claims; four led to awards declining jurisdiction; four led to awards on the merits. The awards on the merits had an average duration of 1,556 days.

22. The delays in the written process sometimes also required postponement of the hearing on jurisdiction or the merits.

C. LENGTH OF TRIBUNAL DELIBERATIONS

23. The 63 cases were also reviewed for the average duration from the final written or oral submission to the Award. For bifurcated proceedings that led to an Award on jurisdiction after the jurisdictional phase, the average length was 258 days. For bifurcated proceedings where jurisdiction was upheld and led to an Award on the merits, the average was 364 days. The average combined deliberation length of bifurcated proceedings that first saw a decision on jurisdiction and then an Award on the merits was thus over 600 days. For joint proceedings on jurisdiction and the merits, the average was 414 days. The merits only proceeding took 191 days in the deliberation phase.

24. These numbers show that the deliberation phase typically took 30-34% of the total length of the process from Tribunal constitution to the Award.



III. PROPOSALS ADDRESSING TIME AND COST IN THE PROPOSED AR AND (AF)AR

25. The proposed Rule amendments in the AR and (AF)AR address many issues of time and cost while maintaining the ability of the parties to agree on time limits and other procedural matters. The rationale for each of the proposed amendments is explained in the WP and are summarized in the below table which compare them with the current rules.

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Filing of the Request for Arbitration	• Limited guidance on contents and scope in IR • Hard copy filing of Request	• IR contain exhaustive check-list and provide guidance on contents (proposed IR 2 and 3; (AF)AR 3 and 4) • Request for arbitration may be considered as the Claimant's memorial (proposed AR 13(2); (AF)AR 22(2)) • Electronic filing of Request (proposed IR 4; (AF)AR 5)
Registration	• Prompt registration by the Secretary-General (typically less than 18 days)	• No change
Method of Constituting the Tribunal	• Parties to agree on method within 60 days (current AR 2); if no agreement, either party may invoke default method under Conv. Art. 37(2)(b)	• Default method automatically triggered if no party agreement within 60 days from registration (proposed AR 22(2); (AF)AR 33(2)) • Parties may ask that the Secretary-General assist with appointments (proposed AR 24; (AF)AR 34)
Appointment of Arbitrators	• If Tribunal is not constituted within 90 days, either party may request the Chairman of the Administrative Council to appoint the missing arbitrators (Conv. Art. 38)	• No change (mandatory Convention provision)
Acceptance of Appointment	• Arbitrator must accept within 15 days after request for acceptance and must provide arbitrator declaration at the latest at the first session	• Arbitrator must both accept and provide detailed arbitrator declaration within 20 days after request for acceptance (proposed AR 26; (AF)AR 36)

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Constitution of the Tribunal	• Immediately when all arbitrators have accepted their appointments	• No change (proposed AR 28; (AF)AR 38)
First Session	• Within 60 days or such other time as the parties may agree • Default method of holding the session is typically in-person meeting • Overlap with preliminary procedural consultation in current AR 30 • Limited list of matters to be discussed	• No change • May be held by any means the Tribunal deems appropriate • Matters to be discussed include: o the number, type and format of pleadings (including Tribunal directions on length) o to what extent requests for document production should be allowed and the procedure for such requests o the full procedural calendar, with pleadings, hearings, the Tribunal's orders, decisions and the Award • Tribunal must issue Procedural Order No. 1 within 15 days after the first session or last submission on procedural matters (proposed AR 34; (AF)AR 44)
The Conduct of the Written and Oral Process - **General Duty to Act Expeditiously**	• No general duty	• Tribunal and the parties must conduct the proceeding in an expeditious and cost-effective manner (proposed AR 11(3); (AF)AR 20(3))
- **Time Limits for Tribunal**	• No specific time limits except to render the Award within 120 days after the closure of the proceeding (current AR 46)	• Best effort time limits for orders, decisions and the Award with requirement to advise if time limit won't be met and anticipated date of delivery (proposed AR 8(3)) • Time limits start from last written or oral submission: o Procedural Order No. 1: 15 days (proposed AR 34(5); (AF)AR 44(5)) o Decision on disqualification: 30 days (proposed AR 30(3); (AF)AR 40(2)) o Decision on an objection that a claim is manifestly without legal merit: 60 days (proposed AR 35(2)(d); (AF)AR 45(2)(d))

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
		o Decision on a preliminary objection: 180 days (proposed AR 36(2)(d); (AF)AR 46(7)) o Decision on bifurcation: 30 (proposed AR 37(2)(d); (AF)AR 47(2)(d)) o Decision on provisional measures: 30 days (proposed AR 50(2)(d); (AF)AR 59(2)(d)) o Decision on security for costs: 30 days (proposed AR 51(2)(d); (AF)AR 60(2)(d)) o Award: 240 days (proposed AR 59(1)(c); (AF)AR 69(1)(c)) o Supplementary decision and rectification: 60 days (proposed AR 62(6); (AF)AR 72(9)) o Decision on stay of enforcement: 30 days (proposed AR 62(3)(d)) o Decision on annulment, interpretation or revision: 120 days (proposed AR 66(5))
- **Time Limits for Filing Submissions by the Parties**	• No time limit for proposal to disqualify an arbitrator • No time limits for submissions on proposal for disqualification • Objection that a claim manifestly lacks legal merit: within 30 days after the constitution of the Tribunal and before first session (current AR 41(5)) • Preliminary objections: as soon as possible, no later than the expiration of the time limit fixed for the filing of the	• Proposal to disqualify an arbitrator must be filed within 20 days after the date on which the party proposing the disqualification first knew or first should have known of the facts leading to the proposal (proposed AR 29(2); (AF)AR 39(2)) • Response to proposal for disqualification must be filed within 7 days of the proposal; arbitrator may file a statement within 5 days after the response; parties may file final observations within 7 days after the arbitrator's statement; decision to be issues within 30 days after the final observations (proposed AR 29(2), 30(3); (AF)AR 39(2), 40(2)) • Objection that a claim manifestly lacks legal merit: can be filed before constitution of the Tribunal, must be filed within 30 days after constitution (proposed AR 35(2)(a); (AF)AR 45(2)(a)) • Preliminary objections: as soon as possible, no later than the date to file the counter-memorial (proposed AR 36(2); (AF)AR 46(3))

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
	counter-memorial (current AR 41(1))	
	• No time limit for request for bifurcation	• Request for bifurcation: within 30 days after the filing of the memorial on the merits (if it relates to a preliminary objection) (proposed AR 37(2)(a); (AF)AR 47(2)(a))
	• Counter-claim no later than memorial (current AR 40(2)) • Incidental or additional claim no later than the reply (current AR 40(2))	• Counter-claim no later than the date to file the counter-memorial • Incidental or additional claim no later than the date to file the reply (proposed AR 52(2); (AF)AR 61(2))
	• Request for provisional measures at any time	• Request for provisional measures at any time, request for security for costs also available under new rule (proposed AR 50, 51; (AF)AR 59, 60)
	• Request for supplementary decision and rectification within 45 days after the award (Conv. Art. 49) • Application for revision within 90 days after discovery of new fact that decisively affects the Award, with cap of three years after the Award (Conv. Art. 51) • Application for annulment within 120 days after the Award (with some exceptions) (Conv. Art. 52)	• Time limits for post-award remedies remain the same (Convention mandatory provisions); reduced to 30 days in (AF)AR proceedings for rectification, supplementary decision and interpretation (proposed (AF)AR 72(2))
	• Other time limits to be agreed by the parties or decided by Tribunal	• Other time limits to be agreed by the parties or decided by the Tribunal, taking into account the general duty of expeditiousness (proposed AR 11(3); (AF)AR 20(3)) • Expedited Arbitration offers a fixed schedule for submissions (proposed AR Chapter XII; (AF)AR Chapter XII)
- **Extension of Time Limits**	• Tribunal may extend any time limit that it has fixed (current AR 26(2))	• Tribunal may extend a time limit upon reasoned application made prior to the expiry of the time limit (proposed AR 9(2); (AF)AR 17(2)) • Parties may extend by agreement, if it is not a mandatory time limit under the

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
	• No rule on extension of time limits specified by the Convention or AR	Convention (proposed AR 8(1)); no limitation on party agreement under (AF)AR (proposed AR 16(1))
- **Filing and Routing of Communications**	• Default is hard copy filing with a minimum of 5 copies • Certification of copies of supporting documents and translations needed (current AFR 30) • All communications typically go through the Secretary of the Tribunal	• Default is electronic filing • No certification of documents or translations needed • Extracts of documents may be filed unless otherwise ordered by the Tribunal (proposed AR 3; (AF)AR 11) • The parties may communicate directly with the Tribunal if requested to do so (proposed AR 4; (AF)AR 12)
- **Procedural Languages, Translations and Interpretation**	• Parties can choose up to two languages; if they do not agree on language, they may each choose an official language of the Centre	• No change regarding the number of languages and default languages • If two procedural languages, a party may file documents in either language unless the Tribunal requires both languages • Parties may agree that Tribunal issue all orders and decisions in only one procedural language • Translation can be limited to the relevant part of a supporting document (proposed AR 5; (AF)AR 13)
- **Case Management Conference**	• Pre-hearing conference can be held to identify uncontested facts and consider the issues in dispute (current AR 21)	• To expedite the proceeding, the Tribunal can address any other procedural or substantive issues at any time (proposed AR 14(c); (AF)AR 23(c))
- **Hearings**	• Hearings are held in-person • Witnesses and experts are examined before the Tribunal (current AR 35)	• President of the Tribunal consults with members and parties about the method of holding hearings (proposed AR 15(2); (AF)AR 25(2)) • Witnesses and experts can only testify if they have filed written statements or reports; if they are not called to testify, their written evidence is evaluated by the Tribunal (proposed AR 41; (AF)AR 51)
- **Deliberations**	• No indication when the Tribunal should deliberate (current AR 15)	• Tribunal must deliberate on any matter immediately after the last submission on the matter (proposed AR 16(4); (AF)AR 26(4))

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Costs	• Parties share expenses of arbitration unless agreed or directed otherwise and subject to the Tribunal's final decision on costs (current AFR 14, AR 28) • If there is default to pay advances to defray costs and neither party pays, the proceeding is suspended after 15 days and may be discontinued after 6 months • Tribunal has discretion to allocate the costs of the proceeding (Conv. Art. 61(2))	• No change, except to underscore that Tribunal may make interim decisions on costs at any time (proposed AR 19(5); AFR 14(5); (AF)AR 29(5); (AF)AFR 7(5)) • In case of default, proceeding is suspended after 15 days but may be discontinued after 90 days (proposed AFR 14(5)(e); AR 58; (AF)AFR 7(5)(e); (AF)AR 67) • No change (Convention mandatory provision), but guidance is provided on the circumstances to be considered, including success in the case, party conduct, and the extent to which the parties acted in an expeditious and cost-effective manner (proposed AR 19(4)(b); (AF)AR 29(4)(b))
Suspension and Discontinuance	• No rule on suspension • If the parties fail to take any step in the proceeding for 6 months, it is discontinued (current AR 45) • Proceeding can be discontinued for failure to pay 6 months after it is suspended for non-payment	• Proceeding may be suspended by agreement of the parties, on request for a party or on the Tribunal's own initiative; period must be specified (proposed AR 54; (AF)AR 63) • If parties fail to take any step in the proceeding for 150 days, they are notified and have 30 more days to take step before proceeding is discontinued (proposed AR 57; (AF)AR 66) • Proceeding can be discontinued for failure to pay 90 days after it is suspended for non-payment (proposed AR 58, AFR 14(5)(d); (AF)AR 7(5)(e); (AF)AR 67)
Award	• Award must be rendered within 120 days after the closure of the proceeding (closure is discretionary to the Tribunal)	• Award must be rendered within: 60 days if it is addressing an objection that a claim is manifestly without legal merit; 180 days if it is addressing a preliminary objection; and 240 days for all other matters (proposed AR 59; (AF)AR 69)

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Post-Award Remedies	• Request for supplementary decision and rectification within 45 days after the award (Conv. Art. 49)	• No change for time limits in AR (Convention mandatory provisions); change in (AF)AR to 30 days instead of 45 days for filing a request for supplementary decision, rectification and interpretation
	• Application for revision within 90 days after discovery of new fact that decisively affects the Award, with cap of three years after the Award (Conv. Art. 51) • Application for annulment within 120 days after the Award (with some exceptions) (Conv. Art. 52)	• Procedure is streamlined for interpretation, revision and annulment in AR: default is one round of pleadings; hearing must be requested (proposed AR 66)
	• No time limits for decisions	• Decision on interpretation, revision or annulment must be issued within 120 days after the last submission in AR (proposed AR 66(5))

26. As shown above, the proposals for amendment retain party discretion in Tribunal constitution, but make shorter default timelines applicable unless the parties expressly choose otherwise.

27. The proposals for written submissions include shorter, mandatory, time frames which should reduce the overall time of proceedings.

28. The AR and (AF)AR address the length of the deliberation process, including directions to Tribunals that they must deliberate promptly after the last submission on a matter for decision (proposed AR 16(4); (AF)AR 26(4)) and specify time limits for orders, decisions and the Award. While these are "best effort" obligations under proposed AR 8(3) and (AF)AR 16(3), it is expected that Tribunals will meet the deadlines unless there are special circumstances notified to the parties before the expiry of the relevant time limit. The expectations in this regard should be discussed at the first session (proposed AR 34(4)(i); (AF)AR 44(4)(j)).

29. In addition, the Tribunal and the parties are invited to discuss efficiency at the first session pursuant to proposed AR 34(4). This includes establishing a procedural schedule which takes into account the general duty of parties and Tribunals to conduct the proceeding in an expeditions and cost-effective manner (proposed AR 34 and 11; (AF)AR 44 and 20). It also means that the Tribunal may provide directions on the scope and length of written submissions in determining the number, type and format of written submissions, and on the procedure for requests for production of documents (proposed AR 34(4)(f) and (g); (AF)AR 44(4)(f) and (i)). Limiting the size of submissions may be necessary if Tribunals are to meet the time limits for issuing orders, decisions and the Award. The AR therefore

provide Tribunals with enhanced discretion to guide the parties on efficiency-related matters.

30. The proposed AR provide for case management conferences which the Tribunal can use to address efficiency (proposed AR 14; (AF)AR 23). The proposed Rule is meant to empower parties and Tribunals to actively manage the case. For example, a Tribunal could convene a case management conference after the first-round submissions to guide the parties with regard to the scope, subject matters and questions to be covered in the parties' second round submissions. This will help the parties to focus their submissions and assist the Tribunal in the deliberative process.

31. The AR allow Tribunals to be more restrictive in approving procedural requests. For example, requests for extensions of time limits fixed by the Tribunal may only be extended upon reasoned application made prior to the expiry of the relevant time limit (proposed AR 9(2); (AF)AR 17(2)). If no extension is approved and a party's procedural step is late, the step is disregarded unless there are special circumstances (proposed AR 8(2) and 9(3); (AF)AR 16(2) and 17(3)). In addition, a party must seek leave before filing any unscheduled submission or supporting document, and the Tribunal may only grant such application if the submission or supporting document is necessary in view of all relevant circumstances (proposed AR 13(4); (AF)AR 22(4)).

32. Thus, to enable Tribunals to succeed in meeting new time limits, Tribunals are given tools in the AR and (AF)AR to provide guidance and directions to the parties concerning the conduct of the proceeding.

33. Finally, the AR and (AF)AR have been carefully drafted to address efficiency while maintaining the parties' due process rights and equality of treatment. These are equally important principles.

IV. EXPEDITED ARBITRATION

34. In view of the comments received from Member States and the public concerning case duration and cost, the proposal also includes an expedited arbitration option.

A. FAST-TRACK ARBITRATION MODELS

35. "Fast-track procedures," are offered by many commercial arbitration institutions (*see e.g.*, Appendix VI of the ICC Expedited Procedure Rules (2017); Article 41 of the HKIAC Rules (2013), Rule 5 of the SIAC Rules (2016), and the SCC Rules for Expedited Arbitrations (2017)). They can either be triggered automatically if a claim is under a certain monetary threshold or by way of opt-in (the parties must expressly agree on their application) or opt-out mechanisms (the expedited rules apply unless the parties expressly agree not to apply them). For example, Art. 30(2) on Expedited Procedure of the ICC Rules (2017) provides that:

> The Expedited Procedure Rules (…) shall apply if a) the amount in dispute does not exceed the limit set out in Article 1(2) (…); or b) the parties so agree.

36. A typical fast-track arbitration is conducted by a sole arbitrator nominated by the parties or appointed by the arbitration institution, with an expedited schedule for pleadings, the option to deal with the case on the basis of the written record without a hearing, and leading to an Award within 6 months. The following table compares the features of expedited arbitration under the rules of the SCC, SIAC, ICDR, ICC and HKIAC:

	SCC	SIAC	ICDR	ICC	HKIAC
Arbitrators	1	1, unless SIAC determines otherwise	1	1	1, unless agreement for 3
Monetary threshold	No	Yes; S$6 million	Yes; US$250,000	Yes; US$2 million	Yes; HK$5 million
Application	Opt-in	Party request/Opt-in	Opt-out	Opt-out	Party request/Opt-in
Option to switch/exempt rules	SCC may invite parties to change rules	Upon party request	Silent	Yes	Silent
Case mgmt. conference / P.O.	Conference 7 days from case referral	Silent	P.O. within 14 days from appointment	Conference within 15 days from case referral	Silent
Submissions	RfA and Answer + 1 p/p; Filings not exceed 15 working days	Silent	Submissions due within 60 days of P.O.	Silent	RfA and Answer + 1 p/p
Hearing	Yes, if appropriate	Yes, if appropriate	Yes, if appropriate	Yes, if appropriate	Yes, if appropriate
Award	3 months from case referral	6 months from constitution	30 days from final hearing or receipt final written submissions	6 months from case mgmt. conference	6 months from case referral
Award (reasons)	Reasoned award upon party request	Summary reasons	Silent	Reasoned	Summary reasons

37. Some arbitration institutions that offer fast-track procedures have an *ad valorem* system, meaning that the fees chargeable for the administration of the case are based on the amount of the claim. They require the claimant and respondent to quantify the value of their respective claims and counterclaims in the request for arbitration and in the answer (*see e.g.*, Art. 4(3)(d) and 5(5)(b) ICC; Rule 3(1)(e) and 4(1)(b) SIAC; Art. 6(iii) and 9(1)(iii) SCC; Art. 4(3)(e) HKIAC). This also determines whether the expedited procedure is applicable. ICSID does not require claimants to indicate the amount of the claim, although this is recommended in proposed IR 3(a). It charges an annual flat fee once a case is registered and such fee is not linked to the amount in dispute.

38. Investment arbitrations can have the same level of complexity regardless of the amount in dispute. This is due to the particular characteristics of investment arbitration. As shown above, many cases involve jurisdictional and admissibility objections relating to interpretation of international law instruments. These matters are often heard separately from the merits. As a result, the procedural calendar of cases may look very different in each case and it is difficult to draft a model schedule that fits all scenarios. As a result, mandatory fast-track procedures are not apt for all ICSID cases.

39. At the same time, it is important to offer expedited arbitration for the parties' consideration where the parties agree such procedures are appropriate. The WP has therefore elected an opt-in model by which the parties can consent to apply Chapter XII of the AR and (AF)AR in their arbitration agreement or after the dispute arises, within 20 days after the date of registration of the Request for arbitration.

B. ICSID'S OPT-IN MODEL

40. The proposed EA are incorporated as a Chapter in the AR and (AF)AR, but would not apply automatically. Parties must expressly agree in writing to the application of Chapter XII of the AR and (AF)AR. Such agreement is in addition to an agreement to arbitrate under the ICSID Convention or the Additional Facility.

41. An EA arbitration clause in a contract could be formulated as follows:

> The [Government]/[name of constituent subdivision or agency] of name of Contracting State and name of investor hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of this agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention"). The Parties agree to apply Chapter XII of the [2019] Arbitration Rules of the Centre (Expedited Arbitration) to the arbitration proceeding.

42. The EA may also be suitable for certain disputes under investment laws or treaties. For example, the CETA contains provisions applicable to SMEs, *e.g.* the possibility of mediation, of a sole arbitrator when both parties agree, and for the parties to adopt ceilings for costs claims brought by SMEs (*see* Arts. 8.20, 8.19.3 and 8.23.5 of the CETA). The EA could complement this type of provisions by offering expedited arbitration.

43. Thus, the EA could be a good alternative for parties who want a speedy and lower cost process under arbitration rules that take into account the special characteristics of investment disputes.

C. FEATURES OF ICSID EXPEDITED ARBITRATION

44. The features of the EA are explained in detail in Chapter XII – Expedited Arbitration. In essence, the expedited procedures allow an arbitration to conclude within 470-530 days after the date of registration of the Request for arbitration. They provide for a Sole Arbitrator or three-member Tribunal to be appointed on an expedited basis, and for all matters to be heard in a single proceeding before the Tribunal without any bifurcation. The Arbitration Rules in Chapters I – XI apply to an expedited arbitration, except as expressly modified or excluded.

45. The EA focus on reducing the length of three main phases of the arbitration with long duration: (i) the establishment of the Tribunal; (ii) written procedures, especially interlocutory applications; and (iii) rendering the Award. These areas are also addressed in Chapters I-XI of the AR. However, the EA go a step further in that they offer a simple and expedited process, with clear expectations on the time it takes for each step from the registration of the Request for arbitration, to rendering the Award and any post-Award remedies.

46. The time limits in the EA endeavor to strike a balance between an expedited procedure under commercial arbitration rules and a realistic schedule for investment disputes. The time limits are on a slower track than in commercial arbitration but would significantly reduce the usual length of ISDS cases.

47. As mentioned above, the EA merge all matters before the Tribunal in one procedural schedule and do not allow for bifurcation. However, this does not mean that an EA would be slower than a bifurcated proceeding. As shown in Section II, in the current system, even a bifurcated proceeding dealing with jurisdiction as a preliminary matter typically has a substantially slower track. A review of the bifurcated proceedings showed that these had an average of 369 days for the written process (first session to the last written submission) and 258 days from the hearing for the Tribunal to decide on the objection to jurisdiction. The average length from the constitution of the Tribunal to an Award declining jurisdiction was 750 days. In an EA, the written and oral process are completed within 300 days after Tribunal constitution, and the Award is rendered within 120 days after the hearing, reducing the time by almost 340 days compared to a bifurcated proceeding that led to an Award declining jurisdiction.

48. Electing an EA necessarily means parties and counsel have to make certain compromises. First, parties and counsel must be prepared to limit the length of submissions and the number of separate procedural applications (*e.g.* requests for provisional measures and production of documents). Practice has shown that many arbitrations are delayed due to the high number of procedural applications made by the parties during the proceeding. By definition, an arbitration cannot be expedited if there are numerous disputes as to refusals to produce documents, special procedures, and the like. As a result, the approach of counsel will be vital to making the EA effective.

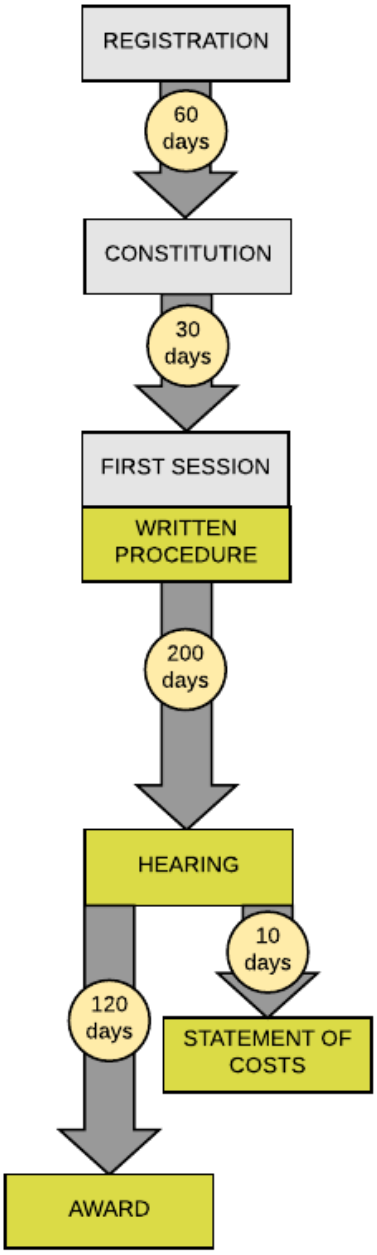
49. Second, parties must be prepared to merge all matters before the Tribunal in one procedural schedule. There is no option to bifurcate proceedings or have parallel schedules. If a party

wishes to raise objections to jurisdiction or to an ancillary claim, these would need to be included in that party's counter-memorial or reply (*see* proposed AR 36) and heard jointly with the other issues in dispute at the hearing.

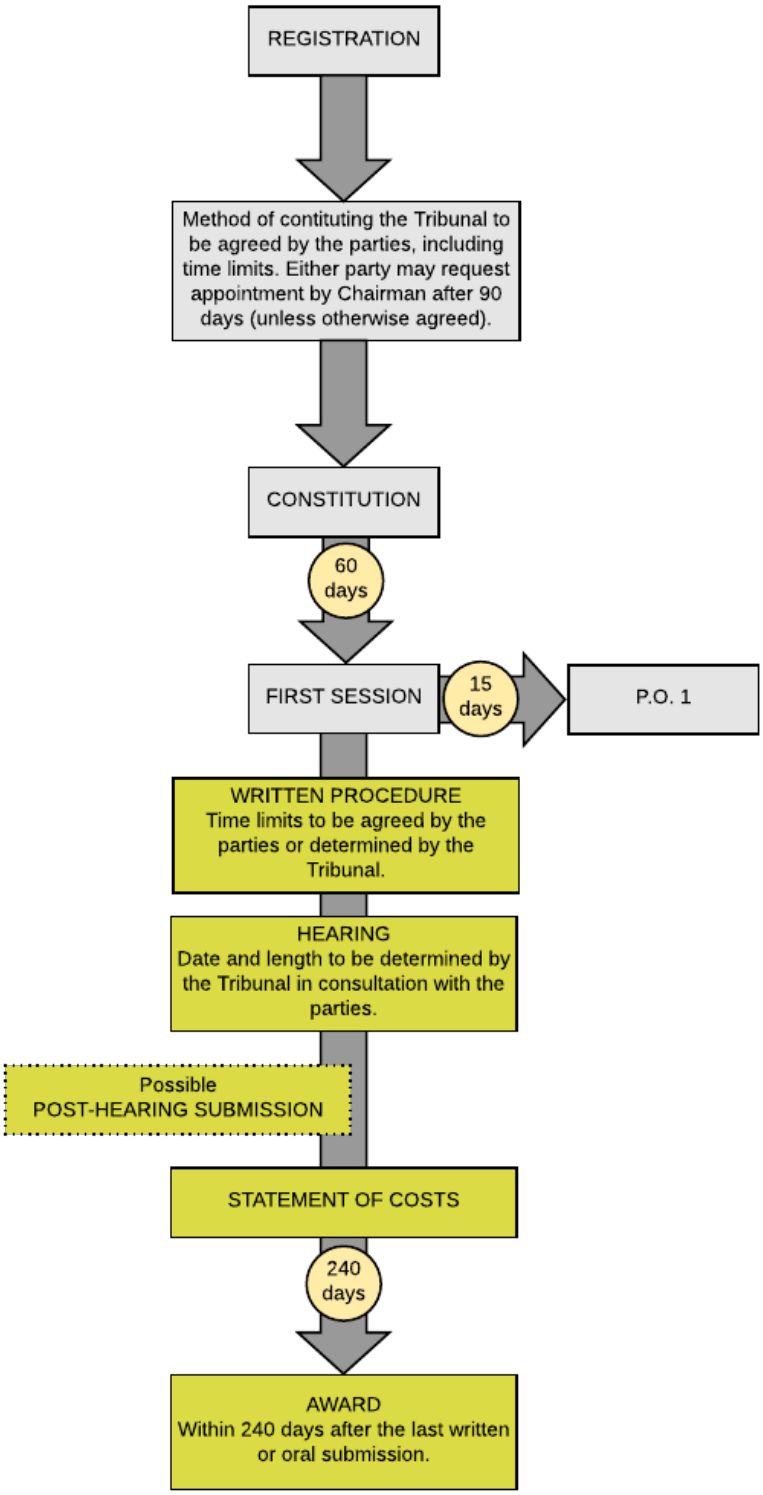
50. Third, the Tribunal must be available to conduct the proceeding under the EA. An expedited proceeding means the Tribunal must devote significant time from the moment it is constituted until the Award is rendered, *i.e.* during a period of approximately 450 days. Candidates for appointment should therefore be prepared to devote the time required to meet the shorter deadlines of the EA.

51. The table below shows the basic time line of an EA compared with an arbitration proceeding under the proposed AR and (AF)AR. It shows an ambitious but feasible procedural schedule, which concludes with an Award within 470-530 days after the registration of the Request for arbitration.

Timeline under EA



Timeline under Proposed AR



V. BEST PRACTICE NOTES AND GUIDELINES

52. The Centre also received a number of suggestions to prepare best practice notes and guidelines to address time and cost efficiency matters. The Centre has previously issued Practice Notes for Respondents in ICSID Arbitration which, among other things, provided suggestions on dispute prevention and pre-arbitration planning. The Centre also offers template documents for case management purposes, *e.g.* a template Procedural Order No. 1 with the matters addressed at the first session.

53. The proposed practice notes would be complementary to the Rule amendments and similar to those issued by ICSID in the past. They would concern different stages of the proceeding and particular matters where the Centre can contribute its experience in administering cases.

54. The practice notes will include case management techniques to reduce time and cost, including:

- how to manage electronic filing and organize submissions, *e.g.* how evidence should be produced (how exhibits should be numbered, whether or not publicly available legal authorities should be annexed, how to deal with electronic documents and meta data, etc.);
- how to handle bi-lingual cases in the most cost-effective manner (*e.g.* concerning translation and interpretation);
- templates of possible matters to be discussed in case management conferences;
- protocol regarding the role of secretaries and assistants to Tribunals;
- how to best manage documents for publication, and other transparency matters;
- consolidation and coordination of cases;
- how to conduct efficient and cost-effective hearings;
- how to manage the case finances; and
- guidance for the deliberations phase and for the preparation of the Award.

55. Some of the practice notes will focus on parties and counsel, and others will focus on arbitrators. This reflects the proposed amendments in the AR and EA, which expect that all involved will contribute to the efficient conduct of the proceedings.

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