Compendium of Comments for Working Paper # 5
as of October 27, 2021

List of State comments in the compendium:

Armenia
China
Costa Rica
European Union and its Member States
Israel
Panama
Turkey
United States
Group of 10 ICSID Member States [Australia, Canada, Chile, Colombia, Costa Rica, Israel, Republic of Korea, Mexico, Peru, and Singapore]

TABLE OF CONTENTS

GENERAL COMMENTS	
Process, Timing & Effective Date for Adoption of Proposals	**Armenia:** We support the approach of the Secretariat to put the text to a vote by the end of 2020. We do not consider a virtual consultation to be necessary.
Approach to gender neutral language in Spanish/French	
Voting	
Other	**United States:** The United States of America welcomes the International Centre for the Settlement of Investment Disputes (ICSID) Secretariat's initiative to amend and modernize its regulations and rules for resolving disputes between foreign investors and States. The United States notes that potential amendments to the ICSID regulations and rules may also serve to address certain procedural reforms in investor-State dispute settlement. The United States considers that a significant amount of progress has been made as a result of the first four working papers and the various meetings of Member States, resulting in a current proposal that would represent a notable improvement of the rules currently in force. The United States commends the Secretariat for its excellent work in this regard. The following comments represent the views of the United States with respect to a select number of issues addressed in Working Paper (WP) #5. In light of the fact that much progress has been made in narrowing the issues, the United States has limited its comments to recent changes to the proposed rules. In particular, two issues concerning Non-Disputing Treaty Party (NDTP) submissions give the United States the most pause: the issue of their publication by ICSID and ICSID's deletion of the provision providing NDTPs the ability to make oral submissions as of right. No inference with respect to U.S. views should be drawn from the absence of comment on any issue.

Back to Top of Section
Back to Table of Contents

ICSID CONVENTION PROCEEDINGS	
I. Administrative and Financial Regulations	
Introductory Note	
Chapter I - Procedures of the Administrative Council	
Regulation 1 - Date and Place of the Annual Meeting	
Regulation 2 - Notice of Meetings	
Regulation 3 - Agenda for Meetings	
Regulation 4 - Presiding Officer	
Regulation 5 - Secretary of the Council	
Regulation 6 - Attendance at Meetings	
Regulation 7 - Voting	
Chapter II - The Secretariat	
Regulation 8 - Election of the Secretary-General and Deputy Secretaries-General	
Regulation 9 - Acting Secretary-General	
Regulation 10 - Appointment of Staff Members	
Regulation 11 - Conditions of Employment	
Regulation 12 - Authority of the Secretary-General	
Regulation 13 - Incompatibility of Functions	
Chapter III - Financial Provisions	
Regulation 14 - Fees, Allowances and Charges	**Armenia:** As set out in our comments to WP # 3, We propose that, when required to travel to attend a hearing, meeting or session held away from the member's place of residence, members as a general rule be required to use the means of transportation that produces the lowest emissions of greenhouse gases possible. Members should promptly submit proposed travel itineraries to the Secretary-General for approval. The Secretary-General could approve proposed alternative plans generating higher greenhouse gas emissions on exceptional grounds, such as a journey time or cost that is out of all proportion in relation to the difference in greenhouse gas emissions.

	China: China notes that, ICSID charges its administrative fees on a flat rate and on an annual basis, in accordance with paragraph 4 of its Schedule of Fees. However, under the current practice, the billed period may exceed the actual period during which the ICSID Secretariat actively provides its administrative service, especially when the proceeding has been suspended or moved to stay. This will inappropriately increase the cost of proceeding and the burden of the disputing parties. China therefore suggests Regulation 14(3) be modified as follows: *The Secretary-General shall determine and publish administrative charge payable by the parties to the Centre. Administrative fees should be charged based on the actual period during which the Center actively provided its administrative service, and the period for suspension or stay of the proceeding should be deducted from the billed time. The Secretary-General in consultation with the Member States, may determineor adjust the rate and calculation method of the administrative fees of the Centre.*
Regulation 15 - Payments to the Centre	
Regulation 16 - Consequences of Default in Payment	**Costa Rica:** Even though ICSID has indicated that the practice has been flexible on this topic, Costa Rica considers that reflecting this in Regulation 16 will give more legal certainty to States with more complex internal budgeting processes. Additionally, the Memorandum in Schedule 2 does not reflect that the parties can arrange to receive advance notice that a call for funds would be made. Therefore, Costa Rica proposes a modification to Regulation 16 and Schedule 2 that clarifies that the parties can have 60 days to make their payment.
Regulation 17 - Special Services	
Regulation 18 - Fee for Lodging Requests	
Regulation 19 - The Budget	
Regulation 20 - Assessment of Contributions	
Regulation 21 - Audits	
Regulation 22 - Administration of Proceedings	
Chapter IV - General Functions of the Secretariat	
Regulation 23 - List of Contracting States	

Regulation 24 - Panels of Conciliators and of Arbitrators	**Armenia:** As set out in our comments to WP #3, we support the proposal of certain delegations by which government officials should be disqualified from appointment to panels. This is a manifest conflict of interest that should be prohibited by the Rules.
Regulation 25 - Publication	
Regulation 26 - The Registers	
Regulation 27 - Communications with Contracting States	
Regulation 28 - Secretary	
Regulation 29 - Depositary Functions	
Chapter V - Immunities and Privileges	
Regulation 30 - Certificates of Official Travel	
Regulation 31 - Waiver of Immunities	
Chapter VI - Final Provisions	
Regulation 32 - Languages of Rules and Regulations	
II. Institution Rules	
Introductory Note	
Rule 1 - The Request	
Rule 2 - Contents of the Request	**Costa Rica:** Costa Rica continues to support the inclusion of a new sub-paragraph(2)(d)(ii) since this information helps the State understand certain facts about the Claimant and its right to bring a claim. ICSID includes a similar recommendation in Rule 3; however, experience tells that ifthe information is not mandatory the investor will not present it andthe Tribunal will not have the obligation to request it. Proposed edits: **Rule 2 Contents of the Request** (…) (d) if a party is a juridical person: (…) (ii) information concerning the ultimate beneficial owner andcorporate structure of the party; (iii) if that party had the nationality of the Contracting State party to the dispute on the date of consent, information concerning andsupporting documents demonstrating the agreement of the parties to treat the juridical person as a national of another

	Contracting Statepursuant to Article 25(2)(b) of the Convention; (…) **European Union and its Member States:** The European Union and its Member States are grateful to the ICSID Secretariat for having amended Working Paper #4 in line with previously submitted comments as regards, inter alia, Institution Rule 2(2) and AR Rule 14(2). **United States:** The United States supports the added clause to subparagraph (a) of paragraph 2, requiring the Request to include a description of the investment "and of its ownership and control, . . ." The issue of whether the relevant investment is owned or controlled by an alleged investor (with the requisite nationality) is one that frequently arises, and so it will be useful to ensure such information is included in the Request for Arbitration.
Rule 3 - Recommended Additional Information	
Rule 4 - Filing of the Request and Supporting Documents	
Rule 5 - Receipt of the Request and Routing of Written Communications	
Rule 6 - Review and Registration of the Request	**China:** China understands that, upon receipt of the Request, the ICSID Secretary-General may not register the request if the dispute is manifestly outside the jurisdiction of the Centre. In order to avoid frivolous claim which might lead to inappropriately increasing of time and cost for disputing parties, China suggests the Secretary-General seek the opinion of Respondent prior to such registration. China therefore suggests Rules 6 be modified as follows: *(1) Upon receipt of the Request and lodging fee, the Secretary-General shall review the Request pursuant to Article 28(3) or 36(3) of the Convention, and promptly consult with Respondent.* *(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal. In the event that the request is registered, the Secretary-General shall promptly provides the grounds for such registration to the parties, if Respondent raised objection previously.*

Rule 7 - Notice of Registration	
Rule 8 - Withdrawal of the Request	
III. Arbitration Rules	
Introductory Note	
Chapter I - General Provisions	
Rule 1 - Application of Rules	
Rule 2 - Party and Party Representative	
Rule 3 - General Duties	
Rule 4 - Method of Filing	
Rule 5 - Supporting Documents	
Rule 6 - Routing of Documents	
Rule 7 - Procedural Languages, Translation and Interpretation	
Rule 8 - Correction of Errors	
Rule 9 - Calculation of Time Limits	
Rule 10 - Fixing Time Limits	
Rule 11 - Extension of Time Limits Applicable to Parties	
Rule 12 - Time Limits Applicable to the Tribunal	
Chapter II - Establishment of the Tribunal	
Rule 13 - General Provisions Regarding the Establishment of the Tribunal	
Rule 14 - Notice of Third-Party Funding	**Group of 10 ICSID Member States**: With respect to Arbitration Rule14(1), the governments making this submission suggest that this proposed Rule be amended by adding a sentence at the end of the paragraph which would read "Where the non-party providing funds is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person." Including this additional sentence will ensure that important information about any third-party funder would be required to be disclosed. This would close a potentially significant loophole because as it is currently drafted the proposed rule could allow funders to hide their true identity through complex corporate structures. This information, which is already in the possession of the funder, will ensure, among other things, that conflicts checks can be completed accurately and fully at the appropriate time.

	Armenia: As stated in our comments to WP # 3, on the issue of 'third party funding', Armenia supports in principle a complete ban on such funding, whether in the form of financing by a speculator (that is, one acquiring a stake in the dispute settlement process, in contrast to a donor) or by counsel in the form of a contingency funding arrangement. This is due to the various systemic risks, such as party autonomy and conflicts of interest, which such funding arrangements bring to the dispute settlement process. However, we acknowledge that such a complete ban would be impractical in the absence of a trust fund to support indigent claimants; for example, a company whose sole asset at the heart of the proceedings has been allegedly expropriated, leaving it impecunious. s Although we welcome the proposed amendments to draft Rule 14, we support the comments made by the Group of 36 States Parties and others for even more stringent language with respect to both the obligation to disclose the personal details of the 'ultimate beneficial owner' of the party and the relevance of failure to disclose third-party funding for the purpose of costs allocation orders. The fact that such rules are not adopted by other centres is insufficient justification for refraining from enacting such a rule to increase the transparency of funding in the interest of the equality of parties. We welcome and accept the power of the Tribunal to order the disclosure of additional information by paragraph 4. However, a certain minimum of transparency on the true identity of the funder ought to be encoded in the Rule. There is no doubt as to the identity of the respondent and there ought to be equally no doubt as to that of the claimant. **China:** China believes that this provision limits the form of funding only to funds. With the increasing variety of third-party funding methods, parties could receive substantial assistance other than funds. China therefore proposes to add *"including financial and other material assistance"* after "funds" in Rule 14(1). **Costa Rica:** Costa Rica considers that this provision merits further examination beyond the effects in the constitution of the Tribunal and the potential conflict of interest. For example, TPF is also linked to security for costs, possibility of reaching amicable solutions, counterclaims, and transparency in general. Hence, Costa considers that paragraph (1) must request disclosing information about the party´s corporate structure. Proposed edits: **Rule 14 Notice of Third-Party Funding**

(1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding"). Where the non- party providing funds is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.

European Union and its Member States: The European Union and its Member States are grateful to the ICSID Secretariat for having amended Working Paper #4 in line with previously submitted comments as regards, inter alia, Institution Rule 2(2) and AR Rule 14(2).

6. The revised rules, as reflected in Working Paper #5, do not follow the European Union's and its Member States' suggestion to include the 'ultimate beneficial owner' within the scope of the information to be disclosed in case of third-party funding. The comments to Working Paper #5 justify this decision as follows:

   "First, some States suggested that AR 14(1) should also require disclosure of the non-party funder's corporate structure and ultimate beneficial owner ("UBO") to allow a potential or existing conflict to be identified more easily when the non-party is not a natural person. AR 14(1) has not incorporated this suggestion for several reasons: (i) the potential risk identified by States has not been a concern in practice, and non-party funders have provided ample information for arbitrators to assess whether they have a conflict; (ii) adding these terms could create significant confusion for users of the rules, making the provision unclear and difficult to comply with; (iii) no other institutional rules or recent treaties addressing this matter include these terms; and (iv) if further information is required to assess a conflict, it can be requested pursuant to AR 14(4)."

7. It remains the view of the European Union and its Member States that disclosure of the 'ultimate beneficial owner' may be particularly important in cases of complex funding arrangements. Even if not many concerns have been expressed in practice as of today, explicitly including the 'ultimate beneficial owner' within the scope of AR Rule 14(1) serves clarity on the general requirement to disclose detailed information on the corporate structure of any third-party funder.
8. Thus, the European Union and its Member States once again propose the following rewording of AR Rule 14(1) and AF AR Rule 23(1):

	"A party shall file a written notice disclosing the name, address, and where applicable, ultimate beneficial owner and corporate structure, of any non-party from which the party, its affiliate or its representative, individually or collectively, has received, directly or indirectly, funds for the pursuit or defence of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute ("third-party funding")." **Turkey:** The Proposed Arbitration Rule 14 can be tailored to include the obligation of the funded party to disclose the terms and conditions of the funding agreement, or at least the nature of the funding arrangement. Paragraph (2) may refer to the details of third-party funding arrangement; including in particular to those related to adverse costs. **United States:** The United States supports the deletion of the clause "if it deems it necessary at any stage of the proceeding" from the last paragraph of the proposed Rule. The United States observes that this change is consistent with our recommendation in our July 2020 comments on WP #4. We had recommended deleting the language because AR 36(3) is referred to in AR 14(5), and so the "deems it necessary standard" is already incorporated by reference into AR 14(5) by virtue of AR 36(3). We suggested that the duplication of the legal standard could be confusing.
Rule 15 - Method of Constituting the Tribunal	
Rule 16 - Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention	
Rule 17 - Assistance of the Secretary-General with Appointment	
Rule 18 - Appointment of Arbitrators by the Chair in Accordance with Article 38 of the Convention	
Rule 19 - Acceptance of Appointment	**Armenia:** As set out in our comments to WP # 3, concerning the issue of 'double-hatting', Armenia opines that draft Rule 19 ought to prohibit persons designated as arbitrators from acting as counsel in other ICSID arbitrations. However, as the current approach is to regulate this matter in the Code of Conduct, we continue to have concerns, as set out in our comments

	to the draft Code, about the sufficiency of draft Article 4 of the Code. We support the suggestion of States to include a placeholder provision in draft Rule 19 to reflect a binding application of the Code. This is to make it plain that the Code of Conduct is binding upon acceptance.
Rule 20 - Replacement of Arbitrators Prior to Constitution of the Tribunal	
Rule 21 - Constitution of the Tribunal	**United States:** The United States supports the added language to Rule 21(1) to clarify that a Tribunal is deemed constituted once the Secretary-General notifies the parties that all arbitrators have accepted their appointments "and signed the declaration required by Rule 19(3)(b)."
Chapter III - Disqualification of Arbitrators and Vacancies	
Rule 22 - Proposal for Disqualification of Arbitrators	**Turkey:** The Center may be given an opportunity to comment on the proposal for disqualification, response and/or arbitrator statement.
Rule 23 - Decision on the Proposal for Disqualification	
Rule 24 - Incapacity or Failure to Perform Duties	
Rule 25 - Resignation	
Rule 26 - Vacancy on the Tribunal	
Chapter IV - Conduct of the Proceeding	
Rule 27 - Orders and Decisions	**European Union and its Member States:** 16. The European Union and its Member States note that Working Paper #5 introduced into AR Rule 27(2) new text elements providing that orders and decisions "shall indicate the reasons upon which they are made". The European Union and its Member States welcome this amendment. 17. However, this wording, i.e., the usage of "shall", is unique in AR Rule 27(2) and may raise questions with regard to the necessity to provide reasoning for minor procedural and organisational matters, such as requests for extensions of time limits and hearing logistics. In this regard, the European Union and its Member States note that the commentary to Working Paper #5 states that such minor matters do not require reasoning (para. 57 on page 286). The ICSID Secretariat may wish to clarify this point further in the text or commentary.

	United States: The United States also supports the language added to Rule 27(2), requiring that Tribunal orders and decisions be reasoned.
Rule 28 - Waiver	
Rule 29 - First Session	**Armenia:** As set out in our comments on WP # 3, concerning paragraph 4, Armenia suggests that the question of bifurcation be expressly included in the list of matters to be considered in the first session in the interest of procedural efficiency. **United States:** The United States supports the added language in paragraph (4)(f) of the proposed Rule, inviting the parties' views on whether hearings should be held in person or remotely.
Rule 30 - Written Submissions	**Armenia:** Regarding paragraph 1, as set out in our comments to WP # 3, Armenia prefers the current position in the Rules whereby replies and rejoinders be authorised by Tribunal as an exception, rather than become a general expectation as proposed. We accordingly propose that, instead of expecting a second round of written pleadings 'unless the parties otherwise agree', the paragraph be revised to state that a second round will take place 'if the parties agree or the Tribunal orders'. This would place it in a neutral rather than a default position.
Rule 31 - Case Management Conference	**Armenia:** See comments on Rule 29 above.
Rule 32 - Hearings	
Rule 33 - Quorum	
Rule 34 - Deliberations	
Rule 35 - Decisions Made by Majority Vote	
Chapter V - Evidence	
Rule 36 - Evidence: General Principles	
Rule 37 - Disputes Arising from Requests for Production of Documents	
Rule 38 - Witnesses and Experts	
Rule 39 - Tribunal-Appointed Experts	
Rule 40 - Visits and Inquiries	
Chapter VI - Special Procedures	
Rule 41 - Manifest Lack of Legal Merit	

Rule 42 - Bifurcation	**Armenia:** The relationship between Rules 42, 43, 44 and 45 is unclear. In the procedural law of international courts and tribunals, the effect of a preliminary objection is to automatically suspend the consideration of the merits – in other words, to bifurcate on the raising of the objection by the respondent. Thus, the use of the term in the current draft is erroneous because preliminary objections neither include a 'request' to bifurcate (they automatically do so) and cannot be raised without bifurcating. The correct term should accordingly be 'jurisdictional objections' or 'objections to jurisdiction or admissibility'. Rule 43, including the new addition of paragraph 3, duplicates Rule 42. It should accordingly be deleted, leaving the simpler question whether to bifurcate a proceeding in order to separately deal with jurisdictional objections. Likewise Rule 44 is superfluous, as it essentially deals with the same issue as Rule 42. The only difference is that the deadline for requests to bifurcate set out in Rule 44(1)(a) should be moved to Rule 42. In that respect, the deadline of 45 days after filing of the memorial of the merits is unnecessarily lengthy; as set out in our comments to WP #3, the deadline should be 45 days from the first session in the interest of procedural efficiency. This would replace the vague deadline of 'as soon as possible' for requests for bifurcation set out in draft Rule 42(3)(a). Rule 45 is substantively distinct and should be retained under a new name, such as 'Jurisdictional Objections joined to the Merits'. This practice is seen in the procedural law of other international courts and tribunals and is a necessary consequence of a decision of the tribunal not to bifurcate. These changes would leave two rules: Rule 42 dealing with requests to bifurcate eand Rule 42*bis* dealing with the joining of jurisdictional objections to the merits. This would considerably simplify and clarify the handing of jurisdictional objections, which would in turn enhance procedural efficiency and predictability. **United States:** The United States agrees with the rationale provided in WP paragraph 84 for the deletion of the language in paragraph (5) of the proposed rule (and the corresponding change made to Rule 44(3)(a)), that would have allowed a Tribunal discretion not to suspend proceedings in special circumstances if it orders bifurcation.
Rule 43 - Preliminary Objections	**Armenia:** See comment on Rule 42 above.

	United States: With respect to the additional language to paragraph (4) of the proposed rule, providing that a Tribunal may address preliminary objections in a separate phase (or join the issues to the merits) on the request of a party or "at any time on its own initiative," the United States is concerned that this language would empower a Tribunal to bifurcate over the objections of the respondent, or both disputing parties, and therefore does not support the additional language as drafted.
Rule 44 - Preliminary Objections with a Request for Bifurcation	**Armenia:** See comment on Rule 42 above.
Rule 45 - Preliminary Objections without a Request for Bifurcation	**Armenia:** See comment on Rule 42 above.
Rule 46 - Consolidation or Coordination of Arbitrations	
Rule 47 - Provisional Measures	**Turkey:** We are content to see that Working Paper 5 para 91, stated that the summary of explanations including Rule 47 would be issued. The summary/explanatory note may underline that provisional measures might be recommended only in extraordinary and exceptional circumstances; and the nature of the provisional measures are non-binding.
Rule 48 - Ancillary Claims	
Rule 49 - Default	
Chapter VII - Costs	
Rule 50 - Costs of the Proceeding	
Rule 51 - Statement of and Submission on Costs	
Rule 52 - Decisions on Costs	**Group of 10 ICSID Member States:** With respect to Arbitration Rule 52(2), the governments making this submission jointly propose amendments to the following sentence (with the amendments in bold): "If the Tribunal renders an Award or a decision pursuant to Rule 41(3) upholding the objection pursuant to Rule 41(1) or parts thereof, it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs." This amendment to the proposed text is important to ensure that the presumption applies where a part of a claim is dismissed as manifestly without legal merit, but another part of the claim survives. In our view, for example, there is no justifiable reason why the presumption would apply in cases where the whole case is dismissed as frivolous but not in the case where a number of the claims (even a vast majority) are dismissed as frivolous. The goal of this presumption is to deter the filing of frivolous claims, in whole or in part.

Armenia: Armenia support the proposed changes to draft Rule 52(2), which brings greater clarity.

Costa Rica: Costa Rica considers that the prevailing party should be able to claimcosts even if only parts of the objection are upheld by the Tribunal.

Proposed edits

> **Rule 52 Decisions on Costs**
> (…)
> (2) If the Tribunal renders an Award or a decision pursuant to Rule 41(3) upholding the objection pursuant to Rule 41(1) or parts thereof,it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs.
> (…)

European Union and its Member States:

9. The European Union and its Member States welcome the changes within Working Paper #5 intending to accommodate the concerns expressed by a number of ICSID Members with respect to the provision on decisions on costs, in particular, that there should be mandatory cost consequences for submitting claims that manifestly lack legal merit. However, the current proposal limits the application of this Rule in AR Rule 52(2) to Awards rendered pursuant to AR Rule 41(3). Thus, the Tribunal could not allocate the costs in line with AR Rule 52(2) where it finds that only some claims or parts thereof are without legal merit under AR Rule 41(2)(e).
10. In order to remedy these limitations, the European Union and its Member States suggest amending AR Rule 52(2) as follows:

    "(2) If the Tribunal renders an Award or a decision pursuant to Rule 41(3) upholding the objection pursuant to Rule 41(1) or parts thereof, it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs."

United States: In earlier comments, the United States was critical of the presumption in paragraph 2 in favor of awarding costs to the prevailing party on a Rule 41 objection, in part

	because WP#4 had erroneously cited U.S. treaty practice in support of the proposition. In fact, U.S. practice typically provides that a tribunal may award the prevailing party costs with respect to preliminary objections "if warranted." The United States also observed that relatively few "manifest lack of legal merit" objections under the ICSID rules have succeeded, and the cost-shifting presumption of the prior draft could chill States from making proposed Rule 41 objections. The revision to paragraph 2 addresses this concern, but now raises an opposing presumption in favor of respondents where the tribunal issues an award pursuant to a Rule 41(3) objection. The United States refers to the rationale for this proposal provided by States, and noted in WP #5, that an award of costs to the respondent is justified, given the high threshold to sustain proposed Rule 41(3) challenges. The United States would suggest, however, that in lieu of a set presumption, this could be stated as an express factor for a tribunal to take into account in rendering a decision on costs with respect to such objections (whether such costs are allocated as a result of an Award or Decision upholding an objection pursuant to Rule 41(3)).
Rule 53 - Security for Costs	**Armenia:** Armenia is content with the revised text of the draft Rule. **European Union and its Member States:** 11. The European Union and its Member States welcome the revisions made to AR Rule 53(4) and can support the current draft. **Panama:** The Republic of Panama continues to welcome the inclusion of a standalone rule that expressly addresses the issue of security for costs. However, Panama remains concerned about one of the terms used in Paragraph 2(a), which states that "the request shall specify the circumstances that require security for costs." In WP4, the Secretariat had explained the word "require" had been used in order to maintain "consisten[cy] with the drafting of other rules (Provisional Measures and Stay of Enforcement of the Award) and reflects the appropriate standard for security for costs[1]." A similar comment then appeared in WP5, which asserts that the term "require" represents "the appropriate standard for an order of security for costs[2]."

[1] WP4, ¶ 111 (emphasis added)
[2] WP5, ¶ 100.

	However, as the Secretariat itself had acknowledged in WP1, the idea behind what is now Arbitration Rule 53 had been to provide relief from the facts that (1) to date, most "parties requesting security for costs have been required to establish that the legal standard for provisional measures has been met,[3]" and (2) historically, it has been so "difficult for parties requesting security for costs to meet this burden[4]" that, "[a]s of July 2018, there ha[d] only been one public decision granting an application for security for costs [5]. . . ." In the Secretariat's own words, the objectives of the new rule were: • to "treat[] security for costs as a unique form of relief[6]," and • to correct the misimpression that "security for costs" falls exclusively within the ambit of provisional measures[7]. Accordingly, it does not seem appropriate for the new rule to be drafted using the same terminology that appears in Article 47 of the Convention. Rather, the rule should accord with the fact that a tribunal's authority to grant security for costs derives from Articles 61(2) and 44 of the ICSID Convention[8]. For these reasons, and to ensure that the rule actually achieves its intended objectives, Panama proposes once more that Paragraph 2(a) be revised to state: "the circumstances that justify security for costs." This revision would not only (1) better capture the new rule's intent, but also (2) strike a more neutral balance between the applicant and defendant. (As noted above, under the "provisional measures" standard, security-for-costs applications have almost never been granted.) Panama understands that the revised text is supported by both capital importing and capital exporting countries.

[3] WP1, ¶ 500.
[4] WP1, ¶ 500.
[5] WP1, ¶ 502.
[6] WP1, ¶ 514 (emphasis added).
[7] See WP1, ¶ 514 (explaining that the standalone rule was intended to "reflect[] the view that a Tribunal's power to order security for costs flows not only from Art. 47 of the Convention, but is also connected to its power to allocate the costs of the proceeding among the parties").
[8] See, e.g., Commerce Group Corporation and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17 (Decision on El Salvador's Application for Security for Costs, 20 September 2012), ¶¶ 40–45 (Gaillard, Pryles, Schreuer); see also ICSID Convention, Arts. 44, 61(2).

	United States: The United States supports the modifications made by the Secretariat to paragraph (4) of the proposed Rule, which requires the Tribunal to consider various circumstances in awarding costs (outlined in paragraph (3) of the proposed Rule. Additionally, the United States supports the suggestion made to change the word "require" in Rule 53(2)(a) to "justify." We appreciate that the ICSID Secretariat has explained its view that "require" signals an "appropriate standard for an order of security for costs," but given the Secretariat's explanation at paragraph 111 in WP #4, that the term "require" is consistent with the drafting on Rules such as Provisional Measures, the United States is concerned that this term sets too high a threshold for an order for Security for Costs. Unlike Provisional Measures, where the Tribunal must consider whether such measures are "urgent and necessary," the draft Rule on Security for Costs is intended to allow a Tribunal to come to a "balanced decision," considering all relevant circumstances as outlined in the draft Rule. As such, the United States supports the suggestion to change the word "require" to "justify" in this context.
Chapter VIII - Suspension, Settlement and Discontinuance	
Rule 54 - Suspension of the Proceeding	
Rule 55 - Settlement and Discontinuance by Agreement of the Parties	
Rule 56 - Discontinuance at Request of a Party	
Rule 57 - Discontinuance for Failure of Parties to Act	
Chapter IX - The Award	
Rule 58 - Timing of the Award	
Rule 59 - Contents of the Award	
Rule 60 - Rendering of the Award	
Rule 61 - Supplementary Decision and Rectification	
Chapter X - Publication, Access to Proceedings and Non-Disputing Party Submissions	
Rule 62 - Publication of Awards and Decisions on Annulment	
Rule 63 - Publication of Orders and Decisions	**China:** According to Article 48(5) of the ICSID Convention, the publication of Awards is subject to the consent of the parties. China is of the view that the publication of orders and

	decisions should be consistent with the principle applied to the publication of Awards as set out in the ICSID Convention.
Rule 64 - Publication of Documents Filed in the Proceeding	**Armenia:** Armenia supports the retention of the Rule, as revised in this WP. **United States:** The United States strongly opposes the change made to paragraph (1) of the proposed Rule deleting the clause "by a party." As noted in the Secretariat's explanation in WP #5 at paragraph 116: > Proposed AR 64(1) deletes "filed by a party", indicating that the parties to the proceeding could agree to publication of any document, including a submission by an NDP, NDTP, and tribunal appointed expert. If the parties do not agree to such publication, the document would not be published by the Centre and could not be referred to the Tribunal for adjudication of disputes over publication and redaction. This reflects the substantial time and cost that would be incurred if all such documents could be referred to a Tribunal to parse redaction. The United States understands the effect of this deletion is that one party in an arbitration will have a veto over whether an amicus or Non-Disputing Treaty Party (NDTP) submission is published by ICSID because there is no recourse in the second paragraph of the proposed Rule for a Tribunal to oversee redactions, with a view to publication, of any submissions not filed by a party. The United States views this change as inconsistent with the objective of greater transparency. Additionally, it is the practice, indeed frequently as an obligation under its treaties, of the United States to publish all of its own submissions – either as a party to the dispute or a non-disputing party – on the U.S. State Department website.[9] In other contexts as well the United States has encouraged other countries to bring greater openness to dispute settlement by taking steps such as making their written submissions publicly available.[10] The United States is especially concerned that a party that vetoes the publication by ICSID of an amicus or NDTP submission might request a Tribunal for an Order proscribing the

[9] *See* International Claims and Investment Disputes - United States Department of State. A disputing treaty Party may be required by the underlying treaty to publish an NDTP submission. *See, e.g.*, Article 10.21 (Transparency of Arbitral Proceedings) of the U.S.-Peru TPA, paragraph (1)(c) of which requires the publication of non-disputing Party submissions. Additionally, an NDTP may be required by law to publish its submission, or allow for public disclosure of it, pursuant to a law similar to the U.S. Freedom of Information Act. *See* 5 U.S.C. § 552.

[10] *See* Joint Statement on the Importance of Transparency in WTO Dispute Settlement, WT/GC/W/785 (Oct. 15, 2019).

	publication, outside the auspices of ICSID, of such submissions. The United States would view the attempt to block publication by an NDTP of its own submissions as inappropriate and problematic.
Rule 65 - Observation of Hearings	**Armenia:** Armenia prefers that Rule 65(1) state that persons be allowed unless 'both parties object' rather than 'either party objects'.
Rule 66 - Confidential or Protected Information	**United States:** The United States supports the addition of "protected personal information," to "ensure there is no doubt applicable privacy laws can be raised to prevent protected personal information from being disclosed to the public."
Rule 67 - Submission of Non-Disputing Parties	**European Union and its Member States:** 12. Following the suggestion of one ICSID Member State, Working Paper #5 introduces a change in the wording of AR Rule 67(6). The current Rule reads as follows: "The Tribunal <u>may</u> provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects." (emph. add.) 13. Compared to the previous wording, i.e., "The Tribunal <u>shall</u> provide…" (emph. add.), the current wording could make it more difficult for a non-disputing party to access information that may be relevant for informing its submissions. The European Union and its Member States, therefore, suggest keeping the drafting reflected in Working Paper #4: "The Tribunal <u>shall</u> provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects." **Israel:** We understand that there may be State/s that request the reinstatement of the word "shall" instead of "may" in sub-para. 6, and the introduction of a similar para. To Rule 68. The change in Rule 67(6), replacing the word "shall" by "may" had been requested by Israel with the aim of giving the tribunal discretion, in light of the circumstances of each case (such as relevance, necessity, possible contribution to the NDP's position etc.) to consider if an NDP should be exposed to the documents of the case, and to what extent, and reduce the burden on the disputing parties in every case of NDPs' submission to scrutinize the need to object to the provision of documents. Furthermore, in our view, a rule requiring the tribunal to provide NDPs (and NDTPs) with all the documents of the case (unless objected) might have the unwanted effect of serving as an incentive for third parties to request involvement in

	a case as an opportunity to get access to information of the disputing parties - whether of the State or the Investor. We are of the view, in this late stage of the discussions of the amendment of the Rules, that giving the Tribunal the discretion to consider the provision of documents, strikes the right balance between encouraging an open discussion by the disputing parties, and NDPs ability to take part in the discussion in a focused and effective manner. Additionally, with respect to sub-para. 4 Israel does not support the deletion of the reference to publication of the written submissions. We appreciate the Secretariat's commentary in this regards in WP#5's para. 120 stating that the word "publication" has been deleted due to the fact that publication of the NDP submission is now addressed in AR 64(1) which allows the parties to consent to publication of the NDP submission. However in our view, Rule 64 applies to the tribunal and therefore there still is merit for the tribunal to clarify to the NDP any terms applicable with regard to the publication of its submission or publication, subject to Rule 64. The above two comments apply to Rule 68 as well, and to the corresponding Articles in the AF(ARs). **United States:** The United States opposes the deletion of reference to "publication" of NDP submissions as a conforming change, for the reasons set forth with respect to proposed Rule 64 (see above). The United States also disagrees with the change to paragraph (6) of the proposed Rule, which would change the presumption of providing documents to NDPs, unless either party objections, and leave the provision of such documents to the Tribunal's discretion, unless either party objects. In this connection also, the United States continues to oppose the de facto veto by one party to an NDPs access to documents, without which it is difficult for NDPs to make submissions. We maintain our prior suggestion that the veto be removed or changed to "unless either party objects based on compelling grounds," which alternative formulation would allow a Tribunal to make the determination. Finally, the United States observes that the streamlining throughout the proposed Rules (to delete "written or oral" before the word "submission") does not appear to be mirrored in paragraph (5) which deletes "or oral" but leaves the word "written" before "submission.
Rule 68 - Participation of Non-Disputing Treaty Party	**European Union and its Member States:** 14. To reflect the particular situation of Regional Economic Integration Organisations ('REIOs'), and the relationship with its constituent Members, the European Union and its Member States, once again, reiterate their request to include at the end of AR Rule 68(1)

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. We note that the suggestion below has repeatedly been included in previously submitted written comments and no ICSID Member had expressed any objection to it:

"For the purposes of this paragraph, the term "non-disputing Treaty Party" shall include a Regional Economic Integration Organisation, as defined in Article 1(4) of the ICSID Additional Facility Rules, of which the non-disputing Treaty Party is a constituent State."

15. Additionally, the European Union and its Member States note that AR Rule 68 does not allow the non-disputing Treaty Party to request access to documents of the proceedings that may be relevant for informing its submission, similar to what AR Rule 67(6) foresees for non-disputing parties. It is suggested that this be remedied by including a new paragraph into AR Rule 68, reflecting AR Rule 67(6):

"The Tribunal shall provide the non-disputing Treaty Party with access to relevant documents filed in the proceeding, unless either party objects."

United States:
The United States has several comments on the latest version of proposed Rule 68 (AF Rule 78).

First, the United States strongly opposes the deletion in the first paragraph of the proposed Rule of the right for NDTPs to make oral submissions. The United States observes that WP #5 provides no explanation for the deletion and the United States does not see any basis for this change. The right of NDTPs to make oral, as well as written, submissions is important. Tribunals are increasingly scheduling written NDTP submissions before the last round of pleadings, and additional pleadings are oftentimes made subsequent to a written NDTP submission, but prior to a hearing. In our experience, arguments of the parties concerning issues of treaty interpretation often evolve or change after a written submission by the NDTP, and in our view it is beneficial for a Tribunal to have the benefit of the NDTP's views on such new arguments, as they concern issues of treaty interpretation.
The United States does not believe the right to make oral submissions disrupts the proceeding or unduly burdens or unfairly prejudices either party. In our experience, Tribunals have managed the presentation of oral submissions by NDTPs in a manner that causes minimal, if any, impact on a hearing schedule, and affords the disputing parties ample time and opportunity to respond. Moreover, we do not believe the right of oral submissions causes any

	undue administrative burdens or expense for the administering institution or the disputing parties. Consequently, given that the benefits, in our view, far outweigh potential downsides of allowing such submissions, the United States would be interested in learning the Secretariat's views for the deletion and would appreciate hearing from other States on this matter. *Second*, the United States opposes the deletion of reference to "publication" of NDTP submissions as a conforming change, for the reasons set forth with respect to proposed Rule 64 (see above). *Third*, the United States continues to believe that ICSID should include language clarifying that NDTPs should be given access to the arbitral documents. Oddly, the proposed Rule now leaves NDTPs at a potential disadvantage vis-a-vis NDPs with respect to access to documents in the arbitration. *Fourth*, the United States continues to believe that NDTPs should have the right to attend the oral hearings. *Fifth*, with respect to AF Rule 78, our last round of comments on WP #4 recommended deletion of paragraph 2, which provides that a NDTP shall not support a party in a manner tantamount to diplomatic protection. We explained that because the Rule already limits NDTP participation to submissions on treaty interpretation, a NDTP submission could not reasonably be considered tantamount to diplomatic protection.
Chapter XI - Interpretation, Revision and Annulment of the Award	
Rule 69 - The Application	
Rule 70 - Interpretation or Revision: Reconstitution of the Tribunal	
Rule 71 - Annulment: Appointment of the *ad hoc* Committee	
Rule 72 - Procedure Applicable to Interpretation, Revision and Annulment	
Rule 73 - Stay of Enforcement of the Award	
Rule 74 - Resubmission of Dispute after an Annulment	
Chapter XII - Expedited Arbitration	

Rule 75 - Consent of Parties to Expedited Arbitration	**Armenia:** As set out in our comments to WP # 3, Armenia suggests that the Secretariat set out a standard practice whereby it will draw the attention of parties to the possibility of expedited arbitration in 'low value claims', which should be expressed through a 'floor and ceiling' in terms of financial value. Encouraging parties to make use of this mechanism for low value claims should lead to more proportionate use of resources, which may lead to an 'opt out' approach rather than an 'opt in' approach in a future Rules revision. **Israel:** We appreciate the consideration and accommodation of our comment – as reflected in the Secretariat's notes at para. 135 – that an arbitrator should not be able to frustrate the will of the parties to proceed with an expedited arbitration due to unavailability. However, in practice we deem the deletion of the last sentence of AR 75(3) to be insufficient to fulfil this goal. We would like to propose adding a clarifying draft text establishing that: If an arbitrator fails to confirm availability, [OPT 1: the arbitrator may offer to resign] [OPT 2: the disputing parties may agree to replace the unavailable arbitrator or, where applicable, agree to proceed with a sole arbitrator. This comment applies similarly to the corresponding **Rule 79** in the **AF (ARs)**.
Rule 76 - Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	
Rule 77 - Appointment of Sole Arbitrator for Expedited Arbitration	
Rule 78 - Appointment of Three-Member Tribunal for Expedited Arbitration	
Rule 79 - Acceptance of Appointment in Expedited Arbitration	
Rule 80 - First Session in Expedited Arbitration	

Rule 81 - Procedural Schedule in Expedited Arbitration	**Israel:** With regard to AR 81(4), referring to Israel's previous comments, the Secretariat's commented in para. 138 as follows: "one State proposed clarifying that the schedule for submissions on a challenge filed pursuant to AR 22 will not run in parallel with the main schedule as the proceeding will be suspended. AR 81(4) has been clarified accordingly." We appreciate the consideration given to Israel's comments. However, in our view the additional text inserted may still be ambiguous with regards to the linkage to AR 22, and therefore we suggest a slight modification to the new text in para (4): "unless the proceeding was suspended in accordance with other Rules". In our view this modification will clarify that the suspension in AR 22 shall apply in expedited arbitration and AR 81 does not constitute a modification to AR 22 in this respect as per AR 75(2)(b). This comment also refers to **AR 84(2)**.
Rule 82 - Default in Expedited Arbitration	
Rule 83 - Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration	
Rule 84 - Procedural Schedule for Interpretation, Revision or Annulment in Expedited Arbitration	
Rule 85 - Resubmission of a Dispute after Annulment in Expedited Arbitration	
Rule 86 - Opting Out of Expedited Arbitration	
IV. Conciliation Rules	
Introductory Note	
Chapter I - General Provisions	
Rule 1 - Application of Rules	
Rule 2 - Party and Party Representative	
Rule 3 - Method of Filing	
Rule 4 - Supporting Documents	
Rule 5 - Routing of Documents	
Rule 6 - Procedural Languages, Translation and Interpretation	
Rule 7 - Calculation of Time Limits	
Rule 8 - Costs of the Proceeding	

Rule 9 - Confidentiality of the Conciliation	
Rule 10 - Use of Information in Other Proceedings	
Chapter II - Establishment of the Commission	
Rule 11 - General Provisions, Number of Conciliators and Method of Constitution	
Rule 12 - Notice of Third-Party Funding	**Costa Rica:** Costa Rica considers that this provision merits further examination beyond the effects in the constitution of the Tribunal and the potential conflict of interest. For example, TPF is also linked to security for costs, possibility of reaching amicable solutions, counterclaims, and transparency in general. Hence, Costa considers that paragraph (1) must request disclosing information about the party´s corporate structure. Proposed edits **Rule 12 Notice of Third-Party Funding** (1) A party shall file a written notice disclosing the name and addressof any non-party from which the party, directly or indirectly, has received funds for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the conciliation ("third-party funding"). Where the non-party providing funds is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.
Rule 13 - Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention	
Rule 14 - Assistance of the Secretary-General with Appointment	
Rule 15 - Appointment of Conciliators by the Chair in Accordance with Article 30 of the Convention	
Rule 16 - Acceptance of Appointment	
Rule 17 - Replacement of Conciliators Prior to Constitution of the Commission	
Rule 18 - Constitution of the Commission	
Chapter III - Disqualification of Conciliators and Vacancies	

Rule 19 - Proposal for Disqualification of Conciliators	
Rule 20 - Decision on the Proposal for Disqualification	
Rule 21 - Incapacity or Failure to Perform Duties	
Rule 22 - Resignation	
Rule 23 - Vacancy on the Commission	
Chapter IV - Conduct of the Conciliation	
Rule 24 - Functions of the Commission	
Rule 25 - General Duties of the Commission	
Rule 26 - Orders, Decisions and Agreements	
Rule 27 - Quorum	
Rule 28 - Deliberations	
Rule 29 - Cooperation of the Parties	
Rule 30 - Written Statements	**Israel:** We believe that less than 30 days is a very short time to file written statements, especially for states. Thus, we suggest replacing the words "other date" with "later date". This comment applies similarly to **Article 38 of the AF (CRs)**.
Rule 31 - First Session	
Rule 32 - Meetings	
Rule 33 - Preliminary Objections	
Chapter V - Termination of the Conciliation	
Rule 34 - Discontinuance Prior to the Constitution of the Commission	
Rule 35 - Report Noting the Parties' Agreement	
Rule 36 - Report Noting the Failure of the Parties to Reach Agreement	
Rule 37 - Report Recording the Failure of a Party to Appear or Participate	
Rule 38 - The Report	
Rule 39 - Issuance of the Report	

Back to Top of Section
Back to Table of Contents

ADDITIONAL FACILITY PROCEEDINGS	
V. Additional Facility Rules	
Introductory Note	
Article 1 - Definitions	
Article 2 - Additional Facility Proceedings	
Article 3 - Convention Not Applicable	
Article 4 - Application of Rules	
VI. Administrative and Financial Regulations	
Introductory Note	
Chapter I - General Provisions	
Regulation 1 - Application of these Regulations	
Chapter II - General Functions of the Secretariat	
Regulation 2 - Secretary	
Regulation 3 - The Registers	
Regulation 4 - Depositary Functions	
Regulation 5 - Certificates of Official Travel	
Chapter III - Financial Provisions	
Regulation 6 - Fees, Allowances and Charges	
Regulation 7 - Payments to the Centre	
Regulation 8 - Consequences of Default in Payment	**Costa Rica:** Based on our experience in procedures, Costa Rica suggests a 45 day-term in paragraph 2(a). Sometimes, countries face challenges tomeet the 30 days term, merely due to compliance with internal administrative proceedings.
Regulation 9 - Special Services	
Regulation 10 - Fee for Lodging Requests	
Chapter IV - Official Languages and Limitation of Liability	
Regulation 12 - Languages of Rules and Regulations	

Regulation 13 - Prohibition Against Testimony and Limitation of Liability	
VII. Arbitration Rules	
Introductory Note	
Chapter I - Scope	
Rule 1 - Application of Rules	
Chapter II - Institution of Proceedings	
Rule 2 - The Request	
Rule 3 - Contents of the Request	**Costa Rica:** Costa Rica continues to support the inclusion of a new sub-paragraph(2)(d)(ii) since this information helps the State understand certain facts about the Claimant and its right to bring a claim. ICSID includes a similar recommendation in Rule 4; however, experience tells that ifthe information is not mandatory the investor will not present it andthe Tribunal will not have the obligation to request it. Proposed edits **Rule 3 Contents of the Request** (…) (d) if a party is a juridical person: (…) (ii) information concerning the ultimate beneficial owner andcorporate structure of the party; (iii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent, information concerning and supporting documents demonstrating the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the ICSID Additional Facility Rules;
Rule 4 - Recommended Additional Information	
Rule 5 - Filing of the Request and Supporting Documents	
Rule 6 - Receipt of the Request and Routing of Written Communications	
Rule 7 - Review and Registration of the Request	
Rule 8 - Notice of Registration	
Rule 9 - Withdrawal of the Request	

Chapter III - General Provisions	
Rule 10 - Party and Party Representative	
Rule 11 - General Duties	
Rule 12 - Method of Filing	
Rule 13 - Supporting Documents	
Rule 14 - Routing of Documents	
Rule 15 - Procedural Languages, Translation and Interpretation	
Rule 16 - Correction of Errors	
Rule 17 - Calculation of Time Limits	
Rule 18 - Fixing Time Limits	
Rule 19 - Extension of Time Limits Applicable to Parties	
Rule 20 - Time Limits Applicable to the Tribunal	
Chapter IV - Establishment of the Tribunal	
Rule 21 - General Provisions Regarding the Establishment of the Tribunal	
Rule 22 - Qualifications of Arbitrators	
Rule 23 - Notice of Third-Party Funding	**Costa Rica:** Costa Rica considers that this provision merits further examination beyond the effects in the constitution of the Tribunal and the potential conflict of interest. For example, TPF is also linked to security for costs, possibility of reaching amicable solutions, counterclaims, and transparency in general. Hence, Costa considers that paragraph (1) must request disclosing information about the party´s corporate structure. Proposed edits: **Rule 12 Notice of Third-Party Funding** (1) A party shall file a written notice disclosing the name and addressof any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through adonation or grant, or in return for remuneration dependent on the outcome of the proceeding (“third-party funding”). Where the non-party providing funds is a juridical person, the notice shall include thenames of the persons and entities that own and control that juridical person.

	United States: The United States supports the deletion of the clause "if it deems it necessary at any stage of the proceeding" from the last paragraph of the proposed Rule. The United States observes that this change is consistent with our recommendation in our July 2020 comments on WP #4. We had recommended deleting the language because AR 36(3) is referred to in AR 14(5), and so the "deems it necessary standard" is already incorporated by reference into AR 14(5) by virtue of AR 36(3). We suggested that the duplication of the legal standard could be confusing.
Rule 24 - Method of Constituting the Tribunal	
Rule 25 - Assistance of the Secretary-General with Appointment	
Rule 26 - Appointment of Arbitrators by the Secretary-General	
Rule 27 - Acceptance of Appointment	
Rule 28 - Replacement of Arbitrators Prior to Constitution of the Tribunal	
Rule 29 - Constitution of the Tribunal	**United States:** The United States supports the added language to Rule 21(1) to clarify that a Tribunal is deemed constituted once the Secretary-General notifies the parties that all arbitrators have accepted their appointments "and signed the declaration required by Rule 19(3)(b)."
Chapter V - Disqualification of Arbitrators and Vacancies	
Rule 30 - Proposal for Disqualification of Arbitrators	
Rule 31 - Decision on the Proposal for Disqualification	
Rule 32 - Incapacity or Failure to Perform Duties	
Rule 33 - Resignation	
Rule 34 - Vacancy on the Tribunal	
Chapter VI - Conduct of the Proceeding	
Rule 35 - Orders, Decisions and Agreements	**United States:** The United States also supports the language added to Rule 27(2), requiring that Tribunal orders and decisions be reasoned.
Rule 36 - Waiver	

Rule 37 - Filling of Gaps	
Rule 38 - First Session	**United States:** The United States supports the added language in paragraph (4)(f) of the proposed Rule, inviting the parties' views on whether hearings should be held in person or remotely.
Rule 39 - Written Submissions	
Rule 40 - Case Management Conferences	
Rule 41 - Seat of Arbitration	
Rule 42 - Hearings	
Rule 43 - Quorum	
Rule 44 - Deliberations	
Rule 45 - Decisions Made by Majority Vote	
Chapter VII - Evidence	
Rule 46 - Evidence: General Principles	
Rule 47 - Disputes Arising from Requests for Production of Documents	
Rule 48 - Witnesses and Experts	
Rule 49 - Tribunal-Appointed Experts	
Rule 50 - Visits and Inquiries	
Chapter VIII - Special Procedures	
Rule 51 - Manifest Lack of Legal Merit	
Rule 52 - Bifurcation	**United States:** The United States agrees with the rationale provided in WP paragraph 84 for the deletion of the language in paragraph (5) of the proposed rule (and the corresponding change made to Rule 44(3)(a)), that would have allowed a Tribunal discretion not to suspend proceedings in special circumstances if it orders bifurcation.
Rule 53 - Preliminary Objections	**United States:** With respect to the additional language to paragraph (4) of the proposed rule, providing that a Tribunal may address preliminary objections in a separate phase (or join the issues to the merits) on the request of a party or "at any time on its own initiative," the United States is concerned that this language would empower a Tribunal to bifurcate over the objections of the respondent, or both disputing parties, and therefore does not support the additional language as drafted.
Rule 54 - Preliminary Objections with a Request for Bifurcation	

Rule 55 - Preliminary Objections without a Request for Bifurcation	
Rule 56 - Consolidation or Coordination of Arbitrations	
Rule 57 - Provisional Measures	
Rule 58 - Ancillary Claims	
Rule 59 - Default	
Chapter IX - Costs	
Rule 60 - Costs of the Proceeding	
Rule 61 - Statement of and Submission on Costs	
Rule 62 - Decisions on Costs	**Costa Rica:** Costa Rica considers that the prevailing party should be able to claimcosts even if only parts of the objection are upheld by the Tribunal. Proposed edits: **Rule 52 Decisions on Costs** (…) (2) If the Tribunal renders an Award or a decision pursuant to Rule 51(3) upholding the objection pursuant to Rule 51(1) or parts thereof,it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs. (…) **United States:** In earlier comments, the United States was critical of the presumption in paragraph 2 in favor of awarding costs to the prevailing party on a Rule 41 objection, in part because WP#4 had erroneously cited U.S. treaty practice in support of the proposition. In fact, U.S. practice typically provides that a tribunal may award the prevailing party costs with respect to preliminary objections "if warranted." The United States also observed that relatively few "manifest lack of legal merit" objections under the ICSID rules have succeeded, and the cost-shifting presumption of the prior draft could chill States from making proposed Rule 41 objections. The revision to paragraph 2 addresses this concern, but now raises an opposing presumption in favor of respondents where the tribunal issues an award pursuant to a Rule 41(3) objection. The United States refers to the rationale for this proposal provided by States, and noted in WP #5, that an award of costs to the respondent is justified, given the high threshold to sustain

	proposed Rule 41(3) challenges. The United States would suggest, however, that in lieu of a set presumption, this could be stated as an express factor for a tribunal to take into account in rendering a decision on costs with respect to such objections (whether such costs are allocated as a result of an Award or Decision upholding an objection pursuant to Rule 41(3)).
Rule 63 - Security for Costs	**United States:** The United States supports the modifications made by the Secretariat to paragraph (4) of the proposed Rule, which requires the Tribunal to consider various circumstances in awarding costs (outlined in paragraph (3) of the proposed Rule. Additionally, the United States supports the suggestion made to change the word "require" in Rule 53(2)(a) to "justify." We appreciate that the ICSID Secretariat has explained its view that "require" signals an "appropriate standard for an order of security for costs," but given the Secretariat's explanation at paragraph 111 in WP #4, that the term "require" is consistent with the drafting on Rules such as Provisional Measures, the United States is concerned that this term sets too high a threshold for an order for Security for Costs. Unlike Provisional Measures, where the Tribunal must consider whether such measures are "urgent and necessary," the draft Rule on Security for Costs is intended to allow a Tribunal to come to a "balanced decision," considering all relevant circumstances as outlined in the draft Rule. As such, the United States supports the suggestion to change the word "require" to "justify" in this context.
Chapter X - Suspension, Settlement and Discontinuance	
Rule 64 - Suspension of the Proceeding	
Rule 65 - Settlement and Discontinuance by Agreement of the Parties	
Rule 66 - Discontinuance at Request of a Party	
Rule 67 - Discontinuance for Failure of Parties to Act	
Chapter XI - The Award	
Rule 68 - Applicable Law	
Rule 69 - Timing of the Award	
Rule 70 - Contents of the Award	
Rule 71 - Rendering of the Award	
Rule 72 - Supplementary Decision, Rectification and Interpretation of an Award	

Chapter XII - Publication, Access to Proceedings and Non-Disputing Party Submissions	
Rule 73 - Publication of Orders, Decisions and Awards	**Israel:** Israel would like to reiterate the comment made by it previously (including in the in the Washington conference in November 2019), holding that the publication of the Award should be made upon consent of the parties, as we find it strikes the appropriate balance between transparency and the rights of the parties to control the exposure of the Award. Israel's position is that this Rule should be similar to the corresponding AR 61, and maintain the principle of the rule as exists in the 2006 AF(AR).
Rule 74 - Publication of Documents Filed in the Proceeding	**Israel:** Para. (2): Israel views that the word "document" (in the last clause of the paragraph) should be deleted and replaced with "written submission", as was done in AR 64. **United States:** The United States strongly opposes the change made to paragraph (1) of the proposed Rule deleting the clause "by a party." As noted in the Secretariat's explanation in WP #5 at paragraph 116: > Proposed AR 64(1) deletes "filed by a party", indicating that the parties to the proceeding could agree to publication of any document, including a submission by an NDP, NDTP, and tribunal appointed expert. If the parties do not agree to such publication, the document would not be published by the Centre and could not be referred to the Tribunal for adjudication of disputes over publication and redaction. This reflects the substantial time and cost that would be incurred if all such documents could be referred to a Tribunal to parse redaction. The United States understands the effect of this deletion is that one party in an arbitration will have a veto over whether an amicus or Non-Disputing Treaty Party (NDTP) submission is published by ICSID because there is no recourse in the second paragraph of the proposed Rule for a Tribunal to oversee redactions, with a view to publication, of any submissions not filed by a party. The United States views this change as inconsistent with the objective of greater transparency. Additionally, it is the practice, indeed frequently as an obligation under its treaties, of the United States to publish all of its own submissions – either as a party to the

	dispute or a non-disputing party – on the U.S. State Department website.[11] In other contexts as well the United States has encouraged other countries to bring greater openness to dispute settlement by taking steps such as making their written submissions publicly available.[12] The United States is especially concerned that a party that vetoes the publication by ICSID of an amicus or NDTP submission might request a Tribunal for an Order proscribing the publication, outside the auspices of ICSID, of such submissions. The United States would view the attempt to block publication by an NDTP of its own submissions as inappropriate and problematic.
Rule 75 - Observation of Hearings	
Rule 76 - Confidential or Protected Information	**United States:** The United States supports the addition of "protected personal information," to "ensure there is no doubt applicable privacy laws can be raised to prevent protected personal information from being disclosed to the public."
Rule 77 - Submission of Non-Disputing Parties	**United States:** The United States opposes the deletion of reference to "publication" of NDP submissions as a conforming change, for the reasons set forth with respect to proposed Rule 64 (see above). The United States also disagrees with the change to paragraph (6) of the proposed Rule, which would change the presumption of providing documents to NDPs, unless either party objections, and leave the provision of such documents to the Tribunal's discretion, unless either party objects. In this connection also, the United States continues to oppose the de facto veto by one party to an NDPs access to documents, without which it is difficult for NDPs to make submissions. We maintain our prior suggestion that the veto be removed or changed to "unless either party objects based on compelling grounds," which alternative formulation would allow a Tribunal to make the determination. Finally, the United States observes that the streamlining throughout the proposed Rules (to delete "written or oral" before the word "submission") does not appear to be mirrored in paragraph (5) which deletes "or oral" but leaves the word "written" before "submission.
Rule 78 - Participation of Non-Disputing Treaty Party	**United States:**

[11] *See* International Claims and Investment Disputes - United States Department of State. A disputing treaty Party may be required by the underlying treaty to publish an NDTP submission. *See, e.g.*, Article 10.21 (Transparency of Arbitral Proceedings) of the U.S.-Peru TPA, paragraph (1)(c) of which requires the publication of non-disputing Party submissions. Additionally, an NDTP may be required by law to publish its submission, or allow for public disclosure of it, pursuant to a law similar to the U.S. Freedom of Information Act. *See* 5 U.S.C. § 552.

[12] *See* Joint Statement on the Importance of Transparency in WTO Dispute Settlement, WT/GC/W/785 (Oct. 15, 2019).

	The United States has several comments on the latest version of proposed Rule 68 (AF Rule 78). *First*, the United States strongly opposes the deletion in the first paragraph of the proposed Rule of the right for NDTPs to make oral submissions. The United States observes that WP #5 provides no explanation for the deletion and the United States does not see any basis for this change. The right of NDTPs to make oral, as well as written, submissions is important. Tribunals are increasingly scheduling written NDTP submissions before the last round of pleadings, and additional pleadings are oftentimes made subsequent to a written NDTP submission, but prior to a hearing. In our experience, arguments of the parties concerning issues of treaty interpretation often evolve or change after a written submission by the NDTP, and in our view it is beneficial for a Tribunal to have the benefit of the NDTP's views on such new arguments, as they concern issues of treaty interpretation. The United States does not believe the right to make oral submissions disrupts the proceeding or unduly burdens or unfairly prejudices either party. In our experience, Tribunals have managed the presentation of oral submissions by NDTPs in a manner that causes minimal, if any, impact on a hearing schedule, and affords the disputing parties ample time and opportunity to respond. Moreover, we do not believe the right of oral submissions causes any undue administrative burdens or expense for the administering institution or the disputing parties. Consequently, given that the benefits, in our view, far outweigh potential downsides of allowing such submissions, the United States would be interested in learning the Secretariat's views for the deletion and would appreciate hearing from other States on this matter. *Second*, the United States opposes the deletion of reference to "publication" of NDTP submissions as a conforming change, for the reasons set forth with respect to proposed Rule 64 (see above). *Third*, the United States continues to believe that ICSID should include language clarifying that NDTPs should be given access to the arbitral documents. Oddly, the proposed Rule now leaves NDTPs at a potential disadvantage vis-a-vis NDPs with respect to access to documents in the arbitration. *Fourth*, the United States continues to believe that NDTPs should have the right to attend the oral hearings. *Fifth*, with respect to AF Rule 78, our last round of comments on WP #4 recommended deletion of paragraph 2, which provides that a NDTP shall not support a party in a manner

	tantamount to diplomatic protection. We explained that because the Rule already limits NDTP participation to submissions on treaty interpretation, a NDTP submission could not reasonably be considered tantamount to diplomatic protection.
Chapter XIII - Expedited Arbitration	
Rule 79 - Consent of Parties to Expedited Arbitration	
Rule 80 - Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	
Rule 81 - Appointment of Sole Arbitrator for Expedited Arbitration	
Rule 82 - Appointment of Three-Member Tribunal for Expedited Arbitration	
Rule 83 - Acceptance of Appointment in Expedited Arbitration	
Rule 84 - First Session in Expedited Arbitration	
Rule 85 - Procedural Schedule in Expedited Arbitration	
Rule 86 - Default in Expedited Arbitration	
Rule 87 - Procedural Schedule for Supplementary Decision, Rectification and Interpretation in Expedited Arbitration	
Rule 88 - Opting Out of Expedited Arbitration	
VIII. Conciliation Rules	
Introductory Note	
Chapter I - Scope	
Rule 1 - Application of Rules	
Chapter II - Institution of the Proceedings	
Rule 2 - The Request	
Rule 3 - Contents of the Request	**Costa Rica:** Costa Rica continues to support the inclusion of a new sub-paragraph (2)(d)(ii) since this information helps the State understand certain facts about the Claimant and its right to bring a claim. ICSID includes a similar recommendation in Rule 4; however, experience tells that if the information is not mandatory the investor will not present it andthe Tribunal

	will not have the obligation to request it. Proposed edits: **Rule 3 Contents of the Request** (…) (d) if a party is a juridical person: (…) (ii) information concerning the ultimate beneficial owner andcorporate structure of the party; (iii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent, information concerning and supporting documents demonstrating the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the ICSID Additional Facility Rules;
Rule 4 - Recommended Additional Information	
Rule 5 - Filing of the Request and Supporting Documents	
Rule 6 - Receipt of the Request and Routing of Written Communications	
Rule 7 - Review and Registration of the Request	
Rule 8 - Notice of Registration	
Rule 9 - Withdrawal of the Request	
Chapter III - General Provisions	
Rule 10 - Party and Party Representative	
Rule 11 - Method of Filing	
Rule 12 - Supporting Documents	
Rule 13 - Routing of Document	
Rule 14 - Procedural Languages, Translation and Interpretation	
Rule 15 - Calculation of Time Limits	
Rule 16 - Costs of the Proceeding	
Rule 17 - Confidentiality of the Conciliation	

Rule 18 - Use of Information in Other Proceedings	
Chapter IV - Establishment of the Commission	
Rule 19 - General Provisions, Number of Conciliators and Method of Constitution	
Rule 20 - Qualifications of Conciliators	
Rule 21 - Notice of Third-Party Funding	**Costa Rica:** Costa Rica considers that this provision merits further examination beyond the effects in the constitution of the Tribunal and the potential conflict of interest. For example, TPF is also linked to security for costs, possibility of reaching amicable solutions, counterclaims, and transparency in general. Hence, Costa considers that paragraph (1) must request disclosing information about the party´s corporate structure. Proposed edits: **Rule 21 Notice of Third-Party Funding** (1) A party shall file a written notice disclosing the name and addressof any non-party from which the party, directly or indirectly, has received funds for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the conciliation ("third-party funding"). Where the non-party providing funds is a juridical person, the notice shall include the names of the persons and entities that own and control that juridical person.
Rule 22 - Assistance of the Secretary-General with Appointment	
Rule 23 - Appointment of Conciliators by the Secretary-General	
Rule 24 - Acceptance of Appointment	
Rule 25 - Replacement of Conciliators Prior to Constitution of the Commission	
Rule 26 - Constitution of the Commission	
Chapter V - Disqualification of Conciliators and Vacancies	
Rule 27 - Proposal for Disqualification of Conciliators	
Rule 28 - Decision on the Proposal for Disqualification	

Back to Top of Section
Back to Table of Contents

FACT-FINDING PROCEEDINGS	
IX. Fact-Finding Rules	
Introductory Note	
Chapter I - General Provisions	
Rule 1 - Definitions	
Rule 2 - Fact-Finding Proceedings	
Rule 3 - Application of Rules	
Rule 4 – Party Representative	
Chapter II - Institution of the Fact-Finding Proceeding	
Rule 5 - The Request	
Rule 6 - Contents and Filing of the Request	
Rule 7 - Receipt and Registration of the Request	
Chapter III - The Fact-Finding Committee	
Rule 8 - Qualifications of Members of the Committee	
Rule 9 - Number of Members and Method of Constituting the Committee	
Rule 10 - Acceptance of Appointment	
Rule 11 - Constitution of the Committee	
Chapter IV - Conduct of the Fact-Finding Proceeding	
Rule 12 - Sessions and Work of the Committee	
Rule 13 - General Duties	
Rule 14 - Calculation of Time Limits	
Rule 15 - Costs of the Proceeding	
Rule 16 - Confidentiality of the Proceeding	
Rule 17 - Use of Information in Other Proceedings	
Chapter V - Termination of the Fact-Finding Proceeding	

Rule 18 - Manner of Terminating the Proceeding	
Rule 19 - Failure of a Party to Participate or Cooperate	
Rule 20 - Report of the Committee	**Armenia:** As a general matter, Armenia would welcome clarification concerning the use of fact-finding reports, particularly binding ones, in a subsequent arbitration process. In particular, whether such binding reports would bind the parties and the Tribunal as to factual issues addressed therein.
Rule 21 - Issuance of the Report	
X. (Fact-Finding) AFR	
Introductory Note	
Chapter I - General Provisions	
Regulation 1 - Application of these Regulations	
Chapter II - General Functions of the Secretariat	
Regulation 2 - Secretary	
Regulation 3 - The Registers	
Regulation 4 - Depositary Functions	
Regulation 5 - Certificates of Official Travel	
Chapter III - Financial Provisions	
Regulation 6 - Fees, Allowances and Charges	
Regulation 7 - Payments to the Centre	
Regulation 8 - Consequences of Default in Payment	
Regulation 9 - Special Services	
Regulation 10 - Fee for Lodging Requests	
Regulation 11 - Administration of Proceedings	
Chapter IV - Official Languages and Limitation of Liability	
Regulation 12 - Languages of Regulations	
Regulation 13 - Prohibition Against Testimony and Limitation of Liability	

Back to Top of Section
Back to Table of Contents

MEDIATION	
XI. Mediation Rules	
Introductory Note	
Chapter I - General Provisions	
Rule 1 - Definitions	
Rule 2 - Mediation Proceedings	
Rule 3 - Application of Rules	
Rule 4 - Party Representative	
Chapter II - Institution of the Mediation	
Rule 5 - Institution of Mediation Based on Prior Party Agreement	
Rule 6 - Institution of Mediation Absent a Prior Party Agreement	
Rule 7 - Registration of the Request	
Chapter III - General Procedural Provisions	
Rule 8 - Calculation of Time Limits	
Rule 9 - Costs of the Mediation	
Rule 10 - Confidentiality of the Mediation	
Rule 11 - Use of Information in Other Proceedings	
Chapter IV - The Mediator	
Rule 12 - Qualifications of the Mediator	
Rule 13 - Number of Mediators and Method of Appointment	
Rule 14 - Acceptance of Appointment	
Rule 15 - Transmittal of the Request	
Rule 16 - Resignation and Replacement of Mediator	
Chapter V - Conduct of the Mediation	
Rule 17 - Role and Duties of the Mediator	
Rule 18 - Duties of the Parties	
Rule 19 - Initial Written Statements	
Rule 20 - First Session	
Rule 21 - Mediation Procedure	**Turkey:** Rule 21(4) precludes mediator recommendations for settlement terms unless all parties request the mediator to do so.

	We suggest amending the said rule to make sure that the rule accords with Article 7(4) UNCITRAL Model Law on Mediation (2018): "However, the mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute." Alternatively, it would be preferable to consider that the mediator at least should be able to offer a solution proposal in cases where parties cannot reach an agreement after all systematic techniques allowing parties to produce their own solutions are applied. In this regard; we suggest adding a separate paragraph to Rule 21 that reads: "the mediator assists the parties to understand each other and thereby supports the establishment of a communication process between them to produce their own solutions for the dispute. However, in case it turns out that the parties cannot reach a solution, an offer can be made by the mediator for the settlement of the dispute." Thus, in case the parties are obstructed to produce their own solutions, the mediator should be able to offer a final solution proposal.
Rule 22 - Termination of the Mediation	
XII. (Mediation) AFR	
Introductory Note	
Chapter I - General Provisions	
Regulation 1 - Application of these Regulations	
Chapter II - General Functions of the Secretariat	
Regulation 2 - Secretary	
Regulation 3 - The Registers	
Regulation 4 - Depositary Functions	
Regulation 5 - Certificates of Official Travel	
Chapter III - Financial Provisions	
Regulation 6 - Fees, Allowances and Charges	
Regulation 7 - Payments to the Centre	
Regulation 8 - Consequences of Default in Payment	
Regulation 9 - Special Services	
Regulation 10 - Fee for Lodging Requests	

Regulation 11 - Administration of Proceedings	
Chapter IV - Official Languages and Limitation of Liability	
Regulation 12 - Languages of Regulations	
Regulation 13 - Prohibition Against Testimony and Limitation of Liability	

Back to Top of Section
Back to Table of Contents

SCHEDULES	
Schedule 1 – Schedule of Fees	
Schedule 2 – Memorandum of Fees and Expenses in ICSID Proceedings	**Costa Rica:** Even though ICSID has indicated that the practice has been flexible on this topic, Costa Rica considers that reflecting this in Regulation 16 will give more legal certainty to States with more complex internal budgeting processes. Additionally, the Memorandum in Schedule 2 does not reflect that the parties can arrange to receive advance notice that a call for funds would be made. Therefore, Costa Rica proposes a modification to Regulation 16 and Schedule 2 that clarifies that the parties can have 60 days to make their payment.
Schedule 3 – Arbitrator Declaration	
Schedule 4 – Tribunal-Appointed Expert Declaration	
Schedule 5 – *Ad Hoc* Committee Member Declaration	
Schedule 6 – Conciliator Declaration	
Schedule 7 – Fact-Finding Committee Member Declaration	
Schedule 8 – Mediator Declaration	

Back to Table of Contents