Proposals for Amendment of the ICSID Rules — Working Paper

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

Propuesta de Enmiendas a las Reglas del CIADI — Documento de Trabajo
# TABLE OF CONTENTS

## VOL. 1 – SYNOPSIS

<table>
<thead>
<tr>
<th>Language</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>English</td>
<td>1</td>
</tr>
<tr>
<td>Français</td>
<td>16</td>
</tr>
<tr>
<td>Español</td>
<td>34</td>
</tr>
</tbody>
</table>

## VOL. 2 – CONSOLIDATED DRAFT RULES

<table>
<thead>
<tr>
<th>Language</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposals</td>
<td>2</td>
</tr>
<tr>
<td>Proposition</td>
<td>184</td>
</tr>
<tr>
<td>Propuesta</td>
<td>373</td>
</tr>
</tbody>
</table>

## Tables of Concordance | 569

## VOL. 3 – WORKING PAPER

### INTRODUCTION

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

### ICSID CONVENTION PROCEEDINGS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Administrative and Financial Regulations</td>
<td>6</td>
</tr>
<tr>
<td>II. Institution Rules</td>
<td>61</td>
</tr>
<tr>
<td>III. Arbitration Rules</td>
<td>81</td>
</tr>
<tr>
<td>IV. Conciliation Rules</td>
<td>326</td>
</tr>
</tbody>
</table>

### ADDITIONAL FACILITY PROCEEDINGS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>V. Additional Facility Rules</td>
<td>414</td>
</tr>
<tr>
<td>VI. Administrative and Financial Regulations</td>
<td>436</td>
</tr>
<tr>
<td>VII. Arbitration Rules</td>
<td>459</td>
</tr>
<tr>
<td>VIII. Conciliation Rules</td>
<td>627</td>
</tr>
<tr>
<td>IX. Fact-Finding Rules</td>
<td>709</td>
</tr>
<tr>
<td>X. Mediation Rules</td>
<td>747</td>
</tr>
</tbody>
</table>

### SCHEDULES

<table>
<thead>
<tr>
<th>Schedule</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Schedule 1 – Memorandum of Fees and expenses in ICSID Proceedings</td>
<td>793</td>
</tr>
<tr>
<td>Schedule 2 – Arbitrator Declaration</td>
<td>802</td>
</tr>
<tr>
<td>Schedule 3 – Conciliator Declaration</td>
<td>808</td>
</tr>
<tr>
<td>Schedule 4 – Ad Hoc Committee Member Declaration</td>
<td>816</td>
</tr>
<tr>
<td>Schedule 5 – Fact-Finding Committee Member Declaration</td>
<td>820</td>
</tr>
<tr>
<td>Schedule 6 – Mediator Declaration</td>
<td>826</td>
</tr>
<tr>
<td>Schedule 7 – Multiparty Claims and Consolidation</td>
<td>832</td>
</tr>
<tr>
<td>Schedule 9 – Addressing Time and Cost in ICSID Arbitration</td>
<td>897</td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Schedule</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>SCHEDULE 1: MEMORANDUM ON FEES AND EXPENSES IN ICSID PROCEEDINGS</td>
<td>793</td>
</tr>
<tr>
<td></td>
<td>ANNEXE 1: MEMORANDUM SUR LES HONORAIRES ET FRAIS DANS LES INSTANCES CIRDI</td>
<td>796</td>
</tr>
<tr>
<td></td>
<td>APÉNDICE 1: MEMORANDO DE HONORARIOS Y GASTOS EN LOS PROCEDIMIENTOS ANTE EL CIADI</td>
<td>799</td>
</tr>
<tr>
<td>2</td>
<td>SCHEDULE 2: ARBITRATOR DECLARATION</td>
<td>802</td>
</tr>
<tr>
<td></td>
<td>ANNEXE 2: DÉCLARATION D’ARBITRE</td>
<td>804</td>
</tr>
<tr>
<td></td>
<td>APÉNDICE 2: DECLARACIÓN DEL O DE LA ÁRBITRO</td>
<td>806</td>
</tr>
<tr>
<td>3</td>
<td>SCHEDULE 3: CONCILIATOR DECLARATION</td>
<td>808</td>
</tr>
<tr>
<td></td>
<td>ANNEXE 3: DÉCLARATION DE CONCILIAUTEUR(TRICE)</td>
<td>810</td>
</tr>
<tr>
<td></td>
<td>APÉNDICE 3: DECLARACIÓN DEL O DE LA CONCILIADOR(A)</td>
<td>812</td>
</tr>
<tr>
<td>4</td>
<td>SCHEDULE 4: AD HOC COMMITTEE MEMBER DECLARATION</td>
<td>814</td>
</tr>
<tr>
<td></td>
<td>ANNEXE 4: DÉCLARATION DE MEMBRE DU COMITÉ AD HOC</td>
<td>816</td>
</tr>
<tr>
<td></td>
<td>APÉNDICE 4: DECLARACIÓN DEL O DE LA MIEMBRO DEL COMITÉ AD HOC</td>
<td>818</td>
</tr>
<tr>
<td>5</td>
<td>SCHEDULE 5: FACT-FINDING COMMITTEE MEMBER DECLARATION</td>
<td>820</td>
</tr>
<tr>
<td></td>
<td>ANNEXE 5: DÉCLARATION DE MEMBRE DE COMITE DE CONSTATATION DES FAITS</td>
<td>822</td>
</tr>
<tr>
<td></td>
<td>APÉNDICE 5: DECLARACIÓN DEL O DE LA MIEMBRO DEL COMITÉ DE COMPROBACIÓN DE HECHOS</td>
<td>824</td>
</tr>
<tr>
<td>6</td>
<td>SCHEDULE 6: MEDIATOR DECLARATION</td>
<td>826</td>
</tr>
<tr>
<td></td>
<td>ANNEXE 6: DÉCLARATION DE MEDIATEUR(TRICE)</td>
<td>828</td>
</tr>
<tr>
<td></td>
<td>APÉNDICE 6: DECLARACIÓN DEL O DE LA MEDIADOR(A)</td>
<td>830</td>
</tr>
<tr>
<td>7</td>
<td>SCHEDULE 7: MULTIPARTY CLAIMS AND CONSOLIDATION</td>
<td>832</td>
</tr>
<tr>
<td></td>
<td>SCHEDULE 8: TRANSPARENCY – ACCESS TO DOCUMENTS, ACCESS TO HEARINGS, AND NON-DISPUTING PARTY PARTICIPATION IN ICSID PROCEEDINGS</td>
<td>855</td>
</tr>
<tr>
<td>9</td>
<td>SCHEDULE 9: ADDRESSING TIME AND COST IN ICSID ARBITRATION</td>
<td>897</td>
</tr>
</tbody>
</table>
SCHEDULE 7: MULTIPARTY CLAIMS AND CONSOLIDATION

I. INTRODUCTION ............................................................................................................. 833
II. MULTIPARTY CLAIMS .................................................................................................. 833
III. CONSOLIDATION ........................................................................................................... 835
IV. VOLUNTARY CONSOLIDATION WITH PARTY CONSENT ......................................... 838
V. PROPOSED RULE ON VOLUNTARY CONSOLIDATION ................................................... 840
VI. MANDATORY CONSOLIDATION ................................................................................ 842
VII. TREATY CONSOLIDATION PROVISIONS ................................................................. 845
VIII. CONSOLIDATION PROVISIONS IN ARBITRAL RULES ............................................. 847
IX. COMMENTS RECEIVED BY ICSID .............................................................................. 849
X. OPTIONS FOR A MANDATORY CONSOLIDATION RULE ........................................... 849
XI. NOTE ON CLASS CLAIMS ............................................................................................. 854
I. INTRODUCTION

1. The complexity of investment vehicles, the numerous investment instruments available, and the multiple forum options offered by States for the same or related investment claims raise the question of how to ensure that like cases are decided in a like manner and as cost-effectively as possible.

2. Three procedural mechanisms in ICSID practice specifically address this concern: first, the registration and adjudication of like claims in a single multiparty claim; second, full or partial consolidation of like claims initiated separately by multiple parties; and third, ancillary claims, especially counter-claims, before the same Tribunal hearing the main claim. These are distinct mechanisms, but they all involve some degree of joint determination of closely connected claims.

3. This Schedule addresses multiparty claims and consolidation. Ancillary claims, including counter-claims, are discussed in Chapter VIII of the AR.

4. The ICSID Convention, AR and A(AF)R already permit multiparty claims and ancillary claims, including counter-claims. As a result, the proposed amendments to the Rules related to these mechanisms are minimal.

5. The ICSID Convention and the current AR and A(AF)R do not address consolidation of claims. Proposed AR 38 and proposed A(AF)R Art. 48 propose a new rule for voluntary consolidation and coordination of proceedings. In addition, this Schedule includes a draft of a potential mandatory consolidation provision (proposed Rule 38BIS) for consideration by Member States.

II. MULTIPARTY CLAIMS

6. “Multiparty claims” are claims brought by two or more claimants that initiate a single proceeding by jointly filing a single Request for arbitration.

7. The ICSID Convention and AR do not expressly address multiparty claims. However, the travaux préparatoires show that multiparty claims were anticipated by the drafters (see e.g., History of the ICSID Convention, Vol. II-1, 400, 413). In practice, Tribunals have consistently found that the ICSID Convention and AR, and the A(AF)R, allow multiparty proceedings and current procedural rules have accommodated such claims.

8. Most multiparty cases have been brought by multiple claimants (as opposed to cases involving multiple respondents). About 40% of all ICSID cases have involved multiple claimants. Although the number of claimants in one case exceeded 180,000 (Abaclat and others v. Argentina (ARB/07/5), Decision on Jurisdiction and Admissibility (August 4, 2011)), the great majority of cases have involved no more than two or three claimants and have not posed difficulties from a procedural or case management perspective.

9. Examples of multi-claimant cases include claims regarding joint investments made by investors affiliated through family ties (see e.g., von Pezold and others v. Zimbabwe
(ARB/10/15), Award (July 28, 2015), ¶¶118 et seq), by investors in a joint corporate structure (e.g., holding company and subsidiary as in Noble Energy and Machala Power v. Ecuador and Conelec (ARB/05/12), Decision on Jurisdiction (March 5, 2008)), unrelated joint venture partners as in Suez et al v. Argentina, ARB/03/17, Decision on Liability, July 30, 2010; or various shareholders in the same local company as in Goetz and others v. Burundi (ARB/95/3), Award (10 February 1999) ¶89). Other multiparty claims have been brought by unaffiliated investors challenging the same measures. For example, in Funnekotter and others v. Zimbabwe (ARB/05/6), Award (April 22, 2009), 14 apparently unrelated investors brought a claim alleging expropriation due to land acquisition legislation of Zimbabwe.

10. Some multiparty claims invoke a single instrument of consent (a treaty, law or contract), but many rely on multiple sources of consent, including different BITs (see e.g., OKO Pankki Oyj and others v. Estonia (ARB/04/6), Award (November 19, 2007) or combine a BIT claim with a claim based on contract or legislation (see e.g., Goetz and others v. Burundi (ARB/01/2), Award (June 21, 2012)).

11. Consistent with Art. 36(3) of the Convention, ICSID’s practice has been to register a claim submitted by two or more claimants in a single Request for arbitration if the claims are not manifestly outside the jurisdiction of the Centre. Refusals to register a multiparty request are uncommon, although there have been some. For example, a multiparty request would be rejected where the multiple claims submitted have no factual connection whatsoever, or where joint submission is barred by the relevant instrument(s) of consent.

12. As registration by the Centre is without prejudice to the powers of the Tribunal to decide jurisdiction, competence and merits, a Tribunal can review whether a multiparty claim is within the jurisdiction of the Centre or is otherwise within its competence. This includes whether the claims are amenable to joint determination or whether a sufficient nexus exists between the claims of multiple claimants in the proceeding.

13. Tribunals considering whether a multiparty claim can be maintained have considered various factors, including whether: (i) a single dispute exists; (ii) the investment is the same or was made jointly by the claimants; (iii) the underlying facts or the overall economic transaction are the same; (iv) the investors or the claims are affiliated; (v) the challenged measures are the same; (vi) the same respondents are named; or (vi) the remedies sought are aligned. The more related the cases are, the more likely a Tribunal is to treat them together - even over a party’s objection (see e.g., Noble Energy and Machala Power v. Ecuador and Conelec (ARB/05/12), Decision on Jurisdiction (March 5, 2008), ¶¶186-207).

14. An objection to a multiparty claim can also be raised using special procedures available under the current AR or A(AF)R. For example, an objection might be made that the Tribunal does not have jurisdiction or competence under current AR 41(1)-(2) (proposed AR 36 and (AF)AR 46) or that the multiple claims are manifestly lacking in legal merit under current AR 41(5) (proposed AR 35 and (AF)AR 45).

15. Yet in practice respondents have rarely objected to the institution of a single proceeding by multiple claimants (see e.g., Goetz and others v. Burundi (ARB/95/3), Award (10 February
At the same time, Tribunals have stressed that addressing claims jointly does not mean merging the disputes, applicable laws, or remedies. Rather, each case must still be assessed on its own facts and merits (see e.g., Flughafen Zürich and Gestión e Ingeniería v. Venezuela (ARB/10/19), Award (November 18, 2014), ¶¶397-411).

17. Tribunals have also emphasized that a multiparty or mass claim is not a representative or class claim, in which designated claimants pursue the litigation on behalf of a larger group who fall within the definition of the class (e.g., Ambiente Ufficio and others v. Argentina (ARB/08/9), Decision on Jurisdiction and Admissibility (February 8, 2013), ¶574).

18. Few comments were received by ICSID from States or the public with respect to multiparty claims. Apart from general suggestions for more detailed regulation of multiparty claims, only one State made a specific proposal. It suggested that a limit be set on the maximum number of claimants permitted in a multiparty claim. This has not been incorporated in the proposed Rules because it is difficult to identify the “right” number of claimants in a joint claim without reference to the specific facts on which the claim is based.

19. Two law firms submitted comments suggesting that further work be done to craft suitable procedures for mass claims and to specify when mass claims would be considered by a Tribunal. The Centre will do further research on procedural techniques that could be used to address cases with many claimants, including mass claims, and publish a set of “best practices” in this regard.

20. Given that to date the current Rules have worked well for multiparty cases, few amendments are proposed. The proposed rules that address the topic have clarified current practice in multiparty cases and reaffirm that the rules apply in the same manner to a single claimant or respondent as they do to multiple claimants or respondents. For instance, IR 1 now specifies that a request can be made by two or more requesting parties; IR 8 states that any requesting party may withdraw before a request is registered, contemplating the withdrawal of one claimant from a multiparty claim, and AR 2(1)(a) defines a party as including several claimants or respondents, depending on the context (see also proposed (AF)AR 10, CR 2, (AF)CR 10, (AF)FFR 2 and (AF)MR 2).

III. CONSOLIDATION

21. Consolidation is the joinder of two or more ongoing proceedings that were commenced separately. Consolidation differs from multiparty claims mainly in respect of timing: consolidation brings together two or more pending claims, whereas multiparty claims are

22. The arguments for and against consolidation are relatively clear, although not simple to reconcile. In many respects, these arguments oppose systemic interests with individual case interests.

23. The policy arguments most often raised in favor of consolidation include the following:

   • Avoidance of inconsistent or contradictory awards: a single Tribunal deciding cases on a consolidated basis will apply similar logic and outcomes will be consistent;
   • Avoidance of parallel proceedings: consolidation avoids parallel proceedings, at least among cases where there is no jurisdictional bar to consolidation;
   • The time and cost of consolidated proceedings should be less than for multiple, individual proceedings, assuming the cases are sufficiently connected;
   • By reducing time and cost, consolidation can enhance access to justice, especially for small and medium sized investors and developing States;
   • Consolidation may promote better decision-making because the arbitrators have a more complete set of facts as context for their Award; and
   • An ICSID consolidation rule could facilitate the joinder of proceedings based on different instruments of consent (i.e., different treaties, contracts and legislation) and relying on different sets of procedural rules (i.e., ICSID, Additional Facility, UNCITRAL). Consolidation provisions in a single investment treaty usually cannot accomplish this result.

24. The main arguments made against consolidation are that:

   • Consolidation, especially mandatory consolidation, limits a party’s autonomy to decide how and with whom to arbitrate a dispute (for a discussion on the role of consent in a consolidation proceeding under NAFTA, see Canfor Corp. v. United States of America and Terminal Forest Products v. United States of America (UNCITRAL), Order of the Consolidation Tribunal (September 7, 2005); and Corn Products International v. Mexico (ARB/(AF)/04/1) and Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. Mexico (ARB/(AF)/04/5), Order of the Consolidation Tribunal (May 20, 2005));
   • Consolidation may put parties at a strategic disadvantage by having to agree on common rules, strategy, arbitrators, schedules, witnesses, and legal argument. Both claimants and respondents are concerned that consolidation limits their ability to
pursue review of an Award. Claimants may also worry that the presentation of their case will be weakened by co-claimants. Some respondents have insisted that each claimant individually defend their claim rather than consolidating related cases. A well-known example is the refusal of the Czech Republic to consolidate an arbitration commenced by Central European Media (CME) and an arbitration commenced by CME’s ultimate majority shareholder, Ronald S. Lauder (CME Czech Republic B.V. v. The Czech Republic (UNCITRAL), Final Award (March 14, 2003), 2001, ¶427; Ronald S. Lauder v. The Czech Republic (UNCITRAL), Final Award (September 3, 2001), ¶173). The CME and Lauder arbitrations resulted in irreconcilable findings, and have frequently been criticized for rendering inconsistent Awards based on the same fact situation;

- Consolidation may raise other complex case management issues, especially where numerous cases are consolidated. These include scheduling, how to hear the evidence of numerous parties, and how to assess damages and liability on an individual basis;

- Parties may have concerns about maintaining confidentiality in a consolidated case. In *Corn Products*, the Consolidation Tribunal refused to consolidate in part due to concern about protecting sensitive commercial information of the co-claimants, who were market competitors. On the other hand, in *Canfor* the Tribunal held that confidentiality should not be ‘in and of itself a reason not to consolidate’, and that confidential information could be protected through other means such as protective orders;

- Consolidation can slow the progress of cases, especially at the beginning when the terms of consolidation are being established. However, once established, consolidation ought to reduce the time and cost overall of deciding the claims;

- It is virtually impossible to include every relevant party in any single consolidated case. Parties may select different rules, initiate claims at different times or under different treaties. While a consolidation mechanism under the ICSID Rules could best mitigate these obstacles, no consolidation mechanism can avoid them entirely.

25. Consolidation can take various forms depending on the manner and extent to which proceedings are joined. Full consolidation refers to consolidating two or more claims in all respects. It combines multiple cases into one case, with one set of pleadings, a common Tribunal, a common hearing and a single Award.

26. Partial consolidation refers to the situation where only some claims are brought together in a consolidated proceeding, while the remaining claims stay with the individual Tribunals.

27. Some cases align only certain aspects of related cases, other aspects for individual determination in each of the related proceedings. While these are sometimes called partial consolidation, they might more accurately be termed as procedural alignment or case coordination.
28. Case coordination is used most frequently in practice. It involves a case-specific combination of: (i) a single Tribunal deciding the related cases; (ii) joint hearing(s) on the common issues in the related cases; (iii) a single set of pleadings for the claimant and respondent positions; and (iv) a single Award (or the same Award) in each of the like cases.

29. Consolidation may be either voluntary (i.e., agreed to by the parties), or mandatory (i.e., imposed on related cases by operation of law).

30. This Schedule uses “consolidation” both for consolidation of all claims (full consolidation) and consolidation of only some claims (partial consolidation). It uses the term “coordination” where claims are not technically consolidated, but the parties agree to some joint presentation of related cases.

31. The ICSID Convention, AR and A(AF)R currently do not have express provisions on consolidation. Most commentators agree that absent an express consolidation rule, an ICSID Tribunal cannot consolidate against the wishes of the parties (Christoph Schreuer et al, The ICSID Convention: A Commentary (CUP, 2nd ed, 2009), ¶131). Of course, ICSID cases may be consolidated voluntarily by agreement of the parties.

32. The proposed ICSID Rules could incorporate a voluntary consolidation rule, a mandatory consolidation rule, or both. Proposed AR 38 suggests a voluntary consolidation provision that also allows for coordination of cases. A mandatory consolidation provision for discussion is provided in this schedule, but is not incorporated in the draft rule texts. A Member State should first consider whether they want to include mandatory consolidation in the ICSID Rules and if so, what approach should be taken to a mandatory consolidation rule.

IV. VOLUNTARY CONSOLIDATION WITH PARTY CONSENT

33. The absence of an express consolidation rule has not prevented ICSID cases from being consolidated by consent of the parties. The ICSID Secretariat has encouraged voluntary consolidation in like cases and has coordinated such consolidation.

34. The scope of consolidation at ICSID has varied, with the nature of the joint procedures tailored to the specific case. A variety of procedural tools have been used, including appointing the same arbitrators, joint pleadings, joint hearings, common witnesses or experts, or rendering one Award. Sometimes parties use all of these techniques and sometimes they elect to use only some of these techniques in a case.

35. Most often, consolidation has been achieved by constituting Tribunals of the same composition in cases that share a common legal and factual background. See, for example:

• Salini Costruttori and Italstrade v. Morocco (ARB/00/4), Decision on Jurisdiction (July 23, 2001), 42 ILM 609 (2003) and Consortium RFCC v Kingdom of Morocco (ARB/00/6), Award (December 22, 2003);

• Sempra Energy International v. Argentina (ARB/02/16), Award (September 28, 2007) and Camuzzi International v. Argentina (ARB/03/7), Decision of the Arbitral Tribunal on Objections to Jurisdiction (June 10, 2005);

• Pan American Energy LLC and BP Argentina Exploration Company v. Argentina (ARB/03/13) Decision on Preliminary Objections (July 27, 2006), ¶16;

• Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina (ARB/03/17), Decision on Jurisdiction (May 16, 2006) and Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentina (ARB/03/18);

• Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic (ARB/03/19), Decision on Jurisdiction (August 3, 2006); and AWG Group Ltd. v. The Argentina (UNCITRAL), Award (August 3, 2006);

• Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. Mexico (ARB(AF)/04/3) and Talsud, S.A. v. Mexico (ARB(AF)/04/4), Award (June 16, 2010);

• Kardassopoulos v. Georgia (ARB/05/18) and Fuchs v. Georgia (ARB/07/15), Award (March 3, 2010);

• von Pezold and others v. Zimbabwe (ARB/10/15) Award (July 28, 2015) and Border Timbers Limited v. Republic of Zimbabwe (ARB/10/25);

• Electricidad Argentina S.A. and EDF International S.A. v. Argentina (ARB/03/22) and EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina (ARB/03/23), Award (June 11, 2012) FN 1;

• Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia (ARB/12/14 and 12/40), Award (December 6, 2016);

• Sanum Investments Limited v. Lao People’s Democratic Republic (ADHOC/17/1) and Lao Holdings N.V. v. Lao People’s Democratic Republic (ARB(AF)/16/2), Procedural Order No. 1 (May 16, 2017), ¶25.1.)

36. Some parties have effectively consolidated by agreeing to discontinue an existing case and joining the claims into another, consolidated, proceeding (BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (ARB/14/22), Procedural Order No. 5 (February 14, 2016), ¶1.2.1-1.2.2).
37. In most of these cases, claimants were not related to each other but alleged harm caused by similar measures of the same State. For example, in Alcoa Minerals of Jamaica, Kaiser Bauxite, and Reynolds Jamaica Mines Ltd and Reynolds Metals co v. Jamaica each investor had a mining concession contract with Jamaica, and claimed that the imposition of additional taxes by Jamaica breached the contracts. In Salini v. Morocco and Consortium R.F.C.C v. Morocco the claimants made claims arising out of highway construction agreements each had entered with Morocco. In Sempra Energy International v. Argentina and Camuzzi International S.A v. Argentina the claimants were shareholders of the same gas distribution company allegedly harmed by the Respondent’s measures.

38. Many consolidated claims at ICSID have relied on different investment instruments of consent (e.g., Aloca, Kaiser and Reynolds Metals v. Jamaica; Salini and Consortium R.F.C.C. v. Morocco; Sempra and Camuzzi v. Argentina). Although most have been based on the same set of procedural rules, in particular the ICSID Convention AR, consolidation of cases under different rules is also possible. Generally, this has been done by aligning the composition of Tribunals and coordinating the proceedings. For example, in Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentina (ARB/03/19), and AWG Group Ltd. v. The Argentine Republic (UNCITRAL) the parties consented to have ICSID administer a related UNCITRAL case and to appoint the same arbitrators in the ICSID and UNCITRAL proceeding. In Sanum Investments Limited v. Lao People’s Democratic Republic (ADHOC/17/1) and Lao Holdings N.V. v. Lao People’s Democratic Republic (ARB(AF)/16/2), the parties consented to have ICSID administer the related ad hoc proceeding and appointed the same arbitrators in the two cases.

39. In most cases, the written and oral phase of the joined proceedings were coordinated, if not consolidated, and Tribunals issued a single Award (i.e., in a single document). Finally, in most consolidated cases, claimants were represented by same counsel.

40. As can be seen from the above, each consolidation requires tailor-made procedures for the constitution of Tribunals, handling of evidence, legal argument, jurisdictional objections, schedules, confidentiality, and the issuance of Awards. This is usual case management. While it may be challenging with multiple cases or cases with numerous parties, it is certainly achievable, especially where the parties cooperate in these decisions.

V. PROPOSED RULE ON VOLUNTARY CONSOLIDATION

41. Several States and practitioners suggested that a rule be added addressing coordination of proceedings and voluntary consolidation, given their prevalence in practice. While an express rule is not strictly required, such a provision is proposed for the sake of clarity.

42. The proposed Rule suggests a voluntary consolidation and coordination process. Proposed AR 38 and (AF)AR 48 read as follows:
### Consolidation or Coordination on Consent of Parties

(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.

(2) The parties referred to in paragraph (1) shall provide the Secretary-General with written terms of reference, specifying the terms of consolidation or coordination to which they would consent.

(3) The Secretary-General shall take all necessary administrative steps to implement the agreement of the parties if the consolidation or coordination requested would promote a fair and efficient resolution of all or any claims asserted in the arbitrations.

---

### Consolidation ou coordination consentie par les parties

(1) Les parties à un ou plusieurs arbitrages pendants et administrés par le Centre peuvent convenir de consolider ou coordonner ces arbitrages.

(2) Les parties mentionnées au paragraphe (1) doivent fournir au ou à la Secrétaire général(e) un acte de mission précisant les conditions de la consolidation ou de la coordination à laquelle elles consentiraient.

(3) Si le ou la Secrétaire général(e) considère que la consolidation ou la coordination demandée contribuera au règlement juste et efficace de toutes les demandes formulées dans les arbitrages, il ou elle prendra toutes les mesures administratives nécessaires à la mise en œuvre de l’accord des parties.

---

### Acumulación o Coordinación con el Consentimiento de las Partes

(1) Las partes de dos o más arbitrajes en curso administrados por el Centro podrán acordar acumular o coordinar estos arbitrajes.

(2) Las partes a las que se hace referencia en el párrafo (1) le proporcionarán al o a la Secretario(a) General términos de referencia escritos, especificando los términos de acumulación o coordinación que aceptarían.

(3) El o la Secretario(a) General realizará todas las actuaciones administrativas que sean necesarias para implementar el acuerdo de las partes si la acumulación o coordinación...
43. The intent of this provision is to enable parties to consolidate or otherwise coordinate related proceedings to the fullest extent possible. It is intended to apply to all arbitrations “administered by the Centre”, whether under the ICSID Convention Arbitration Rules, the Additional Facility Arbitration Rules or other arbitral rules including UNCITRAL and ad hoc arbitration, subject to applicable jurisdictional limitations.

44. Under the proposed rule, parties could consolidate two or more arbitrations under the ICSID Convention. This involves joining all or some claims under the ICSID Convention Rules. Similarly, they could consolidate an ICSID Convention case with an UNCITRAL or an ad hoc arbitration administered by the Centre. An UNCITRAL or an ad hoc arbitration may also be consolidated into an ICSID Convention proceeding if the applicable jurisdictional requirements are met.

45. If full or partial consolidation are not possible, parties can agree to case coordination. This could include constituting Tribunals composed of the same arbitrator, establishing a common timetable, providing for a single set of pleadings, holding joint hearings on common issues in the related cases, simplifying the presentation of evidence, or having a single Award. Any differences in the procedures required by the applicable rules would have to be respected to the extent that the parties do not or cannot agree otherwise.

46. Proposed AR 38(2) asks the parties to submit their proposed terms of consolidation or coordination in writing to the Secretary-General. This is to ensure that the parties’ proposal addresses all the necessary aspects of the proposed arrangement (e.g., effect of previous orders and decisions, if any; constitution or reconstitution of Tribunals, etc.), including the steps to be taken by the Secretary-General (e.g., future case number and termination of arbitrations, etc.). It is intended to avoid a voluntary agreement that does not anticipate all necessary elements of coordination and could subsequently lead to delay or procedural difficulty.

47. The motivation for proposed AR 38(3) is not to second-guess the parties’ decision to consolidate or otherwise coordinate their proceedings, but to ensure that the terms of reference can be properly implemented.

48. If proposed AR 38 is approved by Member States, ICSID will issue a practice note to assist parties in considering potential terms of consolidation and drafting sufficiently detailed terms of consolidation or coordination.

VI. MANDATORY CONSOLIDATION

49. The advantages and disadvantages of mandatory consolidation are the same as for voluntary consolidation, with the obvious difference that a party cannot refuse a mandatory
order of consolidation and hence cannot avoid any perceived adverse effects of consolidation.

50. At least 100 existing investment treaties, out of more than roughly 3,400 concluded to date, include consolidation provisions that may impose consolidation of all or part of a case if the relevant test is met. Some arbitration rules also contain mandatory consolidation provisions.


52. Consolidation under NAFTA Article 1126 does not require the specific consent of the parties to the dispute. Instead, parties are considered to have consented to consolidation under Article 1126 by initiating their claim under NAFTA Chapter 11 (Canfor Consolidation Order, paras 78-80; Henri C. Alvarez, Arbitration Under the North American Free Trade Agreement, (2014) 16(4) Arb. Int. 393, 414-415).

53. The purpose of Article 1126 is to ensure procedural economy and avoid inconsistent results (Canfor Consolidation Order). It is most likely to be invoked in situations where a single NAFTA State measure has given rise to multiple claims by multiple investors.

54. The procedure under Article 1126 is relatively simple, and typical of most treaty consolidation provisions. If one or more NAFTA Chapter 11 claims have a question of law or fact in common, any disputing party can ask the Secretary-General of ICSID to establish a Consolidation Tribunal. The Consolidation Tribunal must be appointed within 60 days after the request. It is composed of arbitrators from the NAFTA roster, or to the extent not available from that roster, from the ICSID Panel of Arbitrators. The President of the Consolidation Tribunal may not be a national of either disputing party, but the co-arbitrators must be nationals of the parties.

55. The Consolidation Tribunal can stay the individual proceedings while considering whether to consolidate. It has discretion to consolidate claims that have a question of law or fact in common if consolidation is in the interests of fair and efficient resolution of the claims. The Consolidation Tribunal must hear the parties before making its decision on consolidation. It can also assume jurisdiction over all or part of the claims or may determine one or more of the claims if this would assist in the resolution of the others.

56. Article 1126 requires the consolidated claims to be conducted pursuant to the UNCITRAL Arbitration Rules (presumably because Canada and Mexico were not ICSID members when NAFTA was signed; although Canada is now a member and Mexico will be a member effective August 26, 2018.

57. Once claims are consolidated, the original proceedings are stayed to the extent that they will be addressed by the Consolidated Tribunal.
58. A disputing party that was not involved in the consolidation application may apply to join the consolidated case.

59. Three NAFTA cases to date have addressed Article 1126. The first was the *Corn Products* case. Mexico applied to consolidate the claims of three American producers of high-fructose corn syrup concerning the imposition of a 20 per cent excise tax on soft drinks (Confirmation of Agreement of the Disputing Parties Regarding Consolidation, dated April 8, 2005. *See Corn Products*, Consolidation Order). Corn Products International requested arbitration on October 21, 2003, while Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. filed a request almost a year later, on August 4, 2004. On September 8, 2004, Mexico submitted a detailed request for consolidation. Subsequently Mexico and the claimants agreed on the composition and mandate of the Consolidation Tribunal. The Consolidation Agreement also stipulated that should consolidation be ordered, the disputing parties would agree on the composition of the Tribunal to hear the consolidated cases, and that the consolidated proceedings would be governed by the ICSID Additional Facility Arbitration Rules.

60. A Consolidation Tribunal was constituted on April 8, 2005 by the Secretary-General, in consultation with the parties. The Consolidation Tribunal refused to consolidate the two cases. Although it found that the claims shared questions of law or fact in common, it ruled that consolidation would not be in the interests of a fair and efficient resolution of the claims. The Consolidation Tribunal was especially concerned that complex confidentiality measures would be required to protect sensitive business information of the three applicants.

61. The second NAFTA request for consolidation was filed by the United States on March 7, 2005, with respect to three separate cases submitted by Canadian investors Canfor Corp., Terminal Forest Products Ltd, and Tembec Inc. The claimants were softwood lumber producers alleging losses from American countervailing duty and antidumping measures imposed on their products. In its request for consolidation, the United States contended that common issues of law and fact called for consolidation.

62. The Consolidation Tribunal was constituted by the ICSID Secretary-General and held a hearing on June 16, 2005. On September 7, 2005, the Tribunal granted the request for consolidation (*Canfor*, Consolidation Order). After determining that the claims shared many questions of law and fact, the Tribunal considered whether consolidation was ‘in the interests of fair and efficient resolution of the claims’. In doing so, the Tribunal focused on three factors: (i) time; (ii) cost; and (iii) avoidance of conflicting decisions. With respect to time, the Consolidation Tribunal observed that no tribunal had yet issued a decision on jurisdiction and so the consolidation was timely. As to cost, it concluded that consolidated proceedings would be less costly for the U.S. than undertaking three separate arbitrations, and that the cost for each of the claimants would increase, “but not excessively”. Finally, the Consolidation Tribunal held that in light of the numerous common questions of law and fact, there was a risk of conflicting awards if the cases were not consolidated.

63. The *Canfor* Consolidation Tribunal was not hindered by confidentiality concerns or the absence of consent to consolidation. It found that consent to Chapter 11 arbitration included
consent to consolidation. It also held that confidentiality is not a factor to be taken into account when considering the interests of fair and efficient resolution of the claims, save for exceptional cases where consolidation would defeat efficiency of process or would infringe on due process.

64. The third NAFTA request for consolidation was in *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL), *Award on Jurisdiction* (January 28, 2008). Between March 16, 2005 and June 2, 2005, Canadian nationals in the beef and cattle business filed 109 different notices of arbitration alleging that US measures applied to Canadian-origin livestock and beef products as a result of bovine spongiform encephalopathy breached *NAFTA* Chapter 11. The Claimants organized themselves into a group called “Canadian Cattlemen for Fair Trade” and agreed with the respondent US to informal consolidation of their claims before a single tribunal. The consolidation agreement was memorialized in Procedural Order No. 1. The case was eventually dismissed for lack of jurisdiction.

VII. TREATY CONSOLIDATION PROVISIONS

65. About 100 investment treaties negotiated since *NAFTA* have provisions similar or identical to NAFTA Article 1126.

66. Like Article 1126, most of these treaties do not require that the disputing parties explicitly consent to consolidation. Instead, they allow any party or all the disputing parties to apply for consolidation and a Consolidation Tribunal determines whether to grant the order based on criteria in the investment treaty. Only a small number of treaties require specific consent to consolidation. Examples of treaty consolidation provisions are included in: *New-Zealand-China FTA* (2008); *China-Mexico BIT* (2008); *Malaysia-New Zealand FTA* (2009); *Japan-Peru FTA* (2011); *Mexico-Bahrain BIT* (2012); *New Zealand-Taiwan FTA ECA* (2013); *CETA* (not yet in force); *EU-Singapore FTA*, Art. 3.24 (not yet in force); *CPTPP* (not yet in force).

67. Under most treaty provisions, either disputing party can move for consolidation. No specific cut-off date is set, although many treaties provide that consolidation should only be ordered if it is in the interest of the efficient resolution of the cases. In practice, if the cases to be consolidated are significantly advanced or on very different timelines, consolidation arguably might not be in the interest of efficient resolution. Some treaties allow parties to submit a joint application for consolidation (*see e.g.*, *EU-Singapore*).

68. Most of the treaty consolidation provisions require that the claims to be consolidated share a ‘question of law or fact in common’. They may impose further criteria, such as the claims arising ‘out of the same events or circumstances’ or that consolidation serves the ‘interest of fair and efficient resolution of the claims’ (*see e.g.*, *US Model BIT* (2012), Art. 33(6); *CPTPP* (not yet in force)). Some treaties, especially those concluded by Mexico, also require that the claims are ‘in relation to the same investment’ and an absence of ‘harm’ or ‘serious harm’ caused by consolidating (*see Mexico-Switzerland BIT* (1995), Art. 6(2) and 6(3); *Mexico-Netherlands BIT* (1995), Art. 7(2) and 7(3); *Mexico-Argentina BIT* (1996), Art. 4(2) and 4(3); *Mexico-Germany BIT* (1998), Art. 15(2) and 15(3); *Mexico-Italy BIT*
Most of these treaties stipulate that the request for consolidation be made to the Secretary-General of ICSID, who must establish a Consolidation Tribunal, generally 30 or 60 days after receipt of the request. The new investment agreements concluded by the European Union require that the consolidation request be submitted to the President of the Tribunal, reflecting the investment court model adopted in these treaties (CETA, Art. 8.43.4. See also EU-Vietnam FTA (agreed text as of January 2016), Chapter II, Section III, Art. 33(2); EU-Singapore).

A number of recent investment treaties vest the appointing authority (generally the Secretary-General) with screening powers over the request for consolidation. The applicable test for screening is that the consolidation request is not ‘manifestly unfounded’ (US Model BIT (2012), Art. 33(3); CPTPP (not yet in force)) The consolidation provision in the Chile-Japan EPA also grants the ICSID Secretary-General additional screening powers to consider whether the consolidation requirements in the treaty are met (Chile-Japan EPA (2007), Art. 101(3)).

There are two main approaches with respect to the nomination of arbitrators to the Consolidation Tribunal. The first approach requires all arbitrators to be appointed by a neutral authority, usually the ICSID Secretary-General (see e.g., Chile-Japan EPA (2007), Art. 101(3)). In several cases, treaties identify a specifically established FTA-roster or the ICSID Panel of Arbitrators from which the arbitrators or at least the presiding arbitrator must be selected (see e.g., Chile-Republic of Korea FTA (2003), Art. 10.28(4) and 10.30(5); Panama-Taiwan FTA (2003), Art. 10.25(4) and 10.27(5); Canada-Chile FTA (1996), Art. G-25(4) and G-27(5); NAFTA, Art. 1124(4) and 1126(5). Generally, there must be one national from each party, but the presiding arbitrator cannot be a national of either party.

The second approach, which is found mainly in investment treaties concluded by the US, requires that each party appoint one arbitrator and that the Secretary-General of ICSID appoint the presiding arbitrator and any other arbitrator not appointed by a party (see e.g. US Model BIT (2012), Art. 33; US-Republic of Korea FTA (2007), Art. 11.25(4) and 11.25(5); US-Singapore FTA (2003), Art. 15.24(4) and 15.24(5). The parties are free to select a co-national, but the presiding arbitrator must not be a national of either party.

Most treaties stipulate that the Consolidation Tribunal be established and conduct its proceedings under the UNCITRAL Arbitration Rules, likely to account for circumstances where one or more of the disputing parties cannot meet the requirements of the ICSID Convention (CPTPP (not yet in force)). This provision can be modified with consent of the disputing parties (assuming jurisdiction otherwise exists) (EU-Singapore FTA (not yet in force)).

Most treaties allow Consolidation Tribunals to assume jurisdiction over ‘all or part of the claims’ or, alternatively, to ‘determine one or more of the claims if such determination
would assist in the resolution of others’ (EU-Singapore FTA (not yet in force); CPTPP (not yet in force)).

75. These treaties usually give the Consolidation Tribunal power to stay the individual proceedings pending a decision on consolidation.

76. As to the scope of consolidation, it may be full or partial. Some treaties also give the Consolidation Tribunal the power to instruct a previously constituted tribunal to assume jurisdiction over all or any part of the claim, provided that Tribunal is reconstituted with the same composition except for the claimants’ appointee who shall be nominated by agreement of all claimants or otherwise by the appointing authority (US Model BIT (2012), Art. 33(6)(c); US-Uruguay BIT (2005), Art. 33(6)(c); US-Peru FTA (2006), Art. 10.25(6)(c); Nicaragua-Taiwan FTA, Art. 10.25(6)(c); US-Colombia FTA (2006), Art. 10.25(6)(c); Australia-Chile FTA (2008), Art. 10.26(6)(c); Colombia-Panama FTA (2013), Art. 14.25(6)(c); New Zealand-Republic of Korea FTA, Art. 10.29(6)(c)).

77. Finally, most treaties allow a claimant not named in a consolidation request to apply to join the consolidated proceedings.

VIII. CONSOLIDATION PROVISIONS IN ARBITRAL RULES

78. Some arbitral rules have adopted consolidation provisions or similar joinder provisions. Article 31 of the CIETAC Investment Arbitration Rules includes a consolidation provision which allows a party to request consolidation, the arbitral institution to appoint a Consolidation Tribunal, and the Consolidation Tribunal to consolidate all or part of the case or to decide one of the claims. It states:

Article 31 Consolidation of Arbitrations

1. Where two or more disputes have been submitted separately to arbitration under these Rules involving common questions of law or fact, and such disputes arise out of the same events or circumstances, any party may submit a request to consolidate the arbitrations.

2. A party seeking consolidation of arbitrations shall submit in writing such request to the IDSC or the CIETAC Hong Kong Arbitration Center that administers the case, the arbitral tribunal and all other parties, which shall specify: (a) the names and addresses of all parties to the arbitrations; and (b) the facts and grounds on which the consolidation request is based.

3. Where CIETAC considers the request for consolidation of arbitrations is justified, it shall, within thirty (30) days from the date of receipt of such request, constitute an arbitral tribunal pursuant to Chapter III of these Rules unless otherwise agreed by all parties to the arbitrations.
4. Where an arbitral tribunal constituted by virtue of this Article 31 is satisfied that two or more disputes submitted to arbitration involve common questions of law or fact arising out of the same events or circumstances, the arbitral tribunal may, in the interest of fair and efficient resolution of the disputes, and after consultation with the parties to the arbitrations, decide: (a) to consolidate the arbitrations and to render the award on all or part of the claims; or (b) to hear and render the award on one or more claims, but such award shall be made in the belief that it would facilitate the resolution of the other claim(s).

5. Where an arbitral tribunal constituted by virtue of this Article 31 has commenced to hear the consolidated arbitration, unless otherwise determined by such arbitral tribunal, the original arbitral tribunal of the cases before consolidation shall cease to have jurisdiction over the claim(s) which the arbitral tribunal constituted by virtue of Article 31 has assumed jurisdiction.

6. Upon application of a party, where an arbitral tribunal constituted by virtue of this Article 31 makes a decision under Paragraph 4 of this Article, the arbitral tribunal has the power to request that the proceedings of the original arbitral tribunal be stayed, unless the original arbitral tribunal has already suspended its proceedings.

79. Many commercial arbitration rules also include consolidation provisions. To the extent that they are available for ISDS, they may offer a vehicle to consolidate investment cases. (see e.g., Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (2013), Art. 28; International Centre for Dispute Resolution (ICDR) Arbitration Rules (2014), Art.8; International Chamber of Commerce (ICC) Arbitration Rules (2017), Art. 10; Stockholm Chamber of Commerce (SCC) Arbitration Rules (2017), Art. 15.).

80. Usually, these rules allow consolidation if the parties agree. In addition, they typically allow a Tribunal or appointing authority to order consolidation where the claims are made under the same arbitration agreement, or under different but compatible arbitration agreements, if the arbitrations raise common questions of fact or law, and the relief arises out of the same transaction or legal relationship.

81. As a general rule, either party can move for consolidation. There is no time limit but progress of the proceedings and whether an arbitrator has been appointed must be considered in assessing whether to consolidate. Under most rules, the institution itself makes the decision. Few of these rules provide for the possibility of ordering a stay of the proceedings pending a request for consolidation. Some rules also require the appointing authority to consider whether consolidation would serve the expedition of the proceedings.
IX. COMMENTS RECEIVED BY ICSID

82. Several States and legal practitioners suggested an express rule on voluntary consolidation given its prevalence in practice.

83. In addition, numerous States and some organizations suggested that the ICSID Rules adopt a mandatory consolidation procedure along the lines of NAFTA Art. 1126. These comments supported mandatory consolidation in accordance with criteria to be listed in the rules. Some also suggested such a provision to expressly address procedural issues such as how to ensure confidentiality in a consolidated case.

84. One State suggested that instead of consolidation, Tribunals ought to be given discretion to stay cases raising the same facts or law pending decision on the first filed case, making consolidation unnecessary. In fact, proposed AR 54 and (AF)AR 63 allow a Tribunal to suspend the proceeding upon agreement of the parties, the request of a party or on its own initiative. Presumably if parties to a proceeding agreed it should be stayed pending a decision in a related proceeding, they could invoke the suspension rule.

X. OPTIONS FOR A MANDATORY CONSOLIDATION RULE

85. Any proposal on mandatory consolidation in the ICSID Rules will have to address a number of considerations. The chart below lists the usual options for each of these considerations.

| HOW IS CONSENT TO CONSOLIDATION GIVEN? | • consent to consolidation is assumed from the fact of submitting the case under the ICSID Convention AR or (AF)AR; or • specific consent could be required for mandatory consolidation |
| WHO CAN REQUEST CONSOLIDATION? | • any disputing party may apply for consolidation order; • some, but not necessarily all, disputing parties affected by consolidation may apply jointly for a consolidation order; or • all disputing parties affected by consolidation must apply jointly for a consolidation order |
| TIMING OF APPLICATION | • at any time; or • before Tribunal established in any case to be consolidated |
| CONTENTS OF APPLICATION TO CONSOLIDATE | • sent to SG of ICSID, appointing authority, President of Court, or other person named to establish consolidation Tribunal; • in writing; • identify applicant(s), relevant cases, relevant facts, basis for consolidation and order requested; • provided to parties in all cases sought to be consolidated and includes their contact information |
| **WHAT IS THE TEST FOR CONSOLIDATION? (CRITERIA CAN BE CUMULATIVE OR INDIVIDUAL)** | • question of law or fact in common;  
• arise out of same events;  
• in the interest of fair and efficient resolution of the claims;  
• relate to same investment;  
• consolidation will not cause serious harm to any party affected by consolidation order;  
• potential for inconsistent awards exists absent consolidation; and/or  
• potential for double recovery exists absent consolidation |
|-------------------------------|---------------------------------|
| **SCREENING POWER FOR CONSOLIDATION APPLICATION** | • no screening powers;  
• SG or authority appointing for Consolidation Tribunal may screen application for consolidation – can refuse if application is manifestly unfounded or does not meet test |
| **CONSTITUTING A TRIBUNAL TO DECIDE WHETHER TO CONSOLIDATE** | • Could identify a person to make the decision and not have consolidating Tribunal (e.g.: SG of ICSID, Appointing Authority; President of ICJ)  
• If a Tribunal, consider:  
• Standing or ad hoc;  
• Number - one or three persons;  
• Nationality – may require they have different nationality than disputing parties, that only President of Tribunal have different nationality than all parties, or allow them to share nationality of any party;  
• Appointed by: – could be by SG of ICSID or other appointing authority, parties jointly, each party appoints an arbitrator and appointing authority appoints President; ensure appointing authority can appoint in default of party appointment or party agreement  
• Source of Arbitrators – anyone, ICSID Panel of Arbitrators, ICSID Panels of Arbitrators and Conciliators, another roster;  
• Time for Decision – decide within XX days |
| **PROCESS OF CONSOLIDATING TRIBUNAL** | • Allow all parties to make submissions in writing, orally, or both;  
• Time within which to require submissions and hearing |
| **POWER OF CONSOLIDATING TRIBUNAL** | • Decide on consolidation within X days;  
• Stay cases subject to consolidation order until decision to consolidate made;  
• Order full or partial consolidation – if partial, determine which aspects are to be consolidated;  
• Assume jurisdiction over and decide claims in full (with resignation of Tribunals in pending cases); |
<table>
<thead>
<tr>
<th>SUBSEQUENT ADDITION OF PARTIES TO CONSOLIDATED CLAIM</th>
<th>• Party can apply to join consolidated portion of claim at any time – must prove it meets test for consolidation and that its addition would not disrupt consolidated claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUBSEQUENT ADDITION OF PARTIES TO CONSOLIDATED CLAIM</td>
<td>• Party can apply to join consolidated portion of claim at any time – must prove it meets test for consolidation and that its addition would not disrupt consolidated claim</td>
</tr>
</tbody>
</table>
| ARBITRAL RULES APPLICABLE TO CONSOLIDATING TRIBUNAL | • Applicable rules if all cases were commenced under the same rules;  
• Combination of rules agreed to by parties in cases to be consolidated;  
• Additional Facility Rules;  
• UNCITRAL Rules  
• Consider which can be consolidated or coordinate (jurisdiction issue) |
| ARBITRAL RULES APPLICABLE TO CONSOLIDATING TRIBUNAL | • Applicable rules if all cases were commenced under the same rules;  
• Combination of rules agreed to by parties in cases to be consolidated;  
• Additional Facility Rules;  
• UNCITRAL Rules  
• Consider which can be consolidated or coordinate (jurisdiction issue) |
| APPOINTMENT OF TRIBUNAL TO DECIDE CONSOLIDATED CASE | • Number - one or three persons;  
• Nationality – may require arbitrators have different nationality than disputing parties, that only President of Tribunal have different nationality than all parties, or allow them to share nationality of any party;  
• Appointed by: - SG or other appointing authority, parties jointly, each party appoints an arbitrator and appointing authority appoints President; ensure appointing authority can appoint in default of party appointment or party agreement;  
• Timing – appointment within X days of consolidation order;  
• Rules Applicable – as above: applicable rules if all cases commenced under the same rules, rules agreed to by parties, AF rules, UNCITRAL rules |
| APPOINTMENT OF TRIBUNAL TO DECIDE CONSOLIDATED CASE | • Number - one or three persons;  
• Nationality – may require arbitrators have different nationality than disputing parties, that only President of Tribunal have different nationality than all parties, or allow them to share nationality of any party;  
• Appointed by: - SG or other appointing authority, parties jointly, each party appoints an arbitrator and appointing authority appoints President; ensure appointing authority can appoint in default of party appointment or party agreement;  
• Timing – appointment within X days of consolidation order;  
• Rules Applicable – as above: applicable rules if all cases commenced under the same rules, rules agreed to by parties, AF rules, UNCITRAL rules |

86. The following is a potential consolidation provision for discussion. This example provides:
• Consolidation under a single set of rules, rather than multiple rules. This is to ensure there is consent to the consolidation, given that it would be ordered on a mandatory basis (paragraph 1);

• A tripartite test for consolidating, looking at whether the cases arise out of the same circumstances, share a common question of law or fact, and would provide for a fair and efficient resolution of cases (paragraph 2);

• Is initiated by written request to Secretary-General with necessary information (paragraph 3);

• Secretary-General sends application to all affected parties and gives them 45 days to make submissions (paragraph 4);

• Secretary-General also sends application to affected Tribunals – this is so they can consider a stay or other relevant scheduling matters (paragraph 5);

• A single arbitrator is selected – this is intended to reduce cost (paragraph 6).

---

**Rule 38BIS**

**Consolidation by Order**

(1) A party may request full or partial consolidation of two or more arbitrations (“the individual arbitrations”) pending under the ICSID Convention Arbitration Rules.

(2) The individual arbitrations proposed for consolidation shall:

(a) arise out of the same circumstances;

(b) have a question of law or fact in common; and

(c) if consolidated, promote a fair and efficient resolution of all or any of the claims asserted in the individual arbitrations.

(3) A party requesting consolidation shall file a written request with the Secretary-General specifying:

(a) the arbitrations proposed for consolidation;

(b) the grounds for consolidation;

(c) the relevant facts and evidence relied on, attaching supporting documents;

(d) observations on why consolidation is warranted; and

(e) the terms of consolidation sought in the order.
(4) The Secretary-General shall transmit the request for consolidation referred to in paragraph (1) to all parties named in the request and invite them to:

(a) submit their observations on the request with any supporting documents within 45 days after the date of receipt of the request; and

(b) indicate whether a hearing is requested or whether they consent to the order being made on the basis of the written submissions filed.

(5) The Secretary-General shall also transmit a copy of the request for consolidation to all arbitrators appointed in the individual arbitrations.

(6) The request for consolidation shall be decided by a single Consolidating Arbitrator who shall:

(a) be selected by the Secretary-General from the ICSID Panel of Arbitrators, after consulting as far as possible with the parties named in the request for consolidation;

(b) not have the nationality of any of the parties to the individual arbitrations;

(c) not be appointed in any of the individual arbitrations;

(d) be appointed as soon as possible, and no later than 60 days after the Secretary-General receives the request for consolidation referred to in paragraph (3); and

(e) set a date for a hearing on the request for consolidation, if required, to take place no later than 30 days after the Consolidating Arbitrator accepts the appointment.

(7) Pending the order on consolidation, each arbitration sought to be consolidated may be suspended by the Tribunal established for that individual arbitration, or suspended by the Secretary-General if no Tribunal has been constituted for the individual arbitration.

(8) The Consolidating Arbitrator may order consolidation of the individual arbitrations in full or in part, or may reject the request for consolidation. The Consolidating Arbitrator shall give brief reasons for the order within 45 days after the last written or oral submissions.

(9) If the Consolidating Arbitrator orders consolidation in full, the Tribunals constituted to hear the individual arbitrations shall be deemed discontinued pursuant to AR 53. If the Consolidating Arbitrator orders consolidation in part, the Tribunals constituted to hear the individual arbitrations shall continue only with respect to those parts that were not consolidated.

(10) If the Consolidating Arbitrator orders consolidation in full or in part, a Tribunal shall be constituted to hear and decide the Consolidated Arbitration.

(11) The Tribunal for the Consolidated Arbitration shall consist of three members, with one selected by the claimants jointly, one selected by the respondents jointly, and
the Presiding arbitrator selected by agreement of the claimants and the respondent. If the Tribunal for the Consolidated Arbitration has not been constituted within 45 days after dispatch of the order on consolidation, the Chairman shall appoint the arbitrators not yet appointed in accordance with the procedure in AR 25.

(12) The Tribunal for the Consolidated Arbitration may consider requests by other parties to join the Consolidated Arbitration. In so doing, the Tribunal shall consider the stage of the proceedings, the costs incurred to date by the existing parties, and whether the criteria referred to in paragraph (2) are met.

XI. NOTE ON CLASS CLAIMS

87. Several comments from States and the public suggested the creation of rules for class claims in ISDS. The concept of a class claim derives from class actions, where a group of representative claimants is certified to pursue litigation on behalf of all people similarly affected by the measure in question. This results in a single or few claimants, a single set of counsel and a single proceeding, but the outcome benefits the entire class of affected persons. As a result, it avoids multiple separate claims addressing the same conduct.

88. Class actions are available in numerous jurisdictions, including the U.S., Canada, Australia, New Zealand, Chile, and various European States. However, class actions are not available in the domestic jurisdictions of many ICSID member States. As a result, the proposed amendments to the Rules do not currently address this possibility.