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
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I. INTRODUCTION – SCOPE OF SCHEDULE 8

1. This Schedule considers: (1) the extent to which information about, and generated in, proceedings is publicly accessible; (2) public access to ICSID hearings; and (3) whether third parties (neither the claimant nor the respondent) can participate in a proceeding. Collectively, these topics are often referred to as transparency. The proposals address transparency in arbitration, conciliation, fact-finding, and mediation under the Convention and the Additional Facility. The provisions for arbitration and conciliation under the Convention and the Additional Facility are largely similar, except with respect to publication of Awards.

A. GENERAL POLICY CONSIDERATIONS

2. The current ICSID Rules balance openness and confidentiality in proceedings. The policy question for Member States in this amendment process is whether the ICSID Rules should mandate further transparency or remain as they are presently configured.

3. The arguments usually made in favor of increased transparency can be summarised as follows:

   • Increased transparency will foster greater consistency, cohesiveness, and predictability in case outcomes: when case materials are publicly available, parties can better understand the law, focus their arguments more precisely, and predict likely outcomes more accurately. In turn, arbitrators can ensure their rulings consider interpretation of like provisions in other cases. While there is no formal precedent system in ISDS, Tribunals generally try to create a “jurisprudence constante”, and they require access to caselaw to do so. Over time, greater predictability in ISDS should reduce the number and cost of cases.

   • Increased transparency allows disputing parties to better comprehend the ISDS process and more effectively prepare litigation: parties can assess the procedural and substantive arguments available to them by referring to past cases. Parties can also make more informed decisions about arbitrator selection if they have access to prior orders, decisions and Awards.

   • Increased transparency supports investment promotion and dispute avoidance: knowledge of prior decisions will help States draft more precise treaties and adopt policies that comply with their investment obligations. Investors equally benefit from increased predictability about investment obligations when they decide where to locate or expand their investments.

   • Increased transparency enhances the public legitimacy of ISDS: access to documents, hearings, decisions and Awards enhances public understanding and confidence in ISDS.
4. The arguments usually made in favor of maintaining the current approach can be summarized as follows:

- The current ICSID Rules and Regulations provide an appropriate and established balance between transparency and confidentiality and are suitable for the broad range of parties and cases under those Rules.

- Greater consistency, cohesiveness and predictability can best be attained through more precise drafting of substantive obligations in individual treaties, laws and contracts.

- States have different views on transparency of proceedings, which can be individually accommodated by addressing transparency in specific investment treaties or by accession to the United Nations Convention on Transparency in Treaty Based Investor-State Arbitration (2017) (Mauritius Convention). Similarly, individual disputing parties can agree to enhanced transparency on a case-by-case basis. It is preferable to approach transparency in this fashion rather than impose the policy choices of some Member States through the ICSID Rules on other Member State which prefer different policies.

- Greater transparency may increase the cost and length of proceedings, especially due to third party participation. This includes the cost and time for a third party to develop its submission, for disputing parties to respond to the third-party petition and for the Tribunal to address the points raised by the third party. Increased time and cost may also be associated with redaction of documents, identification of in camera portions of hearings, and arrangements for public access to hearings.

B. EVOLUTION OF TRANSPARENCY IN ISDS

5. When the ICSID Convention came into effect on October 14, 1966, few of its provisions expressly addressed transparency of proceedings. Notably, Art. 48(5) of the Convention stated that Awards could only be published with consent of the parties, while current AFR 23 required that case registers for conciliation and arbitration be open to the public.

6. A focus on transparency in ISDS arose in the late-1990s, when the number of investor-State arbitrations began to increase. The discussion was raised primarily in the context of Chapter 11 of the North American Free Trade Agreement (NAFTA) (1994). In July 2001, the NAFTA Parties issued a binding note of interpretation (NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 2001)) confirming that there was no general duty of confidentiality in NAFTA cases and undertaking to publish all documents submitted to or issued by a Chapter 11 Tribunal, subject to redaction of confidential and privileged information. This was followed by statements of the NAFTA Free Trade Commission in October 2003 allowing non-disputing party participation in NAFTA arbitration (NAFTA Free Trade Commission, Statement of Free Trade Commission on non-disputing party participation (October 2003)) and an undertaking to consent to open hearings in NAFTA arbitration (NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 2001)).
ICSID was the first arbitral institution to adopt rules governing public access to documents, open hearings and non-disputing party participation. In 2006, the ICSID Convention and Additional Facility rules were amended to increase transparency. These provisions govern transparency in proceedings based on party consent given after April 2006 (assuming the parties do not have treaty-specific transparency provisions and the Mauritius Convention is inapplicable) and apply to most pending cases at the Centre. The 2006 amendments related to:

- **Publication of Awards and Other Documents:** ICSID was required to publish excerpts of the legal reasoning in an Award if the parties did not consent to publication (current AR 48(4), A(AF)R Art. 53(3)). The Centre also published all other documents in the proceeding with consent of the parties and substantial benchmark information about each case;

- **Public Attendance at Hearings:** Unless either party objected, Tribunals could allow the public to attend hearings, subject to appropriate logistical arrangements. The Tribunal could also impose procedures to protect proprietary or privileged information during a hearing (current AR 32(2), A(AF)R Art. 39(2)); and

- **Non-disputing party participation:** After consulting with the parties, Tribunals could allow a non-disputing party to file a written submission addressing an issue within the scope of the arbitration if it assisted the Tribunal in deciding a relevant factual or legal issue (current AR 37(2), A(AF)R Art. 41(3)).

Older investment treaties often do not address transparency specifically or may mandate confidential proceedings. However, many investment treaties concluded in the last decade have included treaty-specific transparency provisions. The extent of transparency varies among these treaties. For example, Art. 10.20 and 10.21 of the Dominican Republic-Central America FTA (CAFTA-DR) (2006-7) require respondents to make case documents publicly available, including notices of intent, notices of arbitration, pleadings, memorials, minutes, transcripts of hearings, orders, decisions and Awards, except where these documents relate to protected information. Articles 9.16 and 9.17 of the investment chapter in the China-Australia Free Trade Agreement (ChAFTA) (2015) require requests for consultation, notices of arbitration, and orders, decisions and Awards to be public, but give the Treaty Parties discretion to make pleadings, submissions and transcripts public. Article 15 of the Agreement between Japan and the Republic of Kenya for the Promotion and Protection of Investment (Japan-Kenya BIT) (2016) gives the disputing Treaty Party the right to publish all documents submitted to or issued by a Tribunal, subject to redaction of confidential and privileged information. Article 8.36 of the Comprehensive Economic and Trade Agreement (CETA) (not yet in force), incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (UNCITRAL Rules on Transparency (2014)) and additionally requires public access to agreements to mediate, decisions on arbitrator challenges, and requests for consolidation. Article 9.24 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (not
yet in force) requires the parties to make public all notices of intent, notices of arbitration, pleadings, memorials, briefs, transcripts of hearings, orders, decisions and Awards, and to open hearings to the public subject to appropriate logistical arrangements for protected information.

9. Disputing parties can also agree on specific transparency arrangements on a case by case basis. For example, in *BSG Resources Ltd v. Republic of Guinea* (ARB/14/22), *Procedural Order No. 1* (May 13, 2015) the disputing parties agreed to apply the UNCITRAL Rules on Transparency (2014) in an ICSID case.

10. On April 1, 2014, the **UNCITRAL Rules on Transparency** (2014) were adopted. The UNCITRAL Rules on Transparency apply to ISDS cases commenced under the UNCITRAL Arbitration Rules, including UNCITRAL cases administered by ICSID.

11. The main features of the UNCITRAL Rules on Transparency are:

- **Application** (Art. 1): the UNCITRAL Rules on Transparency apply to cases initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded after April 1, 2014, unless the Treaty Parties agree otherwise. Disputing parties or the Treaty Parties can agree to apply the UNCITRAL Rules on Transparency to cases initiated pursuant to treaties concluded before or after April 1, 2014, including cases initiated under rules other than the UNCITRAL rules;

- **Publication of Benchmark Information** (Art. 2): the UNCITRAL repository publishes names of the disputing parties, the economic sector involved, and the treaty at issue in a case;

- **Public Documents in Proceedings** (Art. 3): notices of application and responses to notices, statements of claim and defence, further written statements, lists of exhibits, reports and witness statements, non-disputing party submissions, transcripts, decisions, orders and Awards are published;

- **Non-disputing party Submissions** (Art. 4) can be filed with Tribunal permission;

- **Non-disputing Treaty Party Submissions** (Art. 5) can be filed as of right by a Party to the Treaty and a Tribunal can invite a Treaty Party to make a submission;

- **Public hearings** (Art. 6) shall be held, with provision to go in camera where necessary; and

- **Exceptions to transparency** (Art. 7) are listed, including confidential business information, information protected under the treaty or applicable law, information that would impede law enforcement, information the disclosure of which is contrary to national security interests, and if publication of the information would jeopardize the integrity of the arbitral process.
12. On October 18, 2017, the Mauritius Convention came into force. States ratifying the Mauritius Convention undertake to apply the UNCITRAL Rules on Transparency to all arbitrations initiated pursuant to investment treaties concluded before April 1, 2014. The Mauritius Convention can be ratified with or without reservations. Only 23 States had signed the Mauritius Convention as of July 1, 2018, of which four had ratified the Convention (Cameroon, Canada, Mauritius and Switzerland).

13. The UNCITRAL Rules on Transparency and the Mauritius Convention apply to treaty-based cases. They do not apply to cases based on consent in a contract or investment law.

C. CURRENT TRANSPARENCY REGIME IN ICSID CASES

14. The transparency measures currently applied to an ICSID case depend on a combination of: (i) the applicable investment instruments (treaty, contract, law); (ii) the applicable procedural rules; and (iii) party agreement in each case.

15. Few investment treaties have conciliation, fact-finding, or mediation provisions, and so transparency in these cases is usually governed by the ICSID Rules. In general, these Rules provide for confidentiality in conciliation, fact-finding and mediation, unless the parties agree otherwise.

16. The situation is more complex in arbitration because several different instruments may apply to the same case. The net effect of the applicable investment instruments, procedural rules and party agreement must be considered in each ICSID arbitration. The process to determine the applicable transparency regime in any given case can be summarized as follows:

- **Specific Transparency Provisions are in the Investment Instrument**: if the treaty, contract or investment law has specific provisions addressing transparency, these take precedence in an ICSID arbitration. Usually such provisions are found in BITs and MITs. Normally they increase transparency, although theoretically they could reduce transparency;

- **Mauritius Convention is in Effect**: if an ICSID case involves a BIT or a MIT and both the investor’s home State and the respondent State have ratified the Mauritius Convention, the UNCITRAL Rules on Transparency will apply;

- **No Instrument-Specific Provisions in Effect**: if neither the Mauritius Convention nor specific transparency provisions in the applicable investment instrument apply, the relevant provisions of the ICSID Rules will govern transparency in ICSID cases;

- **Party Agreement**: disputing parties can consensually vary non-mandatory provisions in international investment instruments and procedural rules. Again, such agreements usually increase transparency, although theoretically they could reduce transparency.
Currently the ICSID Rules addressing transparency in an ICSID Convention or Additional Facility arbitration are as follows:

- Extensive information about the Centre and its operations is published online and in hard copy pursuant to current AFR 22(1);

- Extensive benchmark data on each case is published on the ICSID website pursuant to current AFR 23. This includes the names of the disputing parties, counsel and Tribunal members, the method of their appointment, the economic sector and subject matter involved, the instrument of consent invoked, applicable rules, and the stage of proceedings;

- Tribunal members must maintain the confidentiality of information obtained in the proceeding and deliberate in confidence. A Tribunal may authorize another person to attend the deliberation, and usually Tribunals authorize the Tribunal Secretary and the Tribunal Assistant to attend the deliberation so they can assist the Tribunal (current AR 6, 15; A(AF)R Art. 13, 23);

- Pleadings and Supporting Documents: Parties may consent to publish pleadings and supporting documents filed in a proceeding. However, they may refuse to do so, or may agree to publish redacted versions of these documents. This includes materials such as memorials, submissions, observations, statements by fact and expert witnesses, and exhibits. The extent of such consent is usually addressed at the first session. Documents are published on the ICSID website under the case name. ICSID also publishes bibliographic links to documents published on other websites;

- Tribunals may allow third parties to file a non-disputing party (NDP) submission. In considering whether to allow an NDP submission, the Tribunal must consider, among other things, the criteria listed in current AR 37(2) or A(AF)R Art. 41(3);

- Non-disputing State Parties may request permission to make an NDP submission under current AR 37(2) or A(AF)R Art. 41(3) or be asked to do so voluntarily by a Tribunal or disputing party. If the case is closed to the public, the non-disputing State Party can attend hearings only if the disputing parties agree or the applicable treaty confers this right;

- Parties are encouraged to make hearings accessible to the public, generally through web-casting, however they may refuse to do so (current AR 32(2); A(AF)R Art. 39(2)). Public hearings go in camera when confidential information is being addressed;

- Numerous interlocutory orders and decisions are issued by Tribunals during an arbitration. These may address significant questions such as the basis for upholding jurisdiction, the merits of a claim, availability of provisional measures, the scope of documents to be produced, evidentiary rulings, deciding an arbitrator challenge, or whether a non-disputing party may file a submission. Other orders and decisions address routine matters such as the schedule for filing pleadings, hearing dates, and logistical directions for the parties. Orders and decisions are made public by the Centre with consent of the parties, and may include redactions agreed to by the parties. Publication of orders and decisions is usually addressed
by the disputing parties in the first procedural order and ICSID requests permission to publish orders and decisions when they are issued and again at the end of each case;

- The final document deciding an ICSID case is the Award (or a decision on annulment in annulment proceedings). There is only one Award in every ICSID case, and it catalogues the facts, issues, interlocutory decisions, final ruling on all pertinent matters, and determination of costs (current AR 48). Publication of Awards in arbitration is treated differently by the ICSID Convention and the AF arbitration rules.

  o ICSID Convention Arbitration Awards are published by the Centre with consent of the parties. This reflects the prohibition in Art. 48(5) of the Convention on publishing Awards without party consent. An amendment to the ICSID Convention would be required to modify Art. 48(5). If a party objects to publication, the Centre publishes excerpts of the legal reasoning in the Award pursuant to current AR 48(4);

  o ICSID Additional Facility Arbitration Awards are not subject to the prohibition in Art. 48(5) of the Convention. Instead, these Awards are reviewed in accordance with the law of the seat of arbitration. To facilitate this, current A(AF)R Art. 52(3) and 53(4) permit publication of the Award to the extent required by law where the Award is made. AF Awards are published with consent of the parties and ICSID publishes excerpts of AF Awards if the parties do not consent to publication.

18. In recent years, disputing parties have increasingly consented to publication of Awards and some decisions or orders. Publication of other types of case materials is less frequent.

19. The text below explains the proposals on transparency in detail.

II. PROPOSALS ON TRANSPARENCY MEASURES FOR THE CENTRE

CURRENT RELATED PROVISIONS: AFR 22, 23

AFR 22 / (AF)AFR 3
Publication

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

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

(b) documents generated in proceedings, in accordance with the applicable rules.
AFR Article 22 / (AF)AFR Article 3
Publication

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

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

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

AFR Regla 22 / (AF)AFR Regla 3
Publicaciones

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

(a) información sobre las actividades del Centro; y

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

AFR 23 / (AF)AFR 4
The Registers

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

AFR Article 23 / (AF)AFR Article 4
Registres

Le ou la Secrétaire général(e) tient et publie un registre pour chaque affaire, dans lequel figurent toutes les informations importantes concernant l’introduction, la conduite et l’issue de l’instance, y compris la méthode de constitution de chaque Commission, Tribunal et Comité, et sa composition.
AFR Regla 23 / (AF)AFR Regla 4
Los Registros

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

20. The Centre has a tradition of transparency with respect to its own operations, and the provisions governing this aspect of transparency continue the established approach. Proposed AFR 22 and (AF)AFR 3 simplify current AFR 22(1), while maintaining the obligation to publish information about the Centre.

21. Proposed AFR 22(b) and (AF)AFR 3(b) affirm that the Centre publishes case documents “in accordance with the applicable rules”. This ensures that publication is consistent with any specific transparency rules in a treaty or other investment instrument.

III. PROPOSALS ON TRANSPARENCY IN CONCILIATION

CURRENT RELATED PROVISIONS: Convention Art. 35; CR 33(3); C(AF)R Art. 39

CR 7 / (AF)CR 15
Confidentiality

Documents generated in the conciliation shall be confidential. The parties to a conciliation may consent to:

(a) disclosure of any document generated in the conciliation to a non-party;

(b) disclosure by one party of any document obtained from the other party in the conciliation; and

(c) publication by the Centre of documents generated in connection with the proceeding.

CR Article 7 / (AF)CR Article 15
Confidentialité

Les documents générés au cours de la conciliation sont confidentiels. Les parties à une conciliation peuvent consentir à:
(a) la divulgation à une personne autre qu’une partie de tout document généré au cours de la conciliation ;

(b) la divulgation par une partie de tout document obtenu de l’autre partie au cours de la conciliation ; et

(c) la publication par le Centre de tous documents générés en relation avec l’instance.

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Los documentos que se originen durante la conciliación serán de carácter confidencial. Las partes de una conciliación podrán consentir a:

(a) la revelación a quien no sea parte de cualquier documento que se origine durante la conciliación;

(b) la revelación por una parte de cualquier documento obtenido de la otra parte durante la conciliación; y

(c) la publicación por parte del Centro de los documentos que se originen en relación con el procedimiento.

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Unless the parties to the dispute agree otherwise pursuant to Article 35 of the Convention, neither party shall rely on any of the following in other dispute settlement proceedings:

(a) any views expressed, statements, admissions, or offers of settlement made, or positions taken by the other party in the conciliation;

(b) the Report, order, decision, or any recommendation made by the Commission in the conciliation; or

(c) documents generated in connection with the proceeding.
Sauf accord contraire entre les parties au différend conformément à l’article 35 de la Convention, aucune d’elles ne peut, à l’occasion d’une autre procédure de règlement du différend, se fonder sur :

(a) toutes opinions exprimées, déclarations, admissions ou offres de règlement faites, ou positions prises, par l’autre partie au cours de la conciliation ;

(b) le procès-verbal établi, toute ordonnance ou décision rendue ou toute recommandation faite par la Commission au cours de la conciliation ; ou

(c) tous documents générés en relation avec l’instance.

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Salvo acuerdo en contrario de las partes de la diferencia de conformidad con lo dispuesto en el Artículo 35 del Convenio, ninguna de ellas podrá invocar lo siguiente en cualquier otro procedimiento de arreglo de diferencias:

(a) las consideraciones, declaraciones, admisiones, u ofertas de avenencia realizadas, o posiciones adoptadas por la otra parte durante la conciliación;

(b) el informe, la resolución, la decisión o cualquier recomendación formulada por la Comisión durante la conciliación; o

(c) los documentos originados en relación con el procedimiento.

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22. The proposals on publication of documents and observation of proceedings in conciliation allow the parties to consent to publication of any document. However, given the non-binding and consensual nature of these processes, publication is not mandatory.

23. Proposed CR 8 and (AF)CR 16 reiterate the prohibition on using statements, admissions, settlement offers, positions taken by a party, recommendations or the Report from the conciliation process in a different proceeding. This provides parties with assurance that their communications in the conciliation are made “without prejudice”, giving them confidence to make bona fide efforts to resolve the dispute.
IV. PROPOSALS ON TRANSPARENCY IN ADDITIONAL FACILITY FACT-FINDING

(AF)FFR 13
Confidentiality of the Fact-Finding and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the fact-finding, other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential.

(2) The parties shall not make any use of information or documents obtained in the fact-finding, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the Committee during the fact-finding in other proceedings.

(AF)FFR Article 13
Confidentialité de la constatation des faits et utilisation d’informations dans d’autres instances

(1) Sauf accord contraire des parties, toutes les questions relatives à la constatation des faits, autres que les informations publiées par le Centre en vertu du Règlement financier et administratif (Mécanisme supplémentaire), demeurent confidentielles.

(2) Les parties ne doivent pas, à l’occasion d’autres instances, utiliser des informations ou des documents obtenus dans le cadre de la constatation des faits, ni se fonder sur des positions prises, des admissions faites ou des opinions exprimées par l’autre partie ou le Comité au cours de la constatation des faits.

(AF)FFR Regla 13
Confidencialidad de la Comprobación de Hechos y Utilización de Información en el Marco de Otros Procedimientos

(1) Salvo acuerdo contrario de las partes, todas las cuestiones relacionadas con la comprobación de hechos, con la salvedad de la información a ser publicada por el Centro de conformidad con la Regla 4 del Reglamento Administrativo y Financiero (Mecanismo Complementario), serán de carácter confidencial.

(2) Las partes no utilizarán en el marco de otros procedimientos, ninguna información ni ningún documento obtenido en la comprobación de hechos, y no invocarán ninguna postura adoptada, admisión realizada u opinión expresada por la otra parte o el Comité durante la comprobación de hechos.
24. Proposed (AF)FFR 13(1) addresses confidentiality in fact-finding and collateral use of materials obtained in the fact-finding process. The essential rule is that all matters related to fact-finding are confidential unless the parties otherwise agree. The exception to this is that the Centre may publish benchmark information about the proceeding pursuant to the Administrative and Financial Regulations of the Additional Facility. This rule is intended to ensure the parties are able to share information freely with the fact-finders, unconstrained by concern that it will be publicly disclose. It also helps to ensure that the fact-finder operates solely on the basis of the inquiries made and information accumulated in the fact-finding process.

25. Proposed (AF)FFR 13(2) borrows from the Conciliation Rules and provides that parties may not use information obtained through the fact-finding in any other proceeding. This prohibition on collateral use of such information is intended to give parties further confidence that the fact-finding will not be prejudicial to it in a related proceeding and encourages full sharing of information.

V. PROPOSALS ON TRANSPARENCY IN ADDITIONAL FACILITY MEDIATION

(AF)MR 16
Confidentiality of the Mediation and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the mediation other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential, except to the extent that disclosure may be required by law or for purposes of implementation and enforcement.

(2) The parties may consent to the publication by the Centre of documents generated in connection with the mediation.

(3) The parties shall not make any use of information or documents obtained in the mediation, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in other proceedings.

(AF)MR Article 16
Confidentialité de la médiation et utilisation d’informations dans d’autres instances

(1) Sauf accord contraire des parties, toutes les questions relatives à la médiation, autres que les informations publiées par le Centre en vertu du Règlement financier et administratif (Mécanisme supplémentaire), demeurent confidentielles, sauf dans la mesure où leur divulgation peut être exigée légalement ou aux fins de mise en œuvre et d’exécution.

(2) Les parties peuvent consentir à la publication par le Centre de documents générés en relation avec la médiation.
26. Proposed (AF)MR 16 is identical to proposed (AF)FFR 13, and motivated by the same policy goals. It provides that mediation is confidential except for the benchmark publication of materials by the Centre in accordance with the Administrative and Financial Regulations. It also prohibits collateral use of information obtained in the course of mediation.

VI. COMMENTS RECEIVED ON PUBLICATION OF DOCUMENTS

27. ICSID received approximately 20 submissions on matters related to publication of documents in arbitration proceedings. These were primarily from Member States, but also from several organizations and individuals. Every submission supported greater transparency in principle, although States expressed a wide variety of positions on which documents should be public.

28. Several submissions suggested that the Mauritius Convention/UNCITRAL Rules approach would be an appropriate model for ICSID. One organization commented that States desiring the level of transparency prescribed by the Mauritius Convention should ratify that treaty, but that similar provisions in the ICSID Rules would implement transparency more quickly and broadly.
Some States emphasized the importance of publishing Awards, orders and decisions, but were less concerned about publication of case submissions and other supporting documents. Other States suggested that submissions and supporting documents should be public, except where either party expressly objected. One State suggested that witness statements and expert reports should remain confidential.

Several States suggested that increased publication of documents should be accompanied by express provisions allowing for redaction of confidential information. Multiple categories of confidential information were suggested, including professional confidence, commercial and business confidences, industrial and trade secrets, personal information, information affecting essential security interests, and confidences established by domestic legislation.

ICSID received one comment proposing increased transparency in conciliation, relating to publication of the Report and observation of meetings. These matters are addressed in proposed CR 7 and 8 and (AF)CR 15 and 16.

No comments were received concerning transparency in fact-finding or mediation.

**VII. PROPOSALS ON PUBLICATION OF DOCUMENTS IN ARBITRATION**

The proposals concerning publication of documents relate to arbitration under the ICSID Convention and ICSID Additional Facility. They are similar except that ICSID Convention Art. 48(5) prohibits publication of Awards without consent of the parties. The Convention Arbitration Rules address this particularity through current AR 48(4).

In summary, the proposals on publication of documents in arbitration would: (i) increase the number of Awards published in ICSID Convention arbitration; (ii) maintain the requirement for ICSID to publish extracts of Awards in ICSID Convention arbitration, absent party consent to publish; (iii) require publication of Awards in ICSID AF arbitration; (iv) require publication of orders and decisions in both ICSID Convention and AF arbitrations; (v) include a process for redaction of Awards, orders and decisions, and to obtain a Tribunal decision on disputed redactions; and (vi) allow parties to publish other documents they filed in an arbitration, with agreed upon redactions. This is summarized in the following chart:
35. In assessing this proposal, Member States should recall the various options available to States to calibrate the level of public access to documents in ICSID cases: they can ratify the Mauritius Convention, add specific transparency provisions to their individual investment instruments or endeavour to reach consensus on the level of transparency in individual cases.

36. The approach proposed for the amended Rules tries to accommodate the varying positions of Member States and accounts for the fact that there is no potential for “opt out” or ratification with reservations under the ICSID Rules (unlike under the Mauritius Convention). Hence the proposal must be workable for a sufficient number of Member States that may have different positions on this question.
37. Member States should also recall that ICSID cases arise out of investment contracts and laws, and not just treaties. The transparency regime adopted should be suitable to cases based on all of these different types of instrument.

A. ICSID CONVENTION ARBITRATION

CURRENT RELATED PROVISIONS: Convention Art. 48(5); AR 48(4)

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

Rule 44
Publication of Awards and Decisions on Annulment

(1) With consent of the parties, the Centre shall publish every Award, supplementary decision on an Award, rectification, interpretation, and revision of an Award, and decision on annulment.

(2) Consent to publish the documents referred to in paragraph (1) shall be deemed to have been given if no party objects in writing to such publication within 60 days after the date of dispatch of the document.

(3) Absent consent of the parties referred to in paragraphs (1) or (2), the Centre shall publish excerpts of the legal reasoning in such documents (“excerpts”). The following procedure shall apply to publication of excerpts:

(a) the Centre shall propose excerpts to the parties within 30 days after receiving notice that a party declines consent to publication of a document referred to in paragraph (1);

(b) the parties may send comments on the proposed excerpts to the Centre within 30 days after their receipt; and

(c) the Centre shall publish excerpts within 30 days after receipt of the parties’ comments on the proposed excerpts, if any.
## Chapitre VII
**Publication, accès à l’instance et écritures des parties non contestantes**

### Article 44
**Publication des sentences et des décisions sur l’annulation**

(1) Avec le consentement des parties, le Centre publie toute sentence, décision supplémentaire d’une sentence, rectification, interprétation et révision d’une sentence, et toute décision sur l’annulation.

(2) Le consentement à publier les documents visés au paragraphe (1) est réputé avoir été donné si aucune partie ne s’oppose par écrit à une telle publication dans les 60 jours suivant la date d’envoi du document.

(3) À défaut du consentement des parties visé aux paragraphes (1) ou (2), le Centre publie des extraits du raisonnement juridique contenu dans ces documents (« extraits »). La procédure suivante s’applique à la publication d’extraits :

   (a) le Centre propose des extraits aux parties dans les 30 jours suivant la réception d’une notification par laquelle une partie refuse son consentement à la publication d’un document visé au paragraphe (1) ;

   (b) les parties peuvent faire part au Centre de leurs commentaires sur les extraits proposés dans les 30 jours suivant leur réception ; et

   (c) le Centre publie des extraits dans les 30 jours suivant la réception des éventuels commentaires des parties sur les extraits proposés.

## Capítulo VII
**Publicación, Acceso al Procedimiento y Presentaciones de Partes No Contendientes**

### Regla 44
**Publicación de Laudos y Decisiones sobre Anulación**

(1) El Centro publicará todo laudo, decisión suplementaria sobre un laudo, rectificación, aclaración, y revisión de un laudo y decisión sobre anulación, con el consentimiento de las partes.

(2) Si ninguna de las partes objeta por escrito a la publicación de los documentos a los que se hace referencia en el párrafo (1) dentro de los 60 días siguientes a la fecha de envío del documento, se considerará que esta ha otorgado su consentimiento para publicarlos.
(3) En ausencia del consentimiento de las partes al que se hace referencia en los párrafos (1) o (2), el Centro publicará extractos del razonamiento jurídico de dichos documentos (“extractos”). El siguiente procedimiento será aplicable a la publicación de extractos:

(a) el Centro les propondrá extractos a las partes dentro de los 30 días siguientes a la recepción de la notificación de que una parte se niega a consentir a la publicación de uno de los documentos a los que se hace referencia en el párrafo (1);

(b) las partes podrán enviar comentarios al Centro sobre los extractos propuestos, dentro de los 30 días siguientes a su recepción; y

(c) el Centro publicará los extractos dentro de los 30 días siguientes a la recepción de los comentarios de las partes sobre los extractos propuestos, si los hubiera.

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**Rule 45**

**Publication of Orders and Decisions**

(1) The Centre shall publish orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.

(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on the redactions, the Centre shall refer the order or decision to the Tribunal to determine any redactions, and shall publish the order or decision with the redactions approved by the Tribunal.

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**Article 45**

**Publication des ordonnances et des décisions**

(1) Le Centre publie les ordonnances et les décisions dans les 60 jours suivant la date à laquelle elles ont été rendues, avec tous caviardages convenus entre les parties et notifiés conjointement au Centre dans ce délai de 60 jours.

(2) Si l’une des parties notifie au Centre, dans le délai de 60 jours visé au paragraphe (1), que les parties ne sont pas d’accord sur les caviardages, le Centre soumet l’ordonnance ou la décision au Tribunal qui détermine le caviardage à effectuer, et publie l’ordonnance ou la décision avec les caviardages approuvés par le Tribunal.
### Regla 45
**Publicación de Resoluciones y Decisiones**

(1) El Centro publicará resoluciones y decisiones dentro de los 60 días siguientes a su emisión, con cualquier supresión de texto que haya sido acordada por las partes y notificada conjuntamente al Centro dentro del plazo de 60 días.

(2) Si cualquiera de las partes notificara al Centro dentro del plazo de 60 días al que se refiere el párrafo (1) que las partes no están de acuerdo respecto de las supresiones de texto, el Centro remitirá la resolución o decisión al Tribunal quien determinará las supresiones de texto que deban ser realizadas, y publicará la resolución o decisión con las supresiones de texto que sean aprobadas por el Tribunal.

### Rule 46
**Publication of Documents Filed by a Party**

Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.

### Article 46
**Publication des documents déposés par une partie**

À la demande d’une partie, le Centre publie toutes écritures, observations, ou tous autres documents que cette partie a déposés au cours de l’instance, avec les caviardages convenus entre les parties.

### Regla 46
**Publicación de Documentos Presentados por una Parte**

A solicitud de una de las partes, el Centro publicará cualquier escrito, observación u otro documento que esa parte haya presentado en el marco del procedimiento, con las supresiones de texto acordadas por las partes.
CURRENT RELATED PROVISIONS: A(AF)R Art. 53(3)

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

Rule 54
Publication of Awards, Orders and Decisions

(1) The Centre shall publish Awards, orders and decisions within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre within the 60-day period.

(2) If either party notifies the Centre within the 60-day period referred to in paragraph (1) that the parties disagree on redactions, the Centre shall refer the Award, order or decision to the Tribunal to determine any redactions, and shall publish the Award, order or decision with the redactions approved by the Tribunal.

Chapitre VIII
Publication, accès à l’instance et écritures des parties non contestantes

Article 54
Publication des sentences, ordonnances et décisions

(1) Le Centre publie les sentences, les ordonnances et les décisions dans les 60 jours suivant la date à laquelle elles ont été rendues, avec tous caviardages convenus entre les parties et notifiés conjointement au Centre dans ce délai de 60 jours.

(2) Si l’une des parties notifie au Centre, dans le délai de 60 jours visé au paragraphe (1), que les parties ne sont pas d’accord sur les caviardages, le Centre soumet la sentence, l’ordonnance ou la décision au Tribunal qui détermine le caviardage à effectuer, et publie la sentence, l’ordonnance ou la décision avec les caviardages approuvés par le Tribunal.
Capítulo VIII
Publicación, Acceso al Procedimiento y Presentaciones de Partes No Contendientes

Regla 54
Publicación de Laudos, Resoluciones y Decisiones

(1) El Centro publicará laudos, resoluciones y decisiones dentro de los 60 días siguientes a su emisión, con cualquier supresión de texto que haya sido acordada por las partes y notificada conjuntamente al Centro dentro del plazo de 60 días.

(2) Si cualquiera de las partes notificara al Centro dentro del plazo de 60 días al que se hace referencia en el párrafo (1) que las partes no están de acuerdo respecto de las supresiones de texto, el Centro remitirá la resolución o decisión al Tribunal quien determinará las supresiones a realizar, y publicará el laudo, la resolución o decisión con las supresiones de texto aprobadas por el Tribunal.

Rule 55
Publication of Documents Filed by a Party

Upon request of a party, the Centre shall publish any written submissions, observations or other documents which that party filed in the proceeding, with redactions agreed to by the parties.

Article 55
Publication des documents déposés par une partie

À la demande d’une partie, le Centre publie toutes écritures, observations, ou tous autres documents que cette partie a déposés au cours de l’instance, avec les caviardages convenus entre les parties.

Regla 55
Publicación de Documentos Presentados por una Parte

A solicitud de una de las partes, el Centro publicará cualquier escrito, observación u otro documento que esa parte haya presentado en el marco del procedimiento, con las supresiones de texto acordadas por las partes.
38. The provisions concerning publication of documents in ICSID Convention and Additional Facility arbitration are proposed AR 44, 45 and 46, and (AF)AR 54 and 55.

39. **First**, proposed AR 44(1) reiterates that Awards will be published with party consent. In this respect, “Award” includes supplementary decisions on an Award, rectification, interpretation, or revision of the Award, as well as decisions on annulment. As always, parties may consent to publication in full or with redaction for confidential information.

40. **Second**, proposed AR 44(2) and AR 44(3) accommodate the constraints imposed by Convention Art. 48(5) (no publication of an Award without consent of the parties), which cannot be changed without amendment of the ICSID Convention.

41. Proposed AR 44(2) adds a new provision. It states that consent to publish an Award shall be deemed to have been given if a party has not objected in writing to publication of the Award within 60 days of its dispatch. Thus, if neither party objects to publication within the 60-day period, the Award will automatically be published in full. If either party objects to publication within the 60-day period, the Award will not be published other than in extract, as is currently the case.

42. Proposed AR 44(2) would require a decision on publication within a reasonable time after dispatch of the Award. The proposed rule imposes relatively short time limits on both the Centre and the parties to the dispute. It also puts the Centre on notice that excerpts should be prepared.

43. Proposed AR 44(2) does not preclude the parties from giving consent to publication earlier in the process or with redaction. Nor does it prevent the parties from agreeing to publication with mutually agreed redactions at any subsequent time.

44. **Third**, if a party refuses consent to publish a Convention Arbitration Award, the Centre would follow the current practice of publishing excerpts of the legal reasoning. The Centre prepares such excerpts and requests party input on the proposed extracted Award before publication. Proposed AR 44(3) sets out a procedure and time frame for publication of excerpts, which should ensure that excerpts are published rapidly.

45. **Fourth**, proposed AR 45 addresses publication of orders and decisions other than Awards in Convention arbitration proceedings. This would include all rulings issued by the Tribunal and any decision on challenge issued by the Chairman of the Administrative Council. Such publication is not constrained by Art. 48(5) of the Convention.

46. Proposed AR 45(1) addresses publication of orders and decisions issued in a proceeding. Proposed AR 45(1) requires publication of each order or decision within 60 days of its dispatch. If the parties notify the Centre of agreed upon redactions before the expiry of the 60-day period, the order or decision will be published with such redactions. If the parties say nothing before the expiry of the 60-day period, the Centre will publish the order or decision without redaction. If either party notifies the Centre before the end of the 60-day period that there is no agreement on redaction, the Centre will refer the matter to the issuing
Tribunal for appropriate redaction. The Tribunal is in the best position to address appropriate redaction, and can request submissions from the parties if needed to determine such questions. The Centre would then publish the decision as redacted by the Tribunal.

47. The goal of proposed AR 45(1) is to expedite the release of orders and decisions, while allowing the parties to make reasonable, consensual redactions. It also provides a mechanism for determination of disputes on publication or redaction by having the Centre refer the order or decision to the issuing body. By establishing the 60-day review and redaction period, it balances the interests of parties in ensuring appropriate confidentiality is maintained with the public interest in making orders and decisions accessible.

48. Proposed AR 46 addresses publication by a party of its own documents filed in the arbitration. There is no prohibition on such publication, nor is there a requirement to publish such documents. Rather, parties may publish during or after the proceeding as they wish, subject to their confidentiality order (during the proceeding), confidentiality agreements with one another (if any), and the relevant IIAs. The proposed rule states that the Centre will publish documents of the parties if a copy of the redacted version agreed to by the parties is provided to the Centre.

49. The same text is proposed for the Additional Facility Arbitration Rules in proposed (AF)AR 54 and (AF)AR 55 with one exception. Given that the (AF)AR are not constrained by the Convention prohibition on making Awards public, Awards under the Additional Facility are proposed to be treated in the same manner as orders and decisions in proposed AR 45. The proposed text of (AF)AR 54 would also replace current (AF)AR 53(3).

VIII. PROPOSALS ON ACCESS TO HEARINGS IN ARBITRATION

CURRENT RELATED PROVISIONS: AR 32; A(AF)R Art. 39

AR 47 / (AF)AR 56
Observation of Hearings

(1) The Tribunal shall allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal to observe hearings, unless either party objects.

(2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.

(3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.
Proposed AR 47 and (AF)AR 56 are identical Rules for observation of hearings in ICSID Convention arbitration and ICSID Additional Facility arbitration respectively.

Current AR 32(2) and A(AF)R Art. 39(2) provide that the Tribunal may allow third persons to attend or observe arbitral hearings unless either party objects, and after consultation with the Secretary-General. This is subject to the establishment of appropriate procedures to protect confidential information and the availability of appropriate logistical arrangements.

Current AR 32 and A(AF)R Art. 39(1) were part of the 2006 amendments. The initial proposal in the 2006 amendments was to give the Tribunal discretion to open hearings, but this did not garner consensus (Aurelia Antonietti, ‘The 2006 Amendments of the ICSID Rules and Regulations’, (2006) 21 ICSID Rev.-FILJ 427, 430).

Many recent treaties have included provisions requiring that hearings be open to the public (see e.g., CAFTA-DR (2006-7) Art. 10.21(2); CETA (not yet in force) Art. 8.36(5); CPTPP (not yet in force) Chap. 9, Art. 9.24(2); see also UNCITRAL Rules on Transparency (2014) Art. 6). Other treaties have addressed public access to hearings differently. For example,
Art. 9.17(3) of the China-Australia Free Trade Agreement (ChAFTA) (2015) allows hearings to be open to the public with consent of the respondent in the arbitration.


55. To date, public access to ICSID hearings has been based on express consent in treaty provisions such as Art. 10.21 of the CAFTA-DR (2006-7), or on case-specific agreement of the parties, for example as in BSG v. Guinea (ARB/14/22), Procedural Order No. 2 (September 17, 2015).

56. The ICSID Secretariat has developed significant experience with public hearings, having held them in over 30 cases. When a hearing is open to the public, ICSID publishes an announcement on its website providing all relevant information to access the hearing.

57. There are different ways to open a hearing to the public. For example, the hearing can be broadcast through closed-circuit television to a separate room for the public. When the public is allowed on-site attendance at the hearing, the separate room avoids disruption of the proceeding. A hearing can also be broadcast to the public by internet. This gives access to anyone with internet access, and reaches a broader audience. The feed for either of these two methods can be live or time-delayed. A third way of opening a hearing is to prepare a video-recording that is posted online after the hearing.

58. Protecting confidential information is a necessary corollary of making hearings open to the public. If a hearing is broadcast by closed-circuit television, web stream or video recording, portions of the hearing during which confidential information is divulged are not shown. Instead, the image from the hearing room is replaced by the message “closed session” with no sound. When the confidential portion of the hearing concludes, the image and sound feed from the hearing resume. A short time delay in broadcast (usually 1-4 hours) ensures that the parties can avoid accidental broadcast of confidential information. The procedures used by the Centre in open hearings are highly effective and do not disrupt the proceedings.

59. ICSID estimates that the costs of a webcast or closed-circuit hearing for five days, including all technical support, is about USD 20,000-30,000. This cost is charged to the case account, and so it is divided equally between the parties.

60. Proposed AR 47 and (AF)AR 56 make four changes to current AR 32(2) and (AF)AR 39(2) concerning observation of hearings.

61. First, as drafted, current AR 32(2) and A(AF)R Art. 39(2) could mistakenly be read as giving the Secretary-General input on whether a hearing should be open. This is inaccurate. Rather, the Secretariat makes appropriate logistical arrangements when an open hearing is requested by the parties. The proposed rule deletes consultation with the Secretary-General. As a matter of practice, the Tribunal and parties consult the Tribunal Secretary in advance of setting a location for hearing to ensure that it is equipped with the necessary technology.
62. *Second*, the proposed rule refers to “observation” and not “attendance or observation”. In practice, public access is through observation in a separate viewing room or by broadcast, and non-parties normally do not have access to the hearing room.

63. *Third*, proposed AR 47 and (AF)AR 56 maintain the obligation of the Tribunal to arrange for the protection or redaction of confidential information during open hearings. The draft replaces the language “proprietary or privileged” with “confidential” to accommodate a broad range of information. The determination of what falls within this category depends on the facts of the case, the applicable law and procedural orders, and is agreed by the parties or decided by the Tribunal.

64. *Fourth*, the proposed Rule simplifies the syntax in current AR 32(3) and A(AF)R Art. 39(3), and adds witnesses and experts to the list of persons allowed in a hearing. This would not affect witness sequestration, which would take precedence with respect to a witness or expert. This reflects established practice.

**IX. PROPOSALS ON ACCESS TO MEETINGS IN CONCILIATION**

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**CURRENT RELATED PROVISIONS:** CR 27; C(AF)R Art. 20

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**CR 30 / (AF)CR 38**

**Meetings**

(1) The Commission may meet with the parties jointly or separately.

(2) The Commission shall determine the date, time and method of holding meetings, after consulting with the parties.

(3) If a meeting is to be held in person, it may be held at any place agreed to by the parties after consulting with the Commission and the Secretariat. If the parties do not agree on the place of a meeting, it shall be held at the seat of the Centre pursuant to Article 62 of the Convention.

(4) Meetings shall remain confidential. The parties may consent to observation of meetings by persons in addition to the parties and the Commission.

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**CR Article 30 / (AF)CR Article 38**

**Réunions**

(1) La Commission peut tenir des réunions avec les parties ensemble ou séparément.
(2) La Comisión podrá reunirse con las partes en forma conjunta o por separado.

(3) Si una reunión debe celebrarse en persona, podrá celebrarse en cualquier lugar acordado por las partes previa consulta a la Comisión y al Secretariado. Si las partes no acordaran el lugar de una reunión, la misma se celebrará en la sede del Centro de conformidad con lo dispuesto en el Artículo 62 del Convenio.

(4) Las reuniones serán de carácter confidencial. Las partes podrán consentir en que otras personas además de las partes y la Comisión observen las reuniones.

65. The proposed CR 30 and (AF)CR 38 contain identical provisions on observation of conciliation meetings. Not surprisingly given the nature of the process, meetings are to remain confidential. However, the parties may consent to observation of meetings by persons other than the parties and the Commission. This might be done generally, on a meeting-by-meeting basis, or for specific persons. The same rules allow the Commission to meet with the parties jointly or separately. This reflects a technique used by many conciliators of using individual meetings with parties to better understand an issue or to explore ways to resolve differences of views prior to returning to the collective session.

XII. PROPOSALS ON ACCESS TO SESSIONS IN FACT-FINDING AND MEETINGS IN MEDIATION

66. There are no proposals on attendance of third parties at fact-finding and mediation sessions. In both cases the rules governing use of information generated during the proceeding would mean that third persons could not attend such sessions without approval of the parties.
X. PROPOSALS ON NON-DISPUTING PARTY (NDP) AND NON-DISPUTING STATE PARTY (NDSP) PARTICIPATION

A. ICSID CONVENTION ARBITRATION AND ICSID ADDITIONAL FACILITY ARBITRATION

CURRENT RELATED PROVISIONS: AR 37(2); A(AF)R Art. 41(3)

AR 48 / (AF)AR 57
Submission of Non-disputing Parties

(1) Any person or entity that is not a disputing party (“non-disputing party”) may apply for permission to file a written submission in the proceeding.

(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

(a) whether the submission would address a matter within the scope of the dispute;

(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(c) whether the non-disputing party has a significant interest in the proceeding;

(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and

(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

(3) The parties shall have the right to make observations on whether a non-disputing party should be permitted to file a written submission in the proceeding and on the conditions for filing such a submission, if any.

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to:

(a) the format, length or scope of the submission;
(b) the date of filing; and

c) the payment of funds to defray the increased costs of the proceeding attributable to the non-disputing party’s participation.

(5) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.

(6) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

AR Article 48 / (AF) AR Article 57
Écritures des parties non contestantes

(1) Toute personne ou entité qui n’est pas partie au différend (« partie non contestante ») peut demander l’autorisation de déposer des écritures dans le cadre de l’instance.

(2) Afin de déterminer s’il autorise les écritures d’une partie non contestante, le Tribunal tient compte de l’ensemble des circonstances pertinentes, notamment :

(a) si les écritures aborderaient une question qui s’inscrit dans le cadre du différend ;

(b) comment les écritures aideraient le Tribunal à trancher une question de fait ou de droit relative à l’instance en y apportant un point de vue, une connaissance ou un éclairage particulier distincts de ceux présentés par les parties au différend ;

(c) si la partie non contestante porte à l’instance un intérêt significatif ;

(d) l’identité, les activités, l’organisation et les propriétaires de la partie non contestante, y compris toute affiliation directe ou indirecte entre la partie non contestante, une partie ou une Partie à un Traité non contestante ; et

(e) si une personne ou une entité apportera à la partie non contestante une assistance financière ou autre pour déposer les écritures.

(3) Les parties ont le droit de présenter leurs observations sur la question de savoir si une partie non contestante doit être autorisée à déposer des écritures dans le cadre de l’instance et sur les conditions éventuelles du dépôt de telles écritures.

(4) Le Tribunal s’assure que la participation de la partie non contestante ne perturbe pas l’instance ou qu’elle n’impose pas une charge excessive à l’une des parties ou lui cause injustement un préjudice. À cette fin, le Tribunal peut imposer des conditions à la partie non contestante, notamment en ce qui concerne :

(a) la forme, la longueur ou l’étendue des écritures;
(b) la date de dépôt ; et

(c) le versement de fonds pour couvrir les frais supplémentaires de la procédure imputables à la participation de la partie non contestante.

(5) Le Tribunal peut donner à la partie non contestante accès aux documents pertinents déposés dans le cadre de l’instance, sauf si l’une des parties s’y oppose.

(6) Si le Tribunal autorise une partie non contestante à déposer des écritures, les parties ont le droit de présenter des observations sur ces écritures.

AR Regla 48 / (AF)AR Regla 57
Escritos de Partes No Contendientes

(1) Cualquier persona o entidad que no sea parte en la diferencia (“parte no contendiente”) podrá solicitar permiso para presentar un escrito en el marco del procedimiento.

(2) Al determinar si permite la presentación de un escrito de una parte no contendiente, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) si el escrito se referiría a una cuestión dentro del ámbito de la diferencia;

(b) de qué manera el escrito ayudaría al Tribunal en la determinación de las cuestiones de hecho o de derecho relacionadas con el procedimiento al aportar una perspectiva, un conocimiento o una visión particulares distintos a aquéllos de las partes en la diferencia;

(c) si la parte no contendiente tiene un interés significativo en el procedimiento;

(d) la identidad, actividades, organización y los propietarios de la parte no contendiente, lo cual incluye toda afiliación directa o indirecta entre la parte no contendiente, una parte o una parte no contendiente del tratado; y

(e) si alguna persona o entidad le proporcionara a la parte no contendiente asistencia financiera u otro tipo de asistencia para efectuar la presentación.

(3) Las partes tendrán derecho a formular observaciones respecto de si debería permitirse a una parte no contendiente presentar un escrito en el marco del procedimiento y, en su caso, respecto de las condiciones para la presentación de dicho escrito, si se presentara.

(4) El Tribunal deberá asegurarse de que la participación de la parte no contendiente no perturbe el procedimiento, o genere una carga indebida, o perjudique injustamente a
cualquiera de las partes. A tal fin, el Tribunal podrá imponer condiciones a la parte no contendiente, lo cual incluye con respecto a lo siguiente:

(a) el formato, extensión o alcance del escrito;

(b) la fecha de la presentación; y

(c) el desembolso de fondos para sufragar el aumento de costos del procedimiento que sean atribuibles a la participación de la parte no contendiente.

(5) El Tribunal le podrá proporcionar a la parte no contendiente acceso a los documentos pertinentes presentados en el marco del procedimiento, a menos que cualquiera de las partes se oponga.

(6) Si el Tribunal le permitiera a una parte no contendiente presentar un escrito, las partes tendrán derecho a formular observaciones sobre el mismo.

AR 49 / (AF)AR 58
Participation of Non-disputing Treaty Party

(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (“non-disputing Treaty Party”) to make a written submission on the application or interpretation of a treaty at issue in the dispute.

(2) A Tribunal may allow a non-disputing Treaty Party to make a written submission on any other matter within the scope of the dispute, in accordance with the procedure in Rule 48.

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

AR Article 49 / (AF)AR Article 58
Participation d’une Partie à un Traité non contestante

(1) Le Tribunal doit autoriser une partie à un traité qui n’est pas partie au différend (« Partie à un Traité non contestante ») à présenter des écritures sur l’application ou l’interprétation d’un traité en cause dans le différend.

(2) Un Tribunal peut autoriser une Partie à un Traité non contestante à présenter des écritures sur toute autre question dans le cadre du différend, conformément à la procédure prévue à l’article 48.
B. BACKGROUND TO NON-DISPUTING PARTY (NDP) PARTICIPATION

67. Some domestic legal systems allow third parties to participate in litigation. This is often called “amicus curiae” or “friend of the court” participation. The criteria for allowing such participation varies among domestic jurisdictions.

68. Third party participation was absent from international investment arbitration until the early 2000s, when the issue was raised in several cases (see e.g., Methanex Corp. v. US, (UNCITRAL/NAFTA), Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amicus Curiae” (Jan. 15, 2001); Suez v. Argentina (ARB/03/19), Order in Response to a Petition for Transparency and Amicus Curiae (May 19, 2005); Aguas del Tunari S.A. v. Bolivia, (ARB/02/3), Tribunal’s Letter in Response to Non-Disputing Parties’ Petition (Jan. 29, 2003). In 2003, the NAFTA States adopted a Free Trade Commission Statement on non-disputing party participation. This established a two-step process and criteria for Tribunals to determine whether to allow non-disputing parties to participate in an arbitration.

ICSID cases decided before 2006 diverged on whether non-disputing parties could participate in arbitrations. Such participation was refused in *Aguas del Tunari v. Bolivia* (ARB 02/3) *Tribunal's Letter in Response to Non-Disputing Parties' Petition* (January 29, 2003) as beyond the power of the Tribunal. However, in *Suez v. Argentina* (ARB 03/19) *Order in Response to a Petition for Transparency and Participation as Amicus Curiae* (May 19, 2005) the Tribunal found it had authority to allow third party participation under Art. 44 of the ICSID Convention.

The debate was resolved in the 2006 ICSID rule amendments regarding third party participation in ICSID Convention and AF arbitrations (see ICSID Secretariat, *Possible Improvements of the Framework of ICSID Arbitration* (October 2004) and ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* (May 2005.) This led to the adoption of current AR 37(2) and A(AF)R Art. 41(3) on non-disputing party (NDP) participation. The ICSID Convention and AF provisions are identical in content.

In 2014, the UNCITRAL Rules on Transparency (Art. 4) adopted provisions for third party participation. The UNCITRAL provision will apply in an ICSID case if the Mauritius Convention governs the proceeding.

C. **Background to Non-disputing State/ Non-disputing Treaty Party (NDSP/NDTP) Participation**

Many modern investment treaties have specific provisions allowing the non-disputing State Party to the treaty (NDSP) (or non-disputing Treaty Party – NDTP) to make submissions on a question of treaty application or interpretation (see e.g., *NAFTA* (1994) Art. 1128; *CAFTA-DR* (2006-7) Art. 10.20(2); *CETA* (not yet in force) Art. 8.38, Korea-Australia Free Trade Agreement (*KAFTA*) (2014) Art. 11.20(4); *CPTPP* (not yet in force) Art. 9.23.2). Numerous ICSID cases have involved NDSP participation pursuant to such treaty-specific provisions (see e.g., *Al Tamimi v. Oman* (ARB/11/33), *Submission of the United States of America* (Sept. 24, 2014); *Bear Creek Mining Corp. v. Peru* (ARB/14/21), *Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement*, (June 9, 2016).

Some new procedural rules have incorporated NDSP/NDTP provisions as well. Article 5 of the *UNCITRAL Rules on Transparency* (2014) include participation by the non-disputing State Party to the treaty. This provision will apply in an ICSID case if the Mauritius Convention governs the proceeding. Some other procedural rules have followed suit (see e.g., *SCC Arbitration Rules* (2017), App. 3, Art. 4).

D. **NDP and NDSP/NDTP Practice in ICSID Cases**

The Rules on NDP and NDSP/NDTP participation in an ICSID case depend on the applicable provisions of relevant instruments. If a BIT or MIT has specific provisions on NDP, NDSP or NDTP participation, these will take precedence in the ICSID case. If the Mauritius Convention is in effect between the home State of the investor and the respondent State, the UNCITRAL Transparency provisions on NDP and NDSP
participation will apply to the ICSID arbitration. If no treaty-specific provisions apply, such participation is currently addressed under AR 37(2) or A(AF)R Art. 41(3).

76. The current ICSID Rules do not have a specific provision for NDSP or NDTP participation. Instead, such applications have been addressed under the ICSID rules governing NDP participation generally. As a result, ICSID Tribunals have allowed submissions by non-disputing States (see e.g., Siemens AG v. Argentina (ARB/02/8), Submission by the United States of America, (May 1, 2008) and by REIOs (see e.g., Electrabel S.A. v. Hungary, (ARB/07/19) Procedural Order No. 4 (April 28, 2009); Micula v. Romania (ARB/05/20) Award (December 11, 2013). ICSID Tribunals have also exercised their inherent authority to ask a non-disputing State to make a submission if they believe it would be useful (see e.g., Aguas del Tunari S.A. v. Bolivia, (ARB/02/3), Decision on Respondent’s Objections to Jurisdiction (Oct. 21, 2005.)

77. There have been over 60 examples of NDP or NDSP/NDTP participation in ICSID cases since 2006. ICSID has published every decision addressing such a request where the parties consented to publication. These cases can be found on the ICSID website under Decisions on Non-disputing Party Participation in ICSID Cases.

78. The practice under current AR 37(2) is for an NDP to apply for leave to file its submission from the Tribunal. The disputing parties can make observations on whether to allow the NDP to participate. Before giving permission to file a submission, the Tribunal must consider, among other things, whether the NDP submission: (i) would assist the Tribunal in the determination of a factual or legal issue by bringing a different perspective than that of the parties; (ii) is within the scope of the dispute; and (iii) was filed by an NDP that has a significant interest in the dispute. The Tribunal must also ensure that such participation would not disrupt the proceeding or unfairly burden either party.

79. In practice, Tribunals have also considered whether the NDP has an affiliation with any of the disputing parties, or whether any government, person or entity has provided financial or other assistance in preparing the submission (see e.g., Philip Morris Brand Sàrl and others v. Uruguay (ARB/10/7), Award (July 8, 2016) ¶55).

80. The Tribunal has discretion to fix a schedule for the disputing parties to make observations on an NDP submission, which may be filed separately or as part of the pleadings. The Tribunal should address the modalities of NDP, NDSP or NDTP participation as soon as possible, ideally in Procedural Order No. 1. The timing of such applications may vary; however, they are frequently submitted after the first exchange of pleadings on the merits. Normally the Tribunal will limit the page count for an NDP submission and it may require like-minded NDPs to file a joint submission (see e.g., Eli Lilly and Company v. Canada (UNCT/14/2), Procedural Order No. 4 (February 23, 2016) and Procedural Order No. 6 (May 27, 2016); Infinito Gold Ltd. v. Republic of Costa Rica (ARB/14/5), Procedural Order No. 2 (June 1, 2016).

81. Tribunals also have discretion to address corollary issues such as the timing of the submissions, the format and scope of submissions, and access to documents and hearings.
for non-disputing parties. The WP proposes that Tribunals retain broad discretion to address such issues when allowing non-disputing party participation.

82. The right to file an NDP submission does not give the NDP any other procedural rights in the case. For example, the NDP does not get automatic access to documents. However, some Tribunals have asked the disputing parties to provide the NDP with redacted versions of relevant documents to ensure the NDP submission is focused (see e.g., Piero Foresti v. South Africa (ARB (AF)/07/01), Further Decision Concerning the Applications of the Non-Disputing Parties (Sept. 25, 2009); Infinito Gold v. Costa Rica, (ARB/14/5), Procedural Order No. 2 (June 1, 2016)). Other cases have denied NDPs access to documents (see e.g., Gabriel Resources Ltd. v. Romania (ARB/15/31), Procedural Order No. 5 (June 16, 2017) and Suez v. Argentina (ARB/03/17), Order in Response to a Petition for Participation as Amicus Curie (March 17, 2006)). Similarly, the right to file a written submission does not grant an NDP the right to attend hearings. However, there have been cases where both disputing parties consented to the NDP attending part of the hearing.

E. COMMENTS RECEIVED ON NDP AND NDSP/NDTP PARTICIPATION

83. ICSID received numerous comments on NDP and NDSP participation. Some comments suggested giving the Tribunal discretion to allow an NDP submission without first consulting the disputing parties on whether the criteria for participation in the Rules are met – in other words, turning the two-step process into a single step. This would allow the Tribunal to decide whether to permit NDP participation based solely on the application filed by the NDP. In turn, the disputing parties could address both eligibility of the NDP and the merits of its submission once the NDP is given permission to participate.

84. This suggestion would reduce the time and cost of non-disputing party submissions by allowing disputing parties to comment after (and only if) NDP participation is allowed by the Tribunal. However, despite the time and cost savings of a one-step process, the WP does not propose to make this change. It is likely that most disputing parties will want to retain the right to make observations on whether a potential NDP meets the criteria for public interest participation before the NDP addresses the merits.

85. Other suggestions received have been incorporated in the provisions addressing NDP and NDTP participation. These are explained below.

86. First, several comments suggested that Tribunal decisions on whether to allow NDP participation should be publicly available so third parties and States could better understand how the criteria in the Rules are applied. These suggestions are adopted through the proposals on publication of Awards, orders and decisions (see above). If adopted, decisions on NDP and NDSP/NDTP participation would always be published.

87. Second, some suggested that NDPs be given greater access to case documents and hearings. These suggestions are addressed through the general proposals on access to documents and hearings (see above). It also proposes that Tribunals may order that the NDPs receive relevant documents unless either party objects.
Third, one comment suggested elaboration of the criteria for NDP participation to require potential NDPs to disclose their identity in detail (corporate structure and affiliation), to disclose their connection with a disputing party, and to advise whether they would receive financial or other consideration for preparing a non-disputing party submission. These have been considered by some Tribunals. Similar provisions are also found in the SCC Arbitration Rules (2017) and Art. 4(2) of the UNCITRAL Rules on Transparency (2014) and in several treaties (see e.g. SAFTA (2017), Chap. 8, Art. 28(3)). This is included in the proposal.

Fourth, some comments suggested giving the Tribunal discretion to condition NDP participation on their contribution to the costs of the case (see e.g., SCC Arbitration Rules (2017), Art. 3(10); and Art. 3(5) UNCITRAL Rules on Transparency (2014) regarding cost to access documents). To date, NDPs have borne their own cost of preparing submissions, while the disputing parties individually bear their own costs of responding to NDP submissions and share the costs of Tribunal time to address NDP submissions. Concern about costs resulting from NDP participation has increasingly been voiced by Tribunals and commentators (see e.g., Philip Morris Brand SARL (Switzerland) v. Uruguay (ARB/10/7), Procedural Order No. 3 (Feb. 17, 2015) and Procedural Order No. 4 (March 24, 2015); Infinito Gold Ltd. v. Costa Rica (ARB/14/5), Procedural Order No. 2 (June 1, 2016); Electrabel S.A. v. Hungary (ARB/07/19), Award (Nov. 25, 2015) ¶234; Eiser v. Spain (ARB/13/36), Award (May 4, 2017) ¶65).

This raises a policy question for Member States: should a Tribunal have discretion to require NDPs to contribute to the costs of the case? Allowing Tribunals to condition NDP participation on a contribution to costs addresses the cost burden borne by the disputing parties. However, there is a valid question as to whether Member States want to add potential financial hurdles to participation that could be in the public interest.

Fifth, Tribunals can reduce the cost of NDP participation, for example, by limiting the length and scope of their submission and requiring them to make joint submissions with other like-minded applicants.

Sixth, one comment suggested that the Rules expressly allow the European Commission to intervene and submit written observations in all proceedings. Another comment suggested an express rule on NDSP/NDTP participation where the State Parties did not have a specific provision in their treaty allowing such participation. The current ICSID Rules have allowed REIOs and States without specific treaty provisions to act as NDPs if they meet the relevant NDP criteria. Thus, it is debatable whether a specific NDSP/NDTP rule is required. Nonetheless, proposed AR 49 and (AF)AR 58 are included for consideration. The proposed rule applies to “any Party to a treaty”, and hence would apply both to States and to REIOs that have ratified the treaty at issue in the arbitration.
94. Proposed AR 49(1) and (AF)AR 58 would allow a non-disputing Treaty Party to participate as of right with respect to a question of treaty application or interpretation, but would require the State or REIO to meet the usual NDP criteria to participate on a matter other than treaty application or interpretation (proposed AR 49(2) and (AF)AR 58(2)). This is consistent with the relevant provisions in most treaties.

XI. PROPOSALS ON CONFIDENTIALITY IN DELIBERATIONS

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<th>Topic</th>
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<tr>
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<td>(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.</td>
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(3) Solo los miembros del Tribunal tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario del Tribunal.

(4) El Tribunal deliberará inmediatamente después del último escrito o presentación oral sobre cualquier asunto que esté sujeto a decisión.

CR 26 / (AF)CR 34
Deliberations

(1) The deliberations of the Commission shall take place in private and remain confidential.

(2) The Commission may deliberate at any place it considers convenient.

(3) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

CR Article 26 / (AF)CR Article 34
Délibérations

(1) Les délibérations de la Commission ont lieu à huis clos et demeurent confidentielles.

(2) La Commission peut délibérer en tout lieu qu’elle juge pratique.

(3) Seuls les membres de la Commission prennent part à ses délibérations. Aucune autre personne n’est admise sauf si la Commission en décide autrement.

CR Regla 26 / (AF)CR Regla 34
Deliberaciones

(1) Las deliberaciones de la Comisión se realizarán en privado y serán de carácter confidencial.

(2) La Comisión podrá deliberar en cualquier lugar que estime conveniente.

(3) Sólo los miembros de la Comisión tomarán parte en sus deliberaciones. Ninguna otra persona será admitida, salvo decisión en contrario de la Comisión.

95. Proposed AR 16 and (AF)AR 26 do not introduce any changes concerning the Tribunal’s deliberations. Tribunal members cannot disclose any part of the deliberations (proposed AR 16(1) and (AF)AR 26(1)). This assures their independence.
96. The conciliation rules contain a similar provision requiring deliberations to be private (proposed CR 26, (AF)CR 34).

XII. CONFIDENTIALITY AND TRANSPARENCY

97. The ICSID system does not have a general confidentiality rule. Rather, Tribunals address confidentiality in each case in Procedural Order No. 1, or under their inherent power to decide questions not otherwise covered by the Convention and Rules pursuant to Article 44 of the Convention and current AR 19 and Art. 27 of the AR(AF). They may also issue confidentiality orders under the rubric of provisional measures pursuant to Article 47 of the ICSID Convention and current AR 39 and AR(AF) 46.

98. When issuing confidentiality orders, Tribunals generally look to applicable international law; the relevant governing law concerning protected information; the scope of protection required; and how to preserve the integrity of the proceeding. Parties may also agree to confidentiality undertakings as between themselves.

99. The rules note that parties should address confidentiality and confidentiality in orders in their first sessions (proposed AR 34(4), (AF)AR 44(4), CR 29(4), (AF)CR 37(4)).