

Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018

The current version of the compendium includes all comments received from States and public stakeholders until March 15, 2019. Any further comments received will be published on the ICSID [website](#) and subsequently incorporated into the compendium.

The compendium organizes these comments by the rules that they refer to, allowing readers to get a sense of the views advanced on each proposal contained in WP # 1. The compendium incorporates comments alphabetically, in the language in which they were received, and links each comment to the full submission of the commenter. Comments from States appear first, followed by comments from the public.

STATE COMMENTS	PUBLIC STAKEHOLDER COMMENTS
<ul style="list-style-type: none"> • African Union • Algeria • Armenia • Argentine Republic • Australia • Austria • Canada • People's Republic of China • Colombia • Costa Rica • Democratic Republic of Congo • European Union and its Member States • France • Georgia • Guatemala • Haiti • Hellenic Republic 	<ul style="list-style-type: none"> • Charles N. Brower • Burford Capital • CCPIT • Centro Studi TPF • James Clanchy • Debevoise & Plimpton LLP • Dentons • Susan Franck • Freshfields Bruckhaus Deringer LLP • Frank J. Garcia and Kirrin Hough • Chiara Giorgetti • Gibson Dunn • Guglielmino International Law • Margie Jaime • Yarik Kryvoi / BIICL • Sam Luttrell • Paul Eric Mason • Gerard Meijer and Pieter Fritschy

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I. ADMINISTRATIVE AND FINANCIAL REGULATIONS (AFR)

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I. ADMINISTRATIVE AND FINANCIAL REGULATIONS

Chapter I – Procedures of the Administrative Council

Regulation 1 – Date and Place of the Annual Meeting

NO COMMENTS RECEIVED

Regulation 2 – Notice of Meetings

NO COMMENTS RECEIVED

Regulation 3 – Agenda for Meetings

AUSTRIA DECEMBER 21, 2018

The deadline for submitting agenda items has been changed from 7 days prior to a meeting to 14 days prior to a meeting. Member States therefore have 7 days less time to place items on the agenda. Member States must be notified together with the agenda at least 42 days before the deadline. This leaves only 28 instead of 35 days to submit agenda items.

The period of 7 days should therefore be maintained.

SPAIN DECEMBER 21, 2018

La modificación del plazo para incluir asuntos adicionales a la agenda de las reuniones, pasando de 7 a 14 días, impide en la práctica que se puedan introducir asuntos en la agenda en las reuniones urgentes, ya que éstas se pueden convocar con un plazo 10 días, que sería insuficiente para introducir asuntos con el nuevo plazo. Consideramos que es conveniente que los Estados puedan incluir asuntos en la agenda de las reuniones urgentes, situación que estaría limitada con los plazos establecidos.

Regulation 4 – Presiding Officer

NO COMMENTS RECEIVED

Regulation 5 – Secretary of the Council

NO COMMENTS RECEIVED

Regulation 6 – Attendance at Meetings

NO COMMENTS RECEIVED

Regulation 7 – Voting

ARGENTINE REPUBLIC

DECEMBER 28, 2018

[...]

(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 ~~60~~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 affirmative votes ~~those~~ of a majority of the members.

[...]

Commentary

Current Administrative and Financial Regulation 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. Proposed Regulation 7(3)

gives the Chairman greater flexibility to request a written vote between meetings, even if the action can be postponed to the next Annual Meeting of the Council. In that case, member States should be given a longer period of at least 60 days to cast a written vote.

In addition, the safeguard that a written motion must be passed by a majority of member States and not simply by a majority of those voting should clarify that the replies received must include *affirmative* votes of a majority of the members.

GUATEMALA **DECEMBER 21, 2018**

Se sugiere suprimir la última parte del párrafo, dado que dejar abierta esta posibilidad es peligrosa, pues puede abrir la puerta a cambios constantes en las votaciones, haciendo más difícil alcanzar consensos.

Regla 7 Votación

“(…) (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).~~”.

SPAIN **DECEMBER 21, 2018**

Se ha eliminado el criterio de urgencia para poder convocar una votación por correspondencia, que podrá ser solicitado para cualquier tema por parte del Presidente del Consejo Administrativo. Podría ser conveniente que se incorpore que, cuando se requiera una votación formal, se deberá distribuir el texto escrito de la moción que se somete a votación a los miembros con la misma antelación temporal con la que se remitió a los miembros la documentación de la convocatoria.

Consideramos que se deben incluir cláusulas limitativas para solicitar el voto por correspondencia. Por ejemplo, la aprobación del presupuesto, nombramiento de cargos, modificación de reglas, etc... son temas cuya aprobación debería estar expresamente excluida del voto por correspondencia.

Chapter II – The Secretariat

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

NO COMMENTS RECEIVED

Regulation 9 – Acting Secretary-General

GUATEMALA DECEMBER 21, 2018

Se sugiere mantener la disposición vigente, dado que designar a una sola persona puede generar apuros en caso de ausencia de ésta, mientras que el orden de prelación resuelve el problema.

Regla 9

Secretario(a) General Interino(a)

“(1) Si ha y 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 /el orden cual/ ~~cuál~~ de los o las Secretarios(as) Generales Adjuntos(as) actuará como Secretario(a) General. (...)”.

HAITI FEBRUARY 26, 2019

La République d’Haïti attire l’attention sur l’article 9 AFR relatif au remplacement du Secrétaire Général ou de la Secrétaire Générale par l’un de ses adjoints. Alors que la rédaction proposée laisse la désignation du remplaçant à la discrétion du Secrétaire Général, mais compte tenu du rôle déterminant du Secrétaire Général dans le déroulement des procédures arbitrales, la République d’Haïti suggère

que le l'art. 9 AFR soit modifié pour exiger du Secrétaire Général qu'il tienne compte, lors du choix de son remplaçant, des compétences de cette personne dans le domaine de l'arbitrage CIRDI.

DENTONS DECEMBER 21, 2018

We suggest introducing the following changes:

“The Secretary-General shall designate the member of the staff of the Centre **who shall act** 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 **Chairperson** shall designate the member of the staff who shall **act as** Secretary-General.”

The first suggestion is stylistic. The second suggestion reflects the general observation concerning the word “Chairman.” The third suggestion arises from the fact that a member of staff cannot act “for” the Secretary-General where there is a vacancy in the office of the Secretary-General. It aligns the English version with the French and Spanish versions.

Regulation 10 – Appointment of Staff Members

NO COMMENTS RECEIVED

Regulation 11 – Conditions of Service

NO COMMENTS RECEIVED

Regulation 12 – Authority of the Secretary-General

NO COMMENTS RECEIVED

Regulation 13 – Incompatibility of Functions

FRANCE JANUARY 14, 2019

The incompatibility of functions imposed to the staff of the Centre should also apply, in addition to Commissions and Tribunals, to ad hoc Committees.

SPAIN DECEMBER 21, 2018

Esta regla establece que los SG y/o 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. Consideramos adecuado añadir la incompatibilidad con la actividad de asesoramiento a terceros, así como una mención al cumplimiento del código de conducta del Banco Mundial.

Chapter III – Financial Provisions

Regulation 14 – Costs of Proceedings

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

Le paragraphe 12 n’est pas validé, car il propose de réduire les délais de non-paiement alors que ces délais paraissent courts dans la mesure où les procédures administratives peuvent être longues pour les paiements.

1) Les critères retenus pour l'appréciation des frais d'arbitrage manquent de prévisibilité, alors que le caractère conventionnel de l'arbitrage devrait permettre aux Etats de connaître les montants prévisionnels ou forfaitaires des phases de la procédure arbitrale. De ce fait, il est préférable au CIRDI de :

- Communiquer les honoraires des arbitres et du secrétariat aux Etats.
- Transmettre des factures pro forma aux Etats dès la première ordonnance des procédures.
- Déterminer si les conférences de gestion de l'instance, citées dans le paragraphe 24, peuvent générer des coûts supplémentaires pour les Etats.

2) Introduire les vidéos conférences afin de réduire l'ampleur des coûts supplémentaires et diminuer les frais d'arbitrage.

3) Insérer une disposition qui prévoit la réduction des honoraires des arbitres dans le cas de retards dus au tribunal dans le prononcé de la sentence.

ARGENTINE REPUBLIC

DECEMBER 28, 2018

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~~

(be) 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 ~~Administrative Council~~Chairman, shall determine and publish the amount of the fee and the *per diem* allowance referred to in paragraph (1)(a) and (be). 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 for justified reasons and approved by the parties before ~~acceptance of the appointment to the first session of~~ the Commission, Tribunal or Committee ~~and shall justify the increase requested.~~

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

[...]

(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:

[...]

(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 ~~31~~20 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, move that and the Commission or Tribunal, ~~if constituted~~, discontinue the proceeding. If the Commission or Tribunal has not yet been constituted of there is a vacancy on the Tribunal, the Secretary-General may discontinue the proceeding after consulting with the parties.

[...]

Commentary

The fees and expenses of the members of a Commission, Tribunal or Committee to be covered should only include the fee for each hour of work performed in connection with the proceeding and, when required to travel to attend a hearing or session away from the member's place of residence, transportation expenses and a *per diem allowance*.

The amount of the hourly fee and the *per diem* allowance of the members of a Commission, Tribunal or Committee, and the annual administrative charge payable by the parties for the services of the Centre, should be determined by the Secretary-General, *with the approval of the Administrative Council*.

Any request for a higher amount of hourly fees or *per diem* allowances should be made through the Secretary-General for justified reasons and approved by the parties *before acceptance of the appointment* to the Commission, Tribunal or Committee.

The 30-day period for payment is impractical in light of the administrative process of many States. Reflecting this reality, a longer period of time of 120 days should be provided for.

The parties should always be consulted before the suspension or the discontinuance of a proceeding for lack of payment.

While it may be appropriate to allow the Secretary-General to suspend the proceeding for lack of payment, in order to discontinue the proceeding for lack of payment the Secretary-General should move the competent Commission, Tribunal or Committee to issue the relevant order, as provided for in current Administrative and Financial Regulation 14(3)(d).

COSTA RICA **DECEMBER 28, 2018**

Costa Rica views this proposal in favorable terms. Such a rule will unify the methodology to calculate fees and allow for a more exact compensation, as it requires accountability and transparency for billable hours.

Additionally, the rule proposes an important advance in making sure that any request by a member of the tribunal for a higher amount is justified and made only through the Secretary General. In practice, direct requests to the parties are undesirable because it puts them in a difficult position before the tribunal. These requests could result in increasing the overall costs of the proceedings and in compromising the independence and impartiality of the tribunal.

Costa Rica considers the 30 days for payment is not enough time to fulfill its administrative process. It suggests including at least a period of at least 60 days.

HAITI **FEBRUARY 26, 2019**

En effet les arbitres sont maitres de la procédure une fois la saisine faite. Le Secrétaire Général ne peut mettre fin unilatéralement à la procédure pour défaut de paiement. Cette disposition ne peut être effective qu'après notification du Tribunal et des parties. L'Arbitre doit être indépendant de l'administration du CIRDI. S'il est mis fin à l'instance pour non-paiement, il ne devrait pas être possible de reprendre la procédure après un quelconque règlement des paiements.

Par ailleurs, nous souscrivons à la réduction du délai de six (6) à trois (3) mois pour non-paiement des avances mais questionnons le pouvoir du Secrétaire Général de dessaisir le Tribunal et mettre fin à la procédure sans informer formellement les parties et le Tribunal.

FRANCE **JANUARY 14, 2019**

As indicated on page 32 of the Working Document, numerous arbitration centers calculate the costs of the proceedings on the basis of damages requested by the claimant. The French delegation is of the view that the introduction of such ad valorem rules should deserve further consideration. This method could indeed contribute to reducing the costs of the proceedings for disputing parties, especially for SMEs, and better framing damages claimed in investment arbitration proceedings.

THE NETHERLANDS **DECEMBER 21, 2018**

The Kingdom of the Netherlands welcomes the efforts to limit the costs and duration of proceedings. These costs could especially be an obstacle for individuals and small or medium sized enterprises. The interests of individuals and small or medium sized enterprises should specifically be taken into account in the provisions on e.g. expedited procedures, consolidation, decisions on allocation of costs and security for costs.

TOGO **DECEMBER 28, 2018**

Art 14 alinéa 5, (e), (iii) : le délai pendant lequel une procédure peut être suspendue pour non-paiement des avances est réduit de six (6) à trois (3) mois et le ou la Secrétaire Générale peut mettre fin à l'instance à la fin de la période de trois (3) mois sans autre intervention du Tribunal.

En raison de la lourdeur des procédures de décaissement de fonds au sein des services administratifs des Etats, il est souhaitable de maintenir le délai raisonnable de six (6).

DENTONS DECEMBER 21, 2018

The idea that the claimant(s) pay part of the first advance early in order to cover the estimated costs of the proceeding through the first session is welcome. However, the Secretary-General should be careful not to set this amount too high. One of the advantages ICSID has over other rules is the lesser impact on cashflow compared to upfront payment systems like that of the ICC or SCC. The higher the initial payments required by the claimant(s), the lesser this advantage.

FRESHFIELDS DECEMBER 28, 2018

In order to provide incentives for the timely issuance of decisions and awards, consider:

- Amending the Administrative and Financial Regulations to enable the Centre to withhold a portion of the fees of arbitrators, committee members and their assistants until the rendering of a final award or decision (or any other substantive interim decision) in the context of a proceeding. This proposal does not necessarily require an amendment to the Administrative and Financial Regulations, as these Regulations do not require the payment of fees within a specified period. However, a Regulation (or alternatively a practice of the ICSID Secretariat) enabling the Centre, in its discretion, to withhold the payment of a significant portion of the fees of decision-makers and their assistants until such time as an award or decision is rendered, may provide an incentive for the timely completion of arbitral proceedings. Indeed, other arbitral institutions have linked the payment of arbitrator fees to the achievement of certain milestones in the arbitration, which has coincided with a measurable reduction in the length of those institutions' proceedings.
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Regulation 15 – Special Services

NO COMMENTS RECEIVED

Regulation 16 – Fee for Lodging Requests

NO COMMENTS RECEIVED

Regulation 17 – The Budget

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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, with the approval of the Administrative Council, and published in the schedule of fees.

Commentary

The amount of the lodging fees should be determined by the Secretary-General, *with the approval of the Administrative Council*.

SPAIN **DECEMBER 21, 2018**

Esta regla remite la aprobación del presupuesto a la Regla 7, la cual permite la votación por correspondencia. Consideramos que este es un tema que debería estar excluido de la aprobación mediante votación por correspondencia.

Regulation 18 – Assessment of Contributions

TOGO **DECEMBER 28, 2018**

Art 18 : Ligne l supprimer « prévues » et lire « Tout excédent des dépenses sur les recettes prévues... »

Regulation 19 – Audits

NO COMMENTS RECEIVED

Chapter IV – General Functions of the Secretariat

Regulation 20 – List of Contracting States

FRANCE **JANUARY 14, 2019**

As indicated on page 74 of the Working Document, the Secretariat encourages the designation by Member States of the authorities within their government in charge of investment arbitration. This practice could be recognized by encouraging or requiring the notification of this information within AFR 20. The notified authorities would receive the documents covered under AFR 24, which could consequently be adjusted.

ONWUAMAEGBU, UCHEORA

DECEMBER 27, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Efforts to speed up proceedings, including ICSID’s proposed new rules for expedited proceedings, would be more effective if accompanied by measures aimed at helping governments respond more quickly to requests for arbitration and to actively participate in proceedings. Suggestions in this regard include the establishment of critical databases of ICSID members’ addresses for service, and of its members’ contacts for ISDS matters. Another suggestion is to put in place measures to enable the ICSID Secretariat to engage more effectively with members of its Administrative Council.

Establishing Critical Databases

ICSID could establish, and keep updated, a database of addresses for service of its members. This would ensure that arbitration notices and requests are addressed and transmitted to the right offices, thereby enabling both claimants and the Centre to more quickly serve arbitration notices and requests on the relevant office within a respondent government. At the same time, it would help shorten the reaction time of governments to such notices and requests.²

Secondly, ICSID could establish and maintain a database of its members' contacts for institutional matters, generally. This may, or may not, be the same as the contact for service of process. For instance, while the Attorney General's office could be the address for service of process, the contact for administrative matters could be the agency or ministry responsible for investment promotion. It could also be both. To achieve the establishment of the databases, ICSID may simply need to amend its Administrative and Financial Regulations 20 and 24.

Administrative and Financial Regulation 20 is the basis on which ICSID currently maintains several public lists. These include information on the date of entry into force of the Convention for the country; excluded territories for purposes of the ICSID Convention; designated constituent subdivisions or agencies for purposes of the Centre's jurisdiction; class or classes of dispute that a member State would or would not consider submitting to the jurisdiction of the Centre; designated competent court of other authority for the recognition and enforcement of awards; and legislative or other measures taken by the country to give effect to the Convention.³ Although these are information referred to in the Convention, the list could be extended to include other information that would help the Centre to be more effective.

With regard to communications with member countries on administrative matters, Regulation 24 currently provides that unless a specific channel of communication is notified by the State, "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 ..." This effectively means that communications are usually sent to staff of the Central Bank who typically have little day to day dealings with ISDS matters.⁴

It could even be argued that by starting with "[u]nless a specific channel of communication is notified by the State concerned," Regulation 24 anticipates that members would advise the Centre of specific channels of communication. The database could therefore be established on the strength of that provision. However, for the avoidance of ambiguity, clear provisions could be inserted in amendment to either or both Regulations 20 and 24.

Aside from ensuring a more efficient takeoff of proceedings, these databases would also greatly assist ICSID in better targeting its outreach and capacity building efforts.

However, even if the Regulations were to be amended, and the databases are established, for the databases to be kept up to date and useful, ICSID would need to engage more meaningfully with its members on a regular basis. The easiest way to achieve this would be through making changes to the manner in which the Administrative Council operates.

[Changes to workings of the Administrative Council](#)

The ICSID Administrative Council is the Centre's governing body. By virtue of Article 4 of the ICSID Convention, it is made up of "one representative of each Contracting State." While the government may designate any person to be its representative on the Administrative Council, in the absence of such a designation, the country's World Bank Governor shall be its representative on the Administrative Council.⁵ It is Chaired by the President of the World Bank.

Functions of the Administrative Council include approving changes to the Centre's rules and regulations; appointment of the Secretary General and Deputies, and approving the budget of the Centre and its annual reports. In addition, the Convention reserves certain functions for its Chairman, including acting as appointing authority and determining challenges to arbitrators.

With time, the appointing-authority functions assigned to the Chair of the Administrative Council are being increasingly performed by the ICSID Secretary General. This is in part in reflection of the fact that those functions require certain expertise that rightly reside in the office of the Secretary General. On the other hand, the other functions of the Council continue to be performed by the membership as devised over 50 years ago, regardless of how much the Centre and the wider ISDS system have evolved in that time.

As a result, today, even the complex discussions around the extensive changes proposed to ICSID rules are being conducted on behalf of many countries by Central bankers and officials of the Ministries of Finance. These are professionals who are no doubt the best and brightest in the field of public finance, but who may be lesser equipped to debate contemporary issues on ISDS.

The suggestions to address this situation include making changes to the way in which member states are represented on the Administrative Council; and establishing a committee of the Administrative Council that would be better engaged with the Secretariat on a regular basis.

Change in representation of Member States on the Administrative Council

ICSID Member States could ensure that their representation on the Administrative Council are by persons with the relevant expertise. This could be achieved by appointing representatives to the Council that may not necessarily be their World Bank governors.⁶ Indeed, a strict reading of the Convention would suggest that such appointees need not even be government officials, nor even nationals of the member government.⁷

Establishment of Standing Committee on the Administrative Council

As a complement to this, the Administrative Council could establish a standing committee specifically focused on and engaging with the ICSID Secretariat. Article 6 of the ICSID Convention makes this possible by providing that:
“(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.”

Such a committee would ideally be composed of representatives of member countries who have the requisite expertise to deal with ICSID – related issues. This could include the representative on the Administrative Council or, perhaps, officials from the justice ministry or some other agency - like the investment promotion agency, who are sometimes involved in the negotiation of the contracts and treaties that ultimately form the basis of some of the proceedings brought before the Centre.

It is noteworthy that the work done in setting up ICSID itself was conducted by a Committee of the Governors of the World Bank. According to the report of the Executive Directors of the World Bank accompanying the Convention, “The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task.”⁸

While a standing committee of the Administrative Council would provide a useful platform for the Secretariat to easily engage with member States on issues like the updating of the Panels of Arbitrators and Conciliators; and information in the databases of members, it is recognized that certain risks exist.

A more active Administrative Council could become unduly meddlesome in the work of the Secretariat, which must remain neutral at all times. This risk is particularly heightened by the fact that the Secretariat is also charged with acting as secretaries in cases involving the same member States either in their capacity as respondent or as home State of the investor. Care must therefore be taken in engaging with the members to ensure that certain lines are not crossed.

Regulation 21 – Panels of Conciliators and of Arbitrators

SPAIN DECEMBER 21, 2018

Consideramos que sería positivo que la información sobre el curriculum de los árbitros y/ o conciliadores sea mucho más amplia que la que actualmente se ofrece en la página web. Especialmente, sería de gran utilidad conocer a qué despachos de abogados, empresas de peritaje o empresas han asesorado en el periodo sujeto a escrutinio.

Regulation 22 – Publication

AUSTRIA **DECEMBER 21, 2018**

The current provision regarding the publication of information and documents only allows for documents such as "Arbitral awards and minutes and other records of proceedings" to be published with the consent of the parties. Proposed Amended Regulation 22, however, allows the publication of "documents generated in proceedings" without the consent of the parties in accordance with the applicable rules.

Firstly, it should be clarified which rules are the "applicable rules" for the publication of documents. Are they based on international law or national law, and if so, whose national law? From an Austrian point of view, the national law of the respondent state should be taken into account.

Secondly, it should also be noted that Austrian law provides for strict confidentiality obligations, such as banking secrecy and data protection. Therefore, publications should be treated with caution, and consent of the parties should continue to be required.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica shares the objective of enhancing transparency through the Administrative and Financial Regulations, and more generally, in the arbitration process. Consequently, Costa Rica considers that publishing the award (allowing for redaction when required) should be mandatory. Given the specific characteristics of ISDS and the fact that public interests are involved, this would be a very relevant step towards promoting greater transparency.

Costa Rica also suggests mentioning in the rule the specific documents that should be published for greater certainty as to the coverage of this rule. In its view, the documents to be included should be the ones that provide value to external observers in terms of accountability, and not all documents. In Costa Rica's experience, it has been observed that some documents are merely procedural, and their publication could negatively affect the proceedings' good governance and may create greater confusion if taken out of context. Costa Rica suggests an alternative drafting below for consideration, listing the main documents, which in any case, contain the relevant substantive and procedural information.

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

~~[CR: (b) documents generated in proceedings, in accordance with the applicable rules.~~ (b) the following documents generated in proceedings: request for arbitration, memorial, counter-memorial, reply, rejoinder, decisions on jurisdiction, awards and decisions on interpretation, revision and annulment.]

Regulation 23 – The Registers

NO COMMENTS RECEIVED

Regulation 24 – Communications with Contracting States

FRANCE JANUARY 14, 2019

As indicated on page 74 of the Working Document, the Secretariat encourages the designation by Member States of the authorities within their government in charge of investment arbitration. This practice could be recognized by encouraging or requiring the notification of this information within AFR 20. The notified authorities would receive the documents covered under AFR 24, which could consequently be adjusted.

DENTONS DECEMBER 21, 2018

It would be helpful to make it clearer to States that they can also ask for requests for institution of proceedings to be sent to the State organ that handles the dispute. This would avoid some of the gamesmanship involved in relying on the claimant to specify the right agency to which requests for arbitration should be sent.

For example, the regulation could be supplemented with a provision that: “A Contracting State may specify that all requests for arbitration or conciliation be communicated to an identified organ responsible for acting for the State in such proceedings.”

Regulation 25 – Secretary / Regulation 26 – Depositary Functions

NO COMMENTS RECEIVED

Regulation 27 – Time Limits

GUATEMALA DECEMBER 21, 2018

¿Qué sucede con el tema de los plazos? Quedó supremamente escueto en la Regla 27 propuesta. ¿Esto deberá ser un acuerdo incluido en la primera orden procesal? Imaginamos que esa es la intención, dado que en la práctica las partes lo acuerdan en la primera sesión.

Chapter V – Immunities and Privileges

Regulation 28 – Certificates of Official Travel

NO COMMENTS RECEIVED

Regulation 29 – Waiver of Immunities

AUSTRIA DECEMBER 21, 2018

With regard to the waiver of immunities, no changes were proposed in the Working Paper. However, compared to the current version of the administrative and financial regulations, several “and’s” were added to the bulleted list in each paragraph. For the sake of clarity the insertions of “and” should be omitted.

Chapter VI – Official Languages

Regulation 30 – Official Languages

OMAN DECEMBER 28, 2018

We recommend adding the Arabic language to the official languages of the Centre.

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II. INSTITUTION RULES

Rule 1 – The Request

HELLENIC REPUBLIC DECEMBER 28, 2018

Consider to set a limit to the maximum number of claimants with the same request. The same factual and legal basis should be required.

TUNISIA DECEMBER 27, 2018

L'offre publique d'arbitrage qui fait l'originalité de l'arbitrage CIRDI est parfois excessive. La ratification par l'Etat d'un traité d'investissement constitue en effet une offre d'arbitrage à des investisseurs totalement inconnus de l'État lors de l'émission de cette offre. Il suffit à manifester une telle acceptation le dépôt d'une requête d'arbitrage au moment même de la saisine du CIRDI par l'investisseur. Est-il possible de réviser cette tendance largement critiquée.

Rule 2 – Contents of the Request

COSTA RICA DECEMBER 28, 2018

Costa Rica welcomes this proposal. In general, Costa Rica acknowledges the effort to create a more detailed and well supported list of requirements. These could also be easily verified when processing a request for arbitration and expedite the identification of objections to the Centre's jurisdiction on matters such as nationality and authorization to file the claim.

Costa Rica finds the requirement of proving that a juridical person has authorization to file the request particularly useful. In one of its arbitrations, a company initiated presented a claim and afterwards, one of the shareholders requested the suspension of the proceedings alleging a lack of authorization. In such situations, a proper mandate can save costs and time. In the case of natural persons, Costa Rica sees in favorable terms the requirement to provide supporting documents to prove the nationality of the investor. This specific topic is usually an objection on jurisdiction and identifying if the case falls outside of the Centre's jurisdiction could result in saving costs.

Rule 2

Contents of the Request

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

[...]

(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 [CR:; and

(f) an estimate of the amount of pecuniary compensation sought.]

FRANCE JANUARY 14, 2019

The French delegation generally welcomes these proposals which clarify the information to be included in arbitration or conciliation requests. Contrary to the street address and mail address, the respondent's telephone number may be more difficult to retrieve. This requirement could accordingly be included within the non-mandatory information covered under IR 3 and AF(CR) 4 and the respondent could be asked to provide such information to the Secretariat. The non-mandatory nature of this information could also be reflected under AF(MR) 4.

THE NETHERLANDS DECEMBER 21, 2018

The Kingdom of the Netherlands welcomes the inclusion of a clear checklist in Institutional Rules 2 and 3 on what must be included in a request to initiate proceedings. Given the importance of such information for the respondent, it is proposed that the claimant should be required (Rule 2) to include an estimate amount of pecuniary compensation instead of the current listing in Rule 3(a). In addition, the request should include evidence establishing that the claimant is an investor of the other Contracting Party and that it owns or controls the investment and, where its acts on behalf of a locally established company, that it owns or controls the locally established company.

OMAN DECEMBER 28, 2018

Disputes should not be open to all matters related to investment Submission of a dispute should be on a violation provision in an investment treaty.

SLOVAK REPUBLIC DECEMBER 22, 2018

We appreciate the detailed checklist contained in the Request to initiate proceedings. We also support the concept of recommended and not mandatory points as additional source of information. This should enable the respondent to have a clearer picture about the dispute contribute to faster dispute resolution.

SPAIN DECEMBER 21, 2018

El art.25 del Convenio establece los siguientes requisitos para que una disputa esté sujeta a la jurisdicción del centro:

- Que proceda de una inversión
- Entre el nacional de un Estado contratante y otro Estado contratante.
- Existencia del consentimiento arbitral por escrito

La regla 2 propuesta establece que la parte demandante debe acreditar en la solicitud de arbitraje, entre otros, la siguiente información:

- El instrumento que contiene el consentimiento de cada parte (IP 2.b.i)
- Información de la nacionalidad junto con los documentos de respaldo (IP 2.c.; IP 2.d. & IP 2.e)

Es decir, se solicita, con buen criterio, la acreditación del consentimiento y de la nacionalidad. Sin embargo, sólo se pide una descripción de la inversión. Consideramos que la **inversión debería también ser acreditada** a la hora de realizar la solicitud. No existe un motivo para que la demostración del requisito de la inversión (Convenio Art.25) no tenga los mismos requisitos de exigencia que la nacionalidad y el consentimiento arbitral, y no deba ser acreditado, solicitando solamente “*una descripción de la inversión*” (IP 2.2.a).

Además, sería conveniente que con la solicitud se exigiera identificar si existe una **tercera parte financiadora** del arbitraje (third party funder). Y ello porque el fenómeno de la financiación por parte de terceros (“*third party funding*”) tiene repercusión de cara a la independencia de los árbitros, por lo que sería conveniente que desde que se presenta una solicitud de arbitraje la parte demandante ponga de manifiesto su existencia y la identificación, en su caso, del tercero financiador, así como el acuerdo suscrito entre ellos.

Por otro lado, consideramos que la estimación del monto de la compensación pecuniaria pretendida, no debe ser un requisito esencial.

URUGUAY

FEBRUARY 1, 2019

-I- Comentarios relacionados con la uniformidad, coherencia, previsibilidad y corrección de las decisiones arbitrales

A. Interpretaciones divergentes relativas a la competencia, admisibilidad y falta de uniformidad en el procedimiento.

Uruguay reconoce los esfuerzos que se realizan para reformar las reglas de arbitraje y los cambios que se han hecho a nivel bilateral para negociar tratados de inversión con mecanismos de desestimación temprana para resolver demandas frívolas.

En lo referente a enmiendas incluidas en Regla 2 sobre iniciación de los procedimientos de conciliación y arbitraje la Secretaria del CIADI propone realizar una serie de cambios que aseguran a las partes contar con más información al momento de presentar la solicitud de arbitraje-conciliación. En estos se incluyen la presentación de documentos de respaldo sobre el consentimiento y nacionalidad de las partes. En el documento de trabajo se explica que esto facilitará el análisis “prima facie” realizado por esta para desestimar el registro de solicitudes de arbitraje que se encuentran manifiestamente fuera de la jurisdicción del Centro.

De acuerdo al mandato otorgado por el Convenio CIADI – art.28(3) “el Secretario General registrará la solicitud salvo que, de la información contenida en dicha solicitud, encuentre que la diferencia se halla manifiestamente fuera de la jurisdicción del Centro”. Se entiende que el análisis que se realiza es muy preliminar “prima facie”, lo que en la práctica no impide el registro de solicitudes que si bien cumplen con las formalidades exigidas carecen de fundamentos de fondo y se pueden entender como “frívolas”, carentes de fundamento.

Atendiendo al mandato dado a la Secretaría en el Convenio CIADI se comenta que la enmienda que se propone en la regla 2 se limita a exigir más información a la parte demandante, las cuales serán un complemento de las exigencias incluidas en los tratados de inversión más modernos. Se propone agregar entre la documentación exigida información que le permita al Estado como demandado preparar mejor su defensa. Ver agregados en *itálico*.

Si una de las partes es una persona natural - Regla 2 (1) (c) - *se propone incorporar dos incisos (iii) indicar si una tercera parte está financiando la reclamación objeto de la solicitud, y de ser el caso, identificarlo; y (iv) indicar el estado financiero de la parte que presenta la solicitud a fin de demostrar que tiene los recursos necesarios para sufragar la integridad de los costas de ser estas ordenadas por el tribunal.*

Si una de las partes es una persona jurídica - Regla 2 (2) (d) *se propone incorporar tres incisos:(iii) indicar si una tercera parte está financiando la reclamación objeto de la solicitud, y de ser el caso, identificarlo; (iv) indicar el estado financiero de la parte que presenta la solicitud a fin de demostrar que tiene los recursos necesarios para sufragar la integridad de los costas de ser estas ordenadas por el tribunal, (v) indicar su estructura corporativa.*

DENTONS DECEMBER 21, 2018

The text “[...] a statement of the relevant facts, claims, and request for relief [...]” does not accord with the preliminary nature of the request for arbitration, which is not a definitive statement of claim in any international arbitration system (unless the claimant elects to treat it as such or it falls under expedited rules). Consider replacing the word “statement” with the word “**summary**.” Consider, also, whether to include an exception for cases in which the claimant intends to have the Request for arbitration serve as the memorial. (See Art. 3.1(f) SIAC Investment Arbitration Rules.)

Rule 3 – Recommended Additional Information

AUSTRIA DECEMBER 21, 2018

Proposed Amended Institution Rule 3(b) recommends that the Request for Arbitration include proposals on the number of arbitrators and the method of their appointment, absent a prior agreement. Such proposals are “recommended” rather than merely treated as “optional information” as in current Rule 3 Institution Rules. Proposals are still not treated as a required element of the Request for Arbitration. Proposed Rule 22 Arbitration Rules merely sets out a 60 day period for the parties to agree on a method of constituting the Tribunal, but does not set out a framework for the process. [See: Vol. 3, paras 106-124, 273-278]

The proposed changes insufficiently address Austria's proposal. It may be preferable if proposals on the number of arbitrators and the method of their appointment, absent a prior agreement, were introduced as a required element of the Request for Arbitration (e.g., introduced in proposed Rule 2(1) Institution Rules rather than in proposed Rule 3 Institution Rules).

COSTA RICA **DECEMBER 28, 2018**

Costa Rica suggests including the element of estimated damages as mandatory information in Rule 2 (Contents of the Request). An initial estimate of damages has proven to be key in the preparation for the arbitration, for example replying to the RFA, hiring legal or technical counselling and consideration of mediation, conciliation or negotiation.

Rule 3
Recommended Additional Information

It is recommended that the Request also contain:

~~[CR: (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.
-
-

FRANCE **JANUARY 14, 2019**

Some of the information covered under this rule, especially the estimate of the damages claimed, should not only be « recommended ». This rule should be entitled « ~~Recommended~~ Additional Information » and should provide that « ~~It is recommended that the~~ **The Request should** also contain: [...] ».

GUATEMALA **DECEMBER 28, 2018**

Debería exigirse propuestas de todos los aspectos procesales, de modo que al conocer la demandada estos aspectos pueda pronunciarse o contraproponer a la brevedad, haciendo más eficiente esta fase preliminar

HELLENIC REPUBLIC DECEMBER 28, 2018

Claimant in its request has to contain the grounds establishing the cause of the action and an unambiguous specification of the relief requested. Claimant must make a clear and unambiguous report of the facts which according to the substantive treaty or contract support the action, an exact description of the object in litigation and a certain relief.

THE NETHERLANDS DECEMBER 21, 2018

The Kingdom of the Netherlands welcomes the inclusion of a clear checklist in Institutional Rules 2 and 3 on what must be included in a request to initiate proceedings. Given the importance of such information for the respondent, it is proposed that the claimant should be required (Rule 2) to include an estimate amount of pecuniary compensation instead of the current listing in Rule 3(a). In addition, the request should include evidence establishing that the claimant is an investor of the other Contracting Party and that it owns or controls the investment and, where its acts on behalf of a locally established company, that it owns or controls the locally established company.

Rule 4 – Filing of the Request and Supporting Documents

AUSTRIA DECEMBER 21, 2018

Proposed Amended Institution Rule 4(1) stipulates that the Request for Arbitration shall be filed electronically. This obviates the need to clarify the number of (paper) copies needed (as none would be required).

The proposed changes address Austria’s proposal by modernising the method of filing and discarding a requirement of paper copies.

FRANCE JANUARY 14, 2019

The French delegation generally welcomes the proposal of the Secretariat to reduce the use of papers and to favor electronic communications, in line with the « go green » objective put forward at paragraph 5 of the Working Paper. This objective deserves further actions with the view to encourage good practices in favor of the environment. Possible requirements to this end for the selection of the seat of hearings, the designation of arbitrators or the factors taken into account to assess the « reasonableness » of the parties' costs (including copying costs) could for instance be considered.

Rule 5 – Receipt of the Request and Routing of Written Communications

AUSTRIA DECEMBER 21, 2018

Proposed Amended Arbitration Rule 5(4) [...] addresses Austria's proposal to reflect the existing practice.

For the sake of consistency, Rule 5 (a) should read: "[...] to the requesting party or the requesting parties;" Cf. Rule 1 (2) which clarified that several parties can submit one request.

Rule 6 – Review and Registration of the Request

HELLENIC REPUBLIC DECEMBER 28, 2018

Rule 6(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. **The Secretary-General should promptly notify also the Union for a request against Union member-States.**

Rule 7 – Notice of Registration

GUATEMALA **DECEMBER 28, 2018**

Se sugiere:

1. Mantener la frase contenida en la regla 6 vigente, respecto a la aclaración de que “Todo procedimiento previsto en el Convenio se tendrá por instituido en la fecha en que se registre la solicitud. Hace poco Guatemala tuvo una experiencia en la que esa aclaración fue vital para el proceso.
2. No coincidimos con la decisión de eliminar en esta propuesta la terminación de la literal (a) de la regla 7 vigente, por tal motivo sugerimos se mantenga que la notificación del registro de la solicitud debe dejar constancia de la que la solicitud ha sido registrada e indicar la fecha del registro y del envío de la notificación. Ello debido a que de no suceder por alguna razón la notificación del registro a la parte demandada, puede perjudicar a esta última en el cómputo de los plazos.

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 /y del envío de la notificación/; (...).”

Rule 8 – Withdrawal of the Request

SPAIN **DECEMBER 21, 2018**

El art.25.1 del Convenio establece “*La jurisdicción del Centro se extenderá a las diferencias de naturaleza jurídica que surjan directamente de una inversión entre un Estado Contratante y el nacional de otro Estado Contratante*”

Por tanto, el Convenio no establece en ningún artículo que las demandas puedan ser conjuntas. El término “el nacional” hace referencia claramente a un inversor de manera individual.

Por ello, ES se muestra preocupada con la redacción de la regla 8, donde se regula la retirada de una parte cuando existen varias partes solicitantes. Ello permitiría en la práctica un argumento sobre el posible consentimiento de los Estados Parte a la acumulación de varias reclamaciones.

Rule 9 – Final Provisions

NO COMMENTS RECEIVED

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III. ARBITRATION RULES

Chapter I – General Provisions

Rule 1 – Application of Rules

CCPIT **DECEMBER 25, 2018**

1. Original Text

[quotes text of proposed AR 1]

2. Modified Text

It is advised to amend paragraph (2) of Rule 1 (Application of Rules) of the proposed Arbitration Rules as follows:

The official languages of the Centre are **the official languages of the United Nations**. The texts of these Rules are equally authentic in each official language.

3. Reason for Amendment

(1) The issue of procedural language is very important in relation to whether the parties and their representatives can use the language to conduct arbitration proceedings and handle arbitration cases. For China, it is necessary to improve the use of Chinese in arbitration as much as possible, or at least to use it as an option. This is beneficial to practitioners in China who are involved in arbitration to learn about international investment arbitration cases, thus improving their professional skills. Therefore, if possible, there are some basic principles to comply with.

(2) Article 1 of the proposed Arbitration Rules states that the official languages of ICSID are English, French and Spanish. Considering that ICSID has the ability to handle 25 languages and the characteristics of international investment arbitration, that is, investors arbitrate against the host country, it is clear that the number of official ICSID languages does not match their ability to resolve investment disputes and the need for language for investment dispute resolution.

(3) ICSID is one of the members of the World Bank Group, and the World Bank Group is a specialized agency of the United Nations operating international financial services. The parties to the ICSID Convention and the members of the World Bank Group have a high degree of overlap, which means that ICSID and the members of the World Bank Group have an inseparable and close relationship between them and the United Nations. In order to solve the mismatch between the number of official ICSID languages, their ability to resolve investment disputes and the need for investment dispute resolution for language, and to facilitate the active

participation of national arbitrators in international investment arbitration, it is recommended that the official language of the United Nations be the official language of the Center.

Chapter II – Conduct of the Proceeding

Rule 2 – Meaning of Party and Party Representation

ARGENTINE REPUBLIC DECEMBER 28, 2018

Rule 2: Meaning of Party and Party Representation

[...]

(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, the Tribunal and the other party.

Commentary

The Tribunal and the opposing party should also be notified of the names and proof of authority to act of a representative of a party.

AUSTRIA DECEMBER 21, 2018

Rule 2 defines the terms “party” and “representative(s)”. Note No. 145 to Rule 2 explains that if a new representative acts for a party and has not submitted a proxy, he will be asked to submit one before receiving documents.

Rule does not include the obligation for a new representative to submit a power of attorney without delay or at the latest upon submission of documents. In order to be time-efficient, such a provision should be included.

HELLENIC REPUBLIC DECEMBER 28, 2018

Rule should include the obligation for a new representative to submit a power of attorney without delay or at the latest upon submission of documents.

We note an inconsistency between the use of the phrase “Party Representation” in the title and the use of the word “representative” in Rule 2(1)(b) and 2(2). To avoid any uncertainty, you may wish to amend the title of Rule 2 to “Meaning of Party and Party Representative”.

We also offer for your consideration the following amendments to Rule 2(2) for clarity:

*(2) Each party may be represented or assisted by agents, counsel ~~or~~, advocates **or other advisors** (“representative(s)”), whose names, capacity and proof of authority to act **on behalf of that party** shall be notified by that party to the Secretariat **and the other party or parties**.*

Rule 3 – Method of Filing

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. If the authenticity of a document is disputed, the Tribunal may require the submission of the original document for examination or of a duly certified copy.

[...]

(3) If an exhibit or legal authority is lengthy and relevant only in part, An extract of a-the supporting document may be filed, if provided the omission of the text does not render the extract misleading. The document shall indicate on its face that it is an extract and specify which parts have been omitted. The Tribunal may require a fuller extract or a complete version of the document.

Commentary

The rule should provide for the situation where the authenticity of a document is disputed, in which case the Tribunal may require the submission of the original document for examination or of a duly certified copy.

Only exhibits and legal authorities should be allowed to be submitted as extracts, not witness statements or expert reports. The submission of extracts of exhibits and legal authorities should only be permitted in cases where an exhibit or legal authority is lengthy and relevant only in part, provided the omission of the text does not render the extract misleading. The party submitting an extract of an exhibit or legal authority should specify that it has not filed a complete version of the document.

ARMENIA DECEMBER 28, 2018

While the Rule stipulates that written submissions, observations, supporting documents and communications shall be filed electronically, it also provides a possibility for the Tribunal to order otherwise. It is advisable to develop criteria when the Tribunal may order so to avoid possible "out of convenience" situations.

AUSTRALIA JANUARY 22, 2019

2. Electronic Filing

Australia strongly supports AR 3, which provides that filings are to be done electronically, unless there are special reasons to maintain paper filing.

CANADA DECEMBER 28, 2018

1) The Rule in paragraph 1 establishes a default of electronic submission, but allows the Tribunal to order otherwise. In the explanations in the Working Paper, it is suggested that this can only be so ordered for good cause. However that phrase is missing, and not implied in the Rule. Canada suggests that the language be changed to say "...or the Tribunal, for good cause, orders otherwise."

2) In paragraph 1, the language of “shall be introduced” is used, and in the Working Paper it is suggested that this is different than being admitted into the record. Canada questions whether this distinction is clear enough. Canada suggests consideration be given to rephrasing as below (with the additional modification proposed above): “Written submissions, observations, supporting documents and communications shall be filed electronically with the Secretariat, unless the parties otherwise agree or the Tribunal, for good cause, orders otherwise. The Secretariat shall acknowledge receipt and distribute them in accordance with Rule 4.”

3) In paragraph 2, reference is made to the need to file supporting documents with the “written submissions” to which they relate. A written submission is defined in the ICSID Rules later on. In Canada’s experience, supporting documents can accompany other types of communications to the Tribunal as well. Hence, Canada suggests that we broaden the reference in paragraph 2 to be, in both instances, “written submissions, observations, and communications”.

4) In paragraph 3, only the Tribunal is empowered to require a fuller extract or complete version of a document. In the Working Paper, it suggests that the other party may also request it, but that is not clear from the Rule. Canada suggests that this be broadened such that if only an extract is provided, the other party also has the right to require the production of a fuller extract or the complete version. Canada suggests that the last sentence, thus, be changed to say “The other disputing party or the Tribunal....”.

COLOMBIA **DECEMBER 28, 2018**

Párrafo 3. En este párrafo se sugiere la posibilidad de inclusión de extractos de documentos y se guarda la posibilidad para que el Tribunal pueda solicitar una versión completa del documento. Se sugiere que esta posibilidad sea extendida a la otra Parte contendiente, y que se lea “El Tribunal o la otra parte podrán solicitar una versión más amplia del extracto”.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica welcomes this new rule, as it will change the method of document filing from paper to electronic. Eliminating paper will both reduce costs and is a responsible environmental policy. The encouragement of these practices is also consistent with Costa Rica’s environmental policy priorities.

In terms of the language of paragraph 1 of this Rule, Costa Rica suggests a change in the drafting to clarify that exceptions to electronic filing shall be justified by a good cause.

Additionally, on paragraph 3 Costa Rica proposes that both, the Tribunal and the other party, may request a full version of a supporting document. A drafting proposal is included below.

**Rule 3
Method of Filing**

- (1) Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal [CR: for good cause,] 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. [CR: The other disputing party or t]he Tribunal may require a fuller extract or a complete version of the document.

HELLENIC REPUBLIC DECEMBER 28, 2018

Rule 3(2) All 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 of its own motion or at the request of a party require a fuller extract or a complete version of the document.

ITALY DECEMBER 24, 2018

Italy also highly appreciates the efforts of ICSID to reduce the use and delivery of papers. Without intending to force arbitrators and the other party to get fully rid of papers, it favors any solution that would permit reduction of printing and consequent delivery of extremely heavy and costly sets of documents. Of course, a very efficient and safe mechanism of storage of documents in soft copy must be guaranteed, but Italy is confident that this is a goal that can be easily achieved (also in the light of the already highly appreciated ICSID procedures to that end).

QATAR **DECEMBER 19, 2018**

In ICSID’s annotation 145, which states that proposed AR 3(1) requires electronic filing, the parties are permitted to agree otherwise and the Tribunal can 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.

Qatar takes the view that the proposed AR 3(1) does not reflect what has been stated in ICSID’s annotation 145; namely that the filling of the said hard copies should be ordered by the tribunal only if it is necessary.

Qatar recommends amending AR 3(1) as follows:

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 **for necessity**. 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.

Qatar welcomes the proposed reforms addressing the Reduction in the time and cost of arbitration through electronic filing (unless there are special reasons to maintain paper filing).

SINGAPORE **JANUARY 4, 2019**

We note that the presumption of using electronic copies is likely to lead to cost savings and therefore support the proposal.

We note ICSID’s intent in the Working Paper that the tribunal should depart from the general rule of electronic filing only in extraordinary circumstances. However, this does not appear to be reflected in the wording of the rule itself, and so we suggest that this be reflected in the wording of the rule.

[SLOVAK REPUBLIC](#) **DECEMBER 22, 2018**

We appreciate electronic submission of documents. This will contribute not only to expedite the proceeding but also will save environment.

[SOMALIA](#) **JANUARY 17, 2019**

Electronic Filing: Somalia welcomes the Centre’s move to electronic filing. The printing costs alone of each proceeding are astronomical. At the same time, most arbitrators and counsel employ electronic means of document review making much of that printing redundant. However, Somalia takes the position that the Centre should adopt an all-in-one electronic cloud-based system that can be utilized in each proceeding, rather than continuing to rely so heavily on emails. This should be for all submissions and routine correspondence with the Secretariat (such as confirmation of receipt and transmission to the Tribunal). The current file-sharing system is a “housing-only” product; technology presently exists that is far more sophisticated which can integrate the entire process into a single seamless solution. In light of data privacy and security concerns over email, and the ease with which correspondence can be accidentally sent or forwarded to the wrong recipient, such a solution is to be preferred.

[SPAIN](#) **DECEMBER 21, 2018**

ES apoya que la tramitación de procedimientos se realice por medios electrónicos y que el Tribunal pueda solicitar la presentación por otros medios. Ahora bien, consideramos que sería positiva incluir una mención a la excepcionalidad de esta petición del Tribunal.

[DEBEVOISE](#) **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

[...] Finally, we commend ICSID on going green by making the default for all filings electronic, as reflected for example in **Proposed Arbitral Rule 3**.⁴

STEPTOE **DECEMBER 28, 2018**

2.1 We agree with the Rules' establishment of electronic filing as the method of filing.

THREE CROWNS **JANUARY 16, 2019**

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Rule 3 provides for electronic submissions as the default. This is largely what already happens in practice, although the arbitrators often request the parties to provide them with hard copies of the submissions and exhibits which generate large printing costs. Further steps towards electronic documents and paper-free hearings could provide further cost savings while reducing the environmental footprint. For example, electronic filing could be made the default provision in ICSID's model Procedural Order No.1.¹

ZHONG LUN LAW FIRM **DECEMBER 28, 2018**

3. We fully support the method of electronic filing set out in proposed AR 3. We understand that in practice, electronic filing is often achieved by uploading the documents to a file-sharing platform provided by the ICSID Secretariat. It might be the case that the party and its counsel from one jurisdiction have greater difficulty in accessing the file-sharing platform than the other party due to different cybersecurity policies applying in each jurisdiction. It is therefore suggested that an accessibility test be conducted before the Secretariat deploys a document-sharing platform for the filing and exchange of documents for a particular case. An alternative mechanism, for example, by way of an electronic storage device, might be worth considering in specific situations.

Rule 4 – Routing of Written Communications

ARGENTINE REPUBLIC

DECEMBER 28, 2018

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 or agreed by the parties, provided that the other party and the Secretariat are copied on the communications.

[...]

Commentary

It is common practice for the parties to agree to copy the members of the Tribunal on communications sent to the Secretariat.

CANADA

DECEMBER 28, 2018

1) Canada suggests that Rule 4(1)(a), as drafted, may create some confusion as to whether parties must always copy the Secretariat on their bilateral communications even if they have not decided whether such communications need to be filed in the proceeding (i.e., the parties may wish to communicate between themselves and only later determine to submit such communications into the proceeding). Canada suggests that (a) be clarified to allow parties to communicate directly without having to involve the Secretariat by striking out the language after the comma in (a). In Canada’s view, Rule 3 on Method of Filing is sufficiently clear on how the parties must submit a communication to the Tribunal if they wish to do so.

COLOMBIA

DECEMBER 28, 2018

En el párrafo 154 se explica que se ha convertido en una práctica estandarizada que las partes se copien entre ellas en sus comunicaciones al Secretariado. Si bien lo anterior es cierto, el alcance que se le da al literal (a) de la propuesta es más amplio, pues no se considera práctica estandarizada que, en todas sus comunicaciones directas, las partes copien al Secretariado.

[DEBEVOISE](#)

DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Finally, we draw your attention to the suggestions we made in March 2017 that have not been adopted in the current draft of the Proposed Amendments, but which may merit further consideration.

First, ICSID should adopt rules for the appointment of **Emergency Arbitrators** *before* the constitution of the tribunal. Although **Proposed Arbitral Rule 50(7)** allows for recourse to other courts and tribunals, in practice, such relief may not be available because it is severely limited by the terms of Rule 50(7), which require that the “instrument recording the parties’ consent to arbitration” allow for such recourse. As we previously noted, in some cases, the availability of emergency relief can be a matter of life and death.¹¹ The need for access to emergency arbitration is even more acute in light of **Proposed Arbitral Rule 4**, which appears to no longer allow for a party to communicate directly with the tribunal in urgent circumstances.
[see submission for additional comments]

[THREE CROWNS](#)

JANUARY 16, 2019

For clarity, we offer for consideration the following amendment to Rule 4(1)(a):

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

It may be useful to include a limited exception clause in Rule 4(1)(c) to cater for the possibility of *ex parte* communications specifically authorized by the tribunal, *e.g.*, in the context of document production or interim measures:

*(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, **except if the Tribunal otherwise authorizes.***

Rule 5 – Procedural Languages, Translation and Interpretation

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 5: Procedural Languages, Translation and Interpretation

[...]

(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 translation indicates on its face that only part of the document have been translated and specifies which parts have been omitted. ¶The Tribunal may require a fuller or a complete translation. If the translation is disputed, the Tribunal may require a certified translation.

[...]

Commentary

The party submitting a translation of only part of a document should specify that it has not filed a complete translation of the document.

CANADA **DECEMBER 28, 2018**

1) In paragraphs 3, 4 and 6, the proposal is that the Tribunal “may require” translation into both procedural languages. The Working Paper suggests that a party could also make the request, but that is not clear from the Rule. Canada suggests that the Rules state in each case that “the other disputing party or the Tribunal may require...”

COLOMBIA **DECEMBER 28, 2018**

Colombia sugiere que se incluya en los numerales 3, 4 y 6 la posibilidad de que las Partes del procedimiento también soliciten la traducción de algún documento a la otra Parte.

FRANCE **JANUARY 14, 2019**

« Les parties peuvent convenir d'utiliser une ou deux langues pour la conduite de **la** procédure ».

« Les enregistrements et transcriptions d'une audience sont effectués dans la ou les langues(s) ».

GEORGIA **DECEMBER 28, 2018**

Does the terms “document” in the context of Rule 5 include witness statements or expert reports? If this not the case, we believe Rule 5 shall also make reference to this type of written evidence and to the need to translate them in the language of the proceedings; alternatively, the requirement to produce them in the language of the proceedings or accompanied by the relevant translations could be included in the proposed Rules 41.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that in respect of certified translation there is a great deal of confusion regarding what is considered to be a certified translation.

The translation industry is unregulated in many countries. For example, in many countries a certified translation consists of the translation itself accompanied by a signed statement by the translator or translation company affirming that the translated text is an accurate and complete rendering of the original document, however, this certification in and of itself does not prove that the translation is accurate, nor does it mean that the translator who prepared it is certified. This brings into question the authenticity and accuracy of a particular translation.

Qatar takes the view that there should be an accreditation process so that the integrity of the translation process is above reproach and accurate according to accepted standards.

Qatar takes the view that the ICSID should establish guidelines for the certification and recognition of translations submitted before the tribunal.

We support this proposal as it sets out greater clarity regarding the use of procedural languages.

However, we would like to suggest a change to the position in Rule 5(4). We think that the fact that a document filed in the proceeding need not be fully translated and the translation need not be certified unless the Tribunal orders otherwise may in fact lead to more skirmishes at the procedural stage if parties dispute translations or find issues with parts of the translation. In addition, it seems to us that in reality, for a party that does not understand the language in which a document is filed, if the document is not fully translated, costs would have to be incurred to translate it fully for the purposes of that party's understanding. Therefore, the additional work and cost will often be incurred anyway. It seems to us that while it would compromise to some extent on the speediness of the process, it would be advisable that the parties be required to fully translate any documents they intend to use for proceedings.

Proponemos incluir un apartado adicional que recoja el caso de que las partes acuerden un idioma oficial del centro para el procedimiento. En este caso, el Tribunal no puede solicitar la presentación de cualquier documento en otro idioma distinto del acordado por las partes, aunque se trate de otro idioma oficial del centro. Esta medida ahorraría tiempo y costes sustanciales a las partes en el procedimiento. Asimismo esta propuesta contribuye a asegurar que los árbitros que el Centro designe sean capaces de manejar el procedimiento en la lengua elegida por las partes.

Redacción propuesta:

“(X) Si las partes acuerdan la utilización de un idioma oficial del Centro en el procedimiento, el Tribunal no podrá solicitar que las partes presenten cualquier documento en otro idioma, aunque se trate de otro idioma oficial del Centro.”

El apartado (4) indica:

“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”

Quizás fuera conveniente la siguiente modificación (en negrita): “(...) *Será suficiente que se traduzcan solamente las partes pertinentes de un documento; sin embargo, el Tribunal podrá solicitar, **por propia iniciativa o a petición de una de las partes, una traducción más amplia o completa del documento (...)**”*

TOGO **DECEMBER 28, 2018**

Art 5 alinéa (3) : Langues de la procédure, traduction et interprétation dispose que « 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 les deux langues de la procédure... »

Il en résulte qu'en présence de deux (2) langues de procédure, le Tribunal peut s'abstenir d'ordonner la traduction.

Dans le souci d'une compréhension unique et rapide des documents, il vaut mieux maintenir l'exigence d'une traduction automatique et donc réécrire : « 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 doit exiger** d'une partie qu'elle dépose tout document les deux langues de la procédure... »

TUNISIA **DECEMBER 27, 2018**

Article 5 (1) Les parties peuvent-elles convenir d'utiliser plus que deux langues surtout lorsque l'arbitrage est engagé entre plusieurs parties ou en cas de tierce partie ?

Article 5 (4) cet alinéa dispose que les documents présentés au tribunal dans une autre langue que celle de procédure doivent être accompagnés d'une traduction dans une langue de la procédure. S'il s'agit de deux langues, le tribunal peut exiger cette traduction. On pourrait se demander :

a- Si le tribunal exige cette traduction d'office ou sur demande de l'une des parties dans certains cas ?

b-Pourquoi exiger cette traduction si le tribunal et les parties comprennent la langue du document même si elle n'est pas celle de procédure ?

c-Pourquoi exiger la traduction du document dans les deux langues de procédure ? afin d'alléger la tâche aux parties qui se sont convenues sur les deux langues, est-il plus opportun de traduire le document seulement dans l'une des deux langues choisies ?

1. Original Text

[quote text of proposed AR 5]

2. Modified Text and Reason for Amendment of Rule 5(1)

(1) Modified Text

It is advised to amend paragraph (1) of Rule 5 of the proposed Arbitration Rules as follows:

The parties may agree to use one or two procedural languages in the proceeding. **The parties shall consult with the Secretariat or, if the Tribunal has constituted, the Secretariat and Tribunal**, regarding the use of a language that is not an official language of the Centre.

(2) Reason for Amendment

1) The investment arbitrations between investors and host states involve the host country. If the investment agreements between parties stipulate that the official language of the host country is the procedural language, whether such agreements are binding or not should be clarified. We believe that the choice of procedural language should respect the autonomy of the parties. If the investment agreement stipulates that the official language of the host country or any language should be used as the arbitration language, it should be binding. Therefore, in the text of the future investment agreements or trade agreements, the Chinese government needs to consider the procedural language(s) in the text, suggesting that Chinese is the only or one of the procedural languages.

2) The proposed Arbitration Rules stipulate that if a non-Central official language is used, the parties shall consult with the arbitral tribunal and the Secretariat. The question needs to be asked does the requirement require consultation with both the arbitral tribunal and the Secretariat when using a non-Central official language. Since the claimant first contacts the Secretariat and selects the arbitrator, and then the arbitral tribunal is constituted, the claimant or the respondent needs to consider the language issue when selecting arbitrators. Therefore, if the parties agree to use a non-Central official language before the constitution of the arbitral tribunal, is it only necessary to consult the Secretariat. If the consultation with the arbitral tribunal is required, the members of the arbitral tribunal should determine the possibility of using a non-Central official language, it is conducive to selecting appropriate arbitrators and improving arbitration efficiency.

3. Modified Text and Reason for Amendment of Rule 5(2)

(1) Modified Text

It is advised to amend paragraph (2) of Rule 5 of the proposed Arbitration Rules as follows:

If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre, **and both the official languages selected are procedural languages. The agreement on the procedural language(s) reached in the Investment Agreements or Trade Agreement which binding on the parties shall be valid.**

(2) Reason for Amendment

1) Final determination of procedural languages, while the parties did not reach an agreement on procedural languages.

While the parties select different official languages of the Centre, whether both languages are procedural languages, or will it be decided which one is the formal arbitration language by the Secretary-General or the Chairman. It is not specified in the Rules, and it is recommended that when the parties select different official languages of the Centre, it should be clear that both languages are procedural languages to avoid ambiguity.

2) Alternatively, it may provide that when the parties select different official languages of the Centre, it should be decided by Secretary-General which one is the formal arbitration language.

C. Other Consideration of Amendment of Procedural Languages

1. The issue of language in arbitration is considered not only in the arbitration process, but also in the stages of consultation, conciliation and mediation. Therefore, the issue of procedural language needs to be clarified in the Rules and should have some continuity of application.

2. In addition, when the procedural language selected is not the official languages of the nationality of a party to the dispute, the translation work-load is relatively heavy, the translation of materials will affect the delivery time and the impartiality of procedures to a certain extent, which should also be considered.

DENTONS DECEMBER 21, 2018

In the penultimate sentence, we suggest adding “**or the other party may provide**” between “the Tribunal may require” and “a fuller or a complete translation.” Many times incompletions in translations become apparent only later in the proceeding; no due process issues would arise from presenting a more complete translation of a document already of record.

As compared to the previous Rule 22, it seems to encourage bilingual proceedings in which all documents would need to be submitted in both languages. In our experience, this is wasteful in terms of translation costs, and where documents are printed, effectively doubles the cost and environmental footprint. The Rules might instead encourage Tribunals to keep translations to the minimum necessary.

In addition, for clarity, we offer for your consideration the following amendments to Rule 5(4), 5(6) and 5(7):

(4) *If the translation is disputed, the Tribunal shall resolve the dispute and may for that purpose require a certified translation.*

(6) *The recordings and transcripts of a hearing shall be ~~made 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 one or both of the procedural language(s) used at the hearing, as may be directed by the Tribunal.*

4. It is understood that AR 5(1) attempts to balance the interests of the parties with the Tribunal's ability to carry out its role using a language in which it has sufficient competence. In our view, the formulation of proposed AR 5(1) is less clear than the current rule provided in Rule 22(1). This is because the current version gives effect to the autonomy of the parties by expressly noting that the Tribunal has the authority to approve the parties' agreement on the use of a language that is not an official language. In contrast, AR 5(1) is silent as to how the Tribunal or the Secretariat ought to respond following a consultation with the parties. In general, we consider it appropriate to provide in the rules that the Tribunal should favour party autonomy when determining the use of a non-official language in the procedure, unless the Tribunal's approval would result in an undue burden on either party or the Tribunal or the Secretariat itself. Further, the approaches taken in AR 5(1) and AR 5(5) may need to be considered in conjunction, as the latter requires the use of two procedural languages in rendering orders, decisions and the Award (of which the parties may opt out). The Tribunal should not be discouraged from approving the use of non-official languages as procedural languages on the basis of the requirement in AR 5(5) for the Tribunal to render orders, decisions and the Award in both procedural languages. With these considerations in mind, we invite the Secretariat to consider whether proposed AR 5(1) needs to be further revised.

5. The second sentence of AR 5(3) proposes that, in a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages. “Any document” is quite broad in scope and could encompass, for example, long exhibits written in one of the procedural languages. This broad language could lead to an excessive burden borne by a party who is required by the Tribunal to produce a translation. Accordingly, we consider it more appropriate for the burden to be placed on the party who considers it necessary to translate the document into the other procedural language. Thus, we suggest adding a new sentence after the second sentence so that AR 5(3) would read as follows:

Proposed AR 5(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. **A document that is originally written in one of the procedural languages is not required to be translated into the other procedural language, unless one party requests the document to be translated and the Tribunal considers it necessary to do so in the circumstances.**

Rule 6 – Correction of Errors and Deficiencies

CANADA DECEMBER 28, 2018

1) In paragraph 2, the Rule states that the Secretariat may request that a party correct a deficiency. In the Working Paper, at paragraph 170, the suggestion is that the Secretariat may correct the deficiency. Canada supports the wording of the Rule here, but requests clarification in light of the language in the Working Paper.

COLOMBIA DECEMBER 28, 2018

Colombia está de acuerdo con la redacción de esta regla, como está expresada en el sentido de que “El Secretariado podrá solicitar que una parte corrija cualquier deficiencia”. Sin embargo, en el “documento de trabajo” párrafo 170 se menciona que el secretariado “podrá corregir la deficiencia”. En este sentido, se solicita confirmar el alcance del artículo en el documento de trabajo.

SPAIN **DECEMBER 21, 2018**

El apartado 1 establece que una parte podrá corregir cualquier error accidental en *cualquier momento antes de que se dicte el laudo*. ES considera que este plazo es excesivamente amplio y que debería quedar limitado o bien hasta el próximo trámite procesal o bien por un plazo determinado.

El apartado 2 establece que el “*Secretariado podrá solicitar que una parte corrija cualquier deficiencia en una presentación por cuenta propia de la parte*”.

Anteriormente, la corrección de errores estaba limitada por las siguientes disposiciones:

- Regla 24.2: establece que el SG podrá solicitar la corrección de deficiencias formales, falta de número de copias o falta de traducciones.
- Regla 25 RA: establece que se podrá corregir un error si la otra parte o el Tribunal no lo objeta.

Con la redacción actual, la posibilidad de corregir deficiencias se amplía a cualquier término. Además, se eliminan las salvaguardas existentes actualmente, al no requerir el consentimiento del Tribunal o de la otra parte.

Consideramos que la facultad de corregir deficiencias, a instancias del Secretariado, debe estar circunscrita a errores formales, tipográficos, aritméticos y en su caso errores materiales manifiestos. En este sentido, el término “*cualquier*” tiene una gran amplitud y ambigüedad, y que es importante limitar el alcance de corrección.

DENTONS **DECEMBER 21, 2018**

The final part of the sentence should read “with **the** agreement of the other party or with leave of the Tribunal.”
If this suggestion is accepted, conforming changes should be made throughout the English version.

To encourage parties to offer corrections to errors as soon as possible, we offer for consideration the following amendment to Rule 6(1):

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

Rule 7 – Calculation of Time Limits

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 to the parties;
- (b) on which the Tribunal announces the period and it becomes known to the parties; or
- (c) on which the procedural step starting the period is taken and it becomes known to the parties.

(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 public holiday observed ~~by the Secretariat~~ at the place of the party or representative making the relevant submission, it shall be satisfied if the relevant step is taken or the relevant document is received by the Secretariat on the subsequent business day.

Commentary

No event should trigger a time limit if it is unknown to the parties.

The holidays observed at the place of the party or representative making the relevant submission should be taken into account to establish that a time limit does not fall on a business day. Parties have increasingly adopted such criterion.

CANADA **DECEMBER 28, 2018**

1) Canada suggests that clarification be given to the concept of the “day after the date.” In particular, the day after a date can vary depending on the location of a party. For example, an investor in Japan may file a notice on Friday, December 28, 2018 at 9am in Japan. However, that will be Thursday, December 27 in Washington, D.C. In such circumstances, it will be unclear whether the time limit should be calculated from December 29 or from December 28. Canada suggests that consideration be given to specifying the relevant place for the calculation of the date in paragraph 1.

COSTA RICA **DECEMBER 28, 2018**

With the objective of having greater certainty in the calculation of time limits, Costa Rica suggests that a specific time-zone is included in the Rule.

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

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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, provided that such time limit is not mandatory under the Convention and both parties are given an opportunity to state their views.

(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 or the Chairman from complying with a time limit, ~~it shall advise~~ the parties shall be notified of the reason for delay and the date when ~~it anticipates~~ the order, decision or Award is expected to will be delivered.

Commentary

Both parties should be given an opportunity to state their views before the Secretary-General or the Tribunal, as applicable, concludes a delay is justified, as provided for in current Arbitration Rule 26(3). Failure to comply with a time limit that is mandatory under the Convention should not be excused.

Both the Tribunal and the Chairman may be prevented from meeting a time limit in special circumstances.

AUSTRIA DECEMBER 21, 2018

Rule 8 deals with time limits. The parties may, pursuant to para. 1, by mutual agreement, extend non-binding time limits. In the event that the counterparty does not agree, no unilateral extension of time is provided for.

However, this should be possible, since the acquisition of information and the complexity of the procedure are often time-consuming. An extension of time should not be subject to consent of the other party, but should be authorised by the Tribunal upon on a justified request.

CANADA DECEMBER 28, 2018

1) Canada is uncertain of the reference to the powers of the Tribunal in paragraph 2 of this Rule, particularly in light of paragraph 175 of the Working Paper, which provides that “Because these time limits are not fixed by the Tribunal, they cannot be extended by the Tribunal.” In these circumstances, Canada asks for clarification as to how the Tribunal could be empowered to find the existence of special circumstances justifying the delay, when the Tribunal does not have the power to extend the time limits in the first place, according to the Working Paper.

2) Canada notes that paragraphs 2 and 3 both use the concept of special circumstances, however, the Working Paper does not give any guidance as to what constitutes such special circumstances. Canada suggests that consideration be given to providing guidance as to what constitutes special circumstances in some form prior to the implementation of these new Rules.

[COLOMBIA](#)

DECEMBER 28, 2018

Con respecto al párrafo 2, Colombia considera que no queda claro qué tipo de “circunstancias especiales” pueden justificar una demora”. Se sugiere indicar qué incluye dicha expresión con el fin de dar transparencia al proceso de decisión.

[HELLENIC REPUBLIC](#)

DECEMBER 28, 2018

In the event that the counterparty does not agree, a unilateral extension of time should be provided for. The Tribunal should be authorized to decide upon on a justified request.

[TUNISIA](#)

DECEMBER 27, 2018

1. Les parties peuvent-elles proroger les délais fixés par le tribunal par exemple les délais prévus par l’article 9 (nouveau) et 45 du règlement d’arbitrage ?
2. L’alinéa 2 prévoit qu’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.

Cet alinéa n’est pas en parfaite harmonie avec le premier alinéa car il considère comme irrecevables les actes accomplis après les délais fixés par le Secrétaire général ou prévu par la Convention ou le présent Règlement ou par le tribunal alors que le premier alinéa donne aux parties également la possibilité de convenir de prolonger les délais.

Donc, il serait plus juste de rectifier le deuxième alinéa comme suit :

(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, ou les parties conformément au premier alinéa, sauf si le ou la Secrétaire général(e) ou le Tribunal, selon le cas, conclut que des circonstances particulières justifient le retard.

The ICSID Draft takes the following approach to extensions of time:

- (a) time limits set by Convention or by the Secretary General may be extended by agreement of the parties but not by the SG or the Tribunal upon application of a party;
- (b) time limits set by the Tribunal may be extended by the Tribunal itself (upon application of a party) but not by agreement of the parties;
- (c) an application for extension of time can be made prior to the expiry of the time limit, which suggests that the application can be made literally at any time before 11.59pm of the last day of the time limit (Rule 7(2)).

The ICSID Draft would benefit from taking the same approach to extension of time limits of all kinds, i.e. those set by the Convention or the SG or the Tribunal. The parties should endeavor to agree on an extension and approach the Tribunal or the SG absent an agreement. There is no reason why certain route for extension should be available for one kind of time limits and not for the others.

There is also room for improvement of rules on timing of applications for extension of time. An application should be made in the time that allows the Tribunal to deliberate and take a considered decision on the application; the Rules should not encourage last-minute applications that cause difficulties to everyone involved in the arbitration.

We would propose, accordingly, the following amendments to the rules on extensions of time limits:

- (a) first, that time limits of all kinds be amenable to extension both by agreement of the parties or, absent such an agreement, by the SG or the Tribunal upon a reasoned application of a party; and
- (b) second, that an application for extension of a time limit be made in reasonable time before, not just before, the expiry of the time limit.

Rule 8 (1)

~~The parties may agree to extend a~~ A time limit fixed by the Secretary-General or specified by the Convention or these Rules, provided that if such time limit is not mandatory under the Convention-, may be extended by agreement of the parties or, absent such an

agreement, by the Secretary General upon reasoned application by a party made in reasonable time prior to the expiry of the time limit.

DENTONS DECEMBER 21, 2018

We suggest that the wording below be added as an obligation, rather than as an option in a draft procedural order, to reflect the importance of expedition in proceedings, and the accountability of arbitrators.

“[...] 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. **In such circumstances, and until such time as the order, decision or Award is delivered, the Tribunal shall provide the parties with status updates every month following the expiry of the original time limit.**”

If this proposal is adopted, it would also be desirable for the Secretariat to publish the Tribunal’s status updates in the details section of the Pending Case file on the ICSID website. This practice would encourage arbitrators to deliver the order, decision or Award within the prescribed time limit.

STEPTOE DECEMBER 28, 2018

3.1 We agree with the approach reflected in paragraph (3) to time limits, imposing a good-faith obligation on the Tribunal to meet established limits. We agree with ICSID that the complexity of investor-State disputes makes it inappropriate to penalize Tribunals for failing to meet time limits.

The good-faith obligation appears to us to strike the right balance.

THREE CROWNS JANUARY 16, 2019

For clarity, we offer the following suggested amendments to Rule 8(3):

(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 *of* the date when it anticipates the order, decision or Award will be ~~issued~~*delivered*.

Rule 9 – Time Limits Fixed By The Tribunal

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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, provided that both parties are given an opportunity to state their views.

(2) The Tribunal may extend a time limit it fixed upon joint request by both parties or reasoned application by a party made prior to the expiry of the time limit, provided that the other party is given an opportunity to state its views. 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, provided that both parties are given an opportunity to state their views.

Commentary

Time limits should not be fixed or extended without giving both parties an opportunity to state their views. Both parties should be given an opportunity to state their views before the Tribunal concludes a delay is justified, as provided for in current Arbitration Rule 26(3).

ARMENIA **DECEMBER 28, 2018**

Paragraph 2 of the Rules 9 states that the Tribunal may extend a time limit it fixed upon reasoned application by a party made prior to the expiry of the time limit. We propose to modify this wording as to specify that a reasoned application should be made within "reasonable time" prior the expiry of the time limit.

CANADA DECEMBER 28, 2018

1) As written, these Rules suggest that an agreement by the parties to extend the time limit for a particular procedural step can be disregarded by the Tribunal. In Canada’s view, this is inappropriate, and it actually seems to run counter to Rule 12(3) which binds the Tribunal to follow the agreement of the parties on procedural matters. If both parties wish to extend a time limit, it should not be possible for the tribunal to disregard that agreement under any circumstances. Allowing the Tribunal to do so may force the parties into procedural steps that, for whatever reason, they both prefer to delay. In addition, Canada sees no reason why there should be different rules depending on where the original time limit comes from. Canada suggests that a first sentence be added to paragraph 2 that says “The parties may agree to extend a time limit fixed by the Tribunal.” The second sentence could then begin “Absent an agreement of the parties...”

2) Canada notes that paragraph 3 uses the concept of special circumstances, however, the Working Paper does not give any guidance as to what constitutes such special circumstances. Canada suggests that consideration be given to providing guidance as to what constitutes special circumstances in some form prior to the implementation of these new Rules.

COLOMBIA DECEMBER 28, 2018

Colombia considera que la facultad que se otorga al Tribunal en el párrafo (1) debería tener en cuenta los plazos procesales acordados por las partes. En los párrafos (1) y (2) se sugiere establecer una regla general de deferencia a los plazos o modificaciones a los plazos acordados por las partes y presentados ante el Tribunal.

En el párrafo 2 se reitera la necesidad de aclarar el uso del término “circunstancias especiales”.

HUNGARY DECEMBER 28, 2018

The current text of Rule 9 appears to imply that the Tribunal may disregard an agreement reached by the parties to extend a time limit to complete a given procedural step. Also, when Rule 9 is read in conjunction with Rule 12 (3) there appears to be a conflict.

Accordingly, in order to ensure that the agreement of the parties is respected by the Tribunal when extending a time limit, Hungary proposes the following amendment to the wording of Rule 9 (2) [suggested changes highlighted in bold italics]:

“The parties may agree to extend a time limit fixed by the Tribunal. Absent an agreement of the parties 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.”

Finally, Hungary notes that it would be essential for the Secretariat to provide clear and uniform guidance as to what qualify as “*special circumstances*” under the wording of Rule 9 (3).

JAPAN **DECEMBER 27, 2018**

Japan recognizes that Rule 9 of the Arbitration Rules in the working paper is aimed at encouraging parties to meet reasonable time limits and achieving the acceleration and cost efficiency of proceedings, consistent with the guiding principles of proceedings provided for in Rule 11 of the Arbitration Rules in the working paper, as amended by Japan's abovementioned proposal to include parties' responsibility to conduct proceedings in good faith.

In this connection, in Japan's view, not only is it important to address the issue of actions taken by parties after expiration of time limits, there is also a need to address the issue of submissions and evidence presented at an excessively late stage of proceedings which would inevitably cause proceedings to extend. With full respect to the guiding principles of proceedings as described above, submissions and evidence must be presented in a timely fashion in the reasonable course of proceedings. It is crucial to make clear that no surprises that will prolong the conclusion of the case may be tolerated. At the same time, it is important to keep in mind that there are some circumstances where late submissions by parties are not avoidable for good reason. To this end, Japan proposes, as Rule 9bis, a provision to vest Tribunals with authority to disregard late submissions and evidence under specific circumstances where a party is deemed to have acted in an unfaithful manner.

AR – Rule 9bis (Addressing Late Submissions)

The Tribunal may disregard, upon application by a party, any statement contained in submissions or evidence when it finds that the statement was presented with unreasonable delay, intentionally or by gross negligence, and that further consideration of the statement will prolong the conclusion of the case.

The ICSID Draft takes the following approach to extensions of time:

- (d) time limits set by Convention or by the Secretary General may be extended by agreement of the parties but not by the SG or the Tribunal upon application of a party;
- (e) time limits set by the Tribunal may be extended by the Tribunal itself (upon application of a party) but not by agreement of the parties;
- (f) an application for extension of time can be made prior to the expiry of the time limit, which suggests that the application can be made literally at any time before 11.59pm of the last day of the time limit (Rule 7(2)).

The ICSID Draft would benefit from taking the same approach to extension of time limits of all kinds, i.e. those set by the Convention or the SG or the Tribunal. The parties should endeavor to agree on an extension and approach the Tribunal or the SG absent an agreement. There is no reason why certain route for extension should be available for one kind of time limits and not for the others.

There is also room for improvement of rules on timing of applications for extension of time. An application should be made in the time that allows the Tribunal to deliberate and take a considered decision on the application; the Rules should not encourage last-minute applications that cause difficulties to everyone involved in the arbitration.

We would propose, accordingly, the following amendments to the rules on extensions of time limits:

- (c) first, that time limits of all kinds be amenable to extension both by agreement of the parties or, absent such an agreement, by the SG or the Tribunal upon a reasoned application of a party; and
- (d) second, that an application for extension of a time limit be made in reasonable time before, not just before, the expiry of the time limit.

Rule 9(2)

~~The Tribunal may extend a~~ A time limit ~~is~~ fixed by the Tribunal may be extended by agreement of the parties or, absent such an agreement, by the Tribunal upon reasoned application by a party made in reasonable time prior to the expiry of the time limit~~., which power~~ The Tribunal may delegate ~~this power~~ to its President.

Rule 10 – Waiver

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 10: Waiver

Subject to Article 45 of the Convention, if a party knows or should have known that ~~any applicable rule, or~~ agreement of the parties applicable to the proceeding, 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.

Commentary

It should be clarified that the rules and agreements in question are those applicable to the proceeding, as provided for in current Arbitration Rule 27.

SPAIN

DECEMBER 21, 2018

Establece que las partes deberán **objetar con prontitud** la no observancia de alguna regla, acuerdo o resolución del Tribunal. De lo contrario, el Tribunal considerará que ha renunciado a su derecho a objetar el incumplimiento.

Creemos que sería conveniente determinar que se entiende con el término “*con prontitud*”, especialmente teniendo en cuenta la gravedad de las consecuencias previstas. Y ello, bien estableciendo un plazo para ello, o bien por referencia al siguiente trámite del procedimiento (p.ej. si no lo hace así constar en el siguiente trámite procedimental que le corresponda, o similar).

TOGO

DECEMBER 28, 2018

« 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. »

Pour éviter toute interprétation du terme « les plus brefs délais », il y a lieu d'indiquer un nombre de jours précis.

Rule 11 – General Duties

CANADA DECEMBER 28, 2018

1) In paragraph 4, the proposed Rule establishes an obligation to cooperate. The Working Paper suggests that this refers to an obligation to cooperate with the Tribunal, but in Canada’s view, the proposed Rule reads more like an obligation to cooperate between the parties. This Rule would not make sense in many circumstances where there is no cooperation required, but rather simply compliance by one of the parties. Canada suggests that paragraph 4 be rewritten to say “The parties shall implement the Tribunal’s orders and decisions in good faith.”

COLOMBIA DECEMBER 28, 2018

En el párrafo (4) de esta regla se menciona que “las partes cooperarán en la implementación de las Resoluciones del Tribunal”. Colombia considera que en general las resoluciones del Tribunal deben ser acatadas de buena fe. Por lo tanto, se sugiere cambiar el término cooperar por “acatar o cumplir”.

JAPAN DECEMBER 27, 2018

Japan appreciates that the equal opportunity for parties and expeditious and cost-effective proceedings, as proposed in Rule 11 of the Arbitration Rules in the working paper, are fundamental guiding principles of proceedings, both of which are of great value to incorporate in the amended rules.

Adding to these important principles, Japan proposes to include also a provision regarding parties' responsibility to act in good faith. Despite the abstract nature of the additional provision regarding parties' responsibility to act in good faith, Japan is of the view that it would be imperative to add this principle so that it would prevail in all instances in the implementation of the procedural rules.

Given the significance of the set of guiding principles for the ICSID arbitration procedures as stipulated in proposed Rule 11, Japan also proposes to move this article on general duties to the first few set of provisions, perhaps to Rule 2 of the Arbitration Rules in the working paper.

AR — Rule 11 (General Duties) —+ AR — Rule 2 (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.
- (2)bis **The parties shall conduct the proceeding in good faith.**
- (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.

THE NETHERLANDS **DECEMBER 21, 2018**

The Kingdom of the Netherlands welcomes Rule 11(1), in which it is stipulated that parties to the dispute shall be treated equally. Diverging requirements for claimants and respondents should be prevented in e.g. the rules on consolidation and third-party funding.

SPAIN **DECEMBER 21, 2018**

En el apartado 1 se recomienda sustituir el uso del adjetivo “igualitaria” por la expresión “**con igualdad**”. De acuerdo con el diccionario de la RAE el adjetivo “igualitaria” tiene una acepción “que propugna la igualdad social” que puede distorsionar su significado jurídico.

TUNISIA **DECEMBER 27, 2018**

S’il est parfaitement bien d’insérer ce nouvel article qui incarne l’égalité des parties et leurs coopération, certains principes de procédures demeurent néanmoins absents. En effet, il serait également important pour le bon déroulement des affaires d’arbitrage et même de conciliation d’ajouter d’autres principes devenus internationaux tels que le principe de loyauté procédurale et celui de l’égalité des armes. Ces principes contribuent certainement au bon déroulement des affaires d’arbitrage.

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

In particular, **Proposed Arbitral Rules 11(3), 13(2), 14, and 16(4)**—which impose a duty on the Tribunal to act in an expeditious and cost effective manner, encourage active case management, and allow for a Claimant to elect to have its Request for Arbitration considered as the Memorial—reflect overall improvements in the efficiency of the ICSID system.¹

[See submission for additional comments]

Rule 11(4) codifies the generally accepted duty of the parties to cooperate with the orders and decisions of the tribunal, a duty previously recorded in the Rules only in relation to orders of document production under current Rule 34(3). While Rule 11(4) is thus broader than current Rule 34(3) it contains no analog to the passage of current Rule 34(3), which requires the tribunal to “take formal note of the failure of a party to comply with its obligations ... and of any reasons given for this failure.” While this provision does not *require* the tribunal to draw adverse inferences where insufficient reasons are given for a failure to produce, it does provide a clear anchor in the Rules for the drawing of adverse inferences. In order to ensure that this amendment is not interpreted as eliminating or reducing the discretion of a tribunal to draw adverse inferences, consideration should be given to including within the Arbitration Rules (presumably in what is now draft Rule 40 on document production) language similar to that of Article 9(5) of the IBA Rules, which expressly affirms the discretionary power of a tribunal to draw an adverse inference where a party fails to produce any document ordered to be produced by a tribunal.

As there may be circumstances where it is not feasible for the tribunal to consult with the parties before making an order or decision on its own initiative, it may be helpful to add the following language to Rule 11(2):

(2) The Tribunal shall *insofar as practicable* 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.

As presently drafted, Rule 11(4) appears to presuppose that party cooperation is required to implement Tribunal decisions, whereas often implementation rests with only one party, whose good faith is essential to effective implementation. We therefore offer for consideration the following amendments to Rule 11(4):

(4) The parties shall cooperate ~~and~~ *implementing in good faith* the Tribunal's orders and decisions.

Rule 12 – Orders, Decisions and Agreements

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 12: Orders, ~~Decisions~~ and Agreements

(1) The Tribunal shall make the orders ~~and decisions~~ required for the conduct of the proceeding.

(2) Procedural ~~O~~orders ~~and decisions~~ may be taken by any appropriate means of communication and may be signed-issued by the President on behalf of the Tribunal, once all members have had the opportunity to state their views, 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.

Commentary

It is important to clarify that the President may issue a procedural order on behalf of the Tribunal once all members have had the opportunity to state their views. Other decisions should be signed by all members of the Tribunal who voted for it.

DENTONS **DECEMBER 21, 2018**

As a general observation, it is presently unclear what provisions of the Arbitration Rules are mandatory and which can be the subject of derogation by agreement of the parties. AR 12.3 (Orders, Decisions and Agreements) seems to allow any derogation by agreement

consistent with the Convention and the Arbitration and Financial Regulations – but then some individual rules mention that parties may agree otherwise, which gives rise to ambiguity.

Another small linguistic suggestion is to replace the word “taken” with the word “**made**,” as the latter would fit more naturally with both “orders” and “decisions.”

If this suggestion is accepted, conforming changes will have to be made throughout the document – see, for example, revised CR 24.3 (Orders, Decisions and Procedural Agreements) and (AF)AR 21.2 (Orders, Decisions and Agreements).

THREE CROWNS **JANUARY 16, 2019**

We offer for consideration the following technical changes to Rule 12(2) and 12(3):

*(2) Orders and decisions may be taken **in any appropriate form chosen by the Tribunal and communicated to the parties** 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 **applicable law**, the Convention and the Administrative and Financial Regulations.*

Rule 13 – Written Submissions and Observations

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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 unless~~ the parties ~~so agree or the Tribunal finds~~ it unnecessary:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

(2) The ~~requesting parties~~ may ~~agree~~ to have the Request for arbitration considered as the memorial.

[...]

(4) The Tribunal ~~shall~~ may grant leave to file unscheduled written submissions, observations or supporting documents upon a timely and reasoned application, provided that the other party is given an opportunity to state its views and only if these are necessary in view of all relevant circumstances.

Commentary

The decision to have the Request for arbitration considered as the memorial should not be unilaterally made by the requesting party. This should only be the case if both parties agree. A Request for arbitration is generally quite brief, it does not engage in a comprehensive analysis of the issues involved, it is not well-documented, and it usually does not include witness statements or expert reports.

The parties should not be deprived of the possibility of filing a second round of written submissions. Only if both parties agree should they dispense with the reply and the rejoinder.

The Tribunal should have discretion but not a duty to grant leave to file unscheduled submissions or documents. Both parties should be given an opportunity to state their views before the Tribunal grants leave to file unscheduled submissions or documents.

CANADA DECEMBER 28, 2018

1) Paragraph 4 of this proposed Rule provides that the Tribunal “shall grant leave” to file unscheduled submissions. Canada suggests that “shall” be changed to “may” to reflect the conditionality of the next part of the sentence.

2) Paragraph 4 requires a “timely and reasoned application” however it does not offer specificity on when such application must be submitted, and nor does it address whether that application should include the additional unscheduled submission. In Canada’s view, it can be prejudicial for the application to make an unscheduled submission to be accompanied with the actual submission. For example, Canada has had experience where a sur-reply is appended to an application to file a sur-reply, creating the obvious difficulty that the actual sur-reply was put before the Tribunal before permission was granted to file it – making it seem like such permission

was perfunctory. Canada suggests that paragraph 4 be redrafted to say “The Tribunal may grant leave to file unscheduled written submissions, observations or supporting documents only if a timely and reasoned application for permission to file such submissions, observations or supporting documents is made in advance, and only if the Tribunal finds that the submissions, observations or supporting documents are necessary in view of all relevant circumstances.”

CHINA **DECEMBER 28, 2018**

1) China noticed that Rule 13(1) allows for only one round of written submissions by the Parties, unless they agree otherwise. Considering that investment disputes may involve complex facts and legal disputes, and more importantly, some generally applicable government measures relating to public interests, China believes it is necessary to provide adequate procedural rights for disputing parties. It is therefore suggested that the parties shall be allowed to provide two rounds of written submissions; or if the parties so agree, they may choose to file only one round of written submissions.

2) China noticed that Rule 13(2) stipulates that the requesting party may elect to have the Request for Arbitration considered as the memorial, and does not agree with such proposal. It will not promote a fair and efficient resolution of the Parties’ dispute. Since the formal requirements on a Request for Arbitration under Article 36 of the Convention are less stringent than the requirements on the contents of the memorial, the unconditional right to treat the Request for Arbitration as the memorial may be used by the requesting party to deliberately “hold-back” and not disclose all necessary information of the facts, law and arguments relied upon, forcing the respondent to submit its counter-memorial without the knowledge of the full picture of a pleaded case. This would turn the second round of submissions into the real memorial and counter-memorial, which is neither efficient, nor fair to the respondent state. China therefore suggests that the Request for Arbitration be separated from the first memorial.

3) China noticed that the amendment does not clearly define the scope of claims as in the Request for Arbitration, the Memorial and the Reply. Considering that new claims raised in the Memorial and the Reply will impose an undue and unfair burden to the respondent, China proposes that claimant shall set out its request for relief in full, including its claims, legal basis thereof and relief sought, in the Request for Arbitration. Claims not raised in the Request for Arbitration shall not be allowed in the Memorial and the Reply, and the tribunal shall not have jurisdiction over such claims.

4) On parallel proceedings.

Many BITs include “Forks in the Road” clause, and the claimant is likely to have already submitted the investment disputes to other forums, including commencing domestic judicial or administrative proceedings, or other dispute settlement procedures. As such,

China believes that requiring the claimant to notify to the tribunal such proceedings will greatly reduce the burdens of both parties and the tribunal, and improve the efficiency of the arbitration.

China therefore proposes that a provision be added in Rule 13 that the claimant shall disclose any administrative, judicial, arbitration proceedings or other dispute settlement proceedings if they concern the same disputed matter. Such disclosure shall be notified to the Secretariat and the respondent upon registration of the Request for Arbitration, or if such other proceedings are initiated after registration of the Request for arbitration, notified to the Secretariat, the respondent and the tribunal (if applicable) within 15 days from the date on which the other proceedings are initiated.

COLOMBIA **DECEMBER 28, 2018**

Colombia encuentra que puede ser inconveniente para la preparación de la defensa del Estado que la solicitud de arbitraje se tenga como el memorial de demanda. Por ello se sugiere incluir que el reclamante indique, al momento de presentación de la solicitud de arbitraje, si pretende que ésta sea tenida como la demanda.

En el párrafo (4) se lee que “El Tribunal concederá autorización para presentar los escritos, observaciones, o documentos de respaldo fuera del calendario...”, Colombia considera que esta facultad debería ser excepcional ya que los plazos acordados por las partes son de obligatorio cumplimiento, salvo circunstancias excepcionales. Por lo tanto, se sugiere la siguiente redacción “El Tribunal podrá conceder...”.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica shares the proposal to paragraph 1.

Regarding paragraph 2, while Costa Rica shares the general objective of reducing the duration of the process, it considers that this is not an adequate procedural stage to cut timeframes. As Costa Rica understands the proposed rule, the requesting party could decide when filing the RFA that it becomes also the memorial. From its point of view, if this happens, the respondent State would be left with an extremely short period to hire counselling (if necessary), object to ICSID’s jurisdiction, allege that the claim is frivolous, carry out any preliminary negotiations with the claimant and reply to the RFA properly.

Moreover, and speaking from Costa Rica's experience, the country has committed to have transparent and open procurement processes. These must be followed in order to hire legal and technical counselling. Such processes would be negatively affected with short procedural timeframes at the beginning of the arbitration. Constraints to hire adequate counselling would leave the State in an unbalanced position for its defense. For the reasons explained above, Costa Rica suggests the elimination of paragraph 2 of the proposal of Rule 13.

Regarding the last sentence of paragraph 3, Costa Rica acknowledges the element of time effectiveness in restricting the scope of the last two submissions. Paragraph 197 of the Working Paper indicates that introduction of new facts or arguments that are not responsive to the previous pleading would need the approval by the other party or the Tribunal. Although both submissions respond to the previous filing, time effectiveness must be balanced with the flexibility that either of the parties might require. It should be noted that the reply and rejoinder are filed after document production, a phase which normally leads to new arguments. In Costa Rica's experience, introducing new facts or even documents and arguments that arise through document production has been useful. Given these reasons, Costa Rica suggests changing the last phrase of paragraph 3.

Costa Rica agrees with paragraph 4 of the proposal of rule 13.

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 [~~CR: 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.

~~[CR: (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. ~~[CR: A reply and rejoinder shall at least respond 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.

FRANCE JANUARY 14, 2019

The word « timely » in paragraph 4 may be difficult to interpret in practice. The French delegation would accordingly favor a more precise requirement in order to secure the proceedings, and its timetable, and to better frame the tribunal’s powers to allow unscheduled written submissions, observations or supporting documents.

GEORGIA DECEMBER 28, 2018

Comment to Rules 13(2):

Georgia in principle agrees with the procedure proposed in paragraph (2), however, would like to make following observation and suggestion:

I. A reasonable Claimant who plans to request that its Request for Arbitration (**RfA**) be considered as “a memorial by requesting party” would draft its RfA in a way to provide sufficient information regarding its claims (both facts and law) and requested relief, possibly supported with relevant evidence. However, this might not always be the case. In such situation, it would be very hard for the state to respond to unsubstantiated and unsupported submissions and develop its defense. This is especially noteworthy since the Convention and the Institutional Rules provide very general requirements for RfA requiring to contain “information concerning the issues in dispute”.

Therefore, it might be reasonable if the Tribunal *ex officio* or upon the request of the Party concerned is authorized to request the Claimant to provide additional information (provide more details regarding its claims/relief, specify it claims, clarify certain parts of RfA, or present additional evidence (including witness statements)). In practice, in some cases, Claimant might make reference to certain evidence in its RfA but choose not to produce them as exhibits; or Claimant might state that is will have witnesses to testify on the case in writing and in oral but fail to present any witness statement at the time of filing its RfA. In such circumstances it would only be reasonable and fair to the defending party, if the Claimant is required to present additional evidence.

In the light of the above, Georgia proposes following amendment to the proposed Rule 13(2):

“(2) The requesting party may elect to have the Request for arbitration considered as the memorial. The Tribunal upon the request of the other Party or ex officio may require the requesting party to provide additional information or evidence in support of its case.”

II. If the Tribunal grants the request of the Claimant that its RfA be considered as the memorial, the respondent will be the first to file written submission according to the procedural calendar. As a matter of fact states require ample time to collect information and

evidence and to prepare their defense. While Claimants have time to prepare their claim before they initiate formal arbitral proceedings, states will have to fit in a tight schedule developed on the case. In normal course of the proceedings, states in addition to the time-limit to file counter-memorial, would also benefit from the time-limit allocated to Claimant to file its first memorial; in the given case, however, states would have to respond to Claimants contentions in RfA immediately after the start of formal arbitral proceedings. In this circumstances it might be fair if the rules provide a possibility for the state to request a longer period for filing its counter-memorial.

In the view of the above, Georgia proposes to include the possibility of granting different time-limit for filing counter-memorial by respondent state in case of considering RfA as “a memorial by requesting party”. Relevant language could be provided in Rules 13(2) or elsewhere in the Rules, where more appropriate.

Comment to Rule 13(4):

Georgia believes that for the conduct of the proceedings in an “expeditious and cost-effective manner”, unscheduled or unsolicited written submissions or documents should not be allowed unless such submissions or documents would be decisive for the effective and fair resolution of the case. Therefore, we propose to add some language in Rules 13(4) to this effect:

“(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 for the effective and just resolution of the matter in view of all relevant circumstances.”

GUATEMALA DECEMBER 28, 2018

No es conveniente para la parte demandada, recordar que generalmente los demandados son los Estados y que los procesos de éstos son largos y burocráticos.

En tal virtud, Guatemala se opone rotundamente a la inclusión de esta disposición: “(...) (2) La parte solicitante podrá elegir que la solicitud de arbitraje se considere como el memorial. (...)”.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

Rule 13: (1) The parties shall file the following written submissions, with **all** supporting documents, within the time limits fixed by the Tribunal:..... (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. **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.**

To ensure that States have the adequate due process right to preview a claimant's case before a hearing and to respond to the allegations against them, and in light of the proposal to allow a Request for arbitration to be considered as the memorial (AR 13(2)), consider: Making the submission of a reply and rejoinder the default procedure, with the option to limit submissions to a memorial and counter-memorial if the parties so agree or the Tribunal finds it necessary.

Proposed Amended Arbitration Rule 13, as currently drafted, could result in a scenario whereby a respondent would attend a hearing having only previewed the claimant's arguments as set forth in the Request for arbitration.

INDONESIA **DECEMBER 28, 2018**

The proposed amendment introduces the possibility for the Claimant to elect to treat its Request for arbitration as a memorial. The amended Rule does not indicate at what point in the proceeding the Claimant must make this election. The current proposed wording would appear to permit the Claimant to make this election at any time up until the procedural calendar for the case is determined. This could lead to a Respondent State finding out very late that, in fact, the first written submission to be made in the case after the Tribunal is constituted is to come from the State, since the Claimant has elected to treat its Request for arbitration as its (first) memorial. This places the Respondent State in the awkward and uncertain position of not knowing how to proceed to organize its defense. It could lend itself to the tactic of filing a very detailed Request for arbitration, essentially bombarding the Respondent State with a very large documentary filing and significant volumes of evidence to preserve the Claimant's option of electing to treat this documentation as its memorial, while deliberately delaying the communication of any such election so as to try to place the Respondent State at a disadvantage. The Respondent State will be using its best efforts to (i) communicate with its relevant departments or subdivisions to understand the basis for the claim(s) and the State's response, (ii) choose its arbitrator, and perhaps (iii) select outside counsel/advisors, without knowing whether it also urgently needs to (iv) digest the very large volume of evidence presented, and (v) prepare its first full memorial in its defense, together with evidence, witness statements and expert reports, etc.

MEXICO **DECEMBER 28, 2018**

Las propuestas de enmienda a estas reglas (Regla 13(2) RA; Regla 22(2) RAMC) permitirían a la parte que presenta la solicitud de arbitraje considerar ésta como el memorial. De acuerdo con el DT se pretende con esta regla reducir el tiempo en el calendario procesal. Si bien México no objeta que los tiempos procesales del arbitraje se reduzcan en la medida de lo posible, no se debe afectar la equidad procesal ni la certeza jurídica. El permitir que la solicitud de arbitraje se considere como memorial, sin aviso previo al demandado afecta el debido proceso y su defensa. En consecuencia, México propone ajustar la Regla 13(2) para precisar que a más tardar al momento de la presentación de la solicitud de arbitraje la parte solicitante manifieste si elige considerar su solicitud como memorial.

En las reglas 13(4) RA y 22(4) RAMC, se prevé la posibilidad de que el Tribunal admita o rechace escritos no previstos en el calendario procesal. México sugiere que la regla aclare que la solicitud no incluya el escrito, observación o documentos que una parte busca presentar. Lo anterior a efecto de evitar que mediante la presentación de la solicitud, una parte presente al Tribunal el escrito, observación o documento como tal, antes de que el Tribunal valore y decida si lo acepta o no.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that if a party elects to have the Request for arbitration considered as the memorial, the tribunal should be allowed to require further information to be included in the Request for arbitration. The current Rule does not state this clearly enough.

Qatar recommends amending AR 13(2) to read as follows:

- (2) The requesting party may elect to have the Request for arbitration considered as the memorial. **The Tribunal may require further information to be included in the Request for arbitration to ensure that the Request contains necessary substantive information**
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SINGAPORE **JANUARY 4, 2019**

At the ICSID Rules Amendment meeting in September 2018, it was suggested by some States that the respondent should be given the right to seek “further particulars” should the claimant opt to have the RFA be treated as the first memorial pursuant to Rule 13(2). We

also support this suggestion, and are of the view that this should be a general right not limited only to situations where an RFA is treated as a memorial. This will ensure that issues in dispute are crystallized sooner rather than later, which will save time and resources during the proceedings.

SLOVAK REPUBLIC **DECEMBER 22, 2018**

Under 13(2) AR, the requesting party may elect to have the Request for arbitration considered as the memorial. We are concerned that such step could prevent the state as respondent from due preparation of its reply. Additionally, the link to creation of the tribunal at that time is unclear.

We understand that the withdrawal from automatic reply and rejoinder could make the proceeding more efficient, saving both time and financial resources. Nevertheless, it is important to remain cautious since parties should have preserved access to justice. Hence, the grounds for allowing reply/rejoinder should be described in detail (it is noted that generally, only new facts/facts, which could not have been submitted earlier, should be allowed. Speed should not prevail quality.

SPAIN **DECEMBER 21, 2018**

El apartado 4 establece que “La **réplica y réplica** se limitarán a responder al último escrito presentado”.

Consideramos que se debe mencionar que, además de contestar al último escrito presentado, se podrán **introducir hechos adicionales o nuevos** (tal y como se prevé en la regla actual 31.4) que hayan ocurrido o conocido después de la fecha de presentación del memorial. La redacción propuesta en la regla 13.4 es muy limitativa y se aleja de la práctica habitual.

Entendemos que se debe evitar que las partes puedan esconder sus argumentos hasta el final. Ahora bien, los procesos de arbitraje son largos y no es poco frecuente que a lo largo del proceso surjan hechos nuevos que deban ser puestos en conocimiento del Tribunal. La limitación de la regla 13 podría también dar lugar a interpretaciones excesivamente restrictivas en cuanto a la posible presentación de declaraciones testimoniales y/o periciales en los escritos de réplica, cuando no se hubiere presentado una declaración ya con el primer escrito.

[TUNISIA](#) **DECEMBER 27, 2018**

L'article 13 ne reflète pas parfaitement l'exposé de motifs. En effet il a été précisé dans la note relative aux amendements proposés que « la réponse et la réplique se limitent à des faits nouveaux ou à de nouveaux arguments et ne doivent pas répéter le contenu d'écritures antérieures» alors que cette précision qui réduira nettement les délais d'arbitrage ne figure pas expressément dans l'article 13. Les termes généraux et non précis de l'alinéa 3 de l'article 13 à savoir « La réponse et la réplique se limitent à répondre aux écritures précédentes» ne traduisent pas fidèlement cette idée.

[DEBEVOISE](#) **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

In particular, **Proposed Arbitral Rules 11(3), 13(2), 14, and 16(4)**—which impose a duty on the Tribunal to act in an expeditious and cost effective manner, encourage active case management, and allow for a Claimant to elect to have its Request for Arbitration considered as the Memorial—reflect overall improvements in the efficiency of the ICSID system.¹

[see submission for additional comments]

[DENTONS](#) **DECEMBER 21, 2018**

ICSID is one of the few arbitral institutions that do not require the respondent to file an Answer. While we are cognizant that the ICSID procedure is based on that of the International Court of Justice, this peculiarity means that the claimant may have filed two substantive submissions (the Request for arbitration and the memorial) before it is informed of the respondent's defenses. Requiring the respondent to file an Answer would promote a level playing field because both parties would have to disclose their claims and defenses early in the process. Furthermore, in its Answer, the respondent would be required to indicate if it has any counterclaims. This would, in turn, give the parties and the Tribunal a better sense of the appropriate parameters of the schedule and the sequence of submissions.

(See Art. 5(1) ICC Rules; Art. 4.1 SIAC Investment Arbitration Rules.)

As an alternative to a rule requiring that an Answer be filed, a timeline could be built into the Rules for the respondent to file an Answer, if it wishes to do so.

STEPTOE **DECEMBER 28, 2018**

4.1 We agree with the approach reflected in paragraph (2) that would allow the claimant to have its request for arbitration treated as a memorial.

THREE CROWNS **JANUARY 16, 2019**

The revision of the Rules is an appropriate opportunity to introduce a requirement for a Response, consistent with all other major Arbitration Rules. There is no evidence that respondents are averse to such a requirement, and it would have major benefits: more efficient case-planning at the First Session; more certainty as to a potential default on the part of the respondent(s); additional justification for the procedure in Rule 35 (strike-out); additional justification for the requirement that objections to jurisdiction or admissibility must be set out in the Counter-Memorial at the latest.

The reference to “any supporting documents” in Rule 13(1) is both vague as to what is meant and arguably suggests that is optional. For clarity and to conform to standard procedural practices, we offer for consideration the following amendment:

*(1) The parties shall file the following written submissions, **accompanied by all factual exhibits, witness evidence, expert evidence, and legal authorities**~~with any supporting documents~~, within the time limits fixed by the Tribunal:*

New sub-paragraph 2 provides that a Claimant may elect to have the Request for arbitration be considered as its memorial. This possibility may be useful in some cases, however, in our experience, it is important to specify the time at which this election may be made. To be a fair and efficient election, this should not be before the initial exchanges that may inform the election (or cause a party to reconsider an early election), but the election must be made early enough to be taken into account in discussing the procedural timetable at the First Session. Accordingly, we offer for consideration language below that would require this election to be made at the First Session:

*(2) The requesting party may **at the First Session** elect to have the Request for arbitration considered as the memorial.*

New sub-paragraph 4 requires prior tribunal leave before a party may make unscheduled submissions. This is a welcome codification of best practice. The drafting, however, is confusing, since the paragraph starts with mandatory language “the Tribunal shall grant leave” but then qualifies this with the phrase that such leave will be granted “only if these are necessary”. To avoid any confusion, we suggest the following alternative language for Rule 13(4) for your consideration:

(4) ~~The Tribunal shall grant leave to file u~~Unscheduled written submissions, observations or supporting documents ~~may not be filed without prior leave from the Tribunal. The Tribunal may grant such leave upon a timely and reasoned application and only if it deems the filing these are~~ necessary in view of all relevant circumstances.

ZHONG LUN LAW FIRM

DECEMBER 28, 2018

6. Proposed AR 13(2) accords the requesting party the right to “elect to have the Request for Arbitration considered as the memorial”. It is not entirely clear when the election shall be made, thereby causing some uncertainty as to the time that would be available for the other party to prepare the counter-memorial. We suggest that a time limit for such an election be provided for in the rules, for example, in an added sentence to the effect that the election shall be made no later than [5] [subject to further discussions] days after the Tribunal circulates an agenda to the parties and invites their views on procedural matters in accordance with AR 34(4). With our proposed modification, AR 13(2) would read:

Proposed AR 13(2)

The requesting party may elect to have the Request for arbitration considered as the memorial., **as long as the election is made no later than [5] days after the Tribunal circulates an agenda to the parties and invites their views on procedural matters in accordance with Rule 34(4).**

7. It is a bit opaque whether the parties would be allowed to introduce new facts and arguments in the reply and rejoinder without the Tribunal’s approval. We do not anticipate due process issues to arise if the new facts and arguments are introduced to respond to the issues raised in a previous written submission. We thus suggest making it clear that the reply and rejoinder may include new facts and arguments. Please see below for our proposed modification to AR 13(3).

Proposed AR 13(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 (including the introduction of any new fact(s) or argument(s)) shall be limited to responding to the previous written submission.

Rule 14 – Case Management Conference

AUSTRIA DECEMBER 21, 2018

Rule 14 is based on the currently valid Rule 21 of the Arbitration Rules. According to para. 2 of the current Rule 21, a Case Management Conference can be convened to conclude a settlement at the request of the parties.

This possibility is no longer provided for in the proposal for amendments; however, in order to speed up the arbitration this possibility should be retained.

CANADA DECEMBER 28, 2018

1) In the chapeau, the language is permissive in that it grants the Tribunal the power to convene a case management conference, but does not make it mandatory. In Canada's view, case management conferences are useful, and Tribunal's should be required to have them. Hence, Canada suggests that in the chapeau, the "may" be changed to a "shall". Further, in the chapeau, the singular is used – "a case management conference", whereas Canada believes that multiple case management conferences may be necessary. Canada also suggests that there could be other items useful to discuss at a case management conference in addition to the items in the list. As such, Canada suggests language to make it clear that the list is not exhaustive. Finally, Canada suggests that it is important to clarify that case management conferences are distinct from the First Session to be held by the Tribunal. Hence, Canada suggests redrafting

the chapeau to say “With a view to expediting the proceeding, in addition to the First Session, the Tribunal shall convene one or more case management conferences with the parties, at such times as it deems appropriate, in order to, among other things:”

COLOMBIA **DECEMBER 28, 2018**

Colombia considera que esta conferencia es útil para las Partes y para el Tribunal y en ella se pueden resolver varios aspectos como los enunciados en esta regla. Sin embargo, se observa que en la redacción de la regla se deja a potestad del Tribunal la realización de esta conferencia, frente a lo cual Colombia considera que la misma debería ser de obligatorio cumplimiento para las Partes y para el Tribunal.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica has found pre-hearing conferences convened under current AR 21(2) to be very useful. If this rule will no longer exist, Costa Rica supports the alternative proposed and further considers that holding this conference at least once, should be mandatory.

Rule 14
Case Management Conference

With a view to expediting the proceeding, the Tribunal [~~CR: may convene~~ shall convene at least once] 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.
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GEORGIA **DECEMBER 28, 2018**

Comment to the chapeau of Rules 14:

Georgia believes that the case management conference should serve not only for the expeditious but also for the “effective” conduct of the proceedings, which might not necessarily be related to expediting the process. Therefore, we propose to amend the language accordingly:

“With a view to conduct proceedings in an effective and expedited manner, the Tribunal may convene a case management conference with the parties at any time to:”

Comment to Rules 14(c):

We suggest to remove word “*other*”, since the issues in paragraphs (a) and (b) are very specific and stand-alone items and therefore, issues in paragraph (c) shall be regarded as a separate and equally important item.

HELLENIC REPUBLIC DECEMBER 28, 2018

Tribunal to make a "List of the Questions to Be Resolved" (which will not repeat the claims and defenses of the parties, but will be limited to the very list of the issues which the Arbitral Tribunal deems to have to decide), the claims / assertions that need to be proved and require oral hearing. Tribunal shall determine the issues that require an expert opinion. Tribunal shall make Limitations on document production.

JAPAN DECEMBER 27, 2018

Japan recognizes Rule 14 of the Arbitration Rules in the working paper to be an important amendment that would empower Tribunals to manage cases in a proactive manner and enable them to get to the heart of the dispute without delay. This proposed rule should be implemented in a manner consistent with the guiding principles, provided for in Rule 11 of the Arbitration Rules in the working paper, as amended by Japan's abovementioned proposal to include parties' responsibility to conduct proceedings in good faith. To improve the effectiveness of proposed Rule 14 in line with the guiding principles, Japan proposes the following amendments. With these amendments, Tribunals should be able to actively interact with parties with a view to specifying the issues at dispute. Once the issues in dispute are specified through the case management conference amongst the Tribunal and the parties, the Tribunal will have legitimate grounds to convince, as necessary, the parties that the process should be respected and the process should basically not be revisited. Japan especially sees advantage in proposed Rule 14, providing for the convening of a case management conference, when it is implemented to function together with Japan's abovementioned proposal for Rule 9bis aimed at addressing late submissions.

AR — 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;

(a) **bis clarify the content of submissions;**

(b) narrow **and specify** the issues in dispute; and

(c) address any other procedural or substantive issue related to the resolution of the dispute.

[DEBEVOISE](#)

DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

In particular, **Proposed Arbitral Rules 11(3), 13(2), 14, and 16(4)**—which impose a duty on the Tribunal to act in an expeditious and cost effective manner, encourage active case management, and allow for a Claimant to elect to have its Request for Arbitration considered as the Memorial—reflect overall improvements in the efficiency of the ICSID system.¹

[See submission for additional comments]

[FRANCK, SUSAN](#) DECEMBER 24, 2018

I have conducted extensive empirical work in connection with the costs of investment treaty arbitration (ITA). In March 2019, Oxford University Press will publish my book *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*. The publishers have kindly permitted me to provide selected extracts (without footnotes) of the draft final chapter of the book to inform your ongoing efforts.

The book contains multiple findings that affect ICSID's rule reform.

[...]

Finally, as the book demonstrated that the only variable reliably associated with all types of ITA costs—namely investors' legal costs, states' legal costs, and tribunal and other administrative costs and expenses—was time, more should be done to streamline time in hopes of decreasing costs. For example, ICSID's proposal expressly permits (but does not mandate) a Case Management Conference

(CMC). Yet, CMCs are a strategic opportunity to impose time management obligations and set expectations, and failure to take advantage of this tactical moment is unfortunate. Requiring at least one (but permitting more) CMCs provides a fundamental opportunity to streamline the adjudication clock. Chapter 8 provides regression models that explore other variables reliably associated (or not) with the various ITA costs, including repeat player counsel, energy disputes, bifurcation, and the presence of separate opinions among others. While a full discussion is beyond the scope of this cover letter, a general theme that emerges is that ICSID may wish to consider, similar to the U.S. Advisory Committee on the Federal Rules of Civil Procedure, forming a transnational working group to provide insights supporting potential revisions or the establishment of guidelines or best practices, particularly for time efficiency and cost containment. I understand that ICSID already has a *Practice Notes for Respondents in ICSID Arbitration* and Volume 3 (page 977) states that ICSID proposes to “develop best practice notes and guidelines to complement” the new Arbitration Rules and Additional Facility Rules. This is a useful step and may benefit from establishing a more permanent working group to facilitate regular updates and a broader perspective.

[see submission for additional comments on time, costs, mediation, and security for costs]

THREE CROWNS

JANUARY 16, 2019

The introduction of this rule is a welcome invitation to tribunals to use active case management. However we note that items (a) and (b) in the list of reasons appear superfluous, since clause (c) encompasses within it any issue the tribunal might wish to raise, including those referred to in (a) and (b). In these circumstances, the inclusion of items (a) and (b) risks giving the Rule a more limited ambit. We also note that the first phrase identifies expedition as the sole object of such CMCs; however, in our experience, cost-effectiveness is an equally pertinent purpose. While it might go without saying, it may be helpful to clarify that the Rule concerns CMCs other than (and hence, after) the First Session. In light of the above, alternative wording for Rule 14 could be:

With a view to ~~conducting expediting~~ the proceeding in an expeditious and cost-effective manner, the Tribunal may convene a case management conference with the parties at any appropriate time after the First Session to address any procedural or substantive issue related to the resolution of the dispute.

Rule 15 – Hearings

SPAIN DECEMBER 21, 2018

La audiencia es una fase del procedimiento fundamental. Consideramos que la regla general, tal y como sucede en la práctica, debe ser la celebración de **audiencias en persona**. Sólo bajo **circunstancias excepcionales**, se debe celebrar una audiencia por medios electrónicos, y siempre **con el acuerdo de las partes**.

Por ello, consideramos que el apartado 2 debe ser complementado con una redacción que establezca que las audiencias se celebrarán en persona salvo cuando medien circunstancias excepcionales y exista el acuerdo de las partes.

TUNISIA DECEMBER 27, 2018

Le dernier alinéa prévoit que le Tribunal délibère sur toute question devant être tranchée immédiatement après les dernières écritures ou plaidoiries sur cette question. Cette délibération est-elle obligatoire ? On vise essentiellement les décisions relatives aux questions incidentes (art 46 du règlement) ou de compétence du tribunal, sont-elles rendues obligatoirement par décision autonome ou peuvent être incluses.

DENTONS DECEMBER 21, 2018

This proposed amendment does not seem fully to square with Article 63(b) of the Convention, which requires the consent of the Commission or Tribunal to conciliation and arbitration proceedings being held outside an appropriate institution – even where the parties agree.

If the idea is to address hearings being held outside the place of proceedings, then the default in absence of agreement should be the place of proceedings rather than the seat of the Centre.

In respect of Rule 15(2) it is not clear to us that this direction should be made by the presiding arbitrator alone, and in practice it never is, so the following change could be advisable:

(2) The ~~President of the~~ Tribunal shall determine the date, time and method of holding hearings after consulting with the parties.

We query whether the inclusion of Rule 15(4) is necessary as it goes without saying and it is not clear that it settles a difficulty that has actually arisen in practice.

Rule 16 – Deliberations

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 and by any means 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 endeavour to hold deliberations~~deliberate~~ on any matter for decision immediately after the last written or oral submission on that matter.

Commentary

The Tribunal may not only hold in-person deliberations, but also through any appropriate means of communication.

The duty of the Tribunal to reserve time for deliberations immediately after the last written or oral submission should be a best effort obligation. There may be special circumstances that prevent a Tribunal from deliberating immediately after the last submission. In such cases, the Tribunal may reserve time shortly thereafter.

CANADA **DECEMBER 28, 2018**

1) In paragraph 2, there is a reference to the Tribunal deliberating at any “place”. Canada suggests that the word place denotes a physical location where all the members of the Tribunal must be located. As noted in the Working Paper, it is possible for deliberations to occur via other means as well. Canada suggests that this paragraph be amended to say “The Tribunal may deliberate at any place or by any method it considers convenient.”

COSTA RICA **DECEMBER 28, 2018**

Costa Rica notes that, according to the Working Paper, it is possible for deliberations to occur not only at any place but also by any method. Costa Rica suggests that the second paragraph be amended to reflect this on the new rule.

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 [CR: and by any method] 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.
-
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FRANCE **JANUARY 14, 2019**

« Le Tribunal peut délibérer en tout lieu qu’il juge pratique approprié ».

GEORGIA **DECEMBER 28, 2018**

Comment to Rule 16(3):

Georgia believes that the mandate to resolve the matter and to rule on the disputed issued on the case is granted to the Arbitral Tribunal and shall be exclusively discharged by the members of the tribunal/sole arbitrator. Therefore, the admission of any additional persons to the process of deliberation shall be agreed with the parties. Georgia understands that sometimes Tribunals require the attendance of the arbitral secretaries to assist them in discharging their functions without them taking part in the actual deliberations or decision-making functions of the tribunal; however, it would be more legitimate if the attendance of other persons, even for the purpose of assistance, would be brought to the attention of the parries.

In the view of the above, Georgia proposes the following amendment to the Rule 16(3):

“(3) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise in consultation with the parties.”

HELLENIC REPUBLIC **DECEMBER 28, 2018**

To improve the efficiency of the proceedings and to determine early on uncontested facts and legal issues, consider: Providing for mandatory deliberations following the first round of memorials. Such deliberations would facilitate the determination and settlement of uncontested claims, and would allow the parties to focus their attention on the most sensitive issues to be discussed later on, either in the second round of written submissions or at the hearing.

DEBEVOISE **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

In particular, **Proposed Arbitral Rules 11(3), 13(2), 14, and 16(4)**—which impose a duty on the Tribunal to act in an expeditious and cost effective manner, encourage active case management, and allow for a Claimant to elect to have its Request for Arbitration considered as the Memorial—reflect overall improvements in the efficiency of the ICSID system.¹

[...]

Finally, we draw your attention to the suggestions we made in March 2017 that have not been adopted in the current draft of the Proposed Amendments, but which may merit further consideration.
[see additional comments on proposed AR 4, 50]

Second, in order to achieve greater efficiency and active case management through the entire proceedings, ICSID should adopt Rules that require the tribunal to set aside sufficient time for conferencing and deliberation throughout the course of the proceedings, not only after the hearing (*see Proposed Arbitral Rule 16(4)*). In order to be effective, these commitments, including the fixing of actual dates for deliberation, should be incorporated into the standard draft of Procedural Order No. 1.12
[see submission for additional comments]

DENTONS DECEMBER 21, 2018

The proposed amendment currently provides that the Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter. While we agree with this provision, we also believe that it would be helpful expressly to state that it does not prevent the Tribunal from discussing the case at an earlier stage.

For example, the Tribunal may wish to convene a “Reed retreat” in advance of the hearing or during hearing breaks, in order to brainstorm about open issues and identify questions for counsel and witnesses.

THREE CROWNS JANUARY 16, 2019

It may be helpful to incorporate within Rule 16(2) a reference to the Tribunal’s duty to conduct the proceeding in an expeditious and cost-effective manner to make it plain that “convenience” denotes efficiency rather than personal preferences:

(2) The Tribunal may deliberate at any place it considers convenient with due regard to the Tribunal’s duties under Rule 11(3).

Rule 16(3) leaves it unclear what form the tribunal’s “decision” to admit someone to its deliberations will take and whether it will be communicated to the parties. In practice, the only other person that a tribunal might ordinarily decide to include in deliberations would be the ICSID Secretary or a tribunal assistant – notably to assist the tribunal with references to the record/pleadings and to take notes of deliberations – and a tribunal-appointed expert. To that end, we propose the following substitute language, which is meant to allow for the possibility to have present other persons but to make clear that they would be “present” but not “taking part” in the

deliberations. This latter part of the provision may be seen as unnecessary micro-management, hence we have bracketed it for further consideration in that light.

*(3) Only members of the Tribunal shall take part in its deliberations. No other person shall be ~~admitted~~ present during deliberations unless the Tribunal *so* decides ~~otherwise~~ and gives notice to the parties.*

Rule 17 – Quorum

SPAIN **DECEMBER 21, 2018**

Establece que la participación de los miembros del Tribunal puede realizarse por cualquier medio de comunicación apropiado.

A nuestro juicio, y en el mismo sentido que el comentario anterior (Regla 15), consideramos que la **totalidad** de los miembros del Tribunal deberá estar presente **físicamente** durante las audiencias.

La presencia en las audiencias a través de medios electrónicos sólo podría estar justificada por razones **excepcionales**, y siempre con el **acuerdo de las partes**. La redacción actual no resalta ni la excepcionalidad de esta situación ni el necesario acuerdo de las partes.

GUGLIELMINO **DECEMBER 28, 2018**

It is essential that the all the members of the tribunal be present both at hearings and deliberations. Even though the decisions of the Tribunal may be taken by the majority of members (Rule 18), it is of the essence that all arbitrators, whether appointed by the parties, the Centre, the Administrative Council, or other members of the Tribunal/Committee, be present at the hearings and deliberations.

Therefore, a proposal is made for Rule 17 ((AF)AR 27) to read as follows:

Rule 17. Quórum

The participation of **all** 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.

Rule 18 – Decisions Taken by Majority Vote

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 18: Decisions Taken by Majority Vote

The Tribunal shall take decisions by a majority of the votes of all its members, once all members have had the opportunity to state their views. Abstention shall count as a negative vote. Decisions may be taken by any appropriate means of communication.

Commentary

It is important to clarify that the Tribunal shall take decisions by a majority vote only once all members have had the opportunity to state their views, and that decisions may be taken by any appropriate means of communication.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

The Tribunal shall take decisions by a majority of the votes of all its members. **Tribunal members should deliberate and vote on all matters before the Tribunal.** The participation of **all** 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.

Rule 19 – Payment of Advances and Costs of the Proceeding

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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 reasonable 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, and that the Secretary-General submit an account of all amounts paid by each party to the Centre and of all costs incurred and payments made by the Centre for the proceeding, before allocating the costs of the proceeding between the parties. The statements of costs submitted by the parties and the account submitted by the Secretary-General shall be communicated to both parties. The Tribunal may request the parties and the Secretary-General to provide additional information concerning the costs of the proceeding, on its own initiative or the request of a party.

(4) In determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including, but not limited to:

- (a) the outcome of any part of the proceeding or overall the extent to which each claim, objection or defence has been successful, and the proportion in which the amount claimed is reflected in the compensation awarded to the claimant party, if any;
- (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.

[...]

Commentary

Only reasonable legal fees and expenses of the parties should form part of the costs of the proceeding.

Current Arbitration Rule 28 provides that the Secretary-General shall submit an account of costs and that the Tribunal may request the parties and the Secretary-General to provide additional information. It is necessary to maintain such provision. In addition, the statements of costs submitted by the parties and the account submitted by the Secretary-General should be communicated to both parties, so that they may examine the costs, ask the Tribunal to request additional information, and make observations, if any.

It should be clarified that the list of circumstances to be considered by the Tribunal for the purposes of the allocation of costs is not exhaustive, but a list of minimum factors to be considered when deciding how to allocate costs.

In investment arbitration cases, it is usually misleading to look at the final outcome of the proceeding. Instead, the extent to which each claim, objection or defence has been successful should be considered for the purposes of allocating costs, as well as the proportion in which the amount claimed is reflected in the compensation awarded to the claimant, if any, which may be significantly lower than the amount claimed.

AUSTRALIA

JANUARY 22, 2019

Australia recognises that the Tribunal may allocate costs with respect to any part of the proceeding under AR 19 and suggests including an express power to award costs related to arbitrator challenges.

AUSTRIA

DECEMBER 21, 2018

Rule 19 determines 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.

While the behaviour of the parties should be taken into account for the distribution of the costs, it would be a welcome addition to include a possibility to apply for cost separation in order to be able to clearly allocate culpably incurred costs to one party, while distributing the remainder in accordance with the criteria set out in para. 4.

It should be considered to also include the costs of staff evidence into Rule 19.

CANADA

DECEMBER 28, 2018

1) In paragraph 2, Canada suggests that it is not clear that the costs of the proceedings must be reasonable and hence Canada suggests that it be amended to read: “The costs of the proceeding are all reasonable costs....”

2) In paragraph 3, Canada suggests that it be made clear that the tribunal is to determine the reasonableness of the costs (as opposed to the current approach which somewhat implies this step in paragraph 4. Canada suggests paragraph 3 be reworded to say “The Tribunal shall request that each party file a statement of costs, and shall determine the reasonableness of the claimed costs before allocating the costs of the proceeding between the parties.”

3) In paragraph 4, a single Rule is created for decisions with respect to all cost allocations. Canada suggests that a different Rule should be created for instances where a case is dismissed for manifest lack of legal merit under Rule 35. In particular, where a case is dismissed for manifest lack of legal merit, the Rule should be clear that the investor will be responsible for all of the costs of the proceeding. A finding under Rule 35 is essentially a finding that the case is legally frivolous, and in order to create a sufficient

disincentive for bringing such frivolous cases, it is necessary, in Canada's view, to have a hard Rule on costs when the case is dismissed under Rule 35. Canada suggest the creation of a new paragraph 3bis which would read "Where a claim is dismissed under Rule 35, all costs of the proceeding shall be allocated to the claimant."

4) In light of changes to paragraphs 2 and 3, Canada would suggest that paragraph 4 be modified to read "In allocating the costs of proceedings not dismissed under Rule 35..."

5) In paragraph 4(a), the Tribunal is directed to consider the "outcome of any part of the proceeding or overall." In Canada's experience, much cost is often incurred because investors and respondents adopt what might be colloquially called a "kitchen-sink" approach – i.e. an approach where they make every possible argument, or challenge every possible measure. This can have serious cost implications. For example, in Canada's experience, investors almost always make a claim for lost profits, even when there is no basis in law for such a claim. However, such a claim requires the retention of often expensive damages experts, and also requires considerable time and attention be paid to this evidence by the Tribunal. Where such a claim is made, but is unsuccessful, there is still the possibility that some other theory of damages might succeed. Canada suggests that Tribunal's be directed to specifically consider these possible circumstances in cost awards to deter the undesirable inflation of unnecessary costs. As such, Canada suggests that paragraph 4(a) be redrafted to say "the outcome on specific claims or arguments, of any part of the proceeding, or overall".

COLOMBIA **DECEMBER 28, 2018**

Colombia sugiere que el Párrafo (4) solamente debería aplicar cuando no se ha presentado una demanda sin mérito o frívola (en términos de la Regla 35 de la propuesta).

Colombia considera que la mera presentación de una solicitud de arbitraje con manifiesta falta de mérito debe dar lugar a una asignación automática de costos para el reclamante. Para esto, se debería incluir una regla adicional en la que se establezca que el demandante debe asumir los costos cuando ha presentado una demanda frívola.

Por otro lado, si el proceso no continúa por inactividad del reclamante, este debería cargar con las costas por iniciar un proceso sin llevarlo a término.

Finalmente, en el párrafo 4 (a) se debería incluir la posibilidad de que el cálculo de los costos incluya no solamente "de cualquier parte del procedimiento o del procedimiento en su totalidad".

Lo anterior se evidencia en las alegaciones relacionadas con daños y lucro cesante, lo cual implica que el Estado se ve en la necesidad de incurrir en costos adicionales por expertos en esta materia cuando el daño no ha sido debidamente demostrado. Esto debería ser tenido en cuenta por el Tribunal al momento de decretar los costos del procedimiento. Así, esta delegación sugiere la siguiente redacción: “el resultado de alegatos o argumentos específicos y cualquier parte del procedimiento o del procedimiento en su totalidad...”

COSTA RICA **DECEMBER 28, 2018**

While Costa Rica welcomes that the current proposal includes criteria to determine and allocate the costs of the proceeding, it suggests that ICSID considers including a special rule for a finding under Rule 35 (cases dismissed for manifest lack of merit). Such a rule could eventually be useful in cases of frivolous claims, where the investor should be responsible for all the costs of the proceeding.

EU **DECEMBER 21, 2018**

The European Union and its Member States welcome the proposals to provide for certain factors giving guidance to Tribunals on how to allocate costs (AR Rule 19(4), (AF)AR Rule 29(4)), including in particular the assessment of the reasonableness of the costs claimed. The European Union and its Member States also recall their proposal made in this respect in the context of third party funding (para. 12 above).

At the same time, the European Union and its Member States would favour a clearer provision establishing the pre-eminence of the loser-pays principle among the factors to be taken into account by Tribunals when allocating costs. Providing for the loser pays rule to be applied as a matter of principle, unless a different cost apportionment is appropriate in the circumstances of the case, would be more in line with Article 42 of the UNCITRAL Arbitration Rules, as well as recent treaty developments and caselaw. In the view of European Union and its Member States, such a rule also would also have the advantage of deterring unfounded claims.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

Rule 19 (3) The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties. **However these costs should in no case exceed the arbitrators' fees.**

ISRAEL **DECEMBER 27, 2018**

Israel maintains that the Tribunal should be able to determine the method of assigning costs to each party, according to its case-by-case judgement. We believe that a one-for-all approach is not necessary and the current proposal for paragraph (4) reflects this position.

MOROCCO **DECEMBER 27, 2018**

Revoir le mécanisme de partage des frais entre les parties au différend notamment dans le cas des plaintes injustifiées ou frivoles et ce, en intégrant le principe du « perdant-payeur ». Ce principe permet de faire supporter à la partie perdante l'intégralité des frais de la procédure.

Prévoir un barème des frais qui allège les coûts des procédures d'arbitrage à travers notamment la fixation des rémunérations des arbitres, des experts, des témoins et des frais des instances du CIRDI.

Prévoir des règles complémentaires destinées à réduire le fardeau financier pesant sur les pays en voie de développement en matière d'arbitrage CIRDI. Ces règles complémentaires peuvent déterminer les frais d'arbitrage d'un pays en voie de développement en fonction de son PIB par habitant tel que fixé par la Banque mondiale.

PANAMA **DECEMBER 28, 2018**

a. Proposed AR 19 as drafted currently gives Tribunals power to require that parties advance costs, but it does not set guidelines for Tribunals to consider when evaluating the amount and "the portion of the advances payable by each party." Panama proposes including language in the commentary to AR 19(1) that states: "In considering whether to require one or more parties to pay costs in advance, and in setting the magnitude of that advance and the proportion of the advance that each party shall pay, the Tribunal shall consider, among other relevant factors:

The claimant's organization (e.g., as a special purpose vehicle) and ability to pay costs;

- (ii) Whether the party has previously failed to pay the costs of an arbitration;
- (iii) Whether the party has a history of acting in bad faith during the course of an arbitration;
- (iv) Whether the party's case is being financed by a third-party funder, and whether that third-party funder has assumed responsibility for adverse cost awards; and
- (v) Whether the party has a history of filing successive and iterative claims with a purpose to prolong the arbitration, thereby inflating costs."

b. Panama suggests a hard rule for cost allocation where a case is dismissed for manifest lack of legal merit under Rule 35. Panama supports adding language to Rule 35(3) that states: "Where a claim is dismissed under Rule 35, all costs of the proceeding shall be allocated to the claimant."

PORTUGAL **DECEMBER 21, 2018**

Adding the nature of the investor to the list of factors, in Rule 19(4), would clarify that the tribunal could (and should) take into account the alleged lack of financial capacity of SMEs or natural persons when allocating costs.

SINGAPORE **JANUARY 4, 2019**

We strongly support this provision. While stopping short of explicitly setting out a default rule that costs should follow the event, there is now greater guidance on costs awards and an explicit obligation on the tribunal to give a reasoned decision on costs. This would ensure that Tribunals pay particular attention to setting out the factors considered in arriving at their costs allocation.

SPAIN **DECEMBER 21, 2018**

El apartado 4 recoge algunos criterios para orientar al Tribunal en el reparto de los costos. Se deberá tener en cuenta, entre otros, (a) el resultado del procedimiento o de parte de él, (b) la conducta procesal, (c) la complejidad de las cuestiones y (d) la razonabilidad de los costos reclamados.

Consideramos que se debería incluir un quinto punto. Es habitual que las partes demandantes **sobrevaloren las compensaciones solicitadas**. En ocasiones, esta sobrevaloración alcanza umbrales irracionales. Este comportamiento provoca una gran alarma en la opinión pública, generando información confusa pero con un gran impacto mediático. Además, tiene como objetivo influenciar al Tribunal en la valoración de daños.

Por ello, consideramos que se debería incluir un quinto punto que hiciera mención a la **diferencia entre la cuantía otorgada respecto a la cuantía inicialmente solicitada**.

Si bien la redacción actual incluye que se deben valorar “...*todas las circunstancias pertinentes...*”, consideramos necesario la mención explícita con objeto de señalar expresamente a los árbitros y a las partes, que esta conducta no debe ser fomentada y que perjudica al sistema.

Además, consideramos que se debe mencionar que el Tribunal motive su decisión de reparto de costes del procedimiento.

Por último, ES considera que cuando se aplique el principio de "el que pierde paga", también puede ser útil distinguir entre las diferentes categorías de costes, tales como los costes de abogados, por una parte, y los costes del tribunal y administrativos, por otra. La razón de esta propuesta es que, en ocasiones, los Estados se defienden con sus propios recursos y no contratan ayuda de bufetes especializados. En ese caso, aplicar ese principio a los costes legales sería asimétrico, ya que los costes legales del demandado pueden ser mucho más bajos que los del demandante

TOGO **DECEMBER 28, 2018**

L'article 19 alinéa 5 prévoit que le Tribunal puisse rendre des décisions intérimaires sur les frais au cours de l'instance et pas seulement dans la sentence finale (page 26 du synopsis).

L'évaluation des coûts tout au long de l'instance peut être bénéfique. Toutefois, elle peut également constituer un moyen indirect de pression sur l'État qui peut être une partie financièrement faible par rapport à une multinationale.

URUGUAY **FEBRUARY 1, 2019**

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales

A. Duración prolongada y onerosidad de los procesos

Algunas de las propuestas presentadas por la Secretaría del CIADI implican una reducción del plazo del procedimiento arbitral, lo cual tiene un impacto directo en el costo del procedimiento arbitral.

Se comparten las propuestas de reformas que tienden a reducir los plazos de los procedimientos arbitrales siempre que se mantengan las garantías del procedimiento arbitral.

[see additional comments under AR 35-AR 37 & AR 59]

C. -asignación de costos por los tribunales arbitrales - Honorarios arbitros

Se agradecen los estudios realizados por la Secretaría del CIADI para controlar y reducir los costos del procedimiento arbitral. Uruguay como estado demandado utiliza fondos públicos para pagar los elevados costos del proceso de solución de controversias inversionista y estado.

Se apoya la propuesta presentada por la Secretaria del CIADI de renumerar a los árbitros por hora trabajada a los árbitros, conciliadores, personas de comprobar hechos y mediadores. Esta medida asegura el pago de las horas efectivamente trabajadas. Si bien la propuesta presentada no impedirá solicitudes de honorarios más elevados de los sugeridos, esta información será el punto de base para las negociaciones que generalmente se desarrollan durante la primera audiencia procesal con los miembros del tribunal arbitral.

CCPIT DECEMBER 25, 2018

A. Original Text

[quotes text of proposed AR 19]

B. Modified Text

It is advised to amend Rule 19 (Payment of Advances and Costs of the Proceeding) of the proposed Arbitration Rules as follows:

(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, **except any expenses or costs relating to third-party funding;**

C. Reason for Amendment

1. Explicit exclusion of the third-party funding costs from recoverable costs incurred by the parties.

The Article 19(2)(a) of the proposed Arbitration Rules provides that the costs of the proceeding include the legal fees and expenses of the parties, but it is not clear whether the costs of the proceeding include costs of third-party funding. At the same time, paragraph 272 of the specific interpretation of the Article states that:

“Similarly, whether the costs associated with TPF (third-party funding) are recoverable in an order for costs remains a question of fact for the Tribunal and is not expressly addressed in the proposed (Arbitration Rules).”

Because the issue is not clear in the Rules, and modification interpretation of ICSID Rules states that the issue will be decided by the arbitral tribunal. There is only one international commercial arbitration case, in which the arbitral tribunal ruled that the respondent should bear the contingency fee (for a certain percentage of the recovered amount) specified in the claimant’s funding agreement. In addition, for third-party funding, the Secretariat’s amendment proposal also mentioned that only Singapore and Hong Kong have amended the relevant laws to allow third parties to provide funding in international arbitration, but such permission is only adopted in principle, and the specific implementation and supervision regulations are yet to be implemented. In practice, it is unreasonable for the respondent country to bear high third-party funding costs. The question remains to be determined and clarified is whether the third-party funding costs belong to the costs of proceeding. We recommend that the third-party funding costs be explicitly excluded from the reasonable expenses of the party in the Rules, and the successful party has no right to ask the other party to bear the costs. When discussing the Guidelines for the Administration of Arbitral Procedures in 2016, the UNCITRAL had suggested that third-party funding costs should be supported by member states (only in the field of international commercial arbitration), but due to opposition from most states, the UNCITRAL did not discuss this issue, and did not included the costs into the scope of costs of proceedings. Therefore, the issue should be expressly clarified in the Rules, thereby the respondent states will not be responsible for the unreasonable expenses.

[DEBEVOISE](#)

DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

[...] **Proposed Arbitral Rule 19(4)** on allocation of costs also incentivizes the parties to conduct proceedings in an efficient and cost-effective manner.³

[...]

[additional comments on other proposed amendments – see AR 3, 11, 13, 14, 16, 29, 67, 69]

[FRANCK, SUSAN](#) DECEMBER 24, 2018

I have conducted extensive empirical work in connection with the costs of investment treaty arbitration (ITA). In March 2019, Oxford University Press will publish my book *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*. The publishers have kindly permitted me to provide selected extracts (without footnotes) of the draft final chapter of the book to inform your ongoing efforts.

The book contains multiple findings that affect ICSID's rule reform.

[...]

Second, various chapters explore the ongoing challenges of tribunals providing both legal authority and reasoning for their cost assessments; the book identifies the importance of ensuring tribunals identify the criteria affecting cost determinations at an early stage to guide party conduct and promote expectation management. As arbitration costs can be somewhat large, particularly compared to amounts awarded, providing explanations for material fiscal exposure is sound, enhances transparency of adjudication, and promotes rule-of-law values. ICSID's proposals properly emphasize that tribunals have the power to make early cost assessments, although my data reflected that was something tribunals rarely did in practice. Relatedly, ICSID is proposing an obligation to provide express reasoning of costs in the final Award. Both of these reforms are sensible, and welcome, innovations.

I was pleased to see ICSID identify specific factors for tribunals to consider when deciding to shift costs, as this is a decided improvement from the status quo. It was, however, unfortunate that potentially desirable cost-shifting factors were omitted. To facilitate an evidence-based approach to reform, the book empirically analyzed factors for assessing costs, identifying what tribunals have actually done in practice. Given the continued challenge of tribunals under-analyzing cost decisions, clear articulation for cost assessments to promote values that reward useful party conduct or socially desirable norms can guide party behavior and tribunal discretion. Should ICSID wish to provide more transparency and guidance, it should expand the list of pre-articulated factors for assessing costs in line with the factors analyzed in the research, rather than the more limited initial list which may simply offer a new guise to facilitate the continued use of somewhat open-ended discretion.

As parties' legal costs dramatically outweighed the scale of tribunal and administrative costs, it would also seem reasonable for ICSID to differentiate actively between the two cost types. While the August 2018 proposals lump together all cost variables, there is value in making a clear demarcation and then using the different cost elements strategically. For example, where there is a need to send a strong signal about desirable conduct or norms, there should be more active control of parties' legal costs, which are the larger thumb on the scale; but where gentler incentivization is appropriate, then tribunal and administrative expenses are the better lever. Distinguishing between costs provides an opportunity to incentivize behavior more effectively.

Third, to ensure that the incentives related to costs are not just theoretical, it is fundamental for ICSID to provide the express authority for tribunals to order security for costs. This eliminates any remaining doubts as to the powers of the tribunal. The rules, however, should not automatically default to order security for costs, as the power must be exercised with due consideration of the particularities of each case. As chapter 9 identifies, to explore the efficacy of security for costs, it would be prudent to create a working group that seeks to analyze factors that are most fundamental in creating fair and workable decisions, as there can be large deviations among the identity of claimants, the nature of respondents, and the disputes involved. Such variation requires some flexibility and an appreciation of the nuance of individual situations.

[see submission for additional comments]

GUGLIELMINO DECEMBER 28, 2018

In practice, tribunals do not usually decide on the costs of proceedings if the case is terminated for a reason other than an Award. This has led to a lack of certainty as how costs incurred in proceedings even at advanced stages should be distributed if the case is terminated for a reason other than the rendering of an Award. Then, it would be advisable that the orders of settlement and termination (Rule 55) and the orders of discontinuance of proceedings (Rule 56, 57 and 58) include a declaration of the Tribunal on the costs of proceedings, including fees and expenses of each of the members of the Tribunal, and a reasoned decision on the distribution of costs of proceedings.

Therefore, a proposal is made for Rule 19 ((AF)AR 29) to read as follows:

Rule 19. Payment of Advances and Costs of the Proceeding

[...]

(6) The Tribunal shall ensure that all decisions on costs are reasoned and form part of the Award **or of the order of termination or settlement or termination or discontinuance of proceedings, as applicable.**

STEPTOE DECEMBER 28, 2018

5.1 In our view, requiring reasoned cost decisions (paragraph (6)), while lengthening decisions and awards, and likely increasing the time and costs of proceedings, will provide significant benefits and therefore should be retained.

We also agree with the approach reflected in paragraph (4) of providing factors to be considered in allocating costs. It is essential in our view that the Tribunal retains discretion to consider factors other than those enumerated, and our support for the inclusion of specific factors in paragraph (4) is in the context of a broader "all relevant circumstances" mandate.

THREE CROWNS JANUARY 16, 2019

Rule 19(4) provides welcome confirmation that tribunals have a duty to allocate the costs and provides clear guidance that the tribunal should consider the parties' conduct of the proceedings and their success on particular issues and overall in determining the allocation. The complexity of the proceedings, a factor now set out in Rule 19(4)(c), is ordinarily taken into account as part of the assessment of the reasonableness of the costs claimed (Rule 19(4)(d)), rather than as an independent factor. We therefore offer for consideration alternative language that would merge 19(4)(c) and (d), as well as address some technical points in Rules 19(1), 19(5) and 19(6):

*(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. **Unless special circumstances justify an exception, advances shall be made in equal portions as between the requesting and respondent 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, **taking into account the complexity of the issues.***

(5) The Tribunal may at any time make ~~interim~~ decisions on costs of any part of the proceeding.

*(6) The Tribunal shall ensure that all decisions on costs are reasoned and **ultimately** form part of the Award.*

The amendments to 19(1) and (6) are (hopefully) self-explanatory, but a word of justification is required in respect of 19(5). We have deleted the term *interim* as it may lead to disputes over whether such decisions may later be revisited, whereas we understand the intent of the rules is for such cost decisions to be final, not provisional, albeit partial, in the sense that they would relate to part of the proceeding only.

8. In some cases, the Tribunal or the President of the Tribunal will retain an assistant for additional clerical support with the consent of the parties. While we understand that the involvement of assistants is controversial, we consider it prudent to reflect this practice in the rules so that the parties are clear of the costs consequences if they agree to use assistants. Thus, we suggest making it clear that the costs of the tribunal assistant are included in proposed AR 19(2)(b). With our suggested modification, AR 19(2)(b) would read:

Proposed AR 19(2)(b)
the fees and expenses of the members of the Tribunal **and person(s) assisting the Tribunal with the consent of the parties (where applicable);**
and

9. In line with the above the suggestion, it is recommended that a statement of the costs of the person(s) assisting the Tribunal be contained in the Award as well. Therefore, we suggest further adjusting proposed AR 60(1)(j) to the following:

Proposed AR 60(1)(j)
a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal **and of the person(s) assisting the Tribunal,** and a reasoned decision regarding the allocation of the costs of the proceeding.

10. In this connection, we respectfully invite the Secretariat to consider whether it would facilitate the conduct of the proceeding to allow any party to request that a statement of the costs of the proceeding be provided before the parties file a final statement of costs in accordance with AR 19(3).

Chapter III – Constitution of the Tribunal

Rule 20 – General Provisions Regarding the Constitution of the Tribunal

AFRICAN UNION DECEMBER 28, 2018

Comments from the AU in Patrick Osu of Ajumogobia and Okeke memorandum

The Rules for constituting the Tribunal (Rule 20) suggest that majority of the arbitrators shall be Nationals of States (signatories to the convention) other than the State party to the dispute and the State whose National is a party to the dispute unless in the case of a Sole Arbitrator such a person is appointed by agreement of parties. The wording of Rule 20 seems to be fair from a point of achieving neutrality for the process however, it has also been the basis of concentrating the appointment of arbitrators from certain parts of the globe while other parts with equally competent arbitrators are ignored.

From available statistics almost 60% of the African originated disputes have been administered by Arbitrators of European decent while the percentage is below 10% in appointing Arbitrators from Africa, even though the Investment disputes have originated from Africa. While we understand that every single rule cannot be written, even more so matters that could be interpreted as being discriminatory, it is our view that the Secretary General of ICSID has the power and the unique opportunity under Rule 24 (Assistance of Secretary General with Appointments) to encourage the principles of diversity in the appointment of Arbitrators.

We suggest that ICSID should pay special attention to the mode and manner of appointment of Arbitrators especially in relation to disputes from the African region, by ensuring that there is a balance in the way nominations are made. We also suggest that the Centre collaborate with the African Union and all Regional Economic International Organisations to deliberately assist in the development of its pool of African Arbitrators and also provide the opportunity to be appointed as Arbitrators once the opportunity provides itself. We suggest that the ratios must significantly improve if the Centre must be exemplary and open in its appointments.

Comments from the AU in I-ARB AFRICA memorandum:

There are currently 46 African countries that are members to the ICSID Convention. According to the ICSID Case Load Statistics, as of May 31, 2017, ICSID had registered 613 cases under the ICSID Convention and Additional Facility Rules. One hundred and thirty-five (135) of these cases (22%) involved an African State Party.

The 135 cases emerged from 36 African countries. This places the African continent as the third largest in the geographic distribution of disputes following Eastern Europe & Central Asia and South America.

According to the report on Arbitrators, Conciliators and ad hoc Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules, there have been 47 African Arbitrators or Conciliators appointed by ICSID and 45 by the Parties.

When compared to appointment of Arbitrators or Conciliators from other regions which are: 716 appointed by the parties and 263 by ICSID from Western Europe, 364 party appointed and 73 ICSID appointed from North America, and 58 ICSID appointed and 155 party appointed from South America, the appointment of African Arbitrators and by parties and ICSID stands at 5th.

In light of the number of Member-States from the African Continent and the number of cases concerning African parties, the appointment of African Arbitrators and Conciliators by parties and ICSID is very low.

I propose that ICSID, in collaboration with its Member States make significant efforts in increasing appointments of African Arbitrators and Conciliators and have more transparency in the appointment of Arbitrators and Conciliators.

Simultaneously, I propose that the African Union and its member states make significant efforts in building capacity of African Arbitrators so as to increase their participation in ICSID cases. This can be done through collaborations with ICSID and other international arbitration, training and educational institutions.

ALGERIA **JANUARY 14, 2019**

- 1) Pour permettre aux Etats de faire un choix optimal, dans les délais prévus, il est préconisé de prévoir les délais de notification en dehors de la procédure arbitrale elle-même.
- 2) Il est proposé au CIRDI d'élaborer des documents destinés aux Etats et aux investisseurs contenant des orientations sur les qualités et les qualifications requises pour la désignation des arbitres et conciliateurs. Ce document pourra être annexé au règlement du CIRDI.
- 3) Introduire la clause de disponibilité à savoir:
 - Réduire le nombre des arbitrages par arbitre en fixant impérativement le nombre de dossiers à lui confier dans un délai à déterminer.

- Les arbitres presentis doivent déclarer le nombre de dossiers d'arbitrage qu'ils traitent en qualité de Co-arbitre ou de président afin d'éviter l'interpellation des mêmes arbitres d'une manière excessive.

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 20: General Provisions Regarding the Constitution of the Tribunal

(1) The parties shall constitute a Tribunal without delay after the notification of the registration of the Request for arbitration, with due regard to Section 2 of Chapter IV of the Convention.

[...]

Commentary

The expressions “notification of the registration” and “with due regard to Section 2 of Chapter IV of the Convention” in current Arbitration Rule 1(1) should be retained.

CANADA

DECEMBER 28, 2018

1) Canada understands the desire to avoid unnecessary delay, but questions the advisability of forcing the parties to constitute a Tribunal quickly after the registration of a request. Canada favours the use of alternative means to resolve disputes where possible. However, in Canada's experience, once a Tribunal is constituted, it tends to formalize the dispute process and make it more difficult to find a negotiated resolution. As a result, Canada suggests deleting paragraph 1, or maintaining the language from existing ICSID Rule 1(1) (“with all possible dispatch”), which is more permissive.

COLOMBIA

DECEMBER 28, 2018

Esta delegación considera que en esta regla se deben desarrollar y aplicar criterios que regulen el conflicto de interés.

ISRAEL **DECEMBER 27, 2018**

In order to avoid intertwining investment disputes with political ones, Israel proposes adding a new paragraph. (5):
"(5) A party may not appoint an arbitrator who is a national of a State which does not maintain diplomatic relations with the state party to the dispute or with the State whose national is a party to the dispute, without agreement of the other party."

SLOVAK REPUBLIC **DECEMBER 22, 2018**

The Slovak Republic supports, as a part of general reform, the creation of permanent dispute settlement body with random allocation of cases to a panel of adjudicators selected from a roster. Nevertheless, as a preliminary step, constitution of tribunals should be more efficient.

BROWER, CHARLES **DECEMBER 16, 2018**

Rule 20 (2) and (3) in combination allow the President to be someone having the nationality of either the State Party or of the State whose national is the Claimant, while excluding both party-appointed arbitrators from having either such nationality (also a sole arbitrator) absent agreement of the parties. In other words, while it may be unlikely that the parties, the arbitrators or the appointing authority (e.g. ICSID) would appoint an arbitrator who is a national of one of the parties, the possibility of doing so should be eliminated.

CCPIT **DECEMBER 25, 2018**

A. Original Text

[quotes text of proposed AR 20]

B. Modified Text

It is advised to amend Rule 20 (General Provisions Regarding the Constitution of the Tribunal) of the proposed Arbitration Rules as follows:

Rule 20 General Provisions Regarding the Constitution of the Tribunal

(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 **or third-party funder**, 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 **or third-party funder** without agreement of the other party.

C. Reason for Amendment

1. The selection of arbitrators when there is a third-party funding.

To maintain the impartiality and independence of arbitrators, it is recommended that the arbitrators not only shall not be the nationals of State party to the dispute and the State whose national is a party to the dispute, but also shall not be the nationals of a State whose national is a third-party funder of a party to the dispute. Therefore, as stated below, the Rules should include an additional information in the scope of the disclosure of third-party funding, namely the nationality of third-party funders.

Currently, third-party funders are mainly British and American financial institutions. Third-party funders involved in arbitration cases have expected to benefit from the proceedings. In addition, the arbitration tribunal may order the respondent to cover the costs associated with third-party funding (if unable to reach a consensus on modification, as mentioned above). In this case, the third-party funders serve as the invisible parties to the arbitration proceedings, and needed to be imposed corresponding limits. Therefore, the disclosure of information and nationality of third-party funders are extremely important.

[KRYVOI, YARIK / BIICL](#)

NOVEMBER 8, 2018

Arbitration Rule 1 (Draft Arbitration Rule 20) can be amended so as to require the claimant to nominate an arbitrator in the Request for Arbitration and to propose a method for constituting the Tribunal in the absence of a previous agreement.

[MASON, PAUL](#)

AUGUST 6, 2018

I would suggest the Committee give strong consideration to eliminating, or at least limiting and/or otherwise controlling, the practice of "double hatting" in investment arbitration cases whereby the same persons continue acting as arbitrators in some cases and counsel in others.

Unlike commercial arbitration, investment arbitration draws on a relatively small and closed group of arbitrators to decide cases of enormous financial value. Many of these decisions will also carry important ramifications for public health, financial and consequent social welfare in host countries. Adding to this is the lack of transparency in cases with these wider implications.

One by-product of this double-hatting practice is an increased number of costly and lengthy challenges to ICSID arbitrators. These challenges often spill over into the public news forum, sully the reputation of the arbitration process as well as of individuals concerned. This is undoubtedly one reason ICSID is facing a challenge from a prospective Investment Court sponsored by the EU.

The new Dutch Model BIT does exactly this, and with that endorsement I would hope the Committee will pay serious attention and deal responsibly with this issue.

MEIJER, GERARD & FRITSCHY, PIETER **OCTOBER 22, 2018**

In response to your invitation to file suggestions for potential amendments to the ICSID Arbitration Rules, we respectfully submit the following suggestion for a new Rule:

*“If a serious jurisdictional defense is put to an arbitral tribunal, the mandate of all members of this arbitral tribunal (except, where more than one, its chairman) shall be terminated upon rendering a decision on this issue, unless parties agree otherwise. New arbitrators shall be appointed in accordance with the rules which governed the appointment of the arbitrators whose mandate has been terminated.”**

The rationale behind this Rule is that allowing the same arbitrators to decide both on jurisdiction and on the merits of a dispute implies that rendering a negative judgment on jurisdiction will adversely affect what those arbitrators stand to gain (both financially and otherwise) from the arbitral proceedings as a whole. Problematically, this fact in itself can (appear to) constitute a *pro tanto*-reason to render a positive judgment on any jurisdictional question raised - and it can thereby (be perceived to) constitute an obstacle to an unimpaired, objective decision on such questions.

This proposal should be seen as only one example of a critical self-evaluation of the system of international (commercial) arbitration by its professional practitioners, aimed at improving and rejuvenating it or otherwise making it as transparent and ethical as possible. Especially considering the increased criticism (investment) arbitration has encountered in recent years, we believe that this self-evaluation is not merely desirable, but indeed necessary.

* We note that this proposal will be published in the Special Issue of the CIArb's Academic Journal on “Transparency, Diversity and Ethics in International Arbitration” (eds. Professor Mohamed Abdel Wahab & Dr. Emilia Onyema), forthcoming 2019.

MÖLLER, GUSTAF **DECEMBER 27, 2018**

The ICSID Secretariat is to be congratulated for the proposed revision of the rules. I enthusiastically support the revision. My comments are restricted to the proposed chapter on the Constitution of the Tribunal (AR rules 20-22). As to those rules I fully concur with the comments made by The Honourable Charles N. Brower.

THREE CROWNS **JANUARY 16, 2019**

Rule 20(1) places the onus on the parties to “constitute a Tribunal without delay”; however the Parties cannot constitute a tribunal on their own: ICSID and the nominees are also involved in the process. Alternatives would be (i) to phrase the Rule in the passive voice, i.e., “the Tribunal shall be constituted without delay”, or (ii) to impose a duty on all involved to cooperate in constituting the Tribunal without delay, i.e. “the parties, Secretariat, Secretary-General, and any persons nominated as arbitrators shall cooperate in constituting a Tribunal without delay”.

There is a tension between Rules 20(2) and 20(3) insofar as Rule 20(3) would permit each side to appoint an arbitrator of its own nationality (with the other side’s agreement), with the presiding arbitrator to be selected by an appointing authority, but such a result would conflict with Rule 20(2). Consideration should be given to replacing Rule 20(2) with a provision that would exclude nationals of a party from being appointed as sole arbitrator or presiding arbitrator absent agreement of the parties.

Rule 21 – Disclosure of Third-party Funding

AFRICAN UNION **DECEMBER 28, 2018**

Comments from the AU in Patrick Osu of Ajumogobia and Okeke memorandum

The basis for TP Funding is that it generally assists parties with the costs of arbitral proceedings. It impacts a party's access to justice and allows parties arbitrate matters that ordinarily would be impossible without TP funding, and also serves to mitigate party risk in respect of any given arbitration for a cost perspective. This method of funding arbitrable matters appear to be a veritable way of ensuring access to justice is guaranteed, however it is not without its challenges, some of which include matters that affect issues of security for cost and the impact, conflict of interest issues as it relates to arbitrator and Funder amongst other matters.

On one hand is the need for the disclosure of TP funding because of its potential effect on security for cost. For example, in the case of *S&T Oil v Romania*, ICSID case no. ARB/07/13 [2010], the respondent to the Arbitration was not aware that the Claimant had instituted the proceedings with TP funding until a litigation between the TP funder and the Claimant came to light in view of the fact that the TP funder had backed out on the TP funding agreement with the Claimant. If the Respondent had been aware of the fact that the Claimant was unable to fund the arbitration without TP funding, it would have made an application for security for costs which the Tribunal may have considered on the basis of the facts of the matter. This sort of case could have ended with the respondent not being able to recover its costs if the award had been in its favour. The proposed amendment to the ICSID Rule on Security for Costs provides a new, stand-alone rule that would allow a Tribunal to order security for costs. The rule states that the Tribunal must consider the relevant party's ability to comply with an adverse decision on costs and any other relevant circumstances, which should cover whether the TP funder has any obligations towards costs.

Regardless of the benefits of the disclosure of TP Funding, it is essential to ensure that there are safeguards against respondents using its disclosure as a weapon instead of a shield. It can be argued that requiring full disclosure on all aspects of a TP Funding agreement is an overkill when information regarding the identity of the TP Funder and its obligations towards costs is sufficient to resolve the challenges of conflict of interest and security for costs.

In addition to the proposal made in Rule 21 on Disclosure of TPF, we observe that there is indeed timing for the disclosure of TPF 21 (2) which is immediately upon registration for a request for arbitration, however sub rule (3) simply discusses a continuing obligation if there are any changes to the information supplied and when such arrangement terminates without specifically stating when that information must be provided. We suggest that Rule 21 (3) could be amended by adding wording as shown below at the end of the current sentence.

“Each party shall file a written notice of such changes or termination of the funding arrangement with the secretariat within 5 days of the occurrence of such changes”.

The necessity for such inclusion would ensure that the disclosure are made within specific time limits as a disclosure that is important but left to be made by parties whenever they choose may be inimical to the process especially as it would likely affect the kind of application that a party to the process may be required to make given knowledge of new information timeously.

ALGERIA **JANUARY 14, 2019**

[Please note that the paragraph numbers in Algeria's comments refer to the paragraph numbers in the [Synopsis in French](#).]

- 1) Insérer, dans le règlement du CIRDI, une clause relative à la divulgation des personnes physiques ou morales ayants des intérêts financiers directs ou indirects dans l'issue de la procédure arbitrale (revoir le paragraphe 27)
 - 2) Le nouveau texte fait obstacle à la communication du contenu de l'accord de financement conclu. Il est contestable en son principe, car il y a lieu de divulguer cet accord ou du moins le montant de ce dernier.
 - 3) En matière de conflit d'intérêts, les dispositions du règlement du CIRDI devraient évoquer la manière dont ces conflits sont traités lors de la phase de la constitution d'un tribunal.
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ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 21: ~~Disclosure of~~ Third-party Funding

[...]

(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder, and providing the terms and conditions of the third-party funding and any agreements and documents related to the third-party funding arrangement. Such notice shall be sent to the Secretariat and the other party immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration, and shall be provided to the Tribunal once it is constituted.

(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.

(4) The Tribunal shall verify that the third-party funding arrangement respects the following principles:

(a) the funded party must not have assigned its claim or the right to collect the result of its claim;

(b) retain its own independent counsel;

(b) the third-party funder must not cause, directly or indirectly, the funded party's counsel to act in breach of their professional duties, nor take control of decisions to be made by counsel;

(c) the third-party funder must not seek to influence the funded party's counsel to cede control or conduct of the dispute to the funder;

(d) the third-party funder shall be obliged to follow the same confidentiality rules that apply to all parties in the arbitration;

(e) the third-party funder must not be allowed to withdraw support during the proceeding, unless under circumstances clearly provided for in the contract or if the funded party has acted in breach of the financing agreement;

(f) the third-party funder must not be a disguised party or the real party in interest.

(5) The party benefiting from third-party funding and the third-party funding arrangement shall observe the obligations and principles provided for in paragraphs 2 to 4, under penalty of discontinuance of the proceeding.

(6) At the request of the State party to the dispute, the Tribunal shall order the other party benefiting from third-party funding to post security for costs, under penalty of discontinuance of the proceeding.

Commentary

The Argentine Republic is opposed to third-party funding. However, if a majority of two thirds of the members of the Administrative Council decides not to prohibit third-party funding, it should be strictly limited and penalties should be expressly provided for, as proposed above.

AUSTRALIA JANUARY 22, 2019

4. Disclosure of Third-party Funding

Australia supports AR 21 which requires a party to the proceeding to disclose third-party funding and therefore promotes greater transparency in relation to funding arrangements.

Australia suggests that AR 21 (2) be amended to require that any terms of a third-party funding agreement which may impact on whether the claimant in fact remains the true party with an interest in the proceedings or whether it has assigned its rights to the funder also be disclosed. This information goes to whether a claimant fulfils the jurisdictional requirements to bring a claim under Article 25 of the ICSID Convention.

Australia suggests consideration is given to ensuring that this provision does not inadvertently capture sub-national governments in a federal state like Australia, which may, from time to time contribute to the costs of defending a measure adopted by that level of government.

Finally, Australia considers that it should be necessary to disclose whether or not the third party funding arrangement provides that the third party funder will pay any adverse costs order made against the claimant.

AUSTRIA **DECEMBER 21, 2018**

Proposed Amended Arbitration Rule 21 ((AF) Arbitration Rule 32) requires the parties to disclose whether they are third party funded and the identity of the third party funder. The obligation applies throughout the proceedings. Arbitrators are required to disclose relationships with the third party funders.

A significant number of investment arbitrations is funded by commercial third-party funders pursuant to various third-party funding models. Mandatory disclosure requirements regarding the existence and identity of a third-party funder are appropriate to avoid undisclosed conflicts of interest between the funder and an arbitrator. Such disclosure requirements are therefore increasingly included in investment treaties and arbitral rules applicable in investment arbitration (see, e.g., 2018 EU-Singapore Investment Protection Agreement, Art. 3.8; 2017 SIAC Investment Arbitration Rules, Rules 24, 33, 35; see also ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (2017), para. 24) and should also be included in the Amended ICSID Arbitration Rules.

Given the numerous forms third-party funding may take, the broad definition of third party funding included in Amended Arbitration Rules 21(1), which includes non-profit funding and certain types of insurance, is appropriate. It is unclear whether the disclosure obligation also applies to representatives of the parties. Amended Arbitration Rule 2 provides that “‘party’ may include, where the context so admits: [...] (b) an authorized representative of a party.” Amended Arbitration Rule 21(1) defines a third party funder as a “person that is not a party to the dispute.” It is not entirely clear that representatives of a party are included in Amended Arbitration Rule 21(1). In line with the 2018 ICCA TPF Report, for purposes of disclosure, third party funders that are already subject to separate disclosure obligations, such as party representatives, should be excluded from the definition of third party funders.

CANADA **DECEMBER 28, 2018**

- 1) In paragraph 1, it is not clear to Canada how the provision will apply to federal states such as Canada where other levels of government may contribute to the costs of defending a measure adopted by that level of government. Such sub-national governments may not be considered to be “parties” to the ICSID arbitration. To avoid such ambiguity, Canada suggests that the first sentence be amended to say “...by a natural or juridical person that is not a party, or a constituent subdivision or agency of a party, to the dispute....”
- 2) Canada believes that the reference to funding being given to a law firm is unduly restrictive as a party may be represented not be a law firm, but by a sole practitioner etc. Hence, we suggest that the reference to law firm be amended to read “or a law firm, counsel, or other advisor representing that party.”
- 3) Canada believes that it is not clear whether the list in (a) and (b) are the only means through which third party funding is provided. If it is not meant to be limitative, we suggest that this be made clearer by, for example, revising the lead-in sentence to (a) and (b) to read “Such funds or material support may be provided by any means, including but not limited to:”. If it is meant to be limitative, then Canada questions whether (b) is drafted sufficiently widely. For example, as drafted it could be read to exclude loans that are not contingent on outcome. However, if the concerns with respect to third-party funding include potential conflicts of interest and lack of ability to pay a cost award, the fact of a traditional financing, and who offered that financing, seem just as relevant. In order to avoid this, (b) could be redrafted so it is split into a (b) and (c), with (b) being “in return for a premium” and (c) being “in exchange for remuneration or reimbursement...”

CHINA **DECEMBER 28, 2018**

- 1) According to Rule 19(2), the costs of the proceeding include the legal fees and expenses of the parties, but it does not clarify whether such fees and expenses would include those obtained by a party from the third party funder.

China therefore proposes that it shall be clarified that such fees and expenses do not include those obtained by a party from the third party funder, so that the party receiving the funding support may not be awarded compensation for the fees and expenses covered by the funding.

- 2) On disclosure of third party funding.

Considering the potential influence of third party funding on the fairness of arbitration, China proposes to increase transparency of third party funding, and the consequences for failure of disclosure shall be clarified so as to ensure compliance:

First, the party receiving the funding shall have a continuing obligation to disclose any changes to the funding, including after the tribunal is constituted or its members are replaced (if any), so that the party shall discuss with the funder to disclose the relationship between the funder and the members of the tribunal (if any).

Second, to avoid potential conflict of interests between arbitrator and the funder due to third party funding, apart from those information as required in Rule 21(2), other information of the funder shall also be disclosed, such as the contents of the funding contract or arrangement, nationality and equity structure of the funder, whether there is an affiliation or other relation between the funder and the party receiving the funding, the ultimate controlling entity or person of the funder and its interest with regard to the outcome of the arbitration, etc.

Third, the party receiving the funding may not refuse to disclose the above-mentioned information on the excuse that such information are business confidential information.

Fourth, legal consequence for failure of disclosure shall also be clarified. For instance, failure of disclosure may result in suspension of the proceeding, or the party receiving the funding shall bear the amount of cost of proceeding equal to the funding it has received, or other appropriate amount.

3) The current definition of third party fund as in rule 21(1) is still relatively vague, which may be circumvented so that the effectiveness of such requirement is affected. China therefore proposes the definition as follows:

“Third Party funding” means any funding, including financial and other material support, provided by a natural or juridical person who is not a disputing party but who enters into a funding arrangement in order to bear directly or indirectly part or all of the cost of the proceedings in return for a premium or in exchange for reimbursement wholly or partially dependent on the outcome of the dispute or in the form of a donation or grant.

COLOMBIA

DECEMBER 28, 2018

Colombia considera que en el párrafo (1) se debería incluir la participación de abogados independientes (que no pertenezcan a una firma de abogados), quienes también pueden recibir financiación de terceros para efectos de la defensa en un arbitraje de inversión. De esta forma, se sugiere que el texto se redacte de la siguiente manera: “...a una parte del procedimiento, una sociedad relacionada con esa parte, una firma de abogados que represente a esa parte o abogados independientes que represente a esa parte...”

Adicionalmente, Colombia considera que los enunciados de las formas que puede adoptar el tipo de financiación proveniente de terceros no deberían limitarse a los literales (a) y (b). Se considera que sería conveniente aclarar que se trata de una lista no limitativa de las formas de financiación.

De esta forma, el párrafo se leería: “Dichos fondos o apoyo sustancial podrán proporcionarse, a través de las siguientes acciones, pero sin limitarse a: [...]”

Adicionalmente, Colombia sugiere incluir la obligación de revelar el acuerdo completo objeto de la financiación, con la correspondiente sanción por no revelarlo.

[COSTA RICA](#) **DECEMBER 28, 2018**

Costa Rica appreciates ICSID’s efforts to strengthen transparency in arbitration through the disclosure of third-party funding (TPF). This topic has been widely discussed in the ISDS community and one of the key problems identified concerning TPF is non-disclosure, as it may lead to conflicts of interest regarding the Tribunal or counsel to the parties. Furthermore, Costa Rica welcomes that this proposal creates a continuous obligation, making sure that parties disclose any changes in their funding scheme throughout the arbitration, and that tribunals identify any connection with a funder at any stage of the proceeding.

[EU](#) **DECEMBER 21, 2018**

The European Union and its Member States welcome the proposed inclusion into the ICSID Arbitration Rules and the Additional Facility Arbitration Rules of specific disclosure requirements regarding third party funding. The inclusion of such disclosure requirements contributes significantly to increased transparency of investment disputes. The proposed language is similar to recent practice followed by the European Union and its Member States in investment agreements approved at EU-level. The European Union and its Member States note the importance of requiring the disclosure of the existence of third party funding and the name of the third party funder, and of making the disclosure requirement an obligation before the start of the proceedings (notice to be filed “immediately upon registration of the Request for arbitration”), as well as a “standing obligation” during the proceedings (notice to be filed without delay “upon concluding a third party funding arrangement”).

Disclosure of third party funding is primarily relevant from a ‘conflict of interest’ point of view. By making the fact of third party funding transparent, the parties and the Tribunal will be in a position to act (e.g. by means of a proposal for disqualification) if the third

party funding would create a conflict of interest for a Tribunal member. In case of more complex funding arrangements, further clarifications could be included to ensure that the disclosure also reveals the identity of the ultimate funder.

Consequences of failure to disclose third party funding should be also addressed. In this respect, the European Union and its Member States would consider it useful to explicitly mention under the applicable arbitration rules (AR Rule 19(4)(b), (AF)AR Rule 29(4)(b)) that in determining and allocating the costs of proceedings, the Tribunal shall consider the parties' conduct during the proceeding, including in particular any failure to comply with disclosure obligations such as regarding third party funding.

While the knowledge that there is third party funding could be a relevant factor for the respondent when assessing whether it is useful to request security for costs (see below), the European Union and its Member States are of the view that Tribunals should not automatically order security for costs in the presence of third party funding. In all such instances a case-by-case evaluation appears more appropriate, in particular when the claimant is a natural person or a small or medium-sized enterprise.

GEORGIA DECEMBER 28, 2018

Comment to Rule 21(1):

Georgia agrees with the views expressed by the delegations of other member states during the September 2018 Consultations, that

(a) the list of the possible forms of funding provided in paragraph (1) shall not be exhaustive;
“Third-party funding” shall cover the cases of both direct and indirect funding.

HELLENIC REPUBLIC DECEMBER 28, 2018

A party shall file a written notice disclosing the whole TPF arrangement. Tribunal should have the power to examine the accuracy of the information communicated at each stage of the procedure. Tribunal should have the power to order the disclosure 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.

The Tribunal should 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.

Consider to define specific consequences of each violation.

Jurisdiction of the Centre will be judged on the basis of nationality of TPF?

It should be made clear whether a law firm whose “remuneration or reimbursement wholly or partially depend[s] on the outcome of the proceeding” is a third-party funder.

HUNGARY **DECEMBER 28, 2018**

As a general remark, Hungary welcomes the introduction of the obligation to disclose third-party funding into the Arbitration Rules (and into the Additional Facility Arbitration Rules).

Hungary is of the view that the reference to a “*law firm*” as the recipient of the funding in Rule 21 (1) is overly restrictive, given that a party may also be represented by other entities or persons during arbitral proceedings. Accordingly, Hungary would favor the change of the reference to a “*law firm*” to a broader term, to encompass not only law firms as representatives receiving the funding but any other types of potential entities or persons in a representative or advisory capacity.

As regards its views on the consequences of a failure to disclose third party funding, Hungary merely refers to paragraph 12 of the *Comments to the proposed amendments to the ICSID Rules submitted on behalf of the European Union and its Member States*.

INDONESIA **SEPTEMBER 26, 2018**

In line with our position in the security for costs proposal, Indonesia suggests that the Disclosure of Third-Party Funding proposed rule for only to apply to claimant nationals of a Contracting States. Though there were cases where Contracting States were given donations to help their defense in a proceeding, the rationale of the disclosure of a third-party funding is to help Tribunals to assess whether a claim by a national of a Contracting State is a frivolous one, hence the disclosure of third-party funding to Contracting States is irrelevant. In addition, to help Tribunals in assessing whether a claim is a frivolous one, especially for funding that are provided in return for a premium or exchange for remuneration or reimbursement, Indonesia considers that it is really necessary for Tribunals to know terms and conditions of such third-party funding, as were requested by Tribunals in several cases.

We believe that the TPF arrangement (including TPF in form of contingency fee arrangement by the law firm representing the party)

has to be disclosed to the tribunal for the purpose of determining whether the party engage in “arbitral hit and run” or whether the claimant raise financing from TPF in a way which frustrate future enforcement of the award against them, and therefore it has ground to order security for costs. The reason for this is that, while disclosure of the existence and the identity of a third-party funder may address the issue of a potential conflict of interest with counsel and the arbitrators, it does not address the fundamental issues of: (i) which entity has true ownership and control over the claim (which can go to the issue of jurisdiction), and (iii) whether the funder is liable to pay an adverse costs order in the event that costs are ordered against the Claimant, and the terms governing when third-party funder may withdraw funding for the claim. This information is important to a Respondent State when determining whether to request security for costs, to the Tribunal when evaluating any such request, and to the issue of apportionment of costs more generally.

We also propose to expand the scope of disclosure of the third-party funder to the extent its beneficial owner so it would enable a more thorough conflicts of interest assessment between the arbitrator and the beneficial owner if the TPF is structured through a special purpose vehicle (SPV). This is also important as the use SPV may cloud the repeated appointment of an arbitrator by a particular funder that owns the SPV.

For clarity, the definition of “Third-party funding” in this provision shall include, but not limited to: (i) loan specifically for the pursuit of arbitration proceeding, or (ii) new capital injection specifically for the pursuit of proceeding, or (iii) contingency fee arrangement by the law firm representing the party, or (vi) indemnity for all costs incurred in the proceeding. Furthermore, for clarity purposes, Indonesia proposes that disclosure of third-party funding be reflected in the Institutional Rule 2 on Contents of the Request, to make these two rules correspond with each other. Please find below our proposed modification to both rules.

Arbitration 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 that is a national of a party Contracting State](#) 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 or repayment of loan or [gain of the investment or any form of other profit](#) wholly or partially dependent on the outcome of the proceeding.

(2) A [national of a party Contracting State](#) shall file a written notice disclosing that it has third-party funding, and the name of the third-party funder and details including the name of the beneficial owner of the third-party funder or the fund provided, and evidences of the third-party funding arrangement. 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) A [national of a Contracting State](#)~~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.

Furthermore, for clarity purposes, Indonesia proposes that disclosure of third-party funding be reflected in the Institutional Rule 2 on Contents of the Request, to make these two rules correspond with each other. Please find below our proposed modification to both rules.

In Institution Rule 2, we propose requirement for national of a contracting state, submitting a request for arbitration to disclose any existence of TPF in its request. We think, that this early disclosure is important to prevent challenge to the arbitrator in later stage of the arbitration, which will prejudice many stakeholders in the arbitration. The same principle, must apply in the event of appointment of arbitrator under Arbitration Rule 26.

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.
- (g) state, where there is third party funding, the name and address of the third-party funder in accordance with Arbitration Rule 21.

(2) [...]

ISRAEL **DECEMBER 27, 2018**

Third-Party Funding is a major issue in recent investment arbitration discussions. Israel believes that it is a legitimate tool for investors to protect their rights under BITs and investment chapters in FTAs, therefore a balanced approach should be taken.

Subparagraph 1(a): We feel that the means of TPF referred to in this paragraph do not cover cases in which TPF does not include financial assistance (such as pro-bono legal representation). We suggest inserting: "*through a **financial or non-financial** donation or grant*"

Paragraph. 2: Israel believes that further transparency will improve the legitimacy of this tool. We propose that in addition to the name of the third-party funder, the Party using TPF shall have to provide a detailed description of the third party funder, which will include information regarding its ownership structure and stakeholders (in case where the funder is a legal person) as well as its stake in the outcome of the proceedings.

ITALY **DECEMBER 24, 2018**

A proposed rule (AR 21) imposes a new obligation on the parties to disclose whether they have third-party funding, as well as the source of such funding, and to keep such disclosure of information current through the proceeding, while they are not required to disclose the funding agreement or its contents for this purpose.

Italy shares the view expressed by the European Commission to this end, and equally welcomes the inclusion of the requirements proposed by ICSID.

It would yet add that also disclosure on the terms of the agreement might be required to ensure full transparency and correctly evaluate how these could actually affect the proceedings.

In Italy's understanding, this would not only permit to highlight possible conflicts of interest (since the very beginning of the procedure, as the proposal rightly requests the party to inform of the third-party funding at registration or as soon as undertaken after registration), but also to ensure that equality of arms is ensured throughout the procedure.

Italy understands that this approach might be considered to go beyond what is needed for the soundness of the procedure, and in this light proposes that the tribunal be given the faculty to request disclosure of the terms of the agreement, under its general powers of management of the procedure.

Italy would thus propose that, on the one side, rules should prescribe arbitrators to disclose any possible conflict of interests raising from third party funding at the time of their appointment, and that, on the other, they should be given the faculty to ask for disclosure of the terms of the agreement in the course of the procedure, either by their own initiative or under request of one of the parties.

Italy shares the view of the Commission that the existence of third party funding could be a relevant factor for the respondent when assessing whether it is useful to request security for costs, as well as that the tribunal should not automatically order security for costs in the presence of third party funding, but be given a faculty to do so, in order to be able to proceed under a case-by-case approach.

Tal como se explica en el DT (párrafos 237- 272), el financiamiento por parte de terceros es un tema de interés para los Estados en virtud de la reciente tendencia a recurrir a esta figura en los casos de arbitraje de inversión. En ese sentido, México está de acuerdo en incluir, como parte de las enmiendas al CIADI, reglas que tengan como objetivo identificar de manera efectiva conflictos de interés.

La propuesta del CIADI en la regla 21 en el sentido de obligar a las partes contendientes a manifestar si una parte contendiente recibe financiamiento por parte de terceros, así como el nombre del tercero financiador, es adecuada y necesaria para cumplir con el objetivo mencionado, y es congruente con los tratados de inversión recientes que han incluido reglas similares.

Sin embargo, además de lo anterior, el DT reconoce que en el debate sobre el financiamiento por parte de terceros se ha discutido la conveniencia de ir más allá de conocer si una parte contendiente recibe financiamiento, así como el nombre del tercero financiador, en casos diferentes al conflicto de interés. Por ejemplo, en el caso *Muhammet Çap v. Turkmenistan* (ICSID Case No. ARB/12/6), el tribunal sugirió algunas circunstancias por las cuales se podría justificar ordenar dar a conocer los términos del financiamiento: “(a) *To avoid a conflict of interest for the arbitrator as a result of the third-party funder; (b). For transparency and to identify the true party to the case; (c). For the Tribunal to fairly decide how costs should be allocated at the end of any arbitration; (d) If there is an application for security far costs if requested; and (e) To ensure that confidential information which may come out during the arbitral proceedings is not disclosed to parties with ulterior motives*” (Orden del Procedimiento No. 2 (23 de junio de 2014)).

México coincide en que conocer información adicional al nombre del tercero financiador puede ser relevante en casos como los identificados por el Tribunal. Por ejemplo, conocer los términos del contrato de financiamiento para identificar quién es en realidad la parte en disputa (“(b). *For transparency and to identify the true party to the case*”), tendría relevancia para la otra parte contendiente y para la disputa al involucrar cuestiones de jurisdicción del tribunal. En ese sentido, México favorece un enfoque de mayor transparencia en el tema de financiamiento por parte de terceros. Al mismo tiempo, se debe reconocer que en casos en los cuales se ordena revelar los términos del contrato por el que un tercero financia a una parte en disputa, el tribunal podría adoptar las medidas necesarias para permitir que se suprima información confidencial en caso de que ésta exista con base en criterios legales objetivos.

MOROCCO

DECEMBER 27, 2018

Dans la mesure où le financement des procédures arbitrales par des tierces parties vise à aider les parties au différend à supporter le coût élevé des affaires de règlement des différends investisseur/Etat (RDIE), il est proposé d'imposer aux parties à un litige bénéficiant d'un financement tiers de révéler à l'autre partie et au tribunal :

- le montant du financement (non uniquement l'identité du financeur) ; et
- les conditions du contrat de financement dont notamment la présence ou non d'un engagement irrévocable de la tierce partie à assumer une condamnation éventuelle du demandeur (investisseur plaignant) aux dépens étant donné que l'investisseur qui recourt au financement tierce partie est normalement un investisseur qui se trouve dans une situation financière difficile qui ne lui permet pas d'honorer un engagement le condamnant aux dépens ce qui représente un risque pour l'Etat d'accueil.

Further comments received from Morocco

Fixer un délai pour la divulgation des informations concernant le financement par un tiers et prévoir des sanctions en cas de non-respect de cette obligation telles que la suspension par le tribunal de la procédure jusqu'à ce que les informations en question soient publiées ou ordonner la fin de l'instance ;

- Prévoir une définition pour le terme « tiers » pour savoir si le financement par un tiers englobe également les compagnies d'assurance qui offrent des services visant à supporter les frais d'arbitrage en cas de litige (contrats de protection juridique) ou les banques qui accordent des prêts pour financer les procédures d'arbitrage ;
 - prévoir l'obligation de tiers à respecter la confidentialité des documents et des informations fournis lors de la procédure d'arbitrage.
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OMAN

DECEMBER 28, 2018

We recommend that the requirement for disclosure of a third-party funder should be made at the time of registration of the request for arbitration, and not after registration. We are of the view that the Secretary General should be made aware of any funders in order to avoid any potential conflicts when arbitrators are chosen.

PANAMA

DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the State's name hyperlinked above.]

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

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

b. Panama further proposes that AR 21 be modified in the following ways:

(i) That the reference to funding by "a law firm" in paragraph 1 be amended to state "a law firm, counsel, or other advisor representing that party.'

(ii) That the language of paragraph I be changed to clarify that the list in I(a) and I (b) is inclusive of other potential third-party funding structures, rather than an exclusive list. Panama suggests that AR 21 be modified to allow a party to request that a Tribunal require the counterparty to (1) disclose any entity that falls within the Rule's definition of a "third-party funder" or (2) show cause why its funding arrangement does not fall within the disclosure requirement.

QATAR **DECEMBER 19, 2018**

Qatar welcomes the New rules regarding disclosure by the parties of third-party funding

SINGAPORE **JANUARY 4, 2019**

We strongly support this new provision. This was one of the areas for reform that Singapore had raised to the Secretariat. The formulation of the rule is sufficiently flexible and addresses our earlier suggestion to the Secretariat.

SOMALIA JANUARY 17, 2019

Third Party Funding: Somalia recognizes on behalf of its national investors that third party funding can provide access to justice for those of its investors with genuine grievances that would otherwise not have the financial means to bring suit at ICSID. However, equally Somalia shares the serious concerns of other States that unregulated third party funding has spawned a host of arbitrations at ICSID that have frivolous origins and vexatious objectives. Just as importantly, third party funders have all the benefit of the upside in case of success, but consider themselves immune from the costs that are imposed on an unsuccessful claimant. This leaves an imbalance between the State and the third party funder. The only way this can be addressed is both transparency vis-à-vis the funder, as well as amendment to the manner in which security for costs are handled. In relation to third-party funding, Somalia takes the position that the contents of the funding agreement are just as pertinent to the nature of the claimant's case as simply the name and source of the funder. In particular, frivolous or vexatious suits are more likely to demonstrate an unreasonable bias in favor of the third party funder in the waterfall return. A compromise solution to the current amendment may be that information on the contents of the third party funding be provided only to the Tribunal.

SPAIN DECEMBER 21, 2018

Valoramos positivamente la inclusión de una disposición referida a la financiación por parte de terceros.

Ahora bien, tenemos los siguientes comentarios:

- 1.- Consideramos que el incumplimiento de la obligación de revelar esta información es muy grave, ya que puede afectar a la independencia del Tribunal, lo cual es un requisito esencial. Por ello, **proponemos que su incumplimiento tenga como consecuencia la obligación de pagar los costes del procedimiento.**
- 2.- Dada el rápido dinamismo y evolución que puede tener esta figura, consideramos necesario que quede claro en la redacción que la definición **no supone una lista cerrada.**
- 3.- Asimismo, consideramos que la financiación puede ser tanto directa como indirecta, y que puede proceder de **instituciones que no sean persona jurídica o persona natural.** Si bien estas dos últimas cubren la gran mayoría, no son las únicas categorías en las que se puede formalizar una entidad.

4.- Se considera oportuno que se **adelante la comunicación** de la existencia de una financiación por terceros al momento de presentación de la solicitud de arbitraje. Debe hacerse constar que, en ocasiones, el nombramiento del árbitro designado por la parte demandante se hace en la solicitud de arbitraje, por lo que es en ese momento cuando, tanto la Secretaría del Centro, como el propio árbitro, deben conocer la existencia de un tercero financiador a los efectos de garantizar su imparcialidad. Será más difícil remover o renunciar con posterioridad, que si los hechos base se conocen lo antes posible. Por último, si el acuerdo se ha cerrado con posterioridad a la presentación de la solicitud, entonces la comunicación se realizaría durante el procedimiento con la mayor celeridad posible.

TOGO **DECEMBER 28, 2018**

L'obligation de divulguer le financement d'un tiers peut porter préjudice à un investisseur qui souhaiterait garder l'anonymat. Cette obligation ne peut intervenir qu'avec le consentement du tiers financeur. Elle ne peut donc pas être systématique. Un refus de divulguer, doit pouvoir intervenir s'il est suffisamment motivé.

TUNISIA **DECEMBER 27, 2018**

Cet article règle le problème du tiers financeur dans l'arbitrage international du CIRDI. Cet article pose des questions sur le principe même de la divulgation du tiers financeur au CIRDI :

- 1- la majorité des accords de financement comprend des clauses de confidentialité interdisant à la partie financée de divulguer l'existence et les termes de la convention de financement. Une telle obligation de divulgation est trop radicale et porterait atteinte, de manière démesurée, au secret des affaires
- 2-la révélation de l'intervention d'un tiers financeur aura généralement pour conséquence la réclamation par la partie adverse d'un security for costs.
- 3-le fait de révéler l'existence du tiers financeur aurait pour effet d'influencer indirectement les arbitres quant à la solution du litige, dès lors qu'une société de financement n'accepte d'investir dans une réclamation arbitrale que si celle-ci est suffisamment fondée.
- 4-la transparence du contrat de financement risquerait de porter atteinte à l'intégrité de la procédure dès lors que ledit contrat contient le budget, éventuellement le seuil à partir duquel les accords transactionnels seront admis, et d'autres informations qui ne peuvent être portées à la connaissance du tribunal, et encore moins à celle de l'autre partie.

It appears that the definition of third-party funding has been intended to be as much embracing as possible. Indeed, to serve its purpose, the definition must include every form of TPF that is in existence now and, to the extent possible, may emerge in the years to come.

With this in mind, there appear to be the following possible areas for improvement of the definition:

- (a) first, the reference to a “natural or juridical person” may not include all possible TPF providers. Notably, the definition of TPF as it stands does not include the provision of funds or other material support by a state since a state is not by definition a “natural or juridical person”. It is desirable, accordingly, to use a broader notion, and it is proposed to refer to a “person” rather than a “natural or juridical person”;
- (b) second, the reference to a “a law firm representing that party” does not include all types of legal representatives that may act on behalf of the party receiving TPF. The definition as it stands leaves out sole practitioners and organisations that may act on behalf of the party but are not as such incorporated or constituted as law firms. In order to embrace all the possibilities, it is suggested to refer to “a counsel, advisor, or representative” rather than a law firm representing the party; and
- (c) third, the forms of TPF referred to in Rules 21(1)(a) and 21(1)(b) may not embrace all varieties of TPF, and there remains room for interpretation that the list of TPF forms is not exhaustive. It is desirable, therefore, to make it clear that the list is exhaustive and that the forms of TPF are only provided by way of example.

Rule 21(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 a counsel, advisor, or representative of~~ that party. Such funds or material support may be provided, without limitation, (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.

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales

D. *Financiamiento por terceros para hacer frente a la carga financiera de las partes en el proceso.*

La Secretaría del CIADI propone incluir una nueva regla “N.21- revelación de financiamiento por terceros”

Uruguay comparte la inclusión de reglas sobre la participación de terceras partes que financian el procedimiento, aunque entiende que esta debería ser solo aplicable al inversor y no al Estado.

Atendiendo a que el Estado, en calidad de demandante o demandado, financia su actuación con fondos público este está sujeto a normas de transparencia inherentes a su propio actuar. La exigencia de revelar la participación de terceras partes financieras debería ser impuesta sólo al inversionista. El inversionista como parte privada no participa en el procedimiento arbitral mediante el uso de fondos públicos, sino de fuente privada.

Al mismo tiempo observa que en el documento de trabajo presentado a la discusión de los Estados Contratantes del Convenio CIADI, la Secretaria incluyó como ejemplo de donación la realizada por la fundación Bloomberg en caso de Philip Morris v. Uruguay destinado a la defensa de las políticas de control de tabaco en Uruguay.

Entendemos que la mención en forma individual al caso de Uruguay como beneficiario de donación de la Fundación Bloomberg en este contexto no es procedente, atendiendo a que en el mismo no es el resultado de un estudio global que comprenda jurisprudencia o práctica en la materia.

Sin perjuicio de ello se aclara que la donación realizada por la fundación Bloomberg en el procedimiento arbitral se realizó de una forma transparente y pública, no presentándose en el curso del procedimiento arbitral ningún conflicto de intereses. Se considera que el debate sobre la participación de terceras partes financieras se da en aquellos casos en los cuales la intervención de terceras partes financieras no es transparente generando conflicto de intereses e incentivando la presentación de demandas frívolas, sin fundamento.

La introducción de una regla sobre revelación de financiamiento de terceros brindará más transparencia y evitará potenciales conflictos de intereses en los procedimientos arbitrales. Aunque para obtener estos resultados se recomienda un ajuste de la redacción de esta regla para exigir copia del acuerdo financiero realizado entre las partes y el tercero que financia. Muchas veces quien financia no está conectado en forma directa con el inversor, sino que es parte de una estructura corporativa compleja (hedge funds). Lo anteriormente expresado refuerza el comentario de que esta regla debería ser una exigencia sólo para el inversor, parte privada del procedimiento arbitral y no para el Estado.

Reword Rule 21(1) following “proceeding,” as follows: “by a natural or juridical person or persons, none of which is a party to the dispute (“third-party funder”), to [then continue as at present, except changing “material” to “financial” – see below]. Accordingly, in Rule 21(2) “funder” should be changed to “funder or funders.” The plural ensures coverage of all possibilities, including “crowdfunding” of a party.

1. The term “material”

- The term “material” is too vague (imprecise). For example, a fact witness or expert could be characterized as a TPF under Rule 21(1)(a) and parties would therefore have a mandatory obligation to disclose them as TPFs (and potentially at a much earlier stage than with their pleadings). From Rule 21(1) delete “material” and substitute “financial” in both places, as it is financial support in its various forms that is targeted.

2. Potential TPF

- There is nothing per se “evil” about third-party funding. Any such disclosure by a party, however, is likely to open to the non-disclosing party the “evil” possibility of misusing the information it receives for the purpose of delay and harassment through requesting ever more detailed information regarding the funding. The only point of any such disclosure is to preclude any conflict of interest of any of the arbitrators. Whatever a party and a funder agree between themselves is of no interest for any other purpose, other than (some argue, but see below) in respect of security for costs. Therefore, a disclosure for the purpose of precluding conflicts of interest on the part of the arbitrators would best be sought from the arbitrators, who should be required to disclose any relationship to a third-party funder, whether as shareholder, director, officer or user, including use by anyone with whom his or her business is associated, e.g., his or her law firm, and to identify the funder(s). Thereafter the parties should be required either to disclose any resulting conflict or to certify that there is none. That information is not intrusive in respect of the arbitrating parties and law firms can adjust their conflicts systems to accommodate this. Thus, only upon such a disclosure by an arbitrator would it be up to a party to disclose a potential conflict of that arbitrator to the adverse party, the arbitrator and the tribunal.
- I see no legitimate relationship of TPF to issues of security for costs. Such applications should be treated as they presently are litigated. Assuming my proposal above were adopted, the only role of TPF in requests for security for costs would be that a funded party of which security for costs is sought would be free, if that were the case, to assert that it has a TPF which is obligated under their agreement to pay any costs awarded against that party.

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Burford Capital is pleased to present comments on the comprehensive proposals for rule amendments released by the ICSID Secretariat on 2 August 2018. We would also be delighted to engage in further discussion about any of the matters discussed herein.

As the world's leading institution devoted to international investment dispute settlement, it is not surprising that ICSID is again at the forefront of efforts to modernize rules for resolving disputes between foreign investors and states. As the facility of choice for investor-state arbitration – having administered more than 70% of all known investment arbitrations – we have witnessed firsthand the increase in demand for the Centre's services, with ICSID having registered 57 new cases in FY2018, the highest number in its history. And owing to the transparency inherent in ICSID arbitrations, it is decisions and awards rendered by ICSID tribunals in recent years that have informed and motivated discussions among stakeholders about the use of arbitration finance.¹

This has not gone unnoticed. As the world's largest legal finance provider by a clear distance – with more than US\$3 billion currently invested in litigation and arbitration finance assets – Burford Capital has been active in financing investor state arbitrations since 2009, and its founders for many more years than that in a prior vehicle. We have the most experienced arbitration finance team in the industry, with particular expertise in financing ICSID Convention and ICSID Additional Facility arbitrations. We therefore value the opportunity to contribute our experience and knowledge towards the ICSID Rules amendment process. Consistent with this, we were delighted to see that the ICSID Secretariat looked to our scholarship in its Working Paper on the allocation of costs by tribunals,² decisions on security for costs,³ and the length and costs of the investment arbitration process.⁴

Against this background, we will address three categories of ICSID's proposed rule revisions: (1) new disclosure obligations to avoid inadvertent conflicts of interest in funded ICSID arbitrations (Schedule 2 and ICSID Arbitration Rule 21); (2) the relationship of arbitration finance, if any, to a new rule on security for costs (ICSID Arbitration Rule 51); and (3) new proposed timelines for the issuance of awards by tribunals (ICSID Arbitration Rule 59).⁵ We consider each of these in turn below.

1. Proposed Revisions to Schedule 2 (Arbitrator Declaration Form) and Rule 21 (Disclosures related to arbitration finance)

a. Practice in funded investor-state arbitrations suggests that an express rule on the disclosure of arbitration finance by users is unnecessary

A review of practice in funded ICSID arbitrations suggests that an express rule requiring disclosures about the use of arbitration finance from claimants is unnecessary. The ICSID Arbitration Rules do not currently contain provisions that address arbitration finance, and cases under those rules have been funded for considerably more than a decade.

We know for this for several reasons. *First*, ICSID itself has confirmed as much in its Working Paper, released in August 2018 in support of the proposed amendments. There, ICSID explains that “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”.⁶ This is unsurprising: neither a funder nor a claimant in an ICSID or UNCITRAL arbitration has any desire to risk an undisclosed conflict of interest delaying proceedings or jeopardizing enforcement of an award. And in the few cases where ICSID Convention tribunals opted to invite or order disclosure of a funder’s identity, they acted within their inherent discretion, and required no express rule to do so.⁷

Second, although it has been suggested that disclosure of the identity of funders in cases is necessary to address potential arbitrator conflicts, practice in funded arbitrations suggests that the threat is more theoretical than real:

- There is not one known ICSID arbitration in which an arbitrator has been disqualified based on conflicts of interest arising from his/her connections with an arbitration finance firm; and
- There is no known ICSID arbitration in which an award has been successfully challenged – or even challenged at all – based on conflicts of interest involving arbitration finance.

Third, none of the other arbitration rules that figure prominently in investment arbitration disputes expressly require any disclosures from users of arbitration finance.⁸ As reported by UNCTAD in 2017, the majority of the 817 publicly known investment arbitrations (61%) have been brought under the ICSID Convention or ICSID Additional Facility Rules. According to UNCTAD, “the UNCITRAL Arbitration Rules were the second most used procedural basis, followed by the Arbitration Rules of the SCC Arbitration Institute”.⁹ Neither the UNCITRAL Arbitration Rules nor the SCC Arbitration Rules require disclosure of arbitration finance by claimants.

b. The purpose of the disclosure rules: to “avoid inadvertent conflicts of interest”

Nonetheless, in the event ICSID is minded to proceed ahead with rules requiring the disclosure of arbitration finance – which appears to be the case – before assessing the proposed rules, one must first consider the purpose of such rules. To be sure, ICSID has been clear about the rationale for disclosure in funded arbitrations: to avoid conflicts of interest with a potential arbitrator. The ICSID Secretariat has consistently reiterated this purpose in statements before the proposed rules were introduced, during the introduction of the proposed rules, and in a variety of sessions around the world explaining the rule amendment process and proposals in the days and months following their release:

- **15 April 2018:** “What we do propose is required disclosure by parties of third party funding and by arbitrators of a relationship with a funder to identify, and hopefully avoid, conflicts of interest.”¹⁰
- **3 August 2018:** “AR 21 ((AF)AR 32) imposes a new obligation on the parties to disclose whether they have third-party funding, the source of the funding, and to keep such disclosure of information current through the proceeding. They are not required to disclose the funding agreement or its contents for this purpose. The name of an involved funder will be provided to the arbitrators prior to appointment to avoid inadvertent conflicts of interest, and the Arbitrator Declaration requires confirmation that there is no conflict with the named funder.”¹¹
- **27 August 2018:** “States also noted that disclosure is important to avoid conflicts of interest that may arise with third-party funders. Therefore, under the proposed rules, both parties must advise whether a claim or defense is being funded by a third party as soon as the claim is registered, and arbitrators must disclose whether they have any relationship to that funder.”¹²
- **22 October 2018:** “Require disclosure of third-party funding to avoid potential conflicts of interest.”¹³
- **31 October 2018:** “Obligation for both parties to disclose existence of TPF and name of funder as early as possible after registration to prevent conflicts of interest”.¹⁴
- **1 November 2018:** “Proposed Arbitration Rule 21 approaches regulation of third party funding from the perspective of avoiding conflicts of interest between the parties and the arbitrators selected for the tribunal”.¹⁵
- **3 December 2018:** “Third-Party Funding – Parties would be obliged to disclose whether they have third-party funding, and if so, the source of the funding. The name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest.”¹⁶

With ICSID’s stated purpose in mind – to avoid inadvertent conflicts of interest – we next turn to the two proposals advanced by ICSID to do so: one involving disclosures by arbitrators (Schedule 2), and the other, disclosures by claimants (Rule 21).

c. Disclosures by arbitrators (Schedule 2, section 4(a)(iv)) to “avoid inadvertent conflicts of interest”

[quotes text of proposed Schedule 2 – Arbitrator Declaration]

As made clear by ICSID during this rule amendment process, the person best situated to assess whether or not a potential conflict with a provider of arbitration finance may exist is the decision-maker with those relationships: the arbitrator. The better approach, therefore, is to only seek disclosure from arbitrators about potential conflicts of interest owing to relationships with arbitration finance firms, as ICSID proposes to do with amendments to Schedule 2, the Arbitrator Declaration Form. This way, it is only upon disclosure by an arbitrator about a relationship with an arbitration finance firm, that a party would be required to disclose a potential conflict of interest.

Burford is not alone in recommending that this is likely the most effective approach to achieve ICSID’s stated purpose of avoiding or preventing conflicts of interest. In the words of one of the most frequently appointed ICSID arbitrators, Judge Charles N. Brower, having acted in at least 27 ICSID proceedings:

“Therefore, a disclosure for the purpose of precluding conflicts of interest on the part of the arbitrators would best be sought from the arbitrators, who should be required to disclose any relationship to a third-party funder, whether as shareholder, director, officer or user, including use by anyone with whom his or her business is associated, e.g., his or her law firm, and to identify the funder(s). Thereafter the parties should be required either to disclose any resulting conflict or to certify that there is none. That information is not intrusive in respect of the arbitrating parties and law firms can adjust their conflicts systems to accommodate this. Thus, only upon such a disclosure by an arbitrator would it be up to a party to disclose a potential conflict of that arbitrator to the adverse party, the arbitrator and the tribunal.”¹⁷

And ICSID would not be alone in proceeding in this manner. Earlier this month, on 19 December 2018, the ICC – the leading arbitration institution for the settlement of international commercial disputes – released updates to its Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration. The updates, schedule to take effect on 1 January 2019, squarely address the use of arbitration finance, clarifying that “in assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration.”¹⁸ Like the UNCITRAL Arbitration Rules and the SCC Arbitration Rules, the ICC Arbitration Rules do not include an express disclosure requirement for users of arbitration finance.

d. Disclosures by claimants (Rule 21) to “avoid inadvertent conflicts of interest”

[quotes text of proposed AR 21]

As explained above, Burford recommends that ICSID proceed with its proposed amendments to Schedule 2, but not with the introduction of Rule 21. We believe that this is the most effective approach for ICSID to pursue to avoid conflicts of interest, as well as maintain the integrity of proceedings. Nonetheless, if ICSID is minded to proceed with the mandatory disclosure – of the fact of funding and the identity of the funder – by claimants as contemplated in Rule 21, we recommend that any such disclosure be made to ICSID and the arbitrators, but not to counsel for the respondent. ICSID can mandate this through either an amendment to the current draft of Rule 21 or through a practice direction.

In its current formulation, Rule 21(2) requires that a party must disclose funding in a notice to “be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration”. This is in contrast to the rules on disclosure of arbitration finance adopted by other arbitral institutions and in treaty practice, which require the disclosure be made directly to the other disputing party (as contemplated in Article 27 of the CIETAC Investment Arbitration Rules; CETA, Article 8.26(1); EU-Vietnam FTA, Chap. 8(II), Sec. 3, Art. 11(1); and EU-Singapore IPA, Art. 3.8).

Against this background, and given the fact that ICSID canvassed these rules and treaty provisions in its Working Paper, the language of proposed Rule 21(1) appears deliberate. And so must be the exclusion of any language requiring disclosure of arbitration finance

directly to respondents. This way, the disclosure can be considered by ICSID and the arbitrators once the tribunal is constituted, which will serve the stated purpose of avoiding conflicts but avoid the associated procedural maneuvering once the disclosure is made to the respondent. Had that not been the case, then ICSID’s draft Rule 21(2) would not have parties notifying the Secretariat about funding arrangements that occur post-registration – a not infrequent occurrence – as opposed to the tribunal and parties directly.

This interpretation of Rule 21 makes sense. The requirement for the disclosure of the existence of funding and the identity of the funder should not place undue encumbrance upon one category of finance provider over other forms of finance used for arbitration (e.g. insurance, equity capital). In circumstances where the legal funder is a passive provider of finance, it is unclear why there should be any distinction between how the ICSID Arbitration Rules treat arbitration finance in comparison to other capital sources.

There are complex issues here, however, that the contemplated rule does not navigate well, as it is currently drafted. In the event ICSID is minded to ignore our views and attempt to promulgate some sort of claimant disclosure rule, it should be noted that the language of this rule is at risk of being outmoded in short order. The reality of capital provision to the legal industry is that it is considerably more complex in structuring and application than is captured in the definition of “third party funding” used here.

If ICSID is indeed intent on proceeding with a rule mandating claimant disclosure – a path with which we do not agree – we would recommend that it develop a rule that better reflects the current state of the financing market, a market that is now advanced well beyond just single case funding. For example, what if Burford:

- Buys common equity in a public company engaged in an ICSID arbitration with the purpose of the equity purchase being the further capitalization of the company so that it can pay its legal fees;
- Lends money to a law firm secured by the firm’s at-risk receivables in a pool of litigation and arbitration matters, some of which are ICSID arbitrations; or
- Provides insolvency financing (“DIP” or debtor-in-possession financing) approved by a bankruptcy court to a claimant with an ICSID claim, where the capital is used for general corporate purposes (which can include meeting legal fee obligations, at the discretion of the bankruptcy administrators).

Would those constitute instances of “third-party funding” under the proposed Rule 21? And how would that rule apply to the funding provided in the *Crystallex v. Venezuela* ICSID Additional Facility arbitration – one of the largest single capital provisions in arbitral finance history (as well as one of the largest ICSID awards ever rendered) – were it to be filed in a Rule 21 regime? In short, there is a real risk that Rule 21 – as currently formulated – will be problematic in practice and ineffectual in achieving its sole purpose: to avoid inadvertent conflicts of interest.

A. Original Text

[quotes text of proposed AR 21]

B. Modified Text

1. It is advised to amend Rule 21(2) of the proposed Arbitration Rules as follows:

A party shall file a written notice disclosing that it has third-party funding and **the information of the third-party funder, including the identity, nationality, domicile, shareholders of the third-party funder, and Funding Agreement**. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, **or to all the parties, arbitral tribunal and Secretariat within 5 working days** upon concluding a third-party funding arrangement after registration.

2. It is advised to amend Rule 21(3) of the proposed Arbitration Rules as follows:

Each party shall have a continuing obligation to disclose any changes, within **5 working days after the change occurs**, to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.

C. Reason for Amendment

1. In order to avoid conflicts of interest arising between the arbitrators and the third-party funder, in addition to disclosure the existence and the name of the third-party funder as provided for in Rule 21(2) of the proposed Arbitration Rules, other relevant information of third-party funders shall also be disclosed, including the identity, nationality, domicile, shareholders of the third-party funder, and Funding Agreement, in order to make clear whether the third-party funders bear the costs against the funded party, and to review whether there are any other issues related.

2. The obligation to inform all parties, the arbitration tribunal and the secretariat within 5 working days upon concluding a third-party funding arrangement, should be clarified in the Rules.

3. The purpose of disclosing the nationality of the third-party funder is to prevent the arbitrator's nationality from being the same as that of the third-party funder in the arbitrator's selection process; the disclosure of the third-party funder's shareholding structure will help the arbitrator candidates determine whether he or she has a conflict of interest with the third-party funder; the disclosure of the funding agreement can facilitate the arbitral tribunal to understand the distribution of benefits of the third-party funding in the case, and provide empirical basis for the arbitral tribunal and the international community as to application of third-party funding in the field of international investment arbitration, and whether it will lead to abuse of litigation and other issues.

4. Whether all parties, including additional parties and all parties of the consolidation of arbitrations, funded by third-party funder shall fulfill the corresponding obligation of disclosure, and if so, whether such duty needs to be clarified in the Rules.

VI. Other Issue of Third-party Funding

There are two categories of views on third-party funding. The first category consists of suggestions that third-party funding be prohibited entirely, on the basis that third-party funding promotes frivolous claims and is inapt for dispute settlement involving a State. The second category suggests that third-party funding should be permitted, but only if the relevant information of third-party funding is disclosed.

The proposed Arbitration Rules does not prohibit third-party funding on the basis that the receipt of third-party funding does not, in itself, mean a claim is frivolous; More generally, third-party funding is available for litigation in many Member States. Full prohibition of third-party funding remains a policy choice for individual States in their investment instruments rather than in the ICSID Rules. However, the proposed Arbitration Rules, while allowing third-party funding, left the following issues unaddressed.

1. Whether the costs associated with third-party funding are recoverable;
2. The appointment of arbitrators where there is a third-party funding;
3. The scope of information disclosure of third-party funding;
4. Relationship of third-party funding to Security for Costs.

...

The issue of third-party funding is a new issue, and UNCITRAL expressly excluded the issue of “third-party funding” from consideration in its 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, which is adopted on 8 July 2016. International investment arbitration is different from international commercial arbitration, that is, the respondent of the former is a sovereign state. Changes in a country's policies and laws can result in a number of enterprises being affected and can lead to lawsuits. The rules should therefore try to avoid the abuse of a country by third-party funding. Proposed additional conditions for the use of third-party funding, specifically:

1. Entirely prohibit the use of third-party funding in the field of international investment arbitration; or
2. Allow third-party funding, but only if the third-party funder agree to be bound by the Arbitration Agreement, and assume the adverse award rendered against the funded party; or
3. If so, the Rules may provide that, the participation of a third-party funder means that the funder is bound by the Arbitration Agreement, and involved in arbitration proceedings, thereby the arbitration tribunal can order the third-party funder to assume the adverse consequences of losing the case.

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

The proposed comments to this provision of the Draft touch upon two issues:

a) Duty of disclosure:

Need for clearer guidelines in terms of the meaning of the definition.

As the onus lies on a party to decide whether to disclose an arrangement, it would be helpful for ICSID to provide additional guidance around the meaning of the definition, in particular, sub-clause (b), if it is finally adopted in these terms. This guidance might usefully include discussion as to whether the determinative factor is the substance of the arrangement or a matter of form. A situation such as a Third-Party Funder (“**Funder**”) would provide the facility and would only be reimbursed if the party wins the brief.

Need for procedural guidelines

The issue relating to the unclear indication of how the information is handled.

Potential overlooks on the economic consequences due to the duty

o Access of Justice

This duty may cause the cost of compliance to fatally upsurge, as it forces the parties to disclose in all circumstances and at the very first moment information that may have been disclosed anyway in a near future, that is, upon enforcing an award that has possibly favoured the funded party.

o Delay

“Guerrilla tactics”, that is tactics used by the opposing party in delaying the situation, it is a highly debated and faced issue in modern arbitration, especially with reference to investment arbitrations. With the establishment of such an overarching duty, these parties will be awarded yet another reason to seek information on the investor, trying to pierce multiple levels of the corporate veil until finding the very individuals backing the investment, as to maximize their procrastinating manoeuvres. The result will, without doubt, be a greater delay in the conclusion of arbitral proceedings.

This would lead to higher expenses and delay in the proceeding, with a massive increase in the cost of an investment which may reach ten times the value of the investment. The market follows a rather clear logic in relation to such mechanisms: increase the risks and the costs, and prices shall follow.

If in the event of breaching this duty, the party and the investor are presumed to be tainted by some irregularity, which may make life easier for a losing respondent seeking to annul the arbitral award.

o Confidentiality

In many TPF, the relationship between party and Funder is governed by the duty of confidentiality. The reasons why the disclosure of TPF may be necessary include the arbitrators' impartiality requirement, the potential conflicts of interest, and the transparency, the latter, especially in the investment treaty arbitration. Even if the Funder is not the party to an arbitral dispute, it would still participate to a certain extent in various stages of an arbitration.

Therefore, while regulating TPF may be useful, it is important that the arbitral institution pays attentions to balance the duty of confidentiality between the Funder and the party and the need of protection in many cases, of the respondent. Thus, it is understandable that the ICSID Secretariat who received the information regarding TPF shall decide when, if appropriate, disclose the said information to the parties.

b) Insurance

Is insurance exclusively a private matter?

In many arbitrations, insurance has been regarded exclusively as a private matter, which should not be exposed or disclosed in all cases. This notion has been a tradition in many arbitrations since the 19th century, whereby parties likely being supported by all sorts of insurers.

Issues of confidentiality

Historically, there was never a call for regulating participation of insurance, due to many shortcomings such as the duty of confidentiality in a policy, exposure on coverage issues and commercial vulnerabilities, and an unfair advantage to a powerful self-insured opponent, such as a state. An institution that imposed such an obligation in its rules could jeopardise the level playing field, which it is one of its duties to secure.

Cases where TPF does not extend to insurance

Certain treaties concerning investment do not extend TPF to insurances.

1. CETA
2. EU-Vietnam FTA
3. EU-Singapore Investment Protection Agreement

Indeed TPF does need to be regulated. Many treaties and arbitration rules have dealt with them, mainly used the definition that targets the modern phenomenon of non-recourse funding provided in return.

It is worth noting that the proposal of ICSID, as outlined in the Working Paper that accompanies the Draft¹ (“**Working Paper**”) intends to define TPF ‘*in a manner similar to the definitions in the above texts*’.

However, it seems the ICSID Secretariat decided to depart from this view, favouring instead some wording proposed by the ICCA-Queen Mary Task Force Report on Third-Party Funding², which purports to bring insurance within a definition of TPF. Yet, having read in detail of the deliberation of the ICCA-Queen Mary Task Force’s Investment Arbitration Sub-Committee, it seems that the committees of the said Task Force assumed that the TPF was the modern form of non-recourse funding. The said report pointed out political risk insurance but as a ‘point of comparison’ (p. 210) and as an alternative to investment treaty arbitration (p. 211), not as an alternative form, or sub-category, of TPF.

Suggestions for amendments and proposed Third-Party Funding clause

The ICSID Secretariat should consider on the following:

- whether it is proper to go beyond the provisions in recent investment treaties, and beyond the type of TPF discussed by the ICCA-Queen Mary Task Force investment arbitration sub-committee; and
- whether the proposed extension of the definition of Art. 21 of the Draft to insurance, implicit in ‘premium’, might be too broad from what’s concerned.

In light of the above considerations, the TPF clause of the Draft proposed by the TPF Study Centre would read as follows:

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. The Secretariat shall analyse whether the information of the Third-Party Funding is necessary to be disclosed to those in the arbitration proceeding.*

(3) *Each party shall have a continuing obligation to disclose to the Secretariat any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.*

CHEN, YIHUA NOVEMBER 21, 2018

1. Disclosure for third-party funding (AR 21)

It is happy to see that a clause concerning third-party funding is introduced in the proposed Arbitration Rules (Conciliation Rules as well). In fact, either scholars or practitioners are looking forward to seeing the legislative standpoint of ICSID towards third-party funding, thus the proposed amendments to the ICSID rules are of great significance and importance. With regard to the benefits and risks of third-party funding in the investment arbitration context, there have been a great number of discussions in the current study, and I do not want to discuss it here. Since the definition of third-party funding concerns the application of specific rules that are intended to apply to third-party funders, the question thus goes to whether insurance should be included into the scope of third-party funding, and which definition of third-party funding, narrow one or broad one, should be introduced? As to my research experience, I would like to suggest the ICSID Secretariat keep a narrow definition of third-party funding and list insurance separately in AR 21. The reasons are listed as follow:

- 1) The third-party funder and insurer are two different entities, working in different industries and being regulated by different administrations as well as under different rules. They two share some similar features which may raise arbitrator conflicts of interest and thus are introduced to the IBA Guidelines. It is understandable that the ICSID Secretariat intends to accept the legislative model of the IBA Guidelines, viewing both the third-party funder and insurer as the circumstances required to be disclosed to the arbitration institution and other parties, but the IBA Guidelines do not regard the third-party funder and insurer are identical. Specifically, the third-party funder and insurer are just two representatives of the circumstance requiring disclosure, and two shared with two common features. The first one is contributing funds or other material support, no matter how the funds are going to be paid. The second one is having a relationship with the award, either a direct economic interest in or a duty to indemnify for the award. Apart from these two representatives, the non-disputing party who has a controlling influence on the disputing party also needs to be disclosed. Therefore, the IBA Guidelines concern more about the relationship between the third party to a dispute and the arbitrator, which may cause potential conflicts of interest, instead of accurately defining the third-party funder and insurer, who are just two examples used to interpret the General Standard 6(b) and provided in the Explanation to General Standard 6. It is worth noting that the ICC Guidance Note for the disclosure of conflicts by arbitrators takes the same approach by not directly referring third-party funding or insurance in the Note.
- 2) The proposed definition of third-party funding may cause inconsistency in the level of the national and international legislation. To date, Hong Kong and Singapore have provided the definition of 'third-party funding' in their Arbitration Ordinance and Civil Law Act respectively. The key elements of these two definitions are 1) a qualified commercial person carry on the business of funding; 2) provision of arbitration funding; and 3) remuneration is a share or other interest in the proceeds of the proceedings on a non-recourse basis. In this case, insurance is excluded from the definition. At the level of international treaties, all the EU Investment Treaties, including the EU-Vietnam FTA, TTIP and CETA, do not include insurance into the category of third-party

funding. At the level of investment arbitration rules, the Brazilian CAM-CCBC, the CIETAC Investment Arbitration rules do not include insurance either. In addition, the Code of Conduct of the UK Litigation Funding Association is not applicable to the insurance as well. Therefore, using a ‘one-size-fits-all’ definition of third-party funding may influence the national market of insurance and third-party funding. If the ICSID AR are going to take insurance into the definition of third-party funding, it is with no doubt that the inconsistency of the legislation will be aroused - the insurance industry might be forced to be under the regulation of the third-party funding regime and it is the same in the other way around. It would be also quite weird that insurance companies call their products as third-party funding agreements in the future.

- 3) Indeed, the legislative aim of the Arbitration Rules is to maintain the justice and fairness of the proceedings and to decrease the risk of awards being challenged to the minimum. If the insurer may exert a control over the party to a dispute or have an interest in the award, insurance needs to be taken into account when determining the independence and impartiality of arbitrators. We do not need to focus too much on whether the insurer contributes funds or other material support, the questions should be if the controlling power will be imposed upon the party to a dispute by the insurer, and if the insurer has a relationship with arbitrators which may raise conflicts of interest.
- 4) Insurance is a quite mature and long -existed industry, being normally regulated by a national financial administration and financial regulations. Due to the various needs of the policyholder, insurance can be in different forms, such as the ‘before the event’ insurance, ‘after the event’ insurance, legal liability insurance, political risk insurance etc. Compared with the ‘widely-understood’ third-party funder, the remuneration of whom is normally part of the proceeds, the remuneration of the insurer is in the form of the ‘premium’. I’m not going to discuss whether and how the insurer exerts control upon the party to a dispute, since I am also looking forward to hearing the thoughts from the insurer’s perspective concerning the question whether and how the insurer exerts a controlling power upon the party. Therefore, I will hold the view of the IBA Guidelines for the present that the insurance is a circumstance which needs to be disclosed to relevant parties, including the BTE insurance, the ATE insurance and liability insurance. Thus, concerning the wording of the AR 21, I suggest:

Arbitration Rule 21 (1) Disclosure of third-party funding and insurance

- (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 remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.*

(2) *‘Insurance’ is the provision for reimbursement, coverage, indemnification of legal expenses, adverse costs or liability incurred in the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (insurer), to a party to the proceeding, an affiliate of that party, or a law firm representing that party, in return for a premium. Such premium may be provided dependent on the outcome of the proceeding.*

[CLANCHY, JAMES](#)

SEPTEMBER 3, 2018

My comments [...] are restricted to proposed AR 21, which contemplates the mandatory disclosure of third-party funding (TPF) in every arbitration. Although such disclosure is unjustified and there is no consensus for it, funders may have been expecting ICSID’s proposal. However, it will surprise insurers. The word ‘insurance’ does not appear in the Rules but proposed AR 21(1) includes ‘premium’, which suggests that it is intended to bring insurance within its scope. If that is right, I would respectfully suggest that:

- you publish an explanation as to why ICSID seeks to treat insurance as a form of TPF;
- you reach out to insurers and their users during the consultation period; and
- if the inclusion of insurance is to proceed, you amend the wording of AR 21 to state clearly the types of insurance which it covers, using plain language by which insurers could recognise themselves.

[GARCIA, FRANK & HOUGH, KIRPIN](#)

NOVEMBER 27, 2018

On behalf of the Boston College Law School Working Group on Investment Reform, Professor Frank J. Garcia and Kirrin Hough submitted comments regarding the proposed amendments to the ICSID Arbitration Rules, including their recently published ASIL Insights article (“Third Party Funding in International Investor-State Arbitration”).

“Of particular concern to us is the issue of third-party funding in investment arbitration. We applaud the efforts of ICSID to promote greater transparency of third-party funding by requiring a party to the arbitration to disclose that it has third-party funding and the name of the funder, as outlined in proposed Arbitration Rule 21. However, as outlined in our *ASIL Insights* article, effective regulation of third-party funding requires a closer examination of the role of third-party funding in investment arbitration and more comprehensive reform to the ICSID arbitration rules.

As we explain, third-party funding in investment arbitration exacerbates many of the asymmetries that exist in the current ISDS regime. Funders most often invest in investor-claimants and stand to gain enormous returns on their investments, while states and the public, as the residual risk-bearers, bear the costs of defending an increasing number of claims and paying the ever-growing awards. While some proponents of third-party funding argue that third-party funding provides access to justice for investors who lack sufficient financial resources to bring claims, third-party funders themselves acknowledge that in ISDS the incentive is primarily balance-sheet management by sophisticated well-capitalized claimants, while under-resourced state respondents must make do on their own.

In light of the risks that third-party funding poses to the public and the investment regime, we urge ICSID to take the opportunity to closely consider the impact of third-party funding in the investment arbitration context and take greater steps of reform in order to properly regulate the role of third party funding in ICSID arbitrations.”

[See submission to read full text of the article]

[GIBSON DUNN](#) **JANUARY 15, 2019**

We note that the proposed rule is limited in scope to requiring disclosure only of the existence of third-party funding and the identity of the funder. However, the proposed definition of third-party funders is overly broad as it could capture a number of entities not intended by the rule. Given that the primary aim of the rule is to avoid conflicts, it is not clear why the definition of third-party funding would need to capture: a) law firms acting on contingency; b) shareholders that ordinarily fund a company through equity investments, but are not otherwise involved in the arbitration; or c) debt from banks or multinational institutions acquired in the normal course of a company’s or State’s operations. Yet, it is unclear whether the definition of “third party” captures all of these possibilities.

We therefore propose amending the definition as follows:

“‘Third-party funding’ is the provision of funds or material support solely for the pursuit or defense of a proceeding, by a natural or juridical person that is not a known participant in the proceedings (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. [...]”

The amendment of Rule 21 ((AF)AR 32) proposed by the Secretariat imposes on the parties the obligation to disclose if they have third-party funding and the name of the third-party funder. Further, such amendment establishes a continuing obligation to disclose any changes to such information during proceedings.

Our law firm is pleased with the regulation of such an important issue for current international arbitration. However, the importance of requiring the disclosure of the funding agreement should be highlighted. The requirement of disclosing information becomes incomplete if the information provided is not supported by the funding agreement, which may, in turn, affect the integrity of the arbitration proceedings.

On this regard, in line with the most recent arbitral decision on this issue¹, disclosing the funding arrangement must be required to protect the integrity of the proceedings and, therefore, in the event there is a funding agreement, such agreement must be disclosed to the tribunal –especially to avoid any conflict of interest not disclosed to the members of the tribunal- and to the other party, since certain clauses may leave the unfunded party without security for reimbursement of legal costs in the event of a successful case (especially against insolvent parties). There are other serious inconveniences that may arise from the specific terms of a funding agreement, such as circumstances in which the claimant has no longer standing in the case. For that reason, a proposal is made for Rule 21 ((AF)AR 32) to read as follows:

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 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 **and shall disclose the contents of the funding arrangement**. 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, who shall then forward such arrangement to the other party and to the constituting Tribunal.
- (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.

Proposal:

(1) “Third-party funding” is the agreement for the provision of funds or other material support ~~for the pursuit or defense of a proceeding, by~~ between a natural or juridical person that is not a party to the dispute (“third-party funder”), ~~to~~ and a party to the proceeding, an affiliate of that party, or a law firm representing that party to finance part or all of the cost of the pursuit or defense of a proceeding. 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, or

(c) for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled.

(2) The Tribunal has the power to examine the relevant parts of the third-party funding agreement in the context of the security for costs application against an alleged impecunious party.

[(3)]...

[(4)]...

Comment: We welcome a broad definition of “third-party funding” covering a wide range of funding models. The proposed amendment to the proposal defines third-party funding as an “agreement” between the third-party funder and a disputing party (or its legal representative). Furthermore, the added paragraph 2 highlights the importance that the terms of the funding agreement might have in the context of a request for security for costs. Paragraph 1(c) is intended to cover arrangements where the third-party funder is entitled to a share or a contingent payment from the proceeds or potential proceeds of the proceedings not addressed by paragraph (b).

The ICSID Secretariat is to be congratulated for the proposed revision of the rules. I enthusiastically support the revision. My comments are restricted to the proposed chapter on the Constitution of the Tribunal (AR rules 20-22). As to those rules I fully concur with the comments made by The Honourable Charles N. Brower.

6.1 Parties' legal fees in some investment treaty arbitration claims have been funded by way of a contingency fee, i.e. counsel is entitled to a percentage of the damages awarded (in the case of the claimant's counsel) or damages avoided (in the case of the respondent's counsel). In part, Rule 21 states, "'Third-party funding' is the provision of funds or other material support ... 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 ... (b) ... in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding" (emphasis added).

6.2 We understand from ICSID's Working Paper and presentations on the Rules that it is intended that Rule 21 will capture contingency fees, and that the purpose of requiring their disclosure is to avoid conflicts of interest. However, some law firms and their clients may not consider themselves to be third-party funders, and may take the view that no conflict of interest could arise merely because they are working pursuant to a contingency fee. Therefore, they may (wrongly) conclude that Rule 21 is not intended to cover contingency fees.

6.3 Whether or not Rule 21 applies to contingency fees will turn in part on whether the parties' counsel are a "party" for the purpose of Rule 21. If they are a party, their contingency fees will not be caught by Rule 21. The definition of "party" in Rule 2 states it "may include, where the context so admits ... (b) an authorized representative of a party". Therefore, the term "party" in Rule 21 may include the parties' counsel "where the context so admits". The phrase "where the context so admits" is ambiguous.

6.4 We foresee that in the context of Rule 21, counsel and their clients may take the position that the parties' counsel are a "party". Therefore, they will conclude that the "material support" that is provided by the parties' counsel by way of contingency fees is not being provided by a "person that is not a party to the dispute", and in those circumstances the contingency fees do not need to be disclosed.

6.5 In order to address this issue, ICSID may wish to expressly state in Rule 21 that the parties' counsel are not a "party" for the purpose of Rule 21, and therefore make it clearer that contingency fees must be disclosed pursuant to Rule 21.

In respect of Rule 21(1), the term *material* may be too broad, capturing (for example) the supply of pro bono advice. We understand that the intention is to capture forms of aid that are *equivalent* to monetary support and we propose substituting “equivalent” for “material”.

We understand that the purpose of Rule 21’s mandatory requirement to disclose third party funding is to allow any disclosures required to ensure the independence and impartiality of the arbitrators. Assuming this is the case, it may be helpful to include language to this effect in the rule, perhaps an introductory phrase in paragraph 21(2) to read:

(2) With a view to ensuring that the arbitrators and parties are in a position to make a timely assessment of any matters that could affect an arbitrator’s independence or impartiality, a party shall file ...

In view of the link between this Rule and Rule 26 on the arbitrators’ acceptances of their appointments, it may be helpful to put this rule adjacent to Rule 26.

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

As a non-profit academic organization focusing on the research of third-party funding in mainland China, we, @TPF China¹, draw this comment explicitly focusing on the financing issues under the proposed ICSID Arbitration Rules (AR). As the Rule 21 hereunder expressly governs the parties of ICSID arbitration on the disclosure matters concerning third-party funding, it is quoted as below. [quotes text of proposed AR 21 with emphasis added]

Based on our experience as legal practitioners in China, a civil law jurisdiction, we would particularly point out two following queries for the ICSID’s further consideration.

1. Should the representative (lawyers) of the parties be recognized as “**a natural or juridical person that is not a party**”?

From the Chinese perspective, no legislation under the P.R.C. laws restricts an attorney to invest capital or any kind of material support to the funded party. In fact, several local entities in the form of foundation or other financing organizations, have emerged in

mainland China. Among them, more than one third are constituted and funded by domestic law firms or individual lawyers. Under China's Attorney Law, lawyers are only qualified to provide legal services but not to finance cases. However, no existent regulation prohibits lawyers from investing a funding entity, and representing the funded party in the same case financially supported by the entity. In such scenario, the billing standard applied to the lawyers' contingent fees is no longer applicable to the financing agreement, leaving no restriction in the cap of contingent fees.

Therefore, we would kindly invite the ICSID to clarify the scope of the non-parties, especially including or excluding legal professionals as third-party funders concerning the aforementioned issue.

2. If a funder funds a case through a special purpose vehicle (SPV), is it sufficient to disclose merely “**the name of the third-party funder**”?

We have also been aware of that the proposed rule only requires the party to file a written notice disclosing the name of the third-party funder, leaving the question untouched whether the relationships between the funder and other case-relevant companies should be mentioned simultaneously. According to our past observations and experience, almost no funder directly gets involved into the disputes or the funded cases. In most cases, a SPV is established as an independent channel or agent to manage the financing project. In such scenario, the disclosure requirement under the proposed Rule 21 could be nominal. Thus, we recommend that the ICSID should redefine the disclosing requirement accordingly.

Standing in a neutral and objective ground among funders, funded parties and arbitration tribunal, we expect the funding instrument will facilitate the parties' access to justice and flourish the investment arbitration as a proper ADR mechanism to solve investment dispute between the Chinese investors and the related host countries.

VANNIN CAPITAL **JANUARY 14, 2019**

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Vannin Capital is a global expert in legal finance, supporting law firms and corporations in the successful resolution of high-value commercial disputes. We are a member of the Association of Litigation Funders of England and Wales (“ALF”) and conduct our business to the highest ethical standards in line with the ALF code of conduct.

We are pleased to contribute to the discussion on the Proposals for Amendment of the ICSID Rules (“Proposed Amendments”) by submitting Vannin’s comments, which focus on those amendments related to third party funding (“TPF”), in particular proposed ICSID Convention Arbitration Rule 21, Additional Facility Rule 32 and Revised Schedule 2: Declaration of Arbitrator,¹ which read, in relevant part:

[quotes text of proposed AR 21² and Schedule 2: Arbitrator Declaration³]

Disclosure of the Existence of Third Party Funding and the Identity of the Funder

We note that these Proposed Amendments require a funded party to disclose the fact of funding and the name of the funder. The purported reason for such disclosure is the avoidance of potential conflicts of interest.

It bears noting at the outset that the issue of avoiding potential conflicts of interest is a theoretical one. Although this issue has sparked tremendous academic debate and concern, the risk in practice is minimal and, to date, remains purely theoretical. Indeed, we are not aware of any case where an arbitrator was disqualified due to a conflict of interest arising out of his or her relationship with a third party funder.

This is unsurprising. Indeed, this issue remains theoretical precisely because professional third party funders have a system of conflict checks in place. Professional funders store information relating to the arbitrators appointed in the various cases which they fund or, where relevant, arbitrators who, in their capacity as counsel, were involved in the funder’s due diligence process.

At the outset of their involvement in a case, even before sending the Non-Disclosure Agreement to the potential client, professional funders run a conflict check to ensure that there is no pre-existing relationship with an arbitrator involved in the given case which could give rise to potential conflicts of interest or the appearance of conflicts of interest.

Vannin Capital, as part of its institutional good practices, runs an internal conflict check every time it considers financing a case and keeps a record of all arbitrators involved in matters financed or reviewed by Vannin.

In a situation where there is a pre-existing relationship with any of the arbitrators in a dispute, professional funders flag this relationship to the potential client and its legal team. Professional funders like Vannin Capital, will in appropriate circumstances request the client to disclose funding to, in turn, enable the arbitrators to disclose their previous relationship with the funder. The funder can go as far as inserting a provision in the Funding Agreement, making disclosure a pre-condition to funding.

The reason for this is because leaving a situation of potential or apparent conflicts of interest undisclosed puts the funder’s investment at risk. It is precisely this situation, which could potentially endanger, and ultimately derail the arbitration that they are investing in,

that funders are looking to prevent. It is not in the funder's interest to finance arbitrations where the award – and ultimately the chance of recovery – is under threat of challenge.

This is why, as a professional funder, Vannin Capital itself has no objection to the disclosure of its involvement in financing ICSID arbitrations. Indeed, there is nothing in the Non-Disclosure Agreements or Funding Agreements that we enter into with parties that would prevent such disclosure in an arbitration proceeding.

On the contrary, Vannin Capital is in fact in favour of any rules requiring disclosure of TPF. Such disclosure ensures that any potential conflict or appearance of conflict of interest will be aired and dealt with at the outset of the proceedings, which gives an additional guarantee of protection to Vannin Capital's investment.

This being said, as a professional funder we have an obligation to speak up for our client: the funded parties bringing the claims in these proceedings and the ultimate end-users of arbitration. For them, a rule requiring the mandatory disclosure of TPF is not necessarily in their best interest.

First, Respondent states have used the misconception that funding implies a lack of resources to cover the costs of the arbitration to their advantage and have marshalled it as a justification to submit security for costs applications. Respondents regularly apply for such orders immediately after learning of the existence of funding by a third party.

Such applications increase the cost of funding and consequently, render the arbitration and ultimately the access to justice more costly for the claimants.

Any negative connotations with respect to TPF are misplaced and based on faulty premises. Funding does not necessarily imply that a claimant is suffering from a lack of resources. Quite to the contrary, TPF is increasingly being used by well-capitalised corporations. There has been and continues to be a tremendous growth in the use of such financing by corporations wishing to take litigation/arbitration costs off their balance sheets and to allocate those resources to growing their businesses instead. Moreover, in the context of investor-State arbitrations, a party's suffering from a lack of resources, should it be the case, may well be due to actions attributable to the State.

The existence of funding by a reputable professional funder such as Vannin should in fact send positive signals regarding the viability of the underlying claim. Indeed, prior to being brought before the Tribunal, the relevant claims have already been through several levels of review and analysis, all concluding that the claims being brought are strong and meritorious.

If, however, ICSID is still minded to include a disclosure requirement, it would make sense to include an express provision to the effect that the fact of funding is not sufficient reason to justify a security for costs order.⁴ There should also be an express provision allowing the tribunal to hold the requesting party liable for the costs of posting security in the event that security turns out to be unnecessary.⁵ In addition, Vannin would welcome a provision allowing claimants to claim for funding costs where third party funding is the only means of financing a dispute precisely because the Respondent's actions have rendered it impecunious.

Second, for commercial reasons, including but not limited to protecting its assets, reputation and operations, the party relying on TPF may not want to publicize its reliance in funding. Disclosure of the existence of TPF is a decision that may affect—severely in some cases—the interests of the party relying on funding, and therefore, should be analysed on a case by case basis as opposed to being grouped under the purview of a rule of mandatory disclosure.

Moreover, in the ICSID context, provisions on TPF are not strictly necessary. ICSID tribunals are already well-equipped, by virtue of their inherent discretion, to address issues involving TPF.⁶ This is indeed evidenced by several cases in which tribunals have addressed requests for disclosure of the existence of TPF, the identity of the funder, the nature of the funding arrangement, and related requests for security for costs. In the current unregulated environment, ICSID tribunals and other investment arbitration tribunals have exercised the power to decide requests for disclosure of the identity of the funder, by sometimes ordering such disclosure to yield greater transparency, and ensure that the arbitrators have no conflict of interest.⁷ In this same unregulated environment tribunals have also concluded that TPF does not create an automatic requirement to order disclosure of the funding agreement,⁸ and that the fact that a party's arbitration is funded by a third party does not necessarily mean that security for costs should be ordered.⁹

Finally, another point to flag is that the scope of the new Rules is limited by the proposed definition of third party. As TPF is a fast-moving and quickly-evolving industry, if the purpose is to cover all possible TPF arrangements, it is important that the proposed definition be sufficiently broad to avoid it becoming outdated and insufficient in scope very quickly.

Disclosure of the Funding Agreement

As explained by ICSID, the proposed ICSID rules on TPF do not require disclosure of the actual funding agreement or the terms of funding because such disclosure is “not needed to avoid conflict of interest”.¹⁰ If a party requests disclosure of a funding agreement it will be within the tribunal's discretion to address such request.¹¹ Vannin agrees that if a disclosure requirement is included, this should not extend to the terms of the funding agreement which may well be legally privileged (to the extent they reflect or reveal counsel's views on the strength of the underlying claim) and commercially sensitive.

Tribunals should consider on a case by case basis the question of disclosure of the funding agreement. The burden to prove that any specific term of the funding agreement is relevant to the dispute must be borne by the Respondent.¹² Not only should disclosure be

ordered solely in exceptional circumstances, but tribunals should also consider safeguards that limit such disclosure when appropriate, such as in camera review and redaction of the agreement.

Conclusion

For the reasons set out above, the mandatory disclosures proposed in Rules 21 and 32 should not be adopted. While we as a funder, are in favour of mandatory disclosure, disclosure is not necessarily in our client's favour, for whom we have an obligation to speak out.

With their existing powers under the ICSID Convention and its Additional Facility Rules, ICSID tribunals are well equipped to continue deciding issues of disclosure on a case by case basis, considering, among others, (i) the interest of the disputing party relying on TPF, (ii) potential increases in arbitration costs, and (iii) any ensuing consequences to the funded party's access to justice.

WOODSFORD LITIGATION FUNDING

JANUARY 2, 2019

Woodsford Litigation Funding Limited ("Woodsford") is one of the most established litigation and arbitration funders, with offices in London, the USA and Singapore as well as presence in Australia and Israel. Woodsford has been presented with many ICSID cases requiring funding, and has funded a number of those cases. Woodsford therefore has a keen interest in the orderly operation of ICSID arbitrations, in particular as regards the regime applicable to third party funding of such arbitrations.

Woodsford is a founding member of the Association of Litigation Funders (ALF) in England & Wales, the members of which are self-regulated by the ALF's Code of Conduct. The English legislature has chosen not to regulate funding in England & Wales through statute, but instead to allow members of the ALF to apply this self-governing code. This has worked well; the number of disputes between members of the ALF and funded parties has been very limited and the English judiciary has endorsed the satisfactory operation of third party funding pursuant to this regime. In 2017, Lord Keen of Ellie (the Lords Spokesperson for the Ministry of Justice) responded to a question in the House of Lords regarding regulation of third party funding as follows: "The Government does not believe that the case has been made out for moving away from voluntary regulation, as agreed by Parliament during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012." More recently, in March 2018 Lord Justice Jackson, whilst reviewing the reforms made as a result of his 2009 report into the civil litigation costs regime in England & Wales, stated that his proposals to "promote [thirdparty funding] and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so."

This system of ‘self-regulation’, which has operated so successfully in England & Wales in respect of the conduct of funders, has also served the parties in ICSID arbitrations well in relation to the funding of those claims. The present ICSID rules do not seek to ‘regulate’ third-party funding of claims (being silent on the matter) and have operated without significant problems, relying upon the discretionary powers of a tribunal to address the disclosure of funding (and any associated issues) as appropriate.

Since litigation funding has become a commonplace element of litigation and arbitration in many jurisdictions, including international commercial and investor-state arbitration, several arbitral institutions and legislators have had the opportunity to review their institutional rules or legislation and to make amendments as they see fit to accommodate the issues and challenges that can, on occasion, arise when claims are financed by parties other than the claimant. At the time of writing, in only a very small number of enacted rules or legislation is disclosure of the existence of a third-party funder (and the identity of that funder) mandatory (being the International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission; the Hong Kong Arbitration Ordinance and the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules; and Singapore’s Legal Profession (Professional Conduct) Rules 2015).

Woodsford is an established professional funder with very significant capital committed to claims involving top quality legal counsel, and is proud of its involvement in the high calibre of cases that it funds. Accordingly, it is not averse to disclosure of the existence of funding, generally, or of Woodsford’s identity, specifically, per se. However, mandatory disclosure potentially has significant disadvantages for funded parties.

First, the funded party is potentially exposed to increased costs in complying with such an obligation (in circumstances where no concern over potential conflict may exist). Second, mandatory disclosure to an adverse party may also give rise to distracting satellite disputes and attempts by parties, i.e. defendants, to defeat litigation through the tactic of attacking the funding arrangements, seeking irrelevant disclosure, making frivolous challenges to arbitrators and seeking unwarranted applications for security for costs, rather than focusing on the dispute in hand. Since mandatory disclosure can cause significant unfairness to the claimant in this way, if disclosure is to be mandatory, the arbitral tribunal must then ensure that such dilatory tactics are tightly controlled. This should include any disclosure being to the tribunal only and limiting such disclosure to the existence and identity of the funder only.

Whilst the reasoning expressed by ICSID that disclosure assists in ensuring that awards are not challenged because of actual or perceived conflicts arising out of the existence of a third-party funder is understood and appreciated, as far as Woodsford is aware, there is no reported decision of an ICSID award being challenged on such a basis. In any event, any professional funder would likely (and should) decline to fund any arbitration where such a conflict is likely to arise. For example, Woodsford would not fund an arbitration in which John Beechey, a member of Woodsford’s Investment Advisory Panel, was an arbitrator if there was a risk of

conflict, as it would be contrary to Woodsford’s interests to do so. Similarly, arbitrators are also capable of identifying (and are likely to identify) any potential conflicts of this kind and can decline to act as arbitrator where appropriate to do so.

Whilst Woodsford recognises that there are advantages in the certainty that mandated disclosure of third party funding could bring (and as stated above, holds no concern over disclosure of the existence or identity of funders per se), Woodsford’s view is that, on balance, no amendment to the ICSID Rules as regards the disclosure of third party funding on a mandatory basis (or otherwise) is necessary or expedient. If any change is deemed to be necessary, such amendment need only memorialise the existing position and that adopted by many other institutional rules and guidelines: that the Tribunal has the power to order a party to disclose whether it is funded (and the name of that funder), if the particular circumstances of the case so require that disclosure be made, as determined by the Tribunal based on the facts at hand. This balances the rights of a party to order its commercial affairs as it chooses, whilst providing flexibility to the Tribunal and the parties to determine the best approach in each case.

Rule 22 – Method of Constituting the Tribunal

ARGENTINE REPUBLIC

DECEMBER 28, 2018

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. The Secretary-General shall thereupon promptly inform the parties that the Tribunal is to be constituted in accordance with that Article.

Commentary

The notification by the Secretary-General that the Tribunal shall be constituted in accordance with Article 37(2)(b), as provided for in current Arbitration Rule 2(3), should not be eliminated.

AUSTRIA DECEMBER 21, 2018

The proposed amendments are in many respects in line with the Republic of Austria’s September 18, 2017 Initial Comments and improve the efficiency of the process of constituting ICSID tribunals.

Amended Arbitration Rule 22 eliminates the inefficient, multi-step process for the parties to agree on the method for the constitution of the tribunal set forth in current Arbitration Rule 2.

Proposed Amended Arbitration Rule 22 provides that the default formula under Article 37(2)(b) Convention will apply automatically 60 days after the date of registration of the Request for Arbitration, failing parties agreement on number of arbitrators and the method of their appointment. This is in line with Austria’s proposal.

OMAN DECEMBER 28, 2018

We recommend decreasing the period of 60 days after which the tribunal is to be composed under article 37 of the convention, to be 30 days instead We are of the opinion that this would eliminate the question of the number and method of appointment of arbitrators; thus simplifying the parties task so that it is limited to the appointment/nomination of the arbitrator.

QATAR DECEMBER 19, 2018

Qatar takes the view that the time limits in AR 22(2) should be shortened to a period within 45 days.

Qatar recommends amending AR22(2) to read as follows:

(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~~ 45 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.

BROWER, CHARLES **DECEMBER 16, 2018**

The 60-day deadline is perhaps a bit much and 45 days would be better.

FRESHFIELDS **DECEMBER 28, 2018**

In order to increase efficiency and to accelerate the constitution of tribunals, consider:

- Reducing the time limit for the parties to advise the Secretary-General of an agreement on the number of arbitrators and the method of their appointment to 30 days after the date of registration (instead of 60 days). Considering that the registration of a request for arbitration takes approximately 21 days on average, the parties would have approximately seven weeks from the date on which a request for arbitration is filed to consider whether the number of arbitrators or the method of their appointment should be different from the default number and method set out in Article 37(2)(b) of the Convention. This is a sufficient period, particularly considering that, in our experience, the default number of arbitrators and appointment method applies in the vast majority of cases.

[comment also applies to proposed (AF)AR 33(2)]

GIBSON DUNN **JANUARY 15, 2019**

The proposed rule establishes a deadline for the parties to advise the ICSID Secretary-General of their agreement as to the number of arbitrators and the method of their appointment. While we express support for a deadline to advise the Secretary-General of the parties' agreement, we suggest a time limit of 30 days (or, at most, 45 days) rather than 60 days.

Article 38 of the ICSID Convention authorizes the Chairman of the Administrative Tribunal to appoint the remaining arbitrators 90 days after the notice of registration of the request for arbitration has been dispatched to the Secretary-General. The deadline of 60 days in Proposed Rule 22 could result in only 30 remaining days for the parties to actually appoint arbitrators and reach agreement on the presiding member of the tribunal before triggering the 90-day backstop in the Convention. In our experience, 30 days may not always be sufficient. We therefore propose a shorter time limit to advise the Secretary-General of agreement, thereby leaving more time for the parties to actually appoint the tribunal members.

MÖLLER, GUSTAF **DECEMBER 27, 2018**

The ICSID Secretariat is to be congratulated for the proposed revision of the rules. I enthusiastically support the revision. My comments are restricted to the proposed chapter on the Constitution of the Tribunal (AR rules 20-22). As to those rules I fully concur with the comments made by The Honourable Charles N. Brower.

Rule 23 – Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of The Convention

AUSTRIA **DECEMBER 21, 2018**

Amended Arbitration Rule 23 also eliminates the current, multi-step process for the appointment of arbitrators under the default formula set forth in Article 37(2)(b) of the ICSID Convention (current Arbitration Rule 3), which has caused significant delay in the constitution of ICSID tribunals.

Proposed Amended Arbitration Rule 23 stipulates that “*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.*” It does not provide for any default procedure to achieve that objective and does not provide any time limits. This is not in line with Austria’s proposal. It may be considered if setting out a default procedure with specified time limits for appointing arbitrators would enhance the process.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

It may be considered setting out a specified default procedure for appointing arbitrators.

CCPIT **DECEMBER 25, 2018**

A. Original Text
[quotes text of proposed AR 23]

B. Modified Text

It is advised to amend Rule 23 (Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention), Rule 24 (Assistance of the Secretary-General with Appointment) and Rule 25 (Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention) of the proposed Arbitration Rules as follows:

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, **from or out of the Panel of Arbitrators**.

[...]

[see AR 24 & AR 25 for additional comments on those rules]

C. Reason for Amendment

When a party appoints an arbitrator, the Secretary-General assists in the appointment of an arbitrator or the arbitrator appointed by the chairman, whether the arbitrator must be on the Panel of Arbitrators, is an issue should be clarified.

1. The Rule 33 of the proposed Arbitration Rules provides for the replacement of the vacancy of the tribunal by the Chairman from the Panel of Arbitrators, however, the appointment by the parties, or by the Chairman or assisted by the Secretary-General has not been specified whether the arbitrator must be in the Panel of Arbitrators. It should be made clear, especially it should be made clear that the arbitrator is to be appointed from the Panel of Arbitrators by the Chairman when appointing an arbitrator who has not been appointed, in order to be consistent with the manner in which Article 33 provides for vacancy filling.

2. Such modification is conducive to the modification of procedural language, and can also address the issue of general participation of arbitrators.

3. Despite provisions in Article 57 of the Convention, the qualifications of arbitrators needed to be further defined.

Arbitration Rule 3 (Draft Arbitration Rule 23) can be amended so as to include specific timelines for the nomination of arbitrators by the parties (e.g., a process whereby nomination by the requesting party must be within 10 days of the notice of registration; the other party must then make their nomination proposal within 20 days of receipt of the requesting party's proposal; and the requesting party must then make any counter-proposal within 20 days of receipt of the other party's proposal).

[See submission for additional comments]

Rule 24 – Assistance of the Secretary-General with Appointment

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

L’assistance prévue dans le paragraphe 31 doit être encadrée et bien définie, tout en précisant que les parties doivent être toujours autonomes dans le choix des arbitres.

FRANCE JANUARY 14, 2019

Based on the practice described under paragraph 283 of the Working Paper, it could be useful to provide more details on the concrete actions disputing parties may request to the Secretariat in order to help them appointing a chair or a sole arbitrator.

ISRAEL DECEMBER 27, 2018

Israel believes that certain limitations on the Secretary-General should be implemented when assisting in the appointment of an arbitrator, such as nationality of the appointee and ethics requirements.

CCPIT DECEMBER 25, 2018

A. Original Text
[quotes text of proposed AR 23]

B. Modified Text
It is advised to amend Rule 23 (Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention), Rule 24(Assistance of the Secretary-General with Appointment) and Rule 25 (Appointment of Arbitrators by the

Chairman of the Administrative Council in Accordance with Article 38 of the Convention) of the proposed Arbitration Rules as follows:
[...]

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 **from or out of the Panel of Arbitrators**.

[...]
[see AR 23 & AR 25 for additional comments on those rules]

C. Reason for Amendment

When a party appoints an arbitrator, the Secretary-General assists in the appointment of an arbitrator or the arbitrator appointed by the chairman, whether the arbitrator must be on the Panel of Arbitrators, is an issue should be clarified.

1. The Rule 33 of the proposed Arbitration Rules provides for the replacement of the vacancy of the tribunal by the Chairman from the Panel of Arbitrators, however, the appointment by the parties, or by the Chairman or assisted by the Secretary-General has not been specified whether the arbitrator must be in the Panel of Arbitrators. It should be made clear, especially it should be made clear that the arbitrator is to be appointed from the Panel of Arbitrators by the Chairman when appointing an arbitrator who has not been appointed, in order to be consistent with the manner in which Article 33 provides for vacancy filling.
2. Such modification is conducive to the modification of procedural language, and can also address the issue of general participation of arbitrators.
3. Despite provisions in Article 57 of the Convention, the qualifications of arbitrators needed to be further defined.

Rule 25 – Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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 the notice 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. A copy of the request shall forthwith be sent to the other party.

(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. The Chairman shall provide the parties with information about the candidates and the criteria for their selection.

Commentary

The 90-day period for the constitution of the Tribunal should run from the notice of registration.

A copy of the request by a party that the Chairman appoint the arbitrator(s) who have not yet been appointed should forthwith be sent to the other party.

When consulting with the parties before appointing an arbitrator, the Chairman should provide the parties with information about the candidates and the criteria for their selection.

AUSTRIA DECEMBER 21, 2018

Proposed Amended Arbitration Rule 25(1) essentially corresponds to current Rule 4(1) Arbitration Rules. While this reflects Article 38 Convention, it may be considered if imposing a deadline for the parties to request the Chairman to appoint the arbitrator(s) would not add to efficiency of the constitution of the Tribunal.

ITALY DECEMBER 24, 2018

Although Italy sees the efficiency gains that exist in favoring appointment by ICSID of the president in the situations where parties do not seem to be able to find agreement, it would suggest that, within the framework of the Convention, this process be left in the hand of parties to the possible maximum extent, to ensure ownership of the exercise. Italy suggests to this end to possibly consider

mechanisms to facilitate selection by the parties, for instance evaluating the various alternatives that are currently elaborated by various fora or any alternative leading to a fair and shared selection that would improve efficiency.

OMAN **DECEMBER 28, 2018**

We recommend decreasing the period of 30 days provided for in rule 25 to 15 days, and decreasing the period of 20 days provided in rule 25(3) to 15 days.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that for improved transparency, there should be an independent committee within the Secretariat in order to provide further consultation to the Chairman when he appoints the arbitrator or arbitrators.

Qatar takes the view that there is a clear need for ICSID to establish such a committee to further assist the Chairman when he appoints the arbitrator or arbitrators.

Qatar recommends amending AR25(2) to read as follows:

(2) The Chairman shall ~~appoint the President of the Tribunal after appointing any members who have not yet been appointed~~ **consult with the parties and the ad hoc independent committee within the Secretariat 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.**

CCPIT **DECEMBER 25, 2018**

A. Original Text
[quotes text of proposed AR 23]

B. Modified Text
It is advised to amend Rule 23 (Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention), Rule 24(Assistance of the Secretary-General with Appointment) and Rule 25 (Appointment of Arbitrators by the

Chairman of the Administrative Council in Accordance with Article 38 of the Convention) of the proposed Arbitration Rules as follows:

[...]

[see AR 23 & AR 24 for additional comments on those rules]

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. **All members of the Tribunal appointed by Chairman shall be appointed from the Panel of Arbitrators.**

(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.

C. Reason for Amendment

When a party appoints an arbitrator, the Secretary-General assists in the appointment of an arbitrator or the arbitrator appointed by the chairman, whether the arbitrator must be on the Panel of Arbitrators, is an issue should be clarified.

1. The Rule 33 of the proposed Arbitration Rules provides for the replacement of the vacancy of the tribunal by the Chairman from the Panel of Arbitrators, however, the appointment by the parties, or by the Chairman or assisted by the Secretary-General has not been specified whether the arbitrator must be in the Panel of Arbitrators. It should be made clear, especially it should be made clear that the arbitrator is to be appointed from the Panel of Arbitrators by the Chairman when appointing an arbitrator who has not been appointed, in order to be consistent with the manner in which Article 33 provides for vacancy filling.

2. Such modification is conducive to the modification of procedural language, and can also address the issue of general participation of arbitrators.

3. Despite provisions in Article 57 of the Convention, the qualifications of arbitrators needed to be further defined.

Rule 26 – Acceptance of Appointment

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 26: Acceptance of Appointment

[...]

(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, disclosing any past or present interest, relationship, connection or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of dependence or bias, and addressing ~~matters including~~ the arbitrator's ~~independence, impartiality,~~ availability and commitment to maintain the confidentiality of the proceedings.

[...]

(6) Each arbitrator shall have a continuing obligation throughout the proceedings to make reasonable efforts to become aware of any interest, relationship, connection or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of dependence or bias, notify any new professional, business or academic activities he or she intends to undertake, and promptly disclose any change of circumstances that may be relevant to the declaration referred to in paragraph (3)(b).

(7) Failure by an arbitrator to comply with the above duties shall constitute a manifest lack of the qualities required by paragraph (1) of Article 14 of the Convention in the terms of Article 57 of the Convention.

Commentary

The arbitrator's duties should include: investigation, notification and disclosure, as detailed in the above proposal.

For greater certainty, the type of information to be provided by an arbitrator should be included in the Arbitration Rules, as detailed in the above proposal, notwithstanding the text of the declaration form published by the Centre and the forthcoming Code of Ethics.

It should be clarified that an arbitrator's failure to comply with the duties of investigation, notification and disclosure shall constitute a manifest lack of the qualities required by paragraph (1) of Article 14 of the Convention in the terms of Article 57 of the Convention.

AUSTRALIA**JANUARY 22, 2019**

Australia notes that the Consolidated Draft Rules do not include a Code of Conduct for Arbitrators. However, the ICSID Secretariat's Synopsis on Proposals for Amendment of the ICSID Rules states that 'ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators.' We would welcome clarification on the status of this project.

Australia strongly supports the development of a Code of Conduct for Arbitrators. which could address issues such as ethics and conflicts of interest specific to investment arbitration.

AUSTRIA**DECEMBER 21, 2018**

The proposed changes sufficiently address Austria's proposal. The introduction of a code of ethics for ICSID and UNCITRAL investor-State disputes will be welcome. An arbitrator's disclosure requirements in Item 4(b) of Arbitrator Declaration may be expanded to cover not only investor-State cases, but also other matters, including inter-State cases and commercial arbitration cases.

OTHER ISSUES:

While the proposed Arbitration Rules 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 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.

CHINA**DECEMBER 28, 2018**

On the issue of conflict of interest of arbitrators: Given that the issue possible conflict of interests has been a common concern of many members, China proposes that party representatives who have made manifestly inappropriate interpretation of legal issues or claims in an investment dispute shall not be appointed as arbitrator in other investment disputes involving the same respondent and the same legal issues or claims as in the previous dispute.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica views this draft article in favorable terms.

In paragraph 1, Costa Rica supports the introduction of two positive features. First, the clarification that parties are required to provide specific information when they notify ICSID of the appointment of an arbitrator. Second, that it establishes a specific and short time frame for the appointee to accept. This will certainly result in a more expedited process.

Costa Rica welcomes the proposed arbitrator declaration, which adds language to allow the disclosure of the arbitrator’s impartiality and independence from the parties. From its point of view, this purpose will be served to a great extent, with the requirement to disclose professional, business and other significant relationships (within the past 5 years) with parties, counsel of the parties, members of the tribunal and third-party funders.

Although Costa Rica recognizes that this is a relevant step towards a more suitable appointment of authorities, it considers that this must be complemented with a Code of Conduct to establish guidelines and clear rules for tribunal members. As expressed in its initial statement (January 2017) to this amendment process: marking the field is always the best means to assure a fair game.

FRANCE **JANUARY 14, 2019**

The French delegation encourages the ICSID Secretariat to provide as soon as possible the code of conduct envisaged within the joint initiative conducted with UNCITRAL. It is of utmost importance to codify, strengthen and strictly enforce the requirements for arbitrators’ independence and impartiality. The French delegation would like to stress that compliance with strict ethics rules was a critical requirement of the call for applications issued by the French government on October 1st, 2018 for the renewal of its lists of arbitrators and conciliators.

INDONESIA **DECEMBER 28, 2018**

The objectives of the amendments to this rule is to broaden the arbitrators’ duty of disclosure. The Secretariat includes a form that asks the arbitrator to disclose professional, commercial, and other important relationships which have existed during the previous five years with the parties, the parties’ legal representatives, other members of the Tribunal and any third-party funders, including arbitrator’s involvement in any prior investor-state case. While this new, broader disclosure requirement is helpful, it omits to include

one important type of relationship that which may exist between an arbitrator and a legal, technical and economic experts who appears in the case. Therefore, the Secretariat's disclosure form should also include relationship with legal, technical or economic experts.

(1) A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee's name, nationality(ies) contact information, and the party's or the third-party funder's or the beneficial owner of the third party funder's, direct or indirect, with the arbitrator. The party shall have a continuing obligation to notify the Secretariat if any relationship arises between the party or the third-part funder during the proceeding.

ISRAEL **DECEMBER 27, 2018**

Regarding paragraph 5, Israel prefers the wording of the current AR rule 5(3), which is less final, and leaves some flexibility to the Parties to decide whether they want to move on or allow a grace period to the current arbitrator: If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

ITALY **DECEMBER 24, 2018**

Italy does support such tool. It understands that such an exercise is already undertaken by ICSID together with UNCITRAL and highly appreciate joint work to reach common standards. To contribute to this exercise, Italy submits as Annex 1 the Code of Conduct that the Arbitration Chamber of the Italian Chamber of Commerce has produced to this end.

Code of ethics

CODE OF ETHICS OF ARBITRATORS

Art. 1 - Acceptance of the Code of Ethics

1. An arbitrator accepting a mandate in an arbitration administered by the Chamber of Arbitration of Milan shall act in accordance with the Rules of the Chamber of Arbitration and this Code of Ethics, independent of the party that appointed him.
2. This Code of Ethics shall apply by analogy to Expert to the arbitral body appointed in the arbitral proceedings administered by the Chamber of Arbitration.

Art. 2 - Party-appointed arbitrator

A party-appointed arbitrator shall be bound by all the duties under this Code of Ethics throughout the entire course of the proceedings; he may contact the party or its counsel regarding the appointment of the President of the Arbitral Tribunal if asked to appoint him. The indications given by the party shall not be binding on the arbitrator.

Art. 3 - Competence

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to perform his task with the necessary competence with respect to his adjudicating function and the subject matter of the dispute.

Art. 4 - Availability

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to devote the necessary time and attention to the arbitration to perform and complete his task as expeditiously as possible.

Art. 5 - Impartiality

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be able to perform his task with the necessary impartiality characterizing the adjudicating function he undertakes in the interest of all parties.

Art. 6 - Independence

When accepting his mandate, the arbitrator shall, to the best of his knowledge, be objectively independent. He shall remain independent during the entire arbitral proceedings as well as after the award is filed, during the period in which annulment of the award can be sought.

Art. 7 - Statement of impartiality and independence

1. In order to guarantee his impartiality and independence, the arbitrator shall supply the written statement provided for by the Rules of the Chamber of Arbitration when accepting his mandate
2. All doubts as to the opportunity to disclose a fact, circumstance or relationship shall be resolved in favour of disclosure.
3. Where facts, circumstances and relationships that should have been disclosed are subsequently discovered, the Chamber of Arbitration may deem that this fact is a ground for replacing the arbitrator during the proceedings or not confirming him in other arbitral proceedings.

Art. 8 - Development of the proceedings

The arbitrator shall promote a thorough and expeditious development of the proceedings. In particular, he shall decide on the date and manner of the hearings in such a way as to allow for the equal treatment of all parties and the full compliance with the due process of law.

Art. 9 - Unilateral contacts

In the entire course of the proceedings, the arbitrator shall refrain from all unilateral contact with the parties or their counsel. Where there is such a unilateral contact, the arbitrator shall immediately notify the Chamber of Arbitration so that the Chamber can inform the other parties and arbitrators.

Art. 10 - Settlement

The arbitrator may at all stages suggest the possibility of a settlement or conciliation of the dispute to the parties but may not influence their decision by indicating that he has already reached a decision on the outcome of the proceedings.

Art. 11 - Deliberation of the award

The arbitrator shall refrain from any obstructive or non-cooperative behaviour and promptly participate in the deliberation. He shall remain free to refuse to sign the award where the decision is taken by majority vote by the Arbitral Tribunal.

Art. 12 - Costs

1. The arbitrator shall not accept any direct or indirect arrangement on fees and expenses with any of the parties or their counsel.
2. The arbitrator shall be entitled to a fee and reimbursement of expenses as solely determined by the Chamber of Arbitration in accordance with its Schedule of Fees, which is deemed to be approved by the arbitrator when accepting his mandate.
3. The arbitrator shall avoid superfluous expenses that can increase the costs of the proceedings in an unjustified manner.

Art. 13 - Violation of the Code of Ethics

The arbitrator who does not comply with this Code of Ethics shall be replaced by the Chamber of Arbitration, which may also refuse to confirm him in subsequent proceedings because of this violation.

MOROCCO

DECEMBER 27, 2018

Prévoir un code de bonne conduite à destination des arbitres et des conciliateurs qui créera des obligations à leur charge dans le cadre des procédures ce qui offre une garantie supplémentaire de leur neutralité. Ce code de conduite peut être prévu en annexe des règles et procédures du CIRDI.

De même, les arbitres ne devraient pas avoir aucun lien avec l'une des parties contractantes notamment la nationalité ou le statut du résident permanent de l'une d'entre elles ce qui risque d'influencer leur impartialité.

OMAN **DECEMBER 28, 2018**

We recommend a Code of Conduct be developed in one full-set document We are of the view that this Code of Conduct should clearly state how it shall bind the arbitrators.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that in order to ensure quality arbitrations, it is recommended that a Code of Conduct for Arbitrators should be introduced and implemented. This will address issues that have been raised with respect to arbitrators, such as conflicts of interest and the availability of arbitrators. The Code of Conduct would be an important tool to maintain the quality of arbitration. This would provide a set of guidelines to encourage adopting international best practices among arbitrators.

SINGAPORE **JANUARY 4, 2019**

We welcome the amendments to this provision. The changes increase the information disclosed by the appointing parties and the appointee(s) for purposes of ensuring no conflicts of interest and reduces the duration required for appointment.

SLOVAK REPUBLIC **DECEMBER 22, 2018**

The 20 days period to accept appointment and send declaration by arbitrators should contribute to transparency and speed of the proceeding

Valoramos positivamente la inclusión de un modelo preestablecido que sirva como declaración de independencia e imparcialidad del árbitro. En ella, se establece que los árbitros deben de informar de sus relaciones profesionales con (i) las partes, (ii) los abogados de las partes, (iii) otros miembros del Tribunal y (iv) cualquier tercero financiador.

Ahora bien, consideramos que debemos ser exigentes con los requisitos de los árbitros de manera que se asegure la legitimidad del proceso. En este sentido, consideramos positivo y necesario que los árbitros informen también sobre los *despachos de abogados y las empresas de peritaje con los que han trabajado durante los últimos 5 años*.

De lo contrario, se podría dar la situación, a título de ejemplo, de que una de las empresas de peritaje que hace la valoración de daños de una de las partes, ha podido encargar un informe o estudio a uno de los árbitros.

-II- comentarios relacionados con los árbitros y decisores

A. Elaboración de un código de conducta

En referencia a la independencia e imparcialidad de los árbitros y los decisores se apoya la iniciativa propuesta por la Secretaría del CIADI de trabajar en forma conjunta con la Comisión de Naciones Unidas sobre el Derecho Comercial (CNUDMI) en la elaboración de un código de conducta común para árbitros que pueda incorporarse en la declaración presentada por estos.

Algunos tratados de inversión celebrados por Uruguay recientemente han incorporado un código de conducta para los árbitros a fin de garantizar el respeto de normas éticas y profesionales y denunciar conflictos de intereses.

B. Declaración de árbitros

En la declaración propuesta por la Secretaria del CIADI se entendió necesario “revelar relaciones profesionales, comerciales y otras relaciones significativas, dentro de los últimos cinco años, con...iv) cualquier tercero financiero...y b. los casos entre inversionistas y Estados en los que ha estado involucrado en calidad de abogado, conciliador, árbitro.... c. cualquier otra circunstancia que pudieran ocasionar que se cuestione razonablemente su independencia o imparcialidad”.

Se observa que en esta declaración no se exige declarar los casos en los cuales los árbitros ejercen simultáneamente la función de árbitro y consejero legal. Se considera necesario incluir este elemento en la declaración por entender que es una fuente de conflicto de intereses, la cual contribuye a la falta de independencia e imparcialidad del árbitro.

Esta doble función consideramos le quita legitimidad-neutralidad al sistema, por lo que sería necesario contar con guía o códigos de conducta que impidan estas prácticas. Resulta muy difícil para un árbitro que funge también como representante legal de las partes no dejarse influenciar por argumentos desarrollados en la defensa en calidad de abogado.

BROWER, CHARLES **DECEMBER 16, 2018**

Schedule 2: Arbitrator Declaration

Clause 4(a)

- **Cláusulas 2/4** – reference is made to “independence”, “impartiality”, or “judge fairly” but the ICSID Convention, Article 14 designates the standard to include the ability to “exercise independent judgment” and “high moral character”. Similar language should be added.
- **Clause 4(a)** – Disclosure of relationships is unqualified (i.e., by “independence and impartiality” or “independent judgment”)
- **Clause 4(a)(ii)** – Record-keeping practice of arbitrators to record all counsel who have worked on a case to which the arbitrator has been appointed and as formulated in a relationship while acting in other roles. Without qualification (e.g., to “independence and impartiality”), the disclosure requirement remains broadly stated.
- **Clause 4(a)(iv)** – Propose rewording in accordance with my suggestion above that arbitrators must disclose their relationships with TPFs. Disagree that parties must be required to disclose TPF (see discussion above).

Clause 4(b)

- **Clause 4(b)** – Add qualifying language (e.g., independence and impartiality).
- **Clause 4(b)** – The disclosure requirement could be more inclusive and not limited to “investor-State cases”.
- **Clause 4(b)** – possibly qualify “Non-confidential investor-State cases”.
- Relationship between **Clause 4(b)** – language “I have been” and **Clause 5** “continuing obligation to disclose”, which does link disclosure to “independence and impartiality”, creates a double standard of disclosing up-front all other investor-State cases and on a continuing basis only those that “might cause” the arbitrator’s independence or impartiality to be questioned. All disclosure requirements should be made in reference to same qualifying language (i.e., independence and impartiality).

Clauses 5, 8 and 9

- Guidelines on communicating changes and new commitments that affect an arbitrator’s availability could be dealt with elsewhere, such as in a code of conduct for arbitrators.

Further comment on Schedule 2: While the standards might not change, the proposed disclosure requirements will unquestionably lead to higher costs and possibly greater delays in the proceedings. One of the greatest expenses in time in investor-State dispute settlement is the arbitrator challenge.¹ The delay associated with the extra rounds of pleadings and then, possibly, researching and vetting a new candidate increase legal costs. To date, zero ICISD awards have been annulled because an arbitrator was found partial or biased and ad hoc Committees have rejected all known attempts to annul awards based on allegations that one or more of the arbitrators lacked independence or impartiality.² The proposed disclosure obligations go well beyond even the green-listed items of the IBA Guidelines on Conflict of Interest in International Arbitration.³ Compelling arbitrators to disclose beyond what they themselves identify as relevant to their independence or impartiality weakens the trust in their abilities to pass independent judgment. The better option is to qualify each disclosure requirement in Clause 4 with the language “impartiality and independence”. Transparency can be achieved in other ways, such as the development of a set of best practices or code of conduct for arbitrators.

CCPIT **DECEMBER 25, 2018**

A. Original Text of Rule 26 of proposed Arbitration Rules
[quotes text of proposed AR 26]

B. Original Text of Schedule 2: Arbitrator Declaration
[quotes text of proposed Schedule 2]

C. Modified Text

It is advised to insert the following text as paragraph 6 of Schedule 2 (Arbitrator Declaration), and paragraph 6 of the original declaration changes its order to paragraph 7, and so on, as follows:

SCHEDULE 2: ARBITRATOR DECLARATION

...

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 promise that 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, and provide with all the parties the schedule as attached within two years from my signature of this statement as commitment.

D. Reason for Amendment

Schedule 2 (Arbitrator Declaration) has not provided any provisions regarding the availability of arbitration, information contained in which is a basic commitment of the arbitrator to prompt and efficient handling of the arbitration case. This commitment helps to avoid the procrastination, which has been widely criticized in the international investment arbitration process. The missing part is recommended to be supplemented.

For the practice of “availability” of arbitrators, we recommend referring to the approach adopted by ICC International Court of Arbitration, which is, requesting the arbitrators to provide a timeline of the following two years from receipt of the notice of appointment, in which showing the specific available time, as a basic commitment for the arbitrator to have time to handle the case. This would prevent international investment arbitration cases from being dominated by a small group of about 20 main arbitrators and thereby reducing the credibility of arbitration. As to whether the parties may challenge or propose the qualification of an arbitrator when the arbitrator fails to fulfill its commitments, it still needs to be verified through practice and further discussion.

DENTONS DECEMBER 21, 2018

The proposed amendment currently requires prospective arbitrators to provide disclosure, if any, at the time of their acceptance of the appointment. We believe it would be advantageous to require that disclosure be provided in advance of the arbitrator’s acceptance of the appointment and, where a disclosure is made, that it be sent to the parties for comments. This approach would enable the parties to make a better-informed decision on a candidate and, as a result, would reduce arbitrator challenges.

If this proposal is accepted, a conforming change should be made to AR 65 (Annulment: Appointment of ad hoc Committee). (See ICC Rules, Art. 11(2); Art. 10.4 SIAC Investment Arbitration Rules; Art. 18(2) SCC Rules.)

KRYVOI, YARIK / BIICL NOVEMBER 8, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

- The ICSID can require arbitrators to confirm under the Arbitrator Declaration the days or weeks that the arbitrator has already committed to his/her other undertakings over the next two years.³⁰
- The ICSID can require tribunals to provide the parties and the ICSID with regular reports on progress towards an award, for instance, in every three months after the end of the hearing or, if any, following the submission of post-hearing briefs.
- Arbitrators can also be required to routinely disclose in the Arbitrator Declaration all other cases in which they are sitting.

[See submission for additional comments]

THREE CROWNS

JANUARY 16, 2019

Rule 26 expands the scope of declarations by arbitrators: ICSID’s working paper makes clear that the uniform code of conduct for arbitrators in ISDS will be incorporated once it is finalized. Adopting a consistent code of arbitrator ethics for ISDS equally applicable under ICSID and UNCITRAL Rules will be a remarkable and welcome achievement.

ZHONG LUN LAW FIRM

DECEMBER 28, 2018

11. In addition to the arbitrator’s declaration under proposed AR 26, we find it reasonable to impose on the parties an obligation to disclose the matters that could possibly give rise to doubts on the arbitrators’ independence and impartiality. This is because the arbitrator’s declaration may not be complete or accurate due to inadvertent omissions or lack of information. Such obligation should be read in conjunction with proposed AR 21(2) and 21(3), under which the disclosure of a third-party funding arrangement may raise concerns of connections between a third-party funder and the members of the Tribunal. Further, we are cognizant of the practical difficulty to impose a broad disclosure burden on a state, given its different layers of government structure. As such, we suggest that the disclosure obligation for a state party to the dispute be limited to the state organ/ministry/department designated to act on behalf of the state. By reference to the language of article (7) “Duty of the Parties and the Arbitrator” in Part I of the IBA Guidelines on Conflicts of Interest in International Arbitration 2014, the following addition may be worth considering:

Proposed AR 26(7)

A party shall inform an arbitrator, the Tribunal, the other party and the Secretariat of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration, or where the party is a state, the state organ/ministry/department designated to act on behalf of the state), or

between the arbitrator and a third-party funder, or between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, subject to Rules 21(2) and 21(3).

In order to comply with the above requirements, a party shall conduct reasonable enquiries and provide to the arbitrator, the Tribunal, the other party and the Secretariat any relevant information available to it.

Rule 27 – Replacement of Arbitrators Prior to Constitution of the Tribunal

ISRAEL DECEMBER 27, 2018

Israel believes that clarifications should be made with regard to the timeline in the case of replacement arbitrators, especially with regard to replacement under subparagraph 1(b).

THREE CROWNS JANUARY 16, 2019

It is suggested paragraph 27(1)(b) be removed as it may lend itself to tactical gamesmanship, permitting the parties to substitute arbitrators in view of the identity of the other side’s appointee.

ZHONG LUN LAW FIRM DECEMBER 28, 2018

12. We understand that proposed AR 27(1)(b) follows the current Rule 7 under which each party may replace any arbitrator appointed by it at any time before the Tribunal is constituted. The exercise of a party’s right to replace its appointed arbitrator at any time may negatively impact the stability of the Tribunal. In the interests of efficiency and promotion of good faith, we consider that any such replacement should be made subject to the other party’s consent. Accordingly, we suggest deleting AR 27(1)(b) after which the right to replace the arbitrator can still be covered by AR 27(1)(c). Alternatively, it may be worth considering that replacement by any party be limited to certain enumerated situations such as what is provided for in Rule 14.2 of SIAC 2017 Investment Arbitration Rules.

13. Proposed AR 27(2) does not set out a time limit for the appointment of a replacement arbitrator in addition to an “as soon as possible” request. By comparison, when there is a vacancy after the constitution of the Tribunal as a result of the resignation of a party-appointed arbitrator, such vacancy will be filled by the Chairman automatically under proposed AR 33(3)(b) if it has not been filled within 45 days of the notice of the vacancy. To promote the efficient formation of the Tribunal, we suggest that a specific time

limit be provided in AR 27(2) for the appointment of the replacement arbitrator, which should also take into account the mandatory period for the Chairman to use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint under AR 25(3).

Rule 28 – Constitution of the Tribunal

DENTONS DECEMBER 21, 2018

Obtaining reliable information about the persons with a financial interest in the arbitration is a challenge for prospective arbitrators. While the Secretariat prepares helpful summaries about the dispute and the interests involved, it does so on the basis of the limited information available to it. The Request for arbitration, which serves as the key source of relevant information for these summaries, often lacks important details that should ordinarily be part of any diligent conflicts check – such as the identity of the ultimate parent company, the ultimate beneficial owner, and other persons with a financial interest in the arbitration. At present, Requests for arbitration may present the information in a manner that disguises, whether intentionally or inadvertently, the relevance of a particular interest.

Accordingly, we believe that it would be useful (a) for the Request for arbitration to be provided to candidates so that they can assess potential conflicts of interest based on a first-hand review of the relevant documents, and (b) for the parties themselves to identify any persons with a financial interest in the case, and to explain their involvement. In other words, the rationale that applies to the disclosure of third party funding should be extended to this context.

Chapter IV – Disqualification of Arbitrators and Vacancies

FRANCE JANUARY 14, 2019

« Récusation des arbitres ».

Rule 29 – Proposal for Disqualification of Arbitrators

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

- 1) Introduction de la demande de récusation non seulement devant le tribunal du lieu de l’arbitrage mais aussi auprès des tribunaux nationaux de l’Etat concerné par l’arbitrage.
- 2) Introduire dans les mesures supplémentaires :
 - Les modalités de la procédure de récusation
 - L’Institution qui doit décider de la récusation et ce par un jugement de référé.
- 3) Approuver le principe de limitation des délais de récusation mais garder une brèche concernant les suspicions apparentes qui touchent à l’intégrité des arbitres.
- 4) La décision prise par les Co-arbitres sur la récusation d’un arbitre doit être validée par le président du conseil d’administration du CIRDI.

ARGENTINE REPUBLIC DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the State’s name hyperlinked above.]

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. [Article 57 of the Convention does not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.](#)
- (2) The following procedure shall apply, [unless the parties agree otherwise](#):
 - (a) any proposal shall be filed after the constitution of the Tribunal and within ~~20~~21 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 reasonably 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~~7 days after receipt of the written submission, and may agree to the proposal without this implying accepting the validity of the grounds for the proposal, in which case a replacement arbitrator shall be appointed in accordance with the method by which the replaced arbitrator was appointed;
- (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~~7 days after receipt of the written submissions referred to in paragraph (2)(c), and may also withdraw from his or her office without this implying accepting the validity of the grounds for the proposal, in which case his or her resignation shall be accepted for the purposes of Rule 33(3)(a) and a replacement arbitrator shall be appointed in accordance with the method by which the replaced arbitrator was appointed; and
- (e) the parties may file final written submissions on the proposal within ~~seven~~7 days after expiry of the time limit referred to in paragraph (2)(d).
- (3) The proceeding shall be suspended ~~continue~~ while the proposal is pending, unless ~~it is suspended, in whole or in part, by agreement of the parties~~ agree otherwise. ~~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.~~

Commentary

Current ICSID decisions on disqualification confirm that Article 57 of the Convention does not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias, as explained by the Chairman of the Administrative Council in *Blue Bank v. Venezuela*,¹ and reaffirmed in subsequent decisions on disqualification. This should be clarified in proposed Rule 29.

In this regard, an annulment committee has recently noted “the generally unsatisfactory nature of the process for dealing with challenges to arbitrators” and the difficulty in “formulating the appropriate test for deciding on disqualification in the absence of clear guidance in the Convention”, expressed its concern that “insufficient attention may be given to the question of the perception of lack of independence or impartiality”, and observed that “there may be a difference between commercial arbitration [...] and investment arbitration where there is much greater a degree of public interest in the process and outcomes.”²

The parties should be allowed to agree to modify the procedure for a proposal for disqualification.

A party should have at least three weeks (21 days) to make a proposal for disqualification. Such time limit should be calculated from the day after the constitution of the Tribunal or the date on which the party proposing the disqualification first knew or first should have *reasonably* known of the facts on which the proposal is based.

The arbitrator to whom the proposal relates should have at least one week (7 days) to examine the proposal.

Proposed Rule 29 should allow for the possibility that the parties may agree to the proposal or that the arbitration to whom the proposal relates may decide to withdraw from his or her office, without this implying acceptance of the validity of the grounds for the proposal. This is similar to UNCITRAL Arbitration Rules.

Current Arbitration Rule 9(6) provides that the proceeding shall be suspended until a decision has been taken on the proposal. Such provision should not be modified. It is highly inappropriate as a question of due process to allow the proceeding to continue pending a decision on the proposal to disqualify an arbitrator.

ARMENIA **DECEMBER 28, 2018**

We acknowledge the need for a uniform and coherent interpretation of Article 57 of the ICSID Convention which provides a standard for disqualification of an arbitrator, i.e., "a manifest lack of the qualities" outlined in Article 14 (1).

We support proposals advising the ICSID Secretariat to prepare a paper reviewing ICSID practice on dealing with disqualification proposals and provide guidelines based on the practice.

Particularly, it is advisable to develop a precise interpretation of "manifest", and how this threshold differs from the more common "justifiable doubts" formulation.

AUSTRALIA **JANUARY 22, 2019**

Australia notes that the process for challenging arbitrators has been revised, including the introduction of an expedited schedule for parties filing a challenge. Australia welcomes the proposed amendments relating to arbitrator challenges and makes the following comments.

Australia appreciates the expedited schedule for challenges to arbitrators, including the introduction of time limits associated with each step of the process, in AR 29. In particular, we support the removal of the provision for an automatic suspension of proceedings

upon one party filing a disqualification proposal against an arbitrator in AR 29. Australia also welcomes the specific time limit of 20 days to file for disqualification from the date of the constitution of the Tribunal or the later discovery of relevant facts. We believe these changes will reduce the disruptive effect of arbitrator challenges under the current rules.

AUSTRIA DECEMBER 21, 2018

Austria's proposal that a party proposing the disqualification should be able to do so prior to the constitution of the Tribunal has not been implemented, since proposed Rule 29(2)(a) Arbitration Rules foresees that any proposal shall be filed after the constitution of the Tribunal.

Austria's proposal that the parties should have an express right to submit observations on a proposal to disqualify has been implemented in proposed Rule 29(2)(b)-(d) Arbitration Rules.

Austria's proposal that there be a stay of proceedings in case of a proposal to disqualify should not be mandatory has been implemented in proposed Rule 29(3) Arbitration Rules (which stipulates that the "proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties.")

The proposed changes partially address Austria's proposal. It remains to be considered whether a party proposing the disqualification should be able to do so prior to the constitution of the Tribunal to expedite the process and allow the Tribunal to decide on it the moment it is constituted.

Austria's proposal to introduce a time limit for proposing the disqualification of an arbitrator has been implemented in proposed Rule 29(2)(a) Arbitration Rules.

Austria's proposal to introduce a time limit for the decision on the proposal of the disqualification has been implemented in proposed Rule 30(3) Arbitration Rules.

Therefore, the proposed changes sufficiently address Austria's proposal. The proposed amendments significantly improve the procedure for the disqualification of arbitrators by setting strict deadlines for challenging an arbitrator. They also mitigate the potential disruptive effects of challenges by abolishing the mandatory suspension of proceedings following an arbitrator challenge. The proposed amendments accord with the Republic of Austria's September 18, 2017 Initial Comments. However, the seven-day deadline

for the party responding to a challenge to file a response (Amended Arbitration Rule 29(2)(c)) is very short. Consideration should be given to extending the deadline to 14 days, or to 21 days in the case of public holidays of one party.

CANADA **DECEMBER 28, 2018**

1) With respect to paragraph 3, Canada does not believe that eliminating the automatic suspension of the proceedings is the most efficient way to proceed. Canada recognizes that doing so may save some time, but is concerned that it could affect the perceived legitimacy of the tribunal in the period in question. Canada understands the concern that sometimes challenges to arbitrators are used a strategic tool to delay proceedings. However, Canada believes that the better approach would be to reverse the presumption and provide instead that “The proceeding shall be suspended while the proposal is pending unless the parties agree to continue the proceedings, in whole or in part. If the parties agree to continue the proceedings while the proposal is pending, and 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.”

COLOMBIA **DECEMBER 28, 2018**

Colombia encuentra algunos problemas en el párrafo (3) de la regla, en el que se sugiere que el proceso debe continuar aun cuando esté pendiente por decidirse la recusación de un árbitro. El hecho de que el Tribunal pueda continuar podría afectar la eficiencia del proceso, ya que puede darse el caso en el que una de las partes solicite la revisión del procedimiento y de aquellas decisiones que fueron emitidas mientras se resolvió la recusación.

En este sentido, se debería mantener la regla general de la suspensión del procedimiento, y como excepción la posibilidad de que las partes acuerden la posibilidad de seguir con el proceso aun cuando la recusación este pendiente.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica recognizes that including specific time limits in the procedure for disqualification will benefit procedural efficiency. However, it believes that the proposed periods are insufficient given the actions required. For example, from Costa Rica’s point of view, the 7-day period to respond to the request for disqualification is too short because it is required to do research based on alleged facts, internal consultations and request legal opinions from external counsel before drafting an official position.

Costa Rica experienced a disqualification process that lasted over a year. While this might be an extreme case, Costa Rica respectfully suggests that the ICSID Secretariat includes a number based on the average time frames in practice; in order to have an objective bar to define reasonable periods.

With regards to paragraph 3, Costa Rica does not share the proposal to eliminate the automatic suspension of the arbitration. Its main concern is, what will happen if no agreement is reached? In that case, it would not be possible to suspend even though one of the parties considers that the continuation of the process could affect its legitimacy. For instance, decisions taken during the parallel proceeding of disqualification, could be biased; also, if the disqualification succeeds, all actions made by the disqualified arbitrator would be void. These effects will not be easily reversible and could bring irreparable harm to due process. Considering the above, Costa Rica suggests the following drafting:

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 [CR: ~~20~~ XX (include reasonable time)] 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 [CR: ~~seven~~ XX (include reasonable time)] 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 [CR: ~~five~~ XX (include reasonable time)] 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 [CR: ~~seven~~ XX (include reasonable time)] days after expiry of the time limit referred to in paragraph (2)(d).
- (3) The proceeding [CR: ~~shall continue~~ shall be suspended] while the proposal is pending [CR: ~~unless it is suspended in whole or in part, by agreement of parties~~ unless the parties agree to continue the proceedings in whole or in part]. If [CR: ~~the proposal results in a disqualification~~ the parties agree to continue the proceedings while the proposal is pending, and 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.

[EU](#) **DECEMBER 21, 2018**

The European Union and its Member States note the stated rationale (speeding up the procedures) of the proposal as set out in ICSID Arbitration Rule 29(3), mirrored in the relevant rule of the (AF)AR, not to automatically suspend the proceeding pending a disqualification proposal. In view of more and more frequent challenges of arbitrators and the resulting delays of ISDS proceedings, the European Union and its Member States see merit in this proposal. To maintain the balance with the requirement of safeguarding the legitimacy of the process, the Rule should provide that if the challenge results in a disqualification, any order or decision issued by the Tribunal while the proposal was pending, should automatically be reconsidered by the reconstituted Tribunal.

The European Union and its Member States also welcome the proposals that aim to entrust independent outside persons with the decisions on challenges, as opposed to the current ICSID practice where co-arbitrators decide on most challenges. In this respect, the European Union and its Member States particularly welcome the proposal in (AF)AR Rule 40 to entrust the ICSID Secretary General to take any decision on the disqualification of arbitrators under the (AF)AR Rules. We also note with interest the new proposal for ICSID Arbitration Rule 30, that would leave to the Chairman of ICSID Administrative Council the decision on disqualification each time the co-arbitrators are unable to take such decisions for any reason (presumption of being “equally divided” in the sense of Article 58 of the ICSID Convention), which, in practice, could increase the number of challenges decided by the Chairman.

[FRANCE](#) **JANUARY 14, 2019**

« Proposition de récusation **des** ~~d~~ arbitres ».

[GUATEMALA](#) **DECEMBER 28, 2018**

Se sugiere la eliminación de la posibilidad de que árbitro recusado continúe conociendo el proceso, debido a que, si efectivamente se recusa al árbitro, la posibilidad que las partes puedan solicitar al Tribunal reconsiderar lo que el árbitro recusado resolvió, no corresponde con la eficiencia que pretenden estas propuestas de enmienda. Esto haría que el costo y tiempo del proceso se incremente.

Regla 29
Recusación de árbitros y vacantes

“(…) (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.~~”

HAITI **FEBRUARY 26, 2019**

Nous avons bien noté qu'il est permis de récuser un arbitre à n'importe quelle phase de la procédure. A la lumière du document initial et de l'amendement, il y a lieu de formuler une réserve à propos de l'impartialité d'un juge qui a déjà eu connaissance de la cause portée à jugement, comme médiateur ou autre. La conviction du juge ne doit pas être faite avant la saisine.

Sur le délai de Récusation, à l'article 29 AR, la formulation proposée semble permettre le dépôt d'une demande de récusation postérieurement à la clôture de l'instance, contrairement à ce qui est en vigueur actuellement. Une telle situation pourrait donner lieu à l'utilisation de manœuvres dilatoires d'autant qu'elle est susceptible de créer une inimitié entre l'arbitre récusé et la partie récusant. De ce fait, la République d'Haïti préconise d'une part qu'aucune demande en récusation ne puisse être déposée postérieurement à la clôture de l'instance et que d'autre part, celle-ci soit suspendue automatiquement sitôt que le dépôt de la demande de récusation aura été fait.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

It is important for the respondent State that certain time periods be extended. The seven-day period to file a response to a request for disqualification under AR 29 (AF 39) is not workable for a State. The thirty-day period to request bifurcation of preliminary objections in AR 37 (AF 47) is also very tight. Same for the thirty-day period in the request for summary dismissal.

MEXICO **DECEMBER 28, 2018**

México considera que la propuesta contenida en la regla 29(3) RA y regla 39(4) RAMC de no suspender el procedimiento, salvo por acuerdo entre las partes, en tanto se resuelve la recusación de un árbitro puede generar diversos problemas. El primero tiene que ver cuando el procedimiento se encuentra en una etapa en la que se está por emitir una decisión, una orden, un laudo, una medida precautoria, etc., y el árbitro que se está recusando se enfrenta con tener que resolver sobre esa cuestión junto con los otros árbitros, cuando ellos a su vez están resolviendo sobre su recusación.

Otro problema que va de la mano con el anterior es que si está siendo cuestionada la imparcialidad o independencia de un árbitro en virtud de una recusación y el procedimiento sigue su curso, cualquier tipo de decisión, orden, laudo que dicten los árbitros incluyendo el que está siendo recusado, abre serios cuestionamientos sobre la legitimidad y validez de dicha decisión. Por lo tanto, México considera que cuando alguno de los árbitros se enfrenta ante un procedimiento de recusación el procedimiento arbitral debe suspenderse de inmediato y el o la árbitro no debe participar en la toma de decisiones del Tribunal hasta que se haya resuelto su recusación.

Si bien es deseable desalentar recusaciones que tengan por objeto dilatar el procedimiento arbitral, también es importante garantizar su integridad en casos donde las recusaciones puedan ser procedentes. En el balance de ambos objetivos México considera que es preferible que por regla general se suspenda el procedimiento en tanto el tribunal resuelve la propuesta de recusación, a menos que las partes acuerden lo contrario.

QATAR **DECEMBER 19, 2018**

As a general observation, Qatar takes the view that in terms of timelines in the ICSID Rules Amendment, these should be restricted to multiples of 7 days.

This is to create a uniform timeline, which will assist the parties in their proceedings.

Qatar welcomes the proposed reforms addressing the abolition of the automatic suspension of proceedings upon the filing of an arbitrator challenge and continuation of the proceedings to the extent the parties agree in order to avoid delaying the proceedings.

SINGAPORE**JANUARY 4, 2019**

We support the main change to allowing proceedings to continue pending a challenge to the arbitrator, though we do share the concerns expressed by some States at the Rules Amendment meeting in September 2018 regarding the potential wastage in costs and duration downstream if a challenge subsequently proves to be successful and leads to the constitution of a new tribunal. We note the statistics provided by ICSID in its 2018 Annual Report – there were 18 proposals for disqualification filed, all of which were resolved. 1 arbitrator resigned, 16 proposals were rejected and only 1 challenge was upheld. The general trend in the industry is that while rates of success of challenges to arbitrators under ICSID arbitrations seem to be increasing, it still remains unsuccessful most of the time. Therefore, this proposed rule is more likely than not to increase the efficiency of the disqualification process.

SPAIN**DECEMBER 21, 2018**

Consideramos que la recusación de un árbitro es un acto procesal de una extraordinaria importancia, ya que puede afectar a la legitimidad del proceso. Por otro lado, entendemos que en ocasiones, las partes utilizan el procedimiento de recusación para dilatar en el proceso.

Con objeto de salvaguardar la legitimidad del proceso, ES considera que en caso de el árbitro sea recusado, el Tribunal tendrá la obligación, y no la facultad, de revisar todas las ordenes y decisiones adoptadas durante el procedimiento de recusación.

TOGO**DECEMBER 28, 2018**

L'article 29 (2)(a)(ii) : L'expression « aurait dû avoir connaissance » installe une ambigüité par rapport au point de départ de l'action en demande de récusation. L'expression « a pris connaissance ».

L'article 29 (3) : Si dans la proposition d'amendement, la « suspension automatique » de l'instance lors du dépôt d'une proposition de récusation est supprimée, cela pose un problème de sincérité et de confiance pendant l'instance, La formule devrait être : « l'instance est suspendue pendant que la proposition est pendante, saur si elle se poursuit, en tout ou partie, par accord des parties... »

[TUNISIA](#) **DECEMBER 27, 2018**

Dans la pratique du CIRDI, la récusation des arbitres est souvent rare. L'une des raisons qui justifie cette rareté est les conditions sévères de récusation que l'article 57 de la convention exige à savoir le « défaut manifeste des qualités requises par l'article 14 de la convention ». D'où, existe-t-il une proposition d'atténuer ces conditions dans le règlement en leur donnant un sens plus souple d'autant plus que le règlement l'a déjà fait par exemple dans le nouvel article 30 relatif à la notion de « partage de voix » qui a été bien expliquée par le règlement alors qu'elle a été très superflue dans la convention ?

Est-il possible de formuler des directives émanant du CIRDI relatives aux conflits d'intérêts spécifiques au CIRDI ?

[DEBEVOISE](#) **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

[...] Similarly, **Proposed Arbitral Rule 29**, which allows the proceedings to continue while a disqualification challenge is pending, **Proposed Arbitral Rule 67(3)**, which imposes a time limit on the tribunal to rule on a request for stay of enforcement of an award, and **Proposed Arbitral Rules 69–79** on Expedited Procedures are welcome changes to ICSID procedure that will allow for the more timely resolution of parties' disputes.²

[additional comments on other proposed amendments – see AR 3, 11, 13, 14, 16, 19, 67, 69]

[GIORGETTI, CHIARA](#) **JANUARY 26, 2019**

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

I am writing in support of the proposed amendments to the ICSID Arbitration Rules pertaining to the disqualification of arbitrators.

In the last few years, I studied and authored several pieces of scholarship on challenges of arbitrators and judges in International Courts and Tribunals.¹ I have developed an expertise and understanding of these rules, and of their importance to guarantee a fair and legitimate process supported by all parties. I believe that changes in the ICSID Arbitration Rules on disqualifications are both warranted and timely. They also align the ICSID Rules to the institutional rules applicable in other and similar international arbitrations.

The proposed amendments relate to Arbitration Rules (AR) 29 and 30, and Additional Facility Arbitration Rules (AF-AR) 39 and 40.² The proposal calls for three kinds of changes: first, it adds clarity by introducing specific time limits; second, it reduces the time and impact of challenges procedures on the arbitration process by introducing an expedite schedule for parties to file a challenge and, third - and most importantly - it addresses the anomaly that exists in the decision-making process relating to challenges by permitting the remaining co-arbitrators deciding on the challenge to send the challenge to the Chairman (Chairperson) if they are unable to decide the challenge for any reason. This is a most welcomed and necessary change, it addresses a recognized weakness of the existing Rules and it bring the ICSID Rules more in line with other existing international arbitrational rules.

Specifically, the proposal calls for the following changes:

- It introduces a time limit of 20 days for filing a disqualification motion after the basis for the challenges arises. This replaces the requirement that the motion is filled “promptly” which has given pause to several Tribunals. It adds clarity, possibly reduces the time of challenges, and aligns ICSID Rules to other arbitration rules which also adopt a specific time limit.
- It adds a more expedited schedule for parties filing a challenge, which includes strict filing times. In the proposed amendment, a challenge proposal must include all submissions and supporting documents, the reply must be filed within seven days, the observation by the arbitrator must filed within an additional five days and the parties file their final observations simultaneously within seven days. Decisions on challenges will have to be made within 30 days. In addition, the new proposal will eliminate the automatic suspension of the arbitral proceeding upon filing of a challenge. Proceedings are suspended only when both parties agree to suspend any part of the case. This timed schedule and the continuation of the underlying arbitration proceedings will allow a speedier resolution of disqualification requests and would likely also dissuade spurious challenges filed to prolong proceedings.

[...]

[see additional comments under AR 30]

GUGLIELMINO DECEMBER 28, 2018

The Secretariat has proposed a substantial amendment on this subject, by the implementation of Rule AR 29. One of the most remarkable aspects is that the filing of a disqualification motion does not suspend the proceedings. The proposed modification also

replaces the former requirement to file it “promptly” with a limit of 20 days after 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”.

On this regard, it is worth mentioning the significant institutional prejudice of not suspending proceedings after one or more arbitrators have been challenged.

Firstly, the amendment of this rule seems to assume that the request for disqualification has no sufficient merits or seriousness, which is contrary to the principles of the ICSID Convention that –reasonably- includes no assumptions on this issue.

Secondly, a red flag should be placed on several risky situations for the integrity of the proceedings if they are not suspended until the disqualification is decided, including, for example, that the arbitrators may still discuss jurisdiction and the merits of the case while the majority of the tribunal decides on the proposal for disqualification of one of the arbitrators³. It is not viable or advisable that in order to make processes more dynamic, the most basic principles of an international arbitration system like ICSID get weakened. Most importantly, the proposed amendment is not reasonable either in terms of effectiveness, since it may allow for delays and useless costs, for example, arising from a hearing held pending a disqualification decision that may be then held again because one or more arbitrators have been effectively disqualified.

Thirdly, the imposition of fixed and short periods for the party’s submissions and the decision on disqualification –which we deem correct- makes it even more unnecessary to move on with the proceedings, since such fixed and short terms guarantee that not suspending proceedings until deciding on the disqualification becomes insignificant.

Further, we must point out that the term of 20 days after 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” is unnecessarily short, and contrary to the interpretation that main precedents on this subject have made of the term “promptly” in current Arbitration Rule 9(1). The serious and extraordinary nature of a request for disqualification deserves the guarantee of equality of treatment of the parties and the parties’ right to be heard in the proceedings. Thus, recognizing the importance that the Rules provide for a specific term to submit a request for disqualification, and taking into account that, in some cases, requests for disqualification require solid legal analysis and the gathering and assessment of documentary evidence, it is reasonable to extend the term of 20 days to a term of 35 days. This amendment may not have any dilatory impact –mostly bearing in mind the prompt proceedings established for submissions and the decision on disqualification- while it is important to guarantee that the parties may sufficiently prove the existence of irregular circumstances for which a disqualification is filed and to provide well-reasoned grounds for such disqualification.

Therefore, our proposed modification to Rule 29 ((AF)AR 39) reads as follows:

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 35 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 filing of a request for disqualification shall suspend proceedings, unless the parties agree otherwise. If the parties agree not to suspend proceedings and 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.

[JAIME, MARGIE-LYS](#) [DECEMBER 27, 2018](#)

Proposal:

[...]

(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 any comments to the proposed disqualification and provide any supporting documents ~~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).

[...]

Comment: The proposed amendment to the proposed Rule is intended to clarify the role of the “other party” who is not proposing the disqualification of the arbitrator that has been challenged by a party in accordance to Article 57 of the Convention.

KRYVOI, YARIK / BIICL

NOVEMBER 8, 2018

- Tribunals should be encouraged to reflect the costs of the delay incurred by a challenge in the costs awards, so that the costs of delay can be borne by the party making an unsuccessful challenge.
- The standards of challenges should be aligned with those adopted by other leading arbitration institutions. ICSID can publish its own guidelines or best practices in this area.

[see submission for additional comments]

STEPTOE **DECEMBER 28, 2018**

7.1 We consider that three aspects of Rule 29 should be considered.

7.2 First, it could be made clearer that the proposal for disqualification referred to in Rule 29(2)(a) must include the written submission referred to in Rule 29(2)(b), and we understand that is the intention. In other words, the party proposing disqualification cannot merely make a bare request; when making the disqualification proposal it must also provide its "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".

7.3 Second, applications for disqualification are, in some instances, complex, especially if the conduct undertaken by the arbitrator whose disqualification is proposed is not well known to the parties. A recent example of this was when the independence and impartiality of an arbitrator was challenged because he headed an international organization during the course of the arbitration

proceedings which allegedly touched on the party concerned and the subject matter of the arbitration. Therefore, although we agree that time limits for the parties' submissions in regard to disqualification should be imposed by Rule 29, we consider that there should be equality between the parties. Therefore, the respondent party should also have twenty days to file its response and supporting documents after receipt of the applicant's written submission, as opposed to the seven days proposed under Rule 29(2)(c). Alternatively, each party should have fourteen days to file their respective submissions.

7.4 Third, we note that Rule 29(3) provides that, if the proposal to disqualify an arbitrator 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". We foresee that the facts leading to a disqualification may be such that it would call into question all of the Tribunal's prior orders or decisions, not just those issued during the period that a proposal to disqualify was pending. Therefore, we consider that it would be appropriate to amend Rule 29(3) so that either party may request that *all* orders or decisions issued by the Tribunal prior to the disqualification be reconsidered by the reconstituted tribunal.

Rule 30 – Decision on the Proposal for Disqualification

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 30: Decision on the Proposal for Disqualification

(1) **If the parties do not agree to the proposal or the arbitrator does not withdraw,** ~~T~~he 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.

[...]

(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), **subject to Rule 8(3).**

Commentary

Only if the parties do not agree to the proposal or the arbitrator does not withdraw will a decision on the proposal for disqualification become necessary.

It is not clear how the 30-day time limit to make a decision on a proposal for disqualification will be calculated in the case of proposed Rule 30(2)(b).

It should be clarified that the 30-day time limit to make a decision on a proposal for disqualification is subject to proposed Rule 8(3), which provides that special circumstances may prevent the Tribunal or the Chairman for meeting a time limit, in which case the parties shall be notified of the reason for delay and the date when the order, decision or Award is expected to be delivered.

AUSTRALIA **JANUARY 22, 2019**

Australia recognises that AR 30 addresses issues which we have previously identified around the consistency of decision-making in relation to arbitrator challenges and supports these changes.

FRANCE **JANUARY 14, 2019**

The French delegation supports the Secretariat’s proposals to facilitate the delegation to the Chairman of decisions on disqualifications, despite the constraints deriving from article 58 of the Washington Convention. As envisaged at paragraph 333 of the Working Paper, the amendment of this provision deserves further consideration.

ISRAEL **DECEMBER 27, 2018**

It seems that the timeline in paragraph 3 is not clear – can the procedure potentially take 60 days?

MOROCCO **DECEMBER 27, 2018**

Prévoir pour ce qui est de la proposition de récusation d’un arbitre ou d’un conciliateur, que la décision y afférente soit prise par une instance indépendante autre que les autres membres du tribunal arbitral étant donné que ces derniers ne sont pas les mieux placés pour trancher une telle récusation en toute objectivité.

En outre, et dans le cadre de l'amélioration des conditions de transparence, il est proposé que les décisions de récusation soient publiées.

[CCPIT](#) **DECEMBER 25, 2018**

A. Original Text

[quotes text of proposed AR 30]

B. Modified Text

It is advised to amend Rule 30 (Decision on the Proposal for Disqualification) of the proposed Arbitration Rules as follows:

Rule 30 Decision on the Proposal for Disqualification

(1) **If the parties so agree, 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. **If the parties fail to do so, the decision on any proposal shall be taken by the Chairman.**

(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).

C. Reason for Amendment

One party to an investment arbitration case is an investor and the other party is a sovereign state. On the one hand, compared with the ordinary commercial arbitration, the impact of the results of investment arbitration results is far-reaching, especially when the sovereign state loses its case, its national interests are often affected, and a series of similar claims will be triggered. On the other hand, from the perspective of investors, its economic strength and influence are difficult to compete with the host country as the respondent. In short, investment arbitration cases have higher requirements for the arbitrators' qualifications, independence and impartiality, and the decision on the proposal for disqualification must be treated with caution. In contrast, the number of arbitrators in the community of investment arbitration is limited, and arbitrators may be familiar with each other or have interests in common. In the

three-member arbitral tribunal, when a party proposes disqualification of one arbitrator, the other two arbitrators may be reluctant to dismiss the proposal, thereby reducing the likelihood of success of the proposal.

Under Article 58 of the ICSID Convention: “The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision.”

In the above case, we believe that the Arbitration Rules may provide a limited interpretation to the provisions of Article 58 of the ICSID Convention, that is, limit the right of decision of the remaining arbitrators on the proposal of qualification to the premise of “consensus consent of the parties”. This means that all proposals of disqualification will be decided by the chairman unless the parties agree that it would be decided by the other members of the arbitral tribunal and then by the chairman if those members are equally divided. In addition, the decision on the proposal for disqualification should be allowed for judicial review.

[GIORGETTI, CHIARA](#) **JANUARY 26, 2019**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

I am writing in support of the proposed amendments to the ICSID Arbitration Rules pertaining to the disqualification of arbitrators.

[see additional comments under AR 29]

Specifically, the proposal calls for the following changes:

[...]

- The most important and relevant proposed change is found in AR 30 and addresses the decision-making process in challenges. Article 58 of the ICSID Convention requires the two non-challenged co-arbitrators to decide a challenge to a single member of a three-person Tribunal. Only when “those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators,” it is for the Chairman (Chairperson) to make the decision on the challenge/s. The requirement that the two co-arbitrators decide on the challenge of the other member of the Tribunal is particularly questionable and out of step with all other existing arbitration rules. It creates the possibility of tensions within members of the Tribunal and the appearance of an unfair process for the parties.³ Case-law also suggests that it is very rarely successful, which appears to reinforce these views.⁴ The proposed new AR 30 would allow the deciding co-arbitrators to send the challenge to the Chairperson if they are

unable to decide the challenge for any reason. In addition, if a second proposal is filed while a first is pending, both can be sent to the Chairperson for decision. The new proposed Rule 30 states:
[quotes text of proposed AR 30]

The new proposed AR 30 provides an interpretation of Article 58 that will allow the two co-arbitrators to request the Chairperson to decide for any reason, and will free them from having to decide on the fate of a member of the same tribunal. In fact, I have argued in the past in favor of adopting a similar reading of Article 58, and I support this amendment.⁶ It is a much welcomed and necessary change.

In the future, it would be desirable to undertake an amendment of Article 58 itself, however, given the constraints created by the ICSID Convention and the difficulty of amending the Convention,⁷ the solution proposed by the Secretariat and incorporated in AR 30, is a positive and desirable one.

Rule 31 – Incapacity or Failure to Perform Duties

CCPIT **DECEMBER 25, 2018**

A. Original Text

[quotes text of proposed AR 31]

B. Modified Text

It is advised to amend Rule 31 (Incapacity or Failure to Perform Duties) of the proposed Arbitration Rules as follows:

Rule 31 Challenge of Arbitrators

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, independence, or availability, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, the procedure in Rules 29 and 30 shall apply.

C. Reason for Amendment

Rule 29(1) of the proposed Arbitration Rules provides that the parties may propose disqualification of an arbitrator under Article 57 of the ICSID Convention, on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14 of the ICSID Convention (i.e. Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law; commerce; industry or finance, who may be relied upon to exercise independent judgment), or on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV (the composition of the arbitral tribunal).

Rule 31 of the proposed Arbitration Rules provides that an arbitrator is disqualified becomes incapacitated or fails to perform the duties required of an arbitrator. However, the proposed Arbitration Rules do not provide for any provisions of the challenge of arbitrators.

The conflict of interest of the arbitrators and the multiple roles of arbitrators are the main issues of international investment arbitration. However, the proposed Arbitration Rules do not provide how conflicts of interest should be dealt with when constituting an arbitral tribunal, and there is no corresponding procedural requirement. This should be supplemented.

We recommend introducing the provisions of Article 11.6 of the latest Hong Kong Arbitration Rules regarding the challenge of arbitrators (as stated in the proposed text). In addition, in cases where the arbitrator fails to act without undue delays, such as when the arbitrator fails to perform his or her commitment to “availability” in the statement of the arbitrator, the parties may challenge the arbitrator based on undue delay.

In addition to the above suggestions, in avoiding the conflict of interest of arbitrators, it is also necessary to pay attention to the lack of procedural provisions on conflicts of interest of arbitrators, such as: conflict of interest guidelines, grounds of challenge of arbitrators, challenge procedures to be followed, decision mechanisms, judicial supervision, etc.

XI. Advice on Arbitrator’s Double-hatting

A. The Issue in Dispute

There is a debate about double-hatting of the arbitrator. 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. Others disagree, and the supporting reasons are as follows.

1. 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. 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.

2. A prohibition on double-hatting as a contradiction of the principle of party-autonomy in the selection of arbitrators.

3. A prohibition on double-hatting will result in a shortage of qualified arbitrators with experience in ISDS.
4. A prohibition on double-hatting will adversely affect arbitrator diversity.
5. A prohibition on double-hatting would also be difficult to reconcile with the fact that the 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.

B. Comments and Advice

The proposed Amendment 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.

As respect to the double-hatting of arbitrators, we believe that double-hatting of arbitrators should be allowed. On the one hand, this approach can make full use of the experience accumulated by arbitrators during other duties, and also the principle of autonomy of the parties; on the other hand, the improvement of the disclosure system can well solve the conflict of interest caused by the double-hatting of arbitrators. Considering that the arbitrator's multiple positions are very common in practice, this means that for the time being, the Rules have implied that the arbitrators are allowed multiple identities. We believe that there is no need to explicitly allow multiple identities of arbitrators in the Rules at this stage, but because this issue is also the main factor leading to the decline of the credibility of international investment arbitration, we recommend that the issue be discussed and defined in depth. If the results of in-depth research tend to prohibit multiple identities of arbitrators, then they should be clarified in the Rules.

Rule 32 – Resignation

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 32: Resignation

(1) An arbitrator may resign by notifying the Secretary-General, ~~and~~ the other members of the Tribunal and the parties, 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 and the parties whether they consent to the arbitrator's resignation for the purposes of Rule 33(3)(a).

Commentary

The resigning arbitrator should notify the Secretary-General, the other members of the Tribunal *and the parties*.

If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General *and the parties* whether they consent to the arbitrator's resignation.

QATAR DECEMBER 19, 2018

Qatar takes the view that an arbitrator may resign but only for justifiable reasons.

Qatar recommends amending AR 32(1) to read as follows:

- (1) An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing **justifiable** reasons for the resignation.

Rule 33 – Vacancy on the Tribunal

ARGENTINE REPUBLIC DECEMBER 28, 2018

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) at the request of either party, 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.

Commentary

Any appointments by the Chairman under scenario (3)(b) should not happen automatically upon the expiry of 45 days after the notice of vacancy, but only if a party expressly requests that the vacancy be filled by the Chairman, as provided for in current Arbitration Rule 11(2)(b).

CANADA DECEMBER 28, 2018

1) The last sentence of paragraph 4 gives a newly appointed arbitrator the right to require that certain portions of a hearing be recommenced, and it introduces a “necessity” test. Canada suggests that as drafted it is unclear who is to decide whether recommencing the hearing is necessary to decide a pending matter. If the intent is to put the decision solely in the hands of the newly appointed arbitrator, Canada suggests that the sentence be amended to say “A newly appointed arbitrator may require that any portion of a hearing be recommenced if such newly appointed arbitrator believes it necessary to decide a pending matter.”

GEORGIA DECEMBER 28, 2018

Comment to Rule 33(2):

Georgia proposes to include an exception to the general rule on suspension of proceedings during the vacancy, whereby the Chairman of the Administrative Council or the Secretary General, as appropriate, could allow the proceedings to continue pending the procedures to fill-in the vacancy with the agreement of the parties. There can be situations when the vacancy appears at a stage of the proceedings when the arbitral tribunal has a very limited involvement (for example, the stage of written submissions of the parties). In such cases suspension of the proceedings would prolong the process without serving any reasonable or practical purpose. In such situations it would be useful if there was a possibility for continuing the proceedings according to the procedural timetable (subject to reasonable extensions of times as requested by the parties later) with the consent of the parties to the dispute.

The Convention (including Article 56) does not provide anything regarding the suspension of the proceedings in case of vacancy. Georgia also tends to believe that content and context of Article 56 and in particular the phrase - “[Tribunal’s] composition shall remain unchanged” - does not exclude the possibility of continuing proceedings pending the procedure to fill-in the vacancy. The

composition of the Tribunal is not altered by not suspending proceedings; the vacancy will be filled-in to reinstate the composition of the tribunal and in the meantime no decisions would be taken by the reminder of the tribunal (accept for the matters that President is authorized to decide individually).

DENTONS DECEMBER 21, 2018

AR 33.2

We consider that the automatic suspension of proceedings upon a vacancy should be revisited. Vacancies often occur at times in the proceedings when no action by the Tribunal is required. In such cases, there is no good reason why the workflow of an arbitration should be interrupted due to, for example, an arbitrator’s decision to resign. Workable solutions can be devised to allow the proceeding to continue. For example, if a party requires an adjustment to the schedule because of the need to identify a replacement arbitrator, such adjustment is not likely to be substantial, and the remaining two members of the Tribunal should be in a position to grant it.

(Art.21(2) SCC Rules.)

If this comment is accepted, conforming changes will also be required to AR 54.5 (Suspension), AR 55.3 (Settlement and Discontinuance), AR 56.2 (Discontinuance at Request of a Party) and AR 57.4 (Discontinuance for Failure of Parties to Act).

AR 33.4

Consider aligning the Spanish “solicitar” with the English word “require” and the French word “requérir.” The Spanish verb “solicitar” does not clearly reflect the right of an arbitrator to “require” the recommencement of any portion of a hearing.

Note, also, the incorrect numbering at subparagraphs (3) and (4) of the French version.

STEPTOE DECEMBER 28, 2018

8.1 We note that pursuant to Rule 29(3), while an application for the disqualification of a member of the Tribunal is pending, the proceeding shall continue unless the parties agree otherwise. However, under Rule 33(2) when there is a vacancy on the Tribunal the proceeding is suspended from the date of notice of the vacancy until the vacancy is filled. For the reasons stated below in regard to our observations on Rule 50 (provisional measures), we foresee this as problematic in regard to a request for provisional measures that is made and needed during a period of a vacancy on the Tribunal. Therefore, we suggest that there is an express provision in Rule 33 which provides that when there is a vacancy the proceedings are not suspended for the purpose of an application for provisional measures (we do not consider that Articles 37 and 56 to 58 of the Convention prevent such a provision). We note that pursuant to Rule

50(6), when the vacancy is filled the reconstituted Tribunal could modify or revoke the provisional measures on its own initiative or upon a party's request, thereby allaying any concerns that may arise in regard to provisional measures ordered by a truncated tribunal.

Chapter V – Initial Procedures

Rule 34 – First Session

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria's comments refer to the paragraph numbers in the [Synopsis in French](#).]

Les premières sessions ne doivent se tenir qu'à partir de la réception d'une réponse par la partie adverse des Etats.

ARMENIA DECEMBER 28, 2018

Paragraph 4 of AR 34 provides number of procedural matters to be addressed during the preliminary procedural consultation. We propose to add secretaries that will be used and third-party funding into the items listed in par. 4.

CHINA DECEMBER 28, 2018

Protection of Confidential Information. As the investment disputes may involve information of national secrets relating to government measures under dispute, the disclosure of which the respondent considers contrary to its essential security. Such information shall be protected from disclosure.

China therefore proposes to add the following rule: The respondent shall not be required to disclose information involving national secrets, the disclosure of which the respondent considers contrary to its essential security. The tribunal may not draw adverse inference based on the fact that such information is not disclosed by the respondent.

GEORGIA DECEMBER 28, 2018

Comment to Rule 34(4):

Georgia believes that the First Session is a very important procedural stage since the agreements and understandings reached at this session will guide the arbitration process for the rest of the proceedings. We are very glad to see that the proposed Rule 34(4) includes quite comprehensive list of procedural matters to be discussed at the first session. In addition, we suggest to include some other items that we believe are equally important and deserve to appear in this list:

- a) Form and requirements of presenting evidence;
- b) Submission and participation of non-disputing parties;
- c) Involvement and role of arbitral secretaries or use of other assistance by the Tribunal.

Georgia would like to specify further regarding its proposed item c): while we understand the specific nature of the appointment of secretaries on ICSID proceedings by Secretary General, we still believe that there could be cases where the parties' involvement in designating secretaries functions would be warranted. In particular, The Regulation 25(d) in Administrative and Financial Regulations, grants possibility to the president of the arbitral tribunal to assign additional functions to the secretary appointed by the Secretary General on a particular case. We believe it would be useful if in such situations president of the arbitral tribunal would bring this issue to the attention of the parties for their views and comments. This is especially important to avoid any complications regarding the role of arbitral secretaries at a later stage in view of discussions around this issue in recent years. The same would be true for any other assistance that the tribunal or the president of the arbitral tribunal would choose to employ.

HELLENIC REPUBLIC DECEMBER 28, 2018

Rule 34(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;...~~

ISRAEL DECEMBER 27, 2018

We suggest leaving this to discussion in light of the provisions adopted relating to transparency under these rules.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that in order to enhance the efficiency of the arbitration process; the time limits in AR 34(2) should be shortened to be within a period not exceeding 30 days.

Qatar recommends amending AR34(2) to read as follows:

(2) The first session shall be held within ~~60~~ 30 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).

Qatar takes the view that the first session should be held in-person in order to encourage in-depth discussion and pro-active case management.

SPAIN **DECEMBER 21, 2018**

Se aprecia cierto solapamiento entre esta Regla 34 que regula la primera sesión con el tribunal y la Regla 14 sobre Conferencia Relativa a la Gestión del Caso.

DENTONS **DECEMBER 21, 2018**

AR 34.4(b)

We consider that this provision should be omitted. Most, if not all, other international arbitration rules provide for a quorum of two arbitrators (including the default rule in current ICSID Arbitration Rule 14(2) (Sittings of the Tribunal)), which allows the proceeding to move forward with a truncated Tribunal. Requiring the parties to discuss the quorum at the first session incentivizes poorly represented parties to agree to a rule on quorum that can result in unnecessary delay in the proceedings. If the parties want to agree to a different rule, they should be free to do so, but there is no reason to encourage them to do so. (See Art. 41(1) SCC Rules; Art.30.7 SIAC Investment Arbitration Rules.)

AR 34.4(f)

Consider adding a discussion of page or word limits for submissions. We have seen an escalation in recent years of the length of submissions that materially add to the work of Tribunals and parties, and thus dramatically increase the cost of arbitration. If arbitration is to remain (or, depending on one's view of the current state of affairs, become) a cost-effective dispute resolution mechanism, it is incumbent on the arbitrators and the parties to create an environment where this goal would be attainable.

GIBSON DUNN **JANUARY 15, 2019**

We suggest adding a section on page limits for the parties to consider in the Draft Procedural Order No. 1 template provided by ICSID. The stated goals of this rules amendment process include increasing the efficiency of the proceedings and reducing costs. A section on page limits would encourage parties to consider potentially shorter pleadings, which would help achieve these goals.

THREE CROWNS **JANUARY 16, 2019**

In our experience, there are cases in which it is only after the first substantive exchange that the parties and the tribunal understand enough about the case to identify genuine opportunities for procedural innovation and efficiency. In such cases, this would be a useful time to have a CMC and to discuss the remainder of the procedural calendar, including the amount of time required for further written submissions, likely duration of hearings, and any opportunities for efficiency gains by breaking down the issues in dispute for sequential or parallel briefing and resolution.

In this context, it may be worth considering the possibility of including within Rule 34(5) language that would make clear that the tribunal retains discretion to reserve its decision on procedural matters where appropriate. Thus, Rule 34(5) could be amended by inserting the underlined text as indicated:

*(5) The Tribunal shall issue an order recording the parties' agreements and any Tribunal decisions on the procedure, **as well as any points on which the Tribunal has reserved its decision**, within 15 days ...*

14. We welcome the detailed and thoughtful list of matters to be addressed at the First Session in proposed AR 34(4), which will encourage an early consultation and resolution of the procedural matters. However, some of the matters (for instance AR 34(4)(b)-(g), (k)) have already been provided for within some of the other rules, which we believe represent the established practice or the balanced approach after careful consideration. However, it is unclear what provisions of these rules are mandatory and what provisions are subject to the parties' agreement. To avoid the tendency for the parties to negotiate the matters set out in AR 34(4) irrespective of the provisions already available in the rules, we respectfully invite the Secretariat to consider whether it will be helpful to draw the parties' attention to the existing rules concerning relevant matters and request that reasons be provided if any party wishes to deviate from the existing rules.

15. In this connection, we believe that the parties are free to negotiate and change the expiration of a time limit, which is referred to as 11:59 p.m. at the seat of the Centre in proposed AR 7. In practice, consideration should be given to different time zones of the parties and the members of the Tribunal in deciding on the expiration of a time limit. We raise this point for the Secretariat to consider whether it is necessary to clarify that this issue is included in either AR 34(4)(e)(the method of filing and routing of written communications) or AR 34(4)(i)(the procedural calendar) for the parties to consider.

Rule 35 – Manifest Lack of Legal Merit

Rule 35: Manifest Lack of Legal Merit

[...]

(2) The following procedure shall apply, **unless the parties agree otherwise**:

- (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) **subject to Rule 8(3)**, 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.

[...]

Commentary

The parties should be allowed to agree to modify the procedure applicable to an objection of manifest lack of legal merit.

It should be clarified that the time limit for the Tribunal to rule on the objection is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

AUSTRALIA **JANUARY 22, 2019**

Australia strongly supports AR 35 which sets out a process related to abusive and frivolous claims and expands upon the rule setting out the Tribunal's ability to render an order where all claims are manifestly without legal merit.

AUSTRIA **DECEMBER 21, 2018**

Austria's proposal that the Arbitration Rules clarify whether a preliminary objection under current Rule 41(5) Arbitration Rules may pertain to jurisdiction of the Tribunal (and not only the merits) has been implemented in amended Arbitration Rule 35(1). The proposed changes sufficiently address Austria's proposal.

Amended Arbitration Rule 35(2) requires a party to file a request for an objection for manifest lack of legal merit no later than 30 days after the constitution of the tribunal. Serious consideration should be given to extending this time period to at least 60 days and/or authorizing the tribunal to extend the time limit.

Amended Arbitration Rule 35 allows a party object that a claim is manifestly without legal merit and no further guidance of the legal test is provided. The proposed changes do not address Austria's proposal. It may be considered whether the Arbitration Rules would benefit from clarifying the legal test required to successfully object to a claim under proposed Amended Arbitration Rule 35.

Tal como ocurre actualmente con la Regla 41(5), definir un estándar de manifiesto para que prosperen estas objeciones preliminares es un umbral muy alto que difícilmente se supera según la información públicamente disponible.

La idea de disponer de un mecanismo de objeciones preliminares es que en aquellos casos en los que existan serias dudas sobre la viabilidad de la demanda, bien sea por jurisdicción o fondo, éstas se resuelvan antes de entrar al fondo de la controversia, ahorrando tiempo y costos para las partes. Un estándar demasiado alto vuelve inoperante este recurso, pues existen demandas que son frívolas sin que necesariamente los motivos de su frivolidad sean manifiestos. Por ejemplo, pueden requerir la presentación o solicitud de documentos para revelarse (que en todo caso significan una carga sustancialmente menor a la del discovery ordinario si el caso siguiera adelante).

Por otro lado, la bifurcación del procedimiento no es obligatoria bajo las Reglas 36 y 37.

Lo ideal es que el reglamento cuente con un proceso expedito para decidir preliminarmente los casos abusivos sin necesidad de incluir el umbral de *manifiesto*.

2) The following procedure shall apply:(a) a party shall file a written submission no later than **60 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.

That's why Claimant in his request has to contain the grounds establishing the cause of the action and an unambiguous specification of the relief requested. Claimant must make a clear and unambiguous report of the facts which according to the substantive treaty or contract support the action, an exact description of the object in litigation and a certain relief.

(4) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect.

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.

Consider to extending the 30 days time period to at least 60 days and authorizing the tribunal to extend the time limit and clarifying the legal test required to successfully object to a claim.

ITALY **DECEMBER 24, 2018**

Italy appreciates the attempt by ICSID to upgrade rules on initial (AR 34 ff) and special (AR 50 ff) procedures. It would however recommend that a mechanism of objection by the respondent be conceived also before the tribunal is set, as it is found in other sets of rules for investment arbitration, such as SCC and ICC. Italy is aware that at this stage information on the case is scarce but at least a preliminary check can be done on prima facie elements of admissibility and lack of jurisdiction. A procedure could be set permitting the claimant to react to opposition by the respondent.

MOROCCO **DECEMBER 27, 2018**

Prévoir pour ce qui est du rejet des plaintes frivoles, qu'une possibilité soit donnée à la partie défenderesse (Etat d'accueil) d'exprimer une objection, non seulement lorsqu'elle considère que la plainte est manifestement dénuée de fondement juridique mais également lorsqu'elle considère que ladite plainte n'est pas fondée en droit étant donné qu'elle n'a pas été introduite dans les formes imposées par le traité bilatéral d'investissement (contester la recevabilité de la plainte).

PANAMA **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the State's name hyperlinked above.]

a. Based on Panama's experience with judgment-proof claimants.⁴ Panama strongly urges the Secretariat to link the running of the time period for submitting objections based on a lack of manifest legal merit to the payment of a claimant's initial deposit rather than the constitution of the Tribunal. Panama suggests that an arbitration should not proceed if a claimant is unable or unwilling to post its initial deposit and that it is uneconomic to require a respondent to incur the expense of drafting its AR 35 objections until the claimant makes its initial deposit. Panama is aware that the purpose of Arbitration Rule 41 (5), the predecessor to AR 35, as explained by ICSID's Working Paper Suggested Changes IQ the ICSID Rules and Regulations is to permit a Tribunal "at an early stage of the proceeding to be asked on an expedited basis to dismiss all or part of the claim on the merits." Counting from the deposit of claimant's advance will still be early in the proceedings and will hardly lengthen proceedings already lengthened by a claimant's own behavior.

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

SPAIN **DECEMBER 21, 2018**

Se recomienda **sustituir la palabra “causales”** de la Regla 35(2)(a) por “causas”, para evitar el matiz limitativo que parece desprenderse de la expresión “causales” que implica un *numerus clausus*, cuando en realidad no existe una limitación de motivos.

TUNISIA **DECEMBER 27, 2018**

Défaut manifeste de fondement juridique

La notion de « Défaut manifeste de fondement juridique » a suscité des interprétations dans la jurisprudence CIRDI. Il s'agit notamment du défaut manifeste de fondement pratique ou factuel. Est-il possible de clarifier cette notion ?

Objections préliminaires

Plusieurs notions relatives à la compétence du CIRDI ou du tribunal demeurent complexes et suscitent des interprétations qui ont un effet direct sur la compétence du tribunal arbitral ou celle du centre. Il s'agit notamment des situations artificielles ou de fraude telles que le *treaty shopping* ou *nationality planning* ? est-il possible de trancher ces questions dans le règlement en fournissant aux arbitres certains indices ?

La clarification de ces notions permettra d'éviter les affaires futiles à but frauduleux.

URUGUAY **FEBRUARY 1, 2019**

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales

A. *Duración prolongada y onerosidad de los procesos*

Algunas de las propuestas presentadas por la Secretaría del CIADI implican una reducción del plazo del procedimiento arbitral, lo cual tiene un impacto directo en el costo del procedimiento arbitral.

Se comparten las propuestas de reformas que tienden a reducir los plazos de los procedimientos arbitrales siempre que se mantengan las garantías del procedimiento arbitral.

[see additional comments under AR 37]

Se comparte la propuesta presentada por la Secretaría del CIADI – Regla 35 manifiesta falta de mérito jurídico – la cual permite interponer una excepción preliminar para desechar demandas frívolas en una etapa temprana del procedimiento arbitral.

[see additional comments under AR 36-AR 37]

DEBEVOISE **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

While the Proposed Amendments improve upon the old ICSID regime in several respects, certain new Rules and Proposed Amendments may only partially achieve, or even run counter to, ICSID’s stated objective of streamlining its arbitral procedure. We call attention to the following four new provisions contained in the Proposed Rules that risk decreasing the overall efficiency and fairness of the ICSID system:

A. Proposed Arbitral Rule 35 – Manifest Lack of Legal Merit. This Proposed Amendment allows for an objection that “a claim” is manifestly without legal merit, and states that the objection may be made to “the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal . . . no later than 30 days after the constitution of the Tribunal.” However, as drafted and in conjunction with the deadline, this Rule appears to preclude the striking out of counterclaims and defenses that are manifestly without legal merit. This creates an unfair distinction between the parties that bring claims and those that defend against them, and exacerbates the problem of unnecessary litigation and added time and expense.⁵

[additional comments on other proposed amendments – see AR 42, 59, 60]

THREE CROWNS **JANUARY 16, 2019**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Although there have been three fully successful and three partly successful applications under current Rule 41(5), it has not proven to be a viable mechanism for resolving unmeritorious claims in an expeditious way. The current proposed changes will reduce the scope for using such applications for the purposes of delay.

However we suggest further changes are needed in order to render it a more effective case management tool and to harmonize Rule 35 with the tribunal's new case management powers under proposed Rule 14, in relation to which we understand Rule 35 to be simply a specific instance. The simplest option would be to remove the word "manifest" from the standard which is not found in the ICSID Convention and has caused more confusion than clarity.² A "lack of legal merit" standard would allow for an expedited decision on, for example, whether the pleaded allegations, if true, actually state a valid claim.

The current structure of Rules 35-37 is limited in scope and one-sided insofar as it currently provides a mechanism only for preliminary resolution of certain issues raised by the respondent State. A mechanism that encouraged early resolution of any preliminary issue whose resolution could materially improve efficiency would not only be more balanced but would be more likely to focus the minds of parties and tribunal members on the questions of efficiency that should be driving questions of structuring the tribunal's decision-making.

On a related drafting point, Rule 36 may generate confusion by its use of the words "preliminary", "jurisdictional" and "competence", while omitting any reference to "admissibility". It is also unclear why objections of jurisdiction or competence (or admissibility) should be described as "preliminary", as this language seems to prejudge the decision about bifurcation. Equally unclear is why "preliminary" should be joined to the word "objections" – Article 41 of the Convention refers to the Tribunal's discretion to determine whether a "jurisdictional objection" should be dealt with as a "preliminary *question*".

One way to resolve these issues would be to merge the "lack of legal merit" standard under Rule 35 within the scope of an expanded version of Rule 37 that would address in a more general way the tribunal's authority to identify issues for early decision that can dispense with a claim, defence, or parts thereof and thus offer more possibilities for efficient case-management. Any needed elements from Rule 36 could also be included in this single Rule dealing with "Separate phases for preliminary or other discrete questions".

One implication of this approach would be that the tribunal would have discretion as to whether to address any proposed issue in a preliminary phase – a discretion that is presently lacking in relation to applications to dismiss a claim for "manifest lack of legal merit" and would continue to be lacking under current draft Rule 35.

[see additional comments on proposed AR 36 & AR 37]

Rule 36 – Preliminary objections

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 36: Preliminary Objections

[...]

(2) The following procedure shall apply, unless the parties agree otherwise:

(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.

(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. Until the Tribunal decides whether to address a preliminary objection in a separate phase or join it to the merits, the proceeding on the merits shall be suspended. If the Tribunal decides to address the preliminary objection in a separate phase, it ~~may~~ shall suspend the proceeding on the merits. If the Tribunal decides to join the objection to the merits, it shall fix any time limit necessary for the further conduct of the proceeding.

(4) If ~~a~~ the party ~~fillings~~ a preliminary objection does not request the bifurcation of the proceeding pursuant to Rule 37, it shall also file its counter-memorial on the merits at the date scheduled to make such submission, 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.~~

(5) 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, subject to Rule 8(3).

[...]

Commentary

The parties should be allowed to agree to modify the procedure for preliminary objections.

The proceeding on the merits should be suspended pending a decision on whether to address a preliminary objection in a separate phase or join it to the merits. If the preliminary objection is addressed in a separate phase, the proceeding on the merits must be suspended. If the Tribunal decides to join the objection to the merits, it should fix any time limit necessary for the further conduct of the proceeding.

If the party filing the preliminary objection does not request the bifurcation of the proceeding pursuant to Rule 37, it should not have to file its counter-memorial on the merits unless and until the Tribunal decides to join the preliminary objection to the merits.

It should be clarified that the time limit for the Tribunal to rule on the objection is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

AUSTRIA DECEMBER 21, 2018

In accordance with current Arbitration Rule 41, proposed Amended Arbitration Rule 36 is limited to preliminary objections that a dispute is not within the jurisdiction of the Centre, or for other reasons not within the competence of the tribunal. ICSID tribunals are divided over whether certain conditions precedent in investor-State arbitration clauses, such as requirements to attempt to settle a dispute amicably for a certain period of time prior to resort to arbitration, raise jurisdictional or admissibility issues.

Consideration should be given to extending Amended Arbitration Rule 36 to objections to the admissibility of a claim, in particular in light of the deadline introduced for the filing of a request for bifurcation relating to “a preliminary objection” in Amended Arbitration Rule 37. For example, as currently drafted, a request for bifurcation of an objection based on claimant’s failure to satisfy a waiting period prescribed by an investor-State arbitration clause would have to be filed within 30 days after the filing of the memorial on the merits if considered to be a jurisdictional objection, but could be filed later if considered to be an objection to admissibility.

CANADA **DECEMBER 28, 2018**

1) In paragraph 3, the Tribunal is given the power to decide to address a preliminary objection in a separate phase, as well as the permissive power to suspend the proceedings on the merits. In Canada’s view, if there is a preliminary objection that a dispute or ancillary claim is not within the jurisdiction of the Centre or competence of the Tribunal, then the proceedings on the merits should be stayed as matter of principle , if the Tribunal decides to hear that objection as a separate phase. Accordingly, Canada suggests that in the last phrase of paragraph (3), the language be changed to “it shall suspend the proceeding on the merits.”

2) In paragraph 4, the presumption is that even when a preliminary objection is filed, the party making the objection is required to file its counter-memorial. In Canada’s view, this process could lead to a significant waste of time and money for States who may be forced to file expensive expert reports and extensive other submissions when it is totally unnecessary because there is no jurisdiction or competence to hear the claim. Canada’s view is that the presumption should be the reverse. Canada understands the desire to achieve shorter arbitration, but this must be balanced against the need to ensure that costs are not wasted on ultimately unnecessary filings. Accordingly, Canada suggests paragraph 4 read “If a party files a preliminary objection, the proceedings shall be suspended until the Tribunal decides whether to hear the preliminary objection in a separate phase pursuant to paragraph 3, unless the Tribunal orders otherwise.”

3) Canada suggests that Rule 36(6) make clear that the specified time limit only applies where the tribunal has decided to hear the preliminary objection as a separate phase under Rule 37. If the preliminary objection is joined to the rest of the merits of the dispute, then the deadline for a decision in Rule 59(1)(c) should apply. In Canada’s view, it would be odd to have the Tribunal rule on questions of preliminary objections prior to the rest of the award in a non-bifurcated proceeding. Hence, Canada suggests that paragraph 6 be reworded to begin “Where the preliminary objection is heard in a separate phase of the proceedings pursuant to Rule 37, the Tribunal shall...”

COLOMBIA **DECEMBER 28, 2018**

El párrafo (3) sugiere que en el trámite de la excepción preliminar el Tribunal “podrá suspender el procedimiento sobre las cuestiones de fondo”. Colombia considera que la decisión sobre la jurisdicción es esencial para abordar los asuntos de fondo, hasta tanto no se decidan estos argumentos, no podrá avanzar el Tribunal sobre la siguiente etapa. Por lo tanto, se sugiere cambiar el condicional “podrá” a “deberá suspender el procedimiento respecto del fondo”.

En el párrafo (4) se sugiere que la presentación de los escritos sobre objeciones preliminares, se deberá presentar igualmente con el memorial sobre el fondo. Sin embargo, esto presenta serias implicaciones ya que se invierten tiempo y dinero en dar respuesta a casos que pueden quizá ser resueltos en las etapas preliminares. Por lo tanto, se sugiere que el Tribunal suspenda la decisión sobre el fondo, hasta tanto no se haya resuelto las excepciones preliminares: “Si una parte presenta una objeción preliminar, el procedimiento se suspenderá hasta que el Tribunal decida si escucha la objeción preliminar en una fase separada de conformidad con el párrafo 3, a menos que el Tribunal ordene lo contrario.”

En el párrafo 36(6) no queda claro que este plazo aplicaría solo en casos en los que se haya bifurcado el procedimiento. De lo contrario, se tendría que dar aplicación a la regla 51(1) (c), de tal forma que la redacción podría ser “cuando la objeción preliminar se resuelva en una parte separada del procedimiento de acuerdo con la regla 37, el Tribunal deberá emitir su decisión dentro de los 180 días...”

COSTA RICA **DECEMBER 28, 2018**

Costa Rica considers that in all cases preliminary objections shall be decided before continuing with the discussion of the merits. Therefore, Costa Rica suggests reflecting this on this rule.

GEORGIA **DECEMBER 28, 2018**

Comment to Rule 36(4):

Georgia understands and fully agrees with the rationale behind paragraph (4) of the Rule 36 as described in paragraph 387 of the Working Document. However, it is our impression that wording of paragraph (4) does not fully reflect the meaning enshrined therein and moreover, it is slightly ambiguous and might leave room for different interpretations.

In the view of the above, we propose to clarify the wording of paragraph (4). We suggest following possible version of the wording: “(4) A party that has filed a preliminary objection 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, if that party failed to request bifurcation within the time limit referred to in Rule 37(2) or unless the Tribunal has ordered otherwise.”

HELLENIC REPUBLIC DECEMBER 28, 2018

Mandatory stay of the procedure.

To ensure that respondents have adequate time to file requests for bifurcation, consider: Extending the period to file such a request to 60 days after the filing of the memorial on the merits if the request for bifurcation relates to a preliminary objection, and providing the Tribunal with the discretion to further lengthen this period if they deem that the circumstances of the case so require, or upon a reasoned request of the parties. The proposed 30-day deadline would allow respondents limited time to analyze the memorial on the merits in order to determine preliminary objections that may lend themselves to bifurcation, especially if the claimant deems its Request for arbitration to be its memorial pursuant to Proposed Amended Rule 13(2), and such Request is short and accompanied by little supporting evidence.

ITALY DECEMBER 24, 2018

Italy appreciates the attempt by ICSID to upgrade rules on initial (AR 34 ff) and special (AR 50 ff) procedures. It would however recommend that a mechanism of objection by the respondent be conceived also before the tribunal is set, as it is found in other sets of rules for investment arbitration, such as SCC and ICC. Italy is aware that at this stage information on the case is scarce but at least a preliminary check can be done on prima facie elements of admissibility and lack of jurisdiction. A procedure could be set permitting the claimant to react to opposition by the respondent.

ISRAEL DECEMBER 27, 2018

It is Israel's view that if a preliminary objection is filed then the requirement to submit a counter-memorial should be delayed until after the decision on the preliminary objection is made. This is in order not to force a party to spend unnecessary fund and resources for the preparation of a counter memorial, in the case it will later be decided that the whole procedure should be rejected.

MEXICO **DECEMBER 28, 2018**

En la regla 36(3) RA y en la regla 46(4) RAMC se prevé la posibilidad de que el Tribunal suspenda el procedimiento si éste decide pronunciarse sobre la excepción preliminar en una fase separada. Sin embargo, México considera que es conveniente prever la suspensión automática del procedimiento si el tribunal decide dirimir una excepción preliminar presentada en una fase separada.

Por otro lado, en cuanto a la regla 36(4) RA y la regla 46(5) RAMC, México no está de acuerdo con la obligación de presentar la contestación a la demanda junto con las excepciones preliminares. Tomando en cuenta la relevancia que tiene el escrito de contestación de la demanda, su preparación requiere tiempo y recursos para su presentación resultaría una carga innecesaria para la parte demandada tomando en cuenta que en estos casos se cuestiona la competencia del Centro o la falta de competencia del tribunal, lo cual podría resultar en la terminación de la reclamación. En su lugar, México sugeriría señalar en la regla 36(4) RA y la regla 46(5) RAMC que en el caso de la presentación de una excepción preliminar, el procedimiento debe suspenderse hasta que el tribunal decida si resolverá dicha excepción en una fase separada de conformidad con el párrafo 3 (en el caso de la regla 36(4) RA), o el párrafo 4 (en el caso de la regla 46(5) RAMC).

OMAN **DECEMBER 28, 2018**

Jurisdiction should be first determined before going to the merits of dispute.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that in order to avoid unnecessary delay in the proceedings because of jurisdictional objections, the time limits in AR 36(6) should be shortened to a period not exceeding 90 days. This will expedite the arbitration process.

Qatar recommends amending AR 36(6) to read as follows:

- (6) The Tribunal shall issue its decision on the preliminary objection within ~~90~~ 180 days after the last written or oral submission on the objection.
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Esta regla incluye, respecto de la versión anterior de las Reglas una limitación temporal para someter una excepción preliminar. Es la siguiente: “A menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción (...)” Se trata de una limitación de aplicación muy complicada y que puede introducir inseguridad jurídica. Se recomienda su supresión y establecer únicamente el límite procedimental, según el estadio en que se encuentre el procedimiento

Rule 36(6) needs to make it clear that the shorter time limits for decision on preliminary objections (180 days after the last written or oral submission on the objections) apply only if the Tribunal decides to deal with the preliminary objection in a separate phase pursuant to Rule 37. Otherwise, if the Tribunal decides not to bifurcate the proceeding, and the decision on preliminary objections is joined to the award on merits, the default rule applies that the award shall be rendered no later than 240 days after the last submission (Rule 59(1)(c)).

Rule 36(6)

If the Tribunal decides to address the preliminary objection in a separate phase pursuant to Rule 37, ~~¶~~the Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales

A. Duración prolongada y onerosidad de los procesos

Algunas de las propuestas presentadas por la Secretaría del CIADI implican una reducción del plazo del procedimiento arbitral, lo cual tiene un impacto directo en el costo del procedimiento arbitral.

Se comparten las propuestas de reformas que tienden a reducir los plazos de los procedimientos arbitrales siempre que se mantengan las garantías del procedimiento arbitral.

[see additional comments under AR 35 and AR 37]

Aunque se observa con precaución los efectos que pueden tener otras enmiendas propuestas las cuales permiten optar por la bifurcación en una etapa avanzada del procedimiento. Por ejemplo, la enmienda incluida en la regla Regla 37 (2)(a) establece la opción de bifurcación 30 días siguientes a la presentación del memorial sobre el fondo. La regla 36 (4) propone que “si una de las partes opone una excepción preliminar, también debe presentar su memorial sobre el fondo o contestar el escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere la demanda subordinada”. Estas propuestas merecen un estudio detallado para evitar otorgar un incentivo en el uso de la opción de bifurcación en una fase avanzada del procedimiento arbitral.

[UAE](#) DECEMBER 27, 2018

Rule 41 Preliminary Objections

- (1) Any 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 shall be made as early as possible. A party shall file the objection with the Secretary-General **in cases where the objection is made before the constitution of the tribunal, or, with the tribunal after its constitution** no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time, **then, that party shall state its objection within the time limit agreed upon, or within 14 days of becoming aware of the** facts on which the objection is based **in the absence of such agreement, otherwise that party shall be deemed to have waived its right to object.**
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[THREE CROWNS](#) JANUARY 16, 2019

[see additional comments on proposed AR 35]

The current structure of Rules 35-37 is limited in scope and one-sided insofar as it currently provides a mechanism only for preliminary resolution of certain issues raised by the respondent State. A mechanism that encouraged early resolution of any preliminary issue whose resolution could materially improve efficiency would not only be more balanced but would be more likely to

focus the minds of parties and tribunal members on the questions of efficiency that should be driving questions of structuring the tribunal's decision-making.

On a related drafting point, Rule 36 may generate confusion by its use of the words “preliminary”, “jurisdictional” and “competence”, while omitting any reference to “admissibility”. It is also unclear why objections of jurisdiction or competence (or admissibility) should be described as “preliminary”, as this language seems to prejudge the decision about bifurcation. Equally unclear is why “preliminary” should be joined to the word “objections” – Article 41 of the Convention refers to the Tribunal's discretion to determine whether a “jurisdictional objection” should be dealt with as a “preliminary *question*”.

One way to resolve these issues would be to merge the “lack of legal merit” standard under Rule 35 within the scope of an expanded version of Rule 37 that would address in a more general way the tribunal's authority to identify issues for early decision that can dispense with a claim, defence, or parts thereof and thus offer more possibilities for efficient case-management. Any needed elements from Rule 36 could also be included in this single Rule dealing with “Separate phases for preliminary or other discrete questions”.

One implication of this approach would be that the tribunal would have discretion as to whether to address any proposed issue in a preliminary phase – a discretion that is presently lacking in relation to applications to dismiss a claim for “manifest lack of legal merit” and would continue to be lacking under current draft Rule 35.

ICSID may also consider a number of revisions to Rule 36. For example, as noted in relation to Rule 13, there is a risk that some might construe the word *documents* too narrowly, a risk that would be avoided if it were replaced with the broader phrase *evidential materials*, as documentary evidence is one species only of evidence, as is in fact recognized in Rule 75(2).

In respect of 36(5), we understand the principal intention here is to capture the power of the Tribunal to consider *sua sponte* its jurisdiction. When the Tribunal may do so—the draft provision says “at any time”—is less important as the matter is fully covered by Rule 11(2) and the procedural schedule that will be set out at the First Session and in CMCs. We therefore suggest that “at any time” be deleted.

Finally, the following amendments to Rule 36(2)(i) and (ii) and 36(7) could enhance clarity:

- (i) *the date to file the counter-memorial if the objection relates to the main Claim (as defined in Rule 52); or*
- (ii) *the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim (as defined in Rule 52);*

(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 *to adjudicate*, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision to adjudicate on the objection and fix any time limit necessary for the further conduct of the proceeding.

Rule 37 – Bifurcation

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 37: Bifurcation

[...]

(2) The following procedure shall apply, unless the parties agree otherwise:

~~(a) if the request for bifurcation relates to a preliminary objection, a party shall file the request no later than the filing of the preliminary objection 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 suspend the proceeding on the merits and 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, subject to Rule 8(3).

(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.~~

Commentary

The parties should be allowed to agree to modify the procedure for bifurcation.

A party filing a request for bifurcation related to a preliminary objection should be permitted to make it together with the preliminary objection.

The proceeding on the merits should be suspended pending a decision on bifurcation.

It should be clarified that the time limit for the Tribunal to rule on bifurcation is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

Since the Tribunal should consider all relevant circumstances when deciding whether to bifurcate, mentioning only one of the circumstances that may be relevant is misleading.

The parties should be allowed to agree to modify the procedure for preliminary objections.

The proceeding on the merits should be suspended pending a decision on whether to address a preliminary objection in a separate phase or join it to the merits. If the preliminary objection is addressed in a separate phase, the proceeding on the merits must be suspended. If the Tribunal decides to join the objection to the merits, it should fix any time limit necessary for the further conduct of the proceeding.

If the party filing the preliminary objection does not request the bifurcation of the proceeding pursuant to Rule 37, it should not have to file its counter-memorial on the merits unless and until the Tribunal decides to join the preliminary objection to the merits.

It should be clarified that the time limit for the Tribunal to rule on the objection is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

[AUSTRALIA](#) **JANUARY 22, 2019**

Australia supports AR 37 which allows bifurcation of cases, noting that Tribunals have been reluctant to bifurcate cases which has led to respondents having to plead the merits where material objections to jurisdiction exist.

[AUSTRIA](#) **DECEMBER 21, 2018**

The requirement that a respondent State file a request for bifurcation relating to a jurisdictional objection within 30 days after the filing of the memorial on the merits provides the respondent State with a rather short period of time to analyze the memorial on the

merits to determine the jurisdictional objections that may be raised and whether the jurisdictional objections identified on the basis of the memorial on the merits lend themselves to bifurcation, in particular if the Request for Arbitration is short and accompanied by little supporting evidence. Consideration should be given to extending this period to 60 days and authorizing tribunals to extend the period based on a reasoned request.

Proposed Amended Arbitration Rule [37] introduces detailed provisions regarding requests for bifurcation in that it specifies the procedure to be followed in case of such a request. It does not however specify the grounds which the tribunal should take into account when deciding the requests for bifurcation ((See commentary to the amendments Vol. 3, p. 189, para. 401)).

The proposed changes partially address Austria's proposal to specify the rules regarding the requests for bifurcation.

CANADA DECEMBER 28, 2018

- 1) Canada questions whether the deadline specified in paragraph 2(a) is sufficient for States to be able to understand and fully consider the Memorial and to make a decision, as a government, on whether to seek bifurcation. Such a decision may require several levels of approval, and requiring it to be made in 30 days may make obtaining such approvals difficult. Canada suggests that the time period be extended to 60 days in paragraph 2(a). Canada further suggests that paragraph 2(a) make clear the deadlines, if any, for requests for bifurcation not related to either preliminary objections or ancillary claims. For example, if a party is seeking the bifurcation of a proceeding between damages and merits, it is unclear when it must file its request for bifurcation under the current wording of 2(a).
- 2) The timing in paragraph 2(a) evidences the concerns Canada has with the lack of a suspension of the proceedings in Rule 36 because it would seem that in no circumstance will a decision on a request for bifurcation made after receipt of the Memorial be decided prior to the Counter-Memorial having to be filed. In Canada's experience, the Counter-Memorial is typically the most costly written submission, and it should not have to be filed unless necessary.
- 3) In paragraph 4, only a single relevant factor is specified that might influence whether a tribunal should grant a request for bifurcation, however, in the Working Paper, in paragraph 393, several considerations are listed. Canada suggests that if any considerations are to be listed, then all relevant considerations should be listed. In addition to the factors mentioned in paragraph 393 of the Working Paper, Canada also suggest that the Tribunal be required to bifurcate proceedings if the parties have so agreed.

CHINA **DECEMBER 28, 2018**

Given the fact that the respondent would often raise request for bifurcation, especially based on personal jurisdiction objections or temporal jurisdiction objections, addressing such objections as a preliminary issue would greatly increase the efficiency of arbitration. China therefore proposes that with regard to Rule 36(3) and 37(4), the tribunal shall be encouraged to allow for bifurcation in principle, unless the jurisdiction objections relied upon for the request for bifurcation are manifestly unfounded or closely linked to the merits of the case. In particular, when the respondent raises personal jurisdiction objections or temporal jurisdiction objections and requests for bifurcation, such bifurcation shall be allowed by the tribunal.

COLOMBIA **DECEMBER 28, 2018**

En el párrafo 2 (a) se sugiere que la solicitud de bifurcación se realice dentro de los 30 días siguientes a la presentación del memorial de fondo. Para Colombia este término parece muy corto, ya que, para tomar esta decisión, se debe analizar a profundidad el caso y existe una alta probabilidad de que los 30 días no sean suficientes. En este sentido, Colombia sugiere una ampliación del plazo a 60 días.

En adición a lo anterior, Colombia considera que el párrafo (2)(a) únicamente debe aplicarse en los casos en los que las partes no han acordado previamente los tiempos y forma en los que se presentará y decidirá la solicitud de bifurcación relativa a una excepción preliminar.

En todo caso, al recibir una solicitud de bifurcación relativa a una excepción preliminar, el procedimiento debe suspenderse hasta tanto no se resuelva la solicitud. Para solicitudes de bifurcación no relativas a la jurisdicción, se sugiere dar la posibilidad a la parte solicitante de pedir la suspensión para asegurar la equidad procesal entre las partes.

En el párrafo (4) cuando se menciona que se tendrán en cuenta todas las circunstancias pertinentes, se debería incluir la posibilidad de bifurcación “por acuerdo de las partes”.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica notes based on its experience that, on matters of bifurcation, flexibility has a lot of value and the analysis should be done on a case by case basis. It is important that parties can mutually agree to bifurcate the process from the beginning of the proceeding or at any moment according to each case’s characteristics.

If the parties do not reach an agreement, they should have enough time to decide whether to seek bifurcation as stated in paragraph 2 (a), and to respond to a request for bifurcation, as indicated in paragraph 2(b). Furthermore, the proceedings on the merits should be suspended when bifurcation is requested, to provide the necessary space to the respondent party to reply.

GEORGIA **DECEMBER 28, 2018**

Comment to the Rule 37(2)(a):

As specified in paragraph 390 of the Working Document, bifurcation might also relate to “other issues”, for example, “bifurcating consideration of merits into liability and quantum phase.” The procedure provided in paragraph 2(a) of Rule 37 only contemplates bifurcation related to preliminary objections and ancillary claims omitting the possibility of bifurcation regarding the quantum and creating a gap regarding the relevant procedure and time limits for requesting bifurcation in such cases.

If our understanding regarding the above is correct, we believe the wording of this clause should be amended in a way to also contemplate cases of bifurcation relating to issues other than preliminary objections and ancillary claims.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

It is important for the respondent State that certain time periods be extended. **T**he seven-day period to file a response to a request for disqualification under AR 29 (AF 39) is not workable for a State. The thirty-day period to request bifurcation of preliminary objections in AR 37 (AF 47) is also very tight. Same for the thirty-day period in the request for summary dismissal.

HUNGARY DECEMBER 28, 2018

In the spirit of its comments made to Rule 9 above, Hungary believes that it would be appropriate to make clear in the wording of Rule 37 that the Tribunal may not disregard an agreement reached by the parties to bifurcate the proceedings.

INDONESIA DECEMBER 28, 2018

In its commentary, the Secretariat noted that various Contracting States had argued that bifurcation should be admitted more often or should be automatic.

Rule 37 establishes a period of 30 days after the presentation of the memorial on the merits by the Claimant for the Respondent State to present a request for bifurcation. This could be interpreted by Claimants to mean that they are always permitted to present their full memorial on the merits prior to any request for bifurcation being presented by the Respondent State. Experience shows that, once a Claimant is permitted to submit a full memorial on the merits, the probability that a Tribunal bifurcates the proceeding to deal first with jurisdictional objections, is diminished substantially. A further problem is that this time-limit applies to all requests for bifurcation. Thus, the time for the Respondent State to consider its request for bifurcation, and fully develop its arguments in this regard, is very short. In our experience, it may be difficult to develop fully a strong argument for bifurcation of such preliminary objections within the very short 30-day window, placing Respondent States at a disadvantage, leading perhaps to requests for bifurcation being rejected when, with more developed argumentation and consideration, they should and would be granted.

ISRAEL DECEMBER 27, 2018

Israel believes that in addition to the provision in paragraph (4), the Tribunal should consider whether bifurcation would materially reduce the time and cost of the proceeding, the tribunal should also "consider whether the avoidance of bifurcation would increase the time and cost of the proceeding.". when deciding for bifurcation according to paragraph (4), the Tribunal shall consult with both Parties and allow them to present their case regarding the decision.

We would also suggest allowing bifurcation at the request of both Parties to the dispute.

MEXICO **DECEMBER 28, 2018**

México considera ampliar el plazo de 30 días previsto en la regla 37(2)(a) RA, y regla 47(2)(a) RAMC, en virtud de dicho plazo no es tiempo suficiente para analizar el memorial y preparar la presentación de una solicitud para bifurcar el procedimiento.

QATAR **DECEMBER 19, 2018**

Qatar takes the view that the current rule does not provide any further details if the parties agree to bifurcate.
Qatar takes the view that AR 37 should be amended to provide that if both parties agree to bifurcate, then the tribunal should respect and implement the said agreement of the parties.

SLOVAK REPUBLIC **DECEMBER 22, 2018**

Bifurcation – we appreciate this option, as it might make the proceeding more efficient.

TOGO **DECEMBER 28, 2018**

L'article ne précise pas les éléments d'appréciation par les arbitres de l'opportunité de la bifurcation. L'expression « ensemble des circonstances pertinentes » est vague.

Aussi, l'article ne précise pas si la même partie peut introduire plusieurs demandes de bifurcation. Dans ce cas, quelle serait la suite à donner à de telles demandes.

Des précautions doivent être prises pour éviter que la bifurcation ne serve de moyen pour extraire une question importante de l'analyse au fond.

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales**A. Duración prolongada y onerosidad de los procesos**

Algunas de las propuestas presentadas por la Secretaría del CIADI implican una reducción del plazo del procedimiento arbitral, lo cual tiene un impacto directo en el costo del procedimiento arbitral.

Se comparten las propuestas de reformas que tienden a reducir los plazos de los procedimientos arbitrales siempre que se mantengan las garantías del procedimiento arbitral.

El recurso a la bifurcación, cuando este no es estrictamente necesario, es señalado en las estadísticas presentadas por la Secretaría del CIADI como un factor que prolonga innecesariamente el procedimiento arbitral. Por lo que toda propuesta que limite la opción del recurso a la bifurcación será una contribución a la reducción de los plazos de los procedimientos y por ende de los costos.

[see additional comments under AR 35]

Aunque se observa con precaución los efectos que pueden tener otras enmiendas propuestas las cuales permiten optar por la bifurcación en una etapa avanzada del procedimiento. Por ejemplo, la enmienda incluida en la regla Regla 37 (2)(a) establece la opción de bifurcación 30 días siguientes a la presentación del memorial sobre el fondo. La regla 36 (4) propone que “si una de las partes opone una excepción preliminar, también debe presentar su memorial sobre el fondo o contestar el escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere la demanda subordinada”. Estas propuestas merecen un estudio detallado para evitar otorgar un incentivo en el uso de la opción de bifurcación en una fase avanzada del procedimiento arbitral.

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

Finally, we draw your attention to the suggestions we made in March 2017 that have not been adopted in the current draft of the Proposed Amendments, but which may merit further consideration.

[additional comments on proposed AR 4, 50]

Second, in order to achieve greater efficiency and active case management through the entire proceedings, ICSID should adopt Rules that require the tribunal to set aside sufficient time for conferencing and deliberation throughout the course of the proceedings, not only after the hearing (*see Proposed Arbitral Rule 16(4)*). In order to be effective, these commitments, including the fixing of actual dates for deliberation, should be incorporated into the standard draft of Procedural Order No. 1.¹² ICSID should also require that the tribunal set the entire schedule for the arbitration at the first procedural conference, which would include a decision on whether to bifurcate or trifurcate the proceedings (*see Proposed Arbitral Rule 37*).¹³ To incentivize the tribunal, ICSID should adopt a fee scale for arbitrators, in line with those used by other arbitral institutions, that takes into consideration the diligence and efficiency of the tribunal in light of the circumstances of the case.¹⁴
[additional comments on proposed AR 50, 63]

THREE CROWNS

JANUARY 16, 2019

[see additional comments on proposed AR 35]

The current structure of Rules 35-37 is limited in scope and one-sided insofar as it currently provides a mechanism only for preliminary resolution of certain issues raised by the respondent State. A mechanism that encouraged early resolution of any preliminary issue whose resolution could materially improve efficiency would not only be more balanced but would be more likely to focus the minds of parties and tribunal members on the questions of efficiency that should be driving questions of structuring the tribunal’s decision-making.

On a related drafting point, Rule 36 may generate confusion by its use of the words “preliminary”, “jurisdictional” and “competence”, while omitting any reference to “admissibility”. It is also unclear why objections of jurisdiction or competence (or admissibility) should be described as “preliminary”, as this language seems to prejudge the decision about bifurcation. Equally unclear is why “preliminary” should be joined to the word “objections” – Article 41 of the Convention refers to the Tribunal’s discretion to determine whether a “jurisdictional objection” should be dealt with as a “preliminary *question*”.

One way to resolve these issues would be to merge the “lack of legal merit” standard under Rule 35 within the scope of an expanded version of Rule 37 that would address in a more general way the tribunal’s authority to identify issues for early decision that can dispense with a claim, defence, or parts thereof and thus offer more possibilities for efficient case-management. Any needed elements from Rule 36 could also be included in this single Rule dealing with “Separate phases for preliminary or other discrete questions”.

One implication of this approach would be that the tribunal would have discretion as to whether to address any proposed issue in a preliminary phase – a discretion that is presently lacking in relation to applications to dismiss a claim for “manifest lack of legal merit” and would continue to be lacking under current draft Rule 35.

[see additional comments on proposed AR 36]

Rule 38 – Consolidation or Coordination on Consent of Parties

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

Pour le paragraphe 40 : La procédure de consolidation des instances, proposée par l’article 38 bis, présente des inconvénients pour les différents acteurs, que ce soit pour les parties ou pour les arbitres :

Pour les parties, lorsque celle-ci n’est pas concernée que par une question de portée restreinte, elle sera contrainte d’attendre la fin d’une instance arbitrale plus longue et plus complexe.

Pour les arbitres, la question de prise en charge de la rémunération de l’arbitre, si elle ne pose aucun problème en présence d’une consolidation, elle pourrait être plus délicate à régler en présence d’une intervention, notamment forcée.

ARGENTINE REPUBLIC DECEMBER 28, 2018

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 and make any recommendations and suggestions aimed at if the consolidation or coordination requested would promoting a fair and efficient resolution of all or any claims asserted in the arbitrations.

Commentary

When taking all necessary administrative steps to implement the agreement of the parties on consolidation or coordination, the Secretary-General may make any recommendations and suggestions aimed at promoting a fair and efficient resolution of all or any claims asserted in the arbitrations.

ARMENIA DECEMBER 28, 2018

Consolidation of multiple disputes into a single arbitration proceeding is considered progress with respect to the efficiency of the arbitration process. However, arguments against consolidation made by some commenters focus on: (i) lack of the parties' consent; (ii) non-participation in the appointment of the arbitral tribunal; (iii) potential infringements of a party's substantive rights; (iv) allocation of arbitral fees and other costs; and (v) general lack of efficiency. While we acknowledge the progressive nature of consolidation mechanism in arbitration that is to ensure efficiency and saving of costs and time, we strongly believe that "voluntary" consolidation under Rule 38 completely addresses situations of multiple claims that might be joined for efficiency purposes. Therefore, the Republic of Armenia supports proposals advising the Secretariat to consider consolidation as a sole discretion of responding Contracting States and modify AR 38BIS accordingly.

AUSTRALIA JANUARY 22, 2019

Australia also welcomes AR 38 which proposes a new rule for consolidation or coordination of claims, with the consent of the parties.

AUSTRIA DECEMBER 21, 2018

The proposed consolidation provisions may somewhat contribute to avoiding inconsistent and conflicting decisions and achieve cost savings. The proposed mandatory consolidation (Amended Arbitration Rule 38BIS) however raises conceptual problems.

Voluntary Consolidation

- Amended Arbitration Rule 38 provides for consolidation with consent of the parties of proceedings of two or more pending arbitrations administered by ICSID, including arbitrations conducted under different arbitral rules, or *ad hoc* arbitrations. Amended Arbitration Rule 38 largely corresponds to existing practice of ICSID tribunals and is included for the sake of clarity.

Mandatory Consolidation

- Amended Arbitration Rule 38BIS providing for mandatory consolidation is proposed in the Working Paper for discussion, but not included in the Consolidated Draft Rules. Mandatory consolidation could be ordered upon unilateral request for consolidation by a single “Consolidating Arbitrator” to be selected by the Secretary-General from the ICSID Panel of Arbitrators.
- Proposed Amended Arbitration Rule 38 BIS resembles the consolidation provisions included in numerous investment treaties, such as Article 1126 NAFTA.
- The ICSID Convention does not contemplate consolidation, and mandatory consolidation may subject the parties to the jurisdiction of an arbitral tribunal for which they may not be in a position to appoint an arbitrator. The Contracting Parties to investment treaties that provide for ICSID arbitration without providing for consolidation consented to submit disputes to ICSID arbitration on the basis that they may appoint an arbitrator to the tribunal that will decide claims brought against them. Serious consideration should be given to the question whether consent to mandatory consolidation should be required in the instrument that contains the respondent State’s consent to ICSID arbitration, as opposed to assuming such consent from the fact that the Contracting Parties previously agreed to ICSID arbitration.
- The expected benefits of mandatory consolidation, avoidance of inconsistent awards and duplication of proceedings, may be limited since proposed Amended Arbitration Rule 38BIS would apply only to arbitrations pending under the ICSID Convention Arbitration Rules, thus excluding parallel proceedings under different arbitral rules.

Query whether introducing provisions for mandatory consolidation by order would be of interest – this provision is for discussion of members, and is not currently proposed for inclusion unless Member States so indicate.

CANADA **DECEMBER 28, 2018**

1) With respect to paragraph 3 of this proposed Rule, Canada does not think that it is appropriate for the Secretary-General to be the one judging if the requested consolidation or coordination would promote a fair and efficient resolution of claims. This is a decision for the parties to make, with the advice (rather than the approval) of the Secretary-General. Hence, Canada suggests that this paragraph be reworded to say “The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties, and shall work with the parties to ensure that the consolidation or coordination requested will promote a fair and efficient resolution of all or any claims asserted in the arbitrations.”

On Rule 38BIS

1) Canada supports a provision on mandatory consolidation, as proposed in Rule 38BIS.

2) With respect to paragraph 7, Canada suggests that it would be wasteful for an individual arbitration to proceed, only if it is to be later consolidated and that at the very least, the decision cannot be left to the original tribunal, which may be reluctant to stay its proceedings. Hence, Canada suggests that the paragraph be reworded to say “Pending the order on consolidation, each arbitration sought to be consolidated shall 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.” Or, “Pending the order on consolidation, each arbitration sought to be consolidated may be suspended by the Consolidating Arbitrator.”

CHINA **DECEMBER 28, 2018**

China noticed that Rule 38BIS of the Working Paper-Consolidation by Order stipulates mandatory consolidation. China proposes that consolidation shall be based on the parties’ consent, given the fact that disputes involving multiple parties may give rise to complex facts and legal issues (such as standing of the claimants based on different treaties or the different procedural requirements in multiple treaties). China therefore believes it more appropriate to have a non-binding guidance.

COLOMBIA **DECEMBER 28, 2018**

Con respecto al párrafo (3) de esta Regla propuesta, Colombia no cree que sea apropiado que el Secretario General sea el que juzgue si la consolidación o coordinación solicitada promovería una resolución justa y eficiente de las reclamaciones. Esta es una decisión que

las partes deben tomar, con el asesoramiento (en lugar de la aprobación) del Secretario General. Por lo tanto, Colombia sugiere que este párrafo se redacte de la siguiente manera: “El Secretario General tomará todas las medidas administrativas necesarias para implementar el acuerdo de las partes, y trabajará con las partes para asegurar que la consolidación o coordinación solicitada promueva un proceso justo y eficiente de todas o cualesquiera reclamaciones presentadas en los arbitrajes”.

Regla 38BIS

Colombia está de acuerdo con esta propuesta. Sin embargo, considera que en el párrafo (7) debe ser obligatorio proceder con la suspensión de los procedimientos paralelos e independientes, mientras se encuentre pendiente la decisión sobre consolidación. En este sentido, se sugiere que la redacción de ese párrafo quede: “Mientras se encuentre en espera la orden de consolidación, cada arbitraje que se busca consolidar debe ser suspendido por el Tribunal de cada caso Árbitro de Consolidación...”.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica agrees with the alternative set out in Rule 38, as we consider that it provides more flexible process for the consolidation of arbitration processes and allows for deciding consolidation rules on a case by case basis.

On Rule 38BIS

Costa Rica prefers the first option to this rule.

EU **DECEMBER 21, 2018**

The European Union and its Member States consider that consolidation can be a useful tool for respondents when faced with multiple claims on similar facts or abusive litigation tactics. Further advantages of consolidation are that costs can be reduced and that the risk of inconsistent interpretations and of conflicting or contradictory awards is avoided.

The European Union and its Member States are willing to engage with ICSID Members in further reflections on introducing, under certain well-defined conditions, the possibility of mandatory consolidation.

HUNGARY**DECEMBER 28, 2018**

Hungary welcomes the proposed rules on consolidation and coordination.

Nevertheless, Hungary would favor the addition of wording to make it clear that in the absence of the parties' agreement to consolidate or coordinate certain arbitration proceedings, tribunals empanelled to hear the given proceedings should be prevented from coordinating with each other.

INDONESIA**SEPTEMBER 26, 2018**

On consolidation, Indonesia considers voluntary consolidation under Rule 38 as sufficient enough to address situations of multiple claims that might be joined for efficiency purposes. In this regard, Indonesia considers that the optional proposed mandatory consolidation under Rule 38BIS as unnecessary.

Nevertheless, Indonesia may be amenable to the optional Rule 38BIS (to replace Rule 38) only if this rule is modified so that it may only be triggered by a responding Contracting State, and not by a claimant that is a national of the other Contracting State. We consider consolidations to be the sole discretion of responding Contracting States. Furthermore, having this rule reliant on the discretion of claimant investors will boost frivolous claims, hence this will not be in the best interest of host Contracting States. Please find below our proposed modification for the current Rule 38BIS proposal.

Rule 38BIS**Consolidation by Order**

- (1) A **Contracting party State** may request full or partial consolidation of two or more arbitrations (“the individual arbitrations”) pending under the ICSID Convention Arbitration Rules.
- (2) [...]
- (3) A **Contracting party State** 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) [...]

ISRAEL **DECEMBER 27, 2018**

Israel believes that the decision whether or not to consolidate should remain under the mandate of the Parties and that the Secretary-General's discretion should be minimal.

We also reckon that there should be some reference to the procedural aspect of such procedure.

Israel believes that consolidation by order should only take place as a result of the request of the State Party to the dispute. In addition, we would like to add in the end of the current text of subparagraph 6(b): "*...nor have the nationality of a state not having diplomatic relations with the State party to the dispute or the State whose national is a party to the dispute*".

In order to prevent additional claimants joining a consolidated claim, we suggest inserting a new paragraph 7: *The Consolidating Arbitrator may only consolidate arbitrations specified in subparagraph 3(a)*

SINGAPORE **JANUARY 4, 2019**

We strongly support this proposal. The respondents in ISDS cases are always States, and it is likely that some types of measures by a State may trigger numerous claims from investors arising from that same measure. It would be beneficial to a State, from a process or cost-management perspective, to be able to propose consolidating several parallel claims to be dealt with under one common set of proceedings.

On Rule 38BIS

We wish to seek further information/statistics from the Secretariat, if available, regarding the frequency of use of voluntary consolidation procedures in investment treaties in the ISDS disputes that ICSID has administered thus far. If voluntary consolidation provisions are virtually unused, it may indicate that there is difficulty obtaining party consent, and thus suggest that "mandatory" consolidations upon application by one party is useful. This information would be helpful for Singapore's consideration of this proposed rule.

En este punto, ES considera que la **acumulación o consolidación debe ser voluntaria** para las partes.

Proposal:

- 1) Where two or more claims have been submitted separately to arbitration to the Centre and the claims have a question of law or fact in common, and arise out of the same events or circumstances, parties to the arbitrations ~~Parties to two or more pending arbitrations administered by the Centre~~ may request, by mutual agreement, agree to consolidate or coordinate these arbitrations.
- (2) The parties seeking the consolidation or coordination order as 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, unless it finds that the request is manifestly unfounded, ~~if the consolidation or coordination requested would promote~~ in the interest of a fair and efficient resolution of all or any claims asserted in the arbitrations.
- (4) Where applicable, and unless all the disputing parties otherwise agree, the Tribunal for the consolidated arbitration shall be comprised by three arbitrators and be established in accordance with Article 37(2)(b) of the Convention. If the Tribunal has not been constituted within [45] days after the Secretary-General receives a request made under paragraph (1), the Chairman shall appoint the arbitrators not yet appointed in accordance with Article 38 of the Convention.
- (5) A claimant that has submitted a claim to arbitration to the Centre and has not been named in the request made under paragraph (1) may make a written request to the tribunal that it be included in any consolidation or coordination order, and shall deliver a copy of its request to the Secretary-General. The request shall specify:
 - (a) the name and address of the claimant;
 - (b) the nature of the order sought; and
 - (c) the grounds on which the order is sought.
- (6) At the request of a disputing party, the consolidating Tribunal may take such measures as it sees fit in order to preserve the confidential or protected information of that disputing party in relation to other disputing parties. Those measures may include the submission of redacted versions of documents containing confidential or protected information to the other parties or arrangements to hold parts of the hearing in private.

Comment: The proposed Rule 38 covers consolidation or coordination by consent of the parties to the dispute. Amendments to paragraph 1 remark the fact that the request refers to pending claims that have a question of law or fact in common, and arise out of the same events or circumstances. Paragraph 3 highlights the power of the Secretary-General to reject the request out of hand if it turns to be manifestly unfunded. The proposed paragraph 4 addresses the composition of the tribunal for the consolidated arbitration. Furthermore, paragraph 5 includes the presence of another claimant that has not been included in the request for consolidation or coordination of claims. This is in line with states' practice in modern investment treaties. Finally, paragraph 6 recognizes legitimate claims to preserve confidential information of one party in relation to other parties.

STEPTOE **DECEMBER 28, 2018**

9.1 First, we support the inclusion of a coordination provision as well as a consolidation option. We also agree with ICSID that mandatory consolidation is not desirable. While some may argue that such consolidation promotes efficiency and consistency, we believe that reliance on party consent is a better approach. It is not only States that may object to consolidation but claimants whose interests are significantly different. Smaller claimants may, for instance, fear that their case will be given short shrift by a consolidated tribunal in favor of the claims of larger claimants. Moreover, mandatory consolidation that turns on the type of criteria identified in Rule 38BIS sets a relatively low bar and can result in parties with significantly different interests and circumstances being forced into a joint proceeding. While we are therefore not in favor of mandatory consolidation, we would, however, support provisions that encourage parties involved in cases arising out of the same circumstances to explore coordination or even, depending on the degree of convergence, consolidation.

THREE CROWNS **JANUARY 16, 2019**

The introduction of a specific rule permitting parties to consolidate or coordinate proceedings is welcome progress. The duty of consultation in Rule 11(2) does not expressly extend to the Secretary-General, hence we propose the following addition (which merely codifies normal practice):

*(3) The Secretary-General, **having consulted with the parties and the tribunals involved**, 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.*

Chapter VI – Evidence

Rule 39 – Evidence: General Principle

CANADA DECEMBER 28, 2018

1) Canada suggests that a paragraph be added to this Rule that makes clear that the Claimant has the burden of proving all of the elements of its claims, as required by general principles of international law.

HELLENIC REPUBLIC DECEMBER 28, 2018

The Tribunal shall determine the claims / assertions that need to be proved.

Each party should prove its own claims / assertions and the other party should be entitled to submit counter-evidence.

Arbitrators should not have any jurisdiction to interpret national consumer-related laws or fundamental rights, even when the interpretation of the treaty empowers them to interpret national law, or it is necessary to interpret national law in order to understand the treaty. In such cases recourse to the courts of appeal or the supreme court of the national judicial systems should be mandatory.

TUNISIA DECEMBER 27, 2018

Serait-il peut être plus opportun de trancher dans cet article relatif à la preuve la question de la légalité des preuves avancées au tribunal. Il s'avère que dans plusieurs affaires, certaines parties apportent des preuves collectées de manières illicites. Bien que rien n'empêche un tribunal d'admettre en preuve des documents qui peuvent avoir été volés ou obtenus illégalement, les tribunaux peuvent refuser d'admettre ces documents sur les motifs d'équité procédurale et l'égalité des parties. En présence des deux interprétations dégagées par la jurisprudence arbitrale internationale et dans un souci de clarté, la question est à aborder.

We understand the purpose of the provision is to affirm the tribunal’s discretion and note that there is a risk that this purpose may be undermined or at least clouded by the use of the mandatory phrase “shall determine”. This risk could be eliminated by retaining the language of the current Rule 34(1) or amending the text to read something like “*The Tribunal shall have discretion to determine...*”

Rule 40 – Tribunal Order to Produce Documents or Other Evidence

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, but not limited to, the burden of proof of the requesting party, the efforts made by the requesting party to obtain the requested evidence through its own means, 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.

Commentary

It should be clarified that the list of circumstances to be considered by the Tribunal for the purposes of deciding a dispute on a request for production of documents and evidence is not exhaustive. Other relevant circumstances should be listed by way of illustration, as proposed above.

We propose to consider introducing the 'adverse inferences' principle under the IBA Rules on the Taking of Evidence in International Arbitration into this Rule.

CANADA **DECEMBER 28, 2018**

1) Canada shares the concerns noted in the comments in the Working Paper that document production has become too extensive, too burdensome and too costly. Canada believes that further guidance needs to be provided to Tribunals on how to manage document production, and particularly their right to refuse document production requests. Canada suggests that an initial step in these Rules might be to expressly introduce the idea of the power of the tribunal in this regard in the second sentence by having it read “In deciding whether to grant, deny, limit or otherwise modify a party’s request for production of documents or other evidence, the Tribunal shall consider....” Consideration should also be given to including more substantive criteria (e.g., “the relevance and materiality of the documents and evidence requested and the potential impact on the outcome of the dispute”) in order to emphasize the concern for avoiding costly and burdensome document discovery.

CHINA **DECEMBER 28, 2018**

Protection of Confidential Information. As the investment disputes may involve information of national secrets relating to government measures under dispute, the disclosure of which the respondent considers contrary to its essential security. Such information shall be protected from disclosure.

China therefore proposes to add the following rule: The respondent shall not be required to disclose information involving national secrets, the disclosure of which the respondent considers contrary to its essential security. The tribunal may not draw adverse inference based on the fact that such information is not disclosed by the respondent.

COLOMBIA **DECEMBER 28, 2018**

Colombia acoge los comentarios expresados en el Documento de Trabajo párrafos 423 a 428, en el sentido en el que la fase de producción de documentos se ha vuelto costosa en términos de tiempo y esfuerzo para ambas partes. En este sentido, Colombia sugiere que los Tribunales tengan herramientas suficientes para abordar las controversias respecto de la solicitud de documentos, y que se adopten criterios más sustantivos para estas decisiones tales como, la relevancia del documento solicitado, el impacto en la controversia, entre otras. Lo anterior pretende evitar, como se indicó, el gasto en tiempo y dinero, así como la imposición de cargas adicionales a las Partes.

FRANCE **JANUARY 14, 2019**

« (...) ~~le fardeau~~ **la charge** que représente une telle production ainsi que toutes objections soulevées par l'autre partie ».

SPAIN **DECEMBER 21, 2018**

El artículo 43.a) del Convenio establece la facultad del Tribunal para solicitar documentos u otra evidencia. La regla 39 reitera esta facultad para ordenar de oficio la exhibición de “documentos u otros medios de prueba”

Ahora bien, consideramos necesario puntualizar lo siguiente:

- o Que se exija la presentación de documentos u escritos presentados en otro arbitraje puede vulnerar la confidencialidad.
 - o La exhibición de documentos ordenada por el Tribunal puede entrar en conflicto con la legislación nacional al respecto.
 - o Tal y como han expresado numerosas delegaciones, la presentación de documentos se ha convertido en una tarea muy costosa, y en numerosas ocasiones, excesiva.
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UKRAINE **DECEMBER 28, 2018**

Rule 40(2) of the ICSID Draft empowers the Tribunal to order, on its own initiative, a party to produce documents or other evidence; Rule 42 empowers the Tribunal to appoint independent experts.

The new Rule 40(2) appears to be a recast Rule 34(2)(a) of the effective Arbitration Rules with one significant modification: the new Rule 40(2) expressly empowers the Tribunal to act on its own initiative. Rule 42 appears to have no counterpart at all in the effective Arbitration Rules.

The proposed new inquisitional powers of the Tribunal are not fully consistent with the adversarial nature of arbitration and may frustrate parties' expectations of the conduct of arbitration.

Notably, the practical application of Rule 40(2) may result in undesirable outcomes where the Tribunal orders one party to produce a document material to the dispute (the materiality may be to the point of being dispositive for the entire arbitration) which the other

party, by omission, has failed to request. In doing so, the Tribunal may play in the hands of one party to the detriment of the other, and that may give rise to due process concerns.

Rule 40(2)

~~The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.~~

DENTONS DECEMBER 21, 2018

Consider adding the word “other” in the second sentence so that it reads, in relevant part, as follows: “[...] the relevance of the documents and **other** evidence requested, the time [...]”

JAIME, MARGIE-LYS DECEMBER 27, 2018

Proposal:

- (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.
- (3) The parties shall cooperate with the tribunal in the production of evidence. The Tribunal shall take formal note of the failure of a party to comply with its obligation under this paragraph and of any reasons given for such failure.

Comment: Paragraph 3 was deleted from the proposed Rule 40 (prior Rule 34(3)); however, it is a key element for persuading the parties to cooperate with the production of evidence in a more specific manner than the proposed Rule 11(4) regarding the Tribunal’s and parties’ general duties. Therefore, we suggest to keep the language.

Document production is one of the most costly and time-consuming aspects of arbitration proceedings, and Rule 40 could do more to ensure that document production is focused and no more costly than necessary. A particularly significant change in Rule 40 is the lowering of the standard for a tribunal to order production. Article 43 of the ICSID Convention and Rule 34(2) of the current ICSID Rules grant the tribunal the power to order production where “necessary”. In practice, this has generally been understood to be identical to the phrase “relevant to the case and material to its outcome” found in the IBA Rules. However, Rule 40 directs the tribunal to consider only “the relevance of the requested documents and evidence”, and not also to require materiality, thus opening the door to significantly more numerous and expansive document requests.

The existing laconic text has been generally working in practice, with parties and tribunals filling the gap by reference to international practice and/or the IBA Rules that attempt to codify that practice. In this context, we would counsel prudence in making any changes to the language. In this respect, as noted in separate correspondence, the IBA are presently considering whether amendments to the existing IBA Rules are necessary, and it may be helpful for ICSID to benefit from any insights that emerge from that review process.

We also note that Rule 40 is also silent about when and how requests to produce are to be made and decided. While Rule 34(h) provides for this topic to be addressed at the First Session, it would be helpful if Rule 40 made clear (like the IBA Rules do) that, absent exceptional circumstances, requests to produce may only be made at the time foreseen in the procedural calendar. As drafted, Rule 40(1) risks being interpreted as allowing parties to request documents at any point and requiring the tribunal to rule on such applications if they are disputed.

Rule 41 – Witnesses and Experts

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 together with the written submission to which it relates. The statement shall identify the witness, contain the evidence of the witness and be signed and dated.

[...]

Commentary

It should be clarified that the written statement by a witness or an expert should be filed together with the party's written submission to which it relates.

FRANCE **JANUARY 14, 2019**

As arbitrators, experts appointed by disputing parties or tribunals should submit a declaration of independence and neutrality disclosing their relations, past or present, direct or indirect, with the disputing parties, their counsels, tribunal members or any third interested party (*e.g.* insurer or funder).

GUATEMALA **DECEMBER 28, 2018**

Debido a que la regla abarca tanto a testigos como a peritos, es preciso incluir la palabra perito de la manera que se indica en la casilla izquierda.

Regla 41
Testigos y Peritos(as)

- “(…) (2) Un o una testigo /o perito/ que haya presentado una declaración escrita podrá ser interrogado(a) durante una audiencia. (…)
- (4) Un o una testigo /o perito/ 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 /o perito/ 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. (…)”.
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QATAR **DECEMBER 19, 2018**

Qatar takes the view that the proposed rules should be amended to encourage tribunals to adopt procedures for examining witnesses and experts at the hearing to ensure the most efficient resolution of the issues, including the use of (i) written witness statements as direct testimony, and (ii) conferencing/ debate among experts.

El apartado 2 establece que un “**un testigo...podrá ser interrogado durante la audiencia**” y que el “el Tribunal determinará la manera en que se lleve a cabo el interrogatorio”.

La redacción de la regla actual sobre los testigos (35.1) establece que los testigos *serán* interrogados.

A nuestro juicio, el cambio de redacción puede ser interpretado por algún Tribunal como que es facultad del Tribunal autorizar que un testigo sea interrogado por una parte.

Suponemos que esta no ha sido la intención al redactar la nueva norma, por lo que agradecemos que se modifique el texto para evitar interpretaciones equivocadas. Con objeto de asegurar la legitimidad de un proceso, un testigo debe poder ser interrogado si una parte lo desea.

The phrase “another means of examination” is ambiguous as to whether it seeks to capture a different process altogether (*e.g.*, correspondence with the witness under the control of the Tribunal) or just appearance via video- or telephonic conference. The latter appears more likely, and is captured by the alternative wording “non-personal appearance”:

(5) A witness shall be examined in person unless the Tribunal determines that ~~another means of examination a different process or non-personal appearance~~ is appropriate in the circumstances.

We also propose a new paragraph 41(9) be added to the effect that: “In the event of a dispute whether a person is to be regarded as a witness or an expert, the Tribunal shall decide.” This provision would cover cases where a party proffers testimony as expert opinion but the other side disputes the characterization on the basis that the witness is in fact testifying as to facts and not opinion.

Rule 42 – Tribunal-Appointed Experts

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 42: Tribunal-Appointed Experts

(1) The Tribunal, upon a party's request or, unless the parties disapprove, on its own initiative, may appoint one or more independent experts to report to it on specific matters addressed by the parties in the proceeding.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including, but not limited to, on the background and qualifications of the expert, the terms of reference of the expert, the candidates that are being considered and their budgets, and any other relevant information for the appointment of the expert. When deciding whether to appoint an expert and who should be selected for that position, the Tribunal shall endeavour not to unnecessarily increase the cost of the proceeding.

[...]

(5) Either party may challenge the Tribunal-appointed expert for justified reasons.

(56) Rule 41(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal appointed expert.

Commentary

An expert may be appointed by the Tribunal upon a party's request or, unless the parties disapprove, on its own initiative. The Tribunal-appointed expert should only report on matters addressed by the parties in the proceeding.

The Tribunal should consult with the parties on any relevant information for the appointment of the expert, as proposed above.

The Tribunal should be mindful of costs when deciding whether it is necessary to appoint an expert and selecting the expert.

The parties should have the right to challenge the Tribunal-appointed expert for justified reasons.

CANADA **DECEMBER 28, 2018**

1) Canada is concerned that this Rule, as it is broadly drafted, could be used by Tribunal's in a way that eliminates the fact that a party bears the burden of proving its own positions. In Canada's view, where a party has failed to meet its burden of proof, it is inappropriate for the Tribunal to itself appoint an expert who can, in a fashion, assist the failing party. As such, any such appointment should be limited to ensure that the tribunal is not overstepping its role.

2) Further, the appointment of an independent expert by the Tribunal will increase the cost of a dispute, and thus it should be subject to the joint control of the parties. Specifically, if both parties disapprove of such appointment it should not be permitted. In addition, the work should be subject to the terms and conditions imposed by the disputing parties, rather than simply adopted in consultation with them.

3) In light of the above, we suggest that paragraph 1 be rewritten to say "Unless the disputing parties agree otherwise, the Tribunal may appoint one or more independent experts to report to it on a specific issue raised by a disputing party in a submission."

4) We also suggest that paragraph 2 be rewritten to say "The Tribunal shall consult with the parties on the appointment of an expert, and shall ensure that any expert respects any terms and conditions on which the disputing parties may agree."

COLOMBIA **DECEMBER 28, 2018**

En general a Colombia le preocupa esta propuesta. La regla en este tipo de disputas, es que los Tribunales tienen el deber de dictaminar con las pruebas presentadas por las partes, y si una de ellas falla en probar su caso, el Tribunal no debe subsanar ni asistir a ninguna de las partes en la prueba de su argumento.

Además, se parte de la premisa según la cual los Tribunales deben ser capaces de entender y decidir sobre la información proporcionada por las partes. A Colombia le preocupa que, al nombrar a un experto, el Tribunal pueda delegar su deber de decidir el caso.

Adicionalmente es preocupante que los términos de referencia al designar a estos expertos superen las facultades de los Tribunales y reemplacen la carga que tiene cada una de las partes para demostrar su caso.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica considers that the appointment proposed might increase the costs of the procedure and has the potential to tilt the burden of proof of the parties. Therefore, Costa Rica suggests that this rule includes a requirement to justify the appointment of the experts by the tribunal and maintain the consultation with the disputing parties as well as the possibility to comment on the expert report.

Rule 42
Tribunal-Appointed Experts

(1) [CR: Under justified circumstances] the Tribunal may appoint one or more independent experts to report to it on specific matters. [...]

FRANCE **JANUARY 14, 2019**

As arbitrators, experts appointed by disputing parties or tribunals should submit a declaration of independence and neutrality disclosing their relations, past or present, direct or indirect, with the disputing parties, their counsels, tribunal members or any third interested party (*e.g.* insurer or funder).

ISRAEL **DECEMBER 27, 2018**

Israel does not understand the necessity or rationality for a Tribunal-Appointed Expert. If such a concept is to be adopted, it should be under limited and clear terms and conditions. It may only be allowed in the case where the expert is necessary for the Tribunal to have a better understanding of the facts and claims presented to it, taking into account that any relevant information should normally be supplied by the Parties and their experts throughout the arbitration procedure. In addition, it is Israel's view that the expert shall not be able to require documents from the parties. And at least. It should be clarified that the provision of documents to an expert should be subject to the designation of the confidentiality of a document by a Party.

[JAPAN](#) **DECEMBER 27, 2018**

Japan recognizes that cases which require knowledge of a specific field of expertise generally tend to take longer than others and that it is indispensable for Tribunals to seek the relevant expert's assistance at an early stage of proceedings so as to identify the core issue in dispute without delay. In this regard, Japan appreciates the secretariat's attempt to incorporate current practices, as reflected in Rule 42 of the Arbitration Rules in the working paper.

Considering the likeliness that Tribunals would depend more on Tribunal-appointed experts than it would on party-appointed experts, Japan proposes the following amendment so that Tribunals would make a careful assessment on the independence and impartiality necessary for Tribunal-appointed experts.

AR - 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.
 - (2)bis The Tribunal shall take into account the expert's independence, impartiality and availability upon its appointment.**
- [...]

[MEXICO](#) **DECEMBER 28, 2018**

Con relación al párrafo 2 de la Regla 42, México estima que la consulta del Tribunal con las partes sobre el nombramiento de un(a) perito(a) debe incluir las preguntas que se harán a fin de que las partes puedan emitir su opinión sobre las mismas.

[SINGAPORE](#) **JANUARY 4, 2019**

We support this proposal. That said, we think it would be even more helpful to have specific guidance within this rule as to the situations in which tribunals can appoint experts. We note that this was also a point raised by some States during the Rules Amendment meeting in September 2018.

[SLOVAK REPUBLIC](#) **DECEMBER 22, 2018**

Is there any special mechanism for the allocation of costs of tribunal-appointed experts or only para 26 [AR 19] applies?

[SPAIN](#) **DECEMBER 21, 2018**

Esta regla codifica una práctica actual, aunque excepcional, consideramos que se debe **regular cómo se produce su nombramiento** (procedimiento de selección, nombramiento, requisitos, incompatibilidades,...).

Por ello, apoyamos que se publique una guía sobre la materia, con objeto de evitar situaciones que puedan afectar a la legitimidad del sistema.

[TUNISIA](#) **DECEMBER 27, 2018**

S'il est important de réglementer la nomination d'experts par le tribunal arbitral, plusieurs questions particulières à cette procédure demeurent posées. Il s'agit notamment de :

- La possibilité de récusation de l'expert ainsi que les procédures suivies à cet égard. En effet, Tout comme l'arbitre, l'expert peut être récusé pour les mêmes raisons que les arbitres. La procédure en récusation d'expert devrait normalement être portée devant le Tribunal arbitral qui décidera d'accueillir ou rejeter la demande de récusation en prononçant une sentence « avant dire droit ».
- L'indépendance, l'impartialité et l'absence de conflit d'intérêt pour les experts devant être nommés par le tribunal.

Les principes que l'expert devra toujours respecter tel que le principe du contradictoire, sauf pour des expertises à caractère scientifique, telles qu'analyses métallurgiques ou chimiques... Pour plus de clarté, de justice et de protection du droit de la défense, il serait plus opportun de règlementer ces questions à forte importance surtout que le recours à l'expertise devient très fréquent dans les affaires d'arbitrage.

[UKRAINE](#) **DECEMBER 28, 2018**

Rule 42 may tempt the Tribunal to appoint an independent expert in every instance where the party-appointed experts disagree – and they almost always disagree – which will add significantly to the costs of arbitration and give rise to a risk of the Tribunal-appointed

expert assuming the role of the Tribunal on the matters referred to expert determination. A more practical approach appears to be to allow the Tribunal to choose between testimonies of the party-appointed experts.

If the parties are content to grant the Tribunal the inquisitional powers in respect of evidence, the parties are free to agree so to the deviation from the default rule that Tribunal has no such inquisitional powers, which agreement may be endorsed in a procedural order of the Tribunal. There appears to be, however, no reason to change the default rule itself.

Rule 42

~~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.~~

[DEBEVOISE](#)

DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

While the Proposed Amendments improve upon the old ICSID regime in several respects, certain new Rules and Proposed Amendments may only partially achieve, or even run counter to, ICSID's stated objective of streamlining its arbitral procedure. We call attention to the following four new provisions contained in the Proposed Rules that risk decreasing the overall efficiency and fairness of the ICSID system:

[additional comments on other proposed amendments – see AR 35]

B. Proposed Arbitral Rule 42 – Tribunal-Appointed Experts. This Proposed Arbitral Rule, for the first time, explicitly provides for tribunal-appointed experts. While this may be appropriate in certain circumstances, it does not necessarily encourage the efficiency of the proceedings and may, in fact, have a deleterious effect. Tribunal-appointed experts are often not accountable to clients in the way party-appointed experts are. The tribunal directs the work of these experts; however, it is the parties that pay for it. As a result, there is seldom the kind of discipline over the process to make it satisfactory. For example, in one case in which our firm is involved, the tribunal announced its intention to appoint a tribunal expert in August 2015. As ICSID will be aware, the appointment of the tribunal expert opened an entire new phase of the proceedings, after the evidentiary hearing and two rounds of fulsome post hearing briefs. This new phase will extend until Spring 2019, *five-and-a-half years* after the relevant hearing in that case.

Instead of encouraging tribunal-appointed experts, both parties and the tribunal would be better served by a rule that encourages meetings of party-appointed experts with each other and perhaps with the tribunal, either before or after their reports are to be drafted, to narrow the scope of the dispute presented to the tribunal.⁶

[additional comments on other proposed amendments – see AR 59, 60]

THREE CROWNS

JANUARY 16, 2019

The current wording (“including . . .”) is indicative rather than exclusive. It may be helpful for ICSID to take this opportunity to provide more specific guidance to parties and tribunals by way of the suggested language below:

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on

(a) disclosures (if any) required to be made by the expert,

(b) his or her identity

(c) the discipline(s) which require expert evidence, and

(d) the terms of reference of the expert.

Rule 43 – Visits and Inquiries

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 43: Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, upon a party’s request or, unless the parties disapprove, 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~~ Tribunal shall consult with the parties on ~~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.

Commentary

The Tribunal may order a visit or inquiry upon a party's request or, unless the parties disapprove, on its own initiative.

The Tribunal should consult with the parties on any relevant questions related to the visit or inquiry.

ISRAEL **DECEMBER 27, 2018**

As it may increase the cost of the procedure, it is our view that such a measure will be taken only in exceptional cases. Israel would like to insert a new paragraph 3: *"When deciding on ordering a visit, the Tribunal shall take under advisement the financial burden on the Parties."*

Despite the fact that the ability of a tribunal to conduct the inquiries in a place connected to the dispute (Rule 24(2)(b)), it this opportunity of amending the rules, we suggest adding that such inquiries may be conducted, so the article could read: "... and may conduct inquiries there as appropriate in accordance with the domestic law". Our comment is relevant also to paragraph 3.

Chapter VII – Publication, Access to proceedings and Non-Disputing Party Submissions

ALGERIA **JANUARY 14, 2019**

[Please note that the paragraph numbers in Algeria's comments refer to the paragraph numbers in the [Synopsis in French](#).]

Les paragraphes 42, 43, 44, 45, 46, 47, 48 et 49 ne sont pas validés par l'Etat Algérien, au motif que la publication intégrale de la sentence est contraire au principe de confidentialité dans le procès arbitral. Il y a lieu de prévoir l'accord express des parties pour toute sorte de publication, intégrale ou caviardée, notamment pour le mécanisme supplémentaire. Seule la publication des extraits de raisonnement juridique est acceptée par l'Etat algérien.

Rule 44 – Publication of Awards and Decisions On Annulment

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 44: Publication of Awards and Decisions on Annulment

[...]

(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, unless the parties agree otherwise:

- (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.

Commentary

The parties should be allowed to agree to modify the procedure applicable to the publication of excerpts.

AUSTRIA DECEMBER 21, 2018

The publication of decisions depends on the agreement of the parties. However, para. 2 provides for a “fiction of consent”, whereby the consent of the parties is assumed, unless a rejection of the publication is filed within 60 days. For security reasons, the provision should be reworded in such a way that consent must be actively given and not by fiction of consent.

Para. 3 describes the procedure if the consent of the parties is not given. In this case, extracts from the legal assessment will be sent to the parties before publication, who will then have the opportunity to comment. However, it should be made clear that these extracts are treated in accordance with national needs for confidentiality.

OTHER ISSUES:

Enhancing transparency appears to be one of the goals for the ICSID amendment – for example, proposed Rule 34(4)(k)-(l) Arbitration Rules invites the parties and Tribunal to discuss the details of publication of case materials and the protection of confidential information and proposed Rules 44-49 Arbitration Rules 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 (see Vol. 3, p. 949). Schedule 8 on Transparency (see Vol. 3, pp. 933-974) discusses in detail various aspects of enhancing transparency of the proceedings, including access to hearings and non-disputing party participation.

CANADA **DECEMBER 28, 2018**

1) Canada urges the Member States of ICSID to reconsider Article 48(5) of the ICSID Convention to require publication of Awards etc., rather than leaving this up to the discretion of the investor and respondent in a particular case.

2) This Rule should include a provision on redactions, similar to that in Rule 45.

COLOMBIA **DECEMBER 28, 2018**

Colombia considera que lo establecido en el párrafo (2) modifica lo dispuesto en el artículo 48 (5) de la Convención. Sin embargo, expresa su compromiso con la búsqueda de transparencia en la solución de controversias entre los inversores y los Estados y está dispuesta a tener cualquier discusión sobre este tema.

Colombia está de acuerdo con la Regla en su párrafo (3), y con el procedimiento de comentarios claro y con términos preestablecidos, antes de la publicación de cualquier extracto de la decisión.

COSTA RICA **DECEMBER 28, 2018**

As expressed in Costa Rica’s comments to Rule 22 of the Administrative and Financial Regulations, Costa Rica considers that publishing the award and decisions on annulment (allowing for redaction when required) should be mandatory. Given the specific characteristics of ISDS and the fact that public interests are involved, this would be a very relevant step towards promoting greater transparency.

Following the concept expressed above, an important part of good governance is also assuring legal certainty through the protection of some information, preventing the disclosure of sensitive personal data and guaranteeing the safety and integrity of individuals. For example, in the case of experts and witnesses.

In order to guarantee consistency, Costa Rica suggests that ICSID considers addressing publication in a single rule (Rule 44).

EU DECEMBER 21, 2018

The European Union and its Member States therefore welcome the proposals of the ICSID Secretariat aiming at increasing the level of transparency of the procedures administered by ICSID, including with respect to the publication of awards and other documents related to a dispute, as well as the publication of recordings or transcripts of hearings, while ensuring appropriate protection of confidential information.

GEORGIA DECEMBER 28, 2018

Georgia believes that there should be certain balance between the need and desire for more publicity on investor-state arbitration matters and related proceedings, on the one hand, and the integrity of arbitral proceedings and effective resolution of the disputes, on the other hand. In this context, we believe that together with the new regulations enshrined in the proposed rules on publicity in Chapter VII, there should be a rule and the respective procedure providing for the exception to the proposed rules on publicity; in particular, such exceptions should aim to avoid jeopardizing integrity of the arbitral process or the effective resolution of the dispute that should be the primary goal in investor-state arbitration proceedings.

Article 7(6)(7) of the Rules on Transparency in Treaty-based Investor-State Arbitration could be a good guidance in regard to this issue.

GUATEMALA **DECEMBER 28, 2018**

Tanto la regla 44 como la 45 abordan la publicación de laudos, decisiones y resoluciones, motivo por el cual se sugiere condensar el contenido de ambas reglas en una sola, mejorando la redacción y orden de las ideas, pues la propuesta actual es confusa y desordenada.

MEXICO **DECEMBER 28, 2018**

México aprecia la propuesta del CIADI en la regla 44(2) RA tomando en cuenta las limitaciones que el artículo 48(5) del Convenio del CIADI prevé. No obstante, sería recomendable que los Estados Contratantes exploraran enmendar dicho artículo para permitir un mayor grado de transparencia en esta materia.

México considera que la objeción a la publicación de la información se debería hacer solamente con base en razones objetivas limitadas a la protección de información (por ejemplo, información comercial confidencial, información privilegiada que esté protegida de divulgación por la ley o información cuya revelación pudiera impedir la observancia de la ley). México opina que las partes en una diferencia deberían buscar, en la medida de sus posibilidades, la máxima publicidad. De hecho, en la práctica de tratados reciente de México ha buscado ese objetivo.

DENTONS **DECEMBER 21, 2018**

Consider whether the procedure governing the publication of excerpts, where the parties provide substantive comments, should be clarified. Specifically, will ICSID adopt all comments made by the parties? What happens if the parties give conflicting comments? A clear process for the resolution of similar issues is set out in AR 45(2) (Publication of Orders and Decisions). We suggest that an analogous protocol be adopted for resolving issues relating to the publication of excerpts.

STEPTOE **DECEMBER 28, 2018**

10 .1 We support the deemed consent approach reflected in Rule 44(2), recognizing the constraints imposed by the ICSID Convention, as well as the approach reflected in Rule 45.

This new provision is a welcome effort to address concerns about transparency. It appears to strike the right balance by making publication the default rule, while allowing parties to protect genuinely confidential or sensitive information from disclosure but without preventing the legal reasoning from being made publicly available.

Rule 45 – Publication of Orders and Decisions

Rule 45: Publication of Orders and Decisions

(1) The Centre shall publish orders and decisions, ~~including, but not limited to, decisions on bifurcation, decisions on disqualification, and decisions on provisional measures 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 ~~may propose redactions before an order or decision is published by~~ notifies the Centre within the ~~60 day~~ 30 days after their issuance. ~~If the other party disagrees with the proposed redactions 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.

Commentary

Decisions on bifurcation, disqualification, and provisional measures should be included among the orders and decisions to be published by the Centre.

The procedure for the publication of orders and decisions should be simplified, as proposed above.

COSTA RICA **DECEMBER 28, 2018**

As also mentioned in the comments to Rule 22 of the Administrative and Financial Regulations, it is Costa Rica’s view that the documents to be published should be the ones that provide value to external observers in terms of accountability, and not all documents of the process. In Costa Rica’s experience, it has been observed that some documents are merely procedural, and their publication could negatively affect the proceedings’ good governance and may create greater confusion if taken out of context. Furthermore, they may create greater confusion and affect the reputation of individuals acting in the process if taken out of context.

Following the concept expressed above, an important part of good governance is also assuring legal certainty through the protection of some information, preventing the disclosure of sensitive personal data and guaranteeing the safety and integrity of individuals. For example, in the case of experts and witnesses.

In order to guarantee consistency, Costa Rica suggests that ICSID considers addressing publication in a single rule (Rule 44).

GUATEMALA **DECEMBER 28, 2018**

Tanto la regla 44 como la 45 abordan la publicación de laudos, decisiones y resoluciones, motivo por el cual se sugiere condensar el contenido de ambas reglas en una sola, mejorando la redacción y orden de las ideas, pues la propuesta actual es confusa y desordenada.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

A. To promote consistency in the publication of awards, orders, and decisions, consider: Harmonizing the various regimes of publication of arbitral awards and of other decisions and orders issued by Tribunals. Proposed Amended Arbitration Rule 45 provides for the publication of “orders” and “decisions” within 60 days after their issuance, with any redactions agreed to by the parties, but without requiring party consent. On the other hand, Proposed Amended Arbitration Rule 44 provides for publication of awards only with party consent. This discrepancy opens the door to 3 inconsistent treatment of awards, decisions, and orders, whereby certain substantive decisions of Tribunals will be automatically published (such as decisions on preliminary objections and bifurcation), while others would escape public scrutiny. To avoid such inconsistency, consideration should be given to aligning the various regimes of publication of decisions, orders and awards.

B. It should be made clear that all published documents are treated in accordance with national laws, regulations and needs on confidentiality. Appropriate protection of confidential information should be ensured.

ISRAEL **DECEMBER 27, 2018**

It is our view that rules regarding the publication of Orders and Decisions should be similar to the publication of Awards.

Rule 46 – Publication of Documents Filed by a Party

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 46: Publication of Documents Filed by a Party

~~Upon request of a party, t~~The Centre shall **not** publish any written submissions, observations or other documents ~~which that filed by either party filed~~ in the proceeding ~~without the express written consent of both parties, with redactions agreed to by the parties.~~

Commentary

Unlike orders and decisions, written submissions, observations or other documents filed by either party must not be published, unless *both* parties give their consent in writing.

CANADA **DECEMBER 28, 2018**

1) In Canada’s opinion, this proposed Rule does not adequately address the public’s interest in transparency and would leave ICSID’s Rules out of step with modern practice, as reflected in the UNCITRAL Rules on Transparency in Investor-State Arbitration. Canada has for nearly two decades included provisions requiring that submissions in investor-State arbitrations be made public. Canada strongly believes that allowing an investor the right to decide to keep its submissions confidential, over the objection of a State, would be contrary to the public interest and would lead to continued criticism of the entire mechanism. Moreover, there is more that can be done because nothing in the Convention prohibits the publication of documents filed by a party without their consent. Hence, Canada

strongly urges this provision to be rewritten along the lines of Rule 45 – mandating the publishing of these documents with a provision on redactions.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

A. To promote consistency in the publication of awards, orders, and decisions, consider: Harmonizing the various regimes of publication of arbitral awards and of other decisions and orders issued by Tribunals. Proposed Amended Arbitration Rule 45 provides for the publication of “orders” and “decisions” within 60 days after their issuance, with any redactions agreed to by the parties, but without requiring party consent. On the other hand, Proposed Amended Arbitration Rule 44 provides for publication of awards only with party consent. This discrepancy opens the door to 3 inconsistent treatment of awards, decisions, and orders, whereby certain substantive decisions of Tribunals will be automatically published (such as decisions on preliminary objections and bifurcation), while others would escape public scrutiny. To avoid such inconsistency, consideration should be given to aligning the various regimes of publication of decisions, orders and awards.

B. It should be made clear that all published documents are treated in accordance with national laws, regulations and needs on confidentiality. Appropriate protection of confidential information should be ensured.

MEXICO **DECEMBER 28, 2018**

La regla propuesta para la publicación de documentos presentados por una parte, permitiría al Centro publicar cualquier documento presentado en el arbitraje de acuerdo con las supresiones acordadas por las partes. Si bien es deseable un mayor grado de transparencia en el marco del procedimiento arbitral, México considera que la regla debería reflejar un mecanismo que permita resolver las diferencias entre las partes, tal como se propone en la regla 45 RA y la regla 54 RAMC. De lo contrario, tal como está redactadas la reglas 46 RA y 55 RAMC no permitirán la publicación de documentos si una de las partes se opone.

SPAIN **DECEMBER 21, 2018**

El Centro publicará cualquier **escrito, observación u otro documento con** las supresiones acordadas por las partes

La publicación de escritos, observaciones o documentos puede afectar la estrategia de defensa de la otra Parte. Es habitual que en los escritos de una Parte se aborde los argumentos de la otra Parte. Adicionalmente, esto podría obligar a la otra Parte a la publicación de sus escritos para que se conozcan la argumentación de ambas partes.

ES considera importante que ambas partes puedan ejercitar su derecho de defensa de manera eficaz. Por ello proponemos la siguiente redacción:

“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 excepciones y supresiones de texto solicitadas por la otra parte”

THREE CROWNS

JANUARY 16, 2019

We urge that further consideration be given to this proposed Rule. The pleadings of one party will inevitably disclose positions and evidence adduced by the other party, which may well not wish for its pleadings to be published. One way to resolve this may be to amend the final clause to say *“with **any redactions agreed to by the parties or required by the other party to safeguard the confidentiality of that party’s submissions, observations or other documents**”*.

Rule 47 – Observation of Hearings

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 47: Observation of Hearings

- (1) The Tribunal shall **only** 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 if both partiesy objectsagree thereto.~~
- (2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.
- (3) The Centre shall **not** publish recordings and transcripts of hearings ~~without the express written consent of both parties, unless either party objects.~~

Commentary

Persons who are not involved in the proceeding in some capacity should not be allowed to observe hearings unless *both* parties agree thereto.

Recordings and transcripts of hearings must not be published, unless *both* parties give their consent in writing.

AUSTRALIA JANUARY 22, 2019

Australia welcomes new rules which support increased transparency in ISDS proceedings and the presumption of transparency that the Consolidated Draft Rules deliver. In particular, we support holding open hearings and publishing recordings and transcripts (AR 47), as well as the introduction of revised criteria for the participation of non-disputing parties (AR 48) and non-disputing treaty parties (AR 49).

AUSTRIA DECEMBER 21, 2018

Amended Arbitration Rule 47 provides for the Tribunal to establish procedures to prevent the disclosure of confidential information to persons observing the hearings and for every party to be able to exclude the public from hearings. However, para. 3 provides that the recordings and transcripts of hearings will subsequently be published unless a party objects.

CANADA DECEMBER 28, 2018

1) In Canada's opinion, this proposed Rule does not adequately address the public's interest in transparency and would leave ICSID's Rules out of step with modern practice, as reflected in the UNCITRAL Rules on Transparency in Investor-State Arbitration. Canada strongly believes that allowing an investor the right to decide to close the hearings would be contrary to the public interest and would lead to continued criticism of the entire mechanism. Moreover, there is more that can be done because nothing in the Convention prohibits public hearings. Canada submits that the Rule should be to mandate that hearings be public, subject to limited closure as necessary to protect confidential information.

[EU](#) **DECEMBER 21, 2018**

It appears, however, that some of the ICSID Secretariat's proposals still remain below the level of transparency achieved in most recent investment agreements or in the recently adopted UNCITRAL Transparency Rules. This seems to be particularly the case with regard to the possibility given to the disputing parties to object to the public access to hearings in arbitration proceedings, or to object to the publication of awards rendered under the ICSID Arbitration Rules. Mindful of the potential limitations that may stem from the ICSID Convention itself (such as Article 48(5) ICSID Convention), the European Union and its Member States would nevertheless like to invite the ICSID Secretariat and ICSID Members to reflect further about possible ways to achieve a level of transparency that would be at least equal to the UNCITRAL Transparency Rules for all investment arbitration proceedings administered by ICSID. Such increased transparency requirements should be discussed in parallel with a more precise description of what would constitute protected or confidential information, similar to what has been agreed within the UNCITRAL Transparency Rules.

[THE NETHERLANDS](#) **DECEMBER 21, 2018**

The transparency of procedures is crucial for the legitimacy of the system. As a minimum, the rules on transparency as laid down in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014 should be implemented in the ICSID Rules. The possibility given to disputing parties in Rule 47 to object to the public access of hearings or to object to the publication of awards are not defensible in procedures between investors and States, as public interests are at stake in such procedures.

[SPAIN](#) **DECEMBER 21, 2018**

Se permite la publicación de las **grabaciones y transcripciones** de las audiencias, a menos que una parte se oponga. ES considera que la regla general debe ser que las audiencias no sean públicas, a menos que el tribunal, previo acuerdo de las partes, así lo acuerde de manera excepcional.

ICSID has taken laudable steps to update the Rules so as to address criticism directed at the lack of transparency in investor-state arbitration. In contrast to Rule 44, Rule 47 arguably does not go far enough in establishing a default rule in favour of transparency, as it still provides for hearings to be private unless a party objects, thus effectively giving either party a veto. By contrast, the UNCITRAL Rules provide for hearings to be public unless the parties agree otherwise.

We also offer for consideration broader wording for Rule 47(1) (i) to take account of the reality that parties include various assistants and client representatives in hearing delegations and that the opposing party ordinarily has no authority to object to the inclusion of such persons, and (ii) preserve the Tribunal’s discretion as to the attendance of witnesses and experts prior to or after their testimony.

(1) The Tribunal shall allow persons in addition to the parties’ delegations, ~~their representatives, witnesses and experts during their testimony,~~ and persons assisting the Tribunal to observe hearings, unless either party objects.

Rule 48 – Submission of Non-Disputing Parties

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, providing the relevant information addressed in paragraph (2).

[...]

(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) if the non-disputing party is a for profit organization, 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 with the consent of both parties~~ ~~objects~~.

[...]

Commentary

The person or entity applying for permission to file a written submission in the proceeding should include in the application the information specified in paragraph (2), which is necessary for the Tribunal to decide whether to permit a non-disputing party submission.

Only for profit organizations should be required to pay funds to defray the increased costs of the proceeding attributable to their participation as non-disputing parties.

Non-disputing parties should not have access to documents filed in the proceeding unless *both* parties agree thereto.

AUSTRALIA JANUARY 22, 2019

Australia welcomes new rules which support increased transparency in ISDS proceedings and the presumption of transparency that the Consolidated Draft Rules deliver. In particular, we support holding open hearings and publishing recordings and transcripts (AR 47), as well as the introduction of revised criteria for the participation of non-disputing parties (AR 48) and non-disputing treaty parties (AR 49).

AUSTRIA DECEMBER 21, 2018

In line with the 2014 UNCITRAL Transparency Rules, Amended Arbitration Rule 49 confers on States and international organizations that are party to a treaty at issue in an ICSID arbitration the right to make written submissions on the interpretation and application of the treaty. This is an important innovation, which is in line with the 2014 UNCITRAL Transparency Rules. It counteracts distortions of the development of international law that may result from the pursuit of purely private interests by individuals and companies in arguing important questions of international law.

Third party funding should also be a criterion of admissibility, which should be disclosed to the parties involved in the proceedings.

The proposed changes address Austria's proposal to clarify rules on non-disputing party participation.

CANADA **DECEMBER 28, 2018**

1) Canada believes that there can be significant value to the participation of non-disputing parties in the arbitration process. Moreover, where a request to participate is denied, reasons should be given. Hence, Canada suggests that in the chapeau paragraph 4, it being that “If the Tribunal decides that a non-disputing party will not be permitted to file a written submission, it shall provide the reasons for such decision. If the Tribunal decides that a non-disputing party will be permitted to file a written submission, it shall ensure that...”

2) With respect to paragraph 4(c), Canada’s experience is that the participation of third parties has not led to significant increases in the costs of arbitration, that calculating exactly what the increased costs are would be difficult. Further, Canada believes that the Rules should not seek to deter the participation of interested groups by imposing upon them a financial burden. Hence, Canada suggests the deletion of this subparagraph. At the very least, it should be made clear that it would only be in very exceptional circumstances that the Tribunal would order the payment of costs attributable to the non-disputing party’s participation.

COLOMBIA **DECEMBER 28, 2018**

En el Documento de Trabajo se infiere que la intención en esta Regla es disminuir los costos del procedimiento con la participación de las partes no contendiente. Sin embargo, Colombia considera que la participación de la sociedad civil es importante en el sistema y apoya la búsqueda de la transparencia y legitimidad. En este sentido, Colombia sugiere que el Tribunal debe analizar si la participación de las partes interesadas implica un cargo irrazonable para las partes, en caso contrario, la deferencia debe ser aceptar esas intervenciones.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica shares the proposal of distinguishing between the non-disputing parties, as subjects external to the treaty, and the non-disputing Treaty Party. Both figures have a very significant value and serve different purposes due to their specific faculties. Therefore, the requirements and limitations for their participation should be separated.

Costa Rica understands that this provision refers to non-disputing parties that are not a party to the investment treaty, also known as “amici curiae”. These consist of persons (natural or juridical) who assist the Tribunal by bringing a perspective or particular knowledge that is different from that of the disputing parties. The above opens a window for the civil society and other organizations to participate more actively in the processes, contribute to the case and enhance transparency and accountability.

With respect to paragraph 4(c), Costa Rica considers that the participation of third parties will not lead to significant increases in the costs of arbitration, that calculating exactly what the increased costs are would be difficult and that such a measure might discourage participation of relevant stakeholders. Hence, Costa Rica suggests the deletion of this subparagraph.

Rule 48 **Submission of Non-disputing Parties**

[...]

(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

~~[CR: (e) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation.]~~

[...]

[EU](#) **DECEMBER 21, 2018**

With regard to submissions of non-disputing parties, the European Union and its Member States are of the view that such submissions should, as a matter of principle, be welcomed and encouraged as – by way of greater participation of stakeholders – they contribute to the increased procedural legitimacy of the investment dispute system. For this reason, the European Union and its Member States propose to add to the wording of Rule 48 an additional paragraph providing that the Tribunal and the disputing parties shall give positive consideration to a request from a non-disputing third party to file a submission, and requiring the Tribunal to give the reasons for a decision to deny such a request.

As indicated during the technical discussions, the European Union and its Member States are concerned with the proposal, as currently drafted in Rule 48(4), on the conditions the Tribunal may attach to its permission to a non-disputing party to file a written submission. The main concern relates to Rule 48(4)(c), on “the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party participation”.

The current wording of this provision is not sufficiently precise, and could theoretically lead to a cost award that would assign to non-disputing parties an obligation to bear, beyond their own costs, also costs of the parties. This outcome would be contrary to the prevailing practice of arbitral tribunals, ordinary courts as well as other international courts and tribunals, that as a general principle follow the rule that non-disputing parties (*amicus curiae*) only bear their own costs. This may, in fact, have an undue chilling effect on interventions by non-disputing parties and constitute a barrier for non-disputing parties to participate in dispute settlement proceedings and thus lead to a result contrary to the intention to embrace more transparency in the proceedings.

The European Union and its Member States note that in the case of certain types of entities, institutionally it may not be possible to commit in advance to a yet unknown financial responsibility that the current wording could entail for a non-disputing party.

The European Union and its Member States recall that Rule 48(2) already includes among the factors to be considered by the Tribunal whether to grant leave precisely that submissions by non-disputing parties should not disrupt the proceedings or unduly burden the parties. In addition, Rule 48(4)(a) provides that Tribunals have the possibility to limit the scope and length of the submission. Taken together, the European Union and its Member States consider that these are in general sufficient guarantees to avoid undue prolongation of proceedings or significant additional costs.

The European Union and its Member States consider that in the light of the function and role of non-disputing party (*amicus curiae*) submissions, it would be appropriate to clarify that if the submission is filed by an entity with a public mandate, such non-disputing parties should only bear their own costs, but not those of the other parties.

In case of other non-disputing parties, different considerations apply and there could be merit in giving the Tribunal the possibility to impose additional conditions with respect to costs. However, such costs should not go beyond the actual increase of costs attributable to the non-disputing party in question. We propose that the language of Rule 48(4)(c) is adjusted accordingly.

FRANCE **JANUARY 14, 2019**

AR 48(2)(d) « l'identité, les activités, l'organisation et ~~les propriétaires~~ **la propriété** 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 ».

ISRAEL **DECEMBER 27, 2018**

Israel maintains that any Non-disputing party submission should be subject to a high threshold on its contribution to the procedure. It is our view that the tribunal should not be able to provide non-disputing Parties with access to documents provided by the Parties. Therefore, we suggest that the paragraph will require consent of the Parties as a rule and not only with an ability to object.

MOROCCO **JANUARY 15, 2019**

- Pour que la partie non contestante intervienne dans la procédure d'arbitrage elle ne devrait pas être un adversaire politique de l'une des parties au différend ou partisane de l'une d'entre elles ;
 - Préciser la nature des observations à présenter par la partie non contestante ;
 - Prévoir la possibilité du tribunal d'accepter ou de refuser, en concertation avec les parties au différend, la demande de la partie non contestante à intervenir dans la procédure d'arbitrage.
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MEXICO **DECEMBER 28, 2018**

México sugiere indicar en la regla 48(4) RR y 57(4) RAMC que el escrito debe presentarse en el idioma o idiomas del procedimiento.

OMAN **DECEMBER 28, 2018**

We are of the opinion that the practice mentioned in both Rules 48 and 49 will have a direct impact on confidentiality. We therefore recommend the practice to be applied only upon the consent of the two parties.

THE NETHERLANDS **DECEMBER 21, 2018**

The Kingdom of the Netherlands welcomes the codification in Rule 48 of the possibility for relevant stakeholders affected by the dispute to participate as a non-disputing party in proceedings between investors and states under International Investment Agreements. It should be added that the Tribunal and disputing parties should give positive consideration to a request from such a stakeholder to

file a submission. In addition, the Tribunal should be required to give the reasons for a decision to deny such a request. Furthermore, stakeholders participating as a non-disputing party should only bear their own costs.

SINGAPORE **JANUARY 4, 2019**

We support the participation of non-disputing parties (“NDP”) in the dispute settlement process. The heightened scrutiny of the identity, activities, organization and ownership of NDP is welcome as a safeguard against abuse.

However, we think it would be more desirable to set out more details as to the classes of information/documents that can be transmitted to a NDP, as well as classes that disputing parties are allowed to unilaterally designate as protected from disclosure. Such an approach can be found in some of the treaties that Singapore has recently concluded.

We have suggested some changes to Rule 48 as well as proposed a new Rule 48bis, for the ICSID Secretariat’s consideration (in tracked changes).

Rule 48

[...]

(5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects **or such documents have been designated as confidential or protected information pursuant to Rule 48bis. Such documents may include:**

- (a) the notice of intent;**
- (b) the notice of arbitration;**
- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party;**
- (d) minutes or transcripts of hearings of the tribunal, if available; and**
- (e) orders, awards and decisions of the tribunal.**

(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.

Rule 48bis

- (1) Confidential or protected information, as defined in paragraph 2, that has been identified in accordance with this Rule, shall not be made available to the non-disputing party.
- (2) Confidential or protected information consists of:
- (a) confidential business information; and
 - (b) information which is protected against being made available to the public, in the case of information of the respondent, under the law of the respondent and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the Tribunal.
- (3) The disputing party who submits a document sought to be designated as confidential or protected shall clearly designate the information at the time it is submitted to the Tribunal.
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SPAIN **DECEMBER 21, 2018**

El apartado 4 establece que el Tribunal puede imponer una serie de condiciones en la presentación de partes no contendientes (“*amicus curiae*”) con objeto de que no genere una carga indebida. Entre dichas condiciones se cita.c) “*el desembolso de fondos para sufragar el aumento de costos del procedimiento que sean atribuibles a la participación de la parte no contendiente.*”

ES considera que la participación de *amicus curiae* es un elemento adicional para permitir que el Tribunal tenga una visión lo más completa posible sobre la controversia. En este sentido, es una herramienta que favorece a ambas partes e incrementa la legitimidad del procedimiento.

Por ello, ES se muestra contraria a introducir la disposición de que el Tribunal pueda imponer un desembolso de fondos para sufragar los costes. Ello **desincentivaría la declaración de los “amicus curiae”**, ante el riesgo de que les suponga un coste. Desincentivar su participación reduce la capacidad del Tribunal para tener una visión completa de la controversia, lo cual es esencial para lograr laudos adecuados y coherentes.

11.1 We agree with the proposed new criteria for non-disputing party submissions found in Rule 48(2)(d)-(e). We also support Rules 48(4)(c), 48(5) and 49.

Rule 49 – Participation of Non-Disputing Treaty Party

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, unless such treaty provides for a joint interpretation mechanism.

(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.

Commentary

If a majority of two thirds of the members of the Administrative Council considers that a special procedure for participation of non-disputing Treaty Parties should be provided for, different from the procedure in proposed Rule 48, such special procedure should be excluded in case the treaty at issue in the dispute provides for a joint interpretation mechanism. In such case, the non-disputing Treaty Party should use the treaty mechanism.

A submission by a non-disputing Treaty Party under the special procedure in proposed Rule 49 should be limited to questions of interpretation of the treaty at issue in the dispute.

AUSTRALIA

JANUARY 22, 2019

Australia welcomes new rules which support increased transparency in ISDS proceedings and the presumption of transparency that the Consolidated Draft Rules deliver. In particular, we support holding open hearings and publishing recordings and transcripts (AR 47), as well as the introduction of revised criteria for the participation of non-disputing parties (AR 48) and non-disputing treaty parties (AR 49).

CANADA

DECEMBER 28, 2018

- 1) With respect to 49(1), Canada suggests that the absolute right of the non-disputing treaty party to participate via a written submission should be limited to issues of the interpretation of the treaty at issue. This is consistent with Canada's treaty practice, as well as the UNCITRAL Rules on Transparency. Thus, Canada suggests deletion of the words "application or" from paragraph 1.
 - 2) Canada suggests that the requirement in paragraph 49(2) for the Tribunal to consider the procedure in Rule 48 in the case of a non-disputing treaty party submission may be awkward, particularly with respect to 48(2)(d) and (e), which do not seem appropriate to apply to States. Hence, Canada suggests that Rule 49(2) be reworded to say "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 procedures in Rule 48 that the Tribunal deems relevant to the application."
 - 3) Canada also suggests that consideration be given here to making clear that the non-disputing Treaty Party's have a right to access relevant documents filed in the proceeding so as to allow them to fully consider all relevant information in making their submissions. In this regard, Canada suggests that if such documents have not been made public, it be made clear that the the non-disputing Treaty Party also have the obligation to keep them confidential.
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COLOMBIA

DECEMBER 28, 2018

Colombia sugiere que se aclare que la intervención de estos Estados (que son signatarios del tratado, pero no están involucrados en la disputa), debe limitarse a la interpretación del tratado en cuestión y no referirse a los hechos de la controversia.

Colombia encuentra algunos problemas con la redacción del párrafo (2) de esta Regla, pues no considera que la intervención de un Estado no parte de la controversia se deba extender a otros asuntos diferentes a la interpretación del Tratado, esto convertiría al Estado

como una parte contendiente dentro del procedimiento e iría más allá del propio procedimiento afectando el derecho de defensa de una de las partes.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica favours the proposal of a separate rule for non-disputing Treaty Parties because they may provide useful insight as to the context, object and purpose intended by the parties when they subscribed the treaty. Costa Rica has had a positive experience with this figure as a tool to assist tribunals with interpretation of the international investment agreement. For this reason, it is Costa Rica’s position that the non-disputing Treaty Party’s participation should be limited to the interpretation of standards and rules in the agreement. The reference to the facts and to the explicit application of treaty provisions to the specific case is not considered adequate because the non-disputing Treaty Parties lack direct knowledge of the facts.

On this basis, Costa Rica provides the following suggestion for this provision:

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 ~~[CR: application or]~~ interpretation of a treaty at issue in the dispute.

(2) ~~[CR: 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.

EU **DECEMBER 21, 2018**

As regards submissions by 'Non-disputing Treaty-Parties' (AR Rule 49), the European Union and its Member States are not convinced by the usefulness to apply the same criteria as for non-disputing parties (*amicus curiae*) for deciding on whether or not to permit a submission on matters beyond issues of treaty interpretation (see current proposal for AR Rule 49(2)). As currently drafted, AR Rule 49 (2) equals 'Non-disputing Treaty Parties' with 'non-disputing parties', whereas AR Rule 48 does not appear well-suited to the particular nature of governments and States (and REIOs). This is the case, in particular, of Rule 48(4)(d) requiring the disclosure of “the identity, activities, organisation and ownership” of the Party, and any possible provisions on costs as currently proposed under Rule 48(4)(c). The European Union and its Member States suggest in this respect to align the current draft AR Rules 49 with Article 5

of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, to better reflect the particular nature of governments and States, as opposed to the broader group of entities who could ask for permission to file a submission as non-disputing parties. To take into account the particular situation of regional economic integration organisations, the European Union and its Member States also propose to add a footnote to Rule 49 with the following wording: “This is understood to include submissions made by regional economic integration organisations as defined in AFR Article 1(4) of which the non-disputing Treaty Party forms part”.

GUATEMALA **DECEMBER 28, 2018**

No queda clara la función de esta figura, ni la diferencia con una parte no contendiente.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

Rule 49(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. **The supreme court of the national judicial systems should interpret national related laws or fundamental rights.**

ISRAEL **DECEMBER 27, 2018**

Israel position in its IIA policy is to distance itself from any dispute between its investors and other states, and wouldn't like other states' involvement in investment disputed in its territory. Our concern is that that such provision may cause unwanted state involvement in disputes with private investors.

Israel believes that this provision should be discussed and resolved under bilateral agreements and not be adopted under the ICSID 2019 rules amendment.

MEXICO **DECEMBER 28, 2018**

México ha expresado anteriormente que considera que la Regla 49(1) RR y 58(1) RAMC debe limitarse a la presentación de escritos sobre cuestiones de interpretación del tratado, eliminando la referencia a cuestiones de aplicación.

En la experiencia de México, la presentación de escritos de Parte no contendiente sobre cuestiones de interpretación del tratado ha resultado satisfactoria en términos generales principalmente en el contexto del TLCAN. En virtud de lo anterior, EE.UU., Canadá y México han mantenido este enfoque en la negociación de tratados con otros países hasta el día de hoy, tal es el caso del CPTPP (Artículo 9.23(2)), CETR (Artículo 8.38(2)), y recientemente el T-MEC (Artículo 14.D.7(2)), entre otros.

Por otro lado, la Regla 49(2) RA y Regla 58(2) RAMC establecen la obligación para las partes no contendiente del tratado a cumplir con los requisitos previstos en la Regla 48(2) RR y Regla 58(2) RAMC, respectivamente, para la presentación de escritos sobre otras cuestiones en el ámbito de la diferencia. Sin embargo, se observa que requisitos de la Regla 48(2) RA y Regla 58(2) RAMC, como los previstos en los párrafos (c) y (e), no son propiamente aplicable a los Estados, por lo que se sugiere ajustar la redacción a efecto de permita al tribunal determinar los requisitos de la Regla 48(2) RR y Regla 58(2) RAMC que deberán cumplir los Estados.

SINGAPORE **JANUARY 4, 2019**

We support this proposal. In our view, this would ensure that a non-disputing treaty party would be able to weigh in with its views on how the investment treaty, which it had negotiated and agreed with the disputing treaty party, should be interpreted. We think this provision will be increasingly useful against the backdrop of a trend towards more comprehensive treaties being concluded amongst more than just two countries.

SPAIN **DECEMBER 21, 2018**

La regla permite que “...una parte del Tratado, que no sea parte en la diferencia, presente un escrito sobre la aplicación o interpretación de un tratado objeto de la diferencia.”

ES tiene los siguientes comentarios:

o Consideramos que la participación de la Parte Contratante no Contendiente (PCnC) debe ser voluntaria. En este sentido, nos preocupa que con la redacción de la regla 40, el Tribunal pueda ordenar la participación de la PCnC.

- o Además, consideramos que la participación debe estar limitada a la interpretación, y no a la aplicación.

DENTONS DECEMBER 21, 2018

The proposed rule imposes an obligation on the Tribunal to allow an interested non-disputing Treaty Party to make a submission. We believe the Tribunal should be able to impose on non-disputing Treaty Parties the same conditions available to it under AR 48.4 (Submission of Non-disputing Parties) with respect to other non-disputing parties. This would protect the integrity of the process. ICSID experience is that non-disputing Treaty Parties can abuse the right to make such submissions by disregarding deadlines set by the Tribunal, filing the submissions at a disruptive time in the proceedings, or making excessively long submissions that impose a burden on the Tribunal and the parties. While the value of such submissions may be higher than that of other non-disputing party submissions, it is not higher than that of party submissions. The ICSID rules should not remove from Tribunals their duty and right to control the process before them.

(See Arts. 29.5 and 29.9 SIAC Investment Arbitration Rules. Note that the SIAC Investment Arbitration Rules draw a distinction between written submissions of Non-disputing Contracting Parties on a “question of treaty interpretation that is directly relevant to the dispute,” which the Tribunal must allow, and other written submissions, which are subject to the Tribunal’s control pursuant to Article 29.3 of the Rules. See Art. 29.1 SIAC Investment Arbitration Rules.)

GIBSON DUNN JANUARY 15, 2019

We suggest eliminating this proposed rule as it appears to derogate from the principle already present in ICSID Arbitration Rule 37(2) and Proposed Rule 48, which recognize that tribunals have broad discretion on whether to admit non-disputing party submissions. This discretion ought to be reserved in Rule 49 as well.

The ICSID Working Paper rightly recognizes that a number of investment treaties allow non-disputing State parties to make submissions on the question of treaty interpretation or application. However, to the extent these treaties grant State parties the right to make submissions, those rights have been the result of careful negotiations between the parties to the investment treaties. There is no generally recognized rule that permits a non-disputing treaty party to make submissions in a dispute arising from the treaty. The ICSID Convention does not provide such a right and therefore the ICSID Arbitration Rules are not the appropriate forum to create one.

Rather, the ICSID Arbitration Rules should preserve the tribunal’s discretion in making these decisions. In other words, ICSID tribunals should be able to consider the same criteria that they are required to consider when assessing applications for submissions by any other non-disputing parties, based on which the tribunal “may” (not “shall”) allow that person or entity to make a submission. Similarly, the tribunal should be allowed to impose limits on the submissions of non-disputing investment treaty parties to ensure that their participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party.

JAIME, MARGIE-LYS **DECEMBER 27, 2018**

Proposal:

- (1) The Tribunal shall permit, or, at the request of at least one of the disputing parties or on its own initiative, may invite, a Party to a treaty that is not a party to the dispute (“nondisputing Treaty Party”) to make a written submission on the application or interpretation of a treaty at issue in the dispute. The Tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to this paragraph.
- (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. In determining whether to allow such submission, the Tribunal shall take into consideration the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.
- (3) The parties shall have the right to make observations on the submission of the nondisputing Treaty Party.

Comment: Amendments to paragraph 1 are intended to cover different circumstances in which one of the parties, or the tribunal under its own initiative, ascertains the need for having the interpretation by the non-disputing treaty parties (as author(s) of the treaty). The second part of paragraph 1 is inspired in Article 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Furthermore, the proposed second phrase of paragraph 2 reaffirms the banning of diplomatic protection in accordance with Article 27 of the ICSID Convention.

ZHONG LUN LAW FIRM **DECEMBER 28, 2018**

16. Proposed AR 49(1) is introduced to grant a non-disputing Treaty Party a right to make a submission on a question of interpretation or application of the disputed treaty. We note that restrictions in proposed AR 48 only apply to the submissions on other matters made by the non-disputing Treaty Party. While we appreciate the value of the submissions by a non-disputing Treaty Party on a question of

interpretation or application of the treaty at issue, we are concerned with the potential disruption to the proceeding if limits are not imposed on a submission of this kind. There will be a stronger need to coordinate the filings if a multilateral treaty is involved. Thus, we suggest that the same conditions set out in proposed AR 48(4) apply as well to the submissions under proposed Rule AR 49(1). If our suggestion is accepted, we propose the following wording:

Proposed AR 49(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, **subject to the conditions set out in Rule 48(4)**.

Chapter VIII – Special Procedures

Rule 50 – Provisional Measures

ALGERIA JANUARY 14, 2019

- 1) Inclure une disposition qui interdit aux investisseurs poursuivis pour des infractions pénales, notamment le blanchiment d’argent et la corruption, de demander des mesures provisoires devant le tribunal arbitral.
- 2) Fournir des indications et des orientations précisant les critères adoptés par le tribunal arbitral pour déterminer si la mesure provisoire doit être accordée ou non.
- 3) Introduire des dispositions qui encadrent et déterminer les situations dans lesquelles les parties à l’arbitrage peuvent recourir aux mesures conservatoires.

ARGENTINE REPUBLIC DECEMBER 28, 2018

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) prevent action which might aggravate or extend 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, unless the parties agree otherwise:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

(b) the party requesting the recommendation of a provisional measure shall satisfy the Tribunal that:

(i) harm not adequately reparable by an award of damages is likely to result if the measure is not recommended, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.

~~(bc)~~ the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

~~(ed)~~ 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

~~(de)~~ subject to Rule 8(3), 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, after giving the parties an opportunity to make submissions. The Tribunal may also recommend provisional measures different from those requested by a party, after giving the parties an opportunity to present their observations on such measures.

(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, after giving the parties an opportunity to make submissions.

[...]

Commentary

It is more appropriate to provide for provisional measures to prevent action that might aggravate or extend the dispute, rather than to maintain the *status quo*.

The parties should be allowed to agree to modify the procedure for provisional measures.

The party requesting the recommendation of a provisional measure should satisfy the Tribunal that: harm not adequately reparable by an award of damages is likely to result if the measure is not recommended, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the Tribunal in making any subsequent determination.

It should be clarified that the time limit for the Tribunal to rule on provisional measures is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

Both parties should be given an opportunity to present their observations before a Tribunal recommends provisional measures on its own initiative, recommends provisional measures different from those requested by a party, or modifies or revokes provisional measures.

ARMENIA DECEMBER 28, 2018

We propose to develop a guidance (based also on other arbitration rules and best practice of arbitral tribunals in this regard) as to the circumstances in which provisional measures may be issued.

CANADA DECEMBER 28, 2018

1) Canada suggests that it is necessary for the Rules to reflect that each State has a right to regulate, and in fact, an obligation to continue to regulate in certain areas even when an investment dispute is ongoing. Any order for provisional measures should respect the sovereignty of the State in this regard. In this regard, Canada suggests that a third sentence be added to paragraph 3, stating that “In recommending the provisional measures it determines are urgent and necessary, the Tribunal shall give due deference to the right of a State to regulate within its territory to achieve legitimate policy objectives.”

COLOMBIA

DECEMBER 28, 2018

Colombia considera que cualquier orden de medidas provisionales debe tener en cuenta el derecho a regular y los deberes del Estado en la protección del interés público.

FRANCE

JANUARY 14, 2019

AR 50 (1)(a)(i) : « causer un dommage réel **actuel** ou imminent à l'autre partie ».

AR 50 (3) : « (...) Le Tribunal ne recommande des mesures conservatoires que s'il **détermine juge** qu'elles sont urgentes et nécessaires ».

INDONESIA

DECEMBER 28, 2018

The Rule regarding provisional measures now specifies which types of measures may be recommended, and provides that provisional measures will only be recommended if the Tribunal determines that they are both urgent and necessary.

Experience shows that applying the criteria of Rule 50 (including urgency and necessity, but of, inter alia, the financial standing of the Claimant), can lead to incorrect outcomes. This issue should be clarified by the Secretariat. The procedure and the criteria applicable to, on the one hand, applications for provisional measures and, on the other hand, applications for security for costs, should be completely separate.

ITALY

DECEMBER 24, 2018

Italy appreciates the attempt by ICSID to upgrade rules on initial (AR 34 ff) and special (AR 50 ff) procedures. It would however recommend that a mechanism of objection by the respondent be conceived also before the tribunal is set, as it is found in other sets of rules for investment arbitration, such as SCC and ICC. Italy is aware that at this stage information on the case is scarce but at least a

preliminary check can be done on prima facie elements of admissibility and lack of jurisdiction. A procedure could be set permitting the claimant to react to opposition by the respondent.

MOROCCO **DECEMBER 27, 2018**

Etant donné que les mesures conservatoires visent à préserver les droits des parties au différend au cours de l'instance et à éviter un dommage irréparable, il est proposé de prévoir la possibilité pour les parties au différend de demander une mesure conservatoire non seulement au tribunal arbitral mais également au juge étatique notamment lorsqu'il y a urgence et que le tribunal arbitral n'est pas encore constitué.

URUGUAY **FEBRUARY 1, 2019**

B. *Procedimientos penales paralelos: medidas provisionales*

La enmienda contenida en la regla 50 propuesta por la Secretaria del CIADI sobre medidas provisionales dice que “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”.

Se observa que en estos criterios no se incluyen “daño irreparable” “riesgo que no se puede reparar con un laudo sobre daños”. La enmienda propuesta debería de contener criterios que se puedan aplicar a aquellos casos en donde la medida provisional interfiere con una investigación o procedimiento criminal en el Estado demandado.

Si bien los Tribunales actúan con precaución cuando estas se refieren al poder soberano del Estado en conducir investigaciones y procesamientos criminales dentro de su territorio, esté debería de incluirse entre las consideraciones que tendrá en cuenta el Tribunal al momento de realizar sus recomendaciones.

DEBEVOISE **DECEMBER 28, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Finally, we draw your attention to the suggestions we made in March 2017 that have not been adopted in the current draft of the Proposed Amendments, but which may merit further consideration.

First, ICSID should adopt rules for the appointment of **Emergency Arbitrators** *before* the constitution of the tribunal. Although **Proposed Arbitral Rule 50(7)** allows for recourse to other courts and tribunals, in practice, such relief may not be available because it is severely limited by the terms of Rule 50(7), which require that the “instrument recording the parties’ consent to arbitration” allow for such recourse. As we previously noted, in some cases, the availability of emergency relief can be a matter of life and death.¹¹ The need for access to emergency arbitration is even more acute in light of **Proposed Arbitral Rule 4**, which appears to no longer allow for a party to communicate directly with the tribunal in urgent circumstances.

[additional comments on proposed AR 16, 37]

Third, ICSID should clarify and expand on **Proposed Arbitral Rule 50**, which addresses **Provisional Measures**. Specifically, we suggest that the language used in Rule 50(1) reflect the binding nature of a tribunal’s recommendation of provisional measures, consistent with well-established precedent. As previously noted, we suggest that the Proposed Amendment also specify the standard applicable to any reconsideration of an order of provisional measures.¹⁵

[additional comments on proposed AR 63]

DENTONS DECEMBER 21, 2018

Note the incorrect numbering in the Spanish version.

STEPTOE DECEMBER 28, 2018

12.1 Provisional measures have heightened importance where there is an ongoing relationship between the parties or there is close proximity between them, for example when the investor is still *in situ*. They become crucial where there is a risk to life and limb. In such instances, the need for an urgent order (interim or otherwise) is even more acute. Therefore, it would be useful for Rule 50 to expressly provide that the Tribunal can (as some have done in the past) issue an interim order prior to the respondent filing its observations on the application for provisional measures. Rule 50(2)(d) (timetable for issuing a decision on provisional measures) is

ambiguous as to whether or not this is possible. Although Rule 50(4) (provisional measures on the Tribunal's own initiative) arguably provides the power to make an interim order, even in that situation, Rule 11(2) requires the Tribunal to "consult with the parties" prior to making such an order, thereby delaying the issue of an interim order. In the circumstances, the Tribunal's power to issue an interim order should be clarified by way of an express provision providing that an interim order can be recommended pending a decision on provisional measures.

12.2 To prevent abusive requests for provisional measures (including an interim order), Article 50 could be amended to provide that a party applying for provisional measures must provide full and frank disclosure, including possible factual arguments as to why the order should not be granted.

12.3 In addition, given the importance and urgency of provisional measures, and the fact that in practice the President of the Tribunal is usually the person dealing with such applications, we consider that it would be worthwhile to recreate Rule 17 of the IC SID Arbitration Rules of 10 April 2006. Rule 17 of those Rules provides that if the President of the Tribunal is unable to act, his or her "functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their appointment to the Tribunal".

THREE CROWNS

JANUARY 16, 2019

We query whether to preserve the historical term *recommend* in Rule 50(1), which lends itself to ambiguity. We suggest instead the neutral term *issue*, which is without prejudice to the question once debated under Article 47 of the Convention of whether provisional measures so issued are mere recommendations or orders.

As presently drafted, Rule 50(3) could be (mis-)read as suggesting that urgency and necessity are the only considerations; accordingly, we suggest alternative language that would clarify this:

(3) *In deciding whether to ~~issue~~~~recommend~~ provisional measures, the Tribunal shall consider all relevant circumstances. ~~The Tribunal shall only recommend, including whether~~ provisional measures ~~if it determines that they~~ are urgent and necessary.*

As drafted, it is not clear whether the power of the tribunal to issue measures “on its own initiative” under Rule 50(4) is in any event conditioned upon a request of a party (in which case the matter is covered by the second sentence of paragraph (4)) or a power that is entirely discretionary, without need for an originating request by a party (in which case it should be set out in paragraph (1) for clarity). The latter would be unprecedented and, so far as we are aware, without an analogue in the UNCITRAL Model Law or other Arbitration Rules.

We also propose a small revision to Rule 50(5) for the purpose of clarity by substituting the word “must” with “is under the continuing duty to”.

The reference in Rule 50(7) to recourse being “available in the instrument recording the parties’ consent” may lead to confusion, as the instrument does not make such recourse available, it simply permits or precludes it. It would therefore be clearer if the Rule provided “if such recourse is permitted by...”.

Finally, we propose the insertion of a new Rule 50(8) that provides for compensation in case interim measures appear at a later stage in the proceedings not to have been warranted, similar to Article 26(8) of the UNCITRAL Rules 2013.

Rule 51 – Security for Costs

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 51: Security for Costs

(1) A State that is party to the dispute 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, if there are reasonable grounds to believe that there is a risk the disputing investor may not be able to honour a possible decision on costs issued against it.

(2) The following procedure shall apply, unless the parties agree otherwise:

(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 State party to the dispute 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) subject to Rule 8(3), 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-disputing investor to provide security for costs, the Tribunal shall consider the party’s disputing investor’s ability to comply with an adverse decision on costs and any other relevant circumstances.

(4) If ~~the disputing investor a party~~ fails to comply with an order for security for costs within the time limit set by the Tribunal, the Tribunal ~~may~~shall suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal ~~may~~shall, 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, after giving the parties an opportunity to make submissions.

Commentary

A State party to the dispute should be allowed to request the Tribunal to order the disputing investor to provide security for the costs if there are reasonable grounds to believe that there is a risk the disputing investor may not be able to honour a possible decision on costs issued against it.

The parties should be allowed to agree to modify the procedure for security for costs.

It should be clarified that the time limit for the Tribunal to rule on security for costs is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

Suspension and discontinuance of the proceeding should be mandatory in case of failure by the disputing investor to comply with an order to provide security for costs.

Both parties should be given an opportunity to present their observations before a Tribunal modifies or revokes its order for security for costs.

ARMENIA DECEMBER 28, 2018

We share some of the Member States' concerns with respect to the reciprocal application of this Rule. While private parties-claimants, i.e., nationals of the other Contracting States may have insufficient assets for well-known reasons, Contracting States are sovereign entities with unlimited number of assets. We support proposals that suggest modifying this Rule as to make it applicable only to the claimants that are nationals of the other Contracting State and not to the Contracting States.

AUSTRALIA**JANUARY 22, 2019**

Australia supports AR 51, which allows the Tribunal to order a party to provide security for costs. We believe a party should be able to seek security for costs from another party where there are reasonable grounds to believe that they would not be able or willing to pay an order for costs. In this regard, Australia considers that AR 51 should be amended to explicitly include as a relevant circumstance, whether the party has received third party funding and the terms thereof.

AUSTRIA**DECEMBER 21, 2018**

Amended Arbitration Rule 51 clarifies that ICSID tribunals have the power to impose security for costs on claimants and empowers them to suspend and eventually discontinue the proceedings if a claimant fails to comply with an order for security for costs. These provisions are important to tackle abuse and regulate extra-judicial influences on the proceedings. Consideration should be given to authorize ICSID tribunals to order disclosure whether or not a third party funder has committed to undertake adverse cost liability for the tribunals to be in a position to take third party funding into consideration when ordering security for costs.

CANADA**DECEMBER 28, 2018**

- 1) Canada believes that it would be useful for the Rules to expressly give to a Tribunal the authority to award security for costs, rather than leaving it as implied under the current approach. Paragraph 1 could thus be revised to say “On the request of the other party, or on its own initiative, the Tribunal may order a party to provide security for the costs of the proceeding, and determine the appropriate terms for the provision of the security.”

- 2) Canada believes that the current standards developed by Tribunals for when security for costs will be required are inappropriate and far too burdensome. These standards should be changed and the proposals for amendment should avoid any suggestion that they are codifying or accepting such standards. In Canada’s view, security for costs should be awarded where there are reasonable grounds to believe that a disputing party will not be able to comply with an adverse costs award. Further, while Canada agrees that the existence of third party funding is not determinative, it is a relevant factor and Canada would support a reference to it here. Hence, Canada suggests that paragraph 3 be rewritten to say “In determining whether to order a party to provide security for costs, the Tribunal shall

consider whether there are reasonable grounds to believe that a party will not be able to comply with an adverse decision on costs and any other relevant circumstances, including the whether the party has received third party funding and the terms thereof.”

COLOMBIA **DECEMBER 28, 2018**

Colombia considera que se debe incluir la posibilidad de que un Tribunal pueda ordenar una garantía por costos, aún sin solicitud de las partes. La redacción del párrafo (1) sería, “(1) a solicitud de una parte, o a iniciativa del Tribunal éste podrá ordenar que la otra parte otorgue una garantía por costos del procedimiento y determine los términos adecuados para el otorgamiento de dicha garantía.

Por otra parte, Colombia considera que los estándares actuales desarrollados por los Tribunales para proceder con la garantía por costos, no están definidos. En opinión de Colombia, esta garantía debe otorgarse si existen motivos razonables para creer que una parte contendiente no podrá cumplir con los efectos de un fallo negativo.

Colombia considera que al momento de decidir si una parte puede soportar los efectos adversos de una decisión, se debería tener en consideración la participación de un Tercero Financiador. De esta manera, se sugiere que se reescriba el párrafo 3, de la siguiente manera: “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, incluyendo si la parte ha recibido financiamiento de terceros y los términos del mismo”.

COSTA RICA **DECEMBER 28, 2018**

Costa Rica supports this proposal because the possibility of granting security for costs might help to discourage frivolous claims and secure the costs of the proceeding for the State involved in cases of frivolous claims. Therefore, Costa Rica believes that it would be useful for the Rules to expressly give to a tribunal the authority to award security for costs, rather than leaving it as implied under the current approach. Costa Rica provides below some drafting proposals in order to reflect this view.

With regards to paragraph 3, Costa Rica provides below a drafting suggestion to clarify the obligation of the tribunal to take into consideration reasonable grounds when requested to grant security for costs. In the case of TPF, while its existence is not determinative, it might be relevant grounds to assume that the other party has financial difficulties and may have no resources to pay for the costs of the proceedings. At the same time, normally there is no information on whether the TPF will be liable for the costs of the proceeding in case of loss. Therefore, Costa Rica would support a reference to it in paragraph 3.

Rule 51
Security for Costs

(1) ~~[CR: On the request of the other party to the dispute or on its own initiative, a Tribunal may order a party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.]~~ ~~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.

[...]

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider ~~[CR: whether there are reasonable grounds to believe that a party will not be able to comply with an adverse decision on costs and any other relevant circumstances]~~ ~~the party's ability~~ ~~[CR:., including the whether the party has received third party funding and the terms thereof.]~~

EU DECEMBER 21, 2018

The European Union and its Member States welcome a separate provision on security for costs (in addition to a rule on provisional measures in general) which is also in line with the recent treaty practice of the European Union and its Member States in agreements approved at EU-level.

Regarding the link between third party funding and security for costs, the European Union and its Member States acknowledge that the existence of third party funding could be an important and relevant factor for the respondent when assessing whether it is useful to request security for costs. Having said this, the European Union and its Member States maintain their view expressed above, that an order on security for costs should always be based on a case-by-case evaluation by the tribunal and the mere presence of third party funding should not ipso facto warrant such an order, in particular where the claimant is a natural person or a small or medium sized enterprise.

[see additional comments on proposed AR 21]

FRANCE JANUARY 14, 2019

« Security for costs » could be translated by « Cautionnement des frais ».

GEORGIA **DECEMBER 28, 2018**

Comment to Rule 51(3):

Georgia highly supports the inclusion of the provision and procedure on the security for costs.

Paragraph 3 of Rule 53, provides guidance for the tribunals regarding the circumstances that should be considered when deciding on the issue of security for costs. Unfortunately, the provision only refers to the “party’s ability to comply with the adverse decision on costs” as possible criteria and then provides a broad formulation as regards other relevant factors - “any other relevant circumstances”. Although Georgia fully agrees with the approach to provide non-exhaustive list of circumstances or criteria to be taken into account by the tribunal regarding security for costs, we still believe that there are certain important criteria that should explicitly be listed in the Rule, such as for example conduct of the parties, bad faith tactics, abuse of procedure, third party funding, etc.

Georgia is also concerned with the fact that in terms of the possible other criteria, the Working Document (527-528) only refers to “the history of non-compliance with legal orders or bad faith”. This circumstance might be very rare and therefore not applicable to the cases of investor-state arbitrations and certainly cannot be regarded as an only possible valid criteria to consider regarding the issue of security for costs. Therefore, Georgia suggests that the comments provided in Working Document are clarified in a way that provides clear understanding to the users that the above-mentioned circumstance is not the only possible factor and that there could be other equally valid factors to be taken into consideration by the arbitral tribunal.

Georgia believes that it is important to give clearer and more precise guidance to both the arbitral tribunal and the parties to investor-state disputes as to what should be an applicable threshold for the use of the security for costs in order to promote effective use of this mechanism in practice. We are strongly convinced that the lack of practice regarding the use of the security for costs to date is the result of the absence of proper legal basis and authority of the arbitral tribunal and the lack of relevant guidance as to when and in what circumstances should this mechanism be applied.

INDONESIA **SEPTEMBER 26, 2018**

In general, Indonesia is amenable with the security of costs proposal under Rule 51, except with the reciprocal nature of the proposal. We do not see the necessity to make this article to apply to the responding Contracting State. The rule should only apply to claimants that are nationals of the other Contracting State. The rule should not apply to Contracting States. Contracting States are sovereign entities with unlimited number of assets. This is entirely different with individual or corporate claimants which may have insufficient assets, especially, as a result of bankruptcy, corporate structuring or otherwise. Therefore, Indonesia proposes to make this rule only to apply to claimants that are nationals of Contracting States. Please find below our proposed modification for the current proposal.

Arbitration Rule 51
Security for Costs

- (1) A **party Contracting State** may request that the Tribunal order the **national of the other party Contracting State** to provide security for the costs [...].
 - (2) The following procedure shall apply:
 - (a) [...]
 - (b) [...]
 - (c) if a **party Contracting State** requests security for costs [...]
 - (d) [...]
 - (3) In determining whether to order a **national of the other party Contracting State** to provide security for costs, the Tribunal shall consider the **party's national's** ability to comply with an adverse decision on costs and any other relevant circumstances.
 - (4) If ~~a~~ **the national of the other party Contracting State** fails to comply [...].
 - (5) ~~A~~ **The national of the other party Contracting State** must promptly disclose [...].
 - (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 [...]
 - (7) **In relation to the TPF, should include any financial agreement with a third-party, among other security for costs.**
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ISRAEL **DECEMBER 27, 2018**

Should this Article refer only to security for costs by the claimant? Or at least para 4? Otherwise the respondent (state) could use this Article as a tool to attempt to suspend proceedings.

In paragraph 3, Israel believes that "any other circumstances" is too broad. Hence, there should be an exhaustive list of circumstances.

ITALY **DECEMBER 24, 2018**

[see additional comments on proposed AR 21]

Italy shares the view of the Commission that the existence of third party funding could be a relevant factor for the respondent when assessing whether it is useful to request security for costs, as well as that the tribunal should not automatically order security for costs in the presence of third party funding, but be given a faculty to do so, in order to be able to proceed under a case-by-case approach.

MEXICO **DECEMBER 28, 2018**

México considera adecuado y necesario incluir reglas específicas sobre garantía por costos dada la experiencia de algunos países (incluido México) en la recuperación de los costos otorgados en los laudos en favor de una parte, así como la tendencia reciente a regular estos casos en tratados y otras reglas de arbitraje.

Algunos Estados han manifestado la importancia de aclarar que el estándar aplicable a la determinación garantías por costos es independiente de criterios desarrollados por tribunales arbitrales, por considerarse en muchos casos inapropiados y gravosos para la parte que solicita su determinación. En ese sentido, la determinación de garantías de costos debe proceder en aquellos casos en los cuales haya elementos que permitan razonablemente inferir que una parte contendiente no tendrá la capacidad que de cumplir con una decisión adversa en materia de costos, tal como se propone en la regla 51(3) RA y regla 60(3) RAMC.

Asimismo, México aprecia que la regla 51(3) RA y regla 60(3) RAMC permita prever el caso específico de financiamiento por terceros (véase DT párrafo 530). Sin embargo, y aun cuando la existencia de financiamiento por terceros no es un elemento determinante, México considera esta situación puede llegar a ser relevante en la determinación de garantías de costos. En ese sentido se propone, al final de la regla 51(3) RA y regla 60(3) RAMC especificar que entre las “circunstancias relevantes” a considerar, se prevea el hecho de que una parte ha recibido financiamiento por terceros, así como sus términos.

MOROCCO **DECEMBER 27, 2018**

Exiger de la partie qui recourt au financement par une tierce partie, le dépôt d'une garantie de paiement des frais dans la mesure où la partie qui utilise ce genre de financement n'a pas les ressources financières lui permettant d'honorer les dépens à sa charge dans l'arbitrage ; et

Exiger que le tribunal ordonne une garantie au paiement des frais s'il existe des raisons de croire que l'investisseur a structuré la société ou cédé des actifs dans le but d'éviter les conséquences de la procédure d'arbitrage.

PANAMA **DECEMBER 28, 2018**

[footnote disclaimer]

Panama believes the Secretariat's proposed rule to formalize the availability of security for costs is an important step to preserve the legitimacy of ICSID in Member States. As the Secretariat's survey of compliance with cost awards shows, in 35% of the cases reported, Member States awarded costs never succeeded in collecting their full award.¹ These cost awards can easily run into the millions of dollars.² For the Member States unable to recover costs awarded to them in one or more cases, it is difficult to justify participating in a system in which taxpayers must bear the burden of arbitrating a claim notwithstanding a favorable costs award. Formalizing a procedure to enhance the probability that Member States will recover cost awards in their favor will strengthen ICSID as an institution.

To the end of reinforcing the proposed rule, Panama offers the following comments:

a. Panama welcomes the Secretariat's decision to create a separate rule giving Tribunals the power to order that parties provide security for costs. Panama considers the adoption of a separate procedural rule addressing security for costs appropriate given the authority of Tribunals to order costs stemming from Article 61 (2) of the Convention and from their inherent powers under Article 44 of the ICSID Convention,³

b. We suggest that ICSID make clear that the source of authority for the proposed rule is the Tribunal's inherent power to manage the arbitration under Article 44.⁴ Panama proposes, further, that the rule or its commentary explicitly state that the "exceptional circumstances" and "urgency" standards from the provisional measures context do not apply⁵ and that the application standard is as stated in this proposed rule, namely "ability to comply with an adverse decision on costs and any other relevant circumstances. Adding this clarifying language will avoid the misapprehension that the Tribunal's power to award security for costs stems from and incorporates the standards of Article 47.⁶

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

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

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

d. Panama agrees with Indonesia that it is unnecessary to apply the security for costs rule to Member States.⁷ Historically, Member States do comply with arbitral awards,⁸ whether by payment or settlement.⁹ Article 55 of the ICSID Convention, which preserves the immunity of sovereign assets from execution in accordance with national law, records a fundamental compromise

reached by the Member States when negotiating the Convention: in exchange for allowing claimants to bring arbitral claims against sovereigns, sovereigns retain a measure of immunity from execution. Allowing claimants to request security for costs would alter the basic bargain of the Convention without the sanction of Member States. Therefore, Panama joins in Indonesia's proposal to limit the rule to requests by Member States for security for costs.

Panama suggests that the rule should expressly ask Tribunal members to evaluate third-party funding as a factor in requiring security for costs. There is an emerging recognition in the ICSID context that third-party funding for an arbitration is one indicium of a claimant's inability to pay an adverse costs award.¹⁰

Panama proposes that AR 51 (3) be amended to state: "In determining whether to order a party to provide security for costs, the Tribunal shall consider whether there are reasonable grounds to believe that a party will not be able to comply with an adverse decision on costs and any other relevant circumstances, including whether the party has received third party funding and the terms thereof. "

PORTUGAL **DECEMBER 21, 2018**

The current amendment concerning security for costs does not specifically protect SMEs. We would tend to support an express reference to the specificities of these companies by providing for an exception to the general regime, such as the creation of an exemption in security for costs rule or a reduction of the respective amount, via definition of threshold.

Also considering the particular situation of SMEs, we express our support to what it is proposed on EU/Members-states document in the sense that Tribunals would not automatically order security for costs when it comes to third party funding.

QATAR **DECEMBER 19, 2018**

Qatar welcomes AR 51 in order to avoid vexatious and frivolous claims.

[SINGAPORE](#)

JANUARY 4, 2019

We strongly support this proposal. Many respondent States currently end up with the short end of the stick even if they succeed in defending themselves as they are statistically less successful in recovering costs than claimants. In contrast, given the relatively stronger financial standing of a State, a successful investor rarely has to worry about recovering any costs that are awarded in its favour. This proposal would address the current systemic imbalance on costs recovery in ISDS.

[SOMALIA](#)

JANUARY 17, 2019

Security for Costs: The previous requirement for security for costs to be intertwined with a provisional measure standard was – as the empirical evidence demonstrates – unworkable. Hence, the standalone rule is welcome. However, the presence of third party funding must be an enumerated criterion for the Tribunal to consider in deciding whether to grant security for costs. As an alternative, a party that has third party funding should demonstrate either the presence of an insurance policy designed to provide for an adverse costs award or an undertaking directly by the third party funder that it will be responsible for such an award. Without such direct guidance to tribunals, the imbalance between State and third party funder may remain unchecked.

[SPAIN](#)

DECEMBER 21, 2018

ES apoya la inclusión de una disposición de garantía por costos.

Ahora bien, consideramos que si una parte incumpliera la orden de garantía por costos, el procedimiento debería ser discontinuado a instancia de parte.

[UKRAINE](#)

DECEMBER 28, 2018

The ICSID Draft makes the remedy of security for costs available to “a party” to arbitration rather than to the respondent alone, which is not acceptable.

Firstly, that security for costs is made available to the claimant, on top of the respondent, is not consistent with the internal logic or the ICSID Draft. Draft Rule 51(4) empowers the Tribunal to suspend the proceeding if a party fails to comply with an order for security for costs, and discontinue the proceeding if it is suspended for more than 90 days. From the claimant's perspective, suspension or discontinuance of the proceeding would be the most undesirable outcome, and it would be, indeed, inappropriate to allow the respondent to essentially shut down the claim by just having failed to comply with an order for security for costs.

Secondly, security for costs has historically been a remedy available to respondents against impecunious claimants, and not the other way around. There are sound considerations behind that principle: a claimant can choose a respondent to sue, and the claimant is able to refrain from suing an impecunious respondent. A respondent, however, has no such a freedom of choice, and the respondent will have to defend a claim even if the claimant is impecunious. That is why, unlike a claimant whose self-help remedy is a considered choice of respondents, a respondent is in an acute need for a remedy of security for costs.

It is proposed, therefore, that the remedy of security for costs be made available to respondents rather than to all parties to arbitration.

Rule 51(1)

~~A party~~ The respondent may request that the Tribunal order the ~~other party~~ claimant to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.

Rule 51 (2) (c)

if ~~a party~~ the respondent 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

Rule 51(3)

In determining whether to order ~~a party~~ the claimant to provide security for costs, the Tribunal shall consider the ~~party's~~ claimant's ability to comply with an adverse decision on costs and any other relevant circumstances.

Rule 51(4) If ~~a party~~ the claimant 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.

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales

D. Garantía de costos

Se comparten las propuestas presentadas por la Secretaría del CIADI de incluir el tema de la garantía de costos en las reglas de iniciación de los procedimientos (regla 14) y en las reglas de procedimientos arbitrales (regla 51).

En la etapa de iniciación de los procedimientos se propone incluir una enmienda a la Regla 14 (5) (a) de iniciación de procedimiento arbitral, la cual permite solicitar el pago por adelantado de los costos estimados del procedimiento hasta la primera sesión del Tribunal arbitral al momento de registrar una solicitud de arbitraje o conciliación.

Esta medida brinda una seguridad financiera en laudos por costas CIADI contra demandantes a prueba de sentencias para aquellos Estados demandado que enfrentan dificultades al tratar de recuperar la totalidad o algunos de sus gastos de los inversionistas demandantes. Si bien, esta no impedirá el registro de solicitudes de arbitraje-conciliación frívolas o sin mérito, sólo se asegura que la parte que presenta una solicitud tenga disponibilidad financiera para adelantar costos del procedimiento.

Como comentario general se señalan diferencias entre la propuesta de enmienda de la Regla 14 y la actual redacción de la misma. Se comparte la propuesta de reducir el plazo de 6 meses a 90 días para discontinuar el procedimiento arbitral en caso de falta de pago por una de las partes – Regla 14 (5) (e) (iii). Se señala que la propuesta, en su redacción en español, habla de la posibilidad de “discontinuar” el procedimiento. En la redacción actual de la regla 14 (3)(d) se habla de “poner fin al procedimiento”. Además de ello, la redacción actual de la regla habla de “suspensión por un periodo de más de 6 meses consecutivos”. Se solicita a la Secretaría aclaración sobre la forma en la cual se contará el plazo de 90 días, además de los efectos entre discontinuar o poner fin al procedimiento.

En la etapa del procedimiento arbitral se apoya la iniciativa de incluir una nueva regla sobre garantía de costos, a través de la cual se puede solicitar al Tribunal que ordene que la otra parte otorgue una garantía por costos del procedimiento y determine los términos adecuados para el otorgamiento de dicha garantía.

La regla 51 fue incorporada a iniciativa de Panamá basándose en su experiencia como país demandado ante la imposibilidad de cobrar laudos del inversor. Aunque se observa que los Estados cuando participan del mecanismo de solución de controversias siempre tienen fondos para honrar laudos por cobro de pesos. En este sentido, esta exigencia debería imponerse sólo a los inversores.

2. Proposed Addition of Rule 51 (Security for Costs)

[quotes text of proposed AR 51]

ICSID and UNCITRAL investment tribunals have generally held that the mere existence of arbitration finance, without any other relevant circumstances, is an insufficient basis for requiring a party to provide security for costs.¹⁹ In what has become a frequent occurrence in ICSID arbitrations, upon learning of the existence of an arbitration finance arrangement, respondents proceed to file applications seeking security for costs. They do so either as a stand-alone application or as part of a sequence of strategic procedural requests. As explained by Judge Charles Bower:

“There is nothing per se “evil” about third-party funding. Any such disclosure by a party, however, is likely to open to the non-disclosing party the “evil” possibility of misusing the information it receives for the purpose of delay and harassment through requesting ever more detailed information regarding the funding.”²⁰

One form of that harassment is the filing of spurious security for costs applications, which are rarely, if ever, successful. The results are unambiguous: a 5% success rate for security for costs applications (as of 1 June 2018), among the lowest for any procedural application advanced in ICSID arbitrations. In the 20 cases where a respondent filed a security for costs application, only one has been successful. In the other 19 arbitrations, tribunals denied security for costs applications because the exceptional circumstances required were absent. In those 19 decisions, the involvement of arbitration finance, if any, has proven not to be an exceptional circumstance.²¹

What is more, although ICSID has explained that states share a central concern – the risk that claimants will fail to comply with costs awards – in practice, very few costs awards in favor of states go unpaid. And this is not just anecdotal. As part of the rule amendment process, ICSID undertook to conduct a survey concerning compliance with awards of costs, based on all ICSID Convention and Additional Facility awards and post-award decisions issued between October 14, 1966 and April 1, 2017. The results are striking: “most awards in favor of States are paid” and for those few that are not paid, “States do not always seek to enforce awards in their favor that have not been complied with”.²²

Consistent with this, ICSID’s proposed Rule 51 on security for costs is a new rule and properly does not address the use of arbitration finance, but 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. In the words of ICSID “[a]s 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.”²³

That said, in light of the low success rate for security for costs applications – the lowest for any procedural application advanced in ICSID arbitrations – we would recommend that ICSID revise Rule 51 to encourage tribunals to make interim decisions on costs in respect of unsuccessful security for costs applications, consistent with the proposed amendments to Rule 19(5).²⁴ Alternatively, ICSID could issue a practice direction encouraging tribunals to issue interim decisions on costs, payable within 30 days, following any unsuccessful application for security for costs. The rationale for issuing interim costs orders is straightforward: to deter any further procedural or other misconduct during the pendency of the arbitration. And there are multiple reasons why such interim costs orders are effective: (a) “costs orders made at the stage of the final award rarely reflect with any precision the conduct of the parties”; (b) “final costs awards do not deter procedural misconduct during the course of the arbitration itself”; and (c) “issues of procedural misconduct can get lost amid the analysis of the underlying merits of the claim” when costs are awarded in the final award.²⁵

[CCPIT](#) **DECEMBER 25, 2018**

A. Original Text

[quotes text of proposed AR 51]

B. Modified Text

It is advised to amend Rule 51 (Security for Costs) of the proposed Arbitration Rules as follows:

Rule 51 Security for Costs

(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. **A party funded by a third-party funder shall be the decisive element as being ordered to provide security for arbitration cost and all the expenses of the other party once it so requests.**

(4) If a party fails to comply with an order for security for costs, the Tribunal **shall** 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 **after having given all the parties reasonable opportunity to present its view.**

C. Reason for Amendment

1. The proposition is that the claimant is required to provide security for costs to prevent abuse of international commercial claims. The consequence of filing an frivolous arbitration is that the arbitral tribunal may rule the claimant bear the costs of arbitration,

attorneys' fee, travel expenses, etc. incurred by the respondent. Of course, the arbitral tribunal's premise of such a ruling is that the claimant's financial situation is not good and may not be able to bear the unfavorable costs. Nevertheless, in order to prevent the respondent from using the security for costs as strategy to intentionally create obstacles for the claimant, the respondent should be required to provide corresponding evidence to prove the reasonableness of security for costs.

2. In order to prevent abuse of claims due to the involvement of third-party funding, claimants are required to provide security for costs to reduce the risks. The argument and its basis is that the involvement of third-party funding does not lead to abuse of claims, which is expressed in the ICCA-QUEEN MARY Third-Party Funding Report, and is mainly provided by third-party funders. Therefore it could not conclude that the involvement of third-party funding would not lead to abuse of claims.

3. The key to determining whether a security for costs is required is the ability of the party to assume an adverse costs award. While third-party funding is increasingly being used by large, solvent companies, however, it is undeniable that parties using third-party funding are more likely to be underprivileged. Therefore, when a party seeks for third-party funding, it should be presumed that the party does not have the ability to comply with adverse cost decisions.

4. If third-party funding, which appears to be in its beginning in the field of international commercial arbitration, is used in international arbitration cases involving investors against the host state, more caution should be taken, as small countries may face bankruptcy as a result and this need to be prevented.

5. Therefore, the existence of third-party funding should be the basis for the claimant's inability to bear the costs of unfavorable arbitration costs, attorneys' fee, etc. The arbitral tribunal should accordingly request the claimant provide security for costs, that is, if the proceeding is funded by third-party funder, then the claimant must bear the consequences of the corresponding unfavorable expenses by providing a security for costs (we could not agree that the use of the funding does not mean the claimant's inability to afford the unfavorable costs).

CENTRO STUDI TPF **DECEMBER 27, 2018**

The proposed comment on this provision of the Draft lies on several points.

To begin with, it should be considered that the Working Paper describes the above provision as “*a new, stand-alone rule allowing a Tribunal to order security for costs*”. The applicable test is “*the party's ability to comply with an adverse decision on costs and any other relevant circumstances*”. A failure to comply with an order to provide security would entitle the tribunal to suspend the proceeding for up to 90 days, and thereafter, to discontinue the proceeding after consulting with the parties.

Paragraphs 267 and 530 of Working Paper also refers to this regulation of security for costs as a new rule, and do not address the effect of TPF. Instead, the proposed provision requires the tribunal to consider the respondent's ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances.

In the aspect of the respondent in investment arbitration, the security for costs is used as a protection to legit claims which will affect the taxpayers' resources.

However, on the other side, a claimant might become financially incapable of accessing justice if it is asked to put up security for costs. With a Funder into the mix, it is more obvious that the claimant has a financial situation of which may be caused a concern. These costs may potentially stifle claims as the Funder may think that the claim will be uneconomic.

The unclear standards as to an award for the security of costs adds more layers to the considerations that any tribunal needs to keep in mind while making an award for security for costs.

As a result, the mere fact of the existence 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 the proposed provision as set forth above.

Another interesting case for security for cost is the possibility that TPF creates an imbalance in the arbitration equation, because of the possibility of an "arbitral hit and run". There were many discussions that a security of cost should be granted to avoid misbalanced.

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 (e.g. *S&T Oil v Romania*, ICSID case no. ARB/07/13 [2010], where security of costs would be beneficial).

Suggestions for amendments and proposed elimination of Security for Costs clause

Among the possible solution to tackle the undesired downsides of a security for costs provision:

Limited disclosure

The idea has recently been introduced and integrated into Rule 24(1) of its Investment Arbitration Rules by the Singapore International Arbitration Centre³. It provides that the tribunal has additional powers to order disclosure of TPF arrangements.

Furthermore, it also provides for the tribunal to seek disclosure of the Funder's commitment towards adverse costs liability.

Similar provisions can be found in the Iran-Slovakia BIT, Article 21, which expressly provides for the circumstances in which the tribunal may order security for costs if it considers that there is a reasonable doubt that claimant would be not capable of satisfying a costs award or consider it necessary because of other reasons. Such provisions are a move toward ensuring that the presence of a Funder does not unduly affect a party and its ability to seek security for costs.

It is also essential to ensure that there are safeguards against respondents using disclosure of TPF as a weapon instead of a shield. For instance, it is unnecessary to seek disclosure of all the aspects of the TPF agreement. The liability as to the costs for the Funder should be the focal point for disclosure.

If the Draft rule is enforced as it currently is, there would be different interpretations and views by different tribunals. There must be something more than having the TPF to be required for an order to be made. In order to analyse as such, the party's ability to pay will

be weighed with matters of such as the desire to allow reasonable claims to proceed, as well as the counterbalancing wish to protect respondents from incurring substantial irrecoverable costs defending themselves against claims that ultimately fail. Furthermore, in order to find the correct balance for any particular case, tribunals need not decide the amount of security on an all or nothing basis.

The Garcia Armas approach.

It refers to a case⁴ where the tribunal ordered security for costs (independently of the existence of TPF), to make it express in the order that if the claimant ultimately prevails on its claims, the respondent state will be ordered to reimburse the reasonable expenses incurred by the claimant to post the security ordered.

Art. 21 of the Draft does not stipulate security for costs and the Draft provision on security for costs reads to be giving express authority to the arbitrator to order security for costs, meaning tribunals would not be obliged to apply the legal standard applicable to provisional measures.

Therefore, the Draft rule on security for costs would not affect TPF as such, but requires the tribunal to consider the respondent's ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. Hence, it can be inferred that the mere existence 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 the proposed provision on security for costs. 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.

In conclusion, it is the impression of the TPF Study Centre that it would be better off at this juncture to not have an express clause relating to security of costs due to the TPF arrangement but rather leave it to arbitrator. It could be a suggestion to the ICSID Secretariat to rather draft proposed guidelines relating to the security of costs.

DENTONS DECEMBER 21, 2018

Note the incorrect numbering in the Spanish version.

FRANCK, SUSAN DECEMBER 24, 2018

I have conducted extensive empirical work in connection with the costs of investment treaty arbitration (ITA). In March 2019, Oxford University Press will publish my book *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*. The publishers have kindly permitted me to provide selected extracts (without footnotes) of the draft final chapter of the book to inform your ongoing efforts.

The book contains multiple findings that affect ICSID's rule reform.

[...]

Third, to ensure that the incentives related to costs are not just theoretical, it is fundamental for ICSID to provide the express authority for tribunals to order security for costs. This eliminates any remaining doubts as to the powers of the tribunal. The rules, however, should not automatically default to order security for costs, as the power must be exercised with due consideration of the particularities of each case. As chapter 9 identifies, to explore the efficacy of security for costs, it would be prudent to create a working group that seeks to analyze factors that are most fundamental in creating fair and workable decisions, as there can be large deviations among the identity of claimants, the nature of respondents, and the disputes involved. Such variation requires some flexibility and an appreciation of the nuance of individual situations.

[see submission for additional comments on time, costs, case management, and mediation]

FRESHFIELDS DECEMBER 28, 2018

In order to ensure fairness in the conduct of proceedings, consider:

- Increasing the number of days before a Tribunal may order the discontinuance of an arbitral proceeding for failure to provide security for costs to 180 days (instead of 90 days). In circumstances where a claimant is under financial distress as a result of State measures that are the object of an arbitration claim, and where the claim itself is the only collateral that can be provided as a guarantee for security, it may take financial institutions more than 90 days in order to assess a claim and process a request for security.

[comment applies also to proposed (AF)AR 60(4)]

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

We note that creating a separate rule for security for costs may suggest that it is a new form of relief, separate from provisional measures. We further note that the ICSID Convention does not provide for an additional right to security for costs apart from Article 47 on provisional measures.¹ We therefore suggest clarifying that the tribunal may award security for costs as a provisional measure. Further, we suggest clarifying that an application for security for costs must meet the threshold requirements for provisional measures pursuant to the ICSID Convention and the ICSID Arbitration Rules.

Additionally, as the ICSID Working Paper notes, only one public decision has granted an application for security for costs.² In this case, the tribunal’s decision was based on a finding that the claimant (a) had a proven history of non-compliance with costs awards; (b) had acknowledged that it lacked sufficient funds to pay a costs award; and (c) was funded by an unknown third party. In contrast to the exceptional circumstances present in this case, Proposed Rule 51(3) only requires the tribunal to consider “the party’s ability to comply with an adverse decision on costs and any other relevant circumstances.” Given the high threshold tribunals have otherwise applied, we suggest elaborating upon and adding additional factors that the tribunal must consider in making a decision on an application for security of costs.

Moreover, the ICSID Working Paper recognizes that tribunals have generally recognized that the mere existence of third-party funding is insufficient to award security for costs.³ Given that the proposed rules also include a separate provision on the disclosure of third-party funding, to avoid any doubt we suggest adding language that clarifies that the mere existence of a third-party funder cannot by itself justify security for costs.⁴

The amendment of Rule AR 51 ((AF)AR 60) proposed by the Secretariat recognizes the power of the tribunal to order the provision of security for costs. Thus, it is positive that the amendment reflects the good practices in this field, especially that the “Tribunal shall consider the party’s ability to comply with an adverse decision on costs and any other relevant circumstances”, in line with the most recent developments on this field.

Notwithstanding the above, and as noted in the comments introduced by some States², potential unfair situations arising from such rules should be taken into account, since it does not distinguish between legal characteristics of individual or corporate entities and those of sovereign entities. Thus, it cannot be ignored that, in opposition to private persons, States are sovereign entities which have no possibility of “dissolution” as private corporate entities, so the requirement of security for costs from them becomes unreasonable.

Therefore, it is proposed that Rule 51 ((AF)AR 60) reads as follows:

Rule 51. Security for Costs

- (1) A party **A Contracting State** may request that the Tribunal order the other party **national of the other Contracting 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) [...];
 - (b) [...];
 - (c) if a party **Contracting State** requires security for costs before the constitution of the Tribunal, [...]; and
 - (d) [...]
- (3) In determining whether to order a party **a national of the other Contracting State** 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 **the national of the other Contracting State** fails to comply with an order for security for costs, [...].
- (5) A party **The national of the other Contracting Party** must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.
- (6) [...].

JAIME, MARGIE-LYS DECEMBER 27, 2018

Proposal:

[...]

- (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, including the existence of a third party funding pursuant to Rule 21. In the event that security turns out not to have been necessary, the tribunal may hold the requesting party liable for the reasonable costs of posting such security.

Comment: The proposal expressly refers to the existence of a third party funding as one of the elements to consider when providing security for costs. The second part of paragraph 3 is intended to protect the party that has been affected for an unfunded request for security for costs.

[LUTTRELL, SAM](#)

FEBRUARY 25, 2019

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

§1. Introduction and §2. Existing Regime for Security for costs at ICSID

[see full submission for commenter's introduction on ICSID's Working Paper proposal of AR 51 and "existing regime"]

§3. Observations on Proposed new Regime: Draft Rule 51

The new regime that ICSID is proposing to introduce is contained in Draft Rule 51, which ICSID has explained will be a 'new stand-alone provision'¹³ for security for costs. The shift from a provisional measures-based regime to a '*stand-alone*' regime for security for costs represents a major change and raises important questions of law and policy for users of the ICSID system, especially SMEs and capital-exporting countries.

In the sections that follow, the focus is on three issues: first, the lower threshold for security for costs that Draft Rule 51 will introduce; second, the applicability of Draft Rule 51 in annulment proceedings; and third, the matters that a tribunal or ad hoc committee is required to consider when deciding a security for costs application under Draft Rule 51.

[A] Lower Threshold for Security for Costs

As summarised above, to date, the law and practice of security for costs has developed as a branch of provisional measures jurisprudence under Article 47 and Rule 39. It bears emphasising that it has been case law, rather than the posited law of the ICSID Convention or the ICSID Rules, that has shaped the development of law and practice in this area. While there is no doctrine of precedent (*stare decisis*) in ICSID arbitration, or international law generally, previous decisions are commonly referred to by ICSID tribunals and annulment committees.

Against this backdrop, a major question that arises out the proposed changes is what effect the introduction of a stand-alone rule will have on the persuasive value of the body of case law that developed through tribunals deciding requests for security for costs under the Article 47/Rule 39 regime. This has important practical implications because, if the prior case law is no longer considered to be persuasive under Draft Rule 51, several important principles may fall away. One of these principles is that parties requesting security

for costs need to show 'exceptional circumstances'.¹⁴ If this principle no longer applies, then the threshold for security for costs will be materially lower than it is under the existing regime.

Draft Rule 51 does not contain any express wording to indicate that a particularly high threshold must be met for security to be granted, and indeed the Working Paper suggests that Draft Rule 51 is intended to lower the threshold that an applicant for security must meet.¹⁵ While it may be argued that decisions made under the prior regime remain persuasive – at least to the extent they stand for principles that are not expressly displaced by the text of Draft Rule 51 – it may also be argued that Draft Rule 51 is an effective codification and, as such, decisions under the previous regime are no longer relevant. Tribunals and committees will have considerable discretion in how they approach this important issue. However, Draft Rule 51 is certain to be regularly used and, as a result, a specific body of jurisprudence will quickly be developed under the new provision. Given that certain parts of the Working Paper suggest an intention to lower the threshold to make security for costs 'more readily available',¹⁶ and considering the way the rule is presently drafted (discussed below), it is likely that this jurisprudence will be significantly more favourable to parties requesting security for costs (typically, States) than the jurisprudence of the existing regime.

What this means is that, in crafting this new '*stand-alone*' security for costs rule, great care needs to be taken to ensure that its text is balanced and does not conflict with the object and purpose of the ICSID Convention. In the writer's view, the rule as currently drafted is manifestly lacking such balance and should not be accepted by capital-exporting States. It should either be opposed or accepted only on the condition that the text of Draft Rule 51(3) is amended to require the tribunal (or committee) to consider the extent to which an order to provide security for costs could limit a party's access to justice. Access to justice concerns are expressly noted in the Working Paper,¹⁷ and so this proposal should not come as a surprise to ICSID. This amended wording will ensure that, in a regime in which the threshold for obtaining security for costs is materially lower, the protections that the ICSID Convention was intended to afford to foreign investors are not overlooked.

[B] Applicability of Draft Rule 51 to Annulment Proceedings

As noted above, historically there has been some uncertainty as to the legal basis upon which an ICSID annulment committee may order security for costs. However, through the introduction of Draft Rule 51, there will be a clear basis for security for costs to be granted in annulment proceedings. This result will be achieved through two steps:

– First, by detaching the regime for security for costs from the provisional measures regime in Article 47 of the ICSID Convention, the fact Article 47 is not one of the articles of the Convention referred to in Article 52(4) (which articles are applicable *mutatis mutandis* in annulment proceedings) will no longer present a barrier to the grant of security for costs by ad hoc annulment committees. Committees will no longer need to resort to inherent powers as an alternate basis for granting security.

– Second, by changing the regime for security for costs so that it is governed purely by a *rule* (rather than an article of the Convention), the regime for security for costs is made eligible for application to annulment proceedings, without creating any conflict with Article 52(4) of the Convention. Note that the work of incorporating the security for costs rule into annulment proceedings is done not by Draft Rule 51, but rather by Draft Rule 66(1), which provides that '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'.

The Working Paper does not explain this in its otherwise comprehensive explanation of Draft Rule 51. This is surprising because the inclusion of Draft Rule 51 in the overall procedure applicable to annulment proceedings will present a real issue for many investors – particularly SMEs – *a fortiori* given that (for reasons explained above) Draft Rule 51 will likely impose a materially lower threshold for the grant of security for costs.

The fundamental issue here is how the new rule will affect the already unique economics of an annulment proceeding. In an annulment proceeding, Rule 14(3(e) provides that 'the applicant shall be solely responsible for making the payments requested by the Secretary-General' to cover the costs of the ad hoc committee and ICSID. This is to be contrasted with proceedings before a first-instance tribunal, where the costs are generally called in equal advance instalments from both parties.

So, not only does the applicant for annulment have to pay the full the costs of the annulment proceedings under Rule 14, but under Draft Rule 51 they stand to be further burdened with providing security for the respondent's legal and other costs (which often run into the millions). For smaller investors – such as single-asset companies who lack the balance sheet to meet these financial obligations – it may not be possible to use the annulment mechanism in the ICSID Convention. Such a result must be avoided. The annulment mechanism is available *as of right* to all parties under the Convention. To introduce any rule that has the effect of limiting or de facto preventing a certain class of investors from exercising this right would be contrary to both the text and the purpose of the ICSID Convention (which is to encourage economic development through private investment).

The writer's proposed amendments to Draft Rule 51(3) are intended to address this issue. They will require annulment committees (just as they will require tribunals) to consider the extent to which an order to provide security for costs could have the effect of limiting the target party's access to justice. Importantly, they will also require the committee to consider whether the costs claimed by the party requesting security are *reasonable* (which often they are not). These amendments will ensure that orders for security for costs do not place an economic burden on investors that they cannot meet, and which the drafters of the ICSID Convention did not intend they would bear.

[C] Relevant Considerations for the grant of Security for Costs

Draft Rule 51 requires the tribunal to consider two broad criteria when making its decision on the request for security for costs. These criteria are set out in Draft Rule 51(3), which reads as follows:

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.

While the Working Paper confirms that these broad criteria are mandatory ('*required*'¹⁸) considerations for the Tribunal, it emphasises that the intent of Draft Rule 51(3) is 'to provide general guidelines for Tribunals without inhibiting the flexibility they will need to address a vast range of factual circumstances'.¹⁹ According to the Working Paper, Draft Rule 51:

avoids more specific mandatory criteria because: (i) the relevance of certain criteria varies on a case-by-case basis; (ii) 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.²⁰

This explanation is interesting in so far as it suggests ICSID is anticipating significant evolution in the jurisprudence of security for costs under the new provision.

Regarding the first limb of Draft Rule 51(3) – the party's ability to comply with an adverse costs order – this reflects existing practice under the Article 47/Rule 39 regime, in which it is generally accepted that a lack of assets alone will not justify a grant of security for costs. This practice is noted in the Working Paper:

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.²¹

Given the specificity of the first limb of Draft Rule 51(3), it is likely that most parties will not bother requesting security unless they have a strong case for saying that the other party does not have the ability to satisfy an adverse costs award. So, in many (if not most) cases, the decision of the tribunal or committee will turn on the second limb of Draft Rule 51(3): whether there are '*other relevant circumstances*' that warrant an order for security for costs. It will be the way these open-textured words are interpreted and applied by tribunals and committees – the circumstances that come to be accepted as favouring a grant of security for costs – that determines how Draft Rule 51 operates in practice.

The Working Paper explains that TPF may be relevant under either or both limbs of Draft Rule 51(3).²² The Working Paper confirms, however, that '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 Draft Rule 51'.²³ This is consistent with the approach taken by ICSID tribunals, such as the tribunal in *EuroGas v. Slovak Republic*.²⁴ However, given that Draft Rule 21 will require a party to

ICSID proceedings to provide 'written notice disclosing that it has third-party funding and the name of the third-party funder' (a rule the writer supports), it seems reasonable to expect that TPF will be a recurring theme in future practice under Draft Rule 51.

Without delving into the wider debate on whether TPF is a good or bad thing, it is worth noting that the likely effect of Draft Rule 51 will be to increase the cost of funding – at least for those SMEs who do not have the balance sheet to satisfy a large adverse costs award (and who are therefore prima facie captured by the first limb of Draft Rule 51(3)). This is because, for such businesses, funders will need to apportion additional monies at the outset of the proceedings to be used as security (in the event security is ordered), with the result that the overall level of funding required for the case is increased and the funded party's share of the proceeds is decreased accordingly. For smaller cases (claims for USD 50 million or less), it may not be possible to secure funding and as a result, these smaller claims will be excluded from the ICSID system. This prospect needs to be considered in the context of the emerging policy of many capital-exporting countries to promote the participation of SMEs in the international trade and investment system.

[D] Consequences of Non-compliance with Security for Costs

Draft Rule 51(4) sets out the regime that applies in circumstances where an order for security for cost is not complied with by the party against whom it is made. It provides that the tribunal may suspend the proceeding until the ordered security is provided and, if the proceeding is suspended for more than 90 days, the tribunal may, after consulting with the parties, order the discontinuance of the proceeding. It is notable that Draft Rule 51(4) uses the permissive word '*may*' (rather than mandatory '*shall*'), thereby signaling that the tribunal retains discretion to determine what consequences should follow from non-compliance with its security for costs order.

While to an extent the suspension mechanism in Draft Rule 51(4) has a precedent in the *RSM v. St Lucia* case,²⁵ and an equivalent provision is present in the Arbitration Rules of the Stockholm Chamber of Commerce, many users of the ICSID system will still see it as a radical proposal. As the Working Paper notes, Draft Rule 51(4) 'would be unique within the [Rules], which otherwise give the Tribunal the power to discontinue the proceedings only with the (deemed) agreement or acquiescence of the parties'.²⁶ However, as the Working Paper also notes, 'many of the tools normally employed by Tribunals to address non-compliance with an order may be ineffective'²⁷ where security for costs orders are concerned. The Working Paper also notes that two Free Trade Agreements have recently included provisions that allow a tribunal to suspend or dismiss the case if a claimant fails to comply with an order for security for costs.²⁸

The Working Paper rightly identifies Draft Rule 51(4) as raising an 'important policy question for Member States'.²⁹ Given that non-compliance with a security for costs order can lead to the draconian result that the proceedings are discontinued without the consent of the parties, it is all the more important that '*access to justice*' be expressly included in Draft Rule 51(3) as one of the considerations that tribunals and annulment committees are required to take into account when they decide requests for security for costs under the new regime.

§4. Concluding Remarks

The ICSID Convention was intended to promote private international investment as a means of stimulating economic development amongst Member States. The dispute resolution mechanisms it offers investors are now regularly used and the system is flourishing as a result. It is not perfect (nor is any system of justice) and there are good reasons for reform in certain areas.

It is true that the current regime, in which security for costs are treated as a form of provisional measure, imposes a heavy burden on parties requesting security (almost always respondent States). Exceptional circumstances must be demonstrated by the requesting party, for the good reason that security for costs orders can have serious consequences for the other party's access to justice under the ICSID system. But cases like *RSM* and *Armas* show that the burden is not insurmountable in practice and that tribunals are sensitive to the competing interests at stake.

While the fact that a *sui generis* test for security for costs has developed in ICSID jurisprudence arguably does speak in favour of the introduction of a dedicated rule (as it may be seen as a signal that security for costs have evolved away from the provisional measures framework), the way that rule is drafted must reflect the asymmetry that is inherent in security for costs in ICSID arbitration and the critical issue of access to justice that often arises where security for costs are ordered. All capital-exporting countries must be on guard to ensure that their nationals – particularly their SMEs – are not unfairly exposed to the new security for costs regime that ICSID is proposing or denied the protection that the drafters of the ICSID Convention intended they would enjoy. Draft Rule 51 as currently proposed will have a disproportionate effect on SMEs and, in the writer's view, ICSID Member States should only accept Draft Rule 51 if the limited but crucial amendments proposed in this paper are accepted.

SUGGESTED AMENDMENTS TO DRAFT RULE 51

Note: the suggested amendments are underlined and in italics in the text below. No words have been deleted from the text proposed by ICSID.

DRAFT 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, the extent to which an order to provide security for costs could limit the party's access to justice, whether the costs claimed are reasonable 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.

STEPTOE DECEMBER 28, 2018

13 .1 Pursuant to Rule 51(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, and if the proceedings are suspended for more than ninety days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding. However, under Rule 11(4), the parties are merely required to "cooperate in implementing the Tribunal's orders and decisions", but there are no sanctions for not cooperating, (although it is noted that pursuant to Rule 19(4), when "determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including ... (b) the parties' conduct during the proceeding ... ").

13.2 It is not apparent to us as to why breaching an order for security for costs is given such elevated status. In particular, if other orders, decisions and the Award are not complied with (the latter in the context of an annulment proceeding where there is no stay on enforcement), there is no specific provision in the Rules for the suspension or discontinuance of the proceeding or other sanction beyond costs. Therefore, we consider that consideration should be given to providing for some form of sanction beyond costs when these other types of decisions, orders and Awards are breached, always ensuring that the sanction does not penalize the innocent party.

Rule 52 – Ancillary Claims

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 52: Ancillary Claims

[...]

(2) An incidental or additional claim shall be presented no later than ~~the date to file in~~ the reply, and a counter-claim shall be presented no later than ~~the date to file in~~ the counter-memorial, unless the Tribunal ~~decides otherwise~~authorizes their presentation at a later stage in the proceeding, after giving the parties an opportunity to state their views.

Commentary

As current Arbitration Rule 40(2), proposed Rule 52(2) should provide that an incidental or additional claim may be presented up to the filing of the reply and a counter-claim up to the filing of the counter-memorial, unless the Tribunal authorizes the presentation of an ancillary claim at a later stage in the proceeding, after giving the parties an opportunity to state their views.

HELLENIC REPUBLIC

DECEMBER 28, 2018

Rule 52(1) Unless the parties agree otherwise, a party may **not** file an incidental or additional claim or a counter-claim (“ancillary claim”).

Rule 53 – Default

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 53: Default

[...]

(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 and, if it is satisfied, verify that the submissions made are well-founded in fact and in law, before deciding the questions submitted to it and rendering an Award.

Commentary

As current Arbitration Rule 42(4), proposed Rule 53 should provide that in case of default the Tribunal must also verify that the submissions made are well-funded in fact an in law.

THREE CROWNS

JANUARY 16, 2019

The aims of defining “default” and preventing a defaulting party from obstructing the proceedings could potentially be better given effect with the following amendments to Rule 53(1) and (2):

*(1) A party is in default if it fails to appear or present its case **through a scheduled submission or at a scheduled hearing**, 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 **without further submission from the defaulting party**.*

We suggest that Rule 53(4) and 53(5)—well-intentioned as they are—be reconsidered. Read against the background of Rule 8, these provisions may provide an incentive to default and thereby gain a grace period rather than just having one’s submission disregarded as untimely.

Chapter IX – Suspension and Discontinuance

Rule 54 – Suspension

ALGERIA **JANUARY 14, 2019**

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

L'expression "sans condition" utilisée dans le paragraphe 52, reste vague et nécessite d'être détaillée.

ARGENTINE REPUBLIC

DECEMBER 28, 2018

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) if necessary, 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, after giving the parties an opportunity to make observations.

(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.

Commentary

It may not always be necessary to specify a procedural calendar to take effect on resumption of the proceeding.

Before deciding to extend the period of the suspension on its own initiative or upon a party's request, the Tribunal should give the parties an opportunity to make observations.

CANADA DECEMBER 28, 2018

1) In Canada’s view, where both parties have agreed to suspend the proceedings, the Tribunal should not have the discretion to act to the contrary. Hence, Canada suggests that paragraph 1 be restructured such that the Tribunal “shall” suspend the proceedings on agreement of the parties, and that it “may” suspend on the request of a party or its own initiative.

COLOMBIA DECEMBER 28, 2018

Colombia considera que el Tribunal deberá atender la solicitud de suspensión cuando ambas partes lo solicitan. Se sugiere que en la redacción del párrafo (1) se aclare que en caso de que ambas partes soliciten la suspensión del procedimiento, el Tribunal “deberá” proceder con la suspensión, y en aquellos casos en los que se proceda de oficio, o a solicitud de una parte, el Tribunal “podrá” proceder con dicha orden.

ISRAEL DECEMBER 27, 2018

Israel suggests to insert new paragraph 2: *"in deciding to suspend a proceeding under subparagraph 2(c), the tribunal shall take under consideration the financial burden of such suspension on the Parties."*

It is our view that as paragraph 1 is drafted, the reasons for calling for suspension are not clear. Additionally, in cases were the disputing Parties agree to suspend the proceeding, the Tribunal 'shall' suspend and shall not have discretion on the matter.

SLOVAK REPUBLIC DECEMBER 22, 2018

We appreciate inclusion of provision on suspension. This may contribute to amicable dispute settlement
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SPAIN **DECEMBER 21, 2018**

La regla establece que el Tribunal “...*podrá suspender el procedimiento*”... *por acuerdo de las partes.*”

Consideramos que, si las partes lo acuerdan, el Tribunal debería otorgar la suspensión del procedimiento, y no quedar al arbitrio del Tribunal.

Rule 55 – Settlement and Discontinuance

GUATEMALA **DECEMBER 28, 2018**

Respecto a la literal (a), ¿es necesario que sea de manera conjunta o puede una sola parte solicitarlo? Se sugiere mejorar la redacción de modo que no surjan dudas al momento de aplicar la disposición.

Respecto de las dos opciones que brinda el numeral (2), no se considera prudente ni oportuno dar dejarlo facultativo debido a que genera ambigüedad, debería en cambio, operarse de manera automática la inclusión en el laudo.

THREE CROWNS **JANUARY 16, 2019**

As presently drafted, Rule 55 does not call for the Tribunal to address costs. This could be expressly provided for with the following amendment to Rule 55(2)(a):

*(a) shall issue an order taking note of the discontinuance of the proceeding **and addressing the costs of the arbitration**, if the parties so request; or*

Rule 56 – Discontinuance at Request of a Party

GUATEMALA **DECEMBER 28, 2018**

Se sugiere traer a esta regla la relación de las causales que justifiquen la discontinuación.

Es necesario establecer el alcance de la discontinuación, pues no queda claro y puede mal utilizarse en su aplicación.

¿Luego de una discontinuación, queda abierta la posibilidad a volverse a presentar o reabrir el caso? De ser así, entonces ¿cuál es el sentido de la figura -además de descargar al centro- cuál es el beneficio para las partes?

Rule 57 – Discontinuance for Failure of Parties to Act

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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~~shall 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.

Commentary

Current Arbitration Rule 45 provides that in case of failure of the parties to act, after notice to the parties, the Tribunal “shall” in an order take note of the discontinuance. Proposed Rule 57 provides that in case of failure of the parties to act, after notice to the parties, the Tribunal “may” issue an order taking note of the discontinuance. The word “shall” should be used instead of “may” in proposed Rule 57, as it is used in current Arbitration Rule 45.

COLOMBIA DECEMBER 28, 2018

Colombia considera que cuando las partes están inactivas, el Tribunal deberá adoptar una resolución manifestando la interrupción, sin notificación adicional. En este sentido se sugiere que la redacción del párrafo (1) sea la siguiente: “(1) Si las partes omiten realizar cualquier acto procesal durante más de 150 días, el Tribunal emitirá una resolución dejando constancia de la discontinuación”.

HELLENIC REPUBLIC DECEMBER 28, 2018

It is important for the respondent State that certain time periods be extended. The seven-day period to file a response to a request for disqualification under AR 29 (AF 39) is not workable for a State. The thirty-day period to request bifurcation of preliminary objections in AR 37 (AF 47) is also very tight. Same for the thirty-day period in the request for summary dismissal.

SLOVAK REPUBLIC DECEMBER 22, 2018

We also support provision on discontinuance for failure to take a step. This would prevent prolongation of dispute by dormant/speculative claimants.

Rule 58 – Discontinuance for Failure to Pay

HELLENIC REPUBLIC DECEMBER 28, 2018

Fail to make payments after **180 days of the notice**.

Chapter X – The Award

ALGERIA JANUARY 14, 2019

1) Prévoir un organe de contrôle à priori de sentence sous forme d'un organe d'alerte afin d'examiner la sentence et faire des observations et recommandations à la formation arbitrale avant de rendre sa sentence.

2) les politiques publiques de certains Etats doivent être prises en compte aux mêmes titres que les intérêts des investisseurs, à savoir, les politiques publiques non discriminatoires de nature nationale et sociale qui doivent être respectées dans le cadre de l'éthique de la déontologie.

Rule 59 – Timing of the Award

ARGENTINE REPUBLIC DECEMBER 28, 2018

Rule 59: Timing of the Award

(1) Subject to Rule 8(3), ~~T~~he 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).

Commentary

It should be clarified that the time limits for the Tribunal to render an Award is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limits.

AUSTRALIA **JANUARY 22, 2019**

Australia supports the changes to AR 59 which, read alongside AR 8(3), require Tribunals to use best efforts to meet these expedited timeframes. while providing sufficient flexibility to revise timeframes where special circumstances arise.

AUSTRIA **DECEMBER 21, 2018**

Pursuant to Amended Arbitration Rule 59, awards must be rendered within 60 days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on other matters. Amended Arbitration Rule 59 may be expected to reduce the significant time taken by ICSID tribunals to issue their awards, on average more than a year between the last hearing and the issuance of the award, and is in line with the Republic of Austria’s September 18, 2017 Initial Comments. However, Amended Arbitration Rule 59 must be read in conjunction with Amended Arbitration Rule 8(3), which specifies that tribunals shall “use best efforts” to meet the time limits for orders, decisions and awards. The proposed time-limits are adequate, but in light of the significant delays in the issuance of awards, it consideration should be given to strengthening the Secretary-General’s role in overseeing compliance with the time limits.

CANADA **DECEMBER 28, 2018**

1) This paragraph provides deadlines for the issuance of the Award. However, it does not cover cases where proceedings have been bifurcated. Canada has had the experience that decisions on certain aspects of a dispute (i.e. jurisdiction or merits) can sometimes take an excessive amount of time. Canada suggests that consideration be given applying similar deadlines to decisions in bifurcated proceedings, rather than just to the Award.

GEORGIA **DECEMBER 28, 2018**

Comment to Rule 59(1):

Paragraph (1) of Rule 59 provides time limits for rendering award in three different cases: 1) award on manifest lack of legal merits; 2) award on preliminary objections; 3) award on any other matter.

What happens in case the proceedings on merits are bifurcated into liability and quantum phase? What would be the time limit to render Award in such case (which would essentially be a decision on damages)? Would 240 day time limit apply? We believe that there is a gap in the procedure which might create misunderstandings in practice, therefore we propose to amend the proposed rule in order to provide some clarity as to what happens in the above-mentioned scenario.

HELLENIC REPUBLIC **DECEMBER 28, 2018**

Consider to strength the Secretary-General’s role in overseeing compliance with the time limits.

MOROCCO **DECEMBER 27, 2018**

Réduire les délais pour rendre la sentence définitive et ce, prévoyant que les délais soient calculés à partir de la date de dépôt de la plainte et non à partir de la dernière écriture ou la dernière plaidoirie.

OMAN **DECEMBER 28, 2018**

We recommend that the tribunal should declare the closing of a case. We are of the opinion that the “last written or oral submission” alone will not suffice to make clear that the pleading has come to an end.

SLOVAK REPUBLIC **DECEMBER 22, 2018**

We appreciate deadlines for awards. There should however be some control mechanisms for failure to comply with deadlines.

URUGUAY **FEBRUARY 1, 2019**

-III – Comentarios relacionados con el costo y la duración de los procedimientos arbitrales

B. Límite de tiempo para emitir un laudo

La actual regla de arbitraje n.46 dice que “el laudo (incluyendo cualquier dictamen individual o disensión) deberá formularse y firmarse dentro de 120 días después del cierre del procedimiento. Sin embargo, el Tribunal podrá ampliar ese plazo por 60 días o más, si de lo contrario no pudiere formular el laudo”.

La aplicación de esta regla ha llevado a que los miembros del Tribunal Arbitral controlen el tiempo en el cual declararán cerrado el procedimiento para luego dictar el laudo. El límite de 120 días comienza a correr cuando el tribunal arbitral así lo decida. La regla no impone límites temporales para el dictado del laudo.

Se comparte la propuesta de la regla 59 la cual trata de solucionar este tema al fijar límites más precisos para el dictado del laudo arbitral, los cuales se cuentan a partir de los escritos presentados por las partes.

BURFORD CAPITAL DECEMBER 28, 2018

3. Proposed Revisions to Rule 59 (Timing of the Award)

[quotes text of proposed AR 59]

We commend ICSID’s proposed Rule 59 (“Timing of the Award”), as it sets concrete expectations on tribunal members to render an award in a timely manner, and at the same time, maintains flexibility based on the circumstances of each case. The introduction of this provision makes sense, since the average duration of ICSID proceedings from registration to award is 3.86 years, and a significant portion of that time is the period between the close of the hearing and the issuance of an award by the tribunal. Specifically, the average time between the last day of a final hearing and an award, however, is 13.3 months.²⁶

That said, Rule 59 does not address any sanctions for arbitrators failing to adhere to time limits (as the ICC has recently done), nor does it address the timing of payments to arbitrators. Although we appreciate that ICSID Administrative and Financial Regulations currently contain no schedule for the payment of arbitrators, we would suggest that ICSID include a requirement that 50 percent of fees will only be paid upon issuance of the final award. We are not alone in requesting a proposed revision of this kind.²⁷

Indeed, there are numerous examples of inexcusable delay in the rendering of ICSID awards. Burford has been publicly identified as having provided financing in an ICSID Convention arbitration (*Teinver S.A., et al. v. Argentina*) that was filed in 2009, had its final hearing in March 2014 and did not receive an award until July 2017. And this case is no outlier. We have identified at least 12 other ICSID cases where an award was not issued until between 2-3 years after the final hearing, and 4 other cases where an ICSID tribunal

did not render an award until more than 3 years after the final hearing.²⁸ These seventeen lamentable examples demonstrate the unmistakable need for a rule linking payment of fees to ICSID arbitrators and the timely issuance of awards.

[DEBEVOISE](#)

DECEMBER 28, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

While the Proposed Amendments improve upon the old ICSID regime in several respects, certain new Rules and Proposed Amendments may only partially achieve, or even run counter to, ICSID’s stated objective of streamlining its arbitral procedure. We call attention to the following four new provisions contained in the Proposed Rules that risk decreasing the overall efficiency and fairness of the ICSID system:

[additional comments on other proposed amendments – see AR 35, 42]

C. Proposed Arbitral Rule 59 – Timing of the Award. Under this Proposed Amendment, the Tribunal “shall render the Award as soon as possible and in any event no later than . . . 240 days after the last written or oral submission” on all matters, save applications for Manifest Lack of Legal Merit (in which case the award shall be rendered within 60 days of the final submission), or Preliminary Objections (120 days). We appreciate ICSID’s desire to shorten the overall time to award. However, as drafted, the proposed deadlines are still prone to abuse and are out of step with current practice under other major arbitral rules.

First, 240 days from final submission is still too long for the rendering of an ICSID award. In our experience, tribunals do not need eight months to draft an award. Moreover, by setting a target date of eight months, this becomes the benchmark in ICSID proceedings and tribunals will have little incentive to submit an award before then. An eight-month deadline also goes against the trend toward more timely, final resolution of international disputes. For example, in ICC arbitrations, the target for submission of draft awards to the ICC Court is three months from the last substantive hearing or submission, and the deadline is set at six months from the Terms of Reference.⁷ Similarly, in SCC arbitrations, the deadline for the award is six months from the referral to the tribunal.⁸ While State parties to ICSID proceedings may require longer periods because of internal prerogatives and processes that exist within sovereigns, the same is not true of arbitrators.

Second, it is not advisable to calibrate the deadline from the final submission in the proceeding. In doing so, the Proposed Amendment creates a perverse incentive for prolonged post-hearing submissions and delayed awards. If the deadline runs from the date of the last written submission—and post-hearing briefs are not otherwise constrained—a tribunal can effectively delay the rendering of an award by allowing drawn-out post-hearing briefing. As a result, the Proposed Amendment imposes no meaningful deadline on the award.

Finally, the Proposed Amendment imposes no consequence for noncompliance. This, too, is out of step with current practice in other major arbitral institutions, such as the ICC, which takes into consideration the diligence and efficiency of the tribunal when determining arbitrator fees.⁹ To promote efficiency and create the proper incentive for timely awards, ICSID should require that (i) an award must be signed within 180 days of the final hearing; (ii) any extensions may only be granted by the Secretariat for due cause shown, and (iii) arbitrators' fees will be proportionately reduced if any awards are released after the deadline.¹⁰
[additional comments on other proposed amendments – see AR 60]

THREE CROWNS **JANUARY 16, 2019**

The deadlines proposed are realistic and achievable and hopefully will have a salutary effect. As noted in the general comments, we query the necessity of including provisions of the Convention within Rule 60. [...]

[see comments on proposed AR 60]

Finally, we query whether it is wise to eliminate altogether the requirement to close the proceedings as required under previous Rule 38. We fully support the idea of setting deadlines from the last written or oral submission. Nevertheless, the closure of the proceedings indicates the point in time where the tribunal closes the file, whereupon nothing further is ordinarily to be submitted. ICSID may wish to consider the incorporation of a provision along the lines of Article 31 of the UNCITRAL Rules.

Rule 60 – Contents of The Award

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 60: Contents of the Award

[...]

(2) The Award shall be signed by the members of the Tribunal who voted for it and the date of each signature shall be indicated. It may be signed by electronic means if the parties agree.

[...]

Commentary

The requirement that the Award indicate the date of the arbitrators' signatures as provided for in current Arbitration Rule 47(2) should be maintained in proposed Rule 60(2).

GUATEMALA **DECEMBER 28, 2018**

Es preciso que el laudo contemple las justificaciones debidas y detalladas sobre la valoración de la prueba, debido a que en casos en los que se ha resuelto por el Tribunal arbitral que la prueba no fue “suficiente”, la contraparte ha utilizado la falta de justificación del tribunal para anular el laudo.

Asimismo, es fundamental que el laudo sea coherente, sobre todo que la parte considerativa y la resolutive sea congruente entre sí. Hemos visto laudos inconsistentes que desembocan en otros procesos, simplemente por no guardar concordancia la parte considerativa y la resolutive. De tal cuenta, sería bueno que se considerase sancionar a los Tribunales por descuidos tan básicos como éstos, que si tienen consecuencias nefastas para las partes. En el mismo orden, se sugiere contemplar la posibilidad que los Tribunales arbitrales sancionen a las partes que presenten demandas, recursos o cualquier otra herramienta frívola o que demore el proceso y aumente los costos e implicaciones del proceso de manera innecesaria. Nos referimos, en pocas palabras a que se castigue la mala fe de las partes.

MOROCCO **DECEMBER 27, 2018**

Examen préalable des sentences :

Il y a lieu de prévoir :

une procédure de contrôle de la qualité de la sentence avant qu'elle ne soit rendue et ce, afin de s'assurer que la sentence respecte toutes les formalités, traite toutes les demandes et énonce les motifs sur lesquels elle se fonde. Cet examen préalable de la sentence peut être assuré par les instances qui relèvent du CIRDI ; et

une procédure permettant aux parties au différend de soumettre des commentaires écrits au tribunal d'arbitrage sur tout aspect concernant la sentence avant qu'elle ne devienne définitive.

[SPAIN](#) **DECEMBER 21, 2018**

El apartado h) establece la obligación de que el laudo contenga “*la decisión del Tribunal sobre cada cuestión, y las razones en las que se funda el laudo*”

Nos preocupa que se pueda interpretar que la motivación del laudo puede ser más general y no tiene por qué atenerse a cada cuestión planteada.

En este sentido, sugerimos incluir la siguiente redacción “*la decisión motivada del Tribunal sobre cada cuestión, y las razones en las que se funda el laudo*”

[TUNISIA](#) **DECEMBER 27, 2018**

Bien que le CIRDI ait à traiter une grande partie des différends opposant investisseurs et États, il n’a pas un système d’examen préalable des sentences. L’important est donc de déterminer s’il serait souhaitable d’essayer d’appliquer l’examen préalable aux affaires d’arbitrage en matière d’investissement qui relèvent du CIRDI. Cette procédure suppose une institution au sein du CIRDI habilité à effectuer cette tâche.

[DEBEVOISE](#) **DECEMBER 28, 2018**

While the Proposed Amendments improve upon the old ICSID regime in several respects, certain new Rules and Proposed Amendments may only partially achieve, or even run counter to, ICSID’s stated objective of streamlining its arbitral procedure. We call attention to the following four new provisions contained in the Proposed Rules that risk decreasing the overall efficiency and fairness of the ICSID system:

[additional comments on other proposed amendments – see AR 35, 42, 59]

D. Proposed Arbitral Rule 60 – Contents of the Award. While the increased specificity of this rule clearly attempts to improve efficiency, as drafted, it is not likely to affect the overall length of the award. There is no question that shortening the descriptions of the proceedings and the submissions of the parties, as well as including in the award only the “relevant” facts, will increase efficiency and encourage compliance with the deadline for issuing the award (*see* subsections (f), (g), and (h)). However, subsection (i) requires further modification if the Proposed Amendment is to achieve its goal. The ICSID Convention requires that the Award “deal with

every question submitted to the tribunal,” so the rule must necessarily reflect that language. However, more can be done to clarify the inherent ambiguity of “every question” that has been submitted. Whether or not a question has been submitted may be uncertain. Tribunals therefore err on the conservative side by providing a decision on every possible question raised, and then reasons for each of those decisions, in order to avoid an argument on annulment that the tribunal did not decide a particular question.

To accomplish the goal of the revised subparagraph (i), there should be a requirement that at some point in the proceedings the parties and tribunal agree on a list of “questions” that must be decided. This would eliminate the uncertainty and potential arguments on annulment that an issue had not been decided. It could be required at or around the time of the initial procedural conference and then confirmed before the final evidentiary hearing.

[THREE CROWNS](#)

JANUARY 16, 2019

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

The deadlines proposed are realistic and achievable and hopefully will have a salutary effect. As noted in the general comments, we query the necessity of including provisions of the Convention within Rule 60. To the extent that this repetition is retained, consideration should be given to whether Rule 60(i) might be expanded to help clarify confusion surrounding the reference in Article 48(3) of the Convention to the tribunal being required to “deal with every question submitted to it”, language that has already spurred a number of annulment applications.

In most cases, large numbers of “questions” are submitted to tribunals that are simply not material to the resolution of the dispute. Often the resolution of one factual or legal question in a particular way obviates the need to decide other questions – indeed the provisions of the Rules on bifurcation presuppose this reality. Compliance with the duty to conduct the proceeding in an expeditious and cost-effective manner militates against dealing with every point that could arguably be described as a “question” regardless of its relevance to the outcome of the dispute.

The settled view appears to be that failure to address every question was not to be grounds for annulment but rather to be grounds for a request for a supplemental decision under Article 49(2).³ With a view toward improving efficiency and reducing the scope for meritless annulment applications, consideration should be given to including within the Rules a clarification that would make clear that Article 49(2) is the remedy for a perceived failure to deal with a “question” and perhaps that also draws from annulment jurisprudence recognizing (a) that the “questions” a tribunal must answer are the material ones, *i.e.*, those that determine “the Parties’ rights and liabilities”⁴, and (b) that not all questions need be dealt with explicitly, as some questions may be dealt with “implicitly”.⁵

Finally, we query whether it is wise to eliminate altogether the requirement to close the proceedings as required under previous Rule 38. We fully support the idea of setting deadlines from the last written or oral submission. Nevertheless, the closure of the proceedings indicates the point in time where the tribunal closes the file, whereupon nothing further is ordinarily to be submitted. ICSID may wish to consider the incorporation of a provision along the lines of Article 31 of the UNCITRAL Rules.

Rule 61 – Rendering of the Award

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 61: Rendering of the Award

(1) ~~Upon signature by the last arbitrator to sign~~ ~~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) ~~authenticate the text of the Award and~~ deposit ~~it the Award~~ in the archives of the Centre, together with any individual opinion and statement of dissent.

[...]

Commentary

The requirements that the Award be dispatched upon signature by the last arbitrator to sign and that the Secretary-General authenticate the text of the Award to be deposited in the archives of the Centre, as provided for in current Arbitration Rule 48(1), should be maintained in proposed Rule 61(1).

Rule 62 – Supplementary Decision and Rectification

ARGENTINE REPUBLIC

DECEMBER 28, 2018

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.~~

(21) 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.

(32) The request referred to in paragraph (12) 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.

(43) 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 (12); and

(c) notify the parties of the registration or refusal to register.

(54) As soon as the request is registered, the Secretariat shall transmit the request and the notice of registration to each member of the Tribunal.

(65) 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.

(76) Rules 60-61 shall apply to any decision of the Tribunal pursuant to this Rule.

(87) Subject to Rule 8(3), ~~the~~ Tribunal shall issue the supplementary decision or rectification within 60 days after the last written or oral submission on the request.

(98) 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.

(109) 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.

Commentary

Article 49(2) of the ICSID Convention does not authorize a Tribunal to rectify clerical, arithmetical or similar errors in the Award on its own initiative, but only upon request of a party made within 45 days after the date on which the Award was rendered. Therefore, proposed Rule 62(1) must be deleted.

It should be clarified that the time limit for the Tribunal to issue a supplementary decision or rectification is subject to proposed Rule 8(3), which specifies that the Tribunal shall use best efforts to meet such time limit.

CANADA DECEMBER 28, 2018

1) In paragraph 3, there are a number of procedural requirements for a request for a supplementary decision. However, Canada notes that in Rule 63, there are additional procedural requirements for an application for interpretation, revision and annulment (particularly R.63 subparagraphs b and d). Canada suggests that the additional requirements in Rule 63 also be included in Rule 62.

COLOMBIA DECEMBER 28, 2018

En el párrafo 3, hay una serie de requisitos de procedimiento para una solicitud de decisión complementaria. Sin embargo, Colombia observa que en la Regla 63, existen requisitos de procedimiento adicionales para una solicitud de interpretación, revisión y anulación, en este sentido sugiere que los requisitos adicionales de la Regla 63 también se incluyan en la Regla 62.

FRANCE JANUARY 14, 2019

« (...) toute erreur ~~cléricale~~ **matérielle**, arithmétique ou de nature similaire contenue dans la sentence (...) ».

HELLENIC REPUBLIC **DECEMBER 28, 2018**

Rule 62(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. **No lodging fee is paid if relate to arithmetical errors in the Award or omissions in the operative part of the Award, and other inadvertent errors.**

SPAIN **DECEMBER 21, 2018**

ES propone que se introduzca en la Regla 62 una disposición que establezca que la **ejecución del laudo queda suspendida hasta que se resuelva la decisión de rectificación.**

Alternativamente, se podría también introducir en la regla 67 en la que “... *una parte de un procedimiento de rectificación, aclaración, revisión o anulación podrá solicitar una suspensión de la ejecución de una parte o de todo el laudo...*”.

Actualmente, se puede solicitar una ejecución del laudo mientras está pendiente una resolución de rectificación. En nuestra opinión, esto es algo que se debe corregir.

Chapter XI – Interpretation, Revision and Annulment of the Award

Rule 63 – The Application

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 63: The Application

[...]

(2) The application shall:

- (a) identify the Award to which it relates;
- (b) be in a procedural language used in the original proceeding, **provided it is an official language of the Centre;**
- (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).
[...]

Commentary

The application should be drawn up in a procedural language used in the original proceeding, provided it is an official language of the Centre.

AUSTRALIA JANUARY 22, 2019

Australia supports AR 63, which clarifies and streamlines the process for interpretation, revision and annulment of awards.

TUNISIA DECEMBER 27, 2018

Si la question de l'élargissement et l'assouplissement des voies de recours contre la sentence arbitrale (appel...) nécessite la révision de la convention elle-même qui l'interdit formellement, le recours à la tierce opposition demeure ambigu aussi bien dans la convention que dans le règlement d'arbitrage. La tierce opposition est souvent ouverte à deux conditions : la personne l'exerçant doit d'une part justifier d'une qualité de tiers tenant au fait qu'elle n'a pas été partie ou représentée, et d'autre part justifier d'un intérêt direct et personnel à exercer ce recours (droits lésés par la sentence). D'où, existe-t-il une possibilité de prévoir ce cas de recours dans le règlement d'arbitrage tel que *les parties non contestantes* ?

DENTONS DECEMBER 21, 2018

AR 63.1 and 63.2

Note the incorrect numbering in the French version.

AR 63.8

Consider removing the word "from" in the first sentence of paragraph (8): "An applicant may **withdraw its application** before it has been registered by filing a written notice of withdrawal with the Secretary General."

The second sentence of paragraph (8) should read "[...] unless the application has not yet been transmitted to the other party pursuant to **paragraph (6)(a)**."

Rule 64 – Interpretation or Revision: Reconstitution of the Tribunal

GUATEMALA **DECEMBER 28, 2018**

¿Uno nuevo quiere decir que se cambia a todos los miembros?

¿por un árbitro que no pueda participar en la consideración de la solicitud se debe sustituir también a los otros dos árbitros?

Rule 65 – Annulment: Appointment of *ad hoc* Committee

ISRAEL **DECEMBER 27, 2018**

It is our view that the Committee under this Rule bares some of the aspects relevant to appointing of a tribunal, and therefore would like that the Parties may be able to have some affect in the sense that they would be able to submit an objection to a Committee member. Furthermore, we suggest that the Secretary General may not appoint a Committee member who is a national of a State which does not maintain diplomatic relations with the state party to the dispute or with the State whose national is a party to the dispute, without agreement of the other party.

SINGAPORE **JANUARY 4, 2019**

We support the proposed amendments.

We note that there were observations by some States that the list of qualifications mandated by Article 14 of the ICSID Convention did not appear to be exhaustive and so it remained open to require further qualifications of arbitrators appointed to annulment proceedings. We share this view as well.

However, from a practical perspective, we are aware that to apply additional requirements to arbitrators appointed to annulment proceedings would require further discussion among the States as to what these additional requirements should be. We would be guided by the Secretariat's assessment whether there is sufficient time/interest among the States to have such discussions.

Rule 66 – Procedure Applicable to Interpretation, Revision and Annulment

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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~~ may apply to a proceeding under this Rule, with necessary modifications, ~~unless if both the parties agree thereto or the Tribunal or Committee orders otherwise.~~

(3) In addition to the application, the written procedure shall consist of ~~one~~ two rounds of written submissions, unless the parties agree ~~otherwise 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) Subject to Rule 8(3), ~~T~~he Tribunal or Committee shall issue its decision within 120 days after the last written or oral submission on the application.

Commentary

The procedural agreements and orders on matters addressed at the first session of the original Tribunal should not apply to interpretation, revision or annulment proceedings unless *both* parties agree thereto.

The procedure should consist of *two* rounds of written submissions, unless the parties agree otherwise.

It should be clarified that the time limit to issue a decision on interpretation, revision or annulment is subject to proposed Rule 8(3), which specifies that the Tribunal (or Committee) shall use best efforts to meet such time limit.

COSTA RICA **DECEMBER 28, 2018**

This proposed rule limits the pleadings to one round of submissions, unless otherwise agreed by the Parties or ordered by the Tribunal or Committee. Costa Rica considers that in annulment proceedings, parties should be granted two rounds of submissions to guarantee an adequate right of reply and proper defense, unless the parties agree otherwise. Annulment proceedings concern the decision over the legitimacy of the award, and often, of the whole arbitration itself. This is a transcendental issue that could imply great costs as a result and cannot be treated lightly.

Costa Rica suggests the following language for this rule:

Rule 66
Procedure Applicable to Interpretation, Revision and Annulment

[...]

(3) In addition to the application, the written procedure shall consist of [CR: two rounds ~~one round~~] of written submissions, unless the parties agree or the Tribunal or Committee orders otherwise.

[...]

FRANCE **JANUARY 14, 2019**

AR 66 (3) « [...] sauf si les parties en conviennent ou **si** le Tribunal ou le Comité en décide autrement ».

ISRAEL **DECEMBER 27, 2018**

In Israel's view it is unclear whether Rules 56-58 regarding discontinuance apply to this Procedure, as we believe they should. We suggest clarifying this matter.

Rule 67 – Stay of Enforcement of the Award

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 67: Stay of Enforcement of the Award

[...]

(3) The following procedure shall apply, unless the parties agree otherwise:

(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; and

~~(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) subject to Rule 8(3), 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.~~

~~(64) 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 specifying the circumstances that require the modification or termination of the stay of enforcement, after giving the other party an opportunity to present observations.~~

~~(75) 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, except that a Committee granting the partial annulment of an Award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request a new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay.~~

Commentary

The parties should be allowed to agree to modify the procedure for stay of enforcement of the Award.

Only the Tribunal or Committee should fix time limits for submissions on stay of enforcement, not the Secretary-General.

It should be clarified that the time limit to issue a decision on stay of enforcement is subject to proposed Rule 8(3), which specifies that the Tribunal (or Committee) shall use best efforts to meet such time limit. Such time limit should not be calculated from the day after the constitution of the Tribunal or Committee, but from the day after the last written submission on the request or the last oral submission on the request, whichever is later.

The ICSID Convention does not authorize the imposition of conditions for the stay, which may even prevent the application of Article 55 of the ICSID Convention.

Any information regarding any changes of circumstances upon which the enforcement was stayed should be provided in the context of a request to modify or terminate a stay of enforcement.

The Tribunal or Committee should only modify or terminate a stay of enforcement upon a party's request specifying the circumstances that require the modification or termination of the stay of enforcement, after giving the other party an opportunity to present observations.

The possibility that a Committee granting the partial annulment of an Award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request a new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay, as provided for in current Arbitration Rule 54(3), should be maintained in proposed Rule 67.

[DEBEVOISE](#) [DECEMBER 28, 2018](#)

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

[...] Similarly, **Proposed Arbitral Rule 29**, which allows the proceedings to continue while a disqualification challenge is pending, **Proposed Arbitral Rule 67(3)**, which imposes a time limit on the tribunal to rule on a request for stay of enforcement of an award,

and **Proposed Arbitral Rules 69–79** on Expedited Procedures are welcome changes to ICSID procedure that will allow for the more timely resolution of parties’ disputes.²

[additional comments on other proposed amendments – see AR 3, 11, 13, 14, 16, 19, 29, 69]

FRANCE **JANUARY 14, 2019**

The French delegation would appreciate further explanations (i) on the deletion of the possibility to prolong the stay of enforcement of an award that was set aside (paragraphs 651 and 654 of the Working Paper) and (ii) on the absence of any deadline to resubmit a case to a new tribunal where the award was set aside (paragraph 652 of the Working Paper).

GUGLIELMINO **DECEMBER 28, 2018**

The proposed amendment of Rule 67 (4) provides that if a Tribunal or Committee decides to stay the enforcement of the award, it may impose conditions for such stay, considering all the relevant circumstances.

On this issue, we must alert of two significant issues that alter the scope of the Rules and the role of the Secretary-General.

Firstly, it must be noted that an arbitral tribunal or an annulment committee constituted under the ICSID Convention have no powers to intervene, guarantee or impose restrictions on potential enforcement of awards. As repeatedly held in different precedents, under the ICSID Convention an arbitral tribunal is not an enforcement tribunal and has no enforcement jurisdiction. Therefore, it erroneous from a technical viewpoint and also highly risky from an institutional viewpoint to delegate on tribunals and annulment committees powers only attributable to enforcement courts.

Secondly, the rule proposed by the Secretariat is contrary to the provisions of the ICSID Convention as it exceeds the scope of these regulations (Rules) and the role of the Secretary-General. Thus, it should be highlighted that the ICSID Convention does not empower, directly or indirectly, arbitral tribunals or *ad hoc* committees to order guarantees as a condition for the stay of enforcement of the award. This is a widely discussed subject for which there are no uniform or constant opinions. For example, taking the Reports of the Centre on annulment proceedings as reference, (ICSID, “Updated Background Paper on Annulment for the Administrative Council of ICSID” (5 May 2016), p. 20-22), thirty-six decisions granted the stay of enforcement but, in only 14 of those cases, a bank security was required as a condition to maintain the stay. As the statistics of the ICSID itself reveal, maintaining the stay of enforcement of the

award conditioned upon the issuance of a banking security is not the rule but the exception. Based on the foregoing, it is not feasible to regulate this issue without amending the ICSID Convention.

An interpretation consistent with the object and purpose of the ICSID Convention shows the impossibility of delegating such powers on the committees. The interpretation of the ICSID Convention made in light of Article 31(1) of the Vienna Convention on the Law of Treaties show such impossibility. Such interpretation was followed, for example, by the committee in the case *Azurix v. Argentine Republic*, holding that:

To apply a strict rule that the “price” for the stay is the provision of security appears to the Committee to create a positive gloss to the enforcement regime provided for under Section 6 of the Convention. Effectively, such an approach would be to add a provision that is neither express nor implicit in the ICSID Convention. Indeed, it would effectively abrogate the scheme for security in Section 6 (particularly under Article 54) and substitute for those expressly qualified rights an entitlement to absolute security.

In the Committee’s view, such a default position would be in derogation to the approach to interpretation reflected in Article 31(1) of the Vienna Convention (see para 27 above) and also would work in a de facto sense impermissibly to amend the ICSID Convention by substituting a new and absolute enforcement mechanism for the qualified provisions of the Convention itself⁴.

Likewise, the annulment committee in the case *El Paso v. Argentine Republic* held that:

In a way, requiring Argentina to provide a guarantee for the continuation of the stay of the enforcement of the Award would be tantamount to punishing Argentina for having applied for the annulment of the award. Clearly, such sanction is not provided for in the ICSID Convention and rules.

Annulment Committees have a specific task: to determine whether the award submitted to them for consideration meets any of the grounds for annulment set out in Article 52 of the ICSID Convention. It is not their task to ensure compliance with the respective award, regardless of the actions of the debtor in the case at hand or in others⁵.

An investigation of the history of the Convention leads to the same conclusion. The possibility of granting a security was originally contemplated in the text of the Convention and was then eliminated. Negotiation document no. 24 provided that:

The Committee shall have the power to stay enforcement of the award pending its decision and to recommend any provisional measures necessary for the protection of the rights of the parties⁶.

Then, in document 123, the text was deleted and the new text reflected the current text of Article 52(5):

The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision⁷.

To impose the burden of granting a security on the party that has filed a request for annulment as an exercise of its rights under the ICSID Convention can be understood as a revocation, by means of regulations, of the will of the Contracting States of the ICSID Convention. Thus, it can be concluded that the Contracting States of the ICSID Convention have not contemplated the possibility that the stay of enforcement of proceedings be conditioned upon the granting of a security or any limitation whatsoever, and then, any amendment of a rule contrary to the provisions of the Convention may not be adopted.

Therefore, a proposal is made to eliminate Rule 67(4) of the amendment document.

SPAIN **DECEMBER 21, 2018**

En relación al comentario de ES a la Regla 62, ES alternativamente propone introducir en la regla 67 en la que “... *una parte de un procedimiento de rectificación, aclaración, revisión o anulación podrá solicitar una suspensión de la ejecución de una parte o de todo el laudo...*”.

Actualmente, se puede solicitar una ejecución del laudo mientras está pendiente una resolución de rectificación. En nuestra opinión, esto es algo que se debe corregir.

Rule 68 – Resubmission of Dispute after an Annulment

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

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 provided it is an official language of the Centre;
- (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.

[...]

(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. It may, however, stay or continue to stay the enforcement of the unannulled portion of the Award until the date its own Award is rendered.

(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~~may apply to the resubmission proceeding, with necessary modifications, if both ~~unless the~~ parties agree ~~thereto~~or the new Tribunal orders otherwise.

Commentary

The request should be drawn up in a procedural language used in the original proceeding, provided it is an official language of the Centre.

The possibility that the new Tribunal may stay or continue to stay the enforcement of the unannulled portion of the Award until the date its own Award is rendered, as provided for in current Arbitration Rule 55(3), should be maintained in proposed Rule 68(3).

The procedural agreements and orders on matters addressed at the first session of the original Tribunal should not apply to resubmission proceeding unless *both* parties agree thereto.

FRANCE JANUARY 14, 2019

The French delegation would appreciate further explanations (i) on the deletion of the possibility to prolong the stay of enforcement of an award that was set aside (paragraphs 651 and 654 of the Working Paper) and (ii) on the absence of any deadline to resubmit a case to a new tribunal where the award was set aside (paragraph 652 of the Working Paper).

GUATEMALA DECEMBER 28, 2018

Se solicita expresamente evaluar la posibilidad de incluir en las enmiendas la posibilidad de:

1. Incluir un plazo para el planteamiento o solicitud de una nueva sumisión.
2. Así como la viabilidad y conveniencia de conservar esta figura del proceso, en relación a los principios de celeridad, eficiencia procesal y, sobre todo, certeza jurídica, ¿ayuda o perjudica la confianza de los usuarios del sistema?

El hecho de que la convención no regule plazo para la nueva sumisión no es limitante para incluir un plazo en las reglas o para que las partes puedan acordarlo en la primera orden procesal, tal como se hace con otros plazos en la práctica. Cabe destacar que el sentido y fin de cualquier reglamento es operativizar el instrumento matriz. Consentir que la nueva sumisión se siga utilizando como hasta ahora, sería consentir con conocimiento de causa y consecuencia, el abuso que usuarios de mala fe han realizado del sistema, mismo que, merece la pena recordar, ha sido sumamente criticado en los últimos tiempos.

HELLENIC REPUBLIC DECEMBER 28, 2018

If the original Award was annulled there should be mandatory stay of enforcement.

ISRAEL DECEMBER 27, 2018

Israel is of the view that the deletion of the second part of the current AR Rule 55(3) deserves further discussions in order to understand its practical consequences.

With regards to paragraph 3, we suggest making the following modifications in order to adjust this paragraph with para 1(e): If the original Award was annulled in part, the new Tribunal shall only reconsider aspects of that part of the dispute pertaining to the annulled portion of the Award, as specified in paragraph 1(e).

DENTONS DECEMBER 21, 2018

While we agree that typically the parties will wish to appoint the resubmission Tribunal using the same method as was used to appoint the original Tribunal, we believe they should also have the option of using a different method, if they so wish.

Chapter XII – Expedited Arbitration

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

Les paragraphes 56, 57,58 et 59 sont validés sous réserve de définir les dispositions relatives à la sélection et à la nomination des arbitres dans ce mode d’arbitrage.

COSTA RICA DECEMBER 28, 2018

We appreciate ICSID’s efforts to provide an alternative to reduce costs and times of the process under certain circumstances. An important feature that we would like to highlight from these Rules is the fact that expedited procedure requires consent from both disputing parties because this guarantees an adequate opportunity of defense, even within a shorter proceeding.

MEXICO DECEMBER 28, 2018

México reconoce que la disminución en los costos y duración de los procedimientos es una cuestión que debería ser abordada en las reformas que está llevando a cabo el CIADI. Sin embargo, al abordar esta reforma es importante tener en consideración que contar con

plazos fijos acotados y más cortos podría tener implicaciones negativas para la defensa de los Estados, ya que éstos a diferencia de los inversionistas, tienen que contactar a las autoridades o agencias para obtener información y documentación, contratar en muchos casos abogados para la defensa, los funcionarios del Estado normalmente deben atender otras cuestiones relativas al servicio público y todo lo anterior puede afectar la adecuada preparación de su defensa. También tiene que celebrar contrataciones de expertos legales y económicos que llevan tiempo, ya que deben pasar por procedimientos administrativos internos y existen limitaciones en cuanto al presupuesto que está ligado ejercicios fiscales.

PORTUGAL **DECEMBER 21, 2018**

The expedited procedure would in many cases be of great use to SMEs, while at the same time it could bring significant efficiency to ISDS, thus benefiting the respondent State as well.

Having said that, every effort should be made to improve the use of this more expeditious and simplified alternative dispute resolution procedure, namely by eliminating the reasons which have been preventing its wider acceptance by the disputing parties.

Again, Secretariat's extensive experience in case management should be used to obtain concrete proposals to improve the rules of this expedited procedure in order to increase its acceptance by the respondent States.

SINGAPORE **JANUARY 4, 2019**

Note: The same rules apply in (AF)AR 73-81.

We will set out our views on this chapter here to avoid repetition. We support this new chapter regarding expedited arbitration. While there may be limits to the utility of such procedures if a particular dispute is complex and requires more time procedurally, it is in line with various States' interest to have such an option and the flexibility of opting into these procedures, in relation to smaller scale claims that could be disposed of more speedily, or if there are fewer factual issues in dispute. Ultimately, the responding State's autonomy is not fettered because the expedited procedure only applies if both disputing parties consent.

ES agradece el esfuerzo del CIADI para elaborar un procedimiento expedito, establecido en un nuevo capítulo. Ahora bien, tenemos dudas sobre los plazos establecidos en el capítulo, y en qué medida la brevedad de los mismos puede dificultar la defensa del Estado.

We welcome the introduction of expedited proceedings under Draft Rules 69-79. While it remains unclear whether a substantial number of parties will agree to such proceedings, we note that, at the very least, the explicit inclusion of shorter timeframes within the Rules may have a positive gravitational pull towards shorter timeframes even in non-expedited proceedings.

Rule 69 – Consent of Parties to 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). The parties may jointly amend the expedited arbitration rules of this Chapter, or, at the request of a party, the Tribunal may make necessary modifications to the expedited arbitration of this Chapter if the circumstances so require. At any time of the proceeding, the parties may agree to discontinue the use of the expedited arbitration rules of this Chapter, or, at the request of a party, the Tribunal may decide to discontinue of the use of the expedited arbitration rules of this Chapter if the circumstances so require.

(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 ~~2~~60 days after the date of registration of the Request for arbitration.

[...]

Commentary

The parties should be allowed to jointly amend the expedited arbitration rules and, at the request of a party, the Tribunal should be allowed to make necessary modifications to the expedited arbitration if the circumstances so require.

In addition, at any time of the proceeding, the parties should be allowed to agree to discontinue the use of the expedited arbitration rules and, at the request of a party, the Tribunal should be allowed to decide to discontinue of the use of the expedited arbitration rules if the circumstances so require.

The parties should be given at least 60 days to jointly notify the Secretariat of their consent to an expedited arbitration.

AUSTRIA DECEMBER 21, 2018

Taking into account of the need for coordination with the ministries, the suggested deadlines are difficult to meet. However, the provisions relating to the accelerated procedure will only apply if the parties agree. Since an accelerated procedure can therefore be avoided, the short deadlines are not discussed in more detail.

The proposed changes may be considered in the context of Austria’s proposal to facilitate SME’s access to arbitration. They do not however address pro bono representation of SMEs.

CANADA DECEMBER 28, 2018

1) Canada believes that there must be an option for the parties or for the tribunal to determine at some point that expedited arbitration is no longer feasible, and that they can then opt out and return to regular arbitration. Canada feels this is important to preserve the flexibility of the parties and the tribunal to respond to potentially changing circumstances.

COLOMBIA DECEMBER 28, 2018

Colombia considera que debe haber una opción para las partes o para el tribunal para que determine en algún momento que el arbitraje expedito ya no es factible, y que luego pueden optar regresar al arbitraje regular. Colombia considera que esto es importante para preservar la flexibilidad de las partes y que se facilite al tribunal para responder a circunstancias potencialmente cambiantes.

SLOVAK REPUBLIC **DECEMBER 22, 2018**

This tool might be effective for claimants. Nevertheless, respondents, being states may face lack of time for preparing submissions. We recommend to keep it as optional proceeding, based on mutual consent of the parties to dispute.

TOGO **DECEMBER 28, 2018**

L'article ne décrit que la procédure mais ne précise pas les conditions requises pour demander un « arbitrage accéléré ». Est-ce un cas d'urgence ? Pour remédier à un problème technique ? Ou tient-il compte de l'importance du différend soumis ?

Concrètement, dans quels cas, les parties peuvent-elles demander un arbitrage d'urgence ?

UKRAINE **DECEMBER 28, 2018**

Extensions of various time limits and document production patently affect the length of arbitral proceedings.

The ICSID Draft seeks to exclude the application of Rule 8(1) but not Rule 9(2), with the result that it will be impossible to extend time limits set by the SG or the Convention but not those set by the Tribunal.

This gives rise to two issues:

- (a) first, if there should be different treatment of time limits set by the SG or the Convention, on one hand, and time limits set by the Tribunal, on the other. There appears to be no discernible reason for that; and
- (b) second, whether expedited proceedings indeed require a complete ban on extensions of time limits, and there appears to be no reason why the Rules should go that far.

It is proposed, accordingly, that extension of all kinds of time limits be allowed in expedited proceedings in the usual way.

Since document production is a much more time consuming exercise and requires significant resources of the parties (which extension of time, of itself, does not), it is proposed to forego document production in expedited proceedings entirely – unless the parties decide to opt in document production and agree otherwise.

Rule 69(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.;
and
- (c) Rule 40 does not apply in an expedited arbitration pursuant to this Chapter unless the parties agree otherwise.

CCPIT **DECEMBER 25, 2018**

A. Original Text

[quotes text of proposed AR 69]

B. Modified Text

It is advised to amend Rule 69 (Consent of Parties to Expedited Arbitration) of the proposed Arbitration Rules as follows:

Rule 69 Consent of Parties to Expedited Arbitration

[...]

(3) The expedited arbitration is recommended to apply if:

(a) the amount in dispute does not exceed half of the average amount of all investment arbitration cases registered by ICSID of last calendar year at the time of the notice referred to in arbitration; and

(b) The merit in dispute is clear to permit the tribunal to issue its reward within a relevant time limit for expedited arbitration.

[...]

C. Reason for Amendment

Rule 69 of the proposed Arbitration Rules states that the application for initiation of the expedited arbitration shall be submitted by the parties in writing, but the applicable standards for the expedited arbitration proceedings are not clearly defined. The vagueness of the applicable standards of procedures is not conducive to the promotion of expedited arbitration and may lead to the abuse of expedited arbitration. It is therefore recommended to supplement the applicable standards of expedited arbitration procedures.

There is no strict distinction between good and bad between ordinary arbitration and expedited arbitration. For cases which are complicated or with large amounts involved, the application of ordinary proceeding can achieve better results in terms of impartiality, but more costs and time are needed. The disadvantages of investment arbitration, namely, high costs and long time-consuming, have long been criticized. The application of the expedited arbitration can considerably improve the efficiency of arbitration and reduce the cost, which can offset the deficiency of the ordinary arbitration to a certain extent.

However, the current proposed Arbitration Rules simply stipulate that the expedited arbitration applies upon an agreement reached by the parties, and there is no explicit provision in terms of the applicable standards applied. In this case, on the one hand, the parties may apply the expedited arbitration to cases which are complicated or with large amounts involved, in order to pursue high efficiency and low cost, which in turn may result in the arbitral tribunal's failure to comply with the time limits applicable to the expedited arbitration, and also may raise concern about the impartiality of the arbitrators. On the other hand, the parties may also choose to apply the ordinary arbitration to cases which is simple or with small amount involved, because of lack of understanding of the expedited arbitration, thereby the advantage of the expedited arbitration cannot be reflected. The two reference standards added above in the suggestions help to review the cases in dispute and decide whether to apply the expedited arbitration. It may also improve the matching degree between the arbitration and the cases, and the credibility of ICSID.

[DEBEVOISE](#) [DECEMBER 28, 2018](#)

[Footnotes have been omitted. To view the full text, please click on the commenter's name hyperlinked above.]

Consistent with the recommendations we presented in our 31 March 2017 Letter to the Secretary-General, the Proposed Amendments make considerable progress toward creating more efficient procedures and encouraging active participation in case management by the tribunal.

[...] Similarly, **Proposed Arbitral Rule 29**, which allows the proceedings to continue while a disqualification challenge is pending, **Proposed Arbitral Rule 67(3)**, which imposes a time limit on the tribunal to rule on a request for stay of enforcement of an award, and **Proposed Arbitral Rules 69–79** on Expedited Procedures are welcome changes to ICSID procedure that will allow for the more timely resolution of parties' disputes.²

[additional comments on other proposed amendments – see AR 3, 11, 13, 14, 16, 19, 29, 67]

Rule 70 – Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

ARGENTINE REPUBLIC

DECEMBER 28, 2018

Rule 70: Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

[...]

(2) The parties shall jointly notify the Secretariat in writing of their election of a Sole Arbitrator or a three-member Tribunal within ~~30~~360 days after the date of registration of the Request for arbitration.

[...]

Commentary

The parties should be given at least 60 days to jointly notify the Secretariat of of their election of a Sole Arbitrator or a three-member Tribunal.

SPAIN

DECEMBER 21, 2018

Consideramos que la norma supletoria de un Árbitro único, en caso de falta de acuerdo entre las partes, puede desincentivar la adopción de este procedimiento.

Rule 71 – Appointment of Sole Arbitrator for Expedited Arbitration

ISRAEL

DECEMBER 27, 2018

We suggest that a provision similar to the one in Rule 25 should be included here, for example that the paragraph will state:

The Secretary General shall consult with the parties as far as possible before appointing an arbitrator.

Rule 72 – Appointment of Three-Member Tribunal for Expedited Arbitration

SPAIN **DECEMBER 21, 2018**

Nos preocupa que si un árbitro nominado por una parte no acepta o rechaza, entonces sea el Secretario General de manera automática quien designe un segundo candidato.

ES considera que la parte que lo nominó debería poder volver a nominar un nuevo candidato.

ISRAEL **DECEMBER 27, 2018**

Our suggestion for Rule 71 applies to this rule *mutatis mutandis*.

Rule 73 – Acceptance of Appointment by Arbitrators in Expedited Arbitration

GUATEMALA **DECEMBER 28, 2018**

Esta regla es innecesaria, esta misma disposición se contempla en varias reglas anteriores.

Rule 74 – First Session in Expedited Arbitration

NO COMMENTS RECEIVED

Rule 75 – The Procedural Schedule in Expedited Arbitration

CANADA DECEMBER 28, 2018

1) With respect to paragraph 3, Canada questions whether the timelines contained in this Rule are feasible if document production is to be allowed. Canada suggests that paragraph 3 be amended to include a first sentence that says “At the request of a party the Tribunal may grant limited requests for specifically identifiable documents that the requesting Party knows, or has good cause to believe exist.”

COLOMBIA DECEMBER 28, 2018

Con respecto al párrafo 3, Colombia cuestiona si los plazos contenidos en esta Regla son factibles para permitir la producción de documentos. Colombia sugiere que se modifique el párrafo 3 para incluir una primera oración que diga “A solicitud de una parte, el Tribunal puede otorgar solicitudes limitadas de documentos específicamente identificables que la Parte solicitante sabe, o tiene una buena razón para creer que existe”.

GEORGIA DECEMBER 28, 2018

Comment to Rule 75(1)(b):

In situations where the requesting party elects to use its RfA as its memorial, the circumstances of the case might warrant granting longer period of time to the Respondent to file its counter-memorial for the same reasons provided above in the comment regarding Rule 13(2). (See comment to Rule 13(2)-II, p.3)

GUATEMALA DECEMBER 28, 2018

Se reitera la oposición de Guatemala con la posibilidad de que el memorial de solicitud de arbitraje pueda ser utilizado por el demandante como memorial de demanda, sería un gran perjuicio para los Estados demandados, por las razones explicadas previamente.

Asimismo, se considera que, al tratarse de un arbitraje expedito, el número de páginas de la primera ronda de escritos debería ser menor, tal como se demuestra en la casilla izquierda.

Finalmente, se considera que los plazos podrían reducirse aún más y limitar con mayor firmeza las prórrogas, con la finalidad de no perder la naturaleza expedita de esta propuesta.

El numeral dos de la regla 75 contempla la posibilidad de modificar los plazos establecidos por el convenio al calendario procesal que las partes acuerden, lo que confirma que no debería haber problema para incorporar un plazo a la solicitud de nueva sumisión, sobre todo porque se estaría modificando, sino incorporando un plazo.

En ese sentido, puede contemplarse en la regla 34 y 75 de la propuesta, incluir la facultad de que las partes puedan establecer el plazo para plantear una nueva sumisión en la 1º orden procesal. Si es posible en el arbitraje expedito, debe ser posible en el normal.

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 ~~/150/200~~ páginas;(…)

HUNGARY DECEMBER 28, 2018

Hungary welcomes the proposed rules on expedited arbitration.

In order to make expedited arbitration more appealing to the parties, Hungary suggests the change of the deadlines stipulated in Rule 75 (1) (b) to 90 days, and the deadlines stipulated in Rule 75 (1) (e) to 60 days.

ISRAEL **DECEMBER 27, 2018**

We suggest to reconsider whether this timeline provided in this rule (and for the entire procedure) is feasible, especially on the part of states.

OMAN **DECEMBER 28, 2018**

We recommend that the tribunal should be permitted, after it has declared its closing, to reopen the case if necessary, in view of any relevant circumstances and to allow the parties to make such a request within a specified time limit commensurate with the nature of expedited arbitration.

Rule 76 – Default during Expedited Arbitration

NO COMMENTS RECEIVED

Rule 77 – The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

ARGENTINE REPUBLIC **DECEMBER 28, 2018**

Rule 77: The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

~~The consent of the parties given pursuant to Rule 69 shall not apply to 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.~~

Commentary

The consent of the parties to expedited arbitration should only cover the original arbitration proceeding and should not extend to post-award remedies.

Rule 78 – The Procedural Schedule For an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration

ARGENTINE REPUBLIC

DECEMBER 28, 2018

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~~ The consent of the parties given pursuant to Rule 69 shall not apply to 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.~~

Commentary

The consent of the parties to expedited arbitration should only cover the original arbitration proceeding and should not extend to post-award remedies.

CANADA

DECEMBER 28, 2018

1) Canada notes that paragraph 1 of this proposed Rule appears to be a typo in that it repeats paragraph 1 of Rule 77. The paragraph belongs in Rule 77 not Rule 78.

GEORGIA DECEMBER 28, 2018

Comment to Rule 78(1):

Paragraph (1) of Rule 78 is repeating the wording of Rule 77(1). We believe this is a technical error and shall be corrected accordingly.

ISRAEL DECEMBER 27, 2018

With regards to paragraph 1, we believe that this paragraph belongs to Rule 77.

It is also our view that the timeline may not be feasible and we suggest extending it.

Rule 79 – Resubmission of a Dispute after an Annulment in Expedited Arbitration

GUATEMALA DECEMBER 28, 2018

Debe entenderse entonces que se acordará un nuevo calendario, que no aplica automáticamente el arbitraje expedito; pero, ¿qué pasa si las partes si lo desean así? ¿Debe haber acuerdo expreso nuevamente? ¿Por qué no preverse igual que los demás procesos derivados? Se deja mucha libertad a la nueva sumisión, es preciso limitar de alguna manera esta posibilidad, de modo que no sea una figura tendenciosa a abusar del procedimiento.

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IV. CONCILIATION RULES

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Rule 6 – Payment of Advances and Costs of the Proceeding

SEE ALSO COMMENTS UNDER AR 19

Rule 7 – Confidentiality

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French.](#)]

Prévoir dans le paragraphe 82 l’accord express des parties pour la divulgation.

Rule 8 – Use of Information in Other Proceedings

NO COMMENTS RECEIVED

Chapter II – Constitution of the Commission

Rule 9 – General Provisions, Number of Conciliators and Method of Constitution

SEE ALSO COMMENTS UNDER AR 20 & 22

Rule 10 – Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French.](#)]

Préciser dans le paragraphe 85 à qui revient le droit de choisir le conciliateur unique en cas de défaut de choix par les parties dans les délais convenus.

[SEE ALSO COMMENTS UNDER AR 23](#)

Rule 11 – Assistance of the Secretary-General with Appointment

[SEE ALSO COMMENTS UNDER AR 24](#)

Rule 12 – Appointment of Conciliators by the Chairman of the Administrative Council in Accordance with Article 30 of the Convention

[SEE ALSO COMMENTS UNDER AR 25](#)

Rule 13 – Disclosure of Third Party Funding

[SEE ALSO COMMENTS UNDER AR 21](#)

Rule 14 – Acceptance of Appointment

[AUSTRIA](#) [DECEMBER 21, 2018](#)

Lit a and b (currently c and d) in paragraph 3 need to be corrected.

[SEE ALSO COMMENTS UNDER AR 26](#)

Rule 15 – Replacement of Conciliators Prior to Constitution of the Commission

[SEE ALSO COMMENTS UNDER AR 27](#)

Rule 16 – Constitution of the Commission

[SEE ALSO COMMENTS UNDER AR 28](#)

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[NO COMMENTS RECEIVED](#)

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Rule 25 – Quorum

[SEE ALSO COMMENTS UNDER AR 17](#)

Rule 26 – Deliberations

[SEE ALSO COMMENTS UNDER AR 16](#)

Rule 27 – Cooperation of the Parties

[NO COMMENTS RECEIVED](#)

Rule 28 – Written Statements

[CHINA](#) [DECEMBER 28, 2018](#)

Rule 28 stipulates that each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views. Considering the fact that the respondent is often at a disadvantaged position for lack of information of the disputed issue at the initial stage of the proceeding, it will be difficult for the respondent to submit such statement simultaneously with the claimant. China therefore proposes that the respondent is allowed to submit such statement a certain period after it receives the submission by the claimant.

[SEE ALSO COMMENTS UNDER AR 13](#)

Rule 29 – First Session

[SEE ALSO COMMENTS UNDER AR 34](#)

Rule 30 – Meetings

SEE ALSO COMMENTS UNDER AR 15 & 47

Rule 31 – Preliminary Objections

SEE ALSO COMMENTS UNDER AR 36

Chapter V – Termination of the Conciliation

Rule 32 – Discontinuance Prior to the Constitution of the Commission

SEE ALSO COMMENTS UNDER AR 55-57

Rule 33 – Discontinuance for Failure to Pay

SEE ALSO COMMENTS UNDER AR 58

Rules 34 – Report noting the Parties’ Agreement

NO COMMENTS RECEIVED

Rules 35 – Report noting the Parties’ Failure to Reach Agreement

NO COMMENTS RECEIVED

Rules 36 – Report noting the Failure of a Party to Appear or Participate

NO COMMENTS RECEIVED

Rule 37 – The Report

SEE ALSO COMMENTS UNDER AR 60

Rule 38 – Issuance of the Report

SEE ALSO COMMENTS UNDER AR 61

V. ADDITIONAL FACILITY (AF) RULES

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V. ADDITIONAL FACILITY (AF) RULES

Article 1 – Definitions

EU **DECEMBER 21, 2018**

The definition of ‘Regional Economic Integration Organisation’ that ICSID has put forward in AFR Article 1(4) is a definition that has been used in other international treaties (eg. Energy Charter Treaty) and can be supported by the European Union and its Member States. The same applies for the proposed definitions of “nationals”, both with respect to natural and juridical persons, as spelled out in AFR Article 1(5)(a)-(c). The European Union and its Member States would invite the ICSID Secretariat to also consult with other potentially interested REIOs about these provisions.

As to the proposal to include a definition of ‘Contracting REIOs’ as part of the definitions for the purpose of the application of AFR Article 1(8), the European Union and its Member States would see merit in including such a definition. The inclusion of such a definition does not prejudice the outcome of any possible future discussions on whether REIOs should or could become Contracting Parties to the ICSID Convention. The European Union and its Member States understand that such a discussion is not part of the current ICSID reform proposals.

JAPAN **DECEMBER 27, 2018**

Japan recognizes that Article I (8) has been proposed in consideration of the possibility that the Article 67 of the Convention might be amended and would allow REIOs to join the Convention in the future.

However, Japan proposes to delete the proposed Article 1 (8) to preclude any prejudice to future discussions on the amendment of the Convention. The necessity of the definition of "Contracting REIO", in Japan's view, should be discussed under a process for the amendment of the Convention.

DENTONS **DECEMBER 21, 2018**

In general terms, consider adding a provision that would allow for conversion of a Convention arbitration to an Additional Facility Rules arbitration (or potentially vice versa) if the requirements of consent for the Convention are not met (or for the Additional

Facility Rules) but those of the Additional Facility Rules are (or the Convention). This is a real possibility, given that a number of treaties provide consent both to Convention arbitration as well as to Additional Facility Rules arbitration.

Article 2 – Additional Facility Proceedings

AFRICAN UNION DECEMBER 28, 2018

We noted the proposed amendments related to Regional Economic Organizations and the Additional Facility Rules related to them. We concur with the idea that they can be parties to ICSID proceedings, provided that such REIOs have clearly expressed their consent, either by becoming parties to the ICSID Conventions or by expressing such consent clearly in writing under the Additional Facility Rules.

Comments from the AU in Patrick Osu of Ajumogobia and Okeke memorandum

The proposal to amend the Additional Facility Rules (AF) appears to suggest the expansion of the reach of the activities of the International Centre for Settlement of Investment Dispute (ICSID). It has been argued that the AF seeks to ensure the inclusion of Regional Economic and International Organizations (REIO) and their nationalities in the activities of ICSID as parties to investor state dispute. While we note that it is a welcome idea, we support the fact that Article 2 which deals with the Additional Facility Proceedings suggest that the Secretariat of the Centre is authorised to administer proceedings between a State and a REIO or a National and a State which the parties consent in writing to submit to the Centre. This article ensures that the Centre would exercise jurisdiction only where parties have given their consent to arbitrate under the AF.

Comments from the AU in I-ARB Africa memorandum:

Under the proposed amendments, Regional Economic International Organization has been defined as “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.”

The proposed amendment further defines “Contracting REIO” as “an REIO for which the Convention is in force” providing the possibility for REIOs to join the ICSID Convention. This means that a REIO can become a party to an ICSID dispute as per the ICSID Convention.

Furthermore, the addition of REIO definition into the Additional Facility Rules (AFR) means that REIOs can now become party to a dispute, arbitration or conciliation, under the AFR without becoming signatories to the ICSID Convention or contracting REIOs.

There are institutions within the African continent that fit into the definition of REIO provided above. In 1991 the African Union undertook the creation of economic communities through the Treaty Establishing the African Economic Community, commonly referred as the Abuja Treaty. The Treaty establishes a Community which it defines as the organic structure for economic integration and constituting an integral part of the OAU.

This Treaty has paved the way to the creation and/or recognition of 8 economic institutions, referred to as Regional Economic Communities in the African continent. According to this definition of REIOs, these 8 institutions that would qualify as a REIO.

As mandated by the Abuja Treaty, the RECs are closely integrated with the AU's work and serve as its building blocks. In addition to the Treaty, the relationship between the AU and the RECs is mandated by the AU Constitutive Act, and guided by the: 2008 Protocol on Relations between the RECs and the AU; and the Memorandum of Understanding (MoU) on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa.

The AU recognizes eight RECs, they are:

- a. Arab Maghreb Union (UMA) is composed of Algeria, Libya, Mauritania, Morocco, and Tunisia and established with the view of working gradually towards achieving free movement of persons and transfer of services, goods and capital among them It is not a signatory of the Protocol on Relations between the RECs and the AU.
- b. Common Market for Eastern and Southern Africa (COMESA) is economic community that has established a is a free trade area with 21 member States: Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Somalia, Eswatini, Seychelles, Tunisia, Uganda, Zambia and Zimbabwe.
- c. Community of Sahel–Saharan States (CEN–SAD) was established in 1998 to with the aim of promotion of external trade through an investment policy in member States. The 24 Member States are Benin, Burkina Faso, Central African Republic, Chad, the Comoros, Côte d'Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, the Sudan, Togo and Tunisia.

d. East African Community (EAC) is a regional intergovernmental organisation of six (6) Partner States, comprising Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda established in 1999.

e. Economic Community of Central African States (ECCAS) was established in 1983 to strengthen the economic ties among Central African States and has 11 Member States: Angola, Burundi, Cameroun, Central African Republic, Republic of Congo, Gabon, Equatorial Guinea, Democratic Republic of Congo, Sao Tome & Principe, Chad and Rwanda.

f. Economic Community of West African States (ECOWAS), composed of 15 West African countries established on 28 May 1975. The countries are: Benin, Burkina faso, Cabo verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

g. Intergovernmental Authority on Development (IGAD) was created in 1996 to supersede the Intergovernmental Authority on Drought and Development (IGADD) which was founded in 1986 to mitigate the effects of the recurring severe droughts and other natural disasters that resulted in widespread famine, ecological degradation and economic hardship in the region. Its members are: Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda, Eritrea and South Sudan.

h. Southern African Development Community (SADC), established in 1992 with a goal to further socio-economic cooperation and integration as well as political and security cooperation among 16 southern Africa states, notably: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, Zimbabwe.

In addition to the 8 RECs above and pursuant to article 4 and 6 of the Abuja Treaty, the African Union is currently negotiating the African Continental Free Trade Area (AfCFTA), with 44 AU Member States have signed Agreement Establishing The African Continental Free Trade Area. So far, 12 African States have ratified the existing Protocols. The AfCFTA will come into force after the ratification of 22 Member States.

All of the RECs and the AfCFTA prescribe the establishment of dispute resolution mechanism in the form of a Court of Justice or other, with the capacity to resolve disputes between Member States as to the interpretation of the instituting document as well as dispute resolution mechanisms under protocols or related agreements governing investments related matters.

The dispute envisaged within the dispute resolution mechanisms in the RECs or AfCFTA concern disputes between State and Nationals or State and State. There is, so far, no dispute resolution mechanism envisaged within these institutions where the RECs are a party to an investment dispute.

I propose that the organizations that fit within the definition of REIO in the AFR be provided with a mechanism through which they opt-in to the AFR through for e.g. a letter indicating the organization’s consent to be a party to an arbitration or conciliation according to the AFR Thus I propose that the definition of REIO be amended as follows “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 and have opt-ed into the AFR”

In the alternative, as the proposed AFR amendments would extend the availability of AF arbitration and conciliation at ICSID to cases where both the claimant and the respondent are not ICSID Contracting States or REIOs, or nationals of ICSID Contracting States or of any constituent States of Contracting REIOs as some IIAs currently offer this possibility. I therefore propose that availability for arbitration and conciliation under the AFR be made available in instances where IIAs or the REIOs make specific reference to ICSID while not being Contracting Parties to the Convention.

Accordingly, I propose the definition of REIOs be amended to “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 and have listed ICSID as a option under their dispute resolution provisions”

As a final alternative, I propose that the definition of REIOs to be included in disputes under the AFR be strictly limited to only those REIOs with no dispute resolution mechanisms (i.e. courts, commissions etc…) or whose dispute resolution mechanisms have become defunct.

Accordingly, I propose the definition of REIOs be amended to “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 where the dispute resolution mechanism is not operational at the time of the dispute”

ALGERIA **JANUARY 14, 2019**

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French.](#)]

1) Les paragraphes 60, 61,67 et 69 sont validés par l’Etat algérien. Cependant il y a lieu de permettre aux membres du CIRDI de recourir au mécanisme supplémentaire, notamment pour certaines dispositions, à savoir la médiation et la conciliation.

2) Les paragraphes 62, 63, 64, 65, 66 et 68 ne sont pas validés par l'Etat algérien. Le mécanisme supplémentaire reste propre aux Etats et aux investisseurs.

TOGO **DECEMBER 28, 2018**

C'est une innovation qui permet d'étendre la médiation ou la conciliation à une Organisation d'intégration économique régionale (OIER), telle que l'UEMOA par exemple. Désormais, les OIER peuvent saisir le CIRDI dans le cadre d'un différend juridique lié à l'investissement.

DENTONS **DECEMBER 21, 2018**

The revised Additional Facility Rules continue to exclude cases involving dual nationals. However, there are no policy reasons for ICSID to exclude administering arbitrations involving dual nationals. Yes, the Convention draws that policy distinction, but there is no principled reason for it to be extended to the Additional Facility. In fact, many investment treaties explicitly cover dual nationals (and even permanent residents) and include references to other arbitration rules *only because ICSID Additional Facility does not cover dual nationals*. ICSID could reinforce its position as the preeminent set of rules for investment treaty arbitration by allowing States that want to cover dual nationals an ICSID option.

It may also be useful to clarify that for Additional Facility proceedings States may specify in their investment treaties (or contracts) what are "investments" intended to be covered. Again, there is no reason in the Additional Facility context to bring in the divergent jurisprudence on the content of the word "investment" under the ICSID Convention.

Article 3 – Convention Not Applicable

NO COMMENTS RECEIVED

Article 4 – Final Provisions

DENTONS DECEMBER 21, 2018

Consider adding a grandfathering provision for cases based on consent given at a time when the scope of arbitration was broader than what is provided in the revised Additional Facility Rules.

VI. (AF) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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VI. (AF) ADMINISTRATIVE AND FINANCIAL REGULATIONS

Chapter I – General Provisions

Regulation 1 – Application of the Regulations

NO COMMENTS RECEIVED

Chapter II – The Secretariat

Regulation 2 – Secretary

SPAIN DECEMBER 21, 2018

Esta regla establece lo siguiente:

“El Secretario General del Centro..... nombrará a un o una Secretario (a) para cada Comisión, Tribunal y Comité... El Secretario(a) podrá pertenecer al Secretariado..... tendrá las siguientes funciones:

A) Representar al Secretario General y podrá desempeñar todas las funciones que este Reglamento ... asignan al o a la Secretario(a) General.”

Las funciones encomendadas al SG son muy amplias y de gran relevancia, como por ejemplo, el nombramiento de árbitros. Por ello, consideramos que la delegación de las mismas en el personal del Secretariado debe hacerse con un procedimiento garantista y controlado.

Por ello, nos gustaría solicitar aclaración sobre cómo se pretende implementar esta delegación de funciones.

SEE ALSO COMMENTS UNDER AFR 25

Regulation 3 – Publication

[SEE ALSO COMMENTS UNDER AFR 22](#)

Regulation 4 – The Registers

[AUSTRIA](#) [DECEMBER 21, 2018](#)

As noted in Comment Nr. 1483, publishing too much information may be detrimental to the purpose. For this reason, information should only be published with extreme restrictions.

[SEE ALSO COMMENTS UNDER AFR 23](#)

Regulation 5 – Depositary Functions

[SEE ALSO COMMENTS UNDER AFR 26](#)

Regulation 6 – Certificates of Official Travel

[SEE ALSO COMMENTS UNDER AFR 28](#)

Chapter III – Financial Provisions

Regulation 7 – Costs of Proceedings

SEE ALSO COMMENTS UNDER AFR 14

Regulation 8 – Special Services

SEE ALSO COMMENTS UNDER AFR 15

Regulation 9 – Fee for Lodging Requests

SEE ALSO COMMENTS UNDER AFR 16

Chapter IV – Official Languages

Regulation 10 – Official Languages

SEE ALSO COMMENTS UNDER AFR 30

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VII. (AF) ARBITRATION RULES

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Rule 1 – Application of Rules

NO COMMENTS RECEIVED

Chapter II – Institution of the Proceeding

Rule 2 – The Request

SEE ALSO COMMENTS UNDER IR 1

Rule 3 – Contents of the Request

SPAIN DECEMBER 21, 2018

Consideramos que la inversión debería también ser acreditada a la hora de solicitar el registro de la solicitud.

SEE ALSO COMMENTS UNDER IR 2

Rule 4 – Recommended Additional Information

SEE ALSO COMMENTS UNDER IR 3

Rule 5 – Filing of the Request and Supporting Documents

[SEE ALSO COMMENTS UNDER IR 4](#)

Rule 6 – Receipt of the Request

[SEE ALSO COMMENTS UNDER IR 5](#)

Rule 7 – Review and Registration of the Request

[SEE ALSO COMMENTS UNDER IR 6](#)

Rule 8 – Notice of registration

[SEE ALSO COMMENTS UNDER IR 7](#)

Rule 9 – Withdrawal of the Request

[SEE ALSO COMMENTS UNDER IR 8](#)

Chapter III – Conduct of the Proceeding

Rule 10 – Party and Party Representation

[SEE ALSO COMMENTS UNDER AR 2](#)

Rule 11 – Method of Filing

SEE ALSO COMMENTS UNDER AR 3

Rule 12 – Routing of Written Communications

SEE ALSO COMMENTS UNDER AR 4

Rule 13 – Procedural Languages, Translation and Interpretation

SEE ALSO COMMENTS UNDER AR 5

Rule 14 – Correction of Errors and Deficiencies

SEE ALSO COMMENTS UNDER AR 6

Rule 15 – Calculation of Time Limits

SEE ALSO COMMENTS UNDER AR 7

Rule 16 – Time Limits Specified By These Rules or Fixed by the Secretary-General

SEE ALSO COMMENTS UNDER AR 8

Rule 17 – Time Limits Fixed By The Tribunal

[SEE ALSO COMMENTS UNDER AR 9](#)

Rule 18 – Waiver

[SEE ALSO COMMENTS UNDER AR 10](#)

Rule 19 – Filling Gaps

[NO COMMENTS RECEIVED](#)

Rule 20 – General Duties

[SEE ALSO COMMENTS UNDER AR 11](#)

Rule 21 – Orders and Decisions and Agreements

[SEE ALSO COMMENTS UNDER AR 12](#)

Rule 22 – Written Submissions and Observations

[SEE ALSO COMMENTS UNDER AR 13](#)

Rule 23 – Case Management Conference

SEE ALSO COMMENTS UNDER AR 14

Rule 24 – Seat of Arbitration

HELLENIC REPUBLIC DECEMBER 28, 2018

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. **The place of proceedings should be fixed, according to the general rule of the respondent's jurisdiction or, in the alternative, the ICSID facilities closer to the respondent state.**

Rule 25 – Hearings

SEE ALSO COMMENTS UNDER AR 15

Rule 26 – Deliberations

FRANCE JANUARY 14, 2019

« Le Tribunal peut délibérer en tout lieu qu'il juge ~~pratique~~ **approprié** ».

SEE ALSO COMMENTS UNDER AR 16

Rule 27 – Quorum

[SEE ALSO COMMENTS UNDER AR 17](#)

Rule 28 – Decisions Taken by Majority Vote

[SEE ALSO COMMENTS UNDER AR 18](#)

Rule 29 – Payment of Advances and Costs of the Proceeding

[SEE ALSO COMMENTS UNDER AR 19](#)

Chapter IV – Constitution of the Tribunal

Rule 30 – General Provisions Regarding the Constitution of the Tribunal

[ALGERIA](#) [JANUARY 14, 2019](#)

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

Les paragraphes 73 et 75 ne sont pas validés.

[EU](#) [DECEMBER 21, 2018](#)

With respect to the constitution of the Tribunal, as set out in the proposed Additional Facility Arbitration Rule ((AF)AR) 30, the European Union and its Member States are of the view that in cases where a REIO is a disputing party, the proposed rule should clarify that investment treaties under which the disputes are initiated may derogate from the conditions regarding the nationality of the

majority of the arbitrators (Rule (AF)AR) 30(2)) or the appointment of arbitrators (Rule (AF)AR) 30(3)), in addition to the derogations foreseen by agreement of the disputing parties.

SPAIN **DECEMBER 21, 2018**

En la regla 30.3 se impide que las partes puedan nombrar a un árbitro que tenga la nacionalidad de cualquier Estado que integre la Organización Regional de Interés Económico (ORIE/REIO) a la que pertenece el Estado contendiente o el Estado al que pertenece el nacional.

Consideramos que esta restricción es excesiva, por las siguientes razones:

1. Según la ORIE/REIO de la que se trate, se elimina un gran número de árbitros potenciales. Ello puede afectar la legitimidad del proceso.
 2. Al eliminar un gran número de árbitros pertenecientes a una ORIE/REIO, también se está privando de que en el proceso arbitral estén representados diversas tradiciones legales.
 3. Imponer esta restricción implica asumir que puede haber ciertos problemas de independencia en los Árbitros cuando son nacionales de un Estado de la ORIE/REIO. Ahora bien, si existe ese riesgo de independencia, sería contradictorio permitirlo en los arbitrajes basados en el Convenio y prohibirlo en los arbitrajes del Mecanismo Complementario. Consideramos que esta asimetría es perjudicial para el sistema.
-
-

SEE ALSO COMMENTS UNDER AR 20

Rule 31 – Qualifications of Arbitrators

SEE ALSO COMMENTS UNDER AR 29

Rule 32 – Disclosure of Third-party Funding

[SEE ALSO COMMENTS UNDER AR 21](#)

Rule 33 – Method of Constituting the Tribunal

[SEE ALSO COMMENTS UNDER AR 22 AND AR 23](#)

Rule 34 – Secretary-General Assistance with Appointment

[FRANCE](#) [JANUARY 14, 2019](#)

Based on the practice described under paragraph 283 of the Working Paper, it could be useful to provide more details on the concrete actions disputing parties may request to the Secretariat in order to help them appointing a chair or a sole arbitrator.

[SEE ALSO COMMENTS UNDER AR 24](#)

Rule 35 – Appointment of Arbitrators by the Secretary-General

[HAITI](#) [FEBRUARY 26, 2019](#)

Traitant de la consultation des parties par le Secrétaire Général, nous estimons que l'expression « Dans la mesure du possible » est floue et laisse trop de latitude au Secrétaire Général. Il faudrait dire « Le Secrétaire Général consultera les parties par courrier express ou courrier électronique. »

In order to increase efficiency and to accelerate the constitution of tribunals, consider:

- Reducing the time limit for the parties to advise the Secretary-General of an agreement on the number of arbitrators and the method of their appointment to 30 days after the date of registration (instead of 60 days). Considering that the registration of a request for arbitration takes approximately 21 days on average, the parties would have approximately seven weeks from the date on which a request for arbitration is filed to consider whether the number of arbitrators or the method of their appointment should be different from the default number and method set out in Article 37(2)(b) of the Convention. This is a sufficient period, particularly considering that, in our experience, the default number of arbitrators and appointment method applies in the vast majority of cases.

In order to increase efficiency and taking into account the above proposal, consider:

- Allowing parties to request that the Secretary-General appoint the arbitrator(s) that have not yet been appointed 60 days after the date of registration (instead of 90 days), as this is a sufficient period for the parties to appoint their respective arbitrators following the filing of a request for arbitration.

[see also comment on proposed AR 22 and proposed (AF)AR 33(2)]

SEE ALSO COMMENTS UNDER AR 25

Rule 36 – Acceptance of Appointment

SEE ALSO COMMENTS UNDER AR 26

Rule 37 – Replacement of Arbitrators Prior to Constitution of the Tribunal

SEE ALSO COMMENTS UNDER AR 27

Rule 38 – Constitution of the Tribunal

[SEE ALSO COMMENTS UNDER AR 28](#)

Chapter V – Disqualification of Arbitrators and Vacancies

Rule 39 – Disqualification of Arbitrators

[AUSTRIA](#) **DECEMBER 21, 2018**

The deadline is very short. Consideration should be given to extending the deadline to 14 days, or to 21 days in the case of public holidays of one party.

[TOGO](#) **DECEMBER 28, 2018**

L'article contesté ne peut pas poursuivre l'instance. La formule devrait être : « l'instance est suspendue pendant que la proposition est pendante, sauf si elle se poursuit, en tout ou partie, par accord des parties. »

[SEE ALSO COMMENTS UNDER AR 29](#)

Rule 40 – Decision of the Proposal for Disqualification

[SPAIN](#) **DECEMBER 21, 2018**

Valoramos positivamente que sea el Secretario General quien tome la decisión sobre la recusación. Ahora bien, dicha función puede ser delegada, de acuerdo con la regla 2, en el personal del Centro.

Consideramos que la recusación es un acto procesal de gran trascendencia y cuya resolución debería quedar excluida de las facultades de delegación del Secretario General.

[SEE ALSO COMMENTS UNDER AR 30](#)

Rule 41 – Incapacity or Failure to Perform Duties

[SEE ALSO COMMENTS UNDER AR 31](#)

Rule 42 – Resignation

[SEE ALSO COMMENTS UNDER AR 32](#)

Rule 43 – Vacancy on the Tribunal

[SEE ALSO COMMENTS UNDER AR 33](#)

Chapter VI – Initial Procedures

Rule 44 – First Session

[SEE ALSO COMMENTS UNDER AR 34](#)

Rule 45 – Manifest Lack of Legal Merit

[SEE ALSO COMMENTS UNDER AR 35](#)

Rule 46 – Preliminary objection

[SEE ALSO COMMENTS UNDER AR 36](#)

Rule 47 – Bifurcation

[SEE ALSO COMMENTS UNDER AR 37](#)

Rule 48 – Consolidation and Coordination on Consent of Parties

[SEE ALSO COMMENTS UNDER AR 38](#)

Chapter VII – Evidence

Rule 49 – Evidence: General Principle

[SEE ALSO COMMENTS UNDER AR 39](#)

Rule 50 – Tribunal Order to Produce Documents and Other Evidence

[SEE ALSO COMMENTS UNDER AR 40](#)

Rule 51 – Witnesses and Experts

[SEE ALSO COMMENTS UNDER AR 41](#)

Rule 52 – Tribunal-appointed Experts

[SEE ALSO COMMENTS UNDER AR 42](#)

Rule 53 – Visits and Inquiries

[SEE ALSO COMMENTS UNDER AR 43](#)

Chapter VIII – Publication, Access to proceedings and Non-Disputing Party Submissions

Rule 54 – Publication of Awards, Orders and Decisions

[ALGERIA](#) [JANUARY 14, 2019](#)

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

Les paragraphes 73 et 75 ne sont pas validés.

[AUSTRIA](#) [DECEMBER 21, 2018](#)

This provision is critical in the sense of secrecy. The consequence of not agreeing with the parties cannot be that ICSID publishes the decision entirely. It must be demanded that in the case of a lack of agreement between the parties, the decision may not be (entirely) published.

SEE ALSO COMMENTS UNDER AR 44 & AR 45

Rule 55 – Publication of Documents Filed by a Party

SEE ALSO COMMENTS UNDER AR 46

Rule 56 – Observation of Hearings

SEE ALSO COMMENTS UNDER AR 47

Rule 57 – Submission of Non-disputing Parties

SEE ALSO COMMENTS UNDER AR 48

Rule 58 – Submission of Non-disputing Treaty Party

SEE ALSO COMMENTS UNDER AR 49

Chapter IX – Special Procedures

Rule 59– Provisional Measures

SEE ALSO COMMENTS UNDER AR 50

Rule 60 – Security for Costs

[SEE ALSO COMMENTS UNDER AR 51](#)

Rule 61 – Ancillary Claims

[SEE ALSO COMMENTS UNDER AR 52](#)

Rule 62 – Default

[SEE ALSO COMMENTS UNDER AR 53](#)

Chapter X – Suspension and Discontinuance

Rule 63 – Suspension

[SEE ALSO COMMENTS UNDER AR 54](#)

Rule 64 – Settlement and Discontinuance

[SEE ALSO COMMENTS UNDER AR 55](#)

Rule 65 – Discontinuance at Request of a Party

[SEE ALSO COMMENTS UNDER AR 56](#)

Rule 66 – Discontinuance for Failure of Parties to Act

[SEE ALSO COMMENTS UNDER AR 57](#)

Rule 67 – Discontinuance for Failure to Pay

[SEE ALSO COMMENTS UNDER AR 58](#)

Chapter XI – The Award

Rule 68 – Applicable Law

[NO COMMENTS RECEIVED](#)

Rule 69 – Timing of the Award

[SEE ALSO COMMENTS UNDER AR 59](#)

Rule 70 – Contents of The Award

[FRANCE](#) [JANUARY 14, 2019](#)

As explained at paragraph 1638 of the Working Paper, the duty to provide reasons is required under the Washington Convention. The possibility, provided under paragraph 1(i) of this rule, to depart from this duty is accordingly difficult to explain. Further explanations from the Secretariat would therefore be highly appreciated.

SPAIN **DECEMBER 21, 2018**

Nos remitimos a los comentarios realizados en la regla 60 de las reglas de arbitraje del procedimiento general. Además, nos ha llamado la atención la ausencia de que el contenido del laudo incluya la decisión motivada del Tribunal sobre cada cuestión.

Consideramos que dicha mención debe estar incluida en la regla.

SEE ALSO COMMENTS UNDER AR 60

Rule 71 – Rendering of the Award

SEE ALSO COMMENTS UNDER AR 61

Rule 72 – Supplementary Decision, Rectification and Interpretation

SPAIN **DECEMBER 21, 2018**

Nos remitimos a los comentarios realizados en la regla 62 y 67 de las reglas de arbitraje del procedimiento general.

Asimismo, nos gustaría que nos explicaran porque han considerado que, en este proceso de enmiendas, no se debe incluir la suspensión del laudo o el recurso de anulación en los arbitrajes basados en el mecanismo complementario.

TUNISIA **DECEMBER 27, 2018**

En adoptant et en appliquant le Règlement du mécanisme supplémentaire, le CIRDI a introduit une certaine uniformité, à tout le moins dans l'administration des différends qu'il traite. Une proposition consiste à étendre cette uniformité à la révision en créant une « facilité additionnelle d'annulation », qui pourrait être utilisée en complément des règles d'arbitrage applicables, quelles qu'elles

soient. Cela permettrait aux pays non parties à la Convention du CIRDI d'avoir eux aussi accès au régime d'annulation indépendant du CIRDI ; ainsi, toute demande de révision serait soumise à un Comité ad hoc et non aux tribunaux nationaux.

[SEE ALSO COMMENTS UNDER AR 62](#)

Chapter XII – Expedited Arbitration

Rule 73 – Consent of Parties to Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 69](#)

Rule 74 – Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 70](#)

Rule 75 – Appointment of Sole Arbitrator for Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 71](#)

Rule 76 – Appointment of Three-Member Tribunal for Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 72](#)

Rule 77 – Acceptance of Appointment in Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 73](#)

Rule 78 – First Session in Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 74](#)

Rule 79 – The Procedural Schedule in Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 75](#)

Rule 80 – Default during Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 76](#)

Rule 81 – The Procedural Schedule for Supplementary Decision, Rectification and Interpretation in Expedited Arbitration

[SEE ALSO COMMENTS UNDER AR 77 & 78](#)

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VIII. (AF) CONCILIATION RULES

Chapter I – General Provisions

Rule 1 – Application of Rules

AUSTRIA DECEMBER 21, 2018

The numbering of the paragraphs should be corrected.

SEE ALSO COMMENTS UNDER CR 1

Chapter II – Institution of the Proceedings

Rule 2 – The Request

SEE ALSO COMMENTS UNDER IR 1

Rule 3 – Contents of the Request

SEE ALSO COMMENTS UNDER IR 2

Rule 4 – Recommended Additional Information / Rule 5 – Filing of the Request and supporting documents

FRANCE JANUARY 14, 2019

The French delegation generally welcomes these proposals which clarify the information to be included in arbitration or conciliation requests. Contrary to the street address and mail address, the respondent's telephone number may be more difficult to retrieve. This

requirement could accordingly be included within the non-mandatory information covered under IR 3 and AF(CR) 4 and the respondent could be asked to provide such information to the Secretariat. The non-mandatory nature of this information could also be reflected under AF(MR) 4.

[SEE ALSO COMMENTS UNDER IR 3](#)

Rule 6 – Receipt of the Request

[TOGO](#) **DECEMBER 28, 2018**

Si, conformément à l'article S, la requête est déposée par voie électronique, quels seraient la forme et le contenu de l'accusé de réception prévu au paragraphe (a) de l'article 6 ?

Le paragraphe (h) du même article concerne la transmission de la requête à l'autre partie. Cette transmission se fait-elle également par voie électronique ou par un autre moyen ?

[SEE ALSO COMMENTS UNDER IR 5](#)

Rule 7 – Review and Registration of the Request / Rule 8 – Notice of registration

[SEE ALSO COMMENTS UNDER IR 6](#)

Rule 9 –Withdrawal of the Request

[SEE ALSO COMMENTS UNDER IR 8](#)

Chapter III – General Procedural Provisions

Rule 10 – Meaning of Party and Party Representation

[SEE ALSO COMMENTS UNDER CR 2](#)

Rule 11 – Method of Filing

[SEE ALSO COMMENTS UNDER CR 3](#)

Rule 12 – Routing of Written Communications

[SEE ALSO COMMENTS UNDER CR 4](#)

Rule 13 – Procedural Languages, Translation and Interpretation

[SEE ALSO COMMENTS UNDER CR 5](#)

Rule 14 – Payment of Advances and Costs of the Proceeding

[SEE ALSO COMMENTS UNDER CR 6](#)

Rule 15 – Confidentiality

[SEE ALSO COMMENTS UNDER CR 7](#)

Rule 16 – Use of Information in Other Proceedings

SEE ALSO COMMENTS UNDER CR 8

Chapter IV – Constitution of the Commission

Rule 17 – General Provisions, Number of Conciliators and Method of Constitution

ALGERIA JANUARY 14, 2019

[Please note that the paragraph numbers in Algeria’s comments refer to the paragraph numbers in the [Synopsis in French](#).]

Préciser dans le paragraphe 85 à qui revient le droit de choisir le conciliateur unique en cas de défaut de choix par les parties dans les délais convenus.

SEE ALSO COMMENTS UNDER CR 9

Rule 18 – Qualifications of Conciliators

SEE ALSO COMMENTS UNDER CR 10

Rule 19 – Assistance of the Secretary-General with Appointment

FRANCE JANUARY 14, 2019

Based on the practice described under paragraph 283 of the Working Paper, it could be useful to provide more details on the concrete actions disputing parties may request to the Secretariat in order to help them appointing a chair or a sole arbitrator.

[SEE ALSO COMMENTS UNDER CR 11](#)

Rule 20 – Appointment of Conciliators by the Secretary-General

[SEE ALSO COMMENTS UNDER CR 12](#)

Rule 21 – Disclosure of Third-Party Funding

[SPAIN](#) [DECEMBER 21, 2018](#)

Consideramos que el incumplimiento de la obligación de revelar la financiación por terceros debe llevar aparejada el pago de costos por la parte que incumplió dicha obligación.

[SEE ALSO COMMENTS UNDER CR 13](#)

Rule 22 – Acceptance of Appointment

[SEE ALSO COMMENTS UNDER CR 14](#)

Rule 23 – Replacement of Conciliators Prior to Constitution of the Commission

[SEE ALSO COMMENTS UNDER CR 15](#)

Rule 24 – Constitution of the Commission

[SEE ALSO COMMENTS UNDER CR 16](#)

Chapter V – Disqualification of Conciliators and Vacancies

Rule 25 – Proposal for Disqualification of Conciliators

[AUSTRIA](#) **DECEMBER 21, 2018**

The numbering of the paragraphs should be corrected.

[TOGO](#) **DECEMBER 28, 2018**

Paragraphe (4) : Le conciliateur contesté ne peut pas poursuivre l'instance.

La formule devrait être : « l'instance est suspendue pendant que la proposition est pendante, sauf si elle se poursuit, en tout ou partie, par accord des parties . . . ».

[SEE ALSO COMMENTS UNDER CR 17](#)

Rule 26 – Decision on the Proposal for Disqualification

[SEE ALSO COMMENTS UNDER CR 18](#)

Rule 27 – Incapacity or Failure to Perform Duties

[SEE ALSO COMMENTS UNDER CR 19](#)

Rule 28 – Resignation

[SEE ALSO COMMENTS UNDER CR 20](#)

Rule 29 – Vacancy on the Commission

[SEE ALSO COMMENTS UNDER CR 21](#)

Chapter VI – Conduct of the Conciliation

Rule 30 – Functions of the Commission

[SEE ALSO COMMENTS UNDER CR 22](#)

Rule 31 – General Duties of the Commission

[SEE ALSO COMMENTS UNDER CR 23](#)

Rule 32 – Orders, Decisions and Procedural Agreements

[SEE ALSO COMMENTS UNDER CR 24](#)

Rule 33 – Quorum

SEE ALSO COMMENTS UNDER CR 25

Rule 34 – Deliberations

SEE ALSO COMMENTS UNDER CR 26

Rule 35 – Cooperation of the Parties

SEE ALSO COMMENTS UNDER CR 27

Rule 36 – Written Statements

SEE ALSO COMMENTS UNDER CR 28

Rule 37 – First Session

SEE ALSO COMMENTS UNDER CR 29

Rule 38 – Meetings

SEE ALSO COMMENTS UNDER CR 30

Rule 39 – Preliminary Objections

[SEE ALSO COMMENTS UNDER CR 31](#)

Chapter VII – Termination of the Conciliation

Rule 40 – Discontinuance Prior to the Constitution of the Commission

[SEE ALSO COMMENTS UNDER CR 32](#)

Rule 41 – Discontinuance for Failure to Pay

[SEE ALSO COMMENTS UNDER CR 33](#)

Rules 42 – Report noting the Parties’ Agreement

[SEE ALSO COMMENTS UNDER CR 34](#)

Rules 43 – Report noting the Parties’ Failure to Reach Agreement

[SEE ALSO COMMENTS UNDER CR 35](#)

Rules 44 – Report noting the Failure of a Party to Appear or Participate

[SEE ALSO COMMENTS UNDER CR 36](#)

Rule 45 – The Report

SEE ALSO COMMENTS UNDER CR 37

Rule 46 – Issuance of the Report

SEE ALSO COMMENTS UNDER CR 38

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Chapter II – Institution of Fact-Finding

Rule 3 – The Request

NO COMMENTS RECEIVED

Rule 4 – Contents and Filing of the Request

NO COMMENTS RECEIVED

Rule 5 – Receipt and Registration of the Request

TOGO DECEMBER 28, 2018

L'article ne précise pas la forme et le contenu de l'accusé de réception de la requête.

Chapter III – The Fact-Finding Committee

Rule 6 – Qualifications of Members of the Committee

NO COMMENTS RECEIVED

Rule 7– Number of Members and Method of Constituting the Committee

NO COMMENTS RECEIVED

Rule 8 – Acceptance of Appointment

NO COMMENTS RECEIVED

Rule 9 –Constitution of the Committee

NO COMMENTS RECEIVED

Chapter IV – Conduct of the Fact-Finding

Rule 10 – Sessions and Work of the Committee

NO COMMENTS RECEIVED

Rule 11 – General Duties

NO COMMENTS RECEIVED

Rule 12 – Payment of Advances and Costs of the Fact-Finding

NO COMMENTS RECEIVED

Rule 13 – Confidentiality of the Fact-finding and use of Information in Other Proceedings

NO COMMENTS RECEIVED

Chapter V – Termination of the Fact-Finding

Rule 14 – Manner of Terminating the Fact-Finding

NO COMMENTS RECEIVED

Rule 15 – Failure of a Party to Participate or Cooperate

NO COMMENTS RECEIVED

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NO COMMENTS RECEIVED

Rule 17 – Issuance of the Report

NO COMMENTS RECEIVED

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X. (AF) MEDIATION RULES

Chapter I – General Provisions

Rule 1 – Application of Rules

CANADA **DECEMBER 28, 2018**

In light of the possibility that certain treaties may contain provisions on mediation that introduce supplemental elements or provisions that differ from the ICSID Mediation Rules, Canada believes that proposed Rule 1(2) should make clear that the applicable treaty mediation rules will prevail. For example, CETA Article 8.20(4) contains a 60 day period in which the disputing parties should seek to resolve the dispute. Canada’s understanding of Rules 1(1) and (2) is that the 60-day time period from CETA Article 8.20(4) forms part of the disputing parties’ agreement to mediate. If ICSID or Member States have a different understanding, proposed Rule 1 should be clarified.

FRANCK, SUSAN **DECEMBER 24, 2018**

I have conducted extensive empirical work in connection with the costs of investment treaty arbitration (ITA). In March 2019, Oxford University Press will publish my book *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*. The publishers have kindly permitted me to provide selected extracts (without footnotes) of the draft final chapter of the book to inform your ongoing efforts.

The book contains multiple findings that affect ICSID’s rule reform.

First, as the book identifies in multiple chapters, it is vital to offer a suite of options for resolving investment disputes and managing different kinds investment conflict. One of the strengths of the ICSID Revision process is its implicit appreciation of expanding, refining, and adapting dispute resolution tools. Offering multiple methods—particularly mediation or fact-finding—to supplement or provide alternatives for managing existing disputes is fundamental, as it has the capacity to facilitate efficiency, cost-savings, and party autonomy. *See also Investor–State Disputes: Prevention and Alternatives to Arbitration: Proceedings of Symposium held on 29 March 2010* (United Nations Conference on Trade and Development, UNCTAD/WEB/DIAE/IA/2010/8 (2011), <http://bit.ly/1nCFwC>). There would, however, be core benefits to flushing out the mediation rules in more detail and creating a

working group to establish protocols, guidelines, or “best practices” for investment-treaty mediation both to guide mediator discretion and to manage stakeholder expectations about the process. Likewise, while current proposals do not focus on creating a standing small-claims adjudicative facility, such an entity could enhance cost-effectiveness and promote access to justice. [see the submission for additional comments on time, costs, case management, and security for costs]

[UBILAVA, ANA & NOTTAGE, LUKE](#) **OCTOBER 17, 2018**

The authors address the proposed ICSID Mediation Rules in detail.

With regard to the application of the rules, they comment that: “Providing mandatory mediation as pre-condition to arbitration would be much more far-reaching, but it is questionable whether ICSID could or should do this through Rule rather than Convention revisions. This may be so even for AF Arbitration Rules, but all the more so for investor-state dispute settlement under the ICSID Convention (where the claimant is from a member state and the respondent is one too). For such a mandatory pre-step to be possible, allowing cost and time savings as well as more creative dispute settlement options, Australia should meanwhile consider consenting to multi-tier ISDS clauses in its IIAs. This could be achieved when replacing all Australia’s existing BITs and FTAs, especially when superseded by broader regional FTAs, as well as by starting to implement such multi-tier dispute settlement clauses in future IIAs.”

Rule 2 - Meaning of Party and Party Representation

NO COMMENTS RECEIVED

Chapter II – Institution of the Mediation

Rule 3 – Institution of Mediation Based on Prior Party Agreement

[UBILAVA, ANA & NOTTAGE, LUKE](#) **OCTOBER 17, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

The authors address the proposed ICSID Mediation Rules in detail.

With regard to rule 3, they observe that: “ICSID AF Mediation Rules provide a procedure for voluntary ISM. The proposal covers two grounds for initiating such mediation. One is when there is an existing agreement to mediate in the treaty that carries the consent to ISDS (Rule 3). Yet only a very small number of international investment agreements (IIAs) specifically mention mediation by including advance consent to mediate in their ISDS provisions. Indeed, according to the introductory text of the proposal, there is only one IIA that has a mandatory mediation clause incorporated in its ISDS provision as a pre-condition to arbitration – the Investment Agreement for the COMESA Common Investment Area (not yet in force).⁴ However, Article 26 of COMESA arguably does not provide for mandatory mediation as a pre-condition to arbitration. A mandatory pre-condition would arise if mediation were to be the only required step before arbitration, but that is not the narrative of Article 26. According to Article 26, parties shall seek the assistance of a mediator ‘where no alternative means of dispute settlement are agreed upon...’⁵

Rule 4 – Institution of Mediation Absent a Prior Party Agreement

CANADA DECEMBER 28, 2018

As written, it is not clear that proposed Rule 4(5) contemplates the possibility that the party receiving the request for mediation might not explicitly accept or reject an offer to mediate but instead make a counter-offer to mediate subject to certain conditions or mediate different issues. In such circumstances, the Secretary-General may find herself conveying counter-proposals and negotiating positions on the proposed agreement to mediate. Canada suggests a new provision be added to this rule that puts the onus on the parties to decide whether such conditions are acceptable or not: “If the other party informs the Secretary-General that it accepts the offer to mediate subject to certain conditions, the Secretary-General shall acknowledge receipt of such communication and transmit it to the requesting party and inform the parties that if no agreement on the offer to mediate is reached between the parties within 30 days, no further action will be taken on the Request.”

FRANCE JANUARY 14, 2019

The French delegation generally welcomes these proposals which clarify the information to be included in arbitration or conciliation requests. Contrary to the street address and mail address, the respondent’s telephone number may be more difficult to retrieve. This requirement could accordingly be included within the non-mandatory information covered under IR 3 and AF(CR) 4 and the

respondent could be asked to provide such information to the Secretariat. The non-mandatory nature of this information could also be reflected under AF(MR) 4.

[UBILAVA, ANA & NOTTAGE, LUKE](#) **OCTOBER 17, 2018**

The authors address the proposed ICSID Mediation Rules in detail.

With regard to rule 4, they observe that: “The second ground for initiating mediation according to the ICSID Mediation Rules is where there is no prior agreement to mediate (Rule 4). In this case, a party interested in mediation can still invoke the process and seek the consent of the other party through the assistance of ICSID’s Secretary-General. This provision should be welcomed in the present reality where most IIAs have no mention of agreements to mediate. It makes these Mediation Rules accessible to everyone who may be interested.”

Rule 5 – Registration of the Request

NO COMMENTS RECEIVED

Chapter III – The Mediator

Rule 6 - Qualifications of the Mediator

NO COMMENTS RECEIVED

Rule 7 - Number of Mediators and Method of Appointment

NO COMMENTS RECEIVED

Rule 8 – Acceptance of Appointment

CANADA DECEMBER 28, 2018

Canada believes that proposed Rule 8(7) is appropriate for the context of mediation as opposed to the stricter conflict of interest rules for arbitrators that may apply under certain treaties in the context of investor-state arbitration. If, however, a treaty contains stricter conditions on mediators than what is contemplated under proposed Rule 8(7), Canada understands those conditions would apply. Otherwise, Canada has no comments on proposed Rule 8.

CHEN, YIHUA NOVEMBER 21, 2018

1. Disclosure for third-party funding (AR 21)

[See comments above under AR 21]

2. Additional Facility Mediation Rules (Annex E) – Independence and Impartiality of the Mediator

With regard to the independence and impartiality of the mediator, it is necessary to add the same rule concerning the disclosure of third-party funding (and insurance) into the AFMR. The reasons are listed as follow:

- 1) Third-party funding is also relevant to the independence and impartiality of the mediator. Although the ICSID Mediation Rules grant parties great powers to control the process and outcome of the mediation, the independence and impartiality of mediators still affect the justice and fairness of the final outcome of the proceeding. Given that the mediator is required to sign the declaration and under a continuing obligation to disclose any change of circumstances related to the declaration in accordance with AFMR 8, the question, then goes to how the independence and impartiality of mediators could be guaranteed without the disclosure of third-party funding by parties?
- 2) The Completeness of the ICSID investment dispute resolution system. Both AF Arbitration Rules and AF Conciliation Rules have been proposed to add the rule with respect to the disclosure of third-party funding. The requirement of the impartiality and independence of a decision-maker should not vary among the arbitrator, conciliator and mediator.
- 3) The pre-existing practice of introducing third-party funding into the Mediation Rules. On 4 June 2017, the Legislative Council of Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill, legalizing third-party

funding of arbitration and mediation in Hong Kong. According to the new Section 7A to the Mediation Ordinance (MO), the financial and ethical safeguards proposed for third-party funding of arbitration and associated proceedings under the Arbitration Ordinance (AO) will be also applicable to the MO and funding of HK services. The Section 98U and 98V of AO, taking into effect in 2019, provide that:

98U Disclosure about third party funding of arbitration

- (1) If a funding agreement is made, the funded party must give written notice of—
 - (a) the fact that a funding agreement has been made; and*
 - (b) the name of the third party funder.**
- (2) The notice must be given—
 - (a) for a funding agreement made on or before the commencement of the arbitration—on the commencement of the arbitration; or*
 - (b) for a funding agreement made after the commencement of the arbitration—within 15 days after the funding agreement is made.**
- (3) The notice must be given to—
 - (a) each other party to the arbitration; and*
 - (b) the arbitration body.**
- (4) For subsection (3)(b), if there is no arbitration body for the arbitration at the time, or at the end of the period, specified in subsection (2) for giving the notice, the notice must instead be given to the arbitration body immediately after there is an arbitration body for the arbitration.*

98V. Disclosure about end of third party funding of arbitration

- (1) If a funding agreement ends (other than because of the end of the arbitration), the funded party must give written notice of—
 - (a) the fact that the funding agreement has ended; and*
 - (b) the date the funding agreement ended.**
- (2) The notice must be given within 15 days after the funding agreement ends.*
- (3) The notice must be given to—
 - (a) each other party to the arbitration; and**

(b) the arbitration body (if any).

- 4) Therefore, I recommend that the same rule of AR 21 be introduced into the AF mediation Rules with regard to the disclosure of third-party funding (and Insurance). Given that ICSID has recognized the status and importance of third-party funding in the ICSID investment dispute resolution system, there is no reason why third-party funding should be missed in the ICSID mediation rules. It is not only about the due process of the proceedings but also the completeness of the whole ICSID dispute resolution system.
-

Rule 9 - Notice of Acceptance

NO COMMENTS RECEIVED

Rule 10 - Resignation and Replacement of Mediator

NO COMMENTS RECEIVED

Chapter IV – Conduct of the Mediation

Rule 11 - Role and Duties of the Mediator

NO COMMENTS RECEIVED

Rule 12 - Duties of the Parties

CANADA DECEMBER 28, 2018

Canada notes that paragraph 1376 of the Explanatory Notes emphasizes that the parties are bound to comply with any request for documents by the mediator, which suggests a mandatory obligation. Canada questions whether such a mandatory obligation is appropriate in the context of a mediation. For example, if a mediator requests a document(s) that a disputing party considers to be highly sensitive or prejudicial, a disputing party should not be required to produce it in the same way it would have to in the context of an arbitration.

Given the different nature of the mediation process as compared to arbitration, Canada suggests proposed Rule 12(2) be modified to emphasize its voluntary nature: “The parties should endeavour to provide all relevant explanations, documents and other information reasonably requested by the mediator.” This proposed rule will not prevent a mediator from making a determination that a party has not cooperated with the mediator under proposed Rule 17(1)(d), if appropriate.

Rule 13 – First Session

UBILAVA, ANA & NOTTAGE, LUKE OCTOBER 17, 2018

The authors address the proposed ICSID Mediation Rules in detail.

With respect to Rule 13 on the First Session, they suggest that: “What could require further attention is the Rule 13(4) (a), stating ‘At the first session or within any other period as the mediator may determine, each party shall: identify a representative who is authorized to settle the dispute on its behalf...’. If and when Australia agrees on these Mediation Rules, it may be beneficial for the State to identify beforehand the person(s) having authority to mediate.”

Rule 14 – Conduct of the Mediation

[UBILAVA, ANA & NOTTAGE, LUKE](#) **OCTOBER 17, 2018**

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

The authors address the proposed ICSID Mediation Rules in detail.

With respect to the conduct of the mediation, they observe that: “Unlike the 2012 IBA Mediation Rules, the ICSID AF Mediation Rules allow the mediator to engage in caucusing i.e. conduct meetings and communications with the parties separately. This is something opponents of ISM might protest due to the sensitivity of caucusing, but it should not be problematic because the mediator is not envisaged to be the same person as the arbitrator(s) appointed if the dispute proceeds to arbitration.

Rule 14(4) of the ICSID AF Mediation Rules preclude mediator recommendations for settlement terms, absent party agreement, thus favouring a more facilitative style mediation even for investor-state disputes. This contrasts with the more formalised ICSID Additional Facility Conciliation Rules (draft Annex C),⁶ including proposed Rule 30(2)-(3) allowing settlement recommendations by the conciliators, which is similar to Rule 30(3) of the current 2006 Conciliation Rules.⁷ Where the parties choose Conciliation Rules instead under the ICSID Convention, applicable where a claimant investor is from a home state as well as the respondent host state are member states of this multilateral treaty, Convention Article 34(1) also allows conciliators to make settlement recommendations.”

Rule 15 - Payment of Advances and Costs of the Proceeding

NO COMMENTS RECEIVED

Rule 16 – Confidentiality of the Mediation and Use of Information in Other Proceedings

AUSTRIA **DECEMBER 21, 2018**

The numbering of the paragraphs should be corrected.

CANADA DECEMBER 28, 2018

For the sake of clarity, Canada suggests several minor modifications for proposed Rule 16(3): “The parties shall not make any use of information or documents obtained in the mediation, and shall not rely on or refer to any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in any other proceedings.”

UBILAVA, ANA & NOTTAGE, LUKE OCTOBER 17, 2018

[Footnotes have been omitted. To view the full text, please click on the commenter’s name hyperlinked above.]

The authors address the proposed ICSID Mediation Rules in detail.

With respect to Rule 16, they state that it “[...] provides the parties with the opportunity to keep their mediation process and settlement agreement as confidential as the parties choose it to be, with two exceptions: (a) when the disclosure is required by law or for the purposes of the enforcement of such agreement and (b) in compliance with the proposed amendments to the AF Rules, Rule 4, according to which only the benchmark information is published by ICSID: the fact of mediation, parties to the mediation and the identity of the appointed mediators. Another major setback commonly identified by opponents of ISM is the secrecy or (less pejoratively) the lack of transparency of this dispute settlement mechanism. Due to this characteristic it has commonly been believed that mediation was not suitable for ISDS because public awareness and transparency constitute a crucial component of a dispute settlement regime where one of the parties is a State. Stakeholders in ISDS have expressed growing concerns that mediation will be used to bypass transparency⁸ and also have access to universal enforceability through the 2018 UN Convention on International Settlement Agreements.⁹ A major argument against settlement in ISDS is that it will be used to keep cases confidential and remove them from public scrutiny. This leaves the impression that settlements are only used to keep cases confidential and that every other arbitration outcome other than amicable settlement ensures transparency.

In fact, Ana Ubilava conducted an empirical study of all known and concluded treaty-based investor-state claims, over 1990-2017, to determine the confidentiality levels of (ICSID and other) arbitration cases that had been settled during the arbitral process but before the final arbitral award had been rendered.¹⁰ In 43% of cases the fact of the settlement, identity of the parties, and the settlement amounts that had been amicably agreed by the parties was found to be publicly available. This figure is nonetheless significantly lower in comparison to investor-won cases where awarded amounts are known in 98% of cases. Based on these results, we can assume that settled cases are indeed more susceptible to confidentiality than any other ISA outcome.

It is possible that the settlement amounts of such cases are known because the dispute had originally been registered for arbitration and once the claimed amounts were publicly known, it was in the interests of the State to then publicize the settlement amounts in order to show to their public that they did not strike a bad deal. The picture could therefore be very different if the mediation is initiated before the arbitration is registered. Under the proposed new ICSID Rules, the benchmark information does not include the dispute amount. So, there may be a greater chance for such mediation settlement agreements and their settlement amounts to stay confidential. If this is of concern for States like Australia, however, they can add in their individual treaties a provision requiring fuller transparency.

Meanwhile, having general procedural rules ready and available through ICSID is better than having none. This is because there may well already be numerous cases of investors and States engaging into conflict resolution procedures with third-party neutrals behind closed doors. There is no database where any such conflict resolution process is or could be registered. Nobody knows what is said or agreed upon during such communications, which means total secrecy. Through the mediation settlement procedure offered by ICSID, the international community will, at the very least, have information on the existence of such a dispute that is being attempted to be settled amicably during a particular mediation process, even if the terms of the final mediation settlement agreement do not automatically become public.”

Chapter V – Termination of the Mediation

Rule 17 – Notice of Termination of the Mediation

UBILAVA, ANA & NOTTAGE, LUKE OCTOBER 17, 2018

The authors address the proposed ICSID Mediation Rules in detail.

With respect to the enforcement of settlements from mediations, they state: “[...] while the ICSID AF Mediation Rules provide the procedural rules for the initiation and the conduct of ISM procedure, they do not provide for the enforcement mechanism for the settlements that result from successful mediations. The ICSID commentary on its proposed Rules refers in this respect to the 2018 Singapore Mediation Convention. That assumes first that the Convention, which provides for enforceability of “commercial” settlement agreements subject to exclusions similar to (but more extensive than) those listed in the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. This is plausible, in light of this and other UN instruments or commentaries referring to “commercial” agreements, as discussed by Em Prof Catharine Kessedjian at the International Law Association conference in Sydney recently.

In addition, if the enforceability of mediation settlement agreements is believed to be essential, the efficiency of these Mediation Rules depends on the Singapore Convention on Mediation. That begins on the premise that amicable settlements take the form of a contract, a new agreement between the parties, and often parties are unable or unwilling to comply with its terms. Some ISDS stakeholders fear that the non-binding nature of amicable settlements could cause similar non-compliance issues and hence prolong the already complex investor-state dispute settlement process. The non-enforceable nature of mediation settlement agreements is often named to be the main reason why amicable settlements in any form or shape, be it mediation or conciliation are believed to be unsuitable for investor-state disputes, which could also explain the underutilization of ICSID Conciliation Rules. This was the reason why in 2014 UNCITRAL began working on the convention responsible for uniform enforceability of such mediation settlement agreements both in purely commercial and investment dispute settlement platforms. Now, ICSID is offering procedural rules for ISM while UNCITRAL is offering a convention for enforcement of settlements reached during such mediations.

Interestingly, however, Ubilava's empirical study of 541 concluded, investor-state treaty-based arbitration cases tells a different story. Once the arbitration process is initiated, parties to investor-state arbitration are not prohibited from attempting amicable settlement of their dispute. When such settlements are successful parties usually have two options: to terminate the arbitration process based on party consent or to embody their settlement agreements in an arbitral award. By embodying their settlements into the arbitral awards, parties attribute the simple settlement contract with the enforceability powers granted by the ICSID or the New York Conventions. The empirical analysis found that approximately one-third of the total number of studied cases were amicably settled by the parties before the final award was reached by the tribunal. If the non-enforceable nature of amicable settlement agreements (including mediation) is a critical concern, then logically the majority of such settlement agreements would be expected to have been embodied into arbitral awards. This has not been the case, however. The study showed that 60% of all known amicably settled ISA cases were in fact not embodied. These findings challenge but do not undermine, the importance of the Singapore Convention. Even if the numbers show that non-enforceability does not seem to be an issue to many parties who settle, the existence of such a convention and its enforcement mechanism should only encourage the non-believers to engage more in amicable settlement negotiations with stronger feeling of security. Australia should therefore consider adopting the Singapore Convention, as part of its response to the new ICSID Rules.”

General Comments

ALGERIA **JANUARY 14, 2019**

Introduire la médiation comme un choix optionnel en parallèle avec l'arbitrage, et ce dès l'introduction d'instance d'arbitrage pour permettre une issue rapide au litige.

TOGO **DECEMBER 28, 2018**

C'est un règlement nouveau qui offre plus d'options aux parties et prend en compte les dispositions de différents instruments internationaux qui prévoient la médiation comme mode de règlement des différends juridiques liés aux investissements.

Le CIRDI est compétent pour administrer une médiation sur demande d'une partie.

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GENERAL COMMENTS

ALGERIA JANUARY 14, 2019

On the introduction of institutional funding by States

- 1) Introduire la notion du financement institutionnel pour les Etats dans le règlement du CIRDI.
 - 2) Envisager la possibilité de créer un fonds de financement de l'arbitrage auprès de la banque mondiale, pour financer les frais découlant de l'arbitrage au profit des Etats ayant des difficultés financières ou nécessitant une assistance juridique.
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AUSTRALIA JANUARY 22, 2019

1. Gender-neutral Language

Australia welcomes the adoption of plain, modern and gender-neutral language in the redrafting of the ICSID Rules and Regulations. Language is important as it signals the culture of an organisation.

AUSTRIA DECEMBER 21, 2018

No proposed changes introduced to indicate that the Administrative Council of ICSID may issue “interpretative resolutions” on issues regarding the application of the ICSID Convention;

No proposed changes introduced to establish a permanent consultative body / consultative mechanism, whereby such a body would issue, at the request of a Tribunal, preliminary rulings on issues regarding the application of the ICSID Convention;

No proposed changes introduced to establish an appellate mechanism.

Sur la question des fonds vautours

La Banque Centrale du Congo (BCC) se félicite des efforts déployés par la Banque Mondiale pour favoriser les investissements internationaux ainsi que pour améliorer le climat des investissements et considère que les propositions d'amendements des Règlements du CIRDI participent à cet objectif. Elle réaffirme qu'elle n'a pas d'objection de principe, en dehors de ce qui a été exprimé par ses délégués lors de ces travaux.

Toutefois, il me semble que la question des « fonds vautours » débattus lors des travaux devrait être prise en compte et il serait, aujourd'hui plus qu'hier, plausible d'intégrer dans les Règlements du CIRDI, une procédure équitable internationale applicable aux « fonds vautours » qui impliquera les investisseurs privés afin de contribuer à éviter de futures crises de l'endettement et garantir la stabilité des équilibres monétaires et financiers.

[...]

Pour lire l'intégralité des observations de la BCC sur ce sujet, veuillez cliquer [ici](#).

FRANCE **JANUARY 14, 2019**

I - Preliminary remarks

The French delegation supports the principle as well as the general orientation of the ICSID rules amendment proposals and welcomes the Secretariat's initiative to modernize and simplify existing rules, to reduce duration and costs of proceedings, to increase transparency and to address several recurrent issues such as conflict of interests, third party funders or parallel claims. The French delegation would however also support further discussions on more structural or systemic reforms to the ICSID rules, in line with the ambitious reforms put forward by the European Union and its Member States in their recent trade agreements as well as within the framework of UNCITRAL Working Group III. The French delegation would more particularly appreciate that more consideration be given to the establishment of an appeal facility, as envisaged during the previous ICSID rules' update process.

II – Substantive comments

[see comments under rules above]

III – Drafting and linguistic comments

[...]

General observation - While the French delegation welcomes the Secretariat’s actions in favor of women and men equality, it is not sure that the use of a so-called inclusive (or “gender neutral”) drafting really contributes to this objective, which is supported by France. In French official documents, the masculine gender shall be used for terms applying to both men and women and inclusive drafting is not permitted due to the specific nature of legal acts and to the need to ensure their comprehensibility and clarity. Within the rules amendment proposals, this inclusive drafting gives rise to frequent and unnecessary complex and burdensome provisions. The French delegation is of the view that concrete actions should instead be taken in order to improve men and women equality, for instance by ensuring the parity of ISCID arbitrators and conciliators’ lists.

GEORGIA **DECEMBER 28, 2018**

Georgia provides these comments and proposals with respect to the amended Arbitration Rules proposed by ICSID. Georgia’s comments and proposals shall equally extend to the corresponding provisions of the amended Additional Facility Arbitration Rules proposed by ICSID.

GUATEMALA **DECEMBER 21, 2018**

2. Debido a la enorme similitud, las mismas observaciones, en lo que sean aplicables, son emitidas por la República de Guatemala para:

- a. Las Reglas Procesales aplicables a los Procedimientos de Conciliación (Reglas de Conciliación).
- b. Reglamento que regula la administración de procedimientos por el Secretariado del Centro Internacional de Arreglo de Diferencias relativas a Inversiones en virtud del Mecanismo Complementario (Reglamento del Mecanismo Complementario).
- c. Anexo A: Reglamento Administrativo y Financiero (Mecanismo Complementario).
- d. Anexo B: Reglas procesales aplicables a los procedimientos de arbitraje del mecanismo complementario (Reglas de arbitraje (Mecanismo Complementario)).
- e. ANEXO C: Reglas procesales aplicables a los procedimientos de conciliación del mecanismo complementario (Reglamento de Conciliación (Mecanismo Complementario)).
- f. ANEXO D: Reglas procesales aplicables a los procedimientos de comprobación de hechos (Mecanismo Complementario) (Reglas de Comprobación (Mecanismo Complementario)).

g. ANEXO E: Reglas procesales aplicables a los procedimientos de mediación del Mecanismo Complementario (Reglas de Mediación (Mecanismo Complementario)).

HELLENIC REPUBLIC **DECEMBER 28, 2018**

Same remarks and comments as in the Arbitration Rules.

ISRAEL **DECEMBER 27, 2018**

Israel has referred only to ICSID arbitration rules. However, in similar provisions under ICSID conciliation rules and under the Additional Facility Proceedings, Israel maintains the same positions *mutatis mutandis*.

MALTA **JANUARY 15, 2019**

Kindly note that comments forwarded by the European Commission should be taken as reflecting Malta's position.

MAURITIUS **DECEMBER 27, 2018**

We have gone through the proposed amendments to the ICSID Rules and are generally agreeable thereto.

We have, at this stage, no specific comment to make.

We understand that there will be a compilation of all written comments circulated by mid-January 2019. We shall revert to you on these comments, should the need arise.

NIGERIA **DECEMBER 28, 2018**

On the issue of all time frames mentioned which applies to the proposed reforms are in themselves commendable as they expedite cases. However, it is much easier for developed countries that have proper data systems to comply with the timelines. Developing countries who have challenges with record-keeping will struggle to make the deadlines. Moreover, a number of cases could emanate from States or even local governments as concerns Nigeria and it will take developing countries a while to piece together qualitative documents and facts required to meet the narrowed deadlines.

We therefore propose increased timeframes cutting across the proposed timelines, which will take cognisance of the developmental differences in member-States.

OMAN **DECEMBER 28, 2018**

Transparency rules should be applied when the parties to the dispute give their consent.

PORTUGAL **DECEMBER 21, 2018**

Portugal greatly appreciates the hard work of the ICSID Secretariat in carrying out a comprehensive revision of ICSID Arbitration Rules (AR) and the Additional Facility Arbitration Rules (AF).

In order to contribute to the abovementioned revision process and without prejudice to what is advocated in the joint EU-Member States document¹[reference to EU comments of December 21, 2018], which we fully subscribe, Portugal would like to provide some additional comments.

The solutions proposed below are essentially intended to improve SMEs' access to investor-state dispute settlement (ISDS) and it could be accommodated without the need to amend the ICSID Convention, which we understand is one of the main constraints to the process under consideration.

Special concerns with SMEs urge us to recommend to the Secretariat a review of its proposals to include, where possible, concrete measures appropriate to the specificities of SMEs. We therefore appeal to Secretariat's extensive experience in case management in identifying other examples to those describe below:

[see comments under proposed AR 19 on allocation of costs, 51 on security for costs, and 69-79 on expedited arbitration]

QATAR **DECEMBER 19, 2018**

As a general observation, Qatar takes the view that in terms of timelines in the ICSID Rules Amendment, these should be restricted to multiples of 7 days.

This is to create a uniform timeline, which will assist the parties in their proceedings.

SINGAPORE **JANUARY 4, 2019**

[...]

2. Singapore takes the view that these proposals are sensible, practical and well-balanced and is heartened to see many of the areas of concern that we highlighted to ICSID in March 2017 were addressed in the proposed amendments.

3. We support the proposed amendments to the CR, (AF)CR, (AF)FFR, (AF)MR, and in particular, the proposed amendments which take into account the enforcement mechanism provided by the Singapore Convention on Mediation. We also strongly support the proposed amendments to the Institution Rules, the AFR and the (AF)AFR. We have no further comments on these.

4. We also support many of the proposed amendments to the AR and (AF)AR, but there are some rules to which we have additional comments, and would be most grateful for further information (if any) from the ICSID Secretariat. To that end, we have prepared a table of comments for the AR, which also encapsulates our views on the (AF)AR as many of the proposed amendments to the (AF)AR mirror those to the AR. Where we have not made any comments, please take this to be a reflection that Singapore finds the proposed amendment to be acceptable.

SPAIN **DECEMBER 21, 2018**

[...]

4. REGLAS PROCESALES APLICABLES A LOS PROCEDIMIENTOS DE CONCILIACIÓN (RC)

Las Reglas de Conciliación (RC) siguen la misma filosofía procedimental que las Reglas de Arbitraje, con las particularidades propias de la Conciliación vs. el Arbitraje.

Por ello, reiteramos nuestros comentarios realizados en las Reglas de Arbitraje, *mutatis mutandi*, para las Reglas de Conciliación.
[...]

COMENTARIOS DE ESPAÑA A LA PROPUESTA DE MODIFICACIÓN DE LAS REGLAS DE LOS PROCEDIMIENTOS REGIDOS POR EL MECANISMO COMPLEMENTARIO EN LA REFORMA DEL CIADI

[...]

II.- Reglas de Arbitraje

Nota importante

Las Reglas de Arbitraje del Mecanismo Complementario siguen mayoritariamente la misma filosofía procedimental que las Reglas de Arbitraje del procedimiento general.

Por ello, reiteramos nuestros comentarios realizados en las Reglas de Arbitraje, *mutatis mutandi*, para las Reglas de Arbitraje del Mecanismo Complementario.

TURKEY JANUARY 11, 2019

Ministry of Treasury and Finance

Turkey has no additional comments to the Proposals for Amendment of the ICSID Rules.

Ministry of Industry and Technology

I am writing with respect to the Proposals for Amendment of the ICSID Rules issued by the ICSID Secretariat in August 2018 on behalf of Turkey.

I would like to inform you that we had conveyed our views through permanent representation of Turkey in ICISD before December 28, 2018 deadline. However, I would like to take the opportunity to briefly summarise Turkey's views on proposals.

Basically, Turkey, as one of the most frequent users of investor-state arbitration mechanisms in the world, closely follows the amendment process of ICSID Rules and fully supports the way that reform efforts pursue. In this regards, our Directorate General conducted in-depth analysis of the reform proposals related to administrative, financial and procedural amendments combined by the

Secretariat. Turkey believes that amendments related to open hearings and third party finance would help improve transparency and efficiency; in addition prevent conflict of interests.

Additionally, clarifications on amie curie submissions would further enhance transparency. Turkey also supports the proposals on composition of arbitration and arbitral process related to cost and time.

Hence, Turkey is fully supportive of reform efforts and welcomes the proposals compiled by the Secretariat.

URUGUAY **FEBRUARY 1, 2019**

La República Oriental del Uruguay (Uruguay) como Estado Contratante del Convenio sobre Arreglo de Diferencias relativas a inversiones entre Estados y Nacionales de otros Estados (Convenio CIADI) realiza los siguientes comentarios a la propuesta de enmienda a las reglas de arbitraje, conciliación y mediación del CIADI para la resolución de diferendos internacionales relativos a inversiones.

Los comentarios que se realizan se basan en su experiencia como Estado demandado en procedimientos arbitrales bajo Acuerdos Bilaterales de Inversión (APPI) y de su participación como Estado soberano en la negociación de estos.

La experiencia de Uruguay en relación con los APPI ha sido en general positiva. Sin embargo, Uruguay como estado demandando se ha enfrentado a situaciones en las cuales ha perdido control sobre el alcance de las cláusulas contenidas en los acuerdos cuando estas son interpretadas en una forma diferente a la establecida en los APPI. El objetivo de un acuerdo internacional de inversión es la promoción y protección recíproca de inversión extranjera directa, la cual no tendría que desvirtuarse.

Uruguay agradece el esfuerzo realizado por la Secretaria del CIADI en la elaboración de las propuestas de enmiendas, los cuales esperamos sirvan para realizar las correcciones procesales necesarias en el sistema y asegurar que las disposiciones de los acuerdos internacionales sean respetadas, sin desvirtuarse.

BURFORD CAPITAL **DECEMBER 28, 2018**

[In footnote 5]

Our comments herein apply also to the draft language of the corresponding ICSID Additional Facility Arbitration Rule amendments (AF Arbitration Rule 32, Disclosure of Third-Party Funding; AF Arbitration Rule 69, Timing of the Award), which track that of the ICSID Arbitration Rule amendments.

CENTRO STUDI TPF **DECEMBER 27, 2018**

[Our comments are] intended to encompass the proposed amendments relating to both the ICSID Arbitration Rules and the Additional Facility Rules. In particular, [...] two key topics: A) Disclosure of Third-Party Funding (Art. 21, page 31 of the Draft; Art. 32, page 109 of the Draft); B) Security for Costs (Art. 51, page 48 of the Draft; Art. 60, page 125 of the Draft).

DENTONS **DECEMBER 21, 2018**

As a general observation, “Chairperson” should replace “Chairman” throughout the English version of the proposed amendments. This suggestion follows the commendable efforts to make the ICSID Rules gender-neutral, aligns the English version with the French and Spanish versions, and can hardly be seen as inconsistent with the Convention’s use of the term “Chairman” to mean the same thing.

FRESHFIELDS **DECEMBER 28, 2018**

The comments are applicable to the ICSID Convention Arbitration Rules (“AR”), and the Additional Facility Arbitration Rules (“AF(AR)”), respectively.

STEPTOE **DECEMBER 28, 2018**

Our comments also apply to the equivalent rule (if any) in the redraft of the ICSID Additional Facility Arbitration Rules.

I. GENERAL COMMENTS AND RELATIONSHIP BETWEEN THE RULES AND THE CONVENTION

An inherent feature of the old and new Rules is the need to follow the Convention. In a number of places, the Rules and the Convention cover the same topics, but with the Rules providing greater detail. In a number of places, the Rules repeat verbatim certain provisions of the Convention, but sometimes in a different order and combined with other text. The present Rules do not contain any cross-references to the relevant provisions of the Convention. For experienced practitioners, this does not present a serious difficulty, but for new participants in the ICSID process, it might be helpful to include cross-references in the final version of the Rules as ICSID has already done in its working paper in addition to (or instead of) repetition of the language of the Convention so that they can immediately have to hand all of the relevant provisions.

Consider, for example, the provisions on the content of an award:

Convention – Article 48 Draft Rules – Rule 60	Convention – Article 48 Draft Rules – Rule 60
<p>(1) The Tribunal shall decide questions by a majority of the votes of all its members.</p> <p>(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.</p> <p>(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.</p> <p>(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.</p> <p>(5) The Centre shall not publish the award without the consent of the parties.</p>	<p>(1) The Award shall be in writing and shall contain: [...]</p> <p>(i) the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based; [...]</p> <p>(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.</p> <p>(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.</p>

As the colour-coding illustrates, the provisions of the Convention have been reproduced, but in a different order, interspersed with other text, and in the case of the discussion of an individual opinion (highlighted blue), different wording is used in the Rule.

One way of dealing with such situations would be for the Rules not to repeat provisions of the Convention but instead refer back to them and add in the additional procedural elements: for example, Rule 60 could say something to the effect that “*The Award shall comply with Articles 48-49 of the Convention. In addition, [...]*”. Such an approach would have the benefit of avoiding any interpretive difficulties that could arise out of a discrepancy between the wording of the Convention and the Rules. One drawback, however, is that the Rules would be less self-contained.

An alternative that would require less extensive amendments to the existing text and retain the self-contained features of the current Rules could be to include margin or parenthetical references for each Rule referring to the relevant Articles of the Convention that the Rule implements.

One additional general observation concerns the structure. Since the Convention and the Rules need to be applied together, it may be helpful, to the extent possible, if the structure of the Rules were to mirror the structure of the Convention. The table below shows the sequencing of topics in the Convention and Draft Rules. We set out some suggestions below the table.

Convention	Draft Rules
Chapter IV – Arbitration Section 1 - Request for Arbitration Section 2 - Constitution of the Tribunal Section 3 - Powers and Functions of the Tribunal Section 4 - The Award Section 5 - Interpretation, Revision and Annulment of the Award Section 6 - Recognition and Enforcement of the Award Chapter V- Replacement and Disqualification of Conciliators and Arbitrators Chapter VI - Cost of Proceedings Chapter VII - Place of Proceedings	Chapter IV – Arbitration Chapter I - General Provisions Chapter II - Conduct of the Proceeding Chapter III - Constitution of the Tribunal Chapter IV - Disqualification of Arbitrators and Vacancies Chapter V - Initial Procedures Chapter VI – Evidence Chapter VII - Publication, Access to Proceedings and Non-Disputing Party Submissions Chapter VIII - Special Procedures Chapter IX - Suspension and Discontinuance Chapter X - The Award Chapter XI - Interpretation, Revision and Annulment of the Award Chapter XII - Expedited Arbitration

Chapter I - General Provisions

This chapter contains only one rule, which concerns the scope of application, so perhaps the chapter should instead be called “Scope of Application”.

Chapter II - Conduct of the Proceeding

It would seem logical to move this chapter after the Rules dealing with tribunal constitution and replacement of arbitrators. It is also unclear why the Rules concerning evidence are not contained within this chapter. It might be helpful to break this Chapter into Sections dealing with particular aspects of the procedure.

Chapter III - Constitution of the Tribunal

Chapter IV - Disqualification of Arbitrators and Vacancies

Consider merging these two Chapters as both deal with the appointment of arbitrators.

Chapter V - Initial Procedures

The logic of having this as a separate Chapter is not entirely clear. Rule 34 (first session), Rule 37 (bifurcation) and Rule 38 (consolidation) seem to fit more logically within the Chapter on “Conduct of the Proceedings”. In contrast, Rule 35 (manifest lack of legal merit) and Rule 36 (preliminary objections) seem to belong more logically with the Rules dealing with “Special Procedures”. In this connection, we note that in the current Rules these topics are handled under the rubric of “Particular Procedures”.

Chapter VI – Evidence

As noted above, it is unclear why these Rules are not within “Conduct of the Proceedings”.

[ZHONG LUN LAW FIRM](#)

DECEMBER 28, 2018

The body of the text only discusses the possible amendments to the Arbitration Rules (AR). References are also made to the corresponding provisions in the Institution Rules (IR), Conciliation Rules (CR), Additional Facility Arbitration Rules ((AF)AR), Additional Facility Conciliation Rules ((AF)CR) where applicable. If any suggestion is adopted, corresponding changes might also need to be considered in the relevant provision of the IR, CR, (AF)AR and (AF)CR.

** END OF DOCUMENT **