Rule Amendment Project – Member State & Public Comments on Working Paper # 2 of March 15, 2019

The current version of the compendium includes all comments received from States and public stakeholders until June 28, 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 # 2. The compendium of comments received on WP #1 until March 15, 2019 is on the website.

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
• Australia • European Union • Canada • Chile • Colombia • Costa Rica • Georgia • Guatemala • Haiti • Indonesia • Israel • Jamaica • Korea, Republic of • Luxembourg • Mexico • Uruguay • Singapore	• Jose Daniel Amado, Jackson Shaw Kern, and Martin Doe Rodriguez • International Institute for Sustainable Development • Natalie Pita

• Joint Comments (Chile, Colombia, Costa Rica, Mexico & Peru)	

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I. ADMINISTRATIVE AND FINANCIAL REGULATIONS

GUATEMALA **JUNE 10, 2019**

Las reglas que no se enlistan son acogidas con agrado por Guatemala.

Chapter I – Procedures of the Administrative Council

Regulation 1 – Date and Place of the Annual Meeting

Regulation 2 – Notice of Meetings

Regulation 2 – Notice of Meetings

Regulation 4 – Presiding Officer

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NO COMMENTS RECEIVED

Regulation 7 – Voting

CHILE **JUNE 18, 2019**

Se sugiere cambio formal por consistencia con versión en francés y mejorar lectura en español.

(3) Entre las reuniones anuales, el o la Presidente(a) del Consejo Administrativo podrá convocar una reunión especial o solicitar que el Consejo Administrativo vote por correspondencia sobre una moción. El o la Secretario(a) General transmitirá la solicitud de~~para~~ voto por correspondencia con el texto de la moción a ser votada a cada miembro.

GUATEMALA JUNE 10, 2019

Se reitera la sugerencia 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.

"(…) (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).~~"

Chapter II – The Secretariat

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

NO COMMENTS RECEIVED

Regulation 9 – Acting Secretary-General

CHILE JUNE 18, 2019

Se sugiere cambio de redacción, por consistencia con la versión en francés e inglés.

(1) Si hay más de un o una Secretario(a) General Adjunto(a), el o la Presidente(a) del Consejo Administrativo podrá proponer al Consejo Administrativo el orden en que los/las ~~dichos~~ Secretarios(as) Adjuntos(as) actuarán como Secretario(a) General de conformidad con lo dispuesto en el Artículo 10(3) del Convenio (…)

HAITI **MAY 20, 2019**

Dans le Règlement Administratif et Financier, la délégation haïtienne 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 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. Cette proposition s'appuie sur le fait que le Secrétaire Général joue un rôle crucial dans la constitution des tribunaux arbitraux, leur gestion et le déroulement de la procédure et certaines fois même dans la clôture de la procédure. Donc, on ne peut pas prendre le risque de choisir quelqu'un dont on n'est pas convaincu de la familiarité avec la procédure d'arbitrage CIRDI.

Regulation 10 – Appointment of Staff Members

Regulation 11 – Conditions of Employment

Regulation 12 – Authority of the Secretary-General

Regulation 13 – Incompatibility of Functions

NO COMMENTS RECEIVED

Chapter III – Financial Provisions

Regulation 14 – Fees, Allowances and Charges

AUSTRALIA **JUNE 14, 2019**

In Australia's view, there may be merit in considering some sort of sanction for arbitrators who without reasonable justification, fail to meet prescribed timelines.

CHILE **JUNE 18, 2019**

Sugerimos que, aparte de contar con la aprobación del Presidente del Consejo Administrativo, la Secretaría del CIADI solicite la aprobación de los Estados miembros, en caso de modificar el honorario y el per diem actualmente propuesto en la Regla 14(1)(a) y (c).

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

EUROPEAN UNION **JUNE 7, 2019**

7. With respect to Rule 11 of the Arbitration Rules and Rule 14 of the Administrative and Financial Rules, the European Union and its Member States encourage a prompt revision of the ICSID Schedule of Fees, with a view to strengthening the incentives for Tribunals to meet applicable time limits. Such a revision could include the consideration of financial consequences in cases of unjustified failure to comply with such obligations (e.g. withholding or docking fees).

GEORGIA JUNE 8, 2019

Pursuant to the Working Paper #2, paragraph 22, in response to the comments by the states, ICSID has considered options to reduce arbitrators' fees for non-timely services, but at this stage decided not to "link the payment of the prescribed fees with the timeliness". We understand the reasoning behind this decision and recognize the importance of all other the procedures and tools included in amended rules to ensure efficiency; however, we still believe that there could be several ways to address the issue of efficiency and timeliness without introducing some drastic changes in the suggested fee-structure:

1. During the Second round of state consultations Canada has proposed to introduce a mechanism whereby arbitral tribunal will not be able to submit request for payment in case of delay of the award for the additional period of time they require to issue an award and will not be able to provide good justification for such delay. In case of such delay, arbitrator's fees could be suspended unless and until they present justification for the delay.
2. Inefficiency of arbitral tribunal/arbitrators or their failure to respect procedural time-limits could be considered by ICSID when considering the same persons for their possible appointment in future on other cases. During the second state consultations we have heard that ICSID is in fact paying due regard to such factors when making mandatory appointments of the members of the tribunal, however, it would be more effective if there is a written rule or guideline that could clearly provide for the criteria of appointing members of the tribunal by ICSID, including considering the efficiency and timeliness demonstrated on previous cases or the failures thereto. This could be an effective way to convey a message to the potential arbitrators that the efficiency and timely resolution of the case is of utmost importance and will be considered for their future appointments. ICSID Secretariat could be best places to suggest a proper pace and form of such regulation, be it in the Administrative and Financial Regulation or a separate legal instrument adopted within ICSID.

HAITI MAY 20, 2019

Après avoir considéré la proposition de la délégation française de frais pouvant être fixés *ad valorem*, la délégation haïtienne ne peut souscrire à cette vision à première vue favorable aux petits pays. En effet, l'effort intellectuel fourni par les arbitres et les frais encourus par le Centre ne dépendent pas de l'importance financière du litige à trancher. Ceci risque de plus d'entrainer l'effet pervers consistant en un refus d'acceptation de mission par les arbitres s'estimant insuffisamment rémunérés.

ISRAEL JUNE 22, 2019

We support the view shared by some States during the April meeting in Washington, according to which a provision regarding the arbitrator's obligation to conduct the proceeding in an expeditious and cost-effective manner should be added.

Regulation 15 – Payments to the Centre

CHILE **JUNE 18, 2019**

Respecto del párrafo (1)(a) Chile apoya la propuesta de avanzar la solicitud de fondos reflejada en la Regla 15 (1)(a).

Respecto del párrafo (1)(d) aparte de proporcionar un estado de cuenta, consideramos que dicho estado de cuenta debería incluir el detalle de honorarios y gastos de los miembros del Tribunal, Comisión o Comité.

En relación con el párrafo (4) se propone reemplazar la palabra “dichos” y en su lugar utilizar “los” de modo que la versión en español de la regla refleje las versiones en inglés y francés.

Regla 15 - Pagos al Centro

(1) Para que el Centro pueda pagar los costos a los que se hace referencia en la Regla 14, las partes deberán realizar pagos al Centro de conformidad con lo siguiente:
(a) al registrar una solicitud de arbitraje o de conciliación el o la Secretario(a) General solicitará a la o las demandante(s) que haga(n) un pago para sufragar los costos estimados del procedimiento hasta la primera sesión de la Comisión o del Tribunal, el cual se considerará un pago parcial por parte de la o las demandante(s) respecto del pago al que se hace referencia en el párrafo (1)(b);
…
(d) el Centro proporcionará con cada solicitud de pago, y en cualquier otro momento a solicitud de parte, un estado de cuenta del caso a las ~~partes con cada solicitud de pago~~, en el que se detallarán los honorarios y gastos de los miembros del Tribunal, Comisión o Comité .~~y en cualquier otro momento a solicitud de parte~~.

(4) Esta Regla será aplicable a las solicitudes de anulación de un laudo, excepto que el solicitante será el único responsable de realizar ~~dichos~~ los pagos que sean solicitados por el o la Secretario(a) General

Regulation 16 – Consequences of Default in Payment

CANADA JUNE 10, 2019

With respect to 16(2)(a), Canada believes that allowing only 30 days for compliance with Tribunal requests for funds is insufficient and recommends that the rule continue to allow 60 days for payments to be made. The reality is that the amount of the deposit required or the particular timing of a request often requires States to seek lengthy internal approvals. While the effect of a default may not be immediate, Canada does not believe that the Rules should be drafted in such a way that the number of instances of default, only if technical and without consequence, increase. This is not an instance where reducing the time to pay a request for funds by thirty days increases the efficiency of the arbitration process. Canada suggests that Regulation 16(2)(a) be changed as follows: "if the amounts requested are not paid in full within 60 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;"

CHILE JUNE 18, 2019

Dado que un procedimiento se podría suspender en más de una ocasión debido al atraso en distintos pagos, se propone agregar el término "consecutivos" a continuación de 90 días para que se entienda que la Regla no es aplicable a la mora de 90 días sumando distintos atrasos en distintos pagos solicitados.

Regla 16 - Consecuencias de la Omisión de Pago (…)

(c) si un procedimiento se suspendiera por más de 90 días consecutivos por falta de pago, el o la Secretario(a) General, podrá d~~e~~iscontinuar el procedimiento después de notificar a las partes y a la Comisión o Tribunal, si se hubiere constituido.

HAITI MAY 20, 2019

La délégation haïtienne partage le souci de plusieurs autres délégations relativement aux conséquences d'un retard dans le paiement des frais de l'instance. Les règles budgétaires ne permettent pas en Haïti qu'une somme soit dépensée qui n'ait pas été prévue au budget qui est voté annuellement au début de l'exercice fiscal. Les procédures parlementaires de désaffectation des fonds dépassent largement les 90 jours prévus dans le texte à l'issue desquels le non-paiement entraine la cessation de l'instance. Ce souci est encore accentué

lorsque dans le cas d'une force majeure (guerre, catastrophe naturelle) les fonds de l'Etat peuvent être concentrés pour faire face à l'urgence, handicapant la capacité de l'Etat de satisfaire à ses obligations financières auprès du Centre.

Regulation 17 – Special Services

CHILE **JUNE 18, 2019**

Se sugiere definir o delimitar los tipos de “servicios especiales” a los que hace referencia la regla.

Regulation 18 – Fees for Lodging Requests

Regulation 19 – The Budget

Regulation 20 – Assessment of Contributions

Regulation 21 – Audits

NO COMMENTS RECEIVED

Chapter IV – General Functions of the Secretariat

Regulation 22 – Administration of Proceedings

CHILE **JUNE 18, 2019**

Chile está de acuerdo con la inclusión de esta nueva Regla que considera da certeza jurídica y asegura una adecuada administración de los procedimientos iniciados de conformidad con el Convenio del CIADI.

Regulation 23 – List of Contracting States

NO COMMENTS RECEIVED

Regulation 24 – Panels of Conciliators and of Arbitrators

CHILE **JUNE 18, 2019**

Se propone establecer en la Regla 24(1), un periodo de tiempo en el que se espera respuesta de los Estados Contratantes respecto de sus designaciones a la lista de árbitros o conciliadores, para alentar a los Estados a responder en un marco de tiempo específico.

Regla 26(2): proponemos especificar que los Estados deben asegurarse de designar individuos que cumplan con todos los criterios, incluidos aquellos de independencia (por ejemplo, no ser un funcionario público) e imparcialidad.

Regla 24 - Listas de Conciliadores y de Árbitros

(1) El o la Secretario(a) General invitará a cada Estado Contratante a hacer sus designaciones a las Listas de Conciliadores y de Árbitros, si no se ha hecho una designación o el período de una designación ha expirado. Los Estados Contratantes harán sus mejores esfuerzos para responder a dicha invitación en un periodo que no exceda [90] días.

Toda designación hecha por un Estado Contratante o por el o la Presidente(a) del Consejo Administrativo deberá contener el nombre, información de contacto, nacionalidad y calificaciones de la persona designada, destacando la competencia en el campo del derecho, el comercio, la industria o las finanzas. Los Estados se abstendrán de designar en las Listas a funcionarios que se encuentren ejerciendo un cargo público en el momento en que se realice la designación.

Regulation 25 – Publication

CANADA **JUNE 10, 2019**

The commentaries indicate that Regulation 25(b) was deleted in order to clarify confusion about what the applicable rules were, particularly in light of the fact, that the transparency of documents is already extensively covered in the existing relevant rules. However, the Working Paper does not delete the paragraph. Canada does not have a preference with Regulation 25(b) either being deleted from these Regulations, or remaining as amended in WP2.

Regulation 26 – The Registers

CHILE **JUNE 18, 2019**

Se propone añadir una mención corta a los recursos posteriores al laudo al final de la Regla 26, para evitar que en el futuro se objete la publicación de esta información, invocando la eliminación de las referencias a las solicitudes de suplementación, ratificación, aclaración, modificación o anulación. Lo anterior, puesto que "procedimiento" podría entenderse solamente como el arbitraje original, y no incorporar las otras fases.

Regla 26 - Los Registros

El o la Secretario(a) General mantendrá y publicará un Registro de cada caso que contenga toda la información relevante sobre la iniciación, la tramitación, y terminación del procedimiento, lo cual incluye el sector económico involucrado, los nombres de las partes y de sus representantes, y el método de constitución y la integración de cada Comisión, Tribunal y Comité, así como también cualquier información relativa a los recursos posteriores al laudo.

Regulation 27 – Communications with Contracting States

NO COMMENTS RECEIVED

[Regulation 27 – Time Limits (deleted in WP #2)]

ISRAEL JUNE 22, 2019

Israel supports the reinstitution of a provision regarding the calculation of time limits, for sake of procedural certainty. We also support the reinstitution of a provision regulating a time limit that expires on a holiday or a Saturday or Sunday observed at the place of delivery, pushing the time limit to CoB on the next business day.

Regulation 28 – Secretary

CHILE JUNE 18, 2019

Recibimos favorablemente el ofrecimiento del CIADI de incorporar información adicional sobre el rol que cumplen las y los Secretarias(os) de los tribunales en la administración de los casos ante el CIADI, y por tanto apoyamos la solicitud de España en ese sentido.

Regulation 29 – Depositary Functions

Se sugiere añadir un párrafo (e) especificando que la conservación de todo lo descrito en los subpárrafos a-d, se realice en formato electrónico. También se sugiere la posibilidad de incorporar un período determinado de años para almacenar estos datos, lo cual es consistente con los requisitos del poder judicial en Chile y entendemos con los requisitos de otros países en la región.

Regla 29 - Funciones del Depositario
(1) El o la Secretario(a) General depositará en los archivos del Centro y hará los arreglos necesarios para la conservación por un período de [xx] años, de los siguientes documentos:
(…)
(e) la conservación de lo descrito en los subpárrafos a- d, se realizará en formato electrónico, salvo acuerdo en contrario de las partes.

Chapter V – Immunities and Privileges

Regulation 30 – Certificates of Official Travel

Regulation 31 – Waiver of Immunities

NO COMMENTS RECEIVED

Chapter VI – Official Languages

Regulation 32 – Official Languages

HAITI **MAY 20, 2019**

Art. 32 (3) *Le singulier des mots contenus dans les Règlements adoptés conformément à la Convention inclut le pluriel de ce mot, sauf indication contraire ou ~~si~~ à moins que le contexte de la disposition ne l'exige.*

II. INSTITUTION RULES (IR)

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II. INSTITUTION RULES

GUATEMALA JUNE 10, 2019

Las reglas que no se enlistan son acogidas con agrado por Guatemala.

Rule 1 – The Request

NO COMMENTS RECEIVED

Rule 2 – Contents of the Request

AUSTRALIA JUNE 14, 2019

ICSID's screening process to prevent frivolous claims performs a valuable role and Australia supports this comprehensive "checklist" of the required contents of a Request. However, Australia considers that an estimate of the amount of damages sought might usefully be added to this checklist.

CHILE JUNE 18, 2019

Considerando que la estructura corporativa de la persona jurídica demandante es relevante a efectos del análisis jurisdiccional bajo el Convenio, creemos que su inclusión es importante en la Regla 2. Asimismo, el contar con esta información podría permitirle al demandado hacer un mejor uso de la excepción preliminar de la Regla de Arbitraje 41(5) e identificar potenciales abusos de proceso o *treaty shopping*. Si se considera que este elemento, tiene una conexión más indirecta con los requisitos jurisdiccionales que los otros elementos listados en la Regla 2, se solicita incorporar la estructura corporativa bajo la Regla 3.

Regla 2 - Contenido de la Solicitud
(1) […]

(2) Respecto de la jurisdicción del Centro, la solicitud deberá incluir: […]
(f) si la parte solicitante es una persona jurídica, indicar que ha obtenido todas las autorizaciones necesarias para presentar la solicitud y adjuntar dichas autorizaciones además de la información respecto de la estructura corporativa de esa parte.

CANADA JUNE 10, 2019

Canada supports inclusion in this Rule of a requirement for the Request for Arbitration to include an estimate of the damages sought, rather than in Rule 3. Canada notes that such an estimate is not required to register the Request. However, the Request for Arbitration serves other purposes than merely allowing registration of a dispute at the Centre. It also often serves as the official notice of a dispute, and in this regard, it is important for the respondent State to know as early as possible the amount being claimed, as this can significantly affect how the State responds to the claim and how it prepares its defence. Accordingly, Canada suggests current Rule 3(a) be moved into Rule 2(2)(a). Further, in order to accommodate this, Canada suggests that the chapeau of paragraph 2(2) be changed to delete the first eight words. In summary, paragraph 2(2)(a) would read:

(2) The Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, an indication that there is a legal dispute between the parties arising directly out of the investment, and an estimate of the amount of damages sought, if any;

EUROPEAN UNION JUNE 7, 2019

9. The European Union and its Member States are in favour of including among the mandatory content of the request for arbitration or conciliation, set out in Rule 2 (Institution Rules), information on the estimated amount of damages sought.

GEORGIA JUNE 8, 2019

It is very important that respondent state parties to the dispute are duly notified regarding the legal and factual basis of the dispute and the relief thought by the Claimant. The investigation of the facts and preparation of the defense requires ample time, resources and coordination inside (relevant governmental bodies and structures, or other entities involves) and outside (outside counsel, experts, etc.) the country. Therefore, it is crucially important that state receives this information as early on the case as possible. Based on the recent trends, states try more and more to include the requirements of the notice of dispute, including the information that it shall contain, in their investment treaties.

In the view of the above, it would be beneficial if this understanding is addressed and reflected in ICSID rules as well. We propose to include a language in Rule 2(2) of the Institutional Rules suggesting that the information included in the Request in not only for the purposes of the "jurisdiction of the Centre" but also to duly inform the respondent state party about the dispute initiated against it.

Thus, Georgia proposes to amend the proposed Rule 2(2) in the following manner:

"*(2) With regard to the jurisdiction of the Centre and in order to duly inform the respondent state party to the dispute, the Request shall include:*

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

URUGUAY MAY 31, 2019

IR 2: Contenido de la Solicitud
IR 3: Información Adicional Recomendada

En lo referente a las enmiendas incluidas en la regla 2 y 3 sobre iniciación de los procedimientos de conciliación y arbitraje, nuestra delegación planteó algunas diferencias con la redacción propuesta. Asimismo, varias delegaciones, incluida la nuestra, aprovecharon esta oportunidad para discutir la pertinencia de exigir al reclamante la revelación de mayor información a la hora de registrar su diferencia ante el Centro.

En este sentido, en el seno de esta discusión se encuentra el problema de cuánta información está a disposición de los países cuando enfrentan estos reclamos, de forma de facilitar el análisis “prima facie” realizado para desestimar el registro de solicitudes de arbitraje que se encuentran manifiestamente fuera de la jurisdicción del Centro.

La delegación de Canadá expresó la necesidad de modificar la regla 3, a efectos de definir como obligatorio el requisito de estimar el monto de la compensación pecuniaria pretendida, si la hubiera. Varias delegaciones apoyaron esta propuesta; teniendo en cuenta que al día de la fecha esta información esta catalogada como “adicional recomendada”. En efecto, nuestro país apoya la modificación sugerida por la delegación canadiense, así como la inquietud de varios países que solicitaron continuar discutiendo la posible adición de otras fuentes de información a la regla 2.

Por su parte, la delegación de Uruguay argumentó la necesidad de incluir en la regla 2 la exigencia de más información sobre el estado financiero de la parte que presenta la solicitud a fin de demostrar que tiene los recursos necesarios para sufragar la integridad de las costas, en caso de ser estas ordenadas por el tribunal; y la identificación de la estructura corporativa del reclamante, en caso que este sea una persona jurídica. En este sentido, la Secretaría tomó nota del planteo y sugirió incluir estas sugerencias en la regla 3, como información adicional recomendada.

Al respecto, para el caso de la reformulación de estas disposiciones, se deberá considerar la inclusión de la siguiente redacción:

(*) 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 las costas de ser estas ordenadas por el tribunal;
(*) en caso que una de las partes sea una persona jurídica, indicar además su estructura corporativa.

Rule 3 – Recommended Additional Information

CHILE **JUNE 18, 2019**

Se sugiere que, entre la información adicional recomendada, se incluya que el demandante indique si goza de un financiamiento por terceros. Será importante contar con dicha información desde el inicio del caso para prepararse correctamente y evitar conflictos de interés. Se propone esta inclusión en la Regla 3 en lugar de la Regla 2. Por tanto, entendemos que esto no genera un perjuicio, ni sugiere que dicha información intervenga con el registro de la solicitud por parte del CIADI. Sin embargo, dicha inclusión podría generar una buena práctica evitando problemas a futuro.

Regla 3 - Información Adicional Recomendada

Se recomienda que la solicitud también contenga: (…)
(e) una indicación de si el o los demandante(s) goza(n) de financiamiento por terceros y el nombre de dicho tercero financiador, si lo hubiere.

COLOMBIA **JUNE 10, 2019**

Please see comments under AR 5.

GUATEMALA **JUNE 10, 2019**

Se reitera que 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.

Es importante destacar que Francia comparte lo manifestado por Guatemala, enfatizándolo en el apartado de cuantificación de daños.

ISRAEL **JUNE 22, 2019**

Regarding para. (b), we suggest adding the language from the old provisions: … "and any provisions agreed to that effect".

URUGUAY **MAY 31, 2019**

Please see comments under IR 2.

Rule 4 – Filing of the Request and Supporting Documents

ISRAEL JUNE 22, 2019

As reflected in our general comments, we believe that there may be some unnecessary duplication that may cause inconsistencies between these regulations and the Arbitration Rules – we refer now to the SG's authority to require a fuller extract or certified copy of a document. As these are also authorities given to the tribunal, we wonder whether a clarification should be made that the SG could also require such documents, but only when necessary for the management of the part of the proceedings prior to the establishment of the tribunal.

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

Rule 6 – Review and Registration of the Request

NO COMMENTS RECEIVED

Rule 7 – Notice of Registration

GUATEMALA JUNE 10, 2019

Nuevamente 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." A finales de 0218 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 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 de respuesta.

"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/; (…)".

ISRAEL **JUNE 22, 2019**

With regards to para. (d), we suggest adding an invitation for the parties to indicate whether they agreed to conduct an arbitration under the expedited procedure.

Rule 8 – Withdrawal of the Request

CHILE **JUNE 18, 2019**

Proponemos una redacción alternativa de la Regla 8 a efectos de aclarar el texto en idioma español. Esta propuesta no debería afectar el texto en los otros idiomas.

Asimismo, sugerimos eliminar la última parte de la Regla 8, pues sería útil que la parte demandada sea informada que se presentó una solicitud, aun cuando no dé lugar al inicio de un procedimiento.

Regla 8 - Retiro de la solicitud

En cualquier momento antes del registro, una parte solicitante podrá notificar por escrito ~~el retiro de la solicitud~~ al o a la Secretario(a) General que está retirando la solicitud o, si hubiere más de una parte solicitante, que dicha parte se retira de la solicitud. El o la Secretario(a) General notificará con prontitud a la~~s~~ otra parte~~s~~ de la ocurrencia de dicho retiro, ~~a menos que la solicitud aún no hubiera sido transmitida de conformidad con lo dispuesto en la Regla 5(b)~~.

Rule 9 – Final Provisions

ISRAEL JUNE 22, 2019

With regards to para.1: is the change in language of this para. in comparison to existing language intended to allow the possible addition of other translations to other languages (as mentioned by the secretariat staff in the discussion in Washington in April 2019)? Should this be the case, would this imply prevalence of the English, French and Spanish texts over other future translations? If so, we believe that this should be clarified for avoidance of doubt in the future.

III. ARBITRATION RULES (AR)

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III. ARBITRATION RULES

GUATEMALA JUNE 10, 2019

1. Las reglas que no se enlistan son acogidas con agrado por Guatemala.

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)).

3. En la versión vigente de las Reglas de Arbitraje existen muchos errores de traducción al español, por lo que se sugiere y solicita ser muy exigentes con estas enmiendas sobre ese tema.

Chapter I – General Provisions

Rule 1 – Application of Rules

NO COMMENTS RECEIVED

Rule 2 – General Duties

AUSTRALIA JUNE 14, 2019

Australia is pleased to note that tribunals will be explicitly required to use their best efforts to meet all applicable time limits.

COLOMBIA JUNE 10, 2019

El comentario de Colombia se tuvo en cuenta en el sentido que quedó mandatorio: “Tramitarán el procedimiento (…) de buena fe” y en inglés es más evidente: “*Shall conduct the proceeding (…) in good faith*”.

HAITI MAY 20, 2019

En disant que les parties « mettent en œuvre de bonne foi » les décisions du tribunal, la version française semble par l'emploi de cette expression laisser une certaine latitude aux parties de se conformer aux ordonnances ou autres décisions du tribunal ; alors que les parties se doivent de s'y plier. Dans ce cas, l'expression « mettre en œuvre » n'exprime pas assez fortement cette obligation d'autant que pour s'y soustraire une partie pourra invoquer qu'elle a essayé de bonne foi de les concrétiser mais sans y arriver. I1 convient d'employer un verbe plus fort comme « obéir » ou « se plier ». La rédaction suivante est de ce fait proposée.

Les parties conduisent l'instance et ~~mettent en oeuvre~~ [obéissent] [se plient] de bonne foi ~~les~~ aux ordonnances et décisions du Tribunal.

En traduisant « equally » par « de manière égale » on court le risque de voir interpréter cette expression de manière mécanique ou arithmétique (temps de parole égal, nombre égal de témoins ou d'experts, égalité de pièces déposées), alors que l'idée transmise est celle de l'impartialité dont doivent faire montre les arbitres sans se laisser aller à un parti pris en faveur de l'une ou l'autre partie. La rédaction suivante est de ce fait proposée :
Le Tribunal traite les parties ~~de manière égale~~ en toute impartialité et donne à chacune d'elles une possibilité raisonnable de faire valoir ses prétentions.

ISRAEL JUNE 22, 2019

In light of the discussion held in the April meeting, Israel believes it is necessary to reach a broad consensus on this issue.

KOREA, REPUBLIC OF JUNE 28, 2019

Korea supports the addition of an explicit reference to the obligation of the parties to conduct the proceeding and implement the Tribunal's orders and decisions in good faith, which is a fundamental principle duly recognized under international law.

Korea further believes that the Rules must be made to include adequate and specific penalties for the violation of this fundamental rule.

SINGAPORE JUNE 21, 2019

We support the changes. This modification strengthens the language in the proposed AR 11 in WP 1 from one of cooperation to an obligation on the parties to implement the Tribunal's orders and decisions. We also note that there was some debate during the second meeting about the meaning of "good faith" in paragraph 2 of this provision. We consider that ICSID's clarification during the second meeting - that the reference to "good faith" is not intended to imply permission for tribunals to consider jurisdictional and admissibility issues – is adequate.

Chapter II – Conduct of the Proceeding

Rule 3 – Meaning of Party and Party Representation

CHILE JUNE 18, 2019

Sugerimos que el establecimiento o cambio de representantes deba ser notificado no sólo al Secretariado sino también a la otra parte y al Tribunal, como se indica en la actual Regla 18. Para ello se proponen los cambios al párrafo (2) de la Regla 3.

Regla 3 - Significado de los Términos Parte y Representante de Parte

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

(a) todas las partes que actúen como demandante o como demandada; y
(b) el o la representante de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as), o abogados(as) u otros(as) asesores(as), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al o a la Secretario(a) General ("representante(s)"), el o la cual informará sin demora a la otra parte y al tribunal.

COLOMBIA **JUNE 10, 2019**

Colombia podría considerar la propuesta de España de incluir una definición de inversionista a la luz del Regla 25.

Rule 4 – Method of Filing

COLOMBIA **JUNE 10, 2019**

Se tuvieron en cuenta los comentarios de Colombia al incluirse la redacción "Se presentarán".

No se tuvieron en cuenta los comentarios, no se incluyeron notas.

En general, no se tuvieron en cuenta los comentarios de Colombia en la regla 4. De hecho, la propuesta de artículo quedó muy sucinto y solamente hace referencia a documentos. Se sugeriría hacer una referencia o definición de "documentos", pues este término continúa siendo muy general.

Sin embargo, la regla 5 desarrolla la inclusión de documentos y especifica que los "documentos de respaldo" deben presentarse junto con la "solicitud, presentación por escrito, observaciones o comunicación a la que se refieren".

Rule 5 – Supporting Documents

CANADA JUNE 10, 2019

Canada agrees that an extract of a supporting document may be filed as long as the extract is not misleading in the context of full document. Canada also supports the inclusion of "or a party" in Rule 5(2) because it will allow for a disputing party to request the full document from the other party directly without having to involve the Tribunal.

CHILE JUNE 18, 2019

Sugerimos un cambio en el texto que sólo debe afectar a la versión en español.

Regla 5 – Documentos de respaldo

(1) Si la autenticidad de un documento de respaldo fuera cuestionada, el Tribunal podrá ordenar a una parte presentar una copia certificada o que el documento original sea puesto a disposición para su ~~examinación.~~examen.

COLOMBIA JUNE 10, 2019

Colombia sugiere incluir elementos para la estimación de los daños.

Colombia sugiere que la inclusión de anexos incluya otro tipo de escritos dirigidos al Tribunal (*written submissions, observations and communications*)

Colombia sugiere que la otra Parte también tenga la posibilidad de solicitar la revelación del documento completo.

Apoya la propuesta de incluir una lista de chequeo más clara para iniciar los procedimientos. En este se debería incluir un estimado del valor de la compensación, así como la evidencia de su nacionalidad, el control y/o la propiedad de esta.

COSTA RICA JUNE 12, 2019

Costa Rica welcomes the addition of paragraph three because it will provide security to the proceeding, in cases when the authenticity of a supporting document is questioned. For greater certainty, Costa Rica suggests to also clarify that the certification relates to the legislation of the jurisdiction in which it was issued, since an eventual misunderstanding of the Rule could lead to higher costs and duration to the proceeding.

Rule 5 Supporting Documents

(1) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the request, written submission, observations or communication to which they relate.
(2) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Tribunal or a party may require a fuller extract or a complete version of the document.
(3) If the authenticity of a supporting document is disputed, the Tribunal may order a party to provide a certified copy according to the legislation of the jurisdiction where the document was issued or to make the original document available for examination.

ISRAEL JUNE 22, 2019

With regard to para. 1, we believe that room should be left for submission of supporting documents also after written submissions, as was previously allowed.

With regard to para. 2, we contend that a party (different to the tribunal) should only be entitled to request "a fuller extract or a complete version of the document" rather than being entitled to require it (as the latter may impose a heavy burden on the Respondent and may deter parties from submitting material that may be part of a broader document that may not all be relevant to the proceedings.).

Rule 6 – Routing of Documents

COLOMBIA JUNE 10, 2019

Se tomó en cuenta el comentario de Colombia.

SINGAPORE **JUNE 21, 2019**

Singapore had made the following points during the second meeting and is reflecting them in our written comments for avoidance of doubt:

(1) We had queried what the intent behind the distinction between the use of the term "transmit" in AR 6 versus "file" in AR 4-5 was. ICSID clarified this was to cover the situation where parties may transmit documents to the Secretary-General but without the intent of filing it in the proceedings. We suggested that ICSID also review whether in AR 4 the reference to filing documents electronically should also be adjusted to cover transmission as well.

(2) We had proposed to swap the order of AR 6(1)(b) and (c) for better flow, and remove the reference to paragraph 1(a) and (c) in paragraph 2(b) because communications between parties in paragraph 1(a) and communications between parties and the Tribunal in paragraph 1(c) did not necessarily involve the Secretary-General at all.

Rule 7 – Procedural Languages, Translation and Interpretation

CHILE **JUNE 18, 2019**

Cuando cada parte elige un idioma distinto en el procedimiento, se propone que ambas proporcionen traducciones, por lo menos de los escritos, solicitudes y presentaciones principales. Lo anterior, para evitar desigualdades en donde una parte, comúnmente un Estado demandado, cuyo idioma oficial es el español o el francés, se ve obligado a proporcionar traducciones al inglés de sus escritos principales, pero la parte demandante se niega a proporcionar copias en español o francés bajo el pretexto que los tres miembros del Tribunal dominan el inglés y no necesitan dichas traducciones. En dichos casos, el Estado podría verse en la obligación de cargar con el costo de traducir no sólo sus propios escritos, sino también los de los demandantes para realizar las coordinaciones internas necesarias a su defensa. Esto genera una desigualdad.

Regla 7 - Idiomas del Procedimiento, Traducción e Interpretación
(…)

(3) Las solicitudes, escritos, observaciones y comunicaciones se presentarán en un idioma del procedimiento. Salvo acuerdo en contrario de las partes, eEn un procedimiento con dos idiomas del procedimiento, el Tribunal ~~podrá~~ ordenará a ~~un~~las partes que presenten dichos documentos en ambos idiomas del procedimiento.

COLOMBIA **JUNE 10, 2019**

Se insiste en la sugerencia de que las Partes del procedimiento también soliciten la traducción de algún documento a la otra Parte.

ISRAEL **JUNE 22, 2019**

In light of the potential added burden, both in cost and in time, of conducting a procedure in two languages, we suggest including a provision calling the parties to use their best endeavors to agree on one procedural language (we do not ask for an obligatory text in this regard but a provision to signal to the parties that the preference is towards one language). Article 24 of UNCITRAL Notes on Organizing Arbitral Proceedings also indicates that parties to arbitration will usually choose one language.

KOREA, REPUBLIC OF **JUNE 28, 2019**

Korea proposes to amend paragraphs (3), (4) and (6) to state “In a proceeding with two procedural languages, the other party or the Tribunal may require a party to…” provide interpretation and/or translation.

Korea believes that it is an imperative requirement of due process and procedural equality for a party to be able to fully comprehend the other party’s submissions, documents and communications in a timely manner. To achieve such purposes, a party must be able to require translation from the other party.

Rule 8 – Correction of Errors and Deficiencies

CANADA JUNE 10, 2019

With respect to paragraph 1, Canada suggests that the rule emphasize that corrections should be made as soon as possible after they are noticed but still before the award is rendered. Canada suggests the following language: "A party may correct an accidental error in a document as soon as possible after the error has been identified, and before the Award is rendered, with the agreement of the other party or with leave of the Tribunal."

With respect to paragraph 2, Canada believes that some confusion is introduced in this paragraph by reference to the term "in a filing", which may be interpreted to mean in the document filed. In practice, the document filed is often referred to as "the filing". Canada understands that the point of this paragraph is not to talk about errors in the document filed, but rather about errors in the way a document was filed. Hence, for clarity, Canada suggests that the paragraph be rewritten to say: "The Secretary-General may request that a party correct any deficiency in how a document was filed or make the required correction."

CHILE JUNE 18, 2019

Se propone cambio formal al texto que no debería afectar las versiones en inglés o francés.

Regla 8 - Corrección de Errores y Deficiencias (…)

(2) El o la Secretario(a) General podrá solicitar que una parte corrija cualquier deficiencia en una presentación o ~~realizar~~ realice la corrección necesaria.

COLOMBIA JUNE 10, 2019

Se tomó en cuenta el comentario de Colombia al incluir "O realizar la corrección necesaria….".

EUROPEAN UNION **JUNE 7, 2019**

10. The European Union and its Member States suggest clarifying the extent of the term "any deficiency" in Rule 8 of the Arbitration Rules, by incorporating some elements of the explanation provided in §93 of Working Paper #2.

ISRAEL **JUNE 22, 2019**

Regarding para. 2, in light of the explanation of the Working Paper as well as clarifications provided in the April meeting, we believe that the provision should clarify that the Secretariat's role in making corrections is limited to technical/clerical corrections.

Rule 9 – Calculation of Time Limits

CANADA **JUNE 10, 2019**

Canada suggests that paragraph 3 does not reflect the most appropriate approach to holiday. Although other holiday periods may be relevant (such as holidays at the location of the Secretariat), the most relevant place is the place of the party required to take the procedural step. Canada takes note of the Secretariat's comment that the parties can plan for such dates in advance when doing up the procedural calendar. However, Canada notes that in its experience, it is rare that a procedural order will specify particular dates. Rather the more typical practice, other than for initial pleadings, is for the Procedural Calendar to specify that the next procedural step shall take place a certain period after the completion of the previous one. For example, a Claimant's Memorial may be due 90 days after the Tribunal's final ruling on document production issues. However, when that final order will be made cannot be known with certainty in advance. Hence, in Canada's view, it is more appropriate to have a default rule regarding holidays in the place of the party required to take a procedural step. Hence, Canada suggests that this Rule be redrafted to say: "A time limit shall be satisfied if a procedural step is taken, or a document is received by the Secretary-General, on the relevant date, or if that date falls on a Saturday, Sunday or holiday observed by the party required to take the procedural step, on the subsequent business day."

CHILE JUNE 18, 2019

Se solicita hacer una revisión adicional de la regla, pues los cambios propuestos son un poco confusos. La Regla 9(1) habla de "referencia temporal" en función de la hora en la sede del centro en la fecha pertinente", pero la Regla 9(3), sólo hace referencia a "la fecha" en que se realice la actuación o se presente el documento. Consideramos que la redacción del WP1, era más clara.

Regla 9 – Cálculo de plazos

(1) Las referencias temporales serán determinadas en función *de la hora en la sede del Centro en la fecha* pertinente.

(3) Un plazo se tendrá por cumplido si la actuación procesal se realiza o el o la Secretario (a) General recibe el documento en *la fecha pertinente* o, si el plazo vence un sábado, domingo, o un feriado observado por el Secretariado, en el día hábil siguiente.

COLOMBIA JUNE 10, 2019

Se atendió el comentario de Colombia al esclarecerse la sede.

COSTA RICA JUNE 12, 2019

As expressed by other Members during the April's meeting, Costa Rica supports the proposal to provide flexibility to the parties in deciding which holidays they will want to take into consideration during the course of the proceeding.

Rule 9 Calculation of Time Limits

(1) References to time shall be determined based on the time at the seat of the Centre on the relevant date.

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

(a) (the Tribunal, or the Secretary-General if applicable, announces the period; or

(b) the procedural step starting the period is taken.

(3) A time limit shall be satisfied if a procedural step is taken or a document is received by the Secretary-General on the relevant date, or, if the date falls on a Saturday, Sunday, or a holiday observed by the Secretariat or as agreed by the parties, on the subsequent business day.

ISRAEL **JUNE 22, 2019**

With regards to para. 3, it is our view that the rules should also take into consideration holidays observed in the countries of the parties to the dispute.

KOREA, REPUBLIC OF **JUNE 28, 2019**

Korea proposes that the holidays that are to be taken into consideration for time calculation purposes in Rule 9(3) be changed from holidays observed by the ICSID Secretariat to public holidays observed by the disputing parties. It is Korea's observation that public holidays observed by the parties have higher relevance in terms of effective case management.

Rule 10 – Time Limits Applicable to Parties

CANADA **JUNE 10, 2019**

Canada suggests that a further clarification be made as to the operation of paragraph 4 by making the first sentence and the second sentence separate paragraphs. This will create a non-derogable rule for the provisions with time limits prescribed by the Convention, and then a more flexible rule with respect to other time limits set by the Tribunal.

Further, in subparagraph (b) of the second sentence, Canada suggests that if the Tribunal or Secretary-General decides to allow an untimely submission, it should specifically state the reasons that comprise the special circumstances. This could be accomplished by adding "in a reasoned decision" after "concludes".

Accordingly, Canada suggests the following changes to the proposed Rule 10(4):

(4) An application or request filed after the expiry of the time limits in Articles 49, 51 and 52 of the Convention shall be disregarded.

(5) A procedural step taken or document received after the expiry of any other time limit set by the Tribunal shall be disregarded unless:

(a) the other party does not object to the late step or filing; or

(b) the Tribunal, or the Secretary-General if applicable, concludes in a reasoned decision that there are special circumstances justifying the failure to meet a time limit that they fixed.

CHILE JUNE 18, 2019

Solicitamos reconsiderar la enmienda propuesta en la Regla 10(2) y volver a la versión sugerida en el WP1, en el sentido que las partes pueden ampliar plazos, siempre y cuando estos no sean obligatorios en virtud del Convenio o las Reglas. La propuesta actual podría estar permitiendo modificar otros plazos de necesario cumplimento (e.g. plazo establecido en el 67(5)). Este cambio impactaría también la Regla 10(4).

Sugerimos incluir el término “presentada” de modo de aclarar hasta cuándo se puede presentar la solicitud para extender los plazos y así reflejar adecuadamente la versión del texto en inglés y francés.

Regla 10 – Plazos Aplicables a las Partes

~~(2)Las partes podrán acordar ampliar cualquier plazo excepto aquellos contenidos en los Artículos 49, 51 y 52 del Convenio~~
(2) Las partes podrán acordar ampliar un plazo fijado por el o la Secretario(a) General o establecido por el Convenio o estas Reglas si dicho plazo no es obligatorio en virtud del Convenio.
(3) El Tribunal, o el o la Secretario(a) General, cuando corresponda, podrá extender los plazos que haya fijado con base en una solicitud fundada de cualquiera de las partes presentada antes del vencimiento de dicho plazo. El Tribunal podrá delegar la potestad para extender plazos al Presidente.

COLOMBIA **JUNE 10, 2019**

Si bien se trataron de hacer reglas más claras, persiste la ambigüedad de las circunstancias para extender los plazos, con la inclusión de "cuando corresponda" en la frase: Tribunal, o el o la Secretario(a) General, cuando corresponda, podrá extender los plazos que haya fijado con base en una solicitud fundada de cualquiera de las partes antes del vencimiento de dicho plazo. El Tribunal podrá delegar la potestad para extender plazos al Presidente."

Colombia sugiere aclarar cuándo ello corresponde o dejar clara la regla de referencia.

Rule 11 – Time Limits Applicable to The Tribunal

CHILE **JUNE 18, 2019**

Considerando que el retraso de los tribunales a rendir el laudo o decisiones es una de las razones por las que los procedimientos pueden tener una duración mayor a la esperada, proponemos por este motivo eliminar la propuesta de la Regla 11(1), según la cual el Tribunal sólo necesita "hacer lo posible" para cumplir con los plazos. Esta nueva regla podría ser contraria al objetivo de agilizar los procedimientos, pues parece aplicar a cualquier plazo, es decir, incluso los plazos para emitir laudos y decisiones, que se están sugiriendo en esta propuesta de enmiendas. Solicitamos conservar únicamente el párrafo 11 (2), que da la suficiente flexibilidad al Tribunal, pero al mismo tiempo confirma la obligatoriedad de los plazos.

Se propone agregar el artículo "la" por consistencia con francés y uso correcto.

Regla 11 – Plazos Aplicables al Tribunal

~~(1) El Tribunal hará lo posible para cumplir con los plazos aplicables.~~
(3) Si surgen circunstancias especiales que impidan al Tribunal cumplir con un plazo, este notificará a las partes el motivo de la demora y la fecha en la que prevé que se emitirá la resolución, la decisión o el laudo.

COLOMBIA JUNE 10, 2019

Si bien la regla es más concisa y se establece que el Tribunal hará lo posible por cumplir, esta obligación continúa siendo ambigua, aún más con el mantenimiento de la inclusión de la terminología "circunstancias especiales": "Si surgen circunstancias especiales que impidan al Tribunal cumplir con un plazo, este notificará a las partes el motivo de la demora y la fecha en la que prevé que se emitirá la resolución, decisión o el laudo."

Por esta razón, Colombia insiste en la necesidad de definir o dar contexto a esas circunstancias especiales, en virtud de que se debe procurar el cumplimiento del calendario procesal establecido por las Partes.

COSTA RICA JUNE 12, 2019

In the interest of certainty and considering that the objective of this process is to reduce the duration of the proceedings, we suggest to include an obligation in paragraph one that can guide the expectations of the parties and paragraph two contains the exception, which provides flexibility to the tribunals, when needed.

Rule 11 Time Limits to the Tribunal

(1) The Tribunal shall ~~use best efforts to~~ meet all applicable time limits.

(2) 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.

EUROPEAN UNION JUNE 7, 2019

7. With respect to Rule 11 of the Arbitration Rules and Rule 14 of the Administrative and Financial Rules, the European Union and its Member States encourage a prompt revision of the ICSID Schedule of Fees, with a view to strengthening the incentives for Tribunals to meet applicable time limits. Such a revision could include the consideration of financial consequences in cases of unjustified failure to comply with such obligations (e.g. withholding or docking fees).

GUATEMALA JUNE 10, 2019

Al igual que Colombia y Canadá se sugiere establecer en el texto una indicación de que se considera como "circunstancias especiales".

Adicionalmente, en razón a la eficiencia y celeridad del proceso se considera necesario establecer que el Tribunal únicamente podrá demorarse en una ocasión.

"(…) (2) Si surgen circunstancias especiales que impidan al Tribunal cumplir con un plazo, este notificará a las partes el motivo de la demora y la fecha en la que prevé que se emitirá la resolución, decisión o el laudo".

(3) El Tribunal únicamente podrá incumplir con el plazo establecido, en una ocasión."

IISD APRIL 12, 2019

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

The proposed rule on Time Limits Applicable to the Tribunal imposes a best-efforts obligation on the tribunal to "meet all applicable time limits."[9] If "special circumstances" prevent the tribunal from complying with a time limit, the tribunal "shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered."[10] While this new provision could have been a useful tool to reduce the length of arbitral proceedings, its wording renders it vague and non-binding on the tribunal.

ICSID member states should consider clarifying the meaning of the "special circumstances" that may prevent a tribunal from complying with a time limit. During the rule amendment process, stakeholders sought guidance of what they might mean, but the secretariat replied that "the term is intentionally left flexible as it is difficult to provide an exhaustive list."[11] One example, according to the secretariat, is "if the Tribunal is diverted from drafting the Award because the parties file other requests (e.g., for provisional measures) that must be addressed in priority."[12]

The difficulty in preparing a list should not be an impediment: there is no need for the list to be exhaustive. An illustrative list of situations or categories of situations that would warrant delay could provide useful guidance to tribunals and parties alike. For example, the list could indicate whether "special circumstances" could relate to personal circumstances of the arbitrators (e.g., illness,

death of a close family member) or to the volume of documents or the number of other requests submitted by the parties (such as in the secretariat's example above).

It could also be useful for ICSID member states to consider a list of situations or categories of situations that could not be considered "special circumstances" for purposes of the application of the rule. For example: arbitrators are not allowed to invoke caseloads in other arbitral proceedings as "special circumstances" warranting their non-compliance with time limits.

In other parts of the proposed rules, the tribunal has obligations to consult with the parties on certain matters. For example, the tribunal "shall consult" with the parties prior to making a procedural decision or order[13] and on the appointment of a tribunal expert, including on the terms of references and fees of the expert.[14] ICSID member states may consider a similar solution for the interpretation of "special circumstances" in proposed AR 11(2), by requiring the tribunal to consult with the parties on whether a particular event qualifies as a "special circumstance" that justifies delaying time limits applicable to the tribunal.

The proposed rule on Time Limits Applicable to the Parties attaches grave consequences to the non-compliance by a party with time limits:[15] "An application or request filed after the expiry of the time limits in Articles 49, 51 and 52 of the Convention shall be disregarded. A procedural step taken or document received after the expiry of any other time limit [that is, those set by the tribunal] shall be disregarded [except if the other party does not object or the tribunal concludes that "special circumstances" justify the failure] [emphasis added]." In turn, the proposed rule on Time Limits Applicable to the Tribunal, as mentioned above, is a mere best-efforts obligation on the tribunal and attaches no consequences to the tribunal's non-compliance with time limits.
ICSID member states may consider ways to remedy this imbalance, by removing the "best-efforts" language from proposed AR 11(1) and by providing for penalties for non-compliance by the tribunal. For example, the revised rules could provide for a reduction in fees as a consequence of a delay. Further, the secretariat could also keep a public record of unjustifiable arbitrator delays. Such transparency and penalties would provide incentives for arbitrators to comply with time limits and ensure expeditious proceedings.

Chapter II – Constitution of the Tribunal

Rule 12 – General Provisions Regarding the Constitution of the Tribunal

COLOMBIA **JUNE 10, 2019**

Colombia considera necesario el desarrollo de un código de conducta que brinde una reglamentación sólida para evitar el conflicto de intereses y la puerta giratoria.

ISRAEL **JUNE 22, 2019**

In order to avoid intertwining investment disputes with political ones, Israel proposes adding a new paragraph. (5):

(5): "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".
We have taken notice of WP#2 explanation regarding Art. 39 of the Convention. However, we would argue that Art. 39 does not entail an exhaustive list of possible restrictions/rationales/causes governing the appointment of an arbitrator. In other words, there need not be a contradiction between Art. 39 and our suggestion. Hence, a reconsideration of our suggestion would be highly appreciated.

With regard to para. 4, we would request the inclusion of 'arbitrator' in the list of persons previously involved in the dispute – as we view the arbitrator too as relevant to this provision.

Rule 13 – Notice of Third-party Funding

AUSTRALIA **JUNE 14, 2019**

Australia considers that disclosure in relation to third-party funding is important in terms of promoting transparency and avoiding conflicts of interest. Such disclosure should involve more than merely providing the name of the funder. It should also, taking into account confidentiality considerations, include the nature of the terms of the funding arrangement, particularly regarding the payment of adverse costs awards. Further guidance on the consequences of non-disclosure might also be helpful.

CANADA **JUNE 10, 2019**

Canada notes the statement of the Secretariat that the primary goal with respect to rules on third-party funding is to avoid conflicts of interest. Canada agrees that this is an important reason for requiring disclosure of third-party funding, but it is not the only reason to require disclosure (for example, it may be relevant for determining whether security for costs is appropriate, or for purposes of award enforcement). Accordingly, Canada suggests that the phrase “For the purposes of completing the arbitrator declaration required by

Rule 18(3)(b)" be deleted, because the purpose of the notice is not solely for the arbitrator declaration. Canada does not consider it necessary to elaborate further as to why the disclosure is required – if the disclosure gives rise to conflict of interest or other concerns, the disputing parties and/or arbitrators can elaborate as necessary.

Second, Canada also suggests that because the avoidance of conflicts of interest is not the only relevant reason to require disclosure of third-party funding, it is still relevant for parties to disclose whether they have contingency fee arrangements with counsel because it may impact on the claimant's willingness or ability to pay a costs award in the event of an unsuccessful claim. While a contingency fee arrangement with a representative should not give rise to an automatic presumption that security for costs is appropriate, it may be a relevant factor for the Tribunal to consider.

Third, as noted in Canada's comments to Working Paper #1, Canada remains concerned about the potential implications the proposed language may have for arrangements between different levels of government in a federal state. A treaty may or may not elaborate on the relationship between different levels of governments, so the proposed rule should be explicit that such other levels of government are not non-parties for the purposes of this provision.

Finally, Canada suggests that further consideration be given to imposing specific consequences for the failure to disclose third-party funding. Canada notes the Secretariat's comment that in fact the conduct of the parties can be taken into account in the allocation of costs. However, Canada suggests that without clear direction on the consequences for failing to disclose third-party funding, parties may be incentivized to avoid disclosure.

In light of the above, Canada suggests that this provision be written as follows:

1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding ("third-party funding").
2) A non-party referred to in paragraph (1) does not include a sub-national or any other level of government of a Contracting State.
3) A party shall send the notice referred to in paragraph (1) to the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.
4) A party which fails to comply with the obligations in this rule shall in principle be responsible for all of the arbitration costs arising from such failure, unless the Tribunal determines that special circumstances exist that justify a different allocation of costs.

CHILE **JUNE 18, 2019**

Solicitamos eliminar la expresión “A efectos de completar la declaración del árbitro requerida por la Regla 18(3)(b)”, pues consideramos que limita indebidamente la facultad de los árbitros de tomar en cuenta estos financiamientos para otros aspectos del procedimiento.

Además de la notificación escrita establecida en esta regla, se propone que las reglas sean explícitas en el sentido de que el Tribunal Arbitral cuente con las facultades necesarias para requerir información adicional y aspectos particulares del contrato de financiamiento, lo que puede incluir pero no se limita a: la naturaleza del financiamiento recibido, si existen disposiciones que regulan el cumplimiento de un laudo adverso y el nivel de participación o derecho de veto del financista ante la posibilidad de una solución negociada.

Si se acoge nuestra propuesta de incorporar financiamiento por terceros en la Regla 3 de las Reglas de Iniciación, sería necesario modificar la Regla 13(3).

Regla 13 - Notificación de financiamiento por terceros

(1) ~~A efectos de completar la declaración del árbitro requerida por la Regla 18(3)(b)~~ U~~u~~na parte deberá presentar~~á~~ una notificación por escrito revelando el nombre de cualquier tercero financiador de quien dicha parte, su afiliada o su representante haya recibido fondos o un apoyo equivalente para la interposición de o defensa en un procedimiento (“financiamiento por terceros”).

(2) El tercero al que se refiere el párrafo (1) no incluye al o la representante de una parte;

(3) (…)

COLOMBIA **JUNE 10, 2019**

Colombia insiste en la inclusión de una sanción para quien no revele el financiamiento por terceros.

Colombia insiste en la necesidad de que exista una revelación amplia de información del financiador. De no ser posible revelar el Acuerdo entre el financiador y el inversionista, Colombia sugiere incluir la propuesta de Perú de brindar al Tribunal una herramienta

tipo formato de requisitos que sirva de referente para que el Tribunal establezca qué debe ser revelado bajo determinadas circunstancias.

COSTA RICA JUNE 12, 2019

Costa Rica appreciates ICSID´s efforts to strengthen transparency in arbitration through the disclosure of third-party funding (TPF). However, after April's discussions, Costa Rica considers that this provision merits further examination beyond the effects in the constitution of the tribunals and the potential conflict of interest. For example, States discussed that TPF is also linked to security for costs, possibility of reaching amicable solutions, counterclaims and transparency in general. Thus, Costa Rica suggests:

1. Moving this Rule to section of General Provisions because this topic is not only linked to the constitution of the Tribunal.
2. Eliminate the first sentence of paragraph one to avoid a constrained interpretation of the use of information on TPF, since there are other concerns associated with it.
3. It has been Costa Rica´s consistent practice to ensure a balance between transparency and confidential information in arbitration. Therefore, we support that confidential information could prejudice legitimate commercial interests.

Rule13 Notice of Third-party Funding

(1) For purposes of completing the arbitrator declaration required by Rule 26(3)(b), a party shall file a written notice disclosing the name of any non-party from which that party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding ("third-party funding").

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall send the notice referred to in paragraph (1) to the Secretary-General upon registration of the Request, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) Once a Party has disclosed the existence of third-party funding, the Tribunal shall order the funded Party to provide information to determine if:

(i) there is a conflict of interest;

(ii) the third-party funding will cover the compliance of an adverse decision on cost;

(iii) the third-party funding imposes restrictions to reach amicable solutions; or

(iv) there is any other circumstance that may negatively affect the conduction of the proceeding.

EUROPEAN UNION JUNE 7, 2019

11. 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 (Rule 13 and Rule 22, respectively). The European Union and its Member States are of the view that the provision should establish a clear obligation of disclosure for the parties, and not only be done for the purpose of the completion of the arbitrator declaration. In this respect, the European Union and its Member States suggest to maintain the original draft of Rule 13 (2) AR in Working Paper #1 that created an autonomous disclosure obligation. The European Union and its Member States would also suggest adding language that will ensure that in cases of complex funding arrangements the provisions also ensures that disclosure reveals the identity of the ultimate funder.

12. The European Union and its Member States could also accept a requirement to disclose the main features or conditions of the third party funding arrangements, where warranted and upon request, provided that the protection of confidential business or strategic information is ensured.

13. With respect to consequences of failure to disclose third party funding, the European Union and its Member States propose to add language stating that failure to comply with disclosure obligations regarding third party funding can be a factor for Tribunals to consider in determining and allocating the costs of proceedings.

GUATEMALA JUNE 10, 2019

Se considera oportuno eliminar la palabra “equivalente” de la nueva definición de financiamiento por terceros. Así como, incluir una redacción similar a la propuesta, de modo que destaque la importancia de la revelación de financiamiento por tercero como muestra de buena fe por parte de la demandante.

"(1)A efecto de completar la declaración del árbitro requerida por la Regla 18(3)(b), una parte presentará una notificación por escrito revelando el nombre de cualquier tercero de quien dicha parte, su afiliada o su representante haya recibido fondos o ~~un~~ cualquier apoyo ~~equivalente~~ para la interposición de o defensa en un procedimiento ("financiamiento por terceros") (…)".

(4) Dentro de los aspectos a considerar al emitir el laudo, deberá tenerse en cuenta la revelación voluntaria del financiamiento por terceros, como factor determinante de buena fe.

INDONESIA **JUNE 10, 2019**

We appreciate secretariat's explanation regarding the changed phrase from "Disclosure of Third-party Funding" to "Notice of Third-party Funding". Based on our experience, the Disclosure of Third-party Funding is not merely about the independency of the arbitrators and counsel. Hence, we persist in our previous position that the Third-party Funding 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 (ii) 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 parties, 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.

ISRAEL **JUNE 22, 2019**

Third-Party Funding is a major issue in recent investment arbitration discussions. It is our position that although TPF could serve as a legitimate tool for parties to a dispute, one should also be mindful of its possible risks, which go beyond a mere transparency issue or conflict of interests (e.g., abuse of the tool and politicization of the dispute).

Therefore, it is our view that TPF should be broadly defined, as well as who may be a third party funder.

Regarding para. (1): further transparency regarding TPF is desirable. We suggest expanding the scope of the disclosure. Further, we suggest enabling the tribunal, upon request of a party to the dispute, or on its own initiative, to require extra information regarding the TPF.

Para. (2): We are concerned that the preclusion of "a representative of a party" might render the obligation of disclosure incomplete, as there are cases where TPF involves some form of legal representation. We hold that the disclosure should apply to funding (or equivalent support) by a representative of a party as well.

Additionally, it seems that proposed AR 13, as it stands now, is lacking some possible scenarios that should be addressed. For example, cases where discovery was made in a very late stage of the procedure (even after the rendering of an award); would such an overdue discovery impact the results of the procedure? Put differently, the implications of overdue discovery should be explicitly regulated, including the imposition of any "sanction" (e.g. explicit reference to TPF in the provisions relating to allocation of costs). Lastly, in our view, the wording of the first paragraph on page 3 of the Backgrounder on Proposals for Amendment of the ICSID Rules (WP#1) should be incorporated into AR 13, stating that: "[t]he name of an involved funder will be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest."

Coordination with UNCITRAL discussions on this topic is recommended.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

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, se está de acuerdo en incluir, como parte de las enmiendas a las Reglas, disposiciones que tengan como objetivo la revelación oportuna de financiamiento por parte de terceros, así como el nombre del tercero financiador.

No obstante, Los Estados consideran que el texto propuesto en el WP2 (Regla 13(1), RA WP2), limita injustificadamente el objeto de dicha revelación del financiamiento por terceros a “efectos de completar la declaración del árbitro requerido.” Si bien estamos de acuerdo que uno de los aspectos principales de la revelación del financiamiento por terceros radica en identificar oportunamente y evitar conflictos de intereses, no debería limitar la capacidad de los árbitros de tomar en cuenta esta situación para otros aspectos del procedimiento.

Durante las reuniones de consulta con Estados Miembros en este proceso de enmienda de las Reglas CIADI, han surgido propuestas a fin de permitir que, además de la existencia y nombre del tercero financiador, se solicite la revelación del acuerdo de financiación. Sin embargo, conscientes de las dificultades que podría presentar dicha propuesta, y a fin de preservar determinados aspectos confidenciales del correspondiente acuerdo, se propone que las reglas sean explícitas en el sentido de permitir que el Tribunal Arbitral cuente con las facultades necesarias para requerir información adicional sobre el financiamiento por terceros y aspectos particulares del acuerdo de financiamiento, los que podrían incluir, pero no se limitan a, la naturaleza del financiamiento recibido, la existencia de disposiciones que regulan el cumplimiento de un laudo adverso y el nivel de participación o el derecho de veto del financista ante la posibilidad de una solución negociada. Se sugiere además que las partes sean consultadas por el Tribunal para determinar aquellos elementos que deban ser revelados por el tercero financiador, en el caso en particular.

KOREA, REPUBLIC OF JUNE 28, 2019

Korea proposes to delete paragraph (2) of Rule 13, which carves out party representatives from the scope of non-party funders. It is Korea's opinion that the previous position taken by Rule 21 in Working Paper #1 where party representatives were also included among third-party funders was the more preferable approach.

In Korea's view, there is no reason to limit the purpose of the obligation to disclose Third-party Funding (hereinafter "TPF") to the avoidance of conflict of interest between arbitrators and third-party funders. The necessity of recognizing the possibility of a party's impecuniosity at an early stage must also be considered a legitimate interest which should be addressed by such a disclosure obligation.

Alternate fee arrangements such as contingency fee arrangements are classic examples of TPF provided by party representatives and may serve as a useful indicator of the lack of that party's ability to comply with adverse decisions on costs. The Tribunal and the parties alike may benefit much from access to such highly relevant information.

The general terms and the nature of the TPF contract must also be subject to the disclosure requirement along with the existence of TPF and the name of the funder. An understanding of the nature of the TPF contract may be crucial in determining the existence of any conflict of interests, as well as a party's impecuniosity.

Korea suggests adding an explicit reference to the Tribunal's power to order a party to supply additional information regarding TPF. In many instances, the information disclosed by a funded party may not be sufficient for the purposes of Rule 13. For example, knowledge of the entirety of the TPF contract may be required to discern the possible existence of any conflict of interest. It may also

be the case that the disclosed funder was a mere conduit vehicle established solely for the purposes of shielding the true identity of the actual funder. The non-compliance of the disclosure obligation must be subject to negative consequences such as the mandatory suspension of the proceedings, adverse considerations by the Tribunal in terms of cost allocation and/or securities for costs.

To incorporate the requirement of the mandatory suspension of the proceedings, Korea suggests adding a fourth paragraph which reads "The Tribunal shall suspend the proceedings when a party is found not to have complied with its obligations under paragraphs (1) and (3), until that party has performed such obligations in good faith."

To incorporate the requirement of negative considerations for costs and security for costs, Korea further suggests adding a fifth paragraph which reads "The Tribunal may take into account the non-compliance of a party with its obligations under paragraphs (1) and (3) as the conduct of a party in the context of Rule 50(1)(b) and Rule 51(3)(d)."

These comments are without prejudice to Korea's position on the permissibility of TPF as a general matter.

LUXEMBOURG JUNE 10, 2019

Luxembourg considers that it is necessary to strike a balance between the requests for full disclosure of third party funding and the need to allow access to the ICSID mechanism. SMEs, in particular, very often need to rely on such funding if they are to use the dispute settlement procedure. Imposing heavy disclosure requirements, if not relevant for the case at hand, might end up hampering such access.
Luxembourg's understanding is that the main objective of the clause is to avoid conflicts of interest. In addition, Luxembourg's understanding is that if relevant for the proceedings, full disclosure (including the funding agreement as well as full shareholder details) can be requested and obtained.
Luxembourg would welcome wording on dissuasive but also proportionate sanctions in case of non-compliance of parties with such a request (either at the beginning or during the proceedings, whenever relevant for the case).

SINGAPORE JUNE 21, 2019

We have two main points to make:

(1) Singapore *strongly supports* ICSID's current proposal, which requires the disclosure of the fact of third-party funding and the identity of the funder, because it strikes the right balance between various interests. It is possible that States that obtain third party

funding may not wish to disclose all the details of their funding arrangements for political or policy considerations. Requiring the disclosure of the entire funding arrangement may potentially stymie the use of this emerging option, and if there are States interested in requiring more extensive disclosure, it always remains open for them to include this in their treaty practice.

That said, we note that during the second meeting, a suggestion was made that the duty of disclosure regarding the identity of the third-party funder should apply also to the persons with an ultimate financial interest in the outcome, in particular ultimate beneficial owners (if any). This is intended to address the potential situation that the companies directly funding the litigation could be shell entities with ultimate beneficial owners. Singapore would like to express its support for this suggestion.

(2) Singapore had made this point during the second meeting but is reflecting it here for avoidance of doubt. We noted the reasons given for excluding a party's representative (*ie*, counsel) from the scope of disclosure under this rule but suggested that the Arbitrator's Declaration should be refined to also include a declaration that the arbitrator has no conflicts of interest arising from any relationship with the party's representative.

In addition, in terms of wording, we think the first part of paragraph 3 should read "A party shall *file* the notice referred to in paragraph (1) *with* the Secretary-General…", since this should be a document filed in the proceedings.

URUGUAY MAY 31, 2019

Varios países coincidieron en la necesidad de arribar a una definición más clara del concepto, ya que existen diferencias en cuanto a la naturaleza de los actores que financian estos procesos; no está laudada la excepción planteada para los representantes de una de las partes (numeral 2 de la regla); y la redacción propuesta dejó atrás la definición dada por la actual regla 21, bastante más precisa.

El formato propuesto es demasiado laxo y no logra circunscribir de manera adecuada las distintas hipótesis que pueden ser entendidas como "financiamiento por terceros". Adicionalmente, la delegación de Uruguay considera que es importante distinguir entre financistas privados que proporcionan fondos o apoyo en contraprestación de una prima o a cambio de una remuneración contingente al resultado del procedimiento, y organizaciones filantrópicas que apoyan a través de donaciones.

En segundo término, una gran mayoría de países plantearon la necesidad de revelar más información acerca de la financiación de terceros, argumentando que contar simplemente con el nombre y el domicilio de la firma que financia no necesariamente sirve para identificar a los actores con intereses en el litigio. Al respecto, la delegación de Uruguay aborda este tema en clave de transparencia y

estima que es imperioso reformar las disposiciones actuales, de manera que se pueda exigir revelar más información acerca de quién financia el proceso y qué responsabilidades tiene, sin llegar al punto de violentar la confidencialidad de los acuerdos entre privados.

En efecto, Uruguay reafirma su reclamo de contar con una reglamentación clara del asunto, dado que es una práctica que se ha extendido mucho en los últimos años y existen una serie de elementos que es necesario transparentar. Esta es una problemática que excede el tema de conflicto de intereses, e involucra el problema de los costos que por ejemplo corresponde asumir en caso de un laudo contrario, planteándose la interrogante de hasta donde llega la responsabilidad del financista. De momento, se cuenta con muy poca información acerca del origen de estos fondos y cuáles son sus motivaciones, así como de posibles acuerdos entre privados que inhiban potenciales vías de mediación o conciliación.

Finalmente, con relación al planteo realizado por Perú, de discutir el contenido de un formulario de declaración al momento de hacer la notificación, que incluya por ejemplo si el financista tiene poder de veto sobre el curso del proceso, si tiene capacidad financiera para asumir un laudo adverso, entre otras cuestiones puntuales, Uruguay apoya que un requisito de estas características pueda ser incorporado.

IISD APRIL 12, 2019

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

Third-party funding (TPF) is becoming increasingly common in investor–state arbitration. TPF is "generally defined as an agreement by an entity (the 'third-party funder') that is not a party to a dispute to provide funds or other material support to a disputing party (usually the claimant or a law firm representing the claimant), in return for a remuneration, which is dependent on the outcome of the dispute."[47] TPF reinforces the structural imbalance in the ISDS regime as states typically do not have access to it. This is because TPF is predicated on the funder receiving a portion of the ultimate award, and a state can virtually never be the recipient of an arbitral award—except potentially in light of a counterclaim, which are very difficult to bring and maintain, as noted above.[48] In the context of UNCITRAL deliberations on ISDS reform,[49]

> it was said that the practice of third-party funding raised ethical issues, and might have negative impacts on ISDS proceedings. It was further pointed out that third-party funders might gain excessive control or influence over the arbitration process, which could lead to frivolous claims and discouragement of settlements (A/CN.9/935, para. 89). Issues raised in relation to third-party funding include potential conflicts of interest, third-party control and influence

on the ISDS proceedings, impact on confidentiality, on costs and security for costs, as well as on speculative, marginal and/or frivolous claims.

In the same context, "the following possible solutions were suggested for further consideration: (i) prohibiting third-party funding entirely in ISDS cases; (ii) regulating third-party funding, for example, by introducing mechanisms to ensure transparency in the arrangements (which could also assist in ensuring the impartiality of the arbitrators)."[50]

Proposed AR 13 has a limited focus on "avoid[ing] conflicts of interest between arbitrators and third-party funders by requiring disclosure of the existence of third-party funding and the name of the funder" (WP #2, v. 1, para. 128). ICSID member states should consider at a minimum expanding the disclosure requirements, by requiring disclosure of the entire funding agreement, as well as requiring the tribunal to take into account the existence of TPF in assessing a claim for security for costs, as proposed above. States should also ensure that arbitrators are not permitted to act as advisors to third-party funders, under the proposals related to arbitrator impartiality. However, moving beyond these issues and recognizing the negative consequences of allowing speculative financers to have "a stake in the outcome and a voice in the determination of which cases to bring, which arbitrators to choose and which cases to settle,"[51] member states should consider banning certain types of TPF entirely from ICSID arbitration.

Rule 14 – Method of Constituting the Tribunal

COLOMBIA **JUNE 10, 2019**

Colombia sugiere que esta Regla incluya los requisitos que deben tener los árbitros para aceptar llevar un caso de controversias de inversión. Al respecto, Colombia ha manifestado en diferentes ámbitos y foros la necesidad de contar con reglas claras que impidan desde el inicio del procedimiento la elección de árbitros que no sean idóneos para llevar un caso.

En este sentido, la Regla 22 debería desarrollar un reglamento que oriente claramente las condiciones que deben tener los árbitros, en términos de imparcialidad, legitimidad, independencia y credibilidad.

Los árbitros deben cumplir con reglas preestablecidas que aseguren, entre otros asuntos:

1. La ausencia de conflictos de interés.
2. Que en caso de recusación el proceso sea suspendido.

3. Tener disponibilidad real para responder en los casos que llevan. En este sentido, se sugiere hacer un análisis sobre el número de casos que un árbitro puede revisar y llevar adecuadamente de manera simultánea. El resultado sería una regla clara que incluya este número máximo, una vez se haya realizado este análisis objetivo.
4. Un mecanismo dinámico para contar con árbitros idóneos, con experiencia y con las mejores calidades jurídicas y éticas, que implique ampliar el ámbito de nombres, respondiendo a los intereses de las Partes, sin dejar de lado el prestigio.
5. Teniendo en cuenta que el arbitraje internacional de inversión es un mecanismo creado a través y en virtud de un acuerdo internacional, el conocimiento en derecho internacional debe ser requisito imperativo para la elección de un árbitro. Esto debe responder a la lógica de que la norma que fundamenta el mecanismo, su procedimiento y los temas sustanciales respecto de la protección en materia de inversión, es una norma de carácter internacional. Por esta razón, además de ser personas expertas en el procedimiento o en el sector que origina la controversia, deber serlo en derecho internacional público.
6. Como consecuencia de lo anterior, debe incluirse una regla que establezca claramente que los árbitros deben aplicar en sus fallos las normas y principios del derecho internacional público.
7. Los árbitros deben contar con tiempo razonable para emitir el laudo.

Esta reglamentación daría certeza y seguridad respecto de la constitución del Tribunal y en general, brindaría confianza en el sistema de arbitrajes internacionales de inversión. La adopción de un código de conducta para árbitros, que quede reflejado en las modificaciones al Convenio es no solamente aconsejable, sino necesario para generar un mejor entendimiento de las reglas, pues asegurará velar por los intereses de ambas partes, lo cual responde a su vez al origen y razón del arbitraje internacional como mecanismo para dirimir disputas.

GUATEMALA JUNE 10, 2019

Pese a que un Estado y varias firmas realizaron la observación en el sentido de disminuir el plazo de 60 días, a 30 o 45 días, es fundamental mantener el plazo original debido a que los Estados deben realizar procesos administrativos necesarios para la toma decisiones importantes, como es la constitución del tribunal arbitral.

"(…)(2)Las partes procurarán acordar cualquier número impar de árbitros y el método de su nombramiento. Si las partes no informan al o a la Secretario(a) General de un acuerdo dentro de los 60 ~~45~~ ~~60~~ días siguientes a la fecha de registro, el Tribunal será constituido de conformidad con lo dispuesto en el Artículo 37(2)(b) del Convenio."

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

5.4 PARTY APPOINTMENTS
The disputing parties' right to appoint arbitrators to arbitral tribunals is one of the factors that have led to concerns about the independence and impartiality of arbitrators and the legitimacy of the investment arbitration regime. In deciding on an arbitrator appointment, disputing parties tend to consider whether the candidate is likely to decide in their favour. Therefore, even when the arbitrator is not actually biased in their favour, there is an unavoidable appearance of bias. Individual arbitrators may be inclined to decide in the interest of the appointing party or be more generally inclined to decide either in favour of claimant investors or respondent states. These perceptions taint the credibility of the arbitration regime.

To avoid these problems, many modern investment treaties and treaty models are moving away from party-appointed arbitrators. An example is the EU proposal for an investment court system, incorporated in the Canada–EU CETA and the Vietnam–EU free trade agreement (FTA). In that proposal, the divisions of tribunal members that hear specific cases are appointed not by the disputing parties, but by the president of the permanent tribunal, who draws names from a pre-existing roster of tribunal members. Appointments are made "on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve."[37] Under the 2019 Dutch model BIT, all tribunal members are appointed (after consultation with the disputing parties) by an appointing authority, which is the Secretary-General of ICSID in case of arbitrations pursuant to the ICSID Convention or the Additional Facility. However, "in making appointments the Secretary-General of ICSID is not limited to the Panel of Arbitrators."[38]

In revising its arbitration rules, ICSID member states should consider providing for alternatives to the existing system of party-appointed arbitrators. This would distance the composition of the arbitral tribunal from the disputing parties, and help to resolve the issue of apparent bias of party-appointed arbitrators. ICSID could consider a roster system under which arbitrators are drawn only from a fixed list of potential arbitrators. Tribunals to hear cases would be formed either through a lottery system or by nomination by an independent appointing authority. In the latter case, the appointing authority should be independent not only from the disputing parties and non-disputing state parties, but also from the ICSID Secretariat and the World Bank Group.

Stakeholders have suggested that proposed AR 15[39] be revised to require that "any appointments by the parties under this provision be made from the ICSID Panel of Arbitrators." This would implement the roster system with arbitrators drawn from a compulsory list, as

suggested above (although not by lottery or nomination by an independent authority). The ICSID Secretariat, however, rejected the suggestion,[40] as it would contradict ICSID Convention Article 40: "(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38." Once again, ICSID member states should consider amending the ICSID Convention to establish a roster system, moving away from the party appointment.

Rule 16 – Assistance of the Secretary-General with Appointment

NO COMMENTS RECEIVED

Rule 17 – Appointment of Arbitrators by the Chair in Accordance with Article 38 of the Convention

COSTA RICA **JUNE 12, 2019**

Costa Rica agrees with the content of this Rule regarding the current practice of consulting the Parties before appointing the President. This could help to ensure that the preference of the Parties regarding a specific profile is considered. Including the phrase "as far as possible" could be interpreted as a facultative consultation to the Parties.

Rule 17 Appointment of Arbitrators by the Chair 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 Chair appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.
(2) The Chair shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.

(3) The Chair 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.

EUROPEAN UNION **JUNE 7, 2019**

14. While recognising that professional qualifications and expertise should be the primary factors in appointment of arbitrators, the European Union and its Member States would welcome a codification of the current ICSID practice to strive for more gender and geographical balance.

Rule 18 – Acceptance of Appointment

AUSTRALIA **JUNE 14, 2019**

Australia supports the expanded Arbitrator Declaration set out in Schedule 2 and welcomes work being undertaken by ICSID and UNCITRAL to develop a Code of Conduct for arbitrators.

CHILE **JUNE 18, 2019**

Sugerimos eliminar el término “nombramiento” ya que inadvertidamente y por error se repite el término.

Regla 18 - Aceptación del Nombramiento

(1) La parte que nombre a un o una árbitro notificará el nombramiento al o a la Secretario(a) General ~~el nombramiento~~ y proporcionará el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada.

COLOMBIA **JUNE 10, 2019**

La regla de aceptación de nombramiento de un árbitro deber ser consecuente con la Regla que establece la Constitución del Tribunal establecida en la Regla 21. Tanto para los árbitros como para las Partes tienen que ser claros los eventos en que pueden aceptar llevar un caso. Por esta razón, se sugiere que la Regla 26 incluya una redacción de la siguiente forma: “(…) (3) Dentro de los 20 días

siguientes a la recepción de la solicitud de aceptación de un nombramiento, el árbitro nombrado deberá aceptar el nombramiento, de conformidad con el cumplimiento de requisitos establecidos en el Código de Conducta/ Reglamento adjunto (…) a la Regla 22 de este Convenio".

COSTA RICA **JUNE 12, 2019**

As already suggested, Costa Rica considers that this provision should mention a possible Code of Conduct that should be attached to the Arbitrator Declaration in Schedule 2.

EUROPEAN UNION **JUNE 7, 2019**

8. The European Union and its Member States also invite the ICSID Secretariat to speed up the on-going work on the elaboration of a binding Code of Conduct for ICSID Arbitration (as referred to in §298 of Working Paper #1). Pending the availability of such a Code of Conduct, the European Union and its Member States suggest that the acceptance of appointment (Rule 18 of Arbitration Rules and arbitrator declaration in Schedule 2) also includes a commitment to comply with existing relevant ethic rules.

URUGUAY **MAY 31, 2019**

Con referencia al trabajo coordinado de la Secretaría del CIADI y la Comisión de Naciones Unidas sobre Derecho Comercial (UNCITRAL) para la elaboración de un código de conducta común sobre independencia e imparcialidad de los árbitros y decisores, se toma nota de los avances y se alienta a continuar con esta importante labor.

En segundo lugar, con relación al contenido de la declaración, la Secretaría informó de la nueva redacción propuesta, que exige al árbitro clarificar su participación en casos inversionista-Estado en los que ha participado hasta el presente, incluso aquellos que están en curso, al tiempo que introduce la obligación de confirmar su disponibilidad durante los próximos 24 meses.

A este respecto, la delegación de Austria solicitó que la declaración propuesta contenga una revelación explícita de la relación del árbitro con otros casos o firmas legales, a efectos de reforzar la cláusula residual contenida en el numeral 4(b), al tiempo de reclamar que también se declare su participación en litigios Estado-Estado. Asimismo, Indonesia se hizo eco de este comentario, solicitando

que la declaración sea más explícita y requiriendo que el tema continúe abierto a la discusión de las partes. La delegación de Uruguay suscribe esta posición y realiza un llamado para lograr que la declaración sea más sustancial y permita conocer mayor información acerca de la actuación de los árbitros en anteriores casos.

IISD APRIL 12, 2019

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

5.0 Independence and Impartiality
Ensuring that investment arbitrators are independent and impartial is among the most fundamental requirements if arbitration is to be perceived as a legitimate means to resolve investor–state disputes. The community of international lawyers acting in investment arbitrations—whether as arbitrators or as counsel—is relatively small. In this context, high standards to avoid actual or apparent conflicts of interest of arbitrators, and ensuring that they can render decisions independently and without bias is critical. These issues have become priorities for states and other stakeholders concerned with the fairness and legitimacy of investment arbitration.

An increasing number of modern investment treaties and models adopt approaches aimed at raising independence and impartiality standards for investment arbitrators. For example, the Canada–European Union Comprehensive Economic and Trade Agreement (CETA),[31] in addition to creating a standing tribunal for the adjudication of investor–state disputes, sets comprehensive ethics standards for tribunal members. CETA Article 8.30 determines that tribunal members must comply with the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration. Importantly, it also provides that, "upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement." This provision was designed to resolve the very frequent and critical "double-hatting" problem—lawyers simultaneously serving as arbitrators and counsel in investment arbitrations. In addition, instead of giving co-arbitrators the power to decide on challenges to a tribunal member, CETA gives such decision-making power to the President of the International Court of Justice. Another example is the 2019 Dutch model BIT, which establishes several professional and ethical requirements for tribunal members, including compliance with the IBA guidelines and a clear prohibition on double-hatting: "Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement."[32]

ICSID member states should revise ICSID rules to provide for stricter standards of independence, impartiality and avoidance of conflicts of interest of arbitrators. They should begin by amending the ICSID Convention and rules to forbid the arbitrator–counsel

dual role. They could then incorporate by reference an existing set of ethics rules for arbitrators or develop ICSID's own code of conduct for arbitrators.

5.1 DOUBLE-HATTING: ARBITRATOR–COUNSEL DUAL ROLE

Proposed AR 26(3)(b) on Acceptance of Appointment requires a party-appointed arbitrator to "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." The declaration referred to is the Arbitrator Declaration contained in WP #2, v. 1, p. 850–851. Instead of prohibiting the arbitrator–counsel dual role, it merely requires the arbitrator to disclose "investor–state cases in which [the appointee has] been or [is] currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator, or expert" (Arbitrator Declaration, para. 4(b)).

Some stakeholders have suggested amending the grounds and standard of disqualification in AR 22 on Decision on the Proposal to Disqualification, or providing that double-hatting "be deemed a fact indicating a manifest lack of the qualities required in an arbitrator." However, the secretariat rejected these proposals, arguing that the grounds for disqualification are established in the ICSID Convention and their alteration would require an amendment to the treaty, not the ARs.[33] ICSID member states should keep these considerations in mind and consider discussing amendments to the ICSID Convention in this regard.

5.2 CODE OF CONDUCT

Other stakeholders proposed including principles to regulate arbitrator conflicts of interest in proposed AR 12(1) on Constitution of the Tribunal. The secretariat again failed to adopt the suggestion, arguing that "ICSID and UNCITRAL Working Group III Secretariats are currently working on a background paper concerning a Code of Conduct for arbitrators. This Code could be incorporated in ICSID cases through the Arbitrator Declaration, once consensus is reached."[34] ICSID member states should ensure expedient agreement on a code of conduct that is binding on all arbitrators and annulment committee members, building on existing instruments.[35]

5.3 DISQUALIFICATION OF ARBITRATORS

[see comment under AR 22]

5.4 PARTY APPOINTMENTS

[see comment under AR 15]

Rule 19 – Replacement of Arbitrators Prior to Constitution of the Tribunal

CHILE **JUNE 18, 2019**

Proponemos el cambio destacado para reflejar adecuadamente el texto en sus versiones en inglés y francés.

Regla 19 - Reemplazo de Árbitros con Anterioridad a la Constitución del Tribunal

(1) En cualquier momento antes de que se constituya el Tribunal:
(b) una parte podrá reemplazar a ~~cualquier~~ un o una árbitro que haya nombrado; o

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Rule 20 – Constitution of the Tribunal

NO COMMENTS RECEIVED

Chapter III – Disqualification of Arbitrators and Vacancies

NO COMMENTS RECEIVED

Rule 21 – Proposal for Disqualification of Arbitrators

CANADA **JUNE 10, 2019**

Canada appreciates the reintroduction of the automatic suspension during challenges as this is the best way to ensure the fair treatment of the parties and the efficient conduct of the arbitration. Canada further notes that dilatory challenges are best dealt with in other ways, including having clearer rules on conflicts of interests, promoting a better understanding of the basis for disqualification through the publishing of decisions on disqualification, and through the imposition of interim costs awards.

CHILE **JUNE 18, 2019**

De acuerdo con la enmienda, pero se sugiere cambio de redacción en la versión en español.

Regla 21 - Propuesta de Recusación de los o las Árbitros

(1) ~~Una~~ Cualquiera de las Partes podrá presentar una propuesta de recusación de uno o más árbitros ("propuesta") de conformidad con el siguiente procedimiento:

COLOMBIA **JUNE 10, 2019**

Nueva Regla 21: La propuesta de Colombia fue acogida en los siguientes términos:
(2) El procedimiento se suspenderá hasta que se emita la decisión sobre la propuesta, salvo que las partes acuerden continuar con el procedimiento en todo o en parte.

EUROPEAN UNION **JUNE 7, 2019**

15. The European Union and its Member States take note of the fact that the proposal not to automatically suspend the proceedings pending a disqualification proposal has not found the support of a majority of ICSID members. We consider that in view of more and more frequent challenges of arbitrators and the resulting delays of ISDS proceedings, ICSID's original proposal had merit. We would have preferred to see this proposal maintained. In order to maintain the balance with the requirement of safeguarding the legitimacy of the process, we propose the introduction of additional language providing that if the challenge results in a disqualification, any order or decision issued by the Tribunal, as well as any taking and hearing of evidence while the proposal was pending, should automatically be reconsidered by the reconstituted Tribunal.

GEORGIA **JUNE 8, 2019**

Georgia maintains its position regarding automatic suspension of arbitration proceedings during the proceedings on disqualification (See Georgia's comment to Working Paper #1). As suggested in our previous comment, there can be situations when the proposal for

disqualification is filed 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.
We still believe that some middle approach can be found: if the timing on the proceedings allows, procedural calendar may be maintained but powers of the arbitral tribunal to issue decisions suspended. This decision could be made by the Chairman of the Administrative Council or the Secretary General, as appropriate, upon the request of the part. This could be a good possibility to on the one hand, avoid unnecessary prolongation of proceedings and the delay of the final resolution of the case, and on the other hand, a good tool to disincentives a party to use the procedure of disqualification for dilatory tactics on the matter.

HAITI MAY 20, 2019

La délégation haïtienne réitère son opposition à ce que l'instance puisse continuer après le dépôt de la demande de récusation même avec l'accord des parties. Cet acte introduit immanquablement une inimitié entre l'arbitre récusé et la partie récusante, creusant davantage la défiance entre les parties et le tribunal. On peut même craindre que l'arbitre récusé nourrisse à partir de là un parti pris à l'encontre du récusant, nuisant, *ipso facto*, à l'impartialité des décisions. Par ailleurs cela entraine une fragilité des décisions sur lesquelles il faudra revenir en cas d'admission de la demande de récusation. De tout ce qui précède, la République d'Haïti préconise que l'instance soit suspendue automatiquement dès le dépôt de la demande de récusation, purement et simplement. La rédaction suivante est de ce fait proposée, *L'instance* est *suspendue jusqu'à ce qu'une décision sur la proposition ait été prise. ~~Sauf si les parties conviennent de poursuivre l'instance en tout ou partie.~~*

KOREA, REPUBLIC OF JUNE 28, 2019

Korea supports the automatic suspension of proceedings in the instance of a proposal for the disqualification of an arbitrator as currently prescribed in Rule 21(2). In Korea's opinion, this approach better ensures the legitimacy of the arbitral proceedings, and also shows better compatibility with the automatic suspension of the proceedings in case of vacancy of the Tribunal as provided by Rule 25(2).

MEXICO **JUNE 24, 2019**

México está de acuerdo con la propuesta de suspender el procedimiento hasta en tanto se emita la decisión sobre la propuesta de recusación de los o las árbitros, prevista en la regla 21. México agradece al CIADI las adecuaciones a esta regla.

NATALIE PITA **JUNE 10, 2019**

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

This commentary is an excerpt of a forthcoming student note in Volume 30, Issue 1 of the Duke Journal of Comparative and International Law. It shows that the current rules for arbitrator disqualifications, which automatically suspend the arbitration proceedings, are a direct contributor to the high costs and long proceedings in ICSID and argues that failing to eliminate the automatic suspension of proceedings is simply putting off a change that will inevitably need to be made. The average delay created by an arbitrator challenge is eighty-one days.[1] With individual cases seeing anywhere from one to nine arbitrator challenges, this delay can quickly become unwieldy.[2] However, ICSID has proposed two different remedies to this problem, which could replace the original rule: the WP # 1 proposal would provide a much-needed contribution to increasing ICSID's efficiency, but the WP # 2 proposal is a little more than an entrenchment of the status quo. As explained below, ICSID should adopt the WP # 1 proposal to continue the proceedings in the face of arbitrator challenges.

I. ICSID Reform Proposal

The original rule for arbitrator disqualification stands in stark contrast to the proposed changes in their initial form. However, the proposal eventually drifts back to the status quo. The procedural status quo – still using the original rule – provides a murky avenue for parties to delay proceedings: even though the actual disqualification process is unclear, it is accompanied by an automatic suspension of the arbitration until the conflict is resolved. The first set of proposed changes provided both procedural clarity and eliminated automatic suspension. These proposals drew the ire of select vocal opponents, who successfully lobbied for a more tempered shift away from the status quo. The latest round of proposals, while offering some additional procedural clarity, therefore continue automatic suspensions.

In comments during the proposal process, multiple Member States expressed concern with parties, and particularly States, launching arbitrator challenges as a "strategic tool" to buy additional time during the proceedings.[3] Parties are increasingly using arbitrator challenges not as a method of ensuring the integrity and fairness of the proceedings, but rather as a technique of "procedural gamesmanship" to delay the proceedings or frustrate the opposing party.[4]

ICSID has provided two distinct alternatives for upgrading the process for arbitrator disqualification and, in particular, working to mitigate what ICSID referred to in WP # 1 as the "disruptive effect" that they have on the proceedings: Rule 29 and Article 21.[5] Article 21 is an updated version of Rule 29, but changes in other articles in the proposal created changes in the rule number.

Proposed New Rule: WP # 1 Rule 29
The original proposal in WP # 1, Rule 29, eliminates the current Convention's policy of an automatic suspension in the case of a request that an arbitrator be disqualified.[6] It instead specifies that the proceedings will continue, unless the parties agree to suspend the proceedings.[7] In the case that the member in question is disqualified, either party may request that the reconstituted tribunal reconsider any order or decision issued by the tribunal while the proposal was pending.[8]

Rule 29 also lays out time restrictions missing in the current provision. Under this new rule, a proposal for disqualification must be filed after the constitution of the tribunal and within twenty days after the later of the tribunal's constitution or the date on which the party challenging the arbitrator "first knew or first should have known of the facts on which the proposal is based."[9]

Proposed New Rule: WP # 2 Article 21
The authors of the draft rules reversed course in Article 21 of WP # 2, replacing the language previously proposed in Rule 29. Article 21 reinstituted the automatic suspension in the draft rule.[10] This alteration was made in light of comments submitted by Member States and the public both in favor of and against the proposal.[11] This reverses the default rule in WP # 1. Under that proposal, the proceedings are continued unless the parties agree otherwise. In WP # 2, the proceedings are suspended unless the parties agree otherwise. The latter proposal would do nothing to prevent the use of an arbitrator challenge as a guerilla tactic, as a party using such a challenge merely to delay proceedings would never agree to carry on regardless.

The WP # 2 proposal seems to represent some sort of middle ground for ICSID, which believes that the proposed WP # 2 rule would "allow the parties to agree to continue with all or part of the case schedule" but also "ensure that a challenge has minimal impact on the overall time to complete the arbitration."[12]

II. The current rules create an undue time and cost burden on the parties involved in an investment arbitration.
An automatic suspension of proceedings in the case of an arbitrator challenges increases the time and cost of an investment arbitration proceeding.
The proposals regarding the process of arbitrator challenges aim at addressing the concern that ICSID arbitration is not sufficiently time nor cost effective.[13] ICSID had registered 735 cases under the ICSID Convention and Additional Facility Rules as of April 26, 2019, and eighty-five of those cases have had at least one arbitrator challenge. This works out to 11.6% of all cases seeing an

arbitrator challenge – and the accompanying automatic suspension. Some of these cases have had multiple challenges, resulting in a total of 146 arbitrator challenges.[14] An estimated sixty-eight percent of these challenges have been made to one member of the Tribunal, but there is an increasing number of challenges to the majority of or all of the Tribunal and in multiple challenges in a single case, sometimes with respect to the same arbitrator.[15] This trend mirrors the increase in the number of cases overall.[16]

The incentives for raising the complaint are high for parties that simply want to delay the challenge, as a challenge at an advanced stage in the arbitration involves significant disruption and prejudice.[17] Although proposals for arbitrator disqualification have been as brief as only one day, as seen in *Olguín v. Paraguay*, a case in which the arbitrator immediately resigned following the filing the proposal for arbitrator disqualification, the typical delay is much longer. The range of delay extends up to a high 260 days in Carnegie Minerals (Gambia) Ltd. v. Rep. of The Gambia.[18] A proposal for disqualification of an arbitrator takes, on average, eighty-one days, or almost three months. Because twenty-five cases with a proposal for disqualification actually involved multiple arbitrator challenges, a case that involves at least one proposal for disqualification is delayed for an average of 103 days, or almost three and half months.[19] These delays are added onto proceedings that are already lengthy.[20]

The extra time and cost that arbitrator challenges create are unreasonable because they rarely pay off in the form of successful challenges.

Although the arbitrator challenges often create extensive delays and cost increases, this typically does not have any impact on the Tribunal's constitution, as these proposals for disqualification are rarely successful. Of the 146 arbitrator challenges that have been made public, one is currently pending, two were never decided upon because the proceedings were discontinued, and only five have been upheld.[21] In 106 of the remaining cases, the arbitrator challenge was declined, leaving only a delayed proceeding and an increased total cost for the parties.[22] While some of these challenges may have been an attempt on the part of one of the parties to ensure the independence and impartiality of the Tribunal, with only 3.4% of arbitrator challenges actually being upheld, there is a concern that many of these proposals for disqualification are merely frivolous challenges intended to exhaust or frustrate one of the parties.[23]

This stands in stark contrast to other major international arbitral systems. Many of these institutions do not publish their challenge decisions, but some general trends are still known.[24] At the United Nations Commission on International Trade Law (UNCITRAL), thirty to forty percent of arbitrator challenges have been successful.[25] The London Court of International Arbitration (LCIA) has published some anonymized summaries of arbitrator challenges decided by the court between 1996 and 2017, which show that challenges were made in less than two percent of the cases before the court and were only successful, either in whole or in part, in about twenty-three percent of those cases.[26] This shows that ICSID challenges are more unlikely to succeed than challenges under the rules of most other international arbitration institutions.[27] From 2013 to 2015, the Stockholm Chamber of Commerce (SCC) made thirteen decisions on arbitrator challenges, excluding decisions made in still-ongoing arbitrations, and upheld four of them, or thirty-one percent.[28] It is not clear how many cases have come before the SCC, and arbitrations before the institution are confidential.[29]

Furthermore, the International Chamber of Commerce (ICC) allows for the examination of an individual's independence and impartiality both when they are appointment for a position as an arbitrator and then during the proceeding, if they are challenged by one of the parties.[30] The confirmation of the arbitrator is denied in the majority of these challenges that occur at the time of appointment.[31]

The process of automatic suspension that creates the extra time and cost of investment arbitration proceedings is unusual.
No other major arbitration rules provide for the automatic suspension of proceedings following an arbitrator challenge, but rather provide only for the possibility of suspension.[32] The American Arbitration Association-International Centre for Dispute Resolution, ICC, LCIA, Singapore International Arbitration Centre (SIAC) and SCC rules do not mention suspension at all.[33] On the other hand, the China International Economic and Trade Arbitration Commission (CIETAC) Rules specify that who has been challenged shall continue to serve on the Tribunal until the CIETAC Chairman has made a final decision on the proposal for disqualification, and the Hong Kong International Arbitration Centre (HKIAC) Rules state that the proceeding may continue pending decision on the challenge.[34]

III. Rule 29, as proposed in WP # 1 solves the problems of increased proceeding time and costs that arbitrator challenges, as well as creates ancillary benefits.
Adopting Rule 29 proposed in WP # 1 would be a substantial step towards increasing the efficiency of ICSID arbitrations and decreasing the length of ICSID arbitrations by weeks or even months. Furthermore, not only will the number of challenges decrease, but the challenges that are brought will be less disruptive. Despite what some other commentators have argued, the current time limits, and even the time limits outlined in WP # 2, are not sufficient to prevent extensive delays, as discussed below. Additionally, the negative impact of adopting WP # 1 would be minimal, and it would not call into question the legitimacy of decisions made by the Tribunal as much as some critics believe.

Rule 29 would decrease the overall number of challenges.
Under this rule, an average delay of eighty-one days for every arbitrator challenge would be a concern of the past, a notable improvement considering that even the current ICSID Secretary-General anticipates that the number of arbitrator challenges will only continue to rise.[35] Adopting this proposal will eliminate incentives parties have to bring challenges simply to delay the proceeding, thereby decreasing the overall number of challenges.

As previously mentioned, many arbitrator challenges are brought simply to delay the proceeding and frustrate the opposing party, which is supported by the high number of arbitrator challenges compared to the 3.4 percent success rate. With such a low success rate, many parties must file proposals for disqualification knowing they have a slim chance of winning. However, the delay and frustration

to the other party created by the challenge may be worth the increase in cost. Eliminating the automatic suspension of the proceedings would erase this incentive, leading to fewer overall challenges.

Rule 29 would reduce the number of arbitrators that resign after a party files an arbitrator challenge against them.
An ancillary benefit of the decreasing number of challenges is a subsequent decrease in the number of resignations: the 3.4% of unsuccessful challenges does not tell the entire story of arbitrator challenges. In twenty-eight of these cases, or nineteen percent of total arbitrator challenges, the challenged arbitrator resigned after the proposal for disqualification was filed.[36] A challenge that casts doubts on an arbitrator's impartiality and independence can have significant negative impacts on an arbitrator's reputation, even if the challenge is ultimately rejected.[37] In contrast, there are also some situations in which an arbitrator appears to collude with a party to resign, in bad faith.[38] Additionally, Charles Brower, an individual who has served as an arbitrator in a multitude of cases and had been challenged six times, has been asked to resign because a party did not want to finance challenge proceedings, and states that is important for arbitrators to speak with the party that appointed them and offer to resign.[39] Brower has also resigned before, also at the appointing party's request, so that the party that appointed him could adhere to other agreements and to ensure that no future award could be challenged on the grounds that the Tribunal was not properly constituted.[40] While there seems to be a connection between the resignations and the proposals for arbitrator disqualifications, it is unclear how much of this related to the merits of the proposal instead of a conciliatory attitude of the challenged arbitrator.[41]

With a lower number of challenges altogether, there will be fewer opportunities for arbitrators to resign as a result. Nineteen percent of challenges currently cause an arbitrator to resign. This is an unfavorable outcome, since it is unclear how many of these arbitrators would actually be disqualified if the Tribunal had an opportunity to decide on the disqualification proposal. Having its first-choice arbitrator resign without sufficient concerns with their independence and impartiality deprives a party of its autonomy, which is one of the biggest reasons that parties enter into investment arbitration.

The challenges that Rule 29 would not eliminate would be less disruptive to the arbitral proceedings than under the current rule.
Furthermore, the challenges that are still brought would not be nearly as disruptive, since the enormous delay that many proposals for disqualification create will be eliminated with the suspension of the automatic suspension. Many Member States recognized this potential for increased efficiency in their public written comments, and therefore supported the WP # 1 proposal, with or without a slight modification.[42] For example, both Australia and Austria explicitly expressed the opinion that the elimination of the automatic suspension of proceedings would "the disruptive effects" that the current rules create.[43] The European Union also saw "merit" in ICSID's efforts to speed up procedures by eliminating the automatic suspension.[44]

WP # 2's term limits do not eliminate the need for Rule 29's continuation of the proceedings.

Guglielmino's comment argues that eliminating the automatic suspension of proceedings is unnecessary when the new rule also established fixed and short terms to make suspension during the qualification decision insignificant.[45] However, WP # 2's new time limits narrowing the window in which a party can file a proposal for arbitrator disqualification are not sufficient for combatting the extensive delay arbitrator challenges create. Even with these limitations, there can still be a delay in the proceedings of weeks or even months while the remaining arbitrators, or, if necessary, the Chairman, decides on the arbitrator proposal. Additionally, with many cases now involving multiple challenges to arbitrators, even adhering to these fixed and short terms can add weeks or months to the time of the proceeding. For example, *ConocoPhillips v. Argentina* had eight different arbitrator challenges.[46] This resulted in a total delay of 403 days, or just over thirteen months.[47] *Pey Casado v. Chile* saw the most proposals for disqualification with nine arbitrator challenges, although not all separate, which were made over a span of nineteen years.[48] The proceedings were suspended for 351 days because of arbitrator challenges, and this number does not include the first two challenges, the time frames of which were not made public.[49]

Adopting Rule 29 would not call into question the legitimacy of the tribunal's decisions.
Finally, Member States, including Canada, Costa Rica, and Mexico, and individual commentators such as Guglielmino have expressed concern adopting WP # 1 might impact the legitimacy of the Tribunal, since arbitrators would still be able to discuss jurisdiction and merits of the case while the proposal for disqualification is still pending.[50] For example, Argentina called it "highly inappropriate" to allow the proceeding to continue pending a decision on an arbitrator challenge.[51] However, this concern should not prevent ICSID from adopting WP # 1's proposal for three main reasons: WP # 1 would still increase efficiency overall, ICSID had not experienced questions of legitimacy in proceedings that have continued, and other arbitral institutions have not experienced problems with legitimacy.

While the legitimacy of the Tribunal may be a concern in those cases in which the arbitrator challenge is upheld, it is important to note that only 3.5% of those challenges are successful. These concerns could be completely alleviated by a slight modification to WP # 1, as recommended by Canada, that would allow either party to ask the Tribunal to review any decisions a disqualified arbitrator was involved in. While, as Colombia and Guatemala recognize and express concern about, this would require an increased delay in those cases where the proposal for disqualification was upheld, this would be significantly outweighed by the decrease in delay seen in the vast majority of cases in which the proposal for arbitrator disqualification is declined.[52] Again, only 3.5% of challenges are successful; still others would be relatively minor and not material to the case, so those, too, would not need to be reconsidered. This leaves us with few instances in which any decisions would have to be reconsidered, with a resulting delay. On the other hand, the vast majority of cases would see a significant improvement in efficiency under WP # 1. Singapore recognized the disparity between the number of successful arbitrator challenges and the number of total challenges, and noted the proposed elimination of the automatic suspension "is more likely than not to increase the efficiency of the disqualification process."[53] Even the delay in the cases where an arbitrator was

disqualified could be minimized if the parties agree to suspend the proceedings, which may happen when both parties realize that there could be an issue with an arbitrator's impartiality and independence.

Some parties have decided to continue with proceedings even under the current rule, and none of these cases have experienced major concerns with legitimacy. This is permissible under Article 44 of the Convention, which allows parties to agree to deviate from ICSID Rules.[54] In *Salini v. Jordan*, the parties continued with the previously scheduled session of the arbitration proceeding even after one of the parties followed an arbitrator challenge.[55] They met informally during this session to agree on procedural issues such as bifurcation of the proceeding and the schedule for the submission of written proceedings.[56] After the challenged arbitrator resigned, the reconstituted Tribunal was presented with and adopted the procedural agreements that had already been reached.[57] In *Carnegie v. Gambia*, the party filing the challenge to the arbitrator stated that it did not want the proposal for disqualification to interrupt the proceedings.[58] Accordingly, both parties filed briefs on the merits of the case, which meant that no changes were made to the timetable that the parties had originally agreed to.[59]

The fact that these cases have been able to successfully continue with proceedings despite an arbitrator challenge suggests that eliminating the automatic suspension will not affect the tribunal's legitimacy, since parties have been able to successfully take care of both procedural and substantive matters in the above examples. Part of the reason for this is that arbitrator challenges typically occur early in the proceedings.[60] Facing these challenges earlier in the proceedings makes it even less likely that a challenged arbitrator who is later disqualified will take part in deciding on a matter that will call into question the Tribunal's legitimacy.

Finally, as previously mentioned, no other major arbitral institution provides for an automatic suspension of the proceedings.[61] None of these other arbitral institutions have faced major legitimacy problems, and therefore ICSID should not prioritize these unsubstantiated concerns over the efficiency problems it is currently facing.

IV. Conclusion

In light of these considerations, ICSID should adopt a slightly modified version of the WP # 1 proposal. ICSID should eliminate the automatic suspension of the proceedings, but it should add to the provision a clause that requires the newly constituted Tribunal to reevaluate any decisions in which a disqualified arbitrator was involved, if the arbitrator challenge is successful, in order to minimize concerns with legitimacy.

ICSID has rightly decided to address the concerns with efficiency that many Member States have started to express. The empirics in this commentary show that arbitrator challenges are a notable source of inefficiency within the rules. The rules for arbitrator challenges have remained largely untouched for fifty-one years. Now is the opportunity to make a change that will make a tangible impact on ICSID proceedings.

Rule 22 – Decision on the Proposal for Disqualification

CANADA JUNE 10, 2019

Canada notes the proposals made to provide further clarity with respect to the grounds for disqualification under the Convention. Canada further notes that in paragraph 183 of the Working Paper, the Secretariat has suggested that such grounds cannot be included because they would require an amendment of the Convention. Canada respectfully disagrees that the Convention prohibits further specificity in the Arbitration Rules. Article 57 of the Convention provides "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." Article 14 provides, in relevant part, "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." Thus, it is clear that Article 57 would prevent the Arbitration Rules from prohibiting disqualification on one of these grounds. However, interpreted in line with the Vienna Convention, Article 57 does not prohibit the Arbitration Rules from providing further specificity on what circumstances might be indicative of an ability to "exercise independent judgment" or of a person who is not of "high moral character."

Notwithstanding the above, Canada believes it would be more productive to allow for consideration of emerging codes of conduct, as well as the disclosures make by the arbitrator and disputing parties, rather than trying to list all possible factors to be considered. Canada suggests the following language be added to Rule 22: "The decision on a proposal for disqualification shall be reasoned and take into account the disclosures made by the arbitrator and disputing parties, any codes of conduct applicable to the arbitrators and the disputing parties and any other relevant guidelines on conflicts of interest appropriate under the circumstances."

IISD APRIL 12, 2019

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

5.0 Independence and Impartiality
[see comment under AR 18]

5.1 DOUBLE-HATTING: ARBITRATOR–COUNSEL DUAL ROLE

Proposed AR 26(3)(b) on Acceptance of Appointment requires a party-appointed arbitrator to "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." The declaration referred to is the Arbitrator Declaration contained in WP #2, v. 1, p. 850–851. Instead of prohibiting the arbitrator–counsel dual role, it merely requires the arbitrator to disclose "investor–state cases in which [the appointee has] been or [is] currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator, or expert" (Arbitrator Declaration, para. 4(b)).

Some stakeholders have suggested amending the grounds and standard of disqualification in AR 22 on Decision on the Proposal to Disqualification, or providing that double-hatting "be deemed a fact indicating a manifest lack of the qualities required in an arbitrator." However, the secretariat rejected these proposals, arguing that the grounds for disqualification are established in the ICSID Convention and their alteration would require an amendment to the treaty, not the ARs.[33] ICSID member states should keep these considerations in mind and consider discussing amendments to the ICSID Convention in this regard.

5.2 CODE OF CONDUCT

[see comment under AR 18]

5.3 DISQUALIFICATION OF ARBITRATORS

Finally, stakeholders proposed that that "decisions on a proposal [for disqualification under proposed AR 22] should be subject to judicial review or validated by the Chair," and that "the non-challenged arbitrators should only decide the proposal if the parties agree, or that the parties be able to agree on a different decisionmaker."[36] By removing the decisions on challenges to arbitrators from the co-arbitrators or the Chair to another decision-maker, these proposals could enhance the (perceived) independence and impartiality of ICSID tribunals. However, the ICSID Secretariat rejected these proposals, pointing to ICSID Convention Article 58:
"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 […]." ICSID member states should keep these proposals in consideration and evaluate the possibility of amending the ICSID Convention accordingly.

5.4 PARTY APPOINTMENTS

[see comment under AR 15]

Rule 23 – Incapacity or Failure to Perform Duties

CHILE **JUNE 18, 2019**

Se solicita revisar la traducción al español de esta regla. Si bien en inglés cambió de "*unable to perform*" a "*failed to perform*", la versión en español no sufrió modificaciones y por tanto en español puede que no se haya logrado el objetivo perseguido. Se sugiere la redacción alternativa que traduzca el término "*failed to perform*".

Regla 23 - Incapacidad o Imposibilidad de Desempeñar Funciones

Si un o una árbitro se incapacitara o no ~~pudiera~~ desempeñara las funciones de su cargo, se aplicará el procedimiento establecido en las Reglas 21 y 22.

Rule 24 – Resignation

NO COMMENTS RECEIVED

Rule 25 – Vacancy on the Tribunal

CHILE **JUNE 18, 2019**

Se sugiere aclarar el concepto de "etapa" del procedimiento en la Regla 25, párrafo 4.

Regla 25 - Vacante en el Tribunal
(…)

(4) Una vez que se haya suplido una vacante y el Tribunal se haya reconstituido, el procedimiento continuará a partir de la *etapa* a la que se había llegado cuando se notificó la vacante. Se reiniciará cualquier parte de una audiencia si el nuevo árbitro lo considera necesario para decidir algún asunto pendiente.

Chapter IV – Initial Procedures

Rule 26 – Orders, Decisions and Agreements

AUSTRALIA **JUNE 14, 2019**

Australia suggests that consideration might be given to moving the "horizontal rule" in Rule 26(4), regarding tribunals applying any agreement of the parties on procedural matters to Rule 2 General Duties.

COLOMBIA **JUNE 10, 2019**

Colombia está de acuerdo con esta inclusión: "El Tribunal consultará con las Partes antes de adoptar de oficio una resolución o decisión autorizada por estas Reglas".

Sin embargo, Colombia considera que sería necesario dejar claridad en que la consulta con las Partes no debe generar dilaciones en la emisión de las decisiones y documentos del Tribunal.

SINGAPORE **JUNE 21, 2019**

Singapore had made these points during the second meeting but is reflecting them here for avoidance of doubt:

(1) The term "conforms" in paragraph 4 could be replaced with "does not conflict" to better reflect the fact that the Convention and the AFR are the outer limit constraints on what the parties can agree to do.

(2) In terms of placement, we also suggested that paragraph 4 could in fact be a general rule on its own that is applied rather than a rule specifically relating to orders, decisions and agreements.

Rule 27 – Waiver

NO COMMENTS RECEIVED

Rule 28 – First Session

CHILE JUNE 18, 2019

Se propone que si los tres miembros del Tribunal no pueden celebrar la primera sesión, ésta se lleve a cabo entre el Presidente y las partes, y no solamente entre los miembros del Tribunal. Parece un poco contrario a la regla que se reúnan solamente los miembros del Tribunal, cuando el objetivo de la primera sesión es que las partes y el Tribunal acuerden las cuestiones procesales y haya una primera aproximación entre las partes y el Tribunal. Creemos que esto va más en línea con la eficiencia y celeridad que persiguen las enmiendas.

Regla 28 - Primera Sesión
(…)

(2) La primera sesión se celebrará dentro de los 60 días siguientes a la constitución del Tribunal, o cualquier otro plazo acordado por las partes. Si el o la Presidente(a) del Tribunal determina que no es posible convocar a las partes y a los otros miembros dentro de este plazo, la primera sesión se celebrará ~~exclusivamente~~ entre ~~los miembros~~el Presidente del Tribunal y las partes después de consultar a las partes por escrito respecto a la lista de cuestiones referidas en el párrafo (4), y de que el Presidente haya consultado con sus co-árbitros sobre cualquiera de esas cuestiones respecto de las cuales las partes no hayan podido tomar una decisión de común acuerdo.

Rule 29 – Written Submissions

CANADA JUNE 10, 2019

In paragraph 216 of the Working Paper, the Secretariat suggests that if the Claimant files its Memorial before the first session, there is a presumption that less time will be needed to file the Counter-Memorial. Canada does not believe that there is any basis for this

presumption and suggests that this be corrected in the next version of the Working Paper to ensure that Tribunals do not presume that this statement is accepted as true by the Contracting States.

Canada also the rule in Rule 29(4) with respect to unscheduled written submissions, and in particular the requirement, for leave to be obtained by the Tribunal before they can be filed. In the last sentence of paragraph 217 of the Working Paper, the Secretariat suggests that this rule makes clear that the leave must be obtained prior to the written submission being filed. Canada agrees with this approach, otherwise the Tribunal has seen the unscheduled written submission, rendering the decision on leave essentially meaningless. However, Canada suggests that this is not clear from the text of the rule as written. Canada suggests an additional sentence at the end of paragraph 4, stating "The application may not include or attach the written submission, observation or supporting documents with respect to which permission to file is being sought."

CHILE JUNE 18, 2019

Se sugiere precisar que dentro del numeral 2, respecto a los petitorios, se exija incluir una estimación del monto de la compensación pecuniaria pretendida si la hubiera.

Asimismo, ratificamos que la propuesta del WP1 de considerar la solicitud de arbitraje como el memorial de demanda, no debe ser incorporada pues podría generar una asimetría significativa en el tiempo que disponen las partes para entender el alcance total de la controversia y preparar su caso. De igual manera, y por los mismos motivos (afectación al derecho a la defensa y al debido proceso) se sugiere eliminar l Regla (29)(3), pues sus efectos son los mismos que los de la Regla 29(2) del WP1. Si bien estamos de acuerdo en buscar maneras de agilizar el procedimiento, proponemos otras alternativas tales como:

1. Establecer un límite en la extensión de los escritos. Si bien la extensión de los escritos ha sido añadida en la Regla 28(4)(e) como uno de los elementos a ser discutidos durante la primera sesión, se considera que las reglas deberían establecer un límite de páginas, sobre la base de la práctica de los últimos 50 años del CIADI. Esto podría tener un impacto en el tiempo que soliciten las partes para preparar sus escritos y esperamos también, en el tiempo que tomen los tribunales en emitir sus decisiones y laudos.

2. Se recomienda establecer algunas consecuencias, pecuniarias u otras, en caso de incumplimiento de los plazos establecidos en las reglas para la emisión de las decisiones o laudos por parte de los tribunales y comités.

Regla 29 – Escritos
(…)

(2) El memorial deberá contener una relación de los hechos pertinentes, el derecho, los argumentos y petitorios, incluido el monto de la compensación pecuniaria pretendida, si la hubiera. El memorial de contestación contendrá una relación de los hechos pertinentes, lo cual incluye la aceptación o negación de los hechos declarados en el memorial y cualesquiera hechos adicionales pertinentes, una declaración del derecho en respuesta al memorial, los argumentos y petitorios. La réplica y la dúplica responderán al último escrito presentado.
~~(3)El memorial sobre el fondo o el memorial sobre excepciones preliminares podrán ser presentados en cualquier momento antes de la primera sesión.~~

COLOMBIA **JUNE 10, 2019**

Si bien la redacción cambió, el problema persiste con la nueva redacción en el párrafo (3): "(3) El memorial sobre el fondo o el memorial sobre excepciones preliminares podrán ser presentados en cualquier momento antes de la primera sesión".

Este párrafo implica que el memorial de demanda se presente antes de la primera sesión, significando que se reciba la demanda sin previo aviso y se cuente con menos tiempo para alistar la defensa requerida por el demandado.

Colombia se opone a esta figura y sugiere que las presentaciones de los escritos se sujeten al calendario procesal.

COSTA RICA **JUNE 12, 2019**

Costa Rica identifies an inconsistency between the resulting Rule 28.4.h and the resulting Rule 29.3 because in the former, the procedural calendar agreed in the first session shall establish dates for the written submission, whereas in the latter the Rule indicates that the memorial on the merits or on preliminary objections shall be filed before the first session. We appreciate the clarification of this inconsistency.

Costa Rica does not support the filing of any submission before agreeing a procedural calendar during the first session.

GUATEMALA JUNE 10, 2019

Fue un acierto suprimir el siguiente apartado "(…) (2) La parte solicitante podrá elegir que la solicitud de arbitraje se considere como el memorial. (…)".

No obstante, el nuevo numeral, resulta contradictorio a la Regla anterior sobre las cuestiones procesales que se discutirán en la primera sesión, siendo una de ellas las reglas de arbitraje aplicables, idioma y formato de los escritos, por consiguiente, ES IMPRESCINDIBLE que sea suprimido; el no hacerlo dejaría completamente desprotegidos a los Estados demandados, constituyéndose en una clara violación al derecho de defensa.

Además, limita el tiempo de respuesta para el peticionario.

~~"(…)(3) (4) El memorial sobre el fondo o el memorial sobre excepciones preliminares podrán ser presentados en cualquier momento antes de la primera sesión (…)".~~

HAITI MAY 20, 2019

La délégation haïtienne considéré que la terminologie dans un texte à caractère normatif ne doit point prêter à confusion et qu'il ne convient point de reproduire les erreurs de traduction ou de terminologie juridique contenus dans la Convention CIRDI.
De ce fait, si le mémoire introductif de la partie demanderesse est suivi d'un contre-mémoire qui est la réplique rédigée par la partie défenderesse, le demandeur qui désire y répondre produit alors une duplique auquel le défendeur répond par une supplique. L'adoption de cette terminologie permet d'utiliser les termes avec le sens qu'ils ont dans tout le droit processuel des différents Etats-Parties et dans la pratique des juridictions arbitrales. De ce fait la rédaction suivante est proposée :

Les parties déposent les écritures suivantes avec tous documents justificatifs
dans les délais fixés par le Tribunal :
(a) un mémoire *de la partie* requérante, sous *réserve du paragraphe (2) ;*
(b) un contre-mémoire *de l'autre partie ;*
et, à moins *que les parties n'en conviennent autrement ou que le Tribunal le juge nécessaire :*
(c) une ~~réponse~~ duplique de la partie requérante ; *et*
(d) une ~~réplique~~ supplique de l'autre partie.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Se considera que reducir los tiempos procesales del arbitraje en la medida que sea posible es un objetivo legítimo. No obstante, ello no debería afectar la equidad procesal y la seguridad jurídica.

La Regla 29(3), referida a la posibilidad de presentar el memorial sobre el fondo o el memorial sobre excepciones preliminares en cualquier momento antes de la primera sesión, puede generar una asimetría significativa en el tiempo que disponen las partes para preparar su caso. Esto es particularmente importante en el proceso de la coordinación y respuesta de los Estados en este tipo de controversias, quienes generalmente, por ser la parte demandada, empiezan a organizar su defensa cuando son notificados de la intención de iniciar un procedimiento de solución de controversias; sin embargo, es la notificación de arbitraje la que detona el inicio formal de la defensa dado que no todas las notificaciones de intención avanzan a las etapas ulteriores. Esto a diferencia de la parte demandante que, por ser la parte actora, tiene control respecto al momento en el que se activa el proceso de arbitraje y, por ende, de la preparación de su caso.

Es importante resaltar que la Regla 29(3) tiene los mismos efectos prácticos que la Regla descartada del WP1 referida a la posibilidad de la parte solicitante de elegir que la solicitud de arbitraje se considere como el memorial, por lo que las preocupaciones expresadas con anterioridad respecto a esta propuesta son también aplicables al WP2.

Por otro lado, consideramos acertado el volver a establecer como regla general que habrá dos rondas de escritos de las partes, salvo acuerdo en contrario de las partes (RA WP2 29(1)).

MEXICO JUNE 24, 2019

En la versión anterior de las enmiendas se proponía que la solicitud de arbitraje pudiera considerarse como el memorial. Como resultado de los comentarios de los países miembros, esta regla se modificó para quedar de la siguiente manera: “(3) El memorial sobre el fondo o el memorial sobre excepciones preliminares podrán ser presentados en cualquier momento antes de la primera sesión.”

Como justificación a esta regla, el WP#2 señala lo siguiente en el párrafo 216: “If either party chooses to file its memorial in advance of the first session, the Tribunal will fix the time limit for the counter-memorial at the first session. It is assumed that less time will be necessary for preparation of the counter-memorial after the first session as a result of the early filing.” [énfasis añadido] No obstante las modificaciones a la regla 29.3, México considera que las consideraciones expresadas en los comentarios presentados el 28 de

diciembre de 2018 persisten. Es decir, con base en esta regla, la parte demandada podría enfrentar una situación adversa en la definición del calendario procesal, específicamente para el tiempo requerido para la presentación del memorial de contestación. Por ejemplo, la parte demandante podría proponer que la demandada cuente con un tiempo reducido para la presentación de su escrito en virtud de la presentación temprana del memorial por parte del demandante. La justificación a la regla 29.3 señalada anteriormente parece apoyar este escenario contraproducente para la parte demandada: “It is assumed that less time will be necessary for preparation of the counter-memorial after the first session as a result of the early filing”.

Es importante tomar en cuenta que previo a la primera sesión tiene lugar un intenso trabajo de coordinación interna y preparación para la parte demandada, incluida la contratación de abogados externos y peritos, así como otros factores propios del arbitraje como el proceso de establecimiento del tribunal. Todos estos factores interfieren en la preparación del memorial de contestación previo a la primera sesión del tribunal. Por tanto, no debe suponerse que por el hecho de que la parte demandante presenta su memorial antes de la primera sesión la parte demandada requerirá menos tiempo para la preparación de su contestación de demanda.

Por lo tanto, México considera que para los Estados contar con cierta flexibilidad en los tiempos es necesario y justificado. Contar con plazos fijos acotados y más cortos podría tener implicaciones negativas para su defensa, ya que los Estados, a diferencia de los inversionistas, tienen que contactar a las autoridades o agencias para obtener información y documentación, y con ello poder preparar su defensa. También tiene que celebrar contrataciones que llevan tiempo, existen limitaciones en cuanto a ejercicios fiscales. Es decir, una serie de restricciones que el inversionista no tiene que enfrentar.

Por lo anterior, México sugiere la eliminación de la Regla 29.3.

Rule 30 – Case Management Conferences

AUSTRALIA **JUNE 14, 2019**

In Australia’s view, case management conferences could be a useful tool to increase the efficiency of arbitration proceedings, both in terms of cost and duration.

CANADA **JUNE 10, 2019**

Canada supports the introduction of case management conferences and suggests that specific mention of document production would be a useful addition to this rule in order to ensure that the Tribunal pay close attention to what is often an onerous and expensive process for both disputing parties. Canada suggests adding "manage any requests for the production of documents; or" as a new subsection (c).

COLOMBIA **JUNE 10, 2019**

La convocatoria quedó mandatoria, lo cual responde a los comentarios de Colombia. Sin embargo, Colombia insisten que la lista sea enunciativa.

Rule 31 – Hearings

Rule 32 – Quorum

NO COMMENTS RECEIVED

Rule 33 – Deliberations

CHILE **JUNE 18, 2019**

Se recomienda dejar explícito en las reglas que la o el Secretaria(o) del Tribunal puede estar presente en las deliberaciones del Tribunal, pero que cualquier otra persona que "tome parte" en las deliberaciones, puede hacerlo únicamente si ha habido previa notificación a las partes. La notificación no exigiría ninguna formalidad especial. Las deliberaciones son un momento esencial del procedimiento, por lo que sería importante que las partes conozcan quiénes participan en las mismas.

Regla 33 – Deliberaciones

(…)

(3) Solo los miembros del Tribunal tomarán parte en sus deliberaciones. Salvo el o la Secretario(a) del Tribunal, Nninguna otra persona será admitida, salvo decisión en contrario del Tribunal, la cual será previamente notificada a las Partes.

Rule 34 – Decisions Made by Majority Vote

NO COMMENTS RECEIVED

Chapter V – Evidence

Rule 35 – Evidence: General Principles

KOREA, REPUBLIC OF JUNE 28, 2019

Korea welcomes the addition of Rule 35 which embodies the general principles of the burden of proof. The principle that the party making a claim bears the initial responsibility of establishing that claim with sufficient evidence is a fundamental basis on which international arbitration stands upon.

Rule 36 – Disputes Arising from Requests for Documents

AUSTRALIA JUNE 14, 2019

Given the material impact that document production can have on the overall cost and length of proceedings, Australia considers that there may be value in including further guidance for tribunals in this regard. In addition, Australia considers that the rules should explicitly recognize exemptions from production for various types of confidential information.

Canada notes that document production can be one of the most costly and burdensome aspects of current international arbitral practice and may result in parties being compelled to collect, review and produce thousands of documents, only a small portion of which are actually material to the dispute and used as exhibits. The Secretariat should take this opportunity to provide guidance to disputing parties and Tribunals to improve existing document production practice.

The Arbitration Rules do not contain an absolute right to document production and Tribunals should be confident in their ability to deny or, if appropriate, modify unreasonable document requests without being accused of denying the requesting party a right to a fair hearing. Accordingly, Rule 36 should not be drafted to suggest that there is an automatic presumption that document production must occur but rather emphasize that a Tribunal should only order production of an appropriately limited and specific request for material and relevant documents.

Canada proposes the following language for Rule 36:

Requests to Produce Documents

1) A party may request that the Tribunal order the other party to produce either a specifically identified document or an appropriately limited category of documents.
2) The party from which the document or documents are requested shall be given an opportunity to provide reasoned objections to the request, including on the grounds that the requested documents are protected from disclosure by applicable privileges and laws.
3) The Tribunal shall grant a disputed request for documents only if the requesting party establishes to the satisfaction of the Tribunal that the request is:
   a. appropriately specific and limited in scope;
   b. only for relevant and material documents;
   c. timely and will not unduly delay or burden the proceedings; and
   d. not unreasonably burdensome in light of the materiality and likely probative value of the documents sought.
4) The Tribunal shall consider the efficiency and appropriateness of a party's document production requests, and the burden imposed on the other party in objecting to and responding to those requests, when allocating costs of the arbitration, even where the requesting party is ultimately successful.

CHILE JUNE 18, 2019

No tenemos una objeción general a la inclusión de esta nueva regla. Sin embargo, proponemos modificarla en el sentido de establecer claramente cuáles son los elementos mínimos que debe contener una solicitud de exhibición de documentos al momento de ser enviada a la otra parte, sin los cuales no debería ser atendida por el tribunal (explicar relevancia, pertinencia para el caso, acciones tomadas para obtener el documento, etc.). El objetivo es que se limiten los *fishing expeditions* y que la fase de exhibición de documentos (que además no es común a todos los sistemas legales), se vuelva lo menos onerosa posible.

COLOMBIA JUNE 10, 2019

Colombia observa la ambigüedad del literal e): "*Toda circunstancia relevante*" y sugiere que esta referencia incluya al menos una lista enunciativa.

Se aceptaron los comentarios de Colombia en el sentido de incluir frases sobre "relevancia e importancia" sobre la producción de documentos.

GEORGIA JUNE 8, 2019

Document production is one of the most painful stages of the proceedings; on some cases it can results in an unreasonably lengthy and costly exercise. It has been noted in paragraph 241 of the Working Paper #2 that the arbitral tribunal has a "power to grant, deny or modify the scope of the document production", however, in practice arbitrators tend to be reluctant to use their inherent powers to properly address the lengthy and/or unreasonable production requests or abusive conduct of the party during documents production process (fishing expeditions, dilatory tactics, obstructing the other party in preparing its case and directing its resources thereto by endless written exchange on document production, etc.).

It would be highly beneficial if this problem is somehow addressed in the rules or in a separate instrument issued within ICSID that could provide guidance to the tribunal and encourage arbitrators to use their inherent powers more effectively in addressing this problem.

HAITI MAY 20, 2019

En ce qui concerne l'objection à une demande de production de documents, la traduction de « timeliness » par « ponctualité » est malencontreuse car ce mot français traduit l'idée de quelqu'un qui effectue une tache exactement au moment où il lui est demande de le faire. Tandis qu'ici, il s'agit de savoir si cette demande de production a été produite en temps utile et non pas très tard de manière chicanière dans le seul but de faire durer la procédure.
L'alternative est la suivante. Soit les règles de procédure fixent un délai, comme dans le droit processuel interne, dans lequel la demande de production de pièces doit être effectuée ; soit il faut utiliser un mot français qui rende mieux l'idée contenue dans le terme anglais de « timeliness ». La délégation haïtienne propose de ce fait la rédaction suivante.

Le Tribunal statue sur tout différend découlant de l'objection d'une partie à la demande de production de documents de l'autre partie. Afin de trancher le différend, le Tribunal tient compte :
(a) de l'étendue et de ~~la ponctualité~~ l'opportunité de la demande dans le temps ;

ISRAEL JUNE 22, 2019

Israel believes that it is desirable to avoid unnecessary allocation of time and funds and to avoid abuse of this procedure. Thus, the right balance needs to be reached. We are of the view that proposed AR 36 should include explicit conditions upon which the parties can object to the production of documents, such as confidentiality and/or commercial secrets.

KOREA, REPUBLIC OF JUNE 28, 2019

Korea suggests adding an explicit reference to the power of the Tribunal to deny requests for documents. As many States have well pointed out, document production phases are prone to incur substantial time and costs due to unnecessarily sweeping document requests that often made by Claimants. Providing an explicit basis for the power to deny document requests will hopefully encourage the Tribunals to manage the proceedings in a more time and cost effective manner.

Rule 37 – Witnesses and Experts

AUSTRALIA **JUNE 14, 2019**

Australia suggests that further consideration might be given to disclosure requirements regarding the independence and impartiality of experts.

CHILE **JUNE 18, 2019**

Considerando que las relaciones de los expertos con las partes y/o con el tribunal han dado lugar a recusaciones, se solicita reconsiderar la propuesta de que los expertos revelen, desde el inicio, cualquier relación con las partes, los miembros del tribunal y el tercero financiador (de haberlo).

EUROPEAN UNION **JUNE 7, 2019**

16. The European Union and its Member States are of the view that experts and witnesses giving evidence in arbitration proceedings should provide a written declaration on their independence and impartiality, on past or present, direct or indirect relationships with the disputing parties, their counsel, members of the Tribunal and any other participant or third-party funder involved in the dispute.

Rule 38 – Tribunal-Appointed Experts

CANADA **JUNE 10, 2019**

Canada remains concerned about the use of tribunal appointed experts, particularly where they are used to provide evidence that was the burden of one of the disputing parties to provide. While tribunal appointed experts should be considered only in rare circumstances, Canada suggests that it is very important for the parties to know as much as possible about any proposed tribunal appointed expert, in order to ensure their full control over the process. Canada notes the comment in paragraph 254 of the Working Paper about qualifications, and the suggestion that these would likely be discussed in the consultations of the parties. However, Canada believes that this should be made explicit in the rule itself, and as such, suggests that paragraph 2 read: “The Tribunal shall

consult with the parties on the appointment of an expert, including on the terms of reference, fees, the expert's independence, qualifications, scope of work, and all other relevant information."

CHILE **JUNE 18, 2019**

Se sugiere introducir cambio de forma destacado con control de cambios para reflejar que la aplicación de la Regla 37(1)-(5) y (8) es obligatoria y no facultativa, y así hacerlo consistente con la versión en inglés.

Regla 38- Peritos(as) Nombrados(as) por el Tribunal

(5) Regla 37(1)-(5) y (8) se aplicará al o a la perito(a) nombrado(a) por el Tribunal con las modificaciones necesarias.

COLOMBIA **JUNE 10, 2019**

Colombia no considera necesario que el Tribunal nombre peritos de oficio.

El WP2 acoge la preocupación de Colombia sobre la revisión de los términos de referencia, pero en todo caso preocupa que el Tribunal ordene peritos adicionales, ya que la carga de probar las reclamaciones le corresponde a las Partes.

Colombia se sigue oponiendo. La regla es que las partes deben probar su caso y no deben excederse los costos, del procedimiento.

GUATEMALA **JUNE 10, 2019**

Se reitera que 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.

"(…)(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~~ será interrogado(a) en persona salvo que el Tribunal determine que otro medio para conducir el interrogatorio es apropiado en las circunstancias del caso. (…)".

ISRAEL JUNE 22, 2019

We contend that there is a need to strike a balance between the Tribunal's authority to appoint an expert (even without the parties' agreement) **and** the parties' obligation to provide the expert "with any information, document or other evidence, as the expert may require". That is, clear and restrictive provisions regarding the latter must be added (para. 3), or in the alternative, the Tribunal's appointment of an expert must require the parties' agreement (para. 2) (as opposed to a mere consultation).

Israel also reiterates its position that such an expert 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.

KOREA, REPUBLIC OF JUNE 28, 2019

Extensive use of Tribunal-appointed experts may undermine the adversarial system and the principles burden of proof, and may also substantially increase the time and costs of the proceedings. It is therefore proposed that Tribunal-appointed experts be limited to cases where both parties agree to its use.

The instances in which a Tribunal requires the use of an expert would in many cases be a situation where one party has failed to discharge its burden of proof regarding a specific issue. In such circumstances, the Tribunal should be encouraged to make a decision in accordance with the general principles of the burden of proof, rather than to seek to exercise any form of inquisitorial powers.

Notwithstanding the issue of whether Tribunal-appointed experts must require party consent, Korea proposes to add a further paragraph which states "In appointing an expert in accordance with paragraph (1) and admitting the report of that expert, the Tribunal shall give due consideration to: (a) the general principles of the burden of proof; and (2) the increase in time and costs incurred as a consequence of the appointment."

IISD APRIL 12, 2019

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

The proposed rule on Tribunal-Appointed Experts expressly allows a tribunal to "appoint one or more independent experts to report to it on specific matters within the scope of the dispute."[16] Although the provision "reflects ICSID practice on Tribunal appointment of independent experts" and "similar provisions can be found in other arbitration rules,"[17] it could lead to significant cost increases for the disputing parties. The rule specifies that "the Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert,"[18] and the ICSID Secretariat indicates that "the parties can always agree under proposed AR 26(4) that a Tribunal-expert not be appointed."[19]

Accordingly, to avoid cost increases that may be unnecessary, ICSID member states should consider explicitly stating in proposed AR 38 that tribunal experts may only be appointed subject to the agreement of both disputing parties.

Rule 39 – Visits and Inquiries

ISRAEL JUNE 22, 2019

In order to avoid the risk of adverse measures to State sovereignty, Israel wishes to reiterate that it deems it necessary to subject the execution of visits and inquiries to applicable domestic law.

Chapter VI – Special Procedures

Rule 40 – Manifest Lack of Legal Merit

AUSTRALIA JUNE 14, 2019

In Australia's view, the rules should contain an explicit presumption that where a claim manifestly lack legal merit the respondent shall be entitled to costs.

CANADA JUNE 10, 2019

The time limit to file an objection that a claim is manifestly without legal merit is currently only 30 days after the constitution of the Tribunal. Canada notes the Secretariat's comment that there is often a period of time between the Request for Arbitration and the constitution of the Tribunal. However, during this period, the Respondent State may only be beginning to organize its defence, and until a Tribunal is actually constituted it may not devote sufficient time to determining if a claim is without legal merit. In Canada's experience, there are a number of claims filed which never proceed to the full constitution of a Tribunal, and hence, Respondent States are right to be cautious in the expenditure of resources before a Tribunal exists. As a result, Canada suggests that the time limit for filing this objection be 60 days.

CHILE JUNE 18, 2019

Se propone incorporar a "la jurisdicción del Centro" en el párrafo 1 para que sea consistente con la versión en inglés y francés de la Regla 40, párrafo (1).

Regla 40 - Manifiesta Falta de Mérito Jurídico

(1) Una parte podrá oponer una excepción relativa a la manifiesta falta de mérito jurídico de una reclamación. La excepción podrá referirse al fondo de la reclamación, a la jurisdicción del Centro, o a la competencia del Tribunal.

COLOMBIA JUNE 10, 2019

Colombia insiste en la necesidad de bajar el umbral de "manifiesto" para evitar realmente demandas frívolas y si es del caso, regular el tema, de ser necesario adoptar un test. La necesidad de evitar reclamaciones de fondo ante demandas frívolas debe ser impulsado mediante una regla de los reglamentos que administra e CIADI.

KOREA, REPUBLIC OF JUNE 28, 2019

It is Korea's position that the 30-day deadline prescribed in Rule 40(2)(a) is too short. It is therefore suggested that the time limit for the submission of an objection on the grounds that a claim manifestly lacks legal merit be extended to 60 days.

The fact that a claim was dismissed under Rule 40 is a hallmark of the abusive nature of that claim. However, States have no choice but to respond to such claims at significant costs. It is highly necessary therefore, that Tribunals be given a strong indication that a dismissal on such grounds is a cause to award costs in favor of the Respondent. Korea believes that either one of the following options may achieve that objective without incurring problems of compatibility with Article 61 of the ICSID Convention.

A new paragraph or subparagraph may be added in Rule 40 which reads: "When a claim is dismissed due to a party's objection under paragraph (1), the Tribunal may award the relevant costs to that prevailing objecting party."

Rule 50(1)(a) may be modified to accommodate the dismissal of a claim according to Rule 40 as an example of an 'outcome of the proceeding': "the outcome on specific claims or arguments of any part of the proceedings or overall, including whether a claim was dismissed as manifestly lacking legal merit under Rule 40."

Rule 41 – Bifurcation

CANADA JUNE 10, 2019

In Canada's view, when a request for bifurcation is granted, it should always result in the suspension of any other phase of the proceedings unless the parties agree otherwise or special circumstances exist. This is the logical consequence of a Tribunal deciding that efficiency would be best served by bifurcation: it makes little sense to, for example, bifurcate liability from damages but then require the parties to engage in briefing on quantum before the Tribunal has rendered its decision on liability. Canada suggests rewriting Rule 41(e) as: "the Tribunal shall suspend any other part of the proceeding if it decides to bifurcate, unless the parties agree otherwise, or the Tribunal determines that special circumstances would render such suspension inappropriate."

COLOMBIA JUNE 10, 2019

Colombia insiste en la suspensión del procedimiento sobre el mérito, en caso de que el Tribunal haya decidido separar los trámites. Se considera importante que se decidan las objeciones preliminares antes de continuar con el mérito, con el fin de evitar costos adicionales contestando el fondo de la controversia.

En cuanto a la suspensión del procedimiento frente a aspectos de fondo, lo cual era una preocupación de Colombia, se aceptó que el procedimiento será suspendido mientras se resuelve la solicitud de bifurcación.

COSTA RICA JUNE 12, 2019

Costa Rica appreciates CIADI's efforts to promote a prompter resolution of the matters submitted to the Tribunal, resulting in a more efficient proceeding. Nevertheless, we consider that such a reduction in the time limit of the Tribunal could cause an inadequate analysis of the matter due to the complexity of the disputes. Thus, Costa Rica supports keeping the 30-days' time limit previously included in the WP1.

Rule 41 Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").

(2) If a request for bifurcation relates to a preliminary objection, Rule 42BIS shall apply.

(3) The following procedure shall apply to requests for bifurcation other than a request referred to in paragraph (2):

(a) the request for bifurcation shall be filed as soon as possible;

(b) the request for bifurcation shall state the questions to be bifurcated;

(c) the Tribunal shall fix time limits for written and oral submissions, as required, on the request for bifurcation;

(d) the Tribunal shall issue its decision on a request for bifurcation within 30 ~~20~~ days after the last written or oral submission on the request;

(e) the Tribunal shall decide whether to suspend any part of the proceeding if it decides to bifurcate; and

(f) the Tribunal shall fix any time limit for the further conduct of the proceeding, as required.

(4) In determining whether to bifurcate, the Tribunal shall consider whether bifurcation would could materially reduce the time and cost of the proceeding and all other relevant circumstances.

(5) 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.

GUATEMALA JUNE 10, 2019

La redacción es ambigua, por eso se sugiere la siguiente "la presentación de la solicitud de bifurcación se discutirá en la primera sesión conforme el cronograma que las partes propongan".

"(…) (3) ~~(2)~~ Se aplicará el siguiente procedimiento a las solicitudes de bifurcación que no sean las referidas en el párrafo (2): (a) ~~si~~ la presentación de la solicitud de bifurcación se discutirá en la primera sesión conforme el cronograma que las partes propongan. ~~se refiere a una excepción preliminar, una parte presentará la solicitud dentro de los 30 días siguientes a la presentación del memorial sobre el fondo o, si la excepción se refiere a una demanda subordinada, dentro de los 30 días siguientes a la presentación del escrito que contenga la demanda subordinada, a menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción deberá presentarse lo antes posible~~; (…)".

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Las propuestas del WP1 y WP2 sugieren que la solicitud de bifurcación aplicable a excepciones preliminares (las más comunes) se realicen dentro de los 30 días siguientes a la presentación del memorial de fondo. Conforme con lo señalado por otros Estados anteriormente, Los Estados consideran que este plazo término puede ser insuficiente. Ello porque, a fin de presentar excepciones adecuadamente fundadas y serias, necesitarán analizar a profundidad el caso, realizar las coordinaciones y averiguaciones internas necesarias para conocer la naturaleza de la supuesta inversión del inversionista y el origen, estructura societaria y nacionalidad de este último para determinar si puede o no prevalerse del instrumento invocado. Con el objetivo que las solicitudes de bifurcación permitan

efectivamente agilizar el proceso, por medio de objeciones serias que pudiesen desechar el procedimiento, se sugiere ampliar este término a, por lo menos, 60 días. En su defecto, proponemos que la flexibilidad aplicada a las otras solicitudes de bifurcación se mantenga para solicitudes de bifurcación relativas a excepciones preliminares; es decir proponemos que estas solicitudes sean presentadas "lo antes posible" como se indica en la Regla 41, de RA WP2.

Asimismo, consideramos que el plazo de 20 días conferido al Tribunal para decidir sobre una solicitud de bifurcación sobre las excepciones preliminares podría resultar insuficiente para que realice un análisis con la necesaria seriedad y profundidad.

SINGAPORE **JUNE 21, 2019**

We support the revised approach that ICSID has taken in WP 2 as regards bifurcation. It is helpful to provide for a separate rule on requests for bifurcation that involve preliminary objections because those requests, usually made in an early stage of the proceedings, raise concerns on timelines specific to those situations, whereas this AR 41 would only deal with bifurcation on the merits which could potentially happen at any point in the proceedings.

Rule 42 – Preliminary objections

CHILE **JUNE 18, 2019**

Se propone introducir los cambios que se ven en la columna izquierda para reflejar adecuadamente el texto de la Regla 42 en su versión en inglés y evitar discrepancias entre las distintas versiones de las reglas.

Regla 42 - Excepciones Preliminares

(1) Una parte podrá oponer una excepción según la cual la diferencia, o ~~una~~ cualquier demanda subordinada, no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de la competencia del Tribunal ("excepción preliminar").(…)

(6) (c) la parte que ~~oponga~~ presente el memorial sobre ~~una~~ excepci~~ó~~ones preliminares presentará también su memorial de contestación sobre el fondo, o, si la excepción se refiere a la demanda subordinada, presentará el siguiente escrito ~~a~~ después de la demanda subordinada;

COLOMBIA **JUNE 10, 2019**

Misma línea sobre la suspensión del procedimiento sobre el mérito, en caso de que el Tribunal haya decidido separar los trámites. En este sentido, Colombia considera que es importante que se decidan las objeciones preliminares antes de continuar con el mérito, con el fin de evitar costos adicionales contestando el fondo de la controversia, frente a demandas que puedan quedar en un trámite preliminar.

GUATEMALA **JUNE 10, 2019**

La redacción es ambigua, por eso se sugiere la siguiente "la presentación de la solicitud de bifurcación se discutirá en la primera sesión conforme el cronograma que las partes propongan".

"(1) Una parte podrá oponer una excepción preliminar según la cual la diferencia, o una demanda subordinada, no se encuentra dentro de la jurisdicción del Centro o por otras razones es de la competencia del Tribunal ("excepción preliminar").
(2) Una excepción preliminar deberá oponerse conforme el cronograma que las partes propongan ~~lo antes posible~~. (…)".

Rule 42BIS – Bifurcation of Preliminary objections

CANADA **JUNE 10, 2019**

In paragraph 1(a), Canada notes that there is a grammar problem in the chapeau in that the "within" cannot be used with (a)(iv). In addition, for similar reasons as Canada's comments on Rule 40, Canada suggests that the time limit for filing a request for bifurcation on a preliminary objection should be 60 days in (a)(i)-(iii). Further, for the same reasons as explained in Canada's comment on Rule 41, if a Tribunal decides to bifurcate a preliminary objection, it should suspend other proceedings. As a result, paragraph 3(a) should instead read: "suspend any other part of the proceeding if it decides to bifurcate, unless the parties agree otherwise, or the Tribunal determines that special circumstances would render such suspension inappropriate."

La propuesta sugiere que la solicitud de bifurcación aplicable a excepciones preliminares (las más comunes) se realice dentro de los 30 días siguientes a la primera sesión o al memorial de fondo. Este término puede ser insuficiente para un Estado. Con el objetivo que las solicitudes de bifurcación permitan efectivamente agilizar el proceso, por medio de objeciones serias que puedan desechar el procedimiento, se sugiere que la flexibilidad aplicada a las otras solicitudes de bifurcación (Regla 41) se mantenga para solicitudes de bifurcación relativas a excepciones preliminares; (i.e. que estas solicitudes sean presentadas "lo antes posible"), o alternativamente, que se dé plazo hasta el memorial de contestación, como lo establece la regla actual. Lo anterior se sugiere, teniendo en cuenta que el plazo para la solicitud de bifurcación es un tema que las partes y el tribunal pueden discutir en la primera sesión.

Asimismo, consideramos que el plazo de 20 días para que el tribunal decida sobre una solicitud de bifurcación sobre las excepciones preliminares (42 Bis (1)(e)) podría resultar insuficiente para que éste realice un análisis con la necesaria seriedad y profundidad. Adicionalmente, sugerimos que en esa misma regla se haga explícito que las decisiones del tribunal deben ser razonadas, puesto que esto no siempre es el caso.

Respecto a la Regla 42 BIS (2), sugerimos incorporar la lista de factores que comúnmente tienen en cuenta los tribunales al decidir sobre una solicitud de bifurcación relativa a una excepción preliminar (y no sólo referirse a "toda otra circunstancia relevante"). Esto permitiría aumentar la predictibilidad del sistema y sería consistente con lo que se ha propuesto en otros temas, como medidas provisionales o exhibición de documentos.

Finalmente, respecto a la Regla 42 BIS (3)(a), relativa a los casos en que el tribunal decide abordar las excepciones preliminares en una fase separada (y por tanto preliminar y anterior a la de fondo), es debatible que en ese escenario el tribunal debería tener la facultad de continuar con el procedimiento de fondo. Consistente con lo que se hace con la Regla 42 BIS (4)(a), la suspensión establecida en la Regla 42 BIS (1)(c) debería mantenerse si el tribunal acepta la solicitud de bifurcación

Regla 42BIS - Bifurcación de excepciones preliminares

(1) Se aplicará el siguiente procedimiento en relación a una solicitud de bifurcación relativa a una excepción preliminar:
(a) salvo que las partes acuerden un plazo distinto, la solicitud de bifurcación deberá presentarse lo antes posible ~~dentro~~:
~~i. de los 30 días después de la primera sesión, si el memorial sobre el fondo se presentará antes de la primera sesión;~~
~~ii. de los 30 días después del memorial sobre el fondo, si este se presenta después de la primera sesión;~~
(…)

(e) el Tribunal emitirá su decisión razonada sobre la solicitud de bifurcación dentro de los [20] días siguientes al último escrito o presentación oral en relación a la solicitud.

(2) Al momento de determinar si corresponde bifurcar, el Tribunal considerará si la bifurcación pudiera reducir sustancialmente el tiempo y costo del procedimiento [y toda otra circunstancia relevante].

(3) Si el Tribunal decide abordar las excepciones preliminares en una fase separada del procedimiento, deberá:
a) ~~decidir si~~ confirmar la suspensión ~~de cualquier parte~~ del procedimiento sobre el fondo establecida de conformidad con el párrafo 1(c).

COSTA RICA JUNE 12, 2019

After further reflexions resulting from discussions with the other Member States, Costa Rica considers that the time limit set out in this Rule could be insufficient for the State to properly assess and decide the convenience on whether to request the bifurcation of preliminary objections. Thus, extend that period to 60 days would better suit the internal administrative procedures that a State should conduct before deciding about the bifurcation.

Rule 42BIS
Bifurcation of Preliminary Objections
(1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:

(a) unless the parties agree on a different time limit, the request for bifurcation shall be filed within:

(i) 60 ~~30~~ days after the first session, if the memorial on the merits is filed before the first session; […]

GEORGIA JUNE 8, 2019

In Georgia's understanding, bifurcation in relation to the preliminary objections is a very useful tool to avoid spending additional resources on a matter that might successfully disappear as a result of the decision on preliminary objections. Therefore, we believe that unlike other situations, in terms of time and cost effectiveness, it will make more sense if in case of bifurcation arbitration proceedings are automatically suspended on a compulsory basis. The only exception to this rule could be if parties to the dispute agree otherwise.

In the view of the above, Georgia proposes to delete sub-paragraph (a) of Article 42BIS (3) and introduce a separate paragraph providing that the proceedings on the merits are automatically suspended unless the parties to the dispute agree otherwise.

GUATEMALA JUNE 10, 2019

En atención al comentario sobre la regla 29, se sugiere eliminar el contenido marcado.

"(1) aplicará el siguiente procedimiento en relación a una solicitud de bifurcación relativa a una excepción preliminar:
(a) salvo que las partes acuerden un plazo distinto, la solicitud de bifurcación deberá presentarse dentro:
~~(i) de los 30 días después de la primera sesión, si el memorial sobre el fondo se presentará antes de la primera sesión;~~
~~(ii) de los 30 días después del memorial sobre el fondo, si éste se presenta después de la primera sesión; (…)".~~

ISRAEL JUNE 22, 2019

Para. (3)(a): We hold that the proceeding on the merit should be automatically suspended upon a decision to bifurcate a preliminary objection.

Also, there seems to be some ambiguity concerning the distinction between proposed AR 42BIS (bifurcation of preliminary objections) and proposed AR 42 (preliminary objections). We are of the view that the distinction between the two proceedings should be clarifies in the text.

Lastly, Israel believes that 30 days may be too short to allow a party to submit a request for bifurcation of preliminary objections.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Las propuestas del WP1 y WP2 sugieren que la solicitud de bifurcación aplicable a excepciones preliminares (las más comunes) se realicen dentro de los 30 días siguientes a la presentación del memorial de fondo. Conforme con lo señalado por otros Estados anteriormente, Los Estados consideran que este plazo término puede ser insuficiente. Ello porque, a fin de presentar excepciones adecuadamente fundadas y serias, necesitarán analizar a profundidad el caso, realizar las coordinaciones y averiguaciones internas

necesarias para conocer la naturaleza de la supuesta inversión del inversionista y el origen, estructura societaria y nacionalidad de este último para determinar si puede o no prevalerse del instrumento invocado. Con el objetivo que las solicitudes de bifurcación permitan efectivamente agilizar el proceso, por medio de objeciones serias que pudiesen desechar el procedimiento, se sugiere ampliar este término a, por lo menos, 60 días. En su defecto, proponemos que la flexibilidad aplicada a las otras solicitudes de bifurcación se mantenga para solicitudes de bifurcación relativas a excepciones preliminares; es decir proponemos que estas solicitudes sean presentadas "lo antes posible" como se indica en la Regla 41, de RA WP2.

Asimismo, consideramos que el plazo de 20 días conferido al Tribunal para decidir sobre una solicitud de bifurcación sobre las excepciones preliminares podría resultar insuficiente para que realice un análisis con la necesaria seriedad y profundidad.

KOREA, REPUBLIC OF JUNE 28, 2019

Korea proposes to delete the 30-day time limits to file a request for bifurcation regarding preliminary objections in Rule 42BIS(1)(a). It is Korea's opinion that questions as to the timeliness of a request for bifurcation would be better handled during a procedural conference or by the Tribunal's discretion in each case.

To assure that untimely requests for bifurcation do not unduly disrupt the proceedings, subparagraph (1)(a) must be modified to state "to the extent that the parties have not agreed on a time limit, the request for bifurcation shall be made in a timely manner."

Also, it is further proposed that paragraph (2) be amended to state "In determining whether to bifurcate…the Tribunal shall consider…all other circumstances, including whether the request for bifurcation was made in a timely manner."

MEXICO JUNE 24, 2019

La regla 42Bis(3)(a) dispone que "si el Tribunal decide abordar las excepciones preliminares en una fase separada del procedimiento, deberá: (a) decidir si suspende cualquier parte del procedimiento sobre el fondo".

Al respecto México sugiere que la regla sea ajustada para que la suspensión del procedimiento sea automática cuando el Tribunal decide abordar las excepciones preliminares en una fase separada del procedimiento, salvo acuerdo en contrario de las partes contendientes. Lo anterior está en línea con la suspensión automática prevista en la Regla 42Bis(1)(c), y con lo señalado en el párrafo

294 del WP#2: “[t]he Tribunal must first decide whether to suspend any part of the proceeding of the merits. This will likely be the case, unlike the parties agree otherwise.” [énfasis añadido]

SINGAPORE **JUNE 21, 2019**

We note that a number of States had indicated that it would be helpful to provide further guidance for tribunals in deciding on whether to allow the bifurcation request in paragraph 2, perhaps taking into account ICSID case law developments. We support this suggestion to further clarify paragraph 2.

Rule 43 – Consolidation or Coordination of Arbitrations

CANADA **JUNE 10, 2019**

Canada suggests that for readability, paragraph 1 of this rule be rewritten to provide the definition of the relevant terms, rather than have descriptive language as proposed. In particular, Canada suggests paragraph 1 read: “Parties to two or more pending arbitrations administered by the Centre may agree to join all aspects of the arbitrations and receive only a single Award (“consolidation”) or align only specific procedural aspects of each pending arbitration while keeping the proceedings separate (“coordination”).” With this drafting, the second sentence of paragraph 2 and the entirety of paragraph 3 can be deleted.

COLOMBIA **JUNE 10, 2019**

Sugerencia aceptada en la Regla 43 del WP2. En los comentarios sobre la consolidación por orden, el WP2 acepta la preocupación de Colombia, y establece que la asistencia de la Secretaría será paralela, cuando se considere necesario atender resolver un problema de las Partes.

EUROPEAN UNION JUNE 7, 2019

17. 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. It could further contribute to the reduction of costs and of the risk of inconsistent interpretations, and to avoidance of conflicting or contradictory awards. In this respect, the European Union and its Member States welcome the inclusion of specific language on voluntary consolidation and the clarification of the role of the Secretary General in the process.

18. The European Union and its Member States remain willing to engage with ICSID Members in further reflections on introducing, under certain well-defined conditions, the possibility of mandatory consolidation and welcome the openness of the Secretariat to such discussions in the future.

ISRAEL JUNE 22, 2019

In light of the discussion in the April meeting we request adding to para. 4 wording refereeing to the fact that along with the ToRs the parties shall provide the SG proposed procedural outline for the consolidation process, including reference to the issue of nomination/merging of arbitration tribunals in a consolidated procedure.

SINGAPORE JUNE 21, 2019

We *strongly support* this proposal. In our view, the proposed amendments in WP 2 make the distinction between consolidation and coordination clearer and also more user-friendly.

IISD APRIL 12, 2019

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

Foreign investors may pursue claims against host states "on different legal bases, including investment treaties and contracts, as well as in different forums, including state courts, domestic arbitration, international arbitration either institutional or ad hoc."[27] Beyond the

negative impacts on consistency and predictability of investment-related dispute settlement, the issue of multiple claims raises concerns because it increases the costs of arbitration proceedings and risks leading to multiple recovery of the same damage.

Responding to numerous comments on the issue, the ICSID Secretariat proposed AR 43 on Consolidation or Coordination of proceedings concerning common questions of law or fact. This could lead to more fairness and efficiency in dispute settlement and avoid the possibility of inconsistent or conflicting awards. In addition to this, ICSID member states could determine that consolidation should be mandatory for the tribunal when triggered by the respondent state, allowing for greater cost savings and expediency of arbitral proceedings.[28]

Rule 44 – Provisional Measures

COLOMBIA **JUNE 10, 2019**

Se aceptó el comentario de Colombia sobre incluir un criterio de urgentes y necesarias.

IISD **APRIL 12, 2019**

Current AR 39 allows tribunals to "recommend any provisional measures which should be taken to preserve the respective rights of either party," upon a moving party's request specifying "the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."

Proposed AR 44(1) on Provisional Measures continues to allow such measures, and includes a non-exhaustive list of the types of measures that tribunals may recommend. Proposed AR 44(3) clarifies that, in deciding whether to recommend provisional measures, the tribunal shall consider whether they are urgent and necessary, the effect they may have on each party, and all other relevant circumstances.

Given the extraordinary nature of such relief, a revision of the ICSID Arbitration Rules should further clarify the narrow circumstances and precise conditions under which these provisional or interim measures may be ordered, and should place the burden on the moving party to prove its need for and the urgency of the measure requested.

Further, the revised rules should specify the safeguards to prevent a disputing party from abusing the use of these measures. This could include imposing a maximum duration of each provisional or interim measure granted; requiring the moving party to post financial or other forms of security to cover potential costs and damages caused by their request; and requiring the moving party to fully disclose any other relevant information that the tribunal may find relevant for its determination of the request, even if the information may not be in their interest.

GEORGIA JUNE 8, 2019

We believe that the application to judicial authorities should not require prior consent of the disputing parties and should be available in addition to the power of the Arbitral Tribunal to grant such measures. In our view, such approach would not be in contradiction with Article 26 of the Convention, since we understand it to refer to the exclusivity of ICSID jurisdiction with respect to the subject-matter of the dispute that is to be decide by ICSID Tribunal with a final and binding award. In the same way, disputing parties or ICSID Tribunals could refer to domestic courts for the assistance in collection of evidence. Besides, involvement of national courts might be necessary for the enforcement of the measures granted by the Tribunal anyways. Therefore, we are convinced that the exclusivity of ICSID jurisdiction cannot be undermined by recognizing in the ICSID Arbitration Rules the authority of local courts to order provisional measures.

We believe that the possibility to apply to the local courts for provisional measures may be an important tool for the disputing party in need of such measures. This remedy might be especially important on a very early stage of the proceedings until the Tribunal is constituted, since in practice considerable time can go by from the date of the Request for Arbitration until the constitution of the tribunal that can be detrimental for a disputing party in need of the provisional measures. Therefore, Georgia suggests to remove any additional consent requirements with regard to the authority of judicial bodies to order provisional measures upon the request of the disputing party.

Rule 45 – Ancillary Claims

AMADO, SHAW KERN & DOE RODRIGUEZ MAY 23, 2019

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

In the ongoing exercise of revision of the Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), we respectfully submit the following proposal for amendment of Arbitration Rule 40 [sic Rule 45] (Ancillary Claims).

The purpose of the proposed amendment is to achieve the simple procedural accommodation of all ancillary claims that are within the jurisdiction of the Centre, thus realizing systemic advantages in keeping with the object and purpose of the Convention. In this manner, further classes of claims may be submitted to the Tribunal, enabling a more global resolution of disputes arising from international investments to the benefit of all stakeholders.

Article 46 of the Convention recognizes "incidental or additional claims or counterclaims" in ICSID arbitration, providing in full as follows:
Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.[1]

Article 46 is situated within the Convention's Chapter IV, Section 3 (Powers and Functions of the Tribunal) and not Chapter II (Jurisdiction of the Centre). To determine jurisdiction over any claim, reference must be had to Article 25, which sets forth the outer bound of the Centre's jurisdiction by reference to "any legal dispute arising directly out of an investment."[2]

To date, Arbitration Rule 40 has not been crafted to coincide with that outer bound. This remains true in the text of the proposed amendments, as currently under consideration:
[proposed AR 45 quoted from ICSID Working Paper # 2, Volume 1, March 2019, p. 216]

As is seen, Arbitration Rule 40 has employed the language of Article 46, and allows only for the filing of a narrower scope of ancillary claims "arising directly out of the subject-matter of the dispute" giving rise to the primary claim.[3] At present, there is a unity as between those ancillary claims which *may* be presented by a party and those which *shall* be determined by the Tribunal (if so presented).

The formulation of the Convention does not require this result. As is seen, the plain language of Article 46 serves only to mandate that the Tribunal is obliged to determine certain specified ancillary claims. It does not foreclose a Tribunal from considering and determining other categories of the same. Under the Convention, a Tribunal may determine any claim (including any ancillary claim) to the fullest extent permitted by the objective requirements of jurisdiction, namely those set out at Article 25.[4]

This result may be reached by simple amendment of Arbitration Rule 40. Arbitration Rule 40(1) may be altered for its text to read as follows, in order to embrace the broader language of Article 25 and allow for the presentation of a wider scope of ancillary claims:

Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim ("ancillary claim") arising directly out of ~~the subject-matter of the dispute~~ an investment, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.[5]

Such provision will serve to mitigate against the eventuality of parallel proceedings in diverse *fora* that are counter to the objectives of the Convention. If any given ancillary claim is within Article 25, then the putative claimant may *ipso facto* constitute another Tribunal for its adjudication (and may in fact be required to do so, "to the exclusion of any other remedy").[6] It is a superior approach to simply accommodate the ancillary claim in a single proceeding, which may be done without contravening the Convention.

In sum, there is no sound reason of law or policy to exclude from the Tribunal's consideration any ancillary claim that falls within the scope of Article 25, as the Arbitration Rules to date have done. Other rules commonly used in investor-State arbitration do not impose any similar limitation,[7] nor do the arbitration rules of ICSID's own Additional Facility.[8] It is thus preferable that the Arbitration Rules be written to effect the procedural accommodation of ancillary claims to the fullest extent permitted under the Convention.

IISD APRIL 12, 2019

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

Under the current ICSID Convention and AR, for a respondent state to bring a counterclaim against an investor, three requirements must be met: (1) the parties must consent to submit counterclaims to ICSID arbitration; (2) the counterclaim must arise directly out of the subject matter of the dispute; and (3) the counterclaim must be within the jurisdiction of ICSID.[29]

The way these requirements have been interpreted made counterclaims virtually impossible in treaty-based investor–state arbitration, for three reasons. First, since investors are not party to the treaty giving rise to the arbitration, and depending on the underlying treaty, it is quite difficult to demonstrate their implied consent to counterclaims. Investors also lack any incentive to provide explicit consent to counterclaims when submitting their request for arbitration. Second, since very few investment treaties explicitly impose substantive obligations on investors, most counterclaims raised by respondent states may not be understood to arise directly out the subject matter of the dispute. This means that they may not be viewed as treaty-based but instead as relying on other instruments such as domestic law or promises made by investors. Third, the stringent jurisdictional requirement for bringing counterclaims has made it

impossible for a counterclaim to survive on its own if the original claim brought by the investor is dismissed on jurisdictional grounds.[30]

Therefore, member states should seize the opportunity presented by the rule amendment process to revise both the ICSID Convention and the ICSID Arbitration Rules so as to modify the requirements for submitting and maintaining counterclaims and provide clarification. Revised rules in both instruments should address the peculiar nature of treaty-based investor–state disputes and ensure that respondent states can exercise their right to bring counterclaims in practice. In particular, member states could consider amending ICSID Convention Articles 25 and 46 as needed with a view to providing that:

1. consent of an investor to arbitrate a claim shall also be deemed consent to arbitrate any counterclaims brought by the state, provided that such counterclaims are within ICSID jurisdiction; and that
2. any counterclaims arising directly or indirectly out of the subject matter of the dispute, even when based on legal instruments other than the instrument invoked by the investor in its claim, are deemed to be within ICSID jurisdiction.

Rule 46 – Default

CHILE **JUNE 18, 2019**

Se sugiere incorporar el cambio propuesto para reflejar la redacción de la Regla 46(8) en sus versiones en inglés y francés.

Regla 46 – Rebeldía

(8) Si la parte en rebeldía se abstuviese de llevar a cabo un acto procesal dentro del período de gracia o si no se hubiera otorgado período de gracia alguno, el Tribunal examinará la jurisdicción del Centro y si la diferencia es de su competencia antes de decidir las cuestiones que le han sido sometidas y dictar el laudo.

Chapter VII – Costs

Rule 47 – Costs of the Proceeding

CHILE **JUNE 18, 2019**

Se sugiere eliminar la palabra “legales” del numeral 1, letra (a) por consistencia con el resto de la disposición y con el texto en los otros idiomas.

Regla 47-Costos del Procedimiento

(1) Los costos del procedimiento consisten en todos los costos incurridos por las partes en relación con el procedimiento, lo cual incluye:

a. Los honorarios y gastos ~~legales~~ de las partes;
b. los honorarios y gastos de los miembros del Tribunal…

COLOMBIA **JUNE 10, 2019**

Es necesario que quede clara la explicación de los costos en su adjudicación, dejando clara la justificación de su determinación, comparándola con la cuantía solicitada.

Es importante tener una regla clara cuando se presenta una demanda frívola en cuyo caso el demandante deberá automáticamente ser condenado en costas. Asimismo, cuando haya alegatos que no han sido debidamente probados, el demandante deberá incurrir en costas.

GEORGIA **JUNE 8, 2019**

Dose notion of “the legal fees and expenses of the Parties” include fees and expenses of party-appointed experts? Paragraph (b) makes explicit reference to the fees and expenses of Tribunal-appointed experts that might provide basis for some misinterpretation whether the same expenses regarding the Party-appointed experts are included in paragraph (a). Therefore, it might be useful to explicitly include

fees and expenses of party-appointed experts in paragraph (a) as well or at least clarify in the Working Paper that "the legal fees and expenses of the Parties" contemplate such costs incurred by the parties as well.

Rule 48 – Payment of Advances

SINGAPORE **JUNE 21, 2019**

We support having a separate chapter specific to costs and establishing AR 48, with its current formulation, as a separate rule.

Rule 49 – Statement of and Submission on Costs

SINGAPORE **JUNE 21, 2019**

We support having a separate chapter specific to costs and establishing AR 49, with its current formulation, as a separate rule.

Rule 50 – Decisions on Costs

AUSTRALIA **JUNE 14, 2019**

In Australia's view, further consideration could be given as to how the rules might accommodate the issue of costs in cases of discontinuance. As noted above, Australia also supports the inclusion of an explicit presumption that costs follow the event upon a finding that a claim manifestly lack legal merit.

CANADA **JUNE 10, 2019**

Canada notes that in paragraph 341 of the Working Paper , the Secretariat states that the Tribunal is empowered to consider the outcome on specific claims or arguments in the context of the phrase "any part of the proceeding". Canada suggests that Rule 50(1)(a)

be rewritten to say "the outcome of the proceeding, as well as the outcome of specific claims, defences and parts of the proceeding." This will empower Tribunals to consider not just the overall outcome of the dispute but the outcome of specific aspects of the dispute (for example, whether damages awarded are reasonably connected to what was claimed; whether certain defences were accepted).

Canada further notes the Secretariat's comment at paragraph 342 of Working Paper #2 that mandatory cost shifting in the context of claims dismissed for a manifest lack of legal merit would be contradictory to the Convention. In Canada's view, Article 61(2) of the Convention is fully compatible with the Arbitration Rules providing guidance to the Tribunal in its decision making without making a mandatory rule. Thus, Canada suggests a new paragraph (2) which provides that "When a claim has been dismissed on the grounds of a manifest legal merit, the Respondent shall in principle be entitled to all of its costs, unless the Tribunal decides that special circumstances exist that justify a different allocation of costs."

EUROPEAN UNION JUNE 7, 2019

26. The European Union and its Member States welcome the proposals to provide for certain factors giving guidance to Tribunals on how to allocate costs, including in particular the assessment of the reasonableness of the costs claimed and the conduct of parties. The European Union and its Member States would also welcome a practice note by the ICSID Secretariat giving guidance on the different factors listed in Rule 50 (1).

27. As a general principle, 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 case-law. Such a rule would also have the advantage of deterring unfounded claims. At a minimum, the rule should apply when a claim is dismissed on a preliminary basis for manifest lack of legal merit.

ISRAEL JUNE 22, 2019

Regarding para. 2, we suggest adding wording as follows:
(2) The Tribunal may make interim decisions on the costs of any part of a proceeding, at any time, ***'Without prejudice to the final decision***,'

KOREA, REPUBLIC OF JUNE 28, 2019

It is Korea's observation that the text "any part of it" in Rule 50(1)(a) may be misunderstood to refer only to distinguishable 'phases' of a case such as bifurcated jurisdiction phases. The Tribunal should be free to take into account more specific elements of the case, including the outcome of certain claims or arguments when deciding on the allocation of costs.

The fact that a claim was dismissed as manifestly lacking legal merit, as well as any circumstances regarding the non-compliance of the obligation to disclose TPF must be reflected in the Tribunal's decision on costs.

Suggestions as to how the above concerns may be best addressed are specified in Korea's comments to Rule 13 and Rule 40.

SINGAPORE JUNE 21, 2019

We support having a separate chapter specific to costs and establishing AR 50, with its current formulation, as a separate rule.

IISD APRIL 12, 2019

ICSID Convention Article 61(2) provides that "the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

In the current rule amendment process, several states have suggested amendments with respect to the allocation of costs. Suggestions included (1) a default rule providing for a costs-follow-the-event allocation instead of full discretion of the tribunal and (2) the mandatory shifting of all costs of the proceeding to the claimant if the claim is dismissed for manifest lack of legal merit. However, as indicated in WP #2, amendments to the ICSID Arbitration Rules in this respect would not conform with the full discretion tribunals have on cost assessment and allocation under ICSID Article 61(2). ICSID member states should consider implementing the proposed changes by means of an amendment to the ICSID Convention.

Rule 51 – Security for Costs

AUSTRALIA JUNE 14, 2019

Australia welcomes the inclusion of this rule but would prefer if it explicitly listed third party funding as one of the factors for tribunals to consider in determining whether to order a party to provide security for costs.

CANADA JUNE 10, 2019

Paragraph 3 of Rule 51 establishes certain criteria for the Tribunal to consider in deciding whether to require security for costs. Canada notes and agrees that the mere existence of third-party funding is not necessarily sufficient to require a party to provide security for costs, but Canada does believe that it might be a relevant factor and sees no reason not to list it in Rule 51(3). Merely including it in the list does not suggest that it is determinative in every instance, just that the Tribunal should consider it. Thus, Canada suggests that there be an additional item in Rule 51(3) for "the existence and terms of any third-party funding."

Further, Canada notes the comments of the Secretariat in paragraph 364 of the Working Paper on the standard for security for costs. However, in light of the reluctance of to order security for costs by many Tribunals, Canada agrees that the standard of reasonable doubt as to the party's willingness or ability to comply with an adverse costs decision should be included in Rule 51(3), as was previously suggested by several Contracting States.

CHILE JUNE 18, 2019

Respecto a la Regla 51(1), sugerimos incluir la posibilidad de que un Tribunal ordene una garantía por costos de oficio, si lo considera adecuado.

Respecto a la Regla 51 (3), se solicita que la participación del Tercero Financiador sea incorporada dentro de la lista de elementos que podría tener en cuenta el Tribunal al momento de decidir si otorga una garantía por costos. Si bien entendemos que esto no

necesariamente es un factor relevante en todos los casos, el texto de la regla puede redactarse de tal forma que solo se tome en cuenta en aquellos casos en que exista dicho tipo de financiamiento.

Finalmente, consideramos que es positivo que las Regla 51(5) establezca consecuencias específicas por el incumplimiento de las garantías por costos.

(1) A solicitud de una de las partes o de oficio, el Tribunal podrá ordenar a cualquiera de las partes que haya presentado una demanda o una demanda reconvencional, que otorgue una garantía por costos. […]

(3) Al determinar si le ordena a una parte que otorgue una garantía por costos, el Tribunal deberá considerar: […]

(e) la participación de un Tercero Financiador, en los casos en que exista este tipo de financiamiento. […]

(5) Si una parte incumpliera una resolución para proveer una garantía por costos, el Tribunal podrá suspender el procedimiento. Si el procedimiento se suspendiera durante más de 90 días, el Tribunal podrá, previa consulta a las partes, ordenar la descontinuación del procedimiento.

COLOMBIA JUNE 10, 2019

Colombia insiste en la necesidad de que haya una relación o vínculo entre el tercero financiador y la garantía por costos en caso de que se vislumbre que una Parte no va a cumplir con un fallo en su contra. En este sentido, será necesario que el Tribunal solicite una garantía por costos para que se asegure la cobertura de costos del procedimiento.

COSTA RICA JUNE 12, 2019

Costa Rica suggests to include the existence of third-party funding as an additional factor that the Tribunal shall consider in the decision to order 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.

Rule 51 Security for Costs Security for Costs

(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.

(2)[…]

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider:

(a) that party's ability to comply with an adverse decision on costs;

(b) that party's willingness to comply with an adverse decision on costs;

(c) the effect that providing security for costs may have on that party's ability to pursue its claim or counterclaim;

(d) the conduct of the parties; and

(e) the existence of a third-party funder.

EUROPEAN UNION **JUNE 7, 2019**

29. The European Union and its Member States welcome a separate provision on security for costs. We also support the proposal of the ICSID Secretariat that the mere presence of third party funding should not ipso facto warrant a security for costs order.

30. With respect to the wording used in Rule 51(3)(b), the European Union and its Member States suggest to clarify the language and refer to "history of non-compliance with previous awards in relevant proceedings" instead of "willingness to comply".

GUATEMALA **JUNE 10, 2019**

Se sugiere eliminar el apartado de "la voluntad", debido que es un elemento subjetivo por lo tanto difícil de determinar.

"(…) (3) Al determinar si le ordena a una parte que otorgue una garantía por costos, el Tribunal deberá considerar:
(a) la capacidad que tiene dicha parte para cumplir con una decisión adversa en materia de costos;

(b) ~~y toda otra circunstancia relevante~~ ~~la voluntad de esa parte para cumplir con una decisión adversa en materia de costos; (…)~~.

HAITI **MAY 20, 2019**

En vue de garantir le paiement des frais de la procédure, la version française utilise tout au long de l'article le terme « cautionnement » comme traduction du terme anglais « security ». Cette traduction est réductrice et risque d'avoir des conséquences juridiques graves. Le terme « security » dans le langage juridique anglais désigne tant les garanties réelles que personnelles, tandis que le « cautionnement » désigne le mécanisme par lequel une personne, la caution, s'engage à exécuter l'obligation du débiteur principal. Dans une procédure mettant aux prises des parties de droit civil ou des arbitres de droit civil francophones se basant de ce fait sur le texte français, l'on risque de chercher et de ne pas trouver cette personne s'engageant à assumer les frais de procédure. Or, l'idée exprimée par le texte anglais, langue originale de la proposition d'amendement, est de permettre que des garanties réelles du genre compte bloque (escrow account), garantie autonome (standby letter of credit) ou même des garanties personnelles du genre cautionnement soit fixées par le Tribunal. De la sorte, la délégation haïtienne préconise que l'on en revienne à la rédaction initiale de la version française qui, dans sa généralité, accorde au Tribunal la souplesse nécessaire lui permettant d'adopter la mesure la plus pertinente. De ce fait, la délégation haïtienne propose que soit remplacé dans cet article le terme « cautionnement » par le terme « garantie » utilise dans la version initiale.

INDONESIA **JUNE 10, 2019**

In general, we propose the provision regarding Security for Costs would be prevail automatically once the Party register Third-party Funder. This provision could avoid Party, especially host state upon loss of compensation of Government's expenses in arbitration proceeding if host state won the case. State has assets, we have state owner enterprises, and government account. Even it is a commercial assets, the otherwise party can easily located our 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.

ISRAEL JUNE 22, 2019

Regarding para.3: we support the views shared by quite a few States during the April meeting in Washington, according to which TPF should be added to the list of criteria in determining whether to order security for costs (as the existence of TPF might increase the risk of encountering difficulties in enforcing a decision on costs).

Additionally, we suggest adding the following wording to para. 4:
The Tribunal shall specify any relevant terms in an order to provide security for costs the amount required to be paid and shall fix a time limit for compliance with the order, and shall decide disputes regarding compliance with the order.

The suggested wording reflects our view that the tribunal is responsible for setting the amount due for security for costs but shall not set the terms by which the amount can be paid- as these may vary. To support this suggested amendment we suggest that in cases of disagreement the tribunal shall decide disputes regarding the compliance with the order.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Se considera necesario incluir la posibilidad de que un Tribunal pueda ordenar una garantía por costos de oficio, si lo considera adecuado. Se considera relevante aprovechar esta revisión de las Reglas para facilitar a los Tribunales criterios para otorgar la garantía de costas cuando procede, sobre todo tomando en cuenta que existen numerosos antecedentes en los que Estados han tenido serios problemas para ejecutar Laudos dictados a su favor. La seguridad de los costos debe otorgarse si existen motivos razonables para creer que una parte contendiente no podrá cumplir con los efectos de un laudo adverso.

Adicionalmente, se solicita que la potencial participación de un Tercero Financiador sea incorporada dentro de la lista de elementos que podría tener en cuenta el Tribunal al momento de decidir si otorga una garantía por costos. Si bien entendemos que esto no necesariamente es un factor relevante en todos los casos, el texto de la regla puede redactarse de tal forma que solo se tome en cuenta, junto con el resto de posibles elementos, en aquellos casos en que exista dicho tipo de financiamiento.

It is Korea's position that the Tribunal should be able to order security for costs on its own initiative. There is no reason why the Tribunal's general powers over procedure should not extend to security for costs. It would also be in better balance with paragraph (7) which allows the Tribunal to revoke an order on security for costs on its own initiative.

Accordingly, paragraph (1) must be amended to read: "The Tribunal may, on its own initiative, or upon the request of a party, order any party asserting a claim or counterclaim to provide security for costs."

The existence of TPF and the terms of the TPF agreement must be taken into account when assessing a party's ability to comply with an adverse decision on costs under subparagraph (3)(a). As previously mentioned in the comments regarding TPF, the existence and terms of TPF may act as a useful indicator of a party's impecuniosity.

Korea proposes to delete subparagraph (3)(c). It is Korea's opinion that the requirement to consider any negative effects that providing security for costs may have on a party's ability to pursue its claim cannot be reconciled with the requirement to consider a party's ability to comply with an adverse decision on costs prescribed in subparagraph (3)(a). A party must not be compelled to assume the risks of another party's evident impecuniosity.

Failure of a party to comply with an order to provide security for costs should result in an automatic suspension of the proceedings, unless the other party objects. Korea believes that the penalty of mandatory suspension would better guarantee compliance with an order to provide security for costs. However, since the other party may prefer to seek an enforceable final award against the non-complying party, the other party must be allowed to object to the suspension of the proceedings.

Therefore, the first sentence of paragraph (5) must be amended to read: "If a party fails to comply with an order to provide security for costs, the Tribunal shall suspend the proceeding unless the other party objects."

Korea proposes to introduce a continuing obligation to disclose material changes in a party's financial status and corporate structure. The financial statuses of the parties are always subject to change, and the necessity of security for costs may arise and decline accordingly. It may also be useful in instances where Claimants liquidate or transfer their assets through corporate restructuring in anticipation of an adverse award on costs, which is not an uncommon development in ISD proceedings.

LUXEMBOURG JUNE 10, 2019

Luxembourg underlines the need to avoid using the security of costs in a way that would end up restricting access of SMEs to the ICSID mechanism. Luxembourg remains favorable to a wording that strikes a balance between the need for States to be able to request such security and the need for SMEs to be able to use the mechanism. Introducing an automatic request for security of costs would most probably end up in hampering SMEs access to the investment dispute mechanism.

SINGAPORE JUNE 21, 2019

We continue to support having this provision as well as ICSID's proposed amendments in WP 2. The changes are welcome because they set out greater guidance for the tribunal in deciding whether to make an order for security for costs.

URUGUAY MAY 31, 2019

En la etapa del procedimiento arbitral, Uruguay acompañó la iniciativa de Panamá de reforzar la regla sobre garantía de costos, a través de la cual se puede solicitar al Tribunal que ordene a una parte a otorgar una garantía por costos del procedimiento y determine los términos adecuados para el cumplimiento de dicha decisión.

Varios países, entre ellos Egipto, Nigeria, Costa Rica y Vietnam reclamaron introducir una cláusula que prevea ordenar el otorgamiento de la garantía cuando existe financiamiento de terceras partes, para evitar el riesgo de que los financistas evadan su responsabilidad ante un laudo contrario.

A este respecto, Uruguay sostiene que es necesario asegurar que los Estados cuenten con mayores garantías en los procesos arbitrales. En efecto, un Estado no llega a declararse en cesación de pagos con la misma facilidad y habitualidad con la que un privado puede desinvertir y esgrimir su insolvencia, por tanto resulta esencial evaluar la responsabilidad del tercero que financia con relación a las costas de un laudo eventualmente desfavorable. El hecho de que exista financiamiento de terceras partes constituye una circunstancia lo suficientemente relevante como para ser incluida de forma explicita en la regla 51 (3).

Adicionalmente, se apoya el planteo de Alemania de incluir una cláusula que contemple el depósito de una garantía para cubrir costos administrativos en los que haya incurrido el Estado, en caso que el reclamante retire su solicitud antes de la constitución del Tribunal.

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

Many states face difficulties in recovering "a substantial part or any of their costs in defending unsuccessful, frivolous or bad faith claims by investors," including when investors "used shell companies, or became impecunious."[20] Under the current ICSID Arbitration Rules, tribunals may only grant security for costs through their general power to take conservatory, interim or provisional measures to preserve the parties' rights.[21] Proposed AR 51 innovates in adding a dedicated provision to security for costs, aimed at addressing these difficulties.

However, proposed AR 51(1) applies not only to claims by investors but to counterclaims made by states. This imposes additional hurdles on states to assert a counterclaim, by requiring states to provide security for the costs of the investor in defending the counterclaim (see Section 4.0 below). It must be recalled that security for costs is intended to remedy an imbalance between the parties: "states, given their permanence, [are] in a different position from investors, who might be unwilling or unable to pay."[22] While states often face problems enforcing an order of costs against claimants who declare bankruptcy, move across jurisdictions or hide their assets, investors can rely on the enforcement mechanism of the ICSID Convention to obtain satisfaction from a state. Furthermore, although investors increasingly rely on third-party funders that pay for their legal fees and costs, such funders cannot be ordered to pay the state's costs, as they are not parties to the arbitration.[23] ICSID member states should consider providing for the security for costs of the state only, amending proposed Rule 51(1) accordingly.

Proposed AR 51(3) lists factors that a tribunal shall consider in determining "whether to order a party to provide security for costs." While including such a list is useful to provide guidance to tribunals, ICSID member states may also consider adding a provision listing circumstances in which the arbitral must order security for costs; for example, where:[24]

a) there is a reason to believe that the investor will be unable to pay, if ordered to do so, a reasonable part of attorney fees and other costs to the Contracting Party which is the party to the dispute; or
b) there is a reason to believe that the investor has structured the enterprise or divested assets to avoid the consequences of the arbitral proceedings; or
c) the investor has disclosed the existence of a third-party funding arrangement in which the third-party funder has not committed to irrevocably undertake adverse costs liability.

Proposed AR 51(5) provides that, in case of non-compliance with a tribunal order to provide security for costs, "the Tribunal may suspend the proceeding until the security is provided," and, after 90 days, "may, after consulting with the parties, order the discontinuance of the proceeding." One state suggested that discontinuance of the proceeding should be mandatory, but the secretariat rejected this to balance "Tribunal discretion with due process and flexibility to account for the circumstances of the case."[25] Past cases have shown that tribunals have tended to exercise their discretion and flexibility in respect of security for costs overwhelmingly in favour of investors. Indeed, there are only two known cases in which a state was granted an order for security for costs.[26] As such, ICSID member states should consider adopting mandatory discontinuance, to avoid prolonging proceedings at the end of which respondent states may be unable to recover their costs.

Chapter VIII – Suspension and Discontinuance

Rule 52 – Suspension of the Proceeding

CHILE **JUNE 18, 2019**

Solicitamos aclarar porque el Tribunal "debe" suspender el procedimiento a solicitud de ambas partes (Regla 52(1)), pero sin embargo "puede" decidir prorrogar o no dicha suspensión, aun cuando haya habido acuerdo de las partes (52(5)).

Regla 52-Suspensión del Procedimiento

(1) El Tribunal *suspenderá* el procedimiento por acuerdo de las Partes.
(…)

(5) El Tribunal *podrá prorrogar* el período de suspensión con anterioridad a su vencimiento por acuerdo de las partes.

(6) El Tribunal podrá prorrogar el período de suspensión con anterioridad a su vencimiento, de oficio o a solicitud de una de las partes después de otorgar a las partes una oportunidad para realizar observaciones.

COLOMBIA **JUNE 10, 2019**

Se tuvo en cuenta el comentario de Colombia.

Rule 53 – Settlement and Discontinuance

GUATEMALA **JUNE 10, 2019**

Nuevamente surge la duda respecto a la literal (2)(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.

Rule 54 – Discontinuance at Request of a Party

CHILE **JUNE 18, 2019**

Observamos que la actual formulación de la regla no se hace cargo necesariamente de dos de los problemas planteados: la formulación de "alguna objeción" no necesariamente va a ser entendida como "objeción o presentación de una condición", que según el WP1, era un objetivo que se buscaba recoger. Por eso se sugiere modificar el texto de la Regla 54(1) de manera de incorporar la palabra "condición."

Proponemos añadir lenguaje que aclare que las resoluciones por las que se descontinua un procedimiento no incorporarían atribuciones de costos (aclarando que esto sólo se puede hacer en el laudo). Lo anterior por las siguientes razones: (a) es mejor que las partes tengan claridad sobre este tema al momento de negociar la descontinuación (b) evitaría que una parte reciba una resolución con costos, cuya ejecutoriedad sería debatible, y (c) evitaría discusiones al respecto entre los miembros del tribunal y determinaciones distintas de un tribunal a otro.

Regla 54 - Descontinuación a Solicitud de una de las Partes

(1) Si una de las partes solicita la descontinuación del procedimiento, el Tribunal fijará el plazo dentro del cual la otra parte podrá oponerse a la descontinuación. Si no se formula objeción alguna por escrito dentro del plazo fijado, se entenderá que la otra parte ha

consentido a la descontinuación y el Tribunal emitirá una resolución que deje constancia de la descontinuación del procedimiento. Si se formula alguna objeción escrita dentro del plazo fijado, incluida cualquier condición para la descontinuación propuesta, el procedimiento continuará. Las resoluciones por las que se descontinúa un procedimiento no podrán incorporar atribuciones de costos, las cuales solo podrán incorporarse en el laudo.

GUATEMALA **JUNE 10, 2019**

Gracias por la respuesta, no obstante, se reitera que 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 (AR 54(1)).

Rule 55 – Discontinuance for Failure of Parties to Act

CHILE **JUNE 18, 2019**

Se solicita aportar clarificaciones respecto de qué debe ser considerado como un “acto procesal” a efectos de esta Regla.

Regla 55 - Descontinuación por Inacción de las Partes

(1) Si las partes omiten realizar cualquier *acto procesal* durante más de 150 días, el Tribunal notificará a las partes que dicho tiempo ha transcurrido desde el último *acto procesal*.

COLOMBIA **JUNE 10, 2019**

Colombia considera que cuando las partes están inactivas, el Tribunal deberá adoptar una resolución manifestando la interrupción, sin notificación previa alguna. En este sentido se sugiere la redacción del párrafo (1) sea la siguiente: (1) Si las Partes omiten realizar cualquier acto procesal durante más de 150 días, el Tribunal podrá emitir una resolución dejando constancia de la discontinuación”.

EUROPEAN UNION **JUNE 7, 2019**

28. To address concerns raised by a number of ICSID Members, the European Union and its Member States encourage the ICSID Secretariat to investigate further solutions that allow respondent States, upon request, to effectively recover costs engaged through cases where the arbitration proceedings are discontinued due to failure of the claimant to act or its failure to pay.

HAITI **MAY 20, 2019**

Pour traiter de la fin de l'instance pour cause de l'inactivité des parties, la version française utilise le terme « désistement » pour traduire le terme anglais « discontinuance ». Cependant, si le terme « discontinuance » est utilisé dans les articles 54, 55 et 56, il appelle une traduction différente en fonction des circonstances dans lesquelles il est ernployé. A l'article 54, i1 est justement traduit par « désistement ». Le nom « désistement » ne s'applique pourtant pas à la situation visée par l'article 55 ou l'inactivité des parties conduit à la cessation de l'instance. En effet, le terme « désistement » désigne un acte volontaire, le plus souvent unilatéral, par lequel une partie désire se retirer d'une instance engagée. Il traduit bien la situation visée à l'article 54. Mais il ne peut s'appliquer lorsque c'est le désintérêt des parties et leur inaction qui met fin à la procédure. Cette situation est en français traduite par un terme bien précis : la péremption. Si l'on veut, dans un souci de précision, employer le terme français adéquat pour chacune des situations envisagées par les trois articles vises et désignés par le terme anglais « discontinuance », à l'article 54 on dira « désistement », à l'article 55 on dira « péremption de l'instance pour cause d'inactivité des parties » et à l'article 56 « fin de l'instance par défaut de paiement ». De ce fait le titre de l'article 55 mérite d'être modifie pour être lu de la manière suivante :

Article 55. ~~Désistement~~ Péremption de l'instance pour cause d'inactivité des parties.

Rule 56 – Discontinuance for Failure to Pay

EUROPEAN UNION **JUNE 7, 2019**

28. To address concerns raised by a number of ICSID Members, the European Union and its Member States encourage the ICSID Secretariat to investigate further solutions that allow respondent States, upon request, to effectively recover costs engaged through cases where the arbitration proceedings are discontinued due to failure of the claimant to act or its failure to pay.

Chapter IX – The Award

Rule 57 – Timing of the Award

CANADA **JUNE 10, 2019**

Canada notes the comments of the Secretariat in paragraph 387 of the Working Paper, but suggests that further consideration be given to some sort of further incentive for arbitrators to meet the 240 day standard. For example, Canada suggests that the Tribunal once the 240 day period expires, the arbitrators cannot make further requests for fees until the award is finalized and ready to be rendered.

CHILE **JUNE 18, 2019**

Conforme con nuestros comentarios a la Regla 29, solicitamos que se establezcan consecuencias pecuniarias o de otra índole, si el Tribunal no ha cumplido con los plazos (permitiendo un cierto margen de acción y flexibilidad).

Apoyamos la decisión del CIADI de comenzar a publicar en su página web el monitoreo que realice sobre las fechas de emisión de decisiones y laudos (WP2, para. 387).

Rule 58 – Contents of The Award

CHILE **JUNE 18, 2019**

Sugerimos que en la Regla 58(1) se incluya, además de los factores ya listados, otros requisitos como el *ius standi* de los reclamantes, la determinación del derecho aplicable y la aplicación de las normas y principios de derecho internacional público relevantes en la resolución de la disputa. Si el tribunal considera que existió una violación del tratado, sugerimos también incorporar (a) una clara identificación del nexo causal entre los hechos o medidas del Estado que se encuentren bajo la jurisdicción del tribunal, y los perjuicios alegados por los cuales se busca compensación monetaria, (b) una explicación detallada de los principios y métodos utilizados para cuantificar el daño que se busca compensar y (c) el cálculo del daño.

Proponemos además incluir que las partes y el Tribunal se deben poner de acuerdo sobre cuáles son "la(s) cuestión(es) que le haya[n] sido sometida[s]" al tribunal, a efectos de limitar posibles solicitudes de anulación. Si se considera que esta regla no es el lugar idóneo, este tema podría proponerse como parte de las cuestiones a ser acordadas en la Resolución Procesal No. 1.

Se propone modificar la Regla 58(2), de manera a que por defecto se incluya la firma electrónica de los árbitros, salvo objeción de alguna de las partes. Lo anterior, en aras de reducir costos de envíos de páginas de firma y acelerar el proceso de emisión del Laudo.

Se solicita aclarar si la Regla 58(3) permite que la opinión individual o disidente de un miembro del Tribunal sea emitida separadamente del Laudo, y si se considera que dichas opiniones son o no parte integral del Laudo.

Regla 58- Contenido del Laudo

(…)
(2)El laudo deberá estar firmado por los miembros del Tribunal que se hayan pronunciado a favor del mismo. ~~Podrá~~ S~~s~~erá firmado a través de medios electrónicos, salvo objeción de alguna de las partes.

(3) Antes de que se dicte el laudo, cualquier miembro del Tribunal podrá adjuntar al laudo su opinión individual o disidencia al laudo.

COLOMBIA **JUNE 10, 2019**

Para Colombia es necesario que las reglas del CIADI reflejen los requisitos básicos que debe contener un laudo. Esto asegura que los árbitros tengan la obligación de motivar y esclarecer los fundamentos que sustentan los laudos que emiten.

Por lo anterior, se sugiere que esta regla incluya un numeral (2) que complemente lo enunciado en el primer numeral y sus literales, de la siguiente forma:

"(2) Para mayor certeza, y sin perjuicio a lo establecido en el numeral 1 de esta Regla, el Laudo solo será vinculante para las Partes contendientes con respecto al caso en particular y estará sujeto a revisión y apelación, de conformidad con las reglas 64 y 66, de conformidad con las instancias previstas en los Acuerdos Internacionales de Inversión que fundamentan la reclamación o cualquier otro tratado sobre el tema del cual ambas partes sean parte.

Ambas Partes Contratantes reconocerán un laudo otorgado por un Tribunal o Tribunal de Justicia en virtud de este Acuerdo como vinculante y lo aplicarán como si fuera un fallo definitivo de un Tribunal de Derecho de esa Parte Contratante.

El Laudo expresará la convicción del Tribunal a partir de la pruebas claras y convincentes que las Partes en conflicto han demostrado con:

a. Su Ius Standi como reclamantes;
b. La relación y el fundamento de la decisión respecto a las normas y principio de derecho internacional público aplicables.
c. La ocurrencia de los hechos o medidas alegadas;
d. La relación con el contexto o situación particular que atraviese un Estado;
e. La existencia de perjuicios por las cuales se buscan daños monetarios;
d. El nexo causal entre c y e.; y
g. Explicación de los costos determinados."

COSTA RICA JUNE 12, 2019

Costa Rica suggests to include an additional requirement for the contents of the award. This would provide more certainty on the grounds on which the Tribunal is rendering its decision.

Rule 58
Contents of the Award
(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;

(d) the name of each member of the Tribunal and the appointing authority of each;

(e) the dates and place(s) of the first session, case management conferences and the hearings;

(f) a brief summary of the proceeding;

(g) a statement of the relevant facts as found by the Tribunal;

(h) a brief summary of the submissions of the parties, including the relief sought;

(i) the decision of the Tribunal on every question submitted to it, and the legal reasoning ~~reasons~~ on which the Award is based; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision on the allocation of costs. […]

GUATEMALA JUNE 10, 2019

Gracias por la explicación, sin embargo, en la experiencia de Guatemala debido a que en un caso en el que se resolvió por el Tribunal arbitral que la prueba no fue "suficiente", la contraparte utilizó la falta de justificación del tribunal para anular el laudo, por lo expuesto se reitera que es preciso que el laudo contemple las justificaciones debidas y detalladas sobre la valoración de la prueba,

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.

Por lo anterior, se sugiere que nuevamente se incorpore el primer párrafo de la regla 62 según el primer documento de trabajo "(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 30 días siguientes a la fecha en que se haya dictado el laudo".

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.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Los Estados consideran necesario que las modificaciones a las reglas tengan en cuenta la necesidad de contar con laudos que estén sustentados adecuadamente. Es necesario que las reglas del CIADI reflejen estos criterios, asegurando que los árbitros tengan la obligación de motivar y esclarecer los fundamentos que sustentan los laudos que emiten.

Por lo anterior, se sugiere que la Regla 58 del WP2 (Regla 60 WP1) incluya, además de los factores ya listados, otros requisitos como el derecho aplicable, el análisis del nexo causal entre los hechos considerados violatorios del instrumento invocado y los perjuicios alegados, así como una justificación del método utilizado para cuantificar y calcular el daño.

Rule 59 – Rendering of the Award

Rule 60 – Supplementary Decision and Rectification

NO COMMENTS RECEIVED

Chapter X – Publication, Access to Proceedings and Non-Disputing Party Submissions

EUROPEAN UNION JUNE 7, 2019

19. In their first written comments, the European Union and its Member States explained in detail the utmost importance of transparency as a general policy objective and one of the main pillars of the EU' reformed approach to investment dispute settlement.

20. The European Union and its Member States regret that the current proposals by the ICSID Secretariat – including on public access to hearings in arbitration proceedings, and on the publication of awards rendered under the ICSID Arbitration Rules –, remain below the level of transparency achieved in most recent investment agreements or in the recently adopted UNCITRAL Transparency Rules.

21. Mindful of the potential limitations stemming from the ICSID Convention, the European Union and its Member States reiterate their invitation to the ICSID Secretariat and ICSID Members to reflect further about possible ways to achieve a greater level of transparency that would be at least similar 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.

(See additional comments under AR 65 and AR 66)

GEORGIA JUNE 8, 2019

Based on the discussion during the second state consultations and concerns expressed by delegations of other states, Georgia maintains its position regarding the necessity to establish more balanced approach with respect to the transparency in investor-state arbitration. In particular, we propose to include certain exceptions to the proposed regime of transparency in order to protect integrity of the arbitral process and guarantee the effective resolution of the dispute. (See Georgia's comments to Working Paper #1)

In addition, we would like support the proposal made by the delegation of Australia and several other delegations during the second state consultations to introduce some language in the relevant part of this Chapter regarding the protection of confidential or otherwise privileged or protected information of the state party or that of the investor party to the dispute (such as state, commercial or bank secret, business confidential information or personal date). Inclusion of similar language is very common in free trade agreements, including in dispute settlement chapters, as well as in new generation investment treaties (whether as a general exception or as part of the dispute settlement procedure).

IISD APRIL 12, 2019

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

10.0 TRANSPARENCY
The fact that investor–state arbitration invariably involves a public party requires a high level of transparency in proceedings, to allow citizens and other stakeholders of the states involved—both the home state and the host state—to be aware of the implications of disputes. It also allows citizens to have access to relevant information to exercise democratic oversight of their governments' action and to monitor states' obligation to act transparently. Transparency in proceedings has become even more important as investor–state arbitration tribunals often decide issues involving public interests affecting a wide range of stakeholders and high claims for monetary damages with significant impacts on government budgets and spending.

After a six-year negotiation process, UNCITRAL formally adopted in July 2013 the UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration, in force since April 2014.[55] By requiring publication of the notice of arbitration, the details of the case, all written submissions and claims and all decisions of the arbitral tribunal, the UNCITRAL Transparency Rules have been referred to by treaties as an acceptable standard for investment arbitration. Furthermore, transparency in investor–state arbitration is becoming the rule rather than the exception in modern investment treaties and treaty models. CETA, for example, incorporates the UNCITRAL Transparency Rules and builds on them, including additional provisions to further strengthen transparency in proceedings.

In its proposed Chapter X on Publication, Access to Proceedings and Non-Disputing Party Submissions, the ICSID Secretariat regrettably shies away from incorporating the same or higher transparency standards than those of the UNCITRAL Transparency Rules.

ICSID Convention Article 48(5) requires consent of the parties to publish awards; accordingly, the secretariat rejects as impossible the proposals of several states who urged mandatory publication of awards.[56] Although the secretariat notes that "a proposal to amend Art. 48 of the Convention could be discussed after the current rule amendment process concludes if Members would like to address this,"[57] ICSID member states may wish to consider amending the ICSID Convention in this respect even before or concomitantly with the current rule amendment process.

The ICSID Arbitration Rules were revised in 2006—for the first time in 40 years, since the ICSID Convention came into force in 1966—and that revision process addressed some of the concerns regarding transparency in investor–state arbitration proceedings. However, in light of the recent developments described above, further improvements are necessary and urgent. Investor–state arbitration should not remain fastened to a commercial arbitration model traditionally built on notions of confidentiality. Instead, ICSID member states should take a leadership role in revising the ICISD AR and, where necessary, the ICSID Convention to go beyond recent reform initiatives and ensure higher standards of transparency. By doing so, ICSID member states would signal to investors and citizens that ICSID arbitration can respond to modern developments and appropriately address widely voiced concerns about transparency.

Rule 61 – Publication of Awards and Decisions on Annulment

AUSTRALIA JUNE 14, 2019

Australia is a strong supporter of promoting further transparency in arbitration proceedings (subject to the appropriate protection of confidential information). Australia therefore suggests that the deemed consent language be reinstated in this rule.

CANADA JUNE 10, 2019

Canada strongly supports maximizing the transparency of ICSID arbitrations as much as possible. Canada recognizes that it would require an amendment to the Convention in order to allow public disclosure of Awards without the consent of both parties. Canada would support such an amendment, and encourages others States to support such an amendment as well.

In the meantime, there are means by which greater transparency can be promoted within the existing ICSID framework. The current practice of publishing only excerpts of the legal reasoning is unsatisfactory – Canada suggests that the presumption should be to disclose as much of the Award as possible and put the onus on the resisting party to justify why redactions are justified. Canada suggests the following language, which should create a greater incentive for parties to work towards greater transparency:

(3) Absent consent of the parties referred to in paragraphs (1) and (2), the Centre shall publish excerpts of such documents, including from the procedural history, factual background, arguments of the parties and legal reasoning of the Tribunal ("excerpts").

(4) The following procedure shall apply to publication of excerpts:

a. The Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to full publication of a document referred to in paragraphs (1) and (2), or if the parties have not provided their consent to publication within 90 days after the dispatch of the document;

b. The parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt, including any substantive and compelling reason why the proposed excerpts should not be publically disclosed; and

c. the Centre shall consider the comments on the proposed excerpts, if any, and publish excerpts within 30 days after receipt of those comments.

COSTA RICA JUNE 12, 2019

In Costa Rica's view, the publication of the awards and decisions are an important transparency element. Since the ISDS does impact the use of public resources of a State, it is a matter of public interest that the citizens may have access to the documents that settled a dispute. Therefore, we consider that any objerction of such publication shall be accompanied by an explanation of the reasons for not give its consent.

The amendment of the Rules is an appropriate opportunity to include additional transparency elements that can strengthen the legitimacy of ISDS.

Rule 61
Publication of Awards and Decisions on Annulment

(1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment. If a party does not consent to the publication of an Award or decision, that party shall explain the reasons for its objection.[…]

ISRAEL JUNE 22, 2019

We acknowledge the importance of transparency. At the same time there is a need to protect confidential information, such that it would be explicitly defined and excluded from publication (this is also true of proposed AR 62, 63 and 64). This suggestion is in line also with UNCITRAL Rules on Transparency (2013).

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Los Estados expresan su compromiso con la búsqueda de transparencia en la solución de controversias inversionista - Estado. En ese sentido, se considera que si bien el Artículo 48(5) del Convenio del CIADI establece que el Centro no publicará el laudo sin el consentimiento de las partes, se debería aprovechar esta oportunidad para delimitar las objeciones a la publicación de Laudos, y

Decisiones sobre Anulación, las cuales deberían ser razonadas y fundarse en razones objetivas relativas a la protección de información confidencial o privilegiada, por citar algunos ejemplos.

Asimismo, apoyamos el procedimiento establecido en la Regla 61 (3) del WP2, pues consideramos necesario contar con procedimientos claros y con términos preestablecidos para la publicación de cualquier extracto de la decisión.

SINGAPORE **JUNE 21, 2019**

We *strongly support* ICSID's proposal in WP 2. In our view it is the appropriate approach to the publication of Awards, taking into account the constraints imposed by the Convention. We also note that it always remains open for States who desire greater transparency to negotiate this in their treaties to the effect that parties to a particular treaty agree that they shall consent in ICSID arbitrations to the publication of Awards.

Rule 62 – Publication of Orders and Decisions

COLOMBIA **JUNE 10, 2019**

Colombia se inclina por la publicación de los documentos, con las clarificaciones de la redacción cuando se trate de extractos.

COSTA RICA **JUNE 12, 2019**

As previously mentioned, 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.

ISRAEL **JUNE 22, 2019**

We wish to reiterate our view that provisions regulating the publication of orders and decisions should be similar to those of the publication of Awards (i.e. require consent of the parties).

KOREA, REPUBLIC OF **JUNE 28, 2019**

In line with its oral comments made during the Second Meeting, Korea submits that Rule 62 should mirror the structure of Rule 61 on the publication of awards and decisions on annulment, given due consideration of the balance between the two provisions as well as the issues of compatibility with the ICSID Convention.

Rule 63 – Publication of Documents Filed by a Party

COSTA RICA **JUNE 12, 2019**

As previously mentioned, 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.

Costa Rica suggests the following wording:

Rule 63
Publication of Documents Filed by a Party
(1) Upon request of a party, the Centre shall publish the following documents generated in proceedings: request for arbitration, memorial, counter-memorial, reply, rejoinder, requests on interpretation, revision and annulment ~~,documents which that party filed in the proceeding~~, with redactions agreed to by the parties.

(2) The parties may refer any dispute regarding the publication or redaction of a document in paragraph (1) to the Tribunal for determination. The Centre shall publish the document in accordance with the determination of the Tribunal.

ISRAEL **JUNE 22, 2019**

See comments under AR 61.

Rule 64 – Observation of Hearings

CANADA **JUNE 10, 2019**

Canada believes that ICSID arbitration hearings should be public, except where going in camera for limited periods of time is necessary to protect confidential information. Canada recommends that this rule be redrafted in order to create the presumption of public hearings but give the Tribunal discretion to order the hearing into confidential session when appropriate.

HAITI **MAY 20, 2019**

La délégation haïtienne approuve la rédaction de cet article qui permet à une partie de s'opposer à la divulgation par vidéo ou autres moyens des audiences en raison des répercussions négatives pour l'Etat du visionnement par un public non averti ou manipule par des politiciens de mauvaise foi.

ISRAEL **JUNE 22, 2019**

See comments under AR 62.
Additionally, we suggest adding a para. to the Rule, allowing the tribunal, after consultation with the disputing parties, to decide to hold all or part of the hearings in closed session when it is necessary for logistical reasons. This too, is also in line with the UNCITRAL transparency Rules (2013).

Rule 65 – Submission of Non-Disputing Parties

CHILE **JUNE 18, 2019**

Estamos de acuerdo con que en la Regla 65 (4) se elimine la posibilidad de que el tribunal imponga una obligación de desembolso de costos a las partes no contendientes, que se había propuesto en el WP1 (Regla 48(4)(c)).

Regla 65 - Escritos de Partes No Contendientes

(…)
(4)El Tribunal deberá asegurar que la participación de la parte no contendiente no perturbe el procedimiento, o genere una carga indebida, o perjudique injustamente a cualquiera de las partes. A tal fin, el Tribunal podrá imponer condiciones a la parte no contendiente, incluyendo el formato, extensión o alcance del escrito y el plazo en el que deberá presentarse.

EUROPEAN UNION **JUNE 7, 2019**

22. On the positive side, with regard to submissions of non-disputing parties, the European Union and its Member States are pleased to see that the initially proposed language that would have made it possible to require non-disputing parties to bear parts of the costs of the proceedings has not been retained in the revised text proposal. Similarly, we welcome that the ICSID Secretariat has taken on board our comment on the requirement for a Tribunal to give the reasons for a decision whether to permit a non-disputing party to file a submission.

HAITI MAY 20, 2019

L'expression anglaise « non-disputing party » est traduite en français par « partie non contestante » Cette expression est trompeuse et inadéquate. Contester en français signifie que l'on s'oppose à quelqu'un ou à une opinion ; être non contestant signifierait donne que l'on acquiesce à cette demande, ce qui ferait de cette personne une partie au procès. Or, il n'en est rien, la « non disputing party» est une personne qui n'est pas partie au procès ni comme demanderesse ni comme défenderesse ; elle n'est pas partie au litige. C'est donné une partie non-litigante. Cette expression qui est familière à tous les juristes francophones familiers des tribunaux est celle qui doit être employée ici. Les remarques relatives à cet article s'appliquent d'ailleurs à l'article 66. De ce fait, la délégation haïtienne propose [remplacer les termes « non contestantes » par « non litigantes »].

ISRAEL JUNE 22, 2019

Para. (6): we hold that providing the non-disputing party with access to documents filed in the proceedings must be subject to the parties' consent (i.e., the burden should be reversed).

In order to fulfill the requirements set forth in para. 2, we propose setting a corresponding disclosure obligation on NDPs.

With regard to the issue of NDP, including NDTP (Rule 66), Israel reiterates its position reflected during the April meeting, that NDP/NDTP submissions and participation should be limited and should include NDP/NDTP reference to a specific treaty and interpretation of such a treaty or its rules. It is less desirable to provide NDP/NDTP an option to comment on the merits of a specific case, as such an option could create a leeway for external intervention and could bring excessive pressure into the procedure.

JAMAICA JUNE 13, 2019

The proposed deletion of **Rule 65(4) (c)** by ICSID which concerns the conditions which the Tribunal may impose on the non-disputing party with respect to the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation is justified by ICSID, on the basis that “Non-disputing Party (NOP) participation can be very useful, and that requiring NOPs to contribute to case cost might deter such participation”. In respect of **Rule 66**, a different stance is adopted. According to paragraph 430 of the Working Paper No. 2, the Member States may wish to delete **Rule 66** entirely.

The GOJ proposes that the appropriate course of action would be for NOP and Non-disputing Treaty Party (NOTP) to bear the additional costs of their participation in the relevant proceedings. In making this recommendation, we would draw attention to Schedule 1, "Memorandum on Fees and Expenses in ICSIO proceedings" in Working Paper No. 2.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Respecto a los escritos de partes no contendientes, estamos de acuerdo con que, en la Regla 65 (RA WP2), se elimine la posibilidad de que el tribunal imponga una obligación de desembolso de costos a las partes no contendientes, que se había propuesto en el WP1 (Regla 48(4)(c)).

Respecto a la Participación de una Parte No Contendiente del Tratado, consideramos que la intervención de estos Estados debe limitarse a la interpretación del tratado en cuestión y no referirse a los hechos o méritos de la controversia. Por lo tanto, estamos de acuerdo con la nueva redacción de la Regla 66 (1) del WP2, que elimina la referencia a la posibilidad de la parte no contendiente de pronunciarse sobre la "aplicación" del tratado.

KOREA, REPUBLIC OF JUNE 28, 2019

It is Korea's position that Non-disputing Party (hereinafter "NDP") submissions must be submitted in all procedural languages applicable to the relevant proceeding. The parties should not have to bear the additional costs of interpretation for third-party participation.

Therefore, the second sentence of paragraph (1) should be amended to read: "The application and the submission, if permitted by the Tribunal, shall be made in all procedural languages."

Korea proposes to reintroduce the Tribunal's power to require an NDP to pay funds to defray the increase in costs of the proceeding attributable to that NDP's participation prescribed in Rule 47(4)(c) of Working Paper #1.

In Korea's view, it is only equitable to leave open the possibility of levying costs from a NDP if it results in a substantial increase in costs for the disputing parties.

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

9.0 Third-Party Intervention and Joinder
Due to the public interest involved in their resolution, investor–state arbitration proceedings and decisions often have impacts beyond the disputing parties and their rights, also affecting non-party stakeholders. Among these are individuals affected by foreign investment activities, local communities or Indigenous Peoples in the area where the investment was made, labour unions, environmental protection entities and civil society organizations.

Many domestic courts or processes offer avenues for these stakeholders to intervene in disputes between companies and the government or to bring a claim against a government or a company in case of harm. Some arbitral institutions have also begun to expand opportunities for third-party joinder.[52]

However, at ICSID meaningful participation of affected non-party stakeholders is very limited. Provisions on transparency and on third-party submissions (amicus curiae), while useful and necessary, are insufficient to allow affected third parties to participate in the proceeding in a meaningful manner. The complexity of investment disputes nowadays requires more sophisticated tools for all affected parties to assert their rights.

In the current rule amendment process, the ICSID Secretariat has not moved beyond the existing approach of amicus curiae submissions. Proposed AR 65 on Submission of Non-disputing Parties, as the ICSID Secretariat acknowledges, "maintains the two-step process in the current rules whereby permission to file must be obtained prior to filing the substantive [non-disputing party] submission."[53] Even when permitting the submission, the tribunal is entitled (but not obligated) to "provide the non-disputing party with access to relevant documents filed in the proceeding," but is forbidden from doing so if either party objects.[54] This imposes significant limitations on the ability of amici curiae to make meaningful submissions.

Analyzing and building on domestic law provisions on third-party intervention and joinder, member states should work on revising the ICSID Convention and Arbitration Rules so that ICSID tribunals—whether at their discretion or on specified grounds—may allow affected non-parties to join or intervene in arbitrations that could affect their rights. By implementing potential revisions in this area, ICSID member states would help prevent tribunals from rendering decisions that negatively affect the rights of third parties.

Rule 66 – Participation of Non-Disputing Treaty Party

AUSTRALIA JUNE 14, 2019

In Australia's view non-disputing treaty party submissions can play an important role in promoting coherence and consistency in arbitral awards. Accordingly, consideration might be given as to whether this rule, as currently drafted, is too narrow.

CHILE JUNE 18, 2019

Consideramos positivo que se mantenga la posible intervención de un Estado Parte No Contendiente, si ésta se limita a la interpretación de las obligaciones sustantivas del tratado. Por lo tanto, estamos de acuerdo con la nueva redacción de la Regla 66 (1) que elimina la referencia a la posibilidad de la parte no contendiente de pronunciarse sobre la "aplicación" del tratado.

Regla 66 – Participación de una Parte No Contendiente del Tratado

(1) El Tribunal permitirá que una parte de un tratado que no sea parte en la diferencia ("parte no contendiente del tratado") presente un escrito sobre la interpretación del tratado objeto de la diferencia y que se invoca como base del consentimiento al arbitraje.

COLOMBIA JUNE 10, 2019

El Párrafo 2 mantuvo la alusión a las cuestiones de hecho y la regla mantiene una posible intervención muy amplia. Colombia insiste en que la intervención de las Partes no contendientes se circunscriba a la interpretación del tratado y no sobre los hechos ni reclamaciones de una controversia.

[Nueva Regla 66]. En el WP2 se acepta que la intervención de este Estado se hará respecto de la interpretación y no aplicación. Esto era una preocupación de Colombia, la cual fue aceptada. Sin embargo, parece conveniente que se incluyan elementos que debe analizar el Tribunal para permitir la presentación de eses escrito, tales como, relevancia de dicho escrito en la controversia, necesidad de ese escrito para el Tribunal teniendo en cuenta que ya tiene las pruebas y los escritos de cada parte, interés del Estado no

contendiente en presentar el escrito. Y de la misma forma en que quedó expuesto en la regla anterior sobre partes no contendientes (*amicus*, etc), que el Tribunal analice que no se está imponiendo una carga adicional a la otra Parte al recibir dicho escrito.

COSTA RICA JUNE 12, 2019

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 not be limited by specific conditions imposed by the Tribunal. Therefore, we suggest deleting paragraph two.

Rule66
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 interpretation of the treaty at issue in the dispute and upon which consent to arbitrate is based.

~~(2) A The 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 impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or scope of the submission and the time limit to file the submission.~~

(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.

EUROPEAN UNION JUNE 7, 2019

23. As regards submissions by 'Non-disputing Treaty-Parties', the European Union and its Member States welcome that this rule has been de-linked from the provision relating to 'non-disputing parties', and is thus better suited to the particular nature of governments and States (and REIOs).

24. The European Union and its Member States are, however, concerned that the wording in Working Paper #2 does not address appropriately all the situations that the language proposed by the European Union and its Member States to this rule intended to cover. To reflect the particular situation of REIOs, and the relationship with its constituent Members, we would request the Secretariat to

reconsider including, in a footnote to what would become Rule 66, language that would state that submissions covered by that rule are understood to include submissions made by REIOs of which the non-disputing Treaty Party forms part.

25. The European Union and its Member States also note that in its current wording the proposal would limit the submissions to issues of "interpretation". We suggest reconsidering to include a provision that would leave it to the discretion of the Tribunals to allow interventions on further matters within the scope of the dispute, as a Tribunal may deem it helpful in light of the circumstances of a particular case, provided that such submissions do not support the claim of the investor in a manner tantamount to diplomatic protection. This would also align the provision with Article 5(2) of the UNCITRAL Transparency Rules and hence contribute to the coherence of existing dispute settlement rules.

GEORGIA JUNE 8, 2019

Georgia proposes to maintain the version of the Rule 66(1) as proposed in Working Paper #2. In particular, Georgia believes that the participation of the Non-disputing Treaty Party (NDTP) in investor-state arbitration is important in order to make sure that the treaty is interpreted accurately in compliance with the will of the contracting parties and the meaning attributed to the terms of the treaty by the latter. In our understanding the aim of extending the possibility to the NDTPs in investor-state arbitration proceedings is to ensure correct and consistent interpretation of treaty provisions by the arbitral tribunals, which have been extensively criticized lately on this subject. However, the participation of NDTPs should not go beyond assisting the disputing parties and the arbitral tribunal in interpreting the treaty terms, i.e. NDTPs should not have a possibility to argue the case or dispute or comment in any manner on factual or legal evidence presented by the parties to the dispute.

Extending the scope of the NDTP's participation to the "application" of the treaty might provide possibility for non-disputing Treaty Parties to attempt arguing the case or somehow effecting the outcome on the case.

In case any issue with respect to the application of the treaty arises Contracting State Parties to the Treaty at hand can always discuss or argue through the mechanism of Inter-State negotiations or Inter-State dispute settlement that is provided in almost all investment treaties (Settlement of Disputes Between Contracting Parties).

ISRAEL JUNE 22, 2019

See comments under AR 65.

JAMAICA JUNE 13, 2019

The proposed deletion of **Rule 65(4) (c)** by ICSID which concerns the conditions which the Tribunal may impose on the non-disputing party with respect to the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party's participation is justified by ICSID, on the basis that "Non-disputing Party (NOP) participation can be very useful, and that requiring NOPs to contribute to case cost might deter such participation". In respect of **Rule 66**, a different stance is adopted. According to paragraph 430 of the Working Paper No. 2, the Member States may wish to delete **Rule 66** entirely.

The GOJ proposes that the appropriate course of action would be for NOP and Non-disputing Treaty Party (NOTP) to bear the additional costs of their participation in the relevant proceedings. In making this recommendation, we would draw attention to Schedule 1, "Memorandum on Fees and Expenses in ICSIO proceedings" in Working Paper No. 2.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

Respecto a los escritos de partes no contendientes, estamos de acuerdo con que, en la Regla 65 (RA WP2), se elimine la posibilidad de que el tribunal imponga una obligación de desembolso de costos a las partes no contendientes, que se había propuesto en el WP1 (Regla 48(4)(c)).

Respecto a la Participación de una Parte No Contendiente del Tratado, consideramos que la intervención de estos Estados debe limitarse a la interpretación del tratado en cuestión y no referirse a los hechos o méritos de la controversia. Por lo tanto, estamos de acuerdo con la nueva redacción de la Regla 66 (1) del WP2, que elimina la referencia a la posibilidad de la parte no contendiente de pronunciarse sobre la "aplicación" del tratado.

KOREA, REPUBLIC OF JUNE 28, 2019

Korea supports the position of Rule 66 in limiting the scope of Non disputing Treaty Party (hereinafter "NDTP") submissions to matters concerning the interpretation of the treaty at dispute. It is Korea's observation that if the NDTP should be imbued with a right

of participation, it is only natural that that right be limited to matters of interpretation of the treaty which provided it with that NDTP status.

In Korea's opinion, it is the NDTP instead of the NDP which should be given the opportunity to be provided with the relevant documents by the Tribunal. The NDTP has a much more direct interest in the outcome of the case in terms of treaty interpretation, and is in a position to provide valuable insight into the key issues of the dispute.

Therefore, Korea proposes to delete Rule 65(6), and add its equivalent to Rule 66 which reads: "The Tribunal may provide the non-disputing treaty party with access to relevant documents filed in the proceeding, unless either party objects."

MEXICO JUNE 24, 2019

México agradece al CIADI los cambios hechos a la regla 66. No obstante, México propone lo siguiente para ajustar la regla:

- En la regla 66(1), se recomienda agregar la referencia a "comunicaciones orales" además de las comunicaciones escritas que ya prevé la regla. México considera que este cambio es conveniente para evitar interpretaciones restrictivas sobre el alcance de la regla 66 que eviten a las partes no contendientes del tratado a intervenir de manera oral en el procedimiento.
- Se recomienda eliminar la regla 66(2) que señala: "El Tribunal podrá imponer condiciones a la presentación de escritos por una parte no contendiente del tratado, incluyendo el formato, extensión o alcance del escrito y el plazo en el que deberá presentarse". México considera que el derecho a presentar cuestiones de interpretación del tratado del cual es parte, no debe ser restringido. Sobretodo llama la atención la posibilidad de restringir el "alcance del escrito", dado que parecería permitir al tribunal la posibilidad de limitar el derecho de una parte del tratado a presentar cuestiones de interpretación del tratado.

SINGAPORE JUNE 21, 2019

We *strongly support* retaining a rule dealing with the participation of a Non-Disputing Treaty Party ("NDTP"). However, we align ourselves with the views of the States that support the WP 1 version of this rule which does not limit the NDTP's submissions to interpretations of the treaty and does not allow a Tribunal to impose conditions on the filing of submissions by the NDTP. States should have the broadest possible space to intervene as and when required because it is difficult to predict all the possible situations

where a NDTP sees a necessity to intervene on issues that bear on the interpretation of a treaty to which it is a party. Therefore, this provision should be left as open-ended as possible.

Chapter XI – Interpretation, Revision and Annulment of the Award

Rule 67 – The Application

CHILE **JUNE 18, 2019**

Sugerimos que en la Regla 67(5)(c) respecto a Solicitud de Anulación, se aclare que el solicitante debe detallar los supuestos errores del procedimiento o laudo que fundamentan la respectiva causal y las razones por las que considera que esos errores constituyen base suficiente para invocar las causales identificadas.

Se solicita también estudiar la posibilidad de incorporar en las reglas lenguaje que busque evitar abusos de proceso por medio de demandas paralelas. Es decir, evitar que disputas que hayan sido resueltas por medio de un laudo CIADI, sean nuevamente presentadas en otro foro, al mismo tiempo que se solicita la anulación del laudo en cuestión

Regla 67 – La Solicitud.
(…)
(5) Una solicitud de anulación de conformidad con lo dispuesto en el Artículo 52(1) del Convenio deberá:

(c) especificar las causales en que se funda, circunscriptas a las causales establecidas en el Artículo 52(1)(a)-(e) del Convenio, y las razones en sustento de cada causal.

Rule 68 – Interpretation or Revision: Reconstitution of the Tribunal

COLOMBIA **JUNE 10, 2019**

Para Colombia es importante incluir la posibilidad de una segunda instancia para la revisión de un laudo. Al respecto, Colombia considera necesario que las reglas del CIADI incluyan esta posibilidad. En este sentido la Regla 68 debe contener un párrafo adicional que introduzca el recurso de apelación, el cual puede tener una redacción de la siguiente forma:

"Reglas 68 Aclaración, Revisión o Apelación: "(1). En cuanto se registre la solicitud de aclaración, revisión o apelación de un laudo, el o la Secretario General deberá: (…)"

En ese mismo sentido, es necesario que la Regla 70, incluya el Procedimiento para la apelación. Por tanto, se propone incluir literalmente este recurso y mantener los 120 días como término para su decisión.

GUATEMALA **JUNE 10, 2019**

Gracias por la respuesta a las preguntas. No obstante, la redacción no es clara, por consiguiente se sugiere establecer en forma precisa que las partes puede nombrar nuevamente a los árbitros que participaron en el arbitraje original. (ver AR68 (3) y (2))

Rule 69 – Annulment: Appointment of *ad hoc* Committee

NO COMMENTS RECEIVED

Rule 70 – Procedure Applicable to Interpretation, Revision and Annulment

CHILE **JUNE 18, 2019**

Se sugiere permitir que una de las partes (i.e. sin necesidad de acuerdo de ambas) pueda objetar a que se apliquen las resoluciones procesales del procedimiento original al procedimiento de anulación. Esto considerando la posibilidad de que existan cambios importantes que lleven a una parte a querer reconsiderar la posición procesal adoptada al inicio del procedimiento original.

Regla 70 - Procedimiento Aplicable a la Aclaración, Revisión y Anulación

(…)
(2) Los acuerdos y resoluciones procesales sobre cuestiones abordadas durante la primera sesión del Tribunal original continuarán siendo aplicables en un procedimiento de aclaración, revisión o anulación, con las modificaciones necesarias, salvo ~~acuerdo~~ objeción de una de las partes. ~~o resolución del Tribunal o Comité en contrario~~.

Rule 71 – Stay of Enforcement of the Award

NO COMMENTS RECEIVED

Rule 72 – Resubmission of Dispute after an Annulment

CHILE **JUNE 18, 2019**

De acuerdo con el contenido, pero se sugiere reemplazar “sumisión” por “presentación”.

Regla 72 Nueva Sumisión de una Diferencia después de la Anulación
(…)
(3) Inmediatamente después de recibir una solicitud de nueva ~~sumisión~~ presentación y el derecho de presentación, el o la Secretario(a) General, deberá con prontitud: (…)

(2) Los acuerdos y resoluciones procesales sobre cuestiones abordadas durante la primera sesión del Tribunal original continuarán siendo aplicables en un procedimiento de aclaración, revisión o anulación, con las modificaciones necesarias, salvo ~~acuerdo~~ objeción de una de las partes. ~~o resolución del Tribunal o Comité en contrario~~.

COSTA RICA **JUNE 12, 2019**

Costa Rica understands that even when the Convention does not provide for any time limit for the resubmission of the dispute, it does not preclude the possibility to establish other time limits additional to those set by it, in this or many other matters. The WP2 indicates that: “Parties may agree to limit the time period for resubmission. WP # 2 therefore does not propose to add a time limit.” Does this refer to the Parties to the Investment Agreement or the Parties to the dispute?

GUATEMALA **JUNE 10, 2019**

Gracias por la explicación, no obstante, se reitera la solicitud de incluir en las enmiendas la posibilidad de incluir un plazo para el planteamiento o solicitud de una nueva sumisión.

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 hacer operativo 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. (ver AR 72(1)).

Chapter XII – Expedited Arbitration

EUROPEAN UNION **JUNE 7, 2019**

4. The European Union and its Member States would have liked to see the current rules amendment process resulting in making ICSID arbitration more accessible for small and medium-sized enterprises. The European Union and its Member States encourage the ICSID Secretariat to consider ways to better take into account their interests throughout the ICSID rules, notably in the financial provisions, provisions on expedited procedures and consolidation, and other rules addressing specifically the particular situation of small and medium-sized enterprises.

JOINT COMMENTS (CH/CO/CR/MEX/PE) **JUNE 26, 2019**

Teniendo presente que los procedimientos ante el CIADI buscan establecer la responsabilidad internacional de un Estado, creemos que es debatible que un Arbitraje Expedito pueda ser un mecanismo idóneo. Si bien entendemos que es un mecanismo consensual que busca, entre otros, permitir que la pequeña y mediana empresa tenga acceso a mecanismos de reparación, los efectos de declarar la responsabilidad internacional del Estado son tan amplios y múltiples, que no se considera que un arbitraje expedito sea el mecanismo adecuado para lograr dicho objetivo. Asimismo, resaltamos que la apropiada defensa del Estado requiere la coordinación de más de una entidad u organismo gubernamental, y que los procesos para la contratación y pagos de servicios de asesoría externos, a veces necesarios para la defensa del Estado requieren tiempo.

Rule 73 – Consent of Parties to Expedited Arbitration

CHILE **JUNE 18, 2019**

Regla 73 - Consentimiento de las Partes a un Arbitraje Expedito

Si bien entendemos que lo que se propone es un mecanismo consensual, los efectos e implicancias de declarar la responsabilidad internacional de un Estado son múltiples, amplios y complejos y no creemos que un arbitraje expedito sea el mecanismo adecuado. Es además riesgoso que este mecanismo pueda ser aceptado por entidades públicas sin tener pleno conocimiento de los efectos. La apropiada defensa del Estado requiere la coordinación de más de una entidad y los procesos para la contratación y coordinación de

servicios de asesoría externos, a veces necesarios para la defensa del Estado, requieren tiempo. Adicionalmente, observamos que la propuesta de arbitraje expedito está modelada sobre la base del arbitraje comercial y elimina ciertas herramientas de defensa como la posibilidad de bifurcar procedimientos y garantías procesales. Por lo tanto, solicitamos eliminar todo el capítulo.

COLOMBIA **JUNE 10, 2019**

Colombia reitera su posición respecto de que las Partes deben tener la potestad de:

1. Elegir si quieren un arbitraje expedito.
2. Una vez lo hayan elegido, puedan volver a instaurar el arbitraje tradicional. Esta facultad resulta necesaria porque dependiendo de la complejidad de los casos, en algunos eventos es necesario que el proceso dure el tiempo que sea necesario para llegar a un fallo. Igualmente, teniendo en cuenta las realidades administrativas, políticas y económicas de los Estados, es necesario darles un ámbito más amplio para la consecución de los recursos, a partir de las necesidades e intereses de defensa de cada caso.

Colombia también considera que debe existir la potestad en cabeza del Tribunal y de las Partes para decidir que, si en algún momento el arbitraje expedito ya no es factible, puedan optar regresar al arbitraje regular.

Colombia considera que esto es importante para preservar la flexibilidad de las Partes y que facilite al Tribunal emitir decisiones de acuerdo con las circunstancias potencialmente cambiantes.

COSTA RICA **JUNE 12, 2019**

We appreciate ICSID’s efforts to provide an alternative to reduce costs and times of the process under certain circumstances. However, after further consideration of this matter and conversations with other member States, we considerate that it is unnecessary to have an expedited arbitration, since it could limit States´ ability to exercise an appropriate defence.

Rule 74 – Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

Rule 75 – Appointment of Sole Arbitrator for Expedited Arbitration

Rule 76 – Appointment of Three-Member Tribunal for Expedited Arbitration

NO COMMENTS RECEIVED

Rule 77 – Acceptance of Appointment by Arbitrators in Expedited Arbitration

GUATEMALA **JUNE 10, 2019**

Se reitera que esta regla es innecesaria, debido que esta misma disposición se contempla en varias reglas anteriores.

"Un o una árbitro nombrado(a) en un arbitraje expedito deberá aceptar el nombramiento y proporcionar una declaración de conformidad con lo dispuesto en la Regla 26(3) dentro de los 10 días siguientes a la recepción de la solicitud de aceptación."

JAMAICA **JUNE 13, 2019**

The **Rule 77** provides an alternative to help to reduce costs and the length of the arbitration process. Paragraphs 501-505 of Working Paper No. 2 depict the stages of an expedited arbitration under various scenarios that would allow for an award within 17-21 months from the date of registration of the "Request" which is under the current average length of a case of 3 years and 7 months from the Tribunal constitution to an Award. The length of time for cases to be resolved raises the financial costs and other difficulties for the parties. The frustration of States and practitioners on the extended time taken to receive awards is reflected in the feedback provided in the ICSIO Rule Amendment process for example in paragraphs 21, 22 and 164 of ICSIO Working Paper No. 2, which suggests that fees be withheld or new fee structures developed to incentivise the issuance of timely reports. It is noted that the ICSIO Secretariat has not adopted any of the recommendations advanced to date that would seek to bring additional pressure on arbitrators to perform their duties in an expeditious and cost-effective manner. We note however **Rule 2** establishing the basic principle that the Tribunal and parties should conduct proceedings in an expeditious and cost-effective manner as well as **Rule 23** concerning Conciliation Commissions. The length of the proceedings will, in principle, also be impacted by the amendments made to **Rule 29** "Written Submissions" which now establish the default rule that the parties submit a reply and rejoinder, whereas previously this was only

where “the Tribunal finds it necessary”. Practically, however, a reply and rejoinder are almost always filed, thus making that the default rule would seem to be justifiable.

Rule 78 – First Session in Expedited Arbitration

NO COMMENTS RECEIVED

Rule 79 – The Procedural Schedule in Expedited Arbitration

COLOMBIA **JUNE 10, 2019**

Se aceptó el comentario de Colombia frente a este aspecto.

GUATEMALA **JUNE 10, 2019**

Se reitera que 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 1° orden procesal. Si es posible en el arbitraje expedito, debe ser posible en el normal.

"(…) (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; (…)

(2) Cualquier excepción preliminar, reconvención, demanda incidental o adicional se incorporará al calendario principal al que se hace referencia en el párrafo (1). El Tribunal deberá adaptar el calendario si una de las partes plantea cualquiera de estas cuestiones, teniendo en cuenta la naturaleza expedita del proceso. (…)"

ISRAEL **JUNE 22, 2019**

In view of rendering the expedited procedure feasible and usable (especially on part of states) we suggest to reconsider the proposed timeline provided in this rule (and for the entire procedure) and extending.

Rule 80 – Default during Expedited Arbitration

Rule 81 – The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

Rule 82 – The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration

NO COMMENTS RECEIVED

Rule 83 – Resubmission of a Dispute after an Annulment in Expedited Arbitration

GUATEMALA **JUNE 10, 2019**

Se reitera que debe entenderse 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 facilite el abuso del procedimiento.

"El consentimiento otorgado por las partes de conformidad con lo dispuesto en la Regla 69 no será aplicable a la nueva sumisión de la diferencia."

Rule 84 – Opting Out of Expedited Arbitration

JAMAICA JUNE 13, 2019

The **Rule 84 (1)** provides that "the parties may agree to opt out of an expedited arbitration by notifying the Tribunal and Secretary-General of their agreement. Upon such notification, only Chapters I-XI shall apply to the arbitration."

The GOJ recommends that consideration be given for the inclusion of a provision that addresses a situation where one party wishes to opt out, but the other party does not agree. For example, a State may be faced with a change of circumstances (such as an emergency or financial crisis) that impacts its ability to comply with the expedited arbitration procedure. Where there is no agreement to opt out, the Tribunal could be empowered to assess the circumstances and determine whether opting out would be permissible, and adjust the timelines as required.

SINGAPORE JUNE 21, 2019

We support having this new rule. This would allow greater flexibility and encourage parties to try the EA procedure as there is an exit option possible if they find during the process that it does not suit the case.

IISD APRIL 12, 2019

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

A chapter on expedited arbitration (EA)[6] forms part of ICSID's efforts to reduce costs and the length of ICSID arbitration. While several states and practitioners support the chapter, other states "observed that the short time limits could present challenges, but did not oppose the process given the requirement of consent from both disputing parties to EA chapter."[7]

Shorter time limits under the EA procedure would impose additional constraints on states, particularly developing countries, many of which struggle to secure the human and financial resources to defend the state in resource- and time-consuming arbitrations. The proposed rules require consent from the investor and the respondent state to opt in to the EA process, but once the state has consented, it is effectively locked in for the duration of the proceedings. The proposed rule states: "The parties may agree to opt out of an expedited arbitration by jointly notifying the Tribunal and Secretary-General of their agreement. Upon such notification, only Chapters I-XI [the regular, non-expedited procedure] shall apply to the arbitration."[8] ICSID member states should consider an alternative rule to allow greater flexibility for states that may need, for any number of legitimate reasons, to pull out of the expedited procedure without the investor's consent.

IV. CONCILIATION RULES (CR)

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IV. CONCILIATION RULES

Chapter I – General Provisions

Rule 1 – Application of Rules

SEE COMMENTS UNDER AR 1

Rule 2 – Meaning of Party and Party Representation

SEE COMMENTS UNDER AR 10

Rule 3 – Method of Filing

SEE COMMENTS UNDER AR 11

Rule 4 – Routing of Written Communications

SEE COMMENTS UNDER AR 12

Rule 5 – Procedural Languages, Translation and Interpretation

SEE COMMENTS UNDER AR 13

Rule 6 – Payment of Advances and Costs of the Proceeding

SEE COMMENTS UNDER AR 19

Rule 7 – Confidentiality

NO COMMENTS RECEIVED

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 COMMENTS UNDER AR 20, 22

Rule 10 – Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention

SEE COMMENTS UNDER AR 23

Rule 11 – Assistance of the Secretary-General with Appointment

SEE 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 COMMENTS UNDER AR 25

Rule 13 – Disclosure of Third-Party Funding

SEE COMMENTS UNDER AR 21

Rule 14 – Acceptance of Appointment

SEE COMMENTS UNDER AR 26

Rule 15 – Replacement of Conciliators Prior to Constitution of the Commission

SEE COMMENTS UNDER AR 27

Rule 16 – Constitution of the Commission

SEE COMMENTS UNDER AR 28

Chapter III – Disqualification of Conciliators and Vacancies

Rule 17 – Proposal for Disqualification of Conciliators

SEE COMMENTS UNDER AR 29

Rule 18 – Decision on the Proposal for Disqualification

SEE COMMENTS UNDER AR 30

Rule 19 – Incapacity or Failure to Perform Duties

SEE COMMENTS UNDER AR 31

Rule 20 – Resignation

SEE COMMENTS UNDER AR 32

Rule 21 – Vacancy on the Commission

SEE COMMENTS UNDER AR 33

Chapter IV – Conduct of the Conciliation

Rule 22 – Functions of the Commission

NO COMMENTS RECEIVED

Rule 23 – General Duties of the Commission

SEE COMMENTS UNDER AR 11

Rule 24 – Orders, Decisions and Procedural Agreements

SEE COMMENTS UNDER AR 12 & 18

Rule 25 – Quorum

SEE COMMENTS UNDER AR 17

Rule 26 – Deliberations

SEE COMMENTS UNDER AR 16

Rule 27 – Cooperation of the Parties

NO COMMENTS RECEIVED

Rule 28 – Written Statements

SEE COMMENTS UNDER AR 13

Rule 29 – First Session

SEE COMMENTS UNDER AR 34

Rule 30 – Meetings

SEE COMMENTS UNDER AR 15 & 47

Rule 31 – Preliminary Objections

SEE COMMENTS UNDER AR 36

Chapter V – Termination of the Conciliation

Rule 32 – Discontinuance Prior to the Constitution of the Commission

SEE COMMENTS UNDER AR 55-57

Rule 33 – Discontinuance for Failure to Pay

SEE 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 COMMENTS UNDER AR 60

Rule 38 – Issuance of the Report

SEE COMMENTS UNDER AR 61

V. ADDITIONAL FACILITY (AF) RULES

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V. ADDITIONAL FACILITY (AF) RULES

CANADA JUNE 10, 2019

Canada notes that with respect to the Additional Facility Rules, many of the comments that Canada has with respect to the relevant Convention Arbitration Rules are equally applicable. Therefore, the comments set out in Appendix A should be considered to apply, as appropriate, to the equivalent rule in the Additional Facility Arbitration Rules.

CHILE JUNE 18, 2019

En términos generales Chile está de acuerdo con el contenido de las Reglas y Reglamentos bajo el Mecanismo Complementario, sujeto a los comentarios que se indican a continuación. Sin perjuicio de lo anterior, se reiteran, *mutatis mutandis*, los comentarios efectuados en relación con las Reglas de Arbitraje, el Reglamento Administrativo y Financiero o las Reglas de Iniciación para los procedimientos bajo el Convenio del CIADI.

Article 1 – Definitions

CHILE JUNE 18, 2019

Chile quisiera una discusión más profunda en torno a la definición de Organismo Regional de Integración Económica. En particular, quisiéramos contar con mayores antecedentes y los elementos que permitan determinar cuándo nos encontramos ante un ORIE, considerando el crecimiento y fortalecimiento de diversos bloques regionales, la posibilidad de esta organización de ser sujeto pasivo o activo en un arbitraje, y los efectos que esto tiene en los países o economías que componen dicho bloque y la manera en que se vinculan a la institución misma. Asimismo, surgen dudas respecto a la amplitud de competencias de las ORIE, pues el texto indica "cuestiones reguladas por este Reglamento".

Se solicita información adicional de cuáles serían los beneficios para el sistema de solución de controversias inversionista-Estado de las revisiones propuestas en el Artículo 1 (5), para permitir que aquellos nacionales con doble nacionalidad puedan entablar acciones contra el Estado.

Objetamos a que por medio de las reglas se tome partido respecto a si se debe aceptar una interpretación objetiva o subjetiva del concepto de inversión bajo el Mecanismo Complementario. Este es un tema ampliamente debatido y no zanjado en la jurisprudencia internacional (tanto bajo el Convenio como bajo el Mecanismo Complementario), y cuyo contenido no es adecuado definir por medio de las propuestas de enmiendas realizadas por el Centro. Por otro lado, tal aproximación no favorece una interpretación uniforme del concepto de inversión bajo el Convenio CIADI y el Mecanismo Complementario, y por lo tanto iría en contra de la consistencia e uniformidad que se está solicitando en los distintos foros de reforma al sistema de solución de controversias inversionista-Estado.

EUROPEAN UNION **JUNE 7, 2019**

5. The European Union and its Member States welcome the proposal to include 'Regional Economic Integration Organisations' (REIO) among the entities that can be parties to disputes under the ICSID Additional Facility Rules (AFR). Inclusion of REIOs would be a recognition of the fact that regional economic integration organisations, including the European Union, have become more active in the area of international investment policy and the conclusion of international investment agreements (IIAs).

6. We also welcome that our comments regarding the constitution of the Tribunal and the related nationality requirements have been taken into account to explicitly permit the parties to derogate from such provisions. It is the EU's and its Member States understanding that different provisions contained in investment treaties (that will be accepted by the claimants when submitting the claim) will equally prevail over the default provisions contained in the proposal.

Article 2 – Additional Facility Proceedings

CHILE **JUNE 18, 2019**

Se solicita información adicional sobre las razones o implicancias de que la mediación y la comprobación de hechos hayan sido extraídas del Mecanismo Complementario (Art. 2 (3)), y como esto es consistente con las funciones del CIADI.

Article 3 – Convention Not Applicable

Article 4 – Final Provisions

NO COMMENTS RECEIVED

VI. (AF) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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VI. (AF) ADMINISTRATIVE AND FINANCIAL REGULATIONS

Chapter I – General Provisions

Regulation 1 – Application of these Regulations

NO COMMENTS RECEIVED

Chapter II – General Functions of The Secretariat

Regulation 2 – Secretary

SEE ALSO COMMENTS UNDER AFR 28

CANADA JUNE 10, 2019

Canada notes that the "its" in the last sentence in this Regulation is not clear. Canada suggests that it be made clear whether the "its" refers to the Secretariat, or to the Commission or Tribunal.

Regulation 3 – The Registers

SEE COMMENTS UNDER AFR 26

Regulation 4 – Depositary Functions

SEE COMMENTS UNDER AFR 29

Regulation 5 – Certificates of Official Travel

SEE COMMENTS UNDER AFR 30

Chapter III – Financial Provisions

Regulation 6 – Fees, Allowances and Charges

SEE COMMENTS UNDER AFR 14

Regulation 7 – Payments to the Centre

SEE COMMENTS UNDER AFR 15

Regulation 8 – Consequences of Default in Payment

SEE COMMENTS UNDER AFR 16

Regulation 9 – Special Services

SEE COMMENTS UNDER AFR 17

Regulation 10 – Fee for Lodging Requests

SEE COMMENTS UNDER AFR 18

Regulation 11 – Administration of Proceedings

SEE COMMENTS UNDER AFR 22

Chapter IV – Official Languages and Limitation of Liability

Regulation 12 – Languages of Regulations

SEE COMMENTS UNDER AFR 32

Regulation 13 – Prohibition Against Testimony and Limitation Liability

AUSTRALIA **JUNE 14, 2019**

Australia is giving this issue further consideration.

CHILE **JUNE 18, 2019**

Consideramos positiva la inclusión de esta nueva regla en el Reglamento, que tiene el objeto de proteger la integridad de los procedimientos y la protección de los miembros del Tribunal.

VII. (AF) ARBITRATION RULES

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VII. (AF) ARBITRATION RULES

SINGAPORE **JUNE 21, 2019**

We also support many of the proposed amendments to the AR and (AF)AR, and have additional comments on some. 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 in Working Paper 2 to the (AF)AR mirror those proposed 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.

Chapter I – General Provisions

Rule 1 – Application of Rules

NO COMMENTS RECEIVED

Chapter II – Institution of the Proceeding

Rule 2 – General Duties

SEE COMMENTS UNDER IR 1

Rule 3 – Meaning of Party and Party Representative

SEE COMMENTS UNDER IR 2

Rule 4 – Method of Filing

SEE COMMENTS UNDER IR 3

Rule 5 – Supporting Documents

SEE COMMENTS UNDER IR 4

Rule 6 – Routing of Documents

SEE COMMENTS UNDER IR 5

Rule 7 – Procedural Languages, Translation and Interpretation

SEE COMMENTS UNDER IR 6

Rule 8 – Correction of Errors and Deficiencies

SEE COMMENTS UNDER IR 7

Rule 9 – Calculation of Time Limits

SEE COMMENTS UNDER IR 8

Rule 10 –Time Limits Applicable to Parties

SEE COMMENTS UNDER IR 8

Rule 11 –Time Limits Applicable to the Tribunal

SEE COMMENTS UNDER IR 8

Chapter II – Institution of Proceedings

Rule 12 – The Request

SEE COMMENTS UNDER AR 2

Rule 13 – Contents of the Request

SEE COMMENTS UNDER AR 3

Rule 14 – Recommended Additional Information

SEE COMMENTS UNDER AR 4

Rule 15 – Filing of the Request and Supporting Documents

SEE COMMENTS UNDER AR 5

Rule 16 – Receipt of the Request and Routing of Written Communications

SEE COMMENTS UNDER AR 6

Rule 17 – Review and Registration of the Request

SEE COMMENTS UNDER AR 7

Rule 18 – Notice of Registration

SEE COMMENTS UNDER AR 8

Rule 19 – Withdrawal of the Request

SEE COMMENTS UNDER AR 9

Chapter III – Constitution of the Tribunal

Rule 20 – General Provisions Regarding the Constitution of the Tribunal

SEE COMMENTS UNDER AR 20

Rule 21 – Qualifications of Arbitrators

SEE COMMENTS UNDER AR 29

Rule 22 – Notice of Third-party Funding

SEE COMMENTS UNDER AR 21

Rule 23 – Method of Constituting the Tribunal

SEE COMMENTS UNDER AR 22 AND AR 23

Rule 24 – Assistance of the Secretary-General with Appointment

SEE COMMENTS UNDER AR 24

Rule 25 – Appointment of Arbitrators by the Secretary-General

SEE COMMENTS UNDER AR 25

Rule 26 – Acceptance of Appointment

SEE COMMENTS UNDER AR 26

Rule 27 – Replacement of Arbitrators Prior to Constitution of the Tribunal

SEE COMMENTS UNDER AR 27

Rule 28 – Constitution of the Tribunal

SEE COMMENTS UNDER AR 28

Chapter IV – Disqualification of Arbitrators and Vacancies

Rule 29 – Disqualification of Arbitrators

SEE COMMENTS UNDER AR 29

Rule 30 – Decision on the Proposal for Disqualification

SEE COMMENTS UNDER AR 30

Rule 31 – Incapacity or Failure to Perform Duties

SEE COMMENTS UNDER AR 31

Rule 32 – Resignation

SEE COMMENTS UNDER AR 32

Rule 33 – Vacancy on the Tribunal

SEE COMMENTS UNDER AR 33

Chapter IV – Conduct of the Proceeding

Rule 34 – Orders and Decisions

SEE COMMENTS UNDER AR 34

Rule 35 – Waiver

SEE COMMENTS UNDER AR 34

Rule 36 – Filling Gaps

NO COMMENTS RECEIVED

Rule 37 – First Session

SEE COMMENTS UNDER AR 34

Rule 38 – Written Submissions and Observations

SEE COMMENTS UNDER AR 13

Rule 39 – Case Management Conference

SEE COMMENTS UNDER AR 14

Rule 40 – Seat of Arbitration

NO COMMENTS RECEIVED

Rule 41 – Hearings

SEE COMMENTS UNDER AR 15

Rule 42 – Quorum

SEE COMMENTS UNDER AR 17

Rule 43 – Deliberations

SEE COMMENTS UNDER AR 16

Rule 44 – Decisions Taken by Majority Vote

SEE COMMENTS UNDER AR 18

Chapter VII – Evidence

Rule 45 – Evidence: General Principle

SEE COMMENTS UNDER AR 39

Rule 46 – Disputes Arising from Requests for Documents

SEE COMMENTS UNDER AR 40

Rule 47 – Witnesses and Experts

SEE COMMENTS UNDER AR 41

Rule 48 – Tribunal-appointed Experts

SEE COMMENTS UNDER AR 42

Rule 49 – Visits and Inquiries

SEE COMMENTS UNDER AR 43

Chapter VII – Special Procedures

Rule 50 – Manifest Lack of Legal Merit

SEE COMMENTS UNDER AR 35

Rule 51 – Bifurcation

SEE COMMENTS UNDER AR 37

Rule 52 – Preliminary objection

SEE COMMENTS UNDER AR 36

Rule 52BIS – Bifurcation of Preliminary Objections

SEE COMMENTS UNDER AR 37

Rule 53 – Consolidation and Coordination on Consent of Parties

SEE COMMENTS UNDER AR 38

Rule 54– Provisional Measures

SEE COMMENTS UNDER AR 44

Rule 55 – Ancillary Claims

SEE COMMENTS UNDER AR 52

Rule 56 – Default

SEE COMMENTS UNDER AR 53

Chapter VIII – Costs

Rule 57 – Costs of the Proceeding

SEE COMMENTS UNDER AR 44 & AR 45

Rule 58 – Payment of Advances

SEE COMMENTS UNDER AR 44 & AR 45

Rule 59 – Statement of and Submission on Costs

SEE COMMENTS UNDER AR 44 & AR 45

Rule 60 – Decisions on Costs

SEE COMMENTS UNDER AR 44 & AR 45

Rule 61 – Security for Costs

SEE COMMENTS UNDER AR 451

Chapter IX – Suspension and Discontinuance

Rule 62 – Suspension

SEE COMMENTS UNDER AR 54

Rule 63 – Settlement and Discontinuance

SEE COMMENTS UNDER AR 55

Rule 64 – Discontinuance at Request of a Party

SEE COMMENTS UNDER AR 56

Rule 65 – Discontinuance for Failure of Parties to Act

SEE COMMENTS UNDER AR 57

Rule 66 – Discontinuance for Failure to Pay

SEE COMMENTS UNDER AR 58

Chapter X – The Award

Rule 67 – Applicable Law

NO COMMENTS RECEIVED

Rule 68 – Timing of the Award

SEE COMMENTS UNDER AR 59

Rule 69 – Contents of The Award

CHILE **JUNE 18, 2019**

Nos oponemos a que las partes puedan acordar que no se deban exponer las razones en que se funda el laudo. Esto puede ser contradictorio con los principios de debido proceso y puede resultar riesgoso, para casos en que una autoridad acepte ciertos elementos, sin pleno conocimiento del contenido de las reglas.

Regla 69 - Contenido del Laudo

(1) El laudo deberá dictarse por escrito y deberá incluir:

(i) Las razones en que se funda el laudo, ~~salvo que las partes hayan acordado que no se deban exponer dichas razones~~; y

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SEE ALSO COMMENTS UNDER AR 60

Rule 70 – Rendering of the Award

SEE COMMENTS UNDER AR 61

Rule 71 – Supplementary Decision, Rectification and Interpretation of an Award

SEE COMMENTS UNDER AR 62

Chapter XI – Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 72 – Publication of Awards, Orders and Decisions

SEE COMMENTS UNDER AR 44 & AR 45

Rule 73 – Publication of Documents Filed by a Party

SEE COMMENTS UNDER AR 46

Rule 74 – Observation of Hearings

SEE COMMENTS UNDER AR 47

Rule 75 – Submission of Non-disputing Parties

SEE COMMENTS UNDER AR 48

Rule 76 – Submission of Non-disputing Treaty Party

SEE COMMENTS UNDER AR 49

Chapter XII – Expedited Arbitration

Rule 77 – Consent of Parties to Expedited Arbitration

SEE COMMENTS UNDER AR 73

Rule 78 – Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

SEE COMMENTS UNDER AR 74

Rule 79 – Appointment of Sole Arbitrator for Expedited Arbitration

SEE COMMENTS UNDER AR 75

Rule 80 – Appointment of Three-Member Tribunal for Expedited Arbitration

SEE COMMENTS UNDER AR 76

Rule 81 – Acceptance of Appointment in Expedited Arbitration

SEE COMMENTS UNDER AR 77

Rule 82 – First Session in Expedited Arbitration

SEE COMMENTS UNDER AR 78

Rule 83 – The Procedural Schedule in Expedited Arbitration

SEE COMMENTS UNDER AR 79

Rule 84 – Default during Expedited Arbitration

SEE COMMENTS UNDER AR 80

Rule 85 – The Procedural Schedule for Supplementary Decision, Rectification and Interpretation in Expedited Arbitration

SEE COMMENTS UNDER AR 83

Rule 86 – Opting Out of Expedited Arbitration

SEE COMMENTS UNDER AR 84

VIII. (AF) CONCILIATION RULES

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VIII. (AF) CONCILIATION RULES

Chapter I – General Provisions

Rule 1 – Application of Rules

SEE COMMENTS UNDER CR 1

Chapter II – Institution of the Proceedings

Rule 2 – The Request

SEE COMMENTS UNDER IR 1

Rule 3 – Contents of the Request

SEE COMMENTS UNDER IR 2

Rule 4 – Recommended Additional Information / Rule 5 – Filing of the Request and supporting documents

SEE COMMENTS UNDER IR 3

Rule 6 – Receipt of the Request

SEE COMMENTS UNDER IR 5

Rule 7 – Review and Registration of the Request / Rule 8 – Notice of registration

SEE COMMENTS UNDER IR 6

Rule 9 –Withdrawal of the Request

SEE COMMENTS UNDER IR 8

Chapter III – General Procedural Provisions

Rule 10 – Meaning of Party and Party Representation

SEE COMMENTS UNDER CR 2

Rule 11 – Method of Filing

SEE COMMENTS UNDER CR 3

Rule 12 – Routing of Written Communications

SEE COMMENTS UNDER CR 4

Rule 13 – Procedural Languages, Translation and Interpretation

SEE COMMENTS UNDER CR 5

Rule 14 – Payment of Advances and Costs of the Proceeding

SEE COMMENTS UNDER CR 6

Rule 15 – Confidentiality

SEE COMMENTS UNDER CR 7

Rule 16 – Use of Information in Other Proceedings

SEE COMMENTS UNDER CR 8

Chapter IV – Constitution of the Commission

Rule 17 – General Provisions, Number of Conciliators and Method of Constitution

SEE COMMENTS UNDER CR 9

Rule 18 – Qualifications of Conciliators

SEE COMMENTS UNDER CR 10

Rule 19 – Assistance of the Secretary-General with Appointment

SEE COMMENTS UNDER CR 11

Rule 20 – Appointment of Conciliators by the Secretary-General

SEE COMMENTS UNDER CR 12

Rule 21 – Disclosure of Third-Party Funding

SEE COMMENTS UNDER CR 13

Rule 22 – Acceptance of Appointment

SEE COMMENTS UNDER CR 14

Rule 23 – Replacement of Conciliators Prior to Constitution of the Commission

SEE COMMENTS UNDER CR 15

Rule 24 – Constitution of the Commission

SEE COMMENTS UNDER CR 16

Chapter V – Disqualification of Conciliators and Vacancies

Rule 25 – Proposal for Disqualification of Conciliators

SEE COMMENTS UNDER CR 17

Rule 26 – Decision on the Proposal for Disqualification

SEE COMMENTS UNDER CR 18

Rule 27 – Incapacity or Failure to Perform Duties

SEE COMMENTS UNDER CR 19

Rule 28 – Resignation

SEE COMMENTS UNDER CR 20

Rule 29 – Vacancy on the Commission

SEE COMMENTS UNDER CR 21

Chapter VI – Conduct of the Conciliation

Rule 30 – Functions of the Commission

SEE COMMENTS UNDER CR 22

Rule 31 – General Duties of the Commission

SEE COMMENTS UNDER CR 23

Rule 32 – Orders, Decisions and Procedural Agreements

SEE COMMENTS UNDER CR 24

Rule 33 – Quorum

SEE COMMENTS UNDER CR 25

Rule 34 – Deliberations

SEE COMMENTS UNDER CR 26

Rule 35 – Cooperation of the Parties

SEE COMMENTS UNDER CR 27

Rule 36 – Written Statements

SEE COMMENTS UNDER CR 28

Rule 37 – First Session

SEE COMMENTS UNDER CR 29

Rule 38 – Meetings

SEE COMMENTS UNDER CR 30

Rule 39 – Preliminary Objections

SEE COMMENTS UNDER CR 31

Chapter VII – Termination of the Conciliation

Rule 40 – Discontinuance Prior to the Constitution of the Commission

SEE COMMENTS UNDER CR 32

Rule 41 – Discontinuance for Failure to Pay

SEE COMMENTS UNDER CR 33

Rules 42 – Report noting the Parties' Agreement

SEE COMMENTS UNDER CR 34

Rules 43 – Report noting the Parties' Failure to Reach Agreement

SEE COMMENTS UNDER CR 35

Rules 44 – Report noting the Failure of a Party to Appear or Participate

SEE COMMENTS UNDER CR 36

Rule 45 – The Report

SEE COMMENTS UNDER CR 37

Rule 46 – Issuance of the Report

SEE COMMENTS UNDER CR 38

IX. FACT-FINDING RULES

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IX. FACT-FINDING RULES

SINGAPORE **JUNE 21, 2019**

We also note that, in Working Paper 2, the Additional Facility Mediation Rules and the Additional Facility Fact-finding Rules are now proposed as separate standalone rules (hereinafter referred to as "MR" and "FFR" respectively) instead, in order to clearly establish that these rules can equally be used for any ISDS disputes (regardless of whether the investors are from Contracting States and whether the respondents are Contracting States) so long as the disputants consent. We support this structural change as well as the proposed substantive amendments in Working Paper 2 to these rules.

We support the revisions in Working Paper 2 to the CR, IR, AFR, Additional Facility Rules, (AF)AFR, (AF)CR, FFR and the MR. We have no further comments on these.

Chapter I – General Provisions

Rule 1 – Application of Rules

Rule 2 – Meaning of Party and Party Representation

NO COMMENTS RECEIVED

Chapter II – Institution of Fact-Finding

Rule 3 – The Request

Rule 4 – Contents and Filing of the Request

Rule 5 – Receipt and Registration of the Request

NO COMMENTS RECEIVED

Chapter III – The Fact-Finding Committee

Rule 6 – Qualifications of Members of the Committee

Rule 7– Number of Members and Method of Constituting the Committee

Rule 8 – Acceptance of Appointment

Rule 9 –Constitution of the Committee

NO COMMENTS RECEIVED

Chapter IV – Conduct of the Fact-Finding

Rule 10 – Sessions and Work of the Committee

Rule 11 – General Duties

Rule 12 – Payment of Advances and Costs of the Fact-Finding

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

Rule 15 – Failure of a Party to Participate or Cooperate

Rule 16 – Report of the Committee

Rule 17 – Issuance of the Report

NO COMMENTS RECEIVED

X. (FACT-FINDING) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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X. (FACT-FINDING) ADMINISTRATIVE AND FINANCIAL REGULATIONS

NO COMMENTS RECEIVED

XI. MEDIATION RULES

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XI. MEDIATION RULES

SINGAPORE **JUNE 21, 2019**

We also note that, in Working Paper 2, the Additional Facility Mediation Rules and the Additional Facility Fact-finding Rules are now proposed as separate standalone rules (hereinafter referred to as "MR" and "FFR" respectively) instead, in order to clearly establish that these rules can equally be used for any ISDS disputes (regardless of whether the investors are from Contracting States and whether the respondents are Contracting States) so long as the disputants consent. We support this structural change as well as the proposed substantive amendments in Working Paper 2 to these rules.

We support the revisions in Working Paper 2 to the CR, IR, AFR, Additional Facility Rules, (AF)AFR, (AF)CR, FFR and the MR. We have no further comments on these.

Chapter I – General Provisions

Rule 1 – Application of Rules

NO COMMENTS RECEIVED

Rule 2 – Mediation Proceedings

CHILE **JUNE 18, 2019**

En la medida que son pocos los tratados que serán la base de un acuerdo para remitir una disputa a mediación, nos gustaría contar con más información sobre los elementos sobre los cuales el Secretariado o el/ la mediador(a), van a determinar si se está ante un "procedimiento de mediación relativo a una inversión" exigido por la regla 2 (1).

Regla 2-Procedimientos de Mediación

(1) El Secretariado está autorizado para administrar *procedimientos de mediación relativos a una inversión* entre un Estado o una ORIE, por una parte, y un nacional de otro Estado, por la otra, que las partes hayan consentido por escrito en someter al Centro.

Rule 3 – Application of Rules

NO COMMENTS RECEIVED

Chapter II – Institution of Mediation

Rule 4 – Institution of Mediation Based on Prior Party Agreement

NO COMMENTS RECEIVED

Rule 5 – Institution of Mediation Absent a Prior Party Agreement

CHILE **JUNE 18, 2019**

Apoyamos la decisión del Centro de proponer Reglas de Mediación y esperamos que éstas resulten en un método efectivo para resolver disputas. Sin embargo, en la medida que se buscan mecanismos que saquen a las partes de una lógica de litigio y más cerca al área de consenso, creemos que el Centro sólo debería administrar procedimientos de mediación en los que ambas partes ya se hayan puesto de acuerdo sobre la idoneidad de la mediación para la disputa en cuestión. Lo anterior para evitar: (a) utilizar los recursos de la parte solicitante y del Centro cuando no hay acuerdo entre las partes para transmitir y notificar de la solicitud, asignar personal, abrir una cuenta financiera…etc., cuando el efecto será igual en caso de que la mediación no prospere; y (b) que el Estado se vea obligado a utilizar recursos para responder a una solicitud ante el CIADI, lo cual suele originar ciertas alarmas y requiere del despliegue de una serie de mecanismos internos de coordinación y autorización, todo lo anterior sin la previa determinación respecto de si la mediación resultará en el mecanismo adecuado para esa disputa en particular. Por lo tanto, solicitamos eliminar la Regla 5 y fortalecer en cambio el mecanismo contenido en la Regla 4, que permite la iniciación de la mediación por acuerdo previo **de ambas partes.**

Rule 6 – Registration of the Request

NO COMMENTS RECEIVED

Chapter III – General Procedural Provisions

Rule 7 – Payment of Advances and Costs of the Mediation

Rule 8 – Confidentiality of the Mediation

Rule 9 – Use of Information in Other Proceedings

NO COMMENTS RECEIVED

Chapter IV – The Mediator

JAMAICA **JUNE 13, 2019**

The GOJ recommends that there should be some elaboration on how the mediator will be appointed or the particular criteria for selection or appointment of mediators. In this regard, it may be necessary to have a list of mediators or to select mediators from the list of arbitrators or conciliators.

There should also be details of the special qualifications of mediators if they are being selected from a list of mediators and not from the list of arbitrators or conciliators. For example, mediators should possess qualifications in law, alternative dispute resolution and should have certified training in mediation. Additionally, their qualification may include special competence in business, commerce, finance, trade and industry.

Another issue for consideration is what happens when a mediator cannot continue the mediation and how another mediator is selected or appointed. In this regard, it is recommended that there should be a list of mediators similar to the list of arbitrators and conciliators. It should also be determined whether there will be a system of rotation or whether parties will select mediators of their own choice from the list of mediators.

Rule 10 – Qualifications of the Mediator

Rule 11 – Qualifications of the Mediator

NO COMMENTS RECEIVED

Rule 12 – Acceptance of Appointment

CANADA JUNE 10, 2019

Canada notes the comment in paragraph 789 of the Working Paper that third-party funding does not raise issues in mediation in the same manner as in arbitration, and thus specific provisions are not needed. Canada believes that similar issues could arise, particularly with respect to conflicts of interest. For example, if an arbitration is ongoing, but the parties decide to pause and try mediation, in order to ensure the independence of the mediator, it will be necessary for him or her to know if there is any relationship between the mediator and the third-party funder. Canada does not see any drawback to requiring such disclosures.

Rule 13 - Notice of Acceptance

NO COMMENTS RECEIVED

Rule 14 - Resignation and Replacement of Mediator

CHILE JUNE 18, 2019

Se propone que la Regla 14(2)(b) se modifique para que se establezca que el mediador debe renunciar si se incapacitara “o no desempeñara” las funciones de su cargo**.**

Regla 14 – Renuncia y Sustitución de un o una Mediador(a)
(2) Un o una mediador(a) deberá renunciar:
(a) (…)
(b) si el mediador(a) se incapacitara o no ~~pudiera~~ desemp~~a~~eñara las funciones de su cargo.

Chapter V – Conduct of the Mediation

Rule 15 - Role and Duties of the Mediator

Rule 16 - Duties of the Parties

NO COMMENTS RECEIVED

Rule 17 – Initial Written Statement

CHILE **JUNE 18, 2019**

Se propone que el plazo de 15 días identificado en la Regla 17(1), pueda ser extendido no solamente por decisión del mediador, sino también por acuerdo de las partes**.**

Regla 17
(1) Cada parte hará una breve presentación escrita inicial describiendo los asuntos en disputa y su posición respecto de esos asuntos y del proceso a seguir dentro de los siguientes 15 días a la fecha de notificación de aceptación, o cualquier otro plazo acordado por las partes o que el mediador(a) determine, pero en cualquier caso antes de la primera sesión.

Rule 18 – First Session

CHILE **JUNE 18, 2019**

Sugerimos revisar la Regla 18, pues parece haber habido un problema de publicación o transcripción de las modificaciones propuestas.

Rule 19 – Conduct of the Mediation

NO COMMENTS RECEIVED

Chapter VI – Termination of the Mediation

Rule 20 – Termination of the Mediation

NO COMMENTS RECEIVED

XII. (MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS

CONTENTS

XII. (MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS

Regulation 3 – The Registers

CANADA JUNE 10, 2019

Mediation Administrative Rules and Financial Regulations

Regulation 3

Canada believes that while a mediation process should be confidential, the existence of the mediation should not be. In fact, this is expressly provided for in the Mediation Rules. However, to be effectively public, the information must somehow be made available to the public. Canada thus supports the publication of Registers, as originally envisaged.

OTHER COMMENTS

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OTHER COMMENTS

CANADA JUNE 10, 2019

Schedule 1

Paragraph 9

Canada understands that the reference to "one class above economy" is meant to refer to business class. However, Canada wonders if this is clear enough in light of the marketing of different types of economy class.

CHILE JUNE 18, 2019

Código de Conducta para árbitros

Entendemos que la Secretaría del CIADI junto con la Secretaría de UNCITRAL, están trabajando en un *background paper* relativo a un código de conducta (ver párrafo 121, del WP2, volumen 1). Instamos a que se logre avanzar rápidamente con esta iniciativa.

Segunda Instancia de Revisión del Laudo – Mecanismo de Apelación

La Secretaría General del CIADI ha indicado en el párrafo 434 del WP2, Volumen 1 que se encuentra preparada para asistir a los Estados si desean discutir la posibilidad de establecer un mecanismo de apelación. En este sentido, y sin que dicha solicitud pueda ser interpretada como una posición particular, solicitamos que el CIADI presente a los Estados un análisis sobre la conveniencia, pertinencia, factibilidad, e implicancias de incorporar una segunda instancia de revisión de un laudo emitido bajo el Convenio del CIADI y cuáles serían los mecanismos disponibles para que dicha incorporación sea compatible con el Convenio.

GUATEMALA JUNE 10, 2019

3. CONSIDERACIONES FINALES

1. En la versión vigente de las Reglas de Arbitraje existen muchos errores de traducción al español, por lo que se sugiere y solicita ser muy exigentes con estas enmiendas sobre ese tema.

2. Una vez más Guatemala reconoce y aplaude el esfuerzo en la labor que se está realizando para la realización de las enmiendas en la propuesta de enmiendas a las reglas CIADI y específicamente lo siguiente:
   a. Las aclaraciones y respuestas a las interrogantes que se plantearon en las primeras observaciones.
   b. La adopción de algunas de las observaciones realizadas por Guatemala, especialmente la referente a la eliminación de la posibilidad de que la solicitud de arbitraje pueda ser utilizado como memorial de demanda.
   c. La recopilación de los comentarios de los Estados y demás entidades, lo cual facilitó este segundo ejercicio.

3. Finalmente, la República manifiesta especial preocupación sobre los siguientes temas (mismos que fueron detallados en el cuadro de observaciones):
   a. Inclusión de la posibilidad de presentar la solicitud de bifurcación y/o excepciones preliminares previo a la primera sesión.
   b. Que no se limite la figura de nueva sumisión, sobre todo que se obvie la posibilidad de al menos establecer un plazo para solicitarla.

EUROPEAN UNION JUNE 7, 2019

1. The European Union and its Member States welcome this opportunity to discuss further the proposed changes put forward by the ICSID Secretariat in its Working Paper #2. We commend the Secretariat colleagues for their dedication and efficiency in working through the comments from the members and the interested public, and providing helpful clarifications through technical meetings and webinars.
2. As already indicated in the written comments submitted to the ICSID Secretariat in December 2018, throughout the last years, the European Union and its Member States have been engaged in a process of fundamental reform of their investment policy and in particular of the functioning of the investor-state dispute settlement (ISDS) system.
3. The European Union and its Member States are also actively engaged in the on-going work of the UNCITRAL Working Group III on the reform of investor-state dispute settlement and are pursuing the objective of establishing a permanent mechanism for the settlement of international investment disputes. Against this background, more systemic reform proposals as regards the functioning of ICSID would also have been welcomed. In this regard, the European Union and its Member States note the Secretariat's readiness, expressed in Working Paper #2 (§434), to assist States in further discussions of the possible creation of an appeal mechanism. In the

meantime, the European Union and its Member States encourage the ICSID Secretariat to engage constructively in the work of the UNCITRAL Working Group III, including in the discussions on systemic reform proposals.
Small and medium-sized enterprises
4. The European Union and its Member States would have liked to see the current rules amendment process resulting in making ICSID arbitration more accessible for small and medium-sized enterprises. The European Union and its Member States encourage the ICSID Secretariat to consider ways to better take into account their interests throughout the ICSID rules, notably in the financial provisions, provisions on expedited procedures and consolidation, and other rules addressing specifically the particular situation of small and medium-sized enterprises.
(See additional specific comments under IR 2; AFR 14; AR 8, 11, 13, 17, 18, 21, 37, 43, 51, 55, 56, 60, 65, 66; and the AF Rules)

JAMAICA JUNE 13, 2019

JAMAICA'S NON-OBJECTION

Jamaica is in support of the amendments proposed by ICSID to date and has no objection to the completion of the Rule Amendment Project with the ongoing participation of Member States.

We ask that the aforementioned comments be incorporated and anticipate receipt of the updated documentation in due course.

COMMENTS ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (ICSID CONVENTION)

The Government of Jamaica (GOJ) notes that the scope of the ICSID Rule Amendment project is specifically in relation to the Rules and Regulations and does not include amendments to the ICSID Convention. We wish to highlight however one (1) particular issue which may require amendment to the Convention in the future. The matter has been outlined as follows:

Article 1 (1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States provides: “There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre)”. Article 1.(2) further provides that the purpose of the said Centre shall be to "provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention." Article 1 (2) could be interpreted as confining the purpose of the Centre to the provision of facilities only in respect of conciliation and arbitration. However, the proposed amendments to the Rules make provision for other methods of alternative dispute settlement such

as mediation and fact finding. The ambit or scope of the proposed amendments is therefore wider than what is stated in Article 1 (2) of the Convention.

For consistency, it is therefore recommended that the provision dealing with the stated purpose of the Centre should also be amended to include the other forms of alternative dispute settlement in addition to conciliation and arbitration.

It is recommended that the provision in Article 1 (2) be rephrased in the following manner:

Article 1
(2) the purpose of the Centre shall be to provide facilities for conciliation, arbitration and other forms of alternative dispute resolution of investment disputes between contracting states and nationals of the other contracting states in accordance with the provisions of the convention;

OR

Article 1
(2) the purpose of the Centre shall be to provide facilities for conciliation, arbitration and other alternative methods of settlement of investment disputes between contracting states and nationals of the other contracting states in accordance with the provisions of the convention.

JOINT COMMENTS (CH/CO/CR/MEX/PE) JUNE 26, 2019

1. Introducción

Chile, Colombia, Costa Rica, México y Perú (en adelante conjuntamente “Los Estados”), como Estados Contratantes del Convenio sobre Arreglo de Diferencias relativas a inversiones entre Estados y Nacionales de otros Estados (Convenio del CIADI), mediante el presente documento presentan comentarios conjuntos a las propuestas de enmienda a las Reglas Procesales Aplicables a los Procedimientos de Arbitraje (Reglas de Arbitraje) del Centro.

El objetivo central de estos comentarios es puntualizar ciertos aspectos de las reglas que gobiernan las actuaciones procesales Inversionista – Estado ante el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), que Los Estados

consideran fundamental abordar para que la práctica arbitral refleje un sistema más balanceado entre los derechos y obligaciones de los Estados y los inversores. Chile, Colombia, Costa Rica, México y Perú, comparten que el propósito primordial de las enmiendas es modernizar, simplificar y agilizar las Reglas. Asimismo, consideran que la flexibilización y reducción de los tiempos de los procedimientos arbitrales, en la medida que no afecten la seguridad jurídica y la equidad procesal entre las partes, deberían contribuir a reducir los costos y hacer más eficientes estos procedimientos.

En este sentido, Los Estados valoran la oportunidad que abre la Secretaría General del CIADI para actualizar las Reglas de Arbitraje que aplican al mecanismo de solución de controversias entre inversionistas y Estados. Mucho se ha discutido sobre las fortalezas y debilidades de este mecanismo, y este proceso ha permitido identificar consensos en cuanto a las posibilidades de mejora sobre la base de sus experiencias conjuntas y la práctica de los Estados en el arbitraje de inversión, a través de los cientos de casos registrados bajo el Convenio del CIADI y el Reglamento del Mecanismo Complementario.

Se presentarán comentarios relacionados con los asuntos que se listan a continuación. Para ellos se hace referencia a la numeración de las Reglas de Arbitraje del CIADI (RA), y al Reglamento de Arbitraje del Mecanismo Complementario (RAMC), actualmente en vigor (2006), así como al número correspondiente en las propuestas de agosto de 2018 (WP1) y marzo de 2019 (WP2).

- Escritos (Regla 31 RA 2006; Regla 13 RA WP1; Regla 29 WP2; Regla 22, RAMC WP1, Regla 38, RAMC WP2).
- Notificación de Financiamiento por Terceros (Regla 21 RA WP1; Regla 13, RA WP 2; Regla 32 RAMC WP1, Regla 22 RAMC WP2).
- Página 2 de 5
- Bifurcación (Regla 37 RA WP1; Reglas 41 y 42 Bis WP2; Regla 47 RAMC WP1, Regla 51 WP2).
- Publicación de Laudos y Decisiones sobre Anulación (Regla 48(4) RA (2006), Regla 44 RA WP1, Regla 61 WP2).
- Escritos de Partes No Contendientes (Regla 37 RA (2006), Regla 48 RA WP1; Regla 65 RA WP2; Regla 57 RAMC WP1, Regla 75 RAMC WP2).
- Participación de una Parte No Contendiente del Tratado (Regla 49 RA WP1; Regla 66 RA WP2, Regla 58 RAMC WP1, Regla 76 RAMC WP2).
- Garantía por costos (Regla 51 RA WP1 y WP2; Regla 60 RAMC WP1, Regla 61 RAMC WP2).
- Contenido del Laudo (Regla 60 RA WP1, Regla 58 RA WP2, Regla 70 RAMC WP1, Regla 69 RAMC WP2).
- Arbitraje Expedito (Reglas 69 a 79 RA WP1; Reglas 73-84 RA WP2)
- Los Estados aclaran que estos comentarios conjuntos se realizan sin perjuicio de los comentarios particulares e individuales que cada uno haya presentado o vaya a presentar ante el CIADI.

3. Otros Comentarios

La Secretaría General del CIADI ha indicado en el párrafo 434 del WP2, Volumen 1 que se encuentra preparada para asistir a los Estados si desean discutir la posibilidad de establecer un mecanismo de apelación. En este sentido, y sin que ello pueda ser interpretado como una posición particular de alguno de Los Estados (y sin perjuicio de lo que cada Estado manifieste de manera individual), sugerimos que el CIADI consulte a los Estados Miembros para conocer el interés de estos en promover la discusión sobre la incorporación de una segunda instancia de revisión de un laudo.

De igual manera, Los Estados entienden que la Secretaría del CIADI junto con la Secretaría de CNUDMI, están trabajando en el establecimiento de un código de conducta (ver párrafo 121, del WP2, volumen 1). Instamos a que se logre avanzar rápidamente con esta iniciativa, y que ésta no se sujete a los tiempos del proceso ante CNUDMI. Lo anterior, puesto que consideramos necesario contar con reglas claras respecto a la conformación y desempeño de los tribunales, para así asegurar la imparcialidad, legitimidad, independencia y credibilidad de los árbitros y del sistema en general.

4. Conclusiones

Los Estados manifiestan su interés en continuar participando activamente en las discusiones de estas reformas, y de aportar en la búsqueda de la modernización del procedimiento ante el CIADI. Más aún, este proceso de reforma es una oportunidad única para los Estados Contratantes de actualizar y modernizar estos instrumentos con reglas que se adecuen al contexto y realidad actual, lo cual permitirá a su vez dar respuesta a las críticas que ha enfrentado el sistema, sin que ello implique el menoscabo de la debida defensa de los Estados.

Se extiende una cordial invitación a los Estados Contratantes a tomar en consideración los comentarios expuestos en el presente documento. En ese sentido, Chile, Colombia, Costa Rica, México y Perú tienen plena confianza en que el objetivo de una reforma profunda, que atienda los desafíos que han venido enfrentando el mecanismo de solución de controversias entre inversionistas y Estados, pueda efectivamente lograrse.

IISD APRIL 12, 2019

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

2.0 General Remarks

The proposed amendments in WP #2 fail to appropriately address many concerns expressed by states and other stakeholders with respect to treaty-based investor–state arbitration. While signalling an effort to improve the procedural rules governing ICSID arbitration, they fall short of promoting meaningful reform of investor–state dispute settlement (ISDS).

The need for meaningful reform has been identified in various forums, including other bodies within the United Nations System, such as the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL). A significant number of investor–state arbitrations are conducted under ICSID rules, which thus have significant influence on the regime generally.

At a more fundamental level, many priority reforms identified by states may not be achieved through amendment of the ICSID Arbitration Rules, according to the secretariat's responses in WP #2 to numerous suggestions received with respect to WP #1. If the analysis provided by the secretariat is considered legally accurate ICSID member states should, in parallel to the rule amendment process, consider amending the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).

[…]

7.0 Expanded Review of Decisions

Disputing parties' rights to challenge awards under the ICSID Arbitration Rules are limited. Although the ICSID Convention allows the party to ask for the constitution of an "annulment committee,"[41] this only provides the disagreeing party a drastic and limited remedy. The ad hoc committee may only choose between leaving the original award intact or declaring it void (either fully or in parts),[42] and may not substitute its own decision on the merits.[43] The only redress open to a party whose award has been annulled is to resubmit the dispute to another arbitral tribunal.

The annulment committee's power of review is also strictly limited.[44] For example, annulment committees have declared that even if an award is based on manifest errors of law or fact, the award must nevertheless stand because such errors are not a ground for annulment under the ICSID Convention.[45]

The ICSID Secretariat indicated that "a question was received as to whether the Centre had further considered the establishment of a mechanism for appeal of awards in investment arbitration."[46] While the secretariat made no proposals in this respect, ICSID member states could consider revising ICSID Convention Articles 50–52 to expand the grounds of review of decision in order to ensure consistency and correctness of arbitral awards in law and fact.

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