# III. RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS

**TABLE OF CONTENTS**

## CHAPTER I – GENERAL PROVISIONS
- Rule 1 – Application of Rules

## CHAPTER II - CONDUCT OF THE PROCEEDING
- Rule 2 – Meaning of Party and Party Representation
- Rule 3 – Method of Filing
- Rule 4 – Routing of Written Communications
- Rule 5 – Procedural Languages, Translation and Interpretation
- Rule 6 – Correction of Errors and Deficiencies
- Rule 7 – Calculation of Time Limits
- Rule 8 – Time Limits Specified By The Convention and these Rules or Fixed by the Secretary-General
- Rule 9 – Time Limits Fixed By The Tribunal
- Rule 10 – Waiver
- Rule 11 – General Duties
- Rule 12 – Orders, Decisions and Agreements
- Rule 13 – Written Submissions and Observations
- Rule 14 – Case Management Conference
- Rule 15 – Hearings
- Rule 16 – Deliberations
- Rule 17 – Quorum
- Rule 18 – Decisions Taken by Majority Vote
- Rule 19 – Payment of Advances and Costs of the Proceeding

## CHAPTER III - CONSTITUTION OF THE TRIBUNAL
- Rule 20 – General Provisions Regarding the Constitution of the Tribunal
- Rule 21 – Disclosure of Third-party Funding
- Rule 22 – Method of Constituting the Tribunal
- Rule 23 – Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of The Convention
- Rule 24 – Assistance of the Secretary-General with Appointment
- Rule 25 – Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention
- Rule 26 – Acceptance of Appointment
- Rule 27 – Replacement of Arbitrators Prior to Constitution of the Tribunal
- Rule 28 – Constitution of the Tribunal

## CHAPTER IV - DISQUALIFICATION OF ARBITRATORS AND VACANCIES
- Rule 29 – Proposal for Disqualification of Arbitrators
Rule 30 – Decision on the Proposal for Disqualification .................................................. 160
Rule 31 – Incapacity or Failure to Perform Duties ............................................................ 163
Rule 32 – Resignation ........................................................................................................ 164
Rule 33 – Vacancy on the Tribunal ................................................................................... 165

CHAPTER V - INITIAL PROCEDURES ................................................................................. 167
Rule 34 – First Session ...................................................................................................... 168
Rule 35 – Manifest Lack of Legal Merit ........................................................................... 175
Rule 36 – Preliminary objections ....................................................................................... 181
Rule 37 – Bifurcation ......................................................................................................... 185
Rule 38 – Consolidation or Coordination on Consent of Parties ....................................... 191

CHAPTER VI - EVIDENCE ...................................................................................................... 196
Rule 39 – Evidence: General Principle .............................................................................. 196
Rule 40 – Tribunal Order to Produce Documents or Other Evidence ............................... 197
Rule 41 – Witnesses and Experts ....................................................................................... 199
Rule 42 – Tribunal-Appointed Experts .............................................................................. 202
Rule 43 – Visits and Inquiries ............................................................................................ 204

CHAPTER VII - PUBLICATION, ACCESS TO PROCEEDINGS AND NON-DISPUTING PARTY SUBMISSIONS ............................................................................................................ 205
Rule 44 – Publication of Awards and Decisions On Annulment ...................................... 205
Rule 45 – Publication of Orders and Decisions .................................................................. 208
Rule 46 – Publication of Documents Filed by a Party ....................................................... 210
Rule 47 – Observation of Hearings .................................................................................... 211
Rule 48 – Submission of Non-Disputing Parties ................................................................ 212
Rule 49 – Participation of Non-Disputing Treaty Party .................................................... 217

CHAPTER VIII - SPECIAL PROCEDURES ............................................................................ 219
Rule 50 – Provisional Measures ......................................................................................... 219
Rule 51 – Security for Costs .............................................................................................. 226
Rule 52 – Ancillary Claims ................................................................................................. 236
Rule 53 – Default ............................................................................................................... 239

CHAPTER IX - SUSPENSION AND DISCONTINUANCE ................................................... 243
Rule 54 – Suspension ......................................................................................................... 243
Rule 55 – Settlement and Discontinuance ......................................................................... 246
Rule 56 – Discontinuance at Request of a Party ................................................................ 249
Rule 57 – Discontinuance for Failure of Parties to Act .................................................... 250
Rule 58 – Discontinuance for Failure to Pay ..................................................................... 253

CHAPTER X - THE AWARD ................................................................................................... 254
Rule 59 – Timing of the Award ......................................................................................... 256
Rule 60 – Contents of The Award ..................................................................................... 258
Rule 61 – Rendering of the Award .................................................................................... 262
Rule 62 – Supplementary Decision and Rectification ............................................................. 265

CHAPTER XI - INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD 270

Rule 63 – The Application .................................................................................................. 270
Rule 64 – Interpretation or Revision: Reconstitution of the Tribunal .................................. 278
Rule 65 – Annulment: Appointment of ad hoc Committee ............................................... 280
Rule 66 – Procedure Applicable to Interpretation, Revision and Annulment ....................... 281
Rule 67 – Stay of Enforcement of the Award ...................................................................... 284
Rule 68 – Resubmission of Dispute after an Annulment .................................................... 289

CHAPTER XII - EXPEDITED ARBITRATION ...................................................................... 292

Rule 69 – Consent of Parties to Expedited Arbitration ......................................................... 295
Rule 70 – Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration ........................................................................................................... 298
Rule 71 – Appointment of Sole Arbitrator for Expedited Arbitration .................................. 300
Rule 72 – Appointment of Three-Member Tribunal for Expedited Arbitration .................. 305
Rule 73 – Acceptance of Appointment by Arbitrators in Expedited Arbitration ................. 310
Rule 74 – First Session in Expedited Arbitration ............................................................... 311
Rule 75 – The Procedural Schedule in Expedited Arbitration ............................................. 312
Rule 76 – Default during Expedited Arbitration ............................................................... 319
Rule 77 – The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration .............................................................................................................. 319
Rule 78 – The Procedural Schedule For an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration ........................................... 321
Procedural Schedule for an Interpretation, Revision or Annulment Proceeding in Expedited Arbitration – Rule 78 .......................................................... 324
Rule 79 – Resubmission of a Dispute after an Annulment in Expedited Arbitration ......... 325
### Introductory Note

The Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(c) of the ICSID Convention.

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre, in particular by Regulation 14.

The Arbitration Rules apply from the date of registration of a Request for arbitration until an Award is rendered and to any post-Award remedy proceedings.

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### Note introductive

Le Règlement de procédure relatif aux instances d’arbitrage (Règlement d’arbitrage) a été adopté par le Conseil administratif du Centre conformément à l’article 6(1)(c) de la Convention CIRDI.

Le Règlement d’arbitrage est complété par le Règlement administratif et financier du Centre, en particulier par l’article 14.

Le Règlement d’arbitrage s’applique de la date de l’enregistrement d’une requête d’arbitrage jusqu’au moment où une sentence est rendue ainsi qu’à toute instance de recours post-sentence.

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### Nota Introductoria

Las Reglas Procesales Aplicables a los Procedimientos de Arbitraje (Reglas de Arbitraje) fueron adoptadas por el Consejo Administrativo del Centro de conformidad con lo dispuesto en el Artículo 6(1)(c) del Convenio del CIADI.

Las Reglas de Arbitraje están complementadas por el Reglamento Administrativo y Financiero del Centro, en particular por la Regla 14.

Las Reglas de Arbitraje se aplican desde la fecha del registro de una solicitud de arbitraje hasta que sea dictado el laudo, así como a cualquier recurso posterior al laudo.
CHAPTER I – GENERAL PROVISIONS

RULE 1 – APPLICATION OF RULES

CURRENT RELATED PROVISIONS: Convention Art. 44; AR 56

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) in accordance with Article 44 of the Convention.

(2) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(3) These Rules may be cited as the “Arbitration Rules” of the Centre.

Chapitre I
Dispositions générales

Article 1
Application du Règlement

(1) Le présent Règlement s’applique à toute instance d’arbitrage conduite en vertu de la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissant(e)s d’autres États (« Convention ») conformément à l’article 44 de la Convention.

(2) Les langues officielles du Centre sont l’anglais, l’espagnol et le français. Les textes du présent Règlement dans chaque langue officielle font également foi.

(3) Le présent Règlement peut être cité comme le « Règlement d’arbitrage » du Centre.
Capítulo I
Disposiciones Generales

Regla 1
Aplicación de las Reglas

(1) Estas Reglas se aplicarán a cualquier procedimiento de arbitraje tramitado en virtud del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados (“Convenio”) de conformidad con el Artículo 44 del Convenio.

(2) Los idiomas oficiales del Centro son el español, el francés y el inglés. El texto de estas Reglas es igualmente auténtico en cada uno de los idiomas oficiales.

(3) Estas Reglas podrán ser citadas como las “Reglas de Arbitraje” del Centro.

139. The Rules of Procedure for Arbitration Proceedings (“Arbitration Rules” or “AR”) complement the procedural provisions in the ICSID Convention and apply from registration of the Request for arbitration to rendering of the Award and any post-Award remedy proceedings.

140. Proposed new Chapter I contains general provisions concerning the application of the Arbitration Rules. Article 44 of the ICSID Convention provides that the applicable AR are those in effect on the date on which the parties consented to arbitration, except as the parties otherwise agree. Proposed AR 1(1) mirrors this principle by stating these rules apply to any arbitration conducted under the ICSID Convention. In addition, under proposed AR 12(3), the Tribunal must apply an agreement of the parties on procedural matters in addition to or instead of the AR, except as otherwise provided in the Convention or the Administrative and Financial Regulations (AFR).

141. Proposed AR 1(2) and 1(3) correspond to current AR 56 (Final Provisions).

CHAPTER II - CONDUCT OF THE PROCEEDING

142. This proposed Chapter II merges current Chapter II (Working of the Tribunal), Chapter III (General Procedural Provisions) and Chapter IV (Written and Oral Provisions). It concerns all general provisions relating to the conduct of the proceeding.

RULE 2 – MEANING OF PARTY AND PARTY REPRESENTATION

CURRENT RELATED PROVISIONS: AR 18
### Chapter II
#### Conduct of the Proceeding

**Rule 2**

**Meaning of Party and Party Representation**

(1) For the purposes of these Rules, “party” may include, where the context so admits:

   (a) all parties acting as claimants or as respondents; and

   (b) an authorized representative of a party.

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

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**Chapitre II**

**Conduite de l’instance**

**Article 2**

**Sens du terme « partie » et représentation des parties**

(1) Aux fins du présent Règlement, le terme « partie » peut comprendre, si le contexte le permet :

   (a) toutes les parties agissant en qualité de demanderesses ou de défenderesses ; et

   (b) tout(e) représentant(e) habilité(e) d’une partie.

(2) Chaque partie peut être représentée ou assistée par des agents, conseillers ou avocats (« représentant(s) »), dont le nom et la preuve de l’habilitation à agir doivent être notifiés par cette partie au Secrétariat.

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**Capítulo II**

**Tramitación del Procedimiento**

**Regla 2**

**Significado de Parte y Representación de las Partes**

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

   (a) todas las partes que actúen como demandantes o como demandadas; y
(b) un representante autorizado de una parte.

(2) Cada parte podrá estar representada o asistida por agentes, consejeros(as) o abogados(as) (“representante(s)”), cuyos nombres y prueba de sus poderes de representación serán notificados por la parte respectiva al Secretariado.

143. Proposed AR 2 is current AR 18 with minor language modifications.

144. First, proposed AR 2(1) specifies that the expression “party” may include, where the context so admits, all parties acting as claimants or respondents and any authorized representatives of the parties. This accommodates multiparty proceedings (see Schedule 7 on Multiparty Claims and Consolidation).

145. Second, proposed AR 2(2) addresses party representation. Under current AR 18, parties may represent themselves before ICSID Tribunals or may authorize someone to represent them. A representative need not be an attorney and may be an officer of the company or government entity or another duly authorized individual. Typically, either a party itself or its counsel informs the Secretariat of its legal representation and attaches a power of attorney. If new counsel notifies the Secretariat of its involvement without providing a power of attorney, the Secretariat requests that the authorization be provided before transmitting files to the new representative. The authorization may take the form of a simple letter.

RULE 3 – METHOD OF FILING

CURRENT RELATED PROVISIONS: AFR 24, 28, 30; AR 23-24

Rule 3
Method of Filing

(1) Written submissions, observations, supporting documents and communications shall be filed electronically, unless the parties agree or the Tribunal orders otherwise. They shall be introduced into the proceeding by filing them with the Secretariat, which shall acknowledge receipt and distribute them in accordance with Rule 4.

(2) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the written submissions to which they relate, within the time limit fixed to file such written submissions.
(3) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Tribunal may require a fuller extract or a complete version of the document.

**Article 3**  
**Modalités de dépôt**

(1) Les écritures, observations, documents justificatifs et communications sont déposés par voie électronique, sauf si les parties en conviennent ou le Tribunal en décide autrement. Leur production au cours de l’instance se fait par leur dépôt auprès du Secrétariat, qui en accuse réception et en assure la distribution conformément à l’article 4.

(2) Les documents justificatifs, notamment les déclarations de témoins, les rapports d’experts, les pièces factuelles et les sources juridiques, sont déposés avec les écritures auxquelles ils se rapportent, dans les délais fixés pour le dépôt de ces écritures.


**Regla 3**  
**Método de Presentación**

(1) Los escritos, observaciones, documentos de respaldo y comunicaciones se presentarán electrónicamente, salvo acuerdo de las partes o resolución del Tribunal en contrario. Los mismos se incorporarán al procedimiento mediante la presentación ante el Secretariado, que acusará recibo y los distribuirá de conformidad con la Regla 4.

(2) Los documentos de respaldo, lo cual incluye declaraciones testimoniales, informes periciales, anexos documentales y anexos legales, se presentarán junto con los escritos a los que se refieren, dentro del plazo fijado para la presentación de dichos escritos.

(3) Se podrá presentar un extracto de un documento de respaldo siempre que la omisión del texto no altere el sentido del extracto. El Tribunal podrá solicitar una versión más amplia del extracto o una versión completa del documento.

146. Current AR 23 requires hard copy filing of all submissions, except as otherwise ordered by the Tribunal. The Rule anticipates the filing of an original for the archives of the Centre and five additional copies where there are three Tribunal members. In practice, parties send
their submissions by electronic mail and upload them to a file-sharing platform created by the Secretariat for the specific case. At the same time, hard copies of the submission and electronic devices containing a digital copy are sent by courier. The format and number of copies is typically agreed by the Tribunal and the parties at the first session (see proposed AR 34) and specified in Procedural Order No. 1 (see draft Procedural Order No. 1 template, item 13).

147. Recently, Tribunals and parties have increasingly dispensed with hard copies of supporting documents. It has become standard practice to file legal authorities in soft (electronic) copy only, and some arbitrators wish to receive only the main submissions in hard copy (with some foregoing hard copies altogether). However, the process remains paper intensive, and the Centre continues to promote efforts to reduce paper use in its daily operations.

148. ICSID offers secure, cloud-based servers to facilitate electronic filing, and its electronic archiving system allows documents to be retained permanently and provided to the parties on request (see proposed AFR 26). Parties and Tribunals can thus upload, download and read submissions on the secure file-sharing platform, and use various software tools to annotate electronic documents in lieu of handwritten notes on hard copies.

149. As part of these efforts, electronic filing is required by proposed AR 3(1). The Rule allows the parties to agree otherwise and the Tribunal to order the production of hard copies only if necessary. Departure from the default of electronic filing should be exceptional and for good cause; Tribunals should not order the production of hard copies merely for convenience. Moreover, if hard copies are required, it is recommended that a single format be used for all sets of submissions.

150. The second sentence of proposed AR 3(1) concerns the method of introducing documents into the proceeding and stems from current AFR 24(2). Documents become part of the record in the case if they have been filed with the Secretariat. The Rule has been revised to account for electronic filing of documents. Once case documents are transmitted by electronic mail or uploaded to a cloud-based server, the Secretary of the Tribunal will acknowledge receipt of the documents and transmit them to the Tribunal and the other party as necessary, subject to the parties’ agreement on the routing of written communications (see proposed AR 4). This proposed Rule deals with introduction of documents. It does not deal with the admissibility of documents and evidence into the formal record, which is a matter to be decided by the Tribunal (see e.g., proposed AR 39).

151. Proposed AR 3(2) is current AR 24 on the filing of supporting documentation with minor language modifications.

152. Proposed AR 3(3) is based on current AFR 30, and concerns supporting documents. It is revised to account for electronic filing without an original hard copy or certified copies. In practice, parties tend not to submit originals as supporting documents unless their authenticity is disputed and the Tribunal wishes to examine the originals. Current AFR 30(2) also contains an outdated procedure for filing extracts of a document. Certification is no longer necessary and, instead, the other party may request a fuller extract or the whole document if it believes that the omitted text renders the extract misleading. Other parts of
current AFR 30 have been incorporated into proposed AR 5 concerning translations of documents.

**RULE 4 – ROUTING OF WRITTEN COMMUNICATIONS**

<table>
<thead>
<tr>
<th>CURRENT RELATED PROVISIONS: Convention Art. 9; AFR 24, 28</th>
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**Rule 4**  
Routing of Written Communications

(1) The Secretariat shall be the official channel of written communications among the parties, the Tribunal, and the Chairman of the Administrative Council (“Chairman”), except that:
   
   (a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the proceeding;
   
   (b) the members of the Tribunal shall communicate directly with each other; and
   
   (c) a party may communicate directly with the Tribunal if requested to do so by the Tribunal, provided that the other party and the Secretariat are copied on the communications.

(2) The Secretariat shall acknowledge receipt of all communications filed by a party and, subject to paragraph (1)(a) and (c), distribute them to the other party and the Tribunal.

**Article 4**  
Transmission des communications écrites

(1) Le Secrétariat est l’intermédiaire officiel pour les communications écrites entre les parties, le Tribunal et le ou la Président(e) du Conseil administratif (« Président(e) du Conseil administratif »), sauf dans les cas suivants :
   
   (a) les parties peuvent communiquer directement entre elles, à condition que le Secrétariat reçoive copie de toutes communications devant être produites au cours de l’instance;
   
   (b) les membres du Tribunal communiquent directement entre eux ; et
   
   (c) les parties peuvent communiquer directement avec le Tribunal si celui-ci lui en fait la demande, à condition que l’autre partie et le Secrétariat reçoivent copie de ces communications.
Proposed AR 4 contains the basic principle, currently in AFR 24, that the Secretariat is the official channel of communications. This distinguishes ICSID from most arbitral institutions, which do not provide this service. In practice, it serves an important role in ensuring the integrity of the process, equality of treatment of the parties, avoidance of ex parte communications, and fulfilment of the Centre’s mandatory archiving function (see current AFR 28 and proposed AFR 26). When a party files a submission or letter, the Secretariat sends an acknowledgment (with a copy of the incoming correspondence) to both parties, and immediately transmits the filing to the Tribunal by separate communication. The acknowledgement and the transmittal are made on the day the filing is received, or on the following business day when it is received late at night or on the weekend. Concurrently, the filing is saved in the Centre’s archiving system.

The basic principle has certain exceptions for practical purposes. First, the Secretariat does not act as intermediary between the Tribunal members, who may communicate directly with each other. Such communications are confidential and do not form part of the official record of the case. Second, it has become standard for parties to copy each other on all communications sent to the Secretariat, obviating the need for the Secretariat to transmit them to the other party. Hard copies and soft (electronic) copies of submissions and case correspondence are thus usually exchanged directly between the parties. Third, the parties
and the Tribunal usually agree to send hard copy submissions directly to the Tribunal members. This saves time and cost.

155. Sometimes the parties also agree on direct communication with the Tribunal by electronic mail; however, this is less common as there is a risk that sensitive messages are inadvertently copied to an unintended addressee. Proposed AR 4(1) lists these exceptions, and specifies that the Secretariat must in all circumstances be copied on submissions and communications that are introduced into the proceeding, to fulfil the Centre’s depositary role (see proposed AFR 26). The chart below notes the options for routing of communications.

**Routing of Communications – Rule 4**

**RULE 5 – PROCEDURAL LANGUAGES, TRANSLATION AND INTERPRETATION**

**CURRENT RELATED PROVISIONS:** AFR 30; AR 22

**Rule 5**

Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Tribunal and the Secretariat regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.
(3) Written submissions, observations, supporting documents and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to file any document in both procedural languages.

(4) A document in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Tribunal may require a party to translate any document into both procedural languages. Translation of only the relevant part of a document is sufficient, provided that the Tribunal may require a fuller or a complete translation. If the translation is disputed, the Tribunal may require a certified translation.

(5) Any written communication from the Tribunal or the Secretariat shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal and, where applicable the Secretary-General, shall render orders, decisions, and the Award in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may require interpretation into the other procedural language. The recordings and transcripts of a hearing shall be kept in the procedural language(s) used at the hearing.

(7) The testimony of a witness or an expert in a language other than a procedural language shall be interpreted into the procedural language(s) used at the hearing.

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**Article 5**

**Langues de la procédure, traduction et interprétation**

(1) Les parties peuvent convenir d’utiliser une ou deux langues pour la conduite de procédure. Les parties doivent consulter le Tribunal et le Secrétariat sur l’utilisation d’une langue qui n’est pas une langue officielle du Centre.

(2) Si les parties ne se mettent pas d’accord sur la ou les langue(s) de la procédure, chacune d’elles peut choisir l’une des langues officielles du Centre.

(3) Les écritures, observations, documents justificatifs et communications sont déposés dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger d’une partie qu’elle dépose tout document dans les deux langues de la procédure.

(4) Tout document dans une langue autre qu’une langue de la procédure est accompagné d’une traduction dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger d’une partie qu’elle traduise tout document dans les deux langues de la procédure. Il suffit que seule la partie pertinente d’un document soit traduite, étant entendu que le Tribunal peut
exiger une traduction plus complète ou intégrale. Si la traduction est contestée, le Tribunal peut exiger une traduction certifiée conforme.

(5) Toute communication écrite émanant du Tribunal ou du Secrétariat est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal et, le cas échéant, le ou la Secrétaire général(e), rendent des ordonnances, décisions et la sentence dans les deux langues de la procédure, sauf si les parties en conviennent autrement.

(6) Toute communication orale est faite dans une langue de la procédure. Dans une instance où sont utilisées deux langues de procédure, le Tribunal peut exiger une interprétation dans l’autre langue de la procédure. Les enregistrements et transcriptions d’une audience sont effectués dans la ou les langues(s) de la procédure utilisée(s) au cours de l’audience.

(7) La déclaration d’un témoin ou d’un expert dans une langue autre qu’une langue de la procédure fait l’objet d’une interprétation dans la ou les langue(s) de la procédure utilisée(s) au cours de l’audience.

| Regla 5 |
| Idiomas del Procedimiento, Traducción e Interpretación |

(1) Las partes podrán acordar la utilización de uno o dos idiomas en el procedimiento. Las partes consultarán al Tribunal y al Secretariado respecto del uso de un idioma que no sea un idioma oficial del Centro.

(2) Si las partes no acordaran el o los idioma(s) del procedimiento, cada una podrá escoger uno de los idiomas oficiales del Centro.

(3) Los escritos, observaciones, documentos de respaldo y comunicaciones se presentarán en un idioma del procedimiento. En un procedimiento que tenga dos idiomas del procedimiento, el Tribunal podrá solicitar a una parte que presente cualquier documento en ambos idiomas del procedimiento.

(4) Un documento redactado en un idioma que no sea un idioma del procedimiento será acompañado de una traduccion a un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento, el Tribunal podrá solicitar a una parte que traduzca cualquier documento a ambos idiomas del procedimiento. Será suficiente que se traduzcan solamente las partes pertinentes de un documento; sin embargo, el Tribunal podrá solicitar una traducción más amplia o completa del documento. El Tribunal podrá solicitar una traducción certificada en caso de que se impugne la traducción.

(5) Cualquier comunicación escrita de parte del Tribunal o del Secretariado deberá estar redactada en un idioma del procedimiento. En un procedimiento con dos idiomas del
procedimiento, el Tribunal y, cuando corresponda, el o la Secretario(a) General, emitirán resoluciones, decisiones y el laudo en ambos idiomas del procedimiento, salvo acuerdo en contrario de las partes.

(6) Cualquier comunicación oral deberá realizarse en un idioma del procedimiento. En un procedimiento con dos idiomas del procedimiento el Tribunal podrá solicitar la interpretación al otro idioma del procedimiento. Las grabaciones y transcripciones de una audiencia se realizarán en el o los idioma(s) del procedimiento utilizado(s) en la audiencia.

(7) El testimonio de un o una testigo o un o una perito(a) en un idioma que no sea un idioma del procedimiento será interpretado al o a los idioma(s) del procedimiento utilizado(s) en la audiencia.

156. Proposed AR 5 merges and revises current AR 22 and AFR 30. It deals with all matters concerning the language to be employed in the proceeding, including the choice of language, translation of documents and interpretation at hearings.

157. The ICSID Convention, Regulations and Rules are drafted in English, French and Spanish, all three texts being equally authentic. The parties often agree to use just one of these languages in the proceeding, and may also agree to use another, either official or non-official, language in the proceeding (“procedural language(s)”). Proposed AR 5(1) provides that the selection of a non-official language is subject to consultation with the Tribunal and the Secretariat, to ensure that the Tribunal can work and the Secretariat can assist in that language. At present, the Secretariat is proficient in 25 languages.

158. Proposed AR 5(2) provides that where parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre (current AR 22). Many ICSID cases involve two procedural languages, with English and Spanish being the most common combination.

159. Using multiple languages necessarily increases the cost of the proceeding and may cause delay, as many documents, including the Tribunal’s decisions, orders and the Award, need to be issued in both procedural languages. In practice, the parties and the Tribunal try to limit the administrative and financial burden resulting from a bilingual proceeding, especially in the first procedural order (see draft Procedural Order No. 1). This largely depends on the language capacity of the Tribunal members and the parties. For example, the parties usually agree that the Tribunal and Secretariat may communicate in the procedural language of their choice in routine administrative or procedural correspondence.

160. If all Tribunal members have working knowledge of the procedural languages selected by the parties, the parties typically also agree that their submissions (including written submissions, expert opinions, witness statements, and all supporting documents) may be filed in the procedural language of their choice. However, if an arbitrator is not proficient
in both procedural languages, a translation must be provided by the parties, even if the parties can work in both languages.

161. The parties often agree that translations may be delivered later than the scheduled filing date, and the time required for producing translations is taken into account in the procedural calendar of the case (see proposed AR 34(4)). The parties usually also agree that each party pays for the translation of its own submissions, and the parties share the cost of translation of Tribunal orders, decisions and the Award, subject to the Tribunal’s ultimate decision on how to allocate costs.

162. In spite of its considerable impact on costs, it is vital to continue to offer the option of bilingual proceedings in view of the Centre’s official languages, the language capacities of arbitrators, counsel and parties, and the geographic spread of ICSID’s membership. At the same time, the Centre wishes to promote techniques for reducing costs arising from the use of multiple procedural languages, and proposes to reflect some of these practices in the revised Rules.

163. **First**, it proposes to invite parties to indicate their preferred procedural language before the appointment of arbitrators, so that the parties can consider candidates with the necessary language skills (see proposed IR 3).

164. **Second**, proposed AR 5(3) allows the parties to file submissions in the procedural language of their choice, and the Tribunal may require translations into the other procedural language when necessary. As mentioned above, a translation is necessary when a Tribunal member is not proficient in a procedural language, or when the other party (or its counsel) is at a linguistic disadvantage.

165. **Third**, proposed AR 5(4) specifies that if a document filed in the proceeding is not in a procedural language, it must be accompanied by a translation to a procedural language, and translated into both procedural languages if the Tribunal so requires. However, the parties need not translate the full document and the translation need not be certified, unless the Tribunal orders otherwise. This typically occurs when the other party disputes the translation or claims that the translated part is misleading given the contents of the remaining part of the document.

166. **Fourth**, proposed AR 5(5) and 5(6) allow the Tribunal and the Secretary-General to communicate with the parties in any procedural language, except that all decisions, orders and the Award must be rendered in both procedural languages unless the parties agree otherwise.

167. **Fifth**, proposed AR 5(6) allows the parties to use any procedural language at a hearing, subject to interpretation into the other procedural language as required. If both procedural languages are used at the hearing, full transcripts will be made in both (including interpretations into those languages).

168. **Sixth**, proposed AR 5(7) specifies that if testimony at a hearing is given in a language other than a procedural language, it shall be interpreted into both procedural languages used at
the hearing. The parties may nevertheless agree to limit the use of interpretation and thus the associated costs.

**Rule 6 – Correction of Errors and Deficiencies**

<table>
<thead>
<tr>
<th>Current Related Provisions: AFR 24; AR 25</th>
</tr>
</thead>
</table>

**Rule 6**  
**Correction of Errors and Deficiencies**

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

2. The Secretariat may request that a party correct any deficiency in a filing, at the party’s own cost.

**Article 6**  
**Correction des erreurs et insuffisances**

1. Une partie peut corriger une erreur accidentelle dans les écritures, observations, documents justificatifs ou communications à tout moment avant que la sentence ne soit rendue, avec l’accord de l’autre partie ou l’autorisation du Tribunal.

2. Le Secrétariat peut demander qu’une partie remédie à une insuffisance dans un dépôt, aux frais de celle-ci.

**Regla 6**  
**Corrección de Errores y Deficiencias**

1. Una parte podrá corregir cualquier error accidental en un escrito, observación, documento de respaldo o comunicación en cualquier momento antes de que se dicte el laudo, si cuenta con el acuerdo de la otra parte o con la autorización del Tribunal.

2. El Secretariado podrá solicitar que una parte corrija cualquier deficiencia en una presentación por cuenta propia de la parte.

Proposed AR 6 merges current AFR 24(2) on deficiencies and current AR 25 on accidental errors in submissions filed by the parties. Errors such as mislabelling of exhibits, miscalculations, misnomers, typographical errors, and the like are common. Typically,
these are discovered shortly after a submission has been filed and the relevant party seeks to introduce an errata sheet or to file a corrected submission. This is almost always allowed by the Tribunal for inadvertent errors. This Rule remains the same in proposed AR 6, with minor language changes.

170. When the Secretary of the Tribunal notices a deficiency in a filing (e.g., an omission to translate a document or missing exhibits), this is brought to the attention of the party filing the submission, which is invited to correct the deficiency. Proposed AR 6(2) is a simplified version of AFR 24(2), as the requirements for documents introduced into the proceeding have been streamlined (e.g., there is no certification required of copies or of translations) and there has rarely been any issue with deficiencies. If a filing is deficient, the Secretariat may, as in the past, correct the deficiency at the cost of the party concerned.

RULE 7 – CALCULATION OF TIME LIMITS

CURRENT RELATED PROVISIONS: AFR 29; AR 26

Rule 7
Calculation of Time Limits

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

(a) of the relevant notice;

(b) on which the Tribunal announces the period; or

(c) on which the procedural step starting the period is taken.

(2) A time limit expires at 11:59 p.m. at the seat of the Centre on the relevant date. Where the end of a time limit falls on a Saturday, Sunday, or a holiday observed by the Secretariat, it shall be satisfied if the relevant step is taken or the relevant document is received by the Secretariat on the subsequent business day.

Article 7
Calcul des délais

(1) Tout délai exprimé sous la forme d’une durée est calculé à compter du lendemain de la date :

(a) de la notification concernée ;

(b) à laquelle le Tribunal annonce cette durée ; ou
(c) à laquelle l’acte d’ordre procédural qui fait courir le délai est accompli.

(2) Un délai expire à 23h59 au siège du Centre à la date concernée. Dans le cas où un délai expire un samedi, un dimanche ou un jour férié observé par le Secrétariat, il est respecté si l’acte concerné est accompli, ou si le document concerné est reçu par le Secrétariat, le jour ouvré suivant.

Regla 7
Cálculo de los Plazos

(1) Cualquier plazo expresado como período de tiempo se calculará desde el día posterior a la fecha:

(a) de la notificación pertinente;

(b) en la que el Tribunal anuncie el período; o

(c) en la que se inicie la etapa procesal que comienza el período.

(2) Un plazo vence a las 11:59 p.m. en la sede del Centro en la fecha pertinente. Cuando el final de un plazo coincida con un sábado, domingo, o un feriado observado por el Secretariado, será suficiente que la actuación pertinente se realice o el Secretariado reciba el documento pertinente el día hábil siguiente.

171. Time limits are currently addressed in AFR 29 and AR 26, which concern time limits prescribed by the Convention and the Rules, or fixed by the Secretary-General or the Tribunal. A time limit will be satisfied if the relevant submission is received by electronic means by 11:59 p.m. at the seat of the Centre (in Washington D.C.) on the day the submission is due.

172. Proposed AR 7(1) confirms that time periods under this provision are calculated from the day after the date when the relevant event was notified to the parties (e.g., the registration of a Request for arbitration, the constitution of a Tribunal or the dispatch of the Award) or from the day after a procedural step triggering the period is taken.

173. Proposed AR 7(2) recalls the current Rule that a time limit not falling on a business day is satisfied if the submission is received by the Secretary-General on the subsequent business day, taking into account holidays observed by the ICSID Secretariat, which are announced on ICSID’s website.
Rule 8

Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General

(1) The parties may agree to extend a time limit fixed by the Secretary-General or specified by the Convention or these Rules if such time limit is not mandatory under the Convention.

(2) Any step taken by the parties after expiry of a time limit fixed by the Secretary-General or specified by the Convention or these Rules shall be disregarded, unless the Secretary-General or the Tribunal, as applicable, concludes that there are special circumstances justifying the delay.

(3) Where these Rules prescribe time limits for orders, decisions and the Award, the Tribunal, or the Chairman, where applicable, shall use best efforts to meet those time limits. If special circumstances arise which prevent the Tribunal from complying with a time limit, it shall advise the parties of the reason for delay and the date when it anticipates the order, decision or Award will be delivered.
174. Proposed AR 8 concerns time limits specified in the Convention and the AR, for example, the time limit to file an objection that the dispute is manifestly without legal merit (current AR 41(5)), the period of grace granted to a defaulting party (current AR 42), and the time limit to file post-Award remedy applications (Convention Art. 50-52, current AR 49 and 50). The Rule also concerns time limits fixed by the Secretary-General, for example, a briefing schedule fixed to file observations on a request for provisional measures before the Tribunal is constituted under current AR 39 (see proposed AR 50).

175. Because these time limits are not fixed by the Tribunal, they cannot be extended by the Tribunal. The parties may, however, agree to extend the time limits in the AR, as long as these are not mandatory under the Convention. The mandatory time limits specified in the Convention and reflected in the Arbitration Rules are: Art. 49(2) and current AR 49(5)/proposed AR 62(1) (a request for rectification of the Award and supplementary decision to be made within 45 days after the award was rendered); Art. 51(2)) and current AR 50(3)(a)/proposed AR 63(3) (an application for revision of the Award to be made within 90 days after discovery of a fact of such a nature as decisively to affect the Award and in any event within three years after the Award was rendered); and Art. 52(2) and current AR 50(3)(b)/proposed AR 63(4) (an application for annulment of the Award to be made within 120 days after the award was rendered, or within 120 days after discovery of corruption if annulment is requested on that ground, and in any event within three years after the Award was rendered). Time limits fixed by the Secretary-General may also be
extended by agreement of the parties. This applies in practice and is now codified in proposed AR 8(1).

176. If the parties do not extend a time limit that they could extend and fail to take a step within a time limit prescribed by the Convention or the Rules, or fixed by the Secretary-General, the late step is disregarded. This corresponds to the current Rules and practice and is now contained in proposed AR 8(2).

177. Proposed AR 8(3) addresses the time limits applicable to Tribunal orders, decisions and the Award. The WP proposes a number of time limits for the Tribunal (e.g., to issue a decision on an objection that the claim manifestly lacks legal merit within 60 days after the last submissions pursuant to proposed AR 35(2)(c)). However, the WP recognizes that flexibility is desirable to address the circumstances of each case. For example, the length of the parties’ pleadings and complexity of the issues. As well, it would be counter-productive to have an “absolute” time for such decisions and Award and potentially nullify the entire proceeding if the Tribunal failed to meet the time frame. AR 8(3) therefore proposes a “best efforts” obligation for Tribunals to comply with time limits for orders, decisions and the Award. If a Tribunal in special circumstances is prevented from complying with a time limit, it must advise the parties of the specific circumstances causing the delay and the anticipated date of delivery of the order, decision or Award.

178. It should be noted that proposed AR 34(4) expects the parties and the Tribunal to include the timing of the Tribunal’s anticipated decisions and orders in the procedural timetable. This will help the Tribunal to reserve adequate time for deliberations and for drafting orders, decisions and the Award and the parties to estimate the overall length of the case.

**RULE 9 – TIME LIMITS FIXED BY THE TRIBUNAL**

**CURRENT RELATED PROVISIONS: AR 26**

**Rule 9**

**Time Limits Fixed by the Tribunal**

(1) The Tribunal shall fix time limits for completion of each step in the proceeding, other than time limits specified by the Convention or these Rules.

(2) The Tribunal may extend a time limit it fixed upon reasoned application by a party made prior to the expiry of the time limit. The Tribunal may delegate this power to its President.

(3) The Tribunal shall disregard any step taken after expiry of a time limit it fixed unless it concludes that there are special circumstances justifying the delay.
### Article 9
**Délais fixés par le Tribunal**

1. Le Tribunal fixe les délais pour l’accomplissement de chaque étape de l’instance, autres que les délais prévus par la Convention ou le présent Règlement.

2. Le Tribunal peut prolonger un délai qu’il a fixé, sur demande motivée présentée par une partie avant l’expiration du délai. Le Tribunal peut déléguer ce pouvoir à son Président.

3. Le Tribunal ne tient pas compte d’un acte accompli après l’expiration d’un délai qu’il a fixé, sauf s’il conclut que des circonstances particulières justifient le retard.

### Regla 9
**Plazos Fijados por el Tribunal**

1. El Tribunal fijará los plazos para llevar a cabo cada etapa del procedimiento que no hayan sido establecidos por el Convenio o estas Reglas.

2. El Tribunal podrá extender un plazo fijado por este, previa solicitud fundada de una parte presentada antes del vencimiento del plazo. El Tribunal podrá delegar esta facultad a su Presidente(a).

3. El Tribunal tendrá por no presentada toda actuación realizada después del vencimiento de un plazo fijado por este, salvo que concluya que existen circunstancias especiales que justifican la demora.

179. Proposed AR 9 concerns time limits fixed by the Tribunal and is currently in AR 26.

180. Proposed AR 7(2) contains a default rule clarifying that a time limit falling on a weekend or holiday observed by the Secretariat shall be satisfied if the relevant filing is received or procedural step is taken on the next business day. However, the parties and the Tribunal may agree on a time limit falling on a weekend or holiday. This may be important for urgent matters, for example, to address a procedural issue before a hearing. In practice, the parties are given the opportunity to propose and comment on time limits fixed by the Tribunal and can therefore consider all circumstances in scheduling written submissions and hearings.

181. Under proposed AR 9(2), the Tribunal may extend a time limit upon application of either party or the parties jointly, if such application is made prior to the expiry of the time limit. Requests for extension of time are common, and are usually granted if the parties agree on the extension or if the request is justified in the circumstances. The proposed Rule adds to current AR 26 that the application must be reasoned, and it is expected that a Tribunal will
consider any request for extension in light of the duty to act expeditiously in proposed AR 11(3). The parties and Tribunals should consider the effect of a request for extension of time on the procedural calendar, especially when the extension might affect hearing dates. This could cause significant delay, as it is often difficult to find common availability for arbitrators and counsel for hearings.

182. Under proposed AR 9(3), if a party does not request an extension before the time limit expires, the request is disregarded unless there are special circumstances that justify the delay and the Tribunal decides to accept the submission. As indicated in proposed AR 3(2), all supporting documents must also be filed within the time limit, or they risk being disregarded. Therefore, a party that anticipates difficulty in satisfying a time limit should request an extension before the expiry (see also current AR 42 and proposed AR 53 on default).

183. The chart below summarizes how parties can obtain extensions of time limits in proceedings.

**Extension of Time Limits – Rules 8-9**

<table>
<thead>
<tr>
<th>Time Limit Set By:</th>
<th>How Can It Be Extended?</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICSID Convention - mandatory articles</td>
<td>No extension</td>
</tr>
<tr>
<td>ICSID Convention - non-mandatory articles</td>
<td>By agreement of the parties before expiry (Rule 8(1))</td>
</tr>
<tr>
<td>ICSID SG</td>
<td>By agreement of the parties after expiry if SG/Tribunal concludes that special circumstances exist (Rule 8(2))</td>
</tr>
<tr>
<td>Tribunal</td>
<td>Before expiry based on a reasoned application (Rule 9(2))</td>
</tr>
<tr>
<td></td>
<td>After expiry if Tribunal concludes that special circumstances exist (Rule 9(3))</td>
</tr>
</tbody>
</table>
RULE 10 – WAIVER

CURRENT RELATED PROVISIONS: Convention Art. 45; AR 27

Rule 10
Waiver

Subject to Article 45 of the Convention, if a party knows or should have known that an applicable rule, agreement of the parties, or any order or decision of the Tribunal or the Secretary-General has not been complied with, and does not promptly object, then that party shall be deemed to have waived its right to object to that non-compliance.

Article 10
Renonciation à un droit

Sous réserve de l’article 45 de la Convention, si une partie a ou devrait avoir connaissance du fait qu’une disposition applicable d’un règlement, un accord des parties ou une ordonnance, ou une décision du Tribunal ou du ou de la Secrétaire général(e) n’a pas été respecté et qu’elle ne fait pas valoir d’objection dans les plus brefs délais, cette partie est réputée avoir renoncé à son droit d’objecter à ce non-respect.

Regla 10
Renuncias

Sujeto a lo establecido por el Artículo 45 del Convenio, si una parte sabe, o debería haber sabido, que no se ha observado alguna regla aplicable, algún acuerdo de las partes, o alguna resolución o decisión del Tribunal, o del o de la Secretario(a) General, y no objeta con prontitud, entonces se considerará que esa parte ha renunciado a su derecho a objetar dicho incumplimiento.

184. Proposed AR 10 is current AR 27 with minor language revisions.
## Rule 11 — General Duties

**CURRENT RELATED PROVISIONS:** AR 34

<table>
<thead>
<tr>
<th>Rule 11</th>
<th>Obligations générales</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.</td>
<td></td>
</tr>
<tr>
<td>(2) The Tribunal shall consult with the parties prior to making an order or decision authorized by these Rules to be made by a Tribunal on its own initiative.</td>
<td></td>
</tr>
<tr>
<td>(3) The Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.</td>
<td></td>
</tr>
<tr>
<td>(4) The parties shall cooperate in implementing the Tribunal’s orders and decisions.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regla 11</th>
<th>Obligaciones Generales</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) El Tribunal deberá tratar a las partes de manera igualitaria y brindarle a cada parte una oportunidad razonable de plantear su postura.</td>
<td></td>
</tr>
<tr>
<td>(2) El Tribunal consultará con las partes antes de adoptar de oficio una resolución o decisión autorizada por estas Reglas.</td>
<td></td>
</tr>
</tbody>
</table>
Duty to Treat Parties Equally and the Parties’ Right to be Heard. Proposed AR 11(1) confirms the application of certain fundamental duties under the AR: equality of treatment of the parties and the parties’ right to be heard. It adopts wording similar to Article 17(1) of the UNCITRAL Arbitration Rules (2010).

Typically, a Tribunal must give a party a reasonable opportunity to file observations when the other party files a request or submission. This includes procedural requests, such as a request for an extension of a time limit (unless there are exceptional circumstances requiring a Tribunal decision before it obtains the other party’s comments). The interpretation of what is “a reasonable opportunity to present its case” will depend on the circumstances of each case. For example, the Tribunal may direct the parties that it is sufficiently briefed and does not wish to receive any further submissions.

As a result of the proposed amendment, the WP proposes not to restate in each rule that a party has the right to file observations, with the exception of those provisions which include a time limit for filing the observations.

Duty to Consult with the Parties. Proposed AR 11(2) reflects current practice and avoids the need to reiterate the Tribunal’s duty to consult with the parties prior to taking a step authorized by these Rules to be taken on its own initiative. Examples of such Rules include proposed AR 36 on preliminary objections, proposed AR 37 on bifurcation, proposed AR 40 on production of documents, proposed AR 43 on site visits, proposed AR 45 on provisional measures or proposed AR 51 on security for costs. Tribunals will typically consult the parties before they take any procedural step on their own initiative, except when it is a minor procedural matter.

Duty to Act Expeditiously. Proposed AR 11(3) introduces a general duty to act in an expeditious and cost-effective manner. This is a new Rule for parties and Tribunal members, who share the responsibility of ensuring timeliness and cost-efficiency.

It is expected that the Tribunal and the parties will cooperate to achieve the objective of this new Rule through pro-active case management. The Tribunal and the parties should discuss any appropriate means to expedite a case early in the process. The ICSID Secretariat will also issue a guidance note on case management techniques.

Duty to Cooperate to Implement Decisions. Proposed AR 11(4) is a new provision modelled on current AR 34(3). The parties have a generally recognized duty to cooperate with the Tribunal deriving from their consent to arbitration. Under current AR 34(4), if a party fails to comply with a Tribunal order to produce evidence, the Tribunal must take
note of this failure and the reasons for the failure. While current AR 34(3) is specific to the production of evidence, the general duty in proposed AR 11(4) applies to all aspects of the procedure. In practice, Tribunals take into consideration the conduct of the parties during the proceeding in deciding on the allocation of costs (see proposed AR 19(4)).

**Rule 12 – Orders, Decisions and Agreements**

**CURRENT RELATED PROVISIONS:** AR 19, 20

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**Rule 12**

**Orders, Decisions and Agreements**

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

(2) Orders and decisions may be taken by any appropriate means of communication and may be signed by the President on behalf of the Tribunal, unless the parties agree otherwise.

(3) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it conforms with the Convention and the Administrative and Financial Regulations.

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**Article 12**

**Ordonnances, décisions et accords**

(1) Le Tribunal rend les ordonnances et les décisions requises pour la conduite de la procédure.

(2) Les ordonnances et les décisions peuvent être rendues par tous moyens de communication appropriés et peuvent être signées par le ou la Président(e) pour le compte du Tribunal, sauf si les parties en conviennent autrement.

(3) Le Tribunal applique tout accord des parties sur les questions de procédure, pour autant que celui-ci soit conforme à la Convention et au Règlement administratif et financier.

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**Regla 12**

**Resoluciones, Decisiones y Acuerdos**

(1) El Tribunal emitirá las resoluciones y decisiones necesarias para la tramitación del procedimiento.
(2) Las resoluciones y decisiones podrán ser emitidas por cualquier medio de comunicación apropiado y podrán estar firmadas por el o la Presidente(a) en nombre y representación del Tribunal, salvo acuerdo en contrario de las partes.

(3) El Tribunal aplicará cualquier acuerdo de las partes sobre cuestiones procesales en la medida en que cumpla con lo establecido en el Convenio y en el Reglamento Administrativo y Financiero.

192. Proposed AR 12 merges current AR 19 and 20(2) with minor language modifications. The parties are free to agree on any procedural provisions as long as they conform with the ICSID Convention and the Administrative and Financial Regulations. Typically, procedural agreements are reached at the first session of the Tribunal held pursuant to proposed AR 34, but they can be made at any time.

193. Proposed AR 12(2) reflects modern practice and specifies that there need not be an in-person quorum for a Tribunal decision, which can be taken by any means of communication. In practice, many decisions are taken by electronic mail exchanges between the Tribunal members, and the decision (by consensus or by majority) is signed by the President of the Tribunal on behalf of the full Tribunal once all members have had the opportunity to state their views. The exception is the Award, which must be signed by all Tribunal members who voted for it (see e.g., Art. 48(2) of the Convention and current AR 48(1)).

**RULE 13 – WRITTEN SUBMISSIONS AND OBSERVATIONS**

**CURRENT RELATED PROVISIONS: AR 31**

**Rule 13**

**Written Submissions and Observations**

(1) The parties shall file the following written submissions, with any supporting documents, within the time limits fixed by the Tribunal:

(a) a memorial by the requesting party, subject to paragraph (2);

(b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal finds it necessary:

(c) a reply by the requesting party; and
(d) a rejoinder by the other party.

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

(3) A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments, and the request for relief. A reply and rejoinder shall be limited to responding to the previous written submission.

(4) The Tribunal shall grant leave to file unscheduled written submissions, observations or supporting documents upon a timely and reasoned application and only if these are necessary in view of all relevant circumstances.

Article 13
Écritures et observations

(1) Les parties déposent les écritures suivantes avec tous documents justificatifs dans les délais fixés par le Tribunal :

(a) un mémoire de la partie requérante, sous réserve du paragraphe (2) ;

(b) un contre-mémoire de l’autre partie ;

et, si les parties en conviennent ou le Tribunal le juge nécessaire :

(c) une réponse de la partie requérante ; et

(d) une réplique de l’autre partie.

(2) La partie requérante a la faculté de demander que la requête d’arbitrage soit considérée comme le mémoire.

(3) Le mémoire contient un exposé des faits pertinents, du droit et des arguments, ainsi que les demandes. Le contre-mémoire contient un exposé des faits pertinents, y compris l’admission ou la contestation des faits exposés dans le mémoire et tous faits supplémentaires nécessaires, un exposé du droit en réponse au mémoire, les arguments et les demandes. La réponse et la réplique se limitent à répondre aux écritures précédentes.

(4) Le Tribunal autorise le dépôt non prévu d’écritures, d’observations ou de documents justificatifs si une demande motivée à cet effet est présentée en temps voulu et
uniquement si ceux-ci sont nécessaires au regard de l’ensemble des circonstances pertinentes.

Regla 13
Escritos y Observaciones

(1) Las partes presentarán los siguientes escritos, junto con cualquier documento de respaldo, dentro de los plazos fijados por el Tribunal:

(a) un memorial de la parte solicitante, sujeto a lo dispuesto en el párrafo (2);
(b) un memorial de contestación de la otra parte;

y si las partes lo acordaran o si el Tribunal lo estimara necesario:

(c) una réplica de la parte solicitante; y
(d) una dúplica de la otra parte.

(2) La parte solicitante podrá elegir que la solicitud de arbitraje se considere como el memorial.

(3) El memorial deberá contener una relación de los hechos pertinentes, el derecho, los argumentos y petitorios. El memorial de contestación contendrá una relación de los hechos pertinentes, lo cual incluye la aceptación o negación de los hechos declarados en el memorial y cualesquiera hechos adicionales pertinentes, una declaración del derecho en respuesta al memorial, los argumentos y petitorios. La réplica y la dúplica se limitarán a responder al último escrito presentado.

(4) El Tribunal concederá autorización para presentar escritos, observaciones, o documentos de respaldo fuera del calendario previa solicitud oportuna y fundada, y solo si resultan necesarios en vista de todas las circunstancias pertinentes.

194. Proposed AR 13 is current AR 31 with some modifications.

195. First, proposed AR 13(1) sets out the basic written submissions on any claim.

196. Second, proposed AR 13(2) allows a requesting party filing a Request for arbitration to consider that pleading as the memorial for the purposes of proposed AR 13(1)(a). A requesting party may thus elect to file a Request for arbitration as a full memorial, which would reduce the time in the procedural calendar. Paragraph (2) of current AR 31 is deleted because it is unnecessary and has not been used to date.
197. **Third**, proposed AR 13(3) restricts the contents of a reply and rejoinder to submissions responsive to the last previous pleading. The introduction of new facts or arguments that are not responsive to the previous pleading would need approval by the other party or the Tribunal. Written submissions must be responsive to the prior submission and join issue on the points in dispute.

198. As a result, written submissions address the following:

**Written Submissions – Rule 13**

199. **Fourth**, proposed AR 13(4) deals with unscheduled submissions and provides that these will only be admitted upon a timely and reasoned application, if the Tribunal finds that they are necessary in view of all relevant circumstances.

**RULE 14 – CASE MANAGEMENT CONFERENCE**

**CURRENT RELATED PROVISIONS:** AR 21

**Rule 14**

**Case Management Conference**

With a view to expediting the proceeding, the Tribunal may convene a case management conference with the parties at any time to:

(a) identify uncontested facts;
(b) narrow the issues in dispute; and

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

**Article 14**

**Conférence sur la gestion de l’instance**

En vue d’accélérer le déroulement de l’instance, le Tribunal peut convoquer à tout moment une conférence de gestion de l’instance avec les parties pour :

(a) identifier les faits dont l’existence n’est pas contestée ;

(b) circonscrire les questions faisant l’objet du différend ; et

(c) traiter toute autre question de procédure ou de fond en relation avec la résolution du différend.

**Regla 14**

**Conferencia Relativa a la Gestión del Caso**

Con miras a que el procedimiento pueda conducirse con mayor celeridad, el Tribunal podrá convocar en cualquier momento una conferencia con las partes relativa a la gestión del caso, con el fin de:

(a) identificar los hechos no controvertidos;

(b) delimitar los asuntos en disputa; y

(c) abordar cualquier otra cuestión procesal o sustantiva relacionada con la resolución de la diferencia.

200. Proposed AR 14 is based on current AR 21(2) concerning a pre-hearing conference to consider the issues in dispute with a view to reaching a settlement. The scope of the proposed provision is expanded to identify uncontested facts, narrow the issues in dispute or address issues that the Tribunal deems relevant for the resolution of the dispute.

201. The proposed rule empowers parties and Tribunals to actively manage the case to achieve an expeditious proceeding. Case management meetings can be convened at any time during the process, or multiple times as useful. For example, a Tribunal could convene a case management conference after the first round of pleadings to guide the parties with regard to the scope, subject matters and questions to be covered in the parties’ second round of pleadings. This would help the parties to focus their pleadings.
Rule 15
Hearings

(1) There shall be one or more hearings before the Tribunal, unless the parties agree otherwise.

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

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

(4) Any member of the Tribunal may put questions to the parties and ask for explanations at any time during a hearing.

Article 15
Audiences

(1) Le Tribunal tient une ou plusieurs audiences, sauf si les parties en conviennent autrement.

(2) Le ou la Président(e) du Tribunal fixe la date, l’heure et les modalités de la tenue des audiences, après consultation des autres membres du Tribunal et des parties.

(3) Si une audience doit se tenir en personne, elle peut se tenir en tout lieu convenu entre les parties après consultation du Tribunal et du Secrétariat. Si les parties ne se mettent pas d’accord sur le lieu d’une audience, celle-ci se tient au siège du Centre, conformément à l’article 62 de la Convention.

(4) Tout membre du Tribunal peut poser des questions aux parties et leur demander des explications à tout moment au cours d’une audience.
Regla 15
Audiencias

(1) Se celebrarán una o más audiencias ante el Tribunal, salvo acuerdo en contrario de las partes.

(2) El o la Presidente(a) del Tribunal determinará la fecha, la hora y la modalidad de celebración de las audiencias, previa consulta a los otros miembros del Tribunal y a las partes.

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

(4) Cualquier miembro del Tribunal podrá interrogar a las partes y solicitarles explicaciones en cualquier momento durante una audiencia.

202. Proposed AR 15 is current AR 13 and 14 with revised content. The current AR refer to sittings of the Tribunal, consisting of hearings and deliberations. In addition, the current AR refer to “sessions,” which consist of one of more “sittings”. In arbitration practice, the term “sitting” is rarely used and has no significance except for the rule on quorum contained in current AR 14(2) (see below proposed AR 17). Therefore, the WP proposes to refer to the first session held pursuant to proposed AR 34 as the “first session” and any subsequent sessions, hearings, meetings or sittings between the parties and the Tribunal as a “hearing”.

203. Proposed AR 15(1) provides that there shall be one or more hearings except when the parties agree otherwise. This principle derives from current AR 29. In practice, it is rare for parties to consent to the Tribunal dealing with the issues before it on the basis of the written pleadings only.

204. Proposed AR 15(2) provides that the President of the Tribunal determines the date, time and method of holding hearings, after consultation with the other members and the parties. Shorter hearings on procedural matters and the first session are increasingly held by telephone or video conference, which reduces costs and increases efficiency. However, hearings with oral argument, examination of witnesses and experts, such as hearings on jurisdiction and on the merits, are almost always held in person. In-person hearings could also include a shorter hearing on an objection that a claim manifestly lacks legal merit, on bifurcation, on provisional measures and on stay of enforcement. Typically, if a party wishes to hold an in-person hearing on such matters, the Tribunal or Committee accommodates the request. The below table shows the number and type of hearings held in FY2017.
Number and Types of Hearings -- FY2017

<table>
<thead>
<tr>
<th>First Session</th>
<th>Hearings</th>
<th>Pre-hearing Organizational Meeting</th>
<th>Other Procedural Meetings/Sessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>53</td>
<td>83</td>
<td>38</td>
<td>8</td>
</tr>
</tbody>
</table>

205. Under the current AR, the parties may agree on the place(s) where hearings will be held, after consulting with the Tribunal. This principle is reflected in Art. 63 of the Convention and is now included in proposed AR 15(3).

206. As long as the place of proceedings is in a Contracting State, it has no legal significance in ICSID Convention proceedings and its only relevance is to determine where hearings will be held if the parties do not otherwise agree. In practice, ICSID hearings are held worldwide at World Bank Group offices or at any hearing facility, provided that adequate logistical arrangements can be made. Most hearings are held by telephone or video conference. A mixed method may also be adopted, for example, with the President physically present with the parties and the Tribunal Secretary, and the co-arbitrators joining by telephone or video conference. The graph below shows the location and method of hearings held in FY2017.

Location & Method of ICSID Hearings – FY2017

207. Art. 62 of the Convention provides that hearings must be held at the seat of the Centre in Washington, D.C. if the parties do not agree to hold hearings elsewhere. Comments received suggest that users and Member States would prefer that the Tribunal be given full discretion to select the most convenient and cost-efficient venue in view of all the circumstances of the case rather than mandating a specific place as a default hearing.
location. This would require a Convention amendment and unanimous approval of all Member States and might be considered in the future.

208. Proposed AR 15(4) is current AR 32(3) with minor language modifications. The reference to agents, counsel and advocates is deleted as it is understood from proposed AR 2 (Meaning of Party and Party Representation).

**RULE 16 – DELIBERATIONS**

**CURRENT RELATED PROVISIONS: AR 14, 15**

<table>
<thead>
<tr>
<th>Rule 16</th>
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<tbody>
<tr>
<td><strong>Deliberations</strong></td>
</tr>
<tr>
<td>(1) The deliberations of the Tribunal shall take place in private and remain confidential.</td>
</tr>
<tr>
<td>(2) The Tribunal may deliberate at any place it considers convenient.</td>
</tr>
<tr>
<td>(3) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.</td>
</tr>
<tr>
<td>(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.</td>
</tr>
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<table>
<thead>
<tr>
<th>Article 16</th>
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<tbody>
<tr>
<td><strong>Délibérations</strong></td>
</tr>
<tr>
<td>(1) Les délibérations du Tribunal ont lieu à huis clos et demeurent confidentielles.</td>
</tr>
<tr>
<td>(2) Le Tribunal peut délibérer en tout lieu qu’il juge pratique.</td>
</tr>
<tr>
<td>(3) Seuls les membres du Tribunal prennent part à ses délibérations. Aucune autre personne n’est admise sauf si le Tribunal en décide autrement.</td>
</tr>
<tr>
<td>(4) Le Tribunal délibère sur toute question devant être tranchée immédiatement après les dernières écritures ou plaidoiries sur cette question.</td>
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<tr>
<th>Regla 16</th>
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<tbody>
<tr>
<td><strong>Deliberaciones</strong></td>
</tr>
<tr>
<td>(1) Las deliberaciones del Tribunal se realizarán en privado y serán de carácter confidencial.</td>
</tr>
</tbody>
</table>
(2) El Tribunal podrá deliberar en cualquier lugar que estime conveniente.

(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.

209. There are no changes to proposed AR 16(1) and (3) concerning the Tribunal’s deliberations. Tribunal members cannot disclose any part of the deliberations even after the case concludes. This assures their independence.

210. Only the Tribunal members can attend the deliberations, unless they decide to admit another person to assist them (AR 16(2)). In practice, Tribunals and Committees often request the attendance of the Secretary of the Tribunal appointed from ICSID Secretariat staff (see proposed AFR 25).

211. Proposed AR 16(4) requires Tribunals to schedule and reserve time for deliberations on the procedural calendar immediately after the hearing, and paragraph (2) facilitates the Tribunal’s prompt deliberations by recognizing the Tribunal’s ability to deliberate at any convenient location.

212. It is understood from the inherent functions of the President of the Tribunal that the President presides at its deliberations. Therefore, current AR 14(1) is not necessary and has been deleted.

**Rule 17 – Quorum**

**CURRENT RELATED PROVISIONS:** AR 14

*Rule 17 Quorum*

The participation of a majority of the members of the Tribunal shall be required at the first session, hearings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.
### Article 17
**Quorum**

La participation d’une majorité des membres du Tribunal est exigée lors de la première session, des audiences et des délibérations, par tous moyens de communication appropriés, sauf si les parties en conviennent autrement.

### Regla 17
**Quórum**

La participación de la mayoría de los miembros del Tribunal será requerida tanto en la primera sesión como en las audiencias y deliberaciones, por cualquier medio de comunicación apropiado, salvo acuerdo en contrario de las partes.

213. Proposed AR 17 is current AR 14(2) dealing with the quorum of the Tribunal. The proposal reflects the practice that a quorum does not require in-person participation but can be attained by any means of communication, for example, through telephone conference, unless the parties agree otherwise. The quorum requirement is typically discussed at the first session (*see* proposed AR 34(4)(b)).

### Rule 18 – Decisions Taken by Majority Vote

**CURRENT RELATED PROVISIONS:** Convention Art. 48; AR 16

**Rule 18**
**Decisions Taken by Majority Vote**

The Tribunal shall take decisions by a majority of the votes of all its members. Abstention shall count as a negative vote.

**Article 18**
**Décisions du Tribunal**

Le Tribunal prend ses décisions à la majorité des voix de tous ses membres. L’abstention est considérée comme un vote négatif.
Regla 18
Decisiones Tomadas por Mayoría de Votos

El Tribunal adoptará decisiones por mayoría de votos de todos sus miembros. Las abstenciones se contarán como votos en contra.

214. Proposed AR 18 is current AR 16 with minor language modifications. Art. 48(1) of the Convention provides that the Tribunal shall decide questions by a majority of the votes of all its members. Proposed AR 18 reflects this principle, and applies to all decisions, orders and the Award of the Tribunal, irrespective of the subject matter. Tribunal members are expected to deliberate and vote on all matters before the Tribunal. However, if a member does not, the abstention is deemed a negative vote. Abstentions are rare in practice. Instead, negative votes are sometimes expressed through dissents, either in the decision itself or in a separate statement by the dissenting arbitrator.

RULE 19 – PAYMENT OF ADVANCES AND COSTS OF THE PROCEEDING

CURRENT RELATED PROVISIONS: Convention Art. 59, 60, 61; AFR 14; AR 28

Rule 19
Payment of Advances and Costs of the Proceeding

(1) The Tribunal shall determine the portion of the advances payable by each party in accordance with Administrative and Financial Regulation 14(5) to defray the costs of the Tribunal and the Centre in connection with the proceeding.

(2) The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:

   (a) the legal fees and expenses of the parties;

   (b) the fees and expenses of the members of the Tribunal; and

   (c) the administrative charges and direct costs of the Centre.

(3) The Tribunal shall request that each party file a statement of costs before allocating the costs of the proceeding between the parties.

(4) In determining and allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:
(a) the outcome of any part of the proceeding or overall;
(b) the parties’ conduct during the proceeding, including the extent to which they acted in an expeditious and cost-effective manner;
(c) the complexity of the issues; and
(d) the reasonableness of the costs claimed.

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

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

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**(Article 19)**

**Paiement d’avances et frais de procédure**

(1) Le Tribunal détermine la quote-part des avances dues par chaque partie conformément à l’article 14(5) du Règlement administratif et financier pour couvrir les frais du Tribunal et du Centre dans le cadre de l’instance.

(2) Les frais de procédure correspondent à l’ensemble des frais exposés par les parties dans le cadre de l’instance, notamment :

(a) les honoraires et frais d’avocat exposés par les parties ;

(b) les honoraires et frais des membres du Tribunal ; et

(c) les frais administratifs et les frais directs du Centre.

(3) Le Tribunal demande à chaque partie de déposer un état des frais avant de répartir les frais de procédure entre les parties.

(4) Pour déterminer et répartir les frais de procédure, le Tribunal tient compte de l’ensemble des circonstances pertinentes, notamment :

(a) l’issue de toute partie ou de l’ensemble de l’instance ;

(b) la conduite des parties au cours de l’instance, notamment la mesure dans laquelle elles ont agi avec célérité et efficacité en termes de coûts ;

(c) la complexité des questions ; et

(d) le caractère raisonnable des frais réclamés.
Le Tribunal peut rendre à tout moment des décisions intérimaires sur les frais relatifs à quelque partie de l’instance que ce soit.

Le Tribunal s’assure que toutes ses décisions sur les frais sont motivées et font partie intégrante de la sentence.

**Regla 19**

**Pago de Anticipos y Costos del Procedimiento**

(1) El Tribunal determinará la porción de los anticipos que debe pagar cada parte de conformidad con la Regla 14(5) del Reglamento Administrativo y Financiero para sufragar los costos del Tribunal y del Centro en relación con el procedimiento.

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

(a) los honorarios y gastos legales de las partes;

(b) los honorarios y gastos de los miembros del Tribunal; y

(c) los cargos administrativos y costos directos del Centro.

(3) El Tribunal solicitará que cada parte presente una declaración sobre los costos antes de decidir la distribución de los costos del procedimiento entre las partes.

(4) Al momento de determinar y distribuir los costos del procedimiento, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye:

(a) el resultado de cualquier parte del procedimiento o del procedimiento en su totalidad;

(b) la conducta de las partes durante el procedimiento, lo cual incluye la medida en la que hayan actuado de manera expedita y eficaz en materia de costos;

(c) la complejidad de las cuestiones; y

(d) la razonabilidad de los costos reclamados.

(5) El Tribunal podrá en cualquier momento adoptar decisiones provisionales respecto de los costos de cualquier parte del procedimiento.

(6) El Tribunal deberá asegurarse de que todas las decisiones sobre costos sean fundadas y formen parte del laudo.
Chapter VI of the Convention (Art. 59-61) concerns the costs associated with ICSID proceedings. Art. 61(2) of the Convention specifically addresses cost allocation, providing Tribunals with wide discretion to decide this issue. It plainly states that save for party agreement, the Tribunal “shall decide how and by whom” the costs of the proceeding shall be paid.

Aside from granting Tribunals discretion in allocating costs, neither the ICSID Convention nor the current Arbitration Rules provide guidance to Tribunals on how costs should be allocated. In the past, Tribunals tended to allocate costs evenly between the parties. However, Tribunals increasingly allocate costs by taking specific factors into consideration, including the outcome of the proceeding or the behaviour of the parties.

The comments received from States and the public on cost allocation unanimously suggested that the amended rule on cost allocation should provide greater guidance to Tribunals on how and when to allocate costs among parties. Some comments supported the introduction of a presumption that Tribunals allocate costs in accordance with the principle that “costs follow the event”, while others requested that the Centre set out factors to be considered by Tribunals.

Consistent with the role conferred on Tribunals under Art. 61 of the Convention, Tribunals maintain full discretion in allocating costs under proposed AR 19. For this reason, the WP does not propose to mandate the “costs follow the event” principle. However, proposed AR 19 lists factors that Tribunals must consider when exercising discretion to allocate costs, including case outcome.

Proposed AR 19 revises current AR 28 addressing the costs of the proceeding. Proposed AR 19 now encompasses six subparagraphs: paragraph (1) concerns the Tribunal’s power to apportion the advances paid by the parties pursuant to AFR 14; paragraph (2) defines “costs of the proceeding”; paragraph (3) provides that a Tribunal must request a statement of costs from the parties before allocating them; paragraph (4) provides guidance to Tribunals on criteria relevant to the exercise of discretion to allocate costs; paragraph (5) allows interim decisions on costs; and paragraph (6) requires a reasoned decision on costs that ultimately will be part of the Award.

First, proposed AR 19(1), like its predecessor current AR 28(1)(a), permits a Tribunal to decide the portion of the advances to be paid by each party pursuant to proposed AFR 14(5). The advances enable the Centre to pay the costs incurred in connection with a proceeding, including Tribunal members’ fees and expenses, the Centre’s administrative charges and other direct costs. Generally, each party pays one half of the advances. However, upon request of a party and depending on the circumstances of the case, a Tribunal may divide the advances among the parties in a different proportion. Such a request may be made at any stage of a proceeding.

Second, proposed AR 19(2) defines “costs of the proceeding”. The definition derives from Art. 61 of the Convention and establishes that “costs of the proceeding” include: (i) the legal costs and expenses of the parties; (ii) the fees and expenses of the Tribunal; and (iii) the annual administrative charge and other direct costs of the Centre related to a
proceeding. The inclusion in the definition clarifies the costs that Tribunals may allocate. The parties’ legal fees and expenses generally amount to 80% or more of the overall costs of a proceeding.

222. **Third**, proposed AR 19(3) provides for the filing of statements of costs by the parties before the Tribunal’s allocation of the costs of the proceeding. The Tribunal may request statements of costs at any time during the proceeding (see below with regard to interim decisions on costs) and must in any event request them before rendering the Award.

223. **Fourth**, proposed AR 19(4) introduces certain factors as guidance to Tribunals on how to determine the costs of the proceeding and how to allocate those costs. These factors were included in response to comments received from both Member States and the public and reinforce the requirement to act expeditiously and in a cost-effective manner. The proposed rule requires Tribunals to take into account any circumstance that it finds relevant in allocating costs, including certain factors most often relied on by ICSID Tribunals in allocating costs. Tribunals are thus to consider: (i) the outcome of the proceeding generally or a phase of the proceeding, accounting for who prevailed and the extent to which a party obtained the relief it sought (proposed AR 19(4)(a)); (ii) the parties’ conduct in the proceeding, including whether the parties or counsel acted in good faith and the extent to which they acted in an expeditious and cost-effective manner (proposed AR 19(4)(b)); (iii) the complexity of the case, such as the nature of the claims and the novelty of the issues raised (proposed AR 19(4)(c)); and (iv) the reasonableness of the costs claimed in the circumstances (proposed AR 19(4)(d)).

224. Some Tribunals first determine the reasonableness of the costs claimed before proceeding to allocate those costs. This is possible under proposed AR 19(4)(d). At the same time, the rule recognizes that other factors may be relevant in determining the reasonableness of the costs, for example, the complexity of the issues. In any event, the intended result is the same: only reasonable costs claimed can be awarded.

225. **Fifth**, proposed AR 19(5) concerns the allocation of costs with respect to specific phases of the proceeding during the pendency of the case. This is consistent with current AR 28(1)(b). The Tribunal may thus request that the parties file a statement of the costs incurred with respect to a certain part of the proceeding at any time and decide on the allocation of those costs in an order or decision. The practice of issuing interim decisions on costs is not commonly used but is encouraged. The issuance of interim cost decisions may promote time and cost efficiency by exposing the parties to the magnitude of costs incurred. The order or decision would eventually be incorporated into and form part of the Award.

226. **Sixth**, in accordance with proposed AR 19(6) and AR 60(1)(j), the Tribunal must include a reasoned decision on costs in the Award, including a statement of the costs of the proceeding. The Tribunal should request a final statement of costs after all main procedural steps have been taken in accordance with proposed AR 19(3).

227. **Finally**, proposed AR 19 deletes the reference regarding a request for the Secretary-General to provide the Tribunal with further information on the cost of the proceeding. The
Secretariat keeps detailed records of all case accounts and regularly submits financial statements to the Tribunal and the parties, so this is unnecessary.

CHAPTER III - CONSTITUTION OF THE TRIBUNAL

228. These proposed amendments seek to simplify the AR and codify ICSID practice. They also address efficiency in constitution of the Tribunal, in response to comments from Member States and the public seeking to reduce the time between registration and constitution.

RULE 20 – GENERAL PROVISIONS REGARDING THE CONSTITUTION OF THE TRIBUNAL

CURRENT RELATED PROVISIONS: Convention Art. 39

Chapter III
Constitution of the Tribunal

Rule 20
General Provisions Regarding the Constitution of the Tribunal

(1) The parties shall constitute a Tribunal without delay after registration of the Request for arbitration.

(2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.

(3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party.

(4) A person previously involved in the resolution of the parties’ dispute as a judge, mediator, conciliator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties.

Chapitre III
Constitution du Tribunal

Article 20
Dispositions générales relatives à la constitution du Tribunal

(1) Les parties constituent un Tribunal sans délai après l’enregistrement de la requête d’arbitrage.
Proposed AR 20 confirms the obligation to constitute a Tribunal rapidly, and limits who may be nominated as arbitrator on the basis of nationality and prior involvement in the dispute. The obligation to inform the Secretary-General promptly of any agreement regarding the method of constituting the Tribunal in current AR 1(2) has been removed. A modified version of this obligation is found in proposed AR 22, which expressly deals with the method of constitution.
Nationality. Proposed AR 20(2) simplifies current AR 1(3) regarding the nationality of arbitrators.

The current rule stems from Art. 39 of the Convention, which requires that the majority of arbitrators to be nationals of States other than the Contracting State party and the Contracting State whose national is a party (except where the parties agree to the appointment of each individual member of the Tribunal). Without any further restrictions, it would, in principle, be possible for the first appointing party (typically the claimant) to select an arbitrator of its own nationality, and in doing so to preclude the second-appointing party from acting in the same manner. Accordingly, in the original 1968 Arbitration Rules, the precursor to current AR 1(3) was included. It provided that unless each member of the Tribunal is appointed by agreement of the parties, “nationals of the State party to the dispute or of the State whose national is a party to the dispute may be appointed by a party only if appointment by the other party to the dispute of the same number of arbitrators or either of these nationalities would not result in a majority of arbitrators of these nationalities”. The commentary to those rules stated that the provision was designed “to ensure the fair application of Art. 39 of the Convention”.

In 2003, the provision was expanded to its current formulation. The drafters at that time sought to retain the original principle, and to expand the provision to explain how the prohibition would operate in cases of three-member Tribunals and five or more-member Tribunals. Commentary explaining that amendment noted that “the [original] provision had proven to be confusing to parties” (Antonio R. Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes” (2007), 22 ICSID Rev.– FILJ 57, 63).

Despite that amendment, the provision remains confusing to users today. Therefore, the proposed text simplifies the restriction and abandons the distinction based on size of the Tribunal.

With respect to a three-member Tribunal, the principle underlying current AR 1(3) remains unaltered by the proposed text; under both the current and proposed formulations, the agreement of the other party to the dispute is always required where a party wants to appoint an arbitrator who is a national of the State party to the dispute or of the State whose national is a party to the dispute.

Moreover, there is no practical need to spell out separate applications of the principle for Tribunals comprising more than three members as there has never been a Tribunal comprised of five or more-members.

Prior involvement in the dispute. Proposed AR 20(4) expands the categories of individuals who may have acted in some capacity in earlier attempts to resolve the dispute. Such individuals may be appointed arbitrator only with party agreement. This gives parties flexibility to agree on appointment of a person with prior involvement in the case, for example a mediator or conciliator. This might reduce the time for explaining the facts to the arbitrator, although usually parties want to select someone with no prior exposure to the case.
Rule 21
Disclosure of Third-party Funding

(1) “Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:

(a) through a donation or grant; or

(b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.

(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.

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

Article 21
Divulgation d’un financement par un tiers

(1) « Financement par un tiers » désigne l’apport de fonds ou de tout autre soutien matériel pour la poursuite d’une instance ou la défense contre une instance, par une personne physique ou morale qui n’est pas partie au différend (« tiers financeur »), à une partie à l’instance, une affiliée de cette partie ou un cabinet d’avocats représentant cette partie. Ces fonds ou ce soutien matériel peuvent être apportés :

(a) par le biais d’un don ou d’une subvention ; ou

(b) en contrepartie d’une prime ou en échange d’une rémunération ou d’un remboursement dépendant en totalité ou en partie de l’issue de l’instance.

(2) Une partie doit déposer une notification écrite divulguant qu’elle bénéficie d’un financement par un tiers et indiquant le nom du tiers financeur. Cette notification est adressée au Secrétariat immédiatement après l’enregistrement de la requête d’arbitrage ou dès la conclusion d’un accord de financement par un tiers après l’enregistrement.
(3) Cada parte a una obligación continua de divulgar toda modificación en las informaciones visées au paragraphe (2) intervenant après la divulgation initiale, y compris la cessation de l’accord de financement.

Regla 21
Revelación de Financiamiento por Terceros

(1) El “financiamiento por terceros” es la provisión de fondos u otro apoyo sustancial a efectos de dar curso o defenderse en un procedimiento por una persona natural o jurídica que no es parte en la diferencia (“tercero financiador”) a una parte del procedimiento, una sociedad relacionada con esa parte o a una firma de abogados que represente a esa parte. Dichos fondos o apoyo sustancial podrán proporcionarse:

(a) mediante una donación o un subsidio; o

(b) en contraprestación de una prima o a cambio de una remuneración o un reembolso total o parcialmente dependiente del resultado del procedimiento.

(2) Una parte deberá presentar una notificación escrita revelando que goza de financiamiento por terceros y el nombre de dicho tercero financiador. Esta notificación deberá enviarse al Secretariado inmediatamente después del registro de la solicitud de arbitraje o una vez se celebre el acuerdo de financiamiento por terceros si este ocurre con posterioridad al registro.

(3) Cada parte tendrá la obligación permanente de revelar cualquier cambio en la información a la que se hace referencia en el párrafo (2) que tenga lugar después de la revelación inicial, lo cual incluye la resolución o rescisión del acuerdo de financiamiento.

In recent years there has been increased resort to third-party funding (TPF) in domestic and international litigation, including in Investor-State Dispute Settlement (ISDS). TPF is obtained mainly by claimants, but has also been used by respondents, including States. Although labelled generically as “TPF”, there are many different models of TPF, which can have significantly different terms (see The ICCA Reports No. 4, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (April 2018) (ICCA-TPF Report) 1-16, and generally for a review of different models of TPF and legal issues arising from TPF in arbitration).

While professional funders and funding brokers are usually the focus of discussion in this context, funding can be obtained from a variety of sources, including insurers (with “after the event” and “before the event” funding), traditional loans from financial institutions or affiliated companies, attorneys acting on contingency or alternate fee arrangements, and
NGOs that support a particular position in a case (see e.g., contribution of the Bloomberg Foundation to tobacco labelling litigation in *Philip Morris Brand Sàrl and others v. Uruguay* (ARB/10/7); see also *ICCA-TPF Report*, 17-43).

240. The availability of TPF has prompted discussion among commentators and ISDS users regarding the effects, if any, of TPF on ISDS.

241. ICSID received two categories of comment on TPF in its rules amendment consultations. The first category consisted of suggestions from a few States that TPF be prohibited entirely; these States argue that TPF promotes frivolous claims and is inapt for dispute settlement involving a State. The second category of comments received by ICSID related to disclosure of information concerning TPF in individual cases.

242. With respect to the first category, the WP does not propose to prohibit TPF. The receipt of TPF does not, in itself, mean a claim is frivolous, and some argue that TPF enables the pursuit of meritorious claims or defences, including those that otherwise might not be pursued due to impecuniosity. In addition, the ICSID Rules create many effective mechanisms to address concern that a claim may be frivolous, including screening for manifest lack of jurisdiction before registration of a request, a motion to dismiss for manifest lack of legal merit, bifurcated preliminary motions, and costs awards.

243. More generally, TPF is available for litigation in many Member States. In addition, States that have addressed TPF in their investment instruments to date have not sought to prohibit it altogether; rather, they have provided for disclosure. Given the continuing discussion as to how to assess the costs and benefits of TPF for both States and investors, the balance struck in proposed Rule 21 is apt. Full prohibition of TPF remains a policy choice for individual States in their investment instruments rather than in the ICSID Rules.

244. With respect to the second category of comments received by ICSID, many States and some organizations proposed mandatory disclosure of TPF to avoid undisclosed conflicts of interest between the funder and an arbitrator. The WP addresses such disclosure in proposed AR 21.

245. Definition and Regulation of TPF. Proposed AR 21 defines TPF for the purposes of TPF disclosure. The various forms of TPF and the fact that new approaches continue to emerge make definition difficult (see *ICCA-TPF Report*, 45-80, 85-115). However, definition of TPF is an essential predicate to imposing any obligations relating to TPF.

246. Several studies, rules and treaties have sought to define TPF. The *ICCA-TPF Report* (81) defines a third-party funder for the purposes of disclosure as:

\[
\ldots\] any natural or legal person who is not a party to the dispute and is not a party’s legal counsel, but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:
a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a selected range of cases, and

b) such support or financing is provided through a donation, or grant, in return for a premium, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the dispute.

247. The International Bar Association Guidelines on Conflict of Interest in International Arbitration (2014) (IBA Conflict Guidelines (2014)) address disclosure requirements to facilitate arbitrator assessments of potential conflict of interest. General Standard 6(b) defines TPF as:

For these purposes, the terms ‘third-party funder’ and ‘insurer’ refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

Under the IBA Conflict Guidelines (2014), a TPF who satisfies this requirement “may be considered to be the equivalent of the party”.

248. Three arbitral institutions have adopted rules on disclosure of TPF. Their provisions address both disclosure of the fact of TPF and its effect on costs.


Unless otherwise agreed by the Parties, in addition to the other powers specified in these Rules, and except as prohibited by the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:

[I] order the disclosure of the existence of a Party’s third-party funding arrangement and/or the identity of the third-party funder and, where appropriate, details of the third-party funder’s interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability; [...] 

Rule 33.1 of the SIAC Investment Arbitration Rules (2017) also allows the Tribunal to take into account any third-party funding arrangements in apportioning the costs of the arbitration (see also, SIAC Practice Note on Arbitrator Conduct in Cases Involving External Funding, PN-01/17 (March 2017).

Arbitration Rules (2017) addresses TPF in relation to disclosure and decisions on costs. It states:

1. In these Rules, a “third party funding” means the situation where a natural person or an entity, who is not a party to the dispute, provides funds to a party to the arbitration to cover all or part of that party’s costs for the arbitral proceedings, through an agreement with the party accepting the funding.

2. As soon as the third party funding agreement is concluded, the party accepting the funding shall notify in writing, without delay, to the other party or parties, the arbitral tribunal, and the IDSC or the CIETAC Hong Kong Arbitration Center that administers the case, of the existence and nature of the third party funding arrangement, and the name and address of the third party funder. The arbitral tribunal shall have the power to order the disclosure by the party accepting the funding of any relevant information of the third party funding arrangement.

3. When making a decision on the costs of arbitration and other fees, the arbitral tribunal may take into account the existence of any third party funding arrangement, and the fact whether the requirements set forth in the preceding Paragraph 2 are complied with by the party or parties accepting the funds.

251. The ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration (October 2017) (¶ 24) states:

For the scope of disclosures, an arbitrator will be considered as bearing the identity of his or her law firm, and a legal entity will include its affiliates. In addressing possible objections to confirmation or challenges, the Court will consider the activities of the arbitrator’s law firm and the relationship of the law firm with the arbitrator in each individual case. Arbitrators should in each case consider disclosing relationships with another arbitrator or counsel who is a member of the same barristers’ chambers. Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.

252. Finally, several recent EU investment treaties regulate TPF, for example:

- The Comprehensive Economic and Trade Agreement (CETA) (not yet in force) Chap. 8, Art. 8.1, 8.26, defines TPF and requires disclosure of a funder:

  Article 8.1 - Definitions
Third party funding means any funding provided by a natural or legal person who is not a disputing party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute. […]

Article 8.26 - Third party funding

(1) Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.

(2) The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

- The Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (EU-Vietnam FTA) (not yet in force) Chap. 8(II), Sec. 3, Art. 2, 11 defines TPF and requires disclosure of the agreement, makes TPF a relevant factor in ordering security for costs, and provides that a party’s conduct in promptly giving notice of TPF must be accounted for in awarding case costs. It states:

Article 2 - Definitions

[…] ‘Third Party funding’ means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant. […]

Article 11- Third party funding

(1) Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal the existence and nature of the funding arrangement, and the name and address of the third party funder.

(2) Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement concluded or the donation or grant is made.

(3) When applying Article 22 (Security for Cost), the Tribunal shall take into account whether there is third party funding. When deciding on the cost of
proceedings pursuant to Article 27(4) (Provisional Award) the Tribunal shall take into account whether the requirements provided for in paragraphs 1 and 2 have been respected.

- Investment Protection Agreement between the European Union and the Republic of Singapore (EU-Singapore Investment Protection Agreement) (not yet in force), Chap. 3, Art. 3.1, 3.8, defines TPF and requires notification of TPF. It states:

  Article 3.1(2)(f)

  [...] ‘third party funding’ means any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the disputing party may become entitled, or in the form of a donation or grant.

  Article 3.8 - Third Party Funding

  Any disputing party benefiting from third party funding shall notify the other disputing party and the Tribunal of the name and address of the third party funder.

  Such notification shall be made at the time of submission of a claim, or without delay as soon as the third party funding is agreed, donated or granted, as applicable.

  253. The WP proposes to define TPF in a manner similar to the definitions in the above texts for the purposes of the ICSID Rules.

  254. Proposed AR 21(1) refers to the pursuit or defense of an arbitration, as it applies to funding of both claimants and respondents. Proposed AR 21(1) also expressly applies to funds provided through donation or grant, and not only to funds provided in return for remuneration. This definition captures funding received for a public interest or advocacy purpose.

  255. Disclosure of TPF to Avoid Conflicts of Interest. There is potential for a conflict of interest when an undisclosed entity provides TPF to a party in arbitration. This conflict could arise in various circumstances, for example, if an arbitrator provides due diligence opinions at the request of a funder or an arbitrator serves on the board of a funder. Absent disclosure, parties and arbitrators may be unaware of such conflicts, which could affect the integrity of ISDS and could give rise to challenges that delay the proceedings.

  256. Increasingly, parties voluntarily disclose the existence of TPF if requested by opposing counsel. In fact, in at least 20 recent cases in which the existence of TPF was at issue before
an ICSID Tribunal, the parties disclosed the existence of TPF and the identity of the funder without requiring an express order to this effect from the Tribunal.

257. ICSID Tribunals have also ordered disclosure of TPF in some cases. The case law recognizes the discretion of a Tribunal to order disclosure of TPF in appropriate circumstances (see e.g., Muhammet Çap v. Turkmenistan (ARB/12/6), Procedural Order No. 3 (June 12, 2015)).

258. Proposed AR 21(2) makes early disclosure of the existence of TPF mandatory in every case. It requires the parties to disclose the existence of any TPF upon the earlier registration of the Request, or the conclusion of a funding arrangement entered into after registration. This duty of disclosure is a continuing one throughout the proceeding.

259. Proposed AR 21(2) ensures that the other party, persons proposed for appointment to the Tribunal or Committee, and ICSID as appointing authority, have the relevant information to assess possible conflicts arising from a relationship between a funder and an arbitrator.

260. Complementary obligations are found in other parts of the AR. Proposed AR 26(3) and Schedule 2 requires arbitrators to sign a declaration stating that they have no conflict of interest with a funder whose identity has been disclosed by a party, and imposes a continuing obligation on the arbitrator to disclose changed circumstances.

261. For the purposes of assessing conflicts of interest, most cases to date have only required disclosure of the existence of TPF and identification of the funder. However, several cases have gone farther and ordered information about the terms of funding or production of the TPF documents. Likewise, most arbitral rules and investment treaties that address TPF only require disclosure of the existence of TPF and the identity of the funder (see ICCA-TPF Report, 106-110 for discussion of cases; see above for relevant provisions of rules and treaties).

262. Proposed AR 21(2) follows the majority line of cases and treaties by requiring disclosure of only the fact of funding and the identity of the funder for the purposes of assessing conflict of interest. It does not create a general duty to disclose the terms of funding or the agreement itself. This is because more elaborate information is not required to achieve the objective of preventing conflicts of interest.

263. While proposed AR 21(2) does not require disclosure of the terms of funding or the funding agreement itself, such disclosure remains in the discretion of the Tribunal pursuant to current AR 34(2)(a) (proposed AR 40(2)) should it subsequently become relevant to an issue to be decided in the proceeding.

264. Maintenance of Confidential Information. The WP does not make a proposal concerning privilege and maintenance of confidential information held by or provided to a funder. Instead, proposed AR 21(2) will assure knowledge of TPF at an early stage and will allow parties to address related questions of confidentiality of information and the application of legal privileges against disclosure at the first session, and to seek appropriate procedural orders regarding confidentiality (see ICCA-TPF Report, 117-143 for detailed discussion of relevant laws and cases).
265. **Relationship of TPF to Security for Costs.** Under the current AR, security for costs has generally been requested under the rule concerning provisional measures (current AR 39, Art. 47 of the Convention). Accordingly, parties have been required to meet the legal standard for provisional measures, and in practice, this has been difficult to do. To date, there has been only one public decision granting an application for security for costs (see *RSM v. St. Lucia* (ARB/12/10), *Decision on St. Lucia’s Request for Security for Costs* (Aug. 13, 2014); see also, *ICCA-TPF Report*, 163-183, 221-227; Jeffrey Commission & Rahim Moloo (eds.), *Procedural Issues in International Investment Arbitration*, (OUP 2018), 38-40; Eduardo Zuleta, ‘Security for Costs: Authority of the Tribunal and Third-Party Funding’ in Meg Kinnear et al (eds.), *Building International Investment Law: The First 50 Years of ICSID*, (Kluwer Law International 2015), 567-81).

In several cases, the party requesting security for costs has raised the existence of TPF to support its request. Tribunals have generally held that the mere existence of TPF, without any other relevant circumstances, is an insufficient basis for requiring a party to provide security for costs (see e.g., *EuroGas v. Slovak Republic* (ARB/14/14), *Procedural Order No. 3 – Decision on the Parties’ Request for Provisional Measures* (June 23, 2015); *RSM v. St. Lucia* (ARB/12/10), *Decision on St. Lucia’s Request for Security for Costs* (Aug. 13, 2014); *South American Silver Limited v. Bolivia* (UNCITRAL, PCA Case No. 2013-15), *Procedural Order No. 10* (Jan. 11, 2016) 59, 77-78, 83; *Guaracachi & Rurelec v. Bolivia*, (UNCITRAL, PCA Case No. 2011-17), *Procedural Order No. 14* (March 11, 2013) 6-7).

Proposed AR 51 on security for costs is a new Rule and does not address the effect of TPF. Instead, proposed AR 51 requires the Tribunal to consider the responding party’s ability to comply with an adverse costs decision and whether a security order is appropriate in light of all the circumstances. As a result, the mere fact of TPF, without relevant evidence of an inability to comply with an adverse costs decision, will continue to be insufficient to obtain an order for security for costs under proposed AR 51. On the other hand, the existence of TPF coupled with other relevant circumstances may form part of the relevant factual circumstances considered by a Tribunal in ordering security for costs. This will be a fact-based determination in each case.

266. **Relationship of TPF to Compliance with Award Debtor’s Obligations Regarding Costs.** A related question arises regarding the effect, if any, of TPF on Awards and especially whether a funder might be responsible for an Award of costs made against the funded party. A simplified mechanism for compliance with and enforcement of ICSID Awards is established in Art. 53-54 of the Convention. However, the Tribunal has no jurisdiction over a non-party. It is therefore unlikely that a funder could be liable for the Tribunal Award on costs, unless such an obligation arises under the terms of the funding agreement. The WP does not propose any new rules addressing this topic.

267. **Relationship of TPF to Allocation of Costs.** Cases have been consistent in holding that TPF is generally irrelevant to determining whether (and how) costs should be allocated to a party (see *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* (ARB/05/18 and ARB/07/15), *Award* (March 3, 2010), ¶691; *ATA Construction, Industrial and Trading Co. v. Jordan* (ARB/08/2), *Order Taking Note of Discontinuance of the Proceeding* (July 11,
The changes in proposed AR 19 on the costs of the proceeding do not change the basic principle that the allocation of costs is in the discretion of the Tribunal. As a result, the cases holding that the existence of TPF does not affect allocation of costs remain relevant.

The one caveat to this is that proposed AR 19 has been revised to ensure Tribunals consider the conduct of the parties, among other factors, when allocating costs. Failure to comply with proposed AR 21(2) requiring disclosure of a funding arrangement and the reasons for such failure might become relevant to cost allocation if a Tribunal finds that such failure reflects on the conduct of a party in the proceeding to such an extent that an adverse costs order is appropriate. Again, this would be a question of fact in each case, and is not expressly addressed in the proposed AR.

Similarly, whether the costs associated with TPF are recoverable in an order for costs remains a question of fact for the Tribunal and is not expressly addressed in the proposed AR.

**Rule 22 – Method of Constituting the Tribunal**

**CURRENT RELATED PROVISIONS:** Convention Art. 37; IR 3

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**Rule 22**  
Method of Constituting the Tribunal

(1) The number of arbitrators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 60 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.

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**Article 22**  
Méthode de constitution du Tribunal

(1) Le nombre d’arbitres et la méthode de leur nomination doivent être déterminés avant que le ou la Secrétaire général(e) ne puisse intervenir sur une quelconque nomination proposée par une partie.

(2) Les parties s’efforcent de se mettre d’accord sur un nombre impair d’arbitres et la méthode de leur nomination. Si les parties n’informent pas le ou la Secrétaire
The number of arbitrators on a Tribunal and the method of their appointment is determined either by agreement of the parties in accordance with Art. 37(2)(a) of the Convention or by recourse to the formula in Art. 37(2)(b) of the Convention. A Tribunal must always consist of a Sole Arbitrator or any uneven number of arbitrators.

Premature Appointments. To encourage parties to take immediate steps to agree on the number of arbitrators and the method of their appointment, proposed AR 22(1) confirms that the Secretary-General may not take any action regarding a proposed appointment until the parties reach an agreement about the number of arbitrators and the method of their appointment or the formula in Art. 37(2)(b) of the Convention is triggered. As the method of constitution sets the legal basis for any appointment, determination of the method must necessarily predate any action by the Secretariat on a proposed appointment. The amendment also seeks to reduce the confusion often evident among users regarding the nature and effect of premature appointments.

Establishing the Method of Constitution by Agreement. Absent a prior agreement, the parties must agree on the number of arbitrators and the method for their appointment. Current AR 2(1) provides a detailed multi-step process and deadlines for exchanging proposals, subject to modification by party agreement. The process contemplated in current AR 2(1) is envisioned to last 50 days. But parties can and often do continue to try to reach agreement after the expiry of the relevant deadlines, and are not limited in the number of proposals or counterproposals that can be made. This can lead to delay in the process of constitution. By eliminating the multistep process in current AR 2(1), which is rarely followed in practice, proposed AR 22(2) affords further flexibility and encourages the parties to agree on a method of constituting the Tribunal within 60 days.

Establishing the Method of Constitution by Default. Under current AR 2(3), if no agreement regarding the number of arbitrators and the method of their appointment is
reached within 60 days of registration of the Request for arbitration, either party may select the formula in Art. 37(2)(b) of the Convention by giving notice to the Secretary-General. This establishes an implicit deadline of 60 days to agree on these matters. However, current AR 2(3) also requires that a party expressly opt for the formula in Art. 37(2)(b) before the constitution can move forward on that basis. As a result, party inaction has led to a proceeding remaining in limbo for a number of months.

277. To address this potential source of inefficiency, proposed AR 22(2) stipulates that the default formula in Art. 37(2)(b) of the Convention is automatically triggered if no agreement on the number of arbitrators and the method of their appointment is communicated to the Secretary-General within 60 days from the date of registration of the Request. The proposed amendment is consistent with Art. 37(2)(b) of the Convention which does not require the formality of an express trigger of the default formula by a party.

278. Channel of Communication. Pursuant to current AR 2(2), the parties must transmit their proposals on the number of arbitrators and the method for their appointment through, or with a copy to, the Secretary-General. This requirement has no practical import as no action can be taken by the Secretary-General based on these unilateral proposals. Accordingly, proposed AR 22(2) now specifies that the parties are only required to advise the Secretary-General once an agreement is actually reached.

**Rule 23 – Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention**

**CURRENT RELATED PROVISIONS:** Convention Art. 37, 38

**Rule 23**

**Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention**

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.
This provision describes the process for the appointment of arbitrators when the formula in Art. 37(2)(b) of the Convention applies as a result of the parties’ lack of agreement on the method of constituting the Tribunal.

The Appointment Process. Current AR 3(1) sets forth a multistep process which is not conducive to rapid Tribunal constitution. It requires the first party making an appointment also to propose a candidate for President of the Tribunal. The other party must then appoint an arbitrator and either concur in the appointment of the arbitrator proposed by the first party for President of the Tribunal or propose another candidate for President. The party making the first appointment must then indicate whether it concurs in the appointment of the new arbitrator proposed as President of the Tribunal by the other party.

Rather than codifying multiple steps for appointment, proposed AR 23 only specifies the principle underlying Art. 37(2)(b) of the Convention: each party appoints an arbitrator and the parties jointly appoint the President of the Tribunal. If the process is not completed within 90 days from registration, either party may request that the Chairman of the ICSID Administrative Council appoint the arbitrator or arbitrators not yet appointed under Art. 38 of the Convention.

Channel of Communication. Current AR 3(2) provides that communications between the parties pursuant to this rule shall be made through, or be copied to, the Secretary-General. This provision is deleted to streamline the process and increase efficiency. As described below, proposed AR 26 (following current AR 5) specifies that the Secretariat shall be notified when an appointment is made, including the appointment of the President; therefore, there is no need to repeat the same provision in proposed AR 23.
Rule 24  
Assistance of the Secretary-General with Appointment  
The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

Article 24  
Assistance du ou de la Secrétaire général(e) dans les nominations  
Les parties peuvent demander conjointement au ou à la Secrétaire général(e) de les assister dans la nomination d’un(e) Président(e) du Tribunal ou d’un(e) arbitre unique.

Regla 24  
Asistencia del o de la Secretario(a) General con los Nombramientos  
Las partes podrán solicitar conjuntamente que el o la Secretario(a) General asista con el nombramiento de un o una Presidente(a) del Tribunal o de un o una Árbitro Único.

Currently, where the parties do not agree on the appointment of the President of the Tribunal and the Chairman is asked to make that appointment under Art. 38 of the Convention, the Secretary-General first offers to conduct a ballot procedure. Under this procedure, the Secretary-General proposes a ballot of 5 or more candidates. If the parties agree on a name in the ballot, the resulting appointment is a consent appointment by the parties. If the parties fail to agree on a ballot candidate, the Chairman will select the presiding arbitrator from the ICSID Panel in accordance with Art. 38 and 40(1) of the Convention.

Proposed AR 24 stems from the current ICSID practice described above, but does not specify a method to be followed by the Secretary-General. This gives the parties more options concerning the method of appointment. The parties can ask the Secretary-General to propose a list of candidates for party ranking, a non-binding ballot or any other viable mechanism. In practice, the Secretary-General will consult with the parties to determine the method most suitable to the circumstances.

The Secretary-General’s assistance can be requested by the parties at any time after the number of arbitrators and the method of their appointment has been determined in
accordance with proposed AR 22(1). It is not limited to instances when Art. 38 of the Convention is invoked. The Secretary-General’s assistance may be requested when the Tribunal is to be constituted in accordance with the formula in Art. 37(2)(b) of the Convention or following the parties’ agreement; but in an Art. 37(2)(b) scenario, the role would necessarily be limited to assisting the parties in reaching agreement on a President, as under Art. 37(2)(b) the appointment of the President must be made by agreement of the parties.


**RULE 25 – APPOINTMENT OF ARBITRATORS BY THE CHAIRMAN OF THE ADMINISTRATIVE COUNCIL IN ACCORDANCE WITH ARTICLE 38 OF THE CONVENTION**

**CURRENT RELATED PROVISIONS:** Convention Art. 38, 40(1)

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**Rule 25**

**Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention**

(1) If the Tribunal has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chairman appoint the arbitrator(s) who have not yet been appointed pursuant to Article 38 of the Convention.

(2) The Chairman shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.

(3) The Chairman shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

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**Article 25**

**Nomination des arbitres par le ou la Président(e) du Conseil administratif conformément à l’article 38 de la Convention**

(1) Si le Tribunal n’a pas été constitué dans un délai de 90 jours suivant la date de l’enregistrement, ou tout autre délai convenu entre les parties, l’une ou l’autre des parties peut demander au ou à la Président(e) du Conseil administratif de nommer
Current AR 4 reflects Art. 38 of the Convention. If a Tribunal is not constituted within 90 days after registration of the Request for arbitration, or such other period as agreed by the parties, either party may request that the Chairman appoint the arbitrator or arbitrators not yet appointed. This ensures completion of the constitution of a Tribunal. When the Chairman appoints pursuant to Art. 38, the arbitrator is selected from the ICSID Panel of Arbitrators, following consultation with the parties. Art. 40(1) of the Convention makes it clear that the Panel restriction applies only when the Chairman acts pursuant to Art. 38 of the Convention. Current AR 4 establishes a “best efforts” obligation to appoint within 30 days of the request to appoint.

Proposed AR 25 does not differ much from current AR 4. The proposed amendments comprise one simplification and two clarifications.

First, current AR 4(2) is deleted as it is not necessary. It provides that current AR 4(1) applies mutatis mutandis if the parties have agreed that the arbitrators shall elect the
President of the Tribunal and they fail to do so. There is no need for such specification. This situation is clearly covered by current AR 4(1) and proposed AR 25(1).

290. **Second**, consistent with the Convention, proposed AR 25(1) clarifies that any request made pursuant to Art. 38 of the Convention must relate to *all* appointments that have not been made. This is because Art. 38 is designed to enable the complete constitution of the Tribunal.

291. **Third**, proposed AR 25(2) specifies, consistent with current practice, that where the Chairman is asked to appoint the presiding arbitrator and another arbitrator, the non-presiding arbitrator shall be appointed first.

**RULE 26 – ACCEPTANCE OF APPOINTMENT**

**CURRENT RELATED PROVISIONS:** AR 5, 6(2)

**Rule 26**  
**Acceptance of Appointment**

(1) A party appointing an arbitrator shall notify the Secretariat of the appointment and provide the appointee’s name, nationality(ies) and contact information.

(2) The Secretariat shall request an acceptance from the appointee upon receipt of the notice referred to in paragraph (1). The Secretariat shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

(3) Within 20 days after the receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

(b) provide a signed declaration in the form published by the Centre, addressing matters including the arbitrator’s independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.

(4) The Secretariat shall notify the parties of the acceptance of appointment by each arbitrator and provide their signed declaration.

(5) The Secretariat shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.
Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

### Article 26
**Acceptation des nominations**

1. Une partie qui nomme un(e) arbitre notifie au Secrétariat la nomination et indique le nom, la ou les nationalité(s) et les coordonnées de la personne nommée.

2. Dès réception de la notification visée au paragraphe (1), le Secrétariat demande à la personne nommée si elle accepte sa nomination. Le Secrétariat transmet également à chaque personne nommée les informations reçues des parties pertinentes pour l’établissement de la déclaration visée au paragraphe (3)(b).

3. Dans les 20 jours suivant la réception de la demande d’acceptation d’une nomination, toute personne nommée doit :
   
   (a) accepter sa nomination ; et
   
   (b) remettre une déclaration signée conforme au modèle publié par le Centre, qui porte sur certaines questions telles que l’indépendance, l’impartialité, la disponibilité de l’arbitre et son engagement à préserver le caractère confidentiel de l’instance.

4. Le Secrétariat notifie aux parties l’acceptation de chaque nomination et fournit la déclaration signée de chaque arbitre.

5. Le Secrétariat notifie aux parties si un(e) arbitre n’accepte pas sa nomination ou ne remet pas de déclaration signée dans le délai visé au paragraphe (3), et une autre personne est nommée en qualité d’arbitre conformément à la méthode suivie pour la précédente nomination.

6. Chaque arbitre a une obligation continue de divulguer tout changement de circonstances en rapport avec la déclaration visée au paragraphe (3)(b).

### Regla 26
**Aceptación del Nombramiento**

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

2. El Secretariado solicitará la aceptación de la persona nombrada una vez recibida la notificación a la que se hace referencia en el párrafo (1). El Secretariado también le
transmitirá a cada persona nombrada la información recibida de las partes que sea relevante para completar la declaración a la que se hace referencia en el párrafo (3)(b).

(3) Dentro de los 20 días siguientes a la recepción de la solicitud de aceptación de un nombramiento, la persona nombrada deberá:

(a) aceptar el nombramiento; y

(b) proporcionar una declaración firmada en la forma publicada por el Centro, en la que indique cuestiones tales como la independencia, imparcialidad y disponibilidad del o de la árbitro y su compromiso de mantener la confidencialidad del procedimiento.

(4) El Secretariado notificará a las partes la aceptación de cada nombramiento y distribuirá la declaración firmada por cada árbitro.

(5) El Secretariado notificará a las partes si un o una árbitro no acepta el nombramiento o no proporciona una declaración firmada dentro del plazo al que se hace referencia en el párrafo (3), en cuyo caso otra persona será nombrada como árbitro de conformidad con el método seguido para el nombramiento anterior.

(6) Cada árbitro tendrá la obligación permanente de revelar cualquier cambio de circunstancias relevante para la declaración a la que se hace referencia en el párrafo (3)(b).

292. Proposed AR 26 introduces modifications intended to reflect current practice and to limit delays in constituting the Tribunal.

293. **First**, proposed AR 26(1) expands the information that a party is expressly required to provide when it notifies the Centre of its appointment of an arbitrator.

294. **Second**, proposed AR 26(2) confirms that the Secretariat shall transmit to each appointee all information received from the parties that is relevant to the completion of the declaration required under proposed AR 26(3).

295. **Third**, proposed AR 26(3), in conjunction with proposed AR 28, seeks to reduce the delay and modernize the procedure regarding the arbitrator’s acceptance.

296. Proposed AR 26 includes a reduced timeframe; the appointee now has 20 days from the Secretariat’s request to accept the appointment and to send the executed declaration with any statement of disclosure. Under current AR 6(2), an arbitrator has until the end of the first session (which takes place within 60 days from constitution) to provide the declaration.
Fourth, proposed AR 26 does not include the text of the declaration to be signed (in current AR 6). However, it makes clear that the declaration form must address matters related to the arbitrator’s independence, impartiality, availability and commitment to the confidentiality of the proceeding. Pursuant to proposed AR 26(3)(b), the form of the declaration to be signed will be published from time to time by ICSID (see Schedule 2 – Arbitrator Declaration). This introduces flexibility for ICSID to adapt the contents of the declaration form.

Arbitrator Declaration. The proposed AR do not yet include a Code of Conduct for ICSID Arbitration. ICSID is currently working on a Code of Conduct for arbitrators with UNCITRAL Working Group III (Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018) (Document A/CN.9/935) ¶64). This approach is preferable because it has the potential to memorialize a uniform set of ethical expectations for ISDS generally. Once final, this Code of Conduct should be attached to the Arbitrator Declaration in Schedule 2.

In the interim, the WP proposes an expanded disclosure in declarations by arbitrators. It will provide parties with more information to determine whether there is a reasonable concern as to conflict of interest.

The proposed new declaration adds language stipulating that the arbitrator is “impartial and independent of […] the parties…” thus expanding the disclosure requirement to encompass the notion of “impartiality”. The English version of Art. 14 of the Convention refers to “independent judgment”. The Spanish version requires “imparcialidad de juicio” (impartiality of judgment). Given that both versions are equally authentic, it has been accepted that arbitrators must be both impartial and independent. The addition reflects the prevailing standard under the Convention and how it has been applied. It also mirrors the language in other arbitration rules.

The proposed new declaration specifies an express requirement to disclose professional, business and other significant relationships, within the past five years, with: (i) the parties; (ii) counsel for the parties; (iii) other members of the Tribunal (presently known); and (iv) any third-party funder disclosed pursuant to proposed AR 21. It also requires an arbitrator to disclose other investor-State cases in which the arbitrator has been involved as counsel, conciliator, arbitrator, ad hoc Committee member, fact-finding Committee member, mediator or expert.

This last requirement responds to concerns expressed by some States and members of the public about the potential for conflict of interest arising from the practice of “double-hatting” (i.e., individuals simultaneously acting as an arbitrator and as counsel or expert in separate and unrelated proceedings).

There is debate about double-hatting among commentators. Some suggest that double-hatting should be prohibited because it creates either an actual conflict of interest or because it creates a perception of conflict of interest that undermines confidence in the ISDS system to such a degree that it should not be permitted. Other commentators disagree. In their view, the determination of whether there is a conflict of interest must in every case
be decided on the basis of the specific facts of the case. These commentators argue that the mere fact that an arbitrator also acts as counsel or expert in unrelated cases, without anything further, does not establish conflict of interest and that double-hatting cannot be used as a proxy for a reasoned and fact-specific determination of conflict in the circumstances of the individual case. Moreover, some see a prohibition on double-hatting as a contradiction of the principle of party-autonomy in the selection of arbitrators. Finally, some commentators suggest that a prohibition on double hatting will result in a shortage of qualified arbitrators with experience in ISDS. They also suggest that a prohibition on double-hatting will adversely affect arbitrator diversity by disqualifying new entrants and persons of different genders, ages and regional origin who may be unable to afford to limit their employment to arbitral appointments.

304. A prohibition on double-hatting would also be difficult to reconcile with the fact that ICSID Member States have designated numerous individuals to the Panels of Arbitrators and Conciliators who are practicing attorneys and would become ineligible to act if a blanket prohibition on double-hatting were imposed.

305. The WP therefore does not take a position on double-hatting, and leaves this for the joint ICSID–UNCITRAL discussions. However, the proposed rules do require greater disclosure and provide a better basis to assess whether a conflict exists in fact. The disclosure of additional information regarding an arbitrator’s other roles proposed in the declaration would enhance transparency and enable the parties to consider potential conflicts of interest deriving from double-hatting on a case-by-case basis, and to pursue the available remedies should they choose to do so.

306. The proposed declaration requires that qualifying relationships that have existed within the past five years be disclosed. This timeframe is slightly longer than the 3-year standard contained in the IBA Conflict Guidelines (2014). The new declaration also requires disclosure of “significant” relationships. This proposed criterion seeks to assist arbitrators in determining what information is relevant for purposes of disclosure.

307. The proposed declaration also adds a requirement to confirm sufficient availability to conduct the arbitration in an expeditious and cost-effective manner. This requirement has been added in light of the comments expressing concern about delays in proceedings occasioned by extended periods of arbitrator unavailability, and by some arbitrators accepting appointments despite insufficient availability. The requirement is intended to provide the parties with specific information regarding the availability of the arbitrators in their dispute. The addition of this requirement does not convey any change in the applicable standards for the challenge of an arbitrator.

308. Finally, the proposed declaration requires confirmation that the arbitrator will adhere to the fee and billing practices in the proposed Memorandum of Fees and Expenses (see Schedule 1). This addition seeks to enhance arbitrator compliance with the requirement to timely submit claims for fees and expenses, and enhances the management of case finances. A revised Memorandum of Fees will be issued with the new rules, once adopted.
**Rule 27 – Replacement of Arbitrators Prior to Constitution of the Tribunal**

**CURRENT RELATED PROVISIONS:** Convention Art. 56; AR 7

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

(1) At any time before the Tribunal is constituted:

(a) an arbitrator may withdraw an acceptance;

(b) a party may replace an arbitrator whom it appointed; or

(c) the parties may agree to replace any arbitrator.

(2) A replacement arbitrator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced arbitrator was appointed.

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**Article 27**  
Remplacement d’arbitres avant la constitution du Tribunal

(1) À tout moment avant que le Tribunal ne soit constitué :

(a) un(e) arbitre peut retirer son acceptation ;

(b) une partie peut remplacer un(e) arbitre qu’elle a nommé(e) ; ou

(c) les parties peuvent convenir du remplacement de tout arbitre.

(2) Un(e) arbitre remplaçant est nommé(e) dès que possible, selon la même méthode que celle utilisée pour l’arbitre ayant retiré son acceptation ou l’arbitre remplacé(e).

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**Regla 27**  
Reemplazo de Árbitros con Anterioridad a la Constitución del Tribunal

(1) En cualquier momento antes de que se constituya el Tribunal:

(a) Un o una árbitro podrá retirar su aceptación;

(b) una parte podrá reemplazar a cualquier árbitro que haya nombrado; o
(c) las partes podrán acordar reemplazar a cualquier árbitro.

(2) Se nombrará a un o una árbitro sustituto(a) lo antes posible, de conformidad con el método utilizado para el nombramiento del o de la árbitro que se haya retirado o reemplazado.

309. Under current AR 7, a party may replace the arbitrator it has appointed, and the parties may agree to replace any arbitrator, at any time prior to the constitution of the Tribunal. Proposed AR 27(1)(b) and (2) maintain the same principle, clarifying that the replacement must follow the method of the original appointment. Reference to the procedure in current AR 1, 5 and 6 is deleted, as it is encompassed in the general statement that the replacement must follow the method of the original appointment.

310. Proposed AR 27(1)(a) codifies current practice with respect to an arbitrator stepping down from an accepted appointment prior to the constitution of the Tribunal, a situation not covered by the AR. Current AR 8 only addresses resignation after constitution.

311. To address the obvious inefficiency of constituting a Tribunal with a member who will resign immediately after constitution, in practice arbitrators have been allowed to withdraw their acceptance of an appointment prior to constitution of the Tribunal. Proposed AR 27(1)(a) codifies that practice. It is also consistent with the AR allowing a party to replace an arbitrator at any time prior to constitution of the Tribunal.

312. Finally, the principle in proposed AR 27(2) that the replacement must follow the same method as the original appointment also applies to the withdrawal of an arbitrator in proposed AR 27(1)(a).

313. The basic steps in constitution of a Tribunal are shown below:
Constitution of the Tribunal – Rules 22-28

1. Request for arbitration registered (Institution Rule 6)
   - Within 60 days

2. Parties agree on method of appointment (Rule 22)
   - Within 60 days

3. Parties appoint arbitrators & arbitrators accept appointments (Rule 26)
   - 90 days after registration

4. If no agreed method, Article 37(2)(b) of the Convention applies
   - Either party may request that the Chairman appoint arbitrator(s) as per Article 38 of the Convention (Rule 25(1))
   - Within 30 days

5. Tribunal constituted (Rule 28)

6. Chairman appoints missing arbitrators (Rule 25(3))
**Rule 28**  
*Constitution of the Tribunal*

(1) The Tribunal shall be deemed to be constituted on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointments.

(2) As soon as the Tribunal is constituted, the Secretary-General shall transmit the Request for arbitration, the supporting documents, the notice of registration and communications with the parties to each member.

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**Article 28**  
*Constitution du Tribunal*

(1) Le Tribunal est réputé constitué à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que tou(te)s les arbitres ont accepté leur nomination.

(2) Dès que le Tribunal est constitué, le ou la Secrétaire général(e) transmet à chaque membre la requête d’arbitrage, les documents justificatifs, la notification d’enregistrement et toutes communications avec les parties.

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**Regla 28**  
*Constitución del Tribunal*

(1) Se entenderá que se ha constituido el Tribunal en la fecha en que el o la Secretario(a) General notifique a las partes que todos los o las árbitros han aceptado sus nombramientos.

(2) Tan pronto como se haya constituido el Tribunal, el o la Secretario(a) General transmitirá la solicitud de arbitraje, los documentos de respaldo, la notificación del registro y las comunicaciones con las partes a cada uno de los miembros del Tribunal.

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314. Current AR 6 stipulates the date on which the Tribunal is deemed to be constituted. Proposed AR 28(1) reflects the same principle while streamlining the text.
The first step after the constitution of the Tribunal is the Secretary-General’s transmission of all documents received from the parties to the members of the Tribunal. Proposed AR 28(2) corresponds to current AR 30 with minor modifications. Unless there are exceptional circumstances, documents would be made available to the Tribunal members only in electronic format in accordance with proposed AR 3.

CHAPTER IV - DISQUALIFICATION OF ARBITRATORS AND VACANCIES

Disqualification, death, incapacity and resignation of arbitrators are the only exceptions to the principle in Art. 56(1) of the Convention that the composition of the Tribunal shall remain unchanged.

The rules governing disqualification, death, incapacity and resignation of arbitrators have been in place since the first AR entered into force in 1968, with minor exceptions. Most notably, AR 8(1), governing incapacity, was modified in 1984 to regulate the scenario where an arbitrator becomes incapacitated but takes no action, or refuses to resign. The 1984 AR 8(1) established that the procedure for disqualification would apply to instances of incapacity that are not resolved through the resignation of the incapacitated arbitrator. The most recent amendment was AR 9(5) in 2003, which made the timeline of 30 days for the Chairman of the Administrative Council to decide on a disqualification a “best efforts” standard.

ICSID received multiple comments from Member States and the public in relation to the disqualification of arbitrators. Most comments addressed the procedure to disqualify arbitrators and the disruptive effect that disqualification proposals have on the procedural calendar.

Some comments proposed charging a fee to file a disqualification proposal to deter frivolous applications. Disqualification proposals are part of the system established by the Convention to ensure proper composition of the Tribunal. Accordingly, the proposed AR do not include a fee as a prerequisite to file a disqualification proposal. However, the Tribunal may allocate costs with respect to any part of the proceeding, including a disqualification proposal, under proposed AR 19(5), and the Tribunal shall take into consideration the conduct of the parties and the outcome of any part of the proceeding in determining how to allocate costs, under proposed AR 19(4). These proposed amendments provide a tool to deter frivolous challenges.

Other commentators suggested the possibility of having third parties make recommendations on the proposal before it is decided, adding a further step to the process. Articles 57 and 58 of the Convention establish who is tasked with deciding a proposal for disqualification. Exceptionally, the decision-makers (the Chairman or the co-arbitrators) have requested a recommendation from a third party. For example, in a few cases where the challenged arbitrator was a former staff member of the World Bank, the Centre requested a recommendation from a third party (see Siemens v Argentina (ARB/02/8), Award (February 6, 2007), ¶36; Generation Ukraine Inc. v. Ukraine (ARB/00/9), Award (September 16, 2003), ¶4.16). On each such occasion, it has been made clear to the parties
that this is an exceptional manner of proceeding and that the final determination remains solely with the decision-maker. Given the exceptional nature of such requests, their limited scope, and the need to decide challenges expeditiously, no amendment is proposed in this regard.

321. The proposed amendments address the remaining concerns raised by the Member States and the public, simplifying the rules and codifying ICSID practice regarding disqualification, death, incapacity and resignation of arbitrators. These proposed amendments are limited by Art. 56-58 of the Convention, which regulate the grounds for, legal standard, decision-making and consequences of a proposal, as well as resignation and incapacity. Articles 56-58 can only be changed by an amendment to the Convention.

**RULE 29 – PROPOSAL FOR DISQUALIFICATION OF ARBITRATORS**

**CURRENT RELATED PROVISIONS:** Convention Art. 56-58

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**Chapter IV**
**Disqualification of Arbitrators and Vacancies**

**Rule 29**
**Proposal for Disqualification of Arbitrators**

(1) A party may propose the disqualification of one or more arbitrators (“proposal”) pursuant to Article 57 of the Convention.

(2) The following procedure shall apply:

(a) any proposal shall be filed after the constitution of the Tribunal and within 20 days after the later of:

(i) the constitution of the Tribunal; or

(ii) the date on which the party proposing the disqualification first knew or first should have known of the facts on which the proposal is based;

(b) the party proposing the disqualification shall file a written submission, specifying the grounds on which it is based and including a statement of the relevant facts, law and arguments, with any supporting documents;

(c) the other party shall file its response and supporting documents within seven days after receipt of the written submission;
(d) the arbitrator to whom the proposal relates may file a statement limited to factual
information relevant to the proposal. This statement shall be filed within five
days after receipt of the written submissions referred to in paragraph (2)(c); and

(e) the parties may file final written submissions on the proposal within seven days
after expiry of the time limit referred to in paragraph (2)(d).

(3) The proceeding shall continue while the proposal is pending unless it is suspended,
in whole or in part, by agreement of the parties. If the proposal results in a
disqualification, either party may request that any order or decision issued by the
Tribunal while the proposal was pending, be reconsidered by the reconstituted
Tribunal.

Chapitre IV
Récusation d’arbitres et vacances

Article 29
Proposition de récusation d’arbitres

(1) Une partie peut proposer la récusation d’un(e) ou plusieurs arbitre(s) (« proposition »)
en vertu de l’article 57 de la Convention.

(2) La procédure suivante s’applique :

(a) une proposition est soumise après la constitution du Tribunal et dans un délai de
20 jours suivant la plus tardive des dates suivantes :

(i) la date de constitution du Tribunal ; ou

(ii) la date à laquelle la partie qui propose la récusation a pris connaissance ou
aurait dû avoir connaissance des faits sur lesquels est fondée la proposition ;

(b) la partie proposant la récusation dépose des écritures précisant les motifs sur
lesquels elle est fondée et comprenant un exposé des faits pertinents, du droit et
des arguments, accompagnées de tous documents justificatifs ;

(c) l’autre partie dépose sa réponse et ses documents justificatifs dans un délai de
sept jours à compter de la réception des écritures ;

(d) l’arbitre qui fait l’objet de la proposition peut déposer une déclaration limitée à
des informations factuelles pertinentes au regard de la proposition. Cette
déclaration est déposée dans un délai de cinq jours à compter de la réception des
écritures visées au paragraphe (2)(c) ; et
Capítulo IV
Recusación de Árbitros y Vacantes

Regla 29
Propuesta de Recusación de los o las Árbitros

(1) Una parte podrá proponer la recusación de uno o más árbitros (“propuesta”) de conformidad con lo dispuesto en el Artículo 57 del Convenio.

(2) Se aplicará el siguiente procedimiento:

(a) cualquier propuesta deberá presentarse después de la constitución del Tribunal y dentro de los 20 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal; o

(ii) la fecha en la que la parte que propone la recusación tuvo conocimiento o debería haber adquirido conocimiento de los hechos en los que se funda la propuesta;

(b) la parte que proponga la recusación deberá presentar un escrito especificando las causales en que se funda la propuesta e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(c) la otra parte deberá presentar su respuesta y documentos de respaldo dentro de los siete días siguientes a la recepción del escrito;

(d) el o la árbitro a quien se refiera la propuesta podrá presentar una explicación que se limite a información de hecho relevante para la propuesta. Esta explicación se presentará dentro de los cinco días siguientes a la recepción de los escritos a los que se hace referencia en el párrafo (2)(c); y

(e) las partes podrán presentar escritos finales acerca de la propuesta dentro de los siete días siguientes al vencimiento del plazo al que se hace referencia en el párrafo (2)(d).
A menos que el procedimiento sea suspendido, total o parcialmente, de común acuerdo por las partes, este continuará mientras la propuesta de recusación se encuentre en curso. Si la propuesta tiene como consecuencia la recusación del o de la árbitro, cualquiera de las partes podrá solicitar que el Tribunal, una vez que sea reconstituido, reconsidere cualquier resolución o decisión emitida por el Tribunal mientras la propuesta de recusación se encontraba en curso.

322. Proposed AR 29 replaces current AR 9 and makes several changes.

323. **First**, proposed AR 29(1) adopts the basic rule in current AR 9(1) that a challenge must be filed in accordance with Art. 57 of the Convention. No amendments are proposed to this portion of the rule as it reflects the corresponding treaty provision.

324. **Second**, proposed AR 29(2)(a) contains the time limit for filing a disqualification proposal. It clarifies that a proposal can only be filed after the Tribunal has been constituted. Proposed AR 29(2) further requires that a proposal for disqualification be filed within 20 days after the later of the constitution of the Tribunal or the date on which the party challenging knew or should have known of the relevant facts. This specific time limit replaces the term “promptly” in current AR 9(1) and affords greater clarity concerning filing deadlines.

325. Proposed AR 29(2)(a) also eliminates the cut-off date to file a disqualification proposal. Currently this is the date on which the proceeding is declared closed (AR 9(1) and 38(1)). Eliminating this cut-off is consistent with the elimination of the formal closure of the proceeding (see Chapter X – The Award) and reflects the fact that arbitrators must retain the qualities required by Art. 14(1) of the Convention until the Award is rendered.

326. **Third**, proposed AR 29(2)(b) requires that the disqualification proposal include all arguments and supporting documents on which the proposal is based. This amendment transforms what could otherwise be a formal lodging of a challenge into a complete written submission, thereby reducing the overall time needed for briefing.

327. **Fourth**, proposed AR 29(2)(c) establishes a specific time limit of seven days for the filing of a submission by the responding party.

328. **Fifth**, proposed AR 29(2)(d) gives the challenged arbitrator the opportunity to file a statement within 5 days from receipt of the other party’s submissions. The statement is limited to factual information and therefore avoids the challenged arbitrators making legal argument as to why they ought not be disqualified.

329. **Sixth**, proposed AR 29(2)(e) permits a final round of observations on the proposal from both parties within seven days. Following ICSID practice, the final round of submissions is filed simultaneously by the parties.
330. **Seventh,** proposed AR 29(3) eliminates the automatic suspension of the proceeding upon the filing of a challenge and the proceeding continues to the extent the parties agree. This gives the parties the ability to agree to full, partial, or no suspension of the proceeding while the proposal is pending. For example, the parties might agree to maintain the schedule for filing the main pleadings while suspending other timelines regarding interlocutory motions. By requiring the parties’ agreement to suspend the proceeding, the proposed rule minimizes the potential for challenges intended to delay the arbitration.

331. Given that the proceeding will continue unless otherwise agreed by the parties, it is possible that the Tribunal will have to issue orders and decisions unrelated to the challenge during its pendency. To safeguard the legitimacy of the proceeding, proposed AR 29(3) provides that if the challenge ultimately results in the disqualification of an arbitrator, any orders or decisions issued by the Tribunal during the pendency of the challenge may be reconsidered by the new Tribunal once it has been reconstituted, upon request of either party.

332. The procedure for disqualification is summarized below:
Rule 30 – Decision on the Proposal for Disqualification

(1) The decision on a proposal shall be taken by the arbitrators not subject to the proposal or by the Chairman in accordance with Article 58 of the Convention.

(2) For the purposes of Article 58 of the Convention:
(a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and shall be considered equally divided;

(b) if a subsequent proposal is filed while the decision on a prior proposal is pending, both proposals shall be decided by the Chairman as if they were a proposal to disqualify a majority of the Tribunal.

(3) The decision on any proposal shall be made within 30 days after the later of the expiry of the time limit referred to in Rule 29(2)(e) or the notice in Rule 30(2)(a).

### Article 30

**Décision sur la proposition de récusation**

(1) La décision relative à une proposition est prise par les arbitres ne faisant pas l’objet de cette proposition ou par le ou la Président(e) du Conseil administratif conformément à l’article 58 de la Convention.

(2) Aux fins de l’article 58 de la Convention :

   (a) si les arbitres ne faisant pas l’objet de la proposition ne parviennent pas à prendre une décision relative à la proposition pour quelque raison que ce soit, ils ou elles le notifient au ou à la Secrétaire général(e) ; une telle situation est réputée constituer un cas de partage égal des voix ;

   (b) si une proposition ultérieure est soumise alors que la décision sur une proposition précédente est pendante, les deux propositions sont tranchées par le ou la Président(e) du Conseil administratif comme s’il s’agissait d’une proposition de récusation visant une majorité du Tribunal.

(3) La décision relative à une proposition est prise dans les 30 jours suivant la plus tardive des dates suivantes, à savoir la date d’expiration du délai visé à l’article 29(2)(e) ou la date de la notification visée à l’article 30(2)(a).

### Regla 30

**Decisión sobre la Propuesta de Recusación**

(1) La decisión sobre una propuesta de recusación será adoptada por los o las árbitros que no sean objeto de la propuesta o por el o la Presidente(a) del Consejo Administrativo de conformidad con el Artículo 58 del Convenio.

(2) A los efectos del Artículo 58 del Convenio:
The Centre received numerous comments from States and the public that favoured repeal of the portion of Art. 58 of the Convention conferring a decision on a challenge to co-arbitrators unless they are “equally divided” on the matter. This change would require an amendment to Art. 58 of the Convention, and may be suitable for consideration by Member States in the future.

The proposed rule amendments to the decision-making process thus focus not on who the decision-makers are, but on some of the circumstances that lead to their intervention, namely: (i) the determination that the non-challenged arbitrators are “equally divided”; and (ii) the circumstances in which one or more challenges would be treated as a challenge to the majority of the Tribunal.

First, proposed AR 30(1) reflects that portion of Art. 58 of the Convention conferring the decision on a challenge of one member of a three-person Tribunal to the other members of the Tribunal, unless they are “equally divided”. If the proposal concerns a Sole Arbitrator or a majority of the Tribunal, the decision is made by the Chairman of the Administrative Council.

Second, proposed AR 30(2)(a) clarifies that the co-arbitrators need not be divided on the merits of the challenge for the purposes of Art. 58 of the Convention. Instead, their lack of consensus may be caused by any reason that leads to their inability to decide it. This reflects case practice.

Third, proposed AR 30(2)(b) addresses the situation where a second challenge is filed while a first challenge is still pending. As explained above in regard to proposed AR 29(3), current AR 9(6) automatically suspends the proceeding following a disqualification proposal. The automatic suspension precludes the possibility of a second challenge being filed while the first one is pending. Consequently, the two proposals have to be argued and decided consecutively, creating extended delays. In several cases, parties confronted with this situation agreed to treat consecutive challenges as one proposal for the disqualification of the majority of the Tribunal, leaving the decision to the Chairman. With the proposed elimination of the automatic suspension, subsequent challenges will be possible. Under
proposed AR 30(2)(b), two or more challenges pending simultaneously will be treated as a challenge to the majority of the Tribunal and decided by the Chairman.

338. Fourth, in keeping with the overall goal of improving efficiency, proposed AR 30(3) provides for a time limit of 30 days to decide the disqualification proposal, running from the later of the expiry of the time limit for simultaneous comments from the parties under proposed AR 29(2)(e) or the notice that the co-arbitrators are “equally divided” in AR 30(2)(a). In accordance with proposed AR 8(3), the co-arbitrators and the Chairman, where applicable, shall use “best efforts” to meet this time limit.

**Rule 31 – Incapacity or Failure to Perform Duties**

**CURRENT RELATED PROVISIONS:** Convention Art. 56

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<td>If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 29 and 30 shall apply.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 31</th>
<th>Incapacité ou défaillance dans l’exercice des fonctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Si un(e) arbitre devient incapable d’exercer ou n’exerce pas ses fonctions d’arbitre, la procédure prévue par les articles 29 et 30 s’applique.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Regla 31</th>
<th>Incapacidad o Imposibilidad de Desempeñar Funciones</th>
</tr>
</thead>
<tbody>
<tr>
<td>Si un o una árbitro se incapacitara o no pudiera desempeñar las funciones de su cargo, se aplicará el procedimiento establecido en las Reglas 29 y 30.</td>
<td></td>
</tr>
</tbody>
</table>

339. Current AR 8(1) regulates incapacity and the inability to perform the duties of the office. It provides that a request to remove an arbitrator based on incapacity or inability to perform shall follow the same procedure as for a disqualification proposal.

340. Proposed AR 31 replaces inability to perform with failure to perform. Thus, an arbitrator who fails to perform the duties of the office may be subject to a challenge applying the procedure in proposed AR 29 and 30.
**Rule 32 – Resignation**

**Current Related Provisions:** Convention Art. 56

<table>
<thead>
<tr>
<th>Rule 32</th>
<th>Démission</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation.</td>
<td>(1) Un(e) arbitre peut démissionner en adressant une notification à cet effet au ou à la Secrétaire général(e) et aux autres membres du Tribunal et en indiquant les motifs de sa démission.</td>
</tr>
<tr>
<td>(2) If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General whether they consent to the arbitrator’s resignation for the purposes of Rule 33(3)(a).</td>
<td>(2) Si cet(te) arbitre a été nommé(e) par une partie, les autres membres du Tribunal notifient dans les plus brefs délais au ou à la Secrétaire général(e) s’ils ou elles consentent à la démission de l’arbitre, aux fins de l’article 33(3)(a).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regla 32</th>
<th>Renuncia</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Un o una árbitro podrá renunciar a su cargo notificando al o a la Secretario(a) General y a los otros miembros del Tribunal y exponiendo las razones de la renuncia.</td>
<td>(1) Si el o la árbitro fue nombrado por una de las partes, los demás miembros del Tribunal notificarán con prontitud al o a la Secretario(a) General si aceptan la renuncia del o de la árbitro a los efectos de la Regla 33(3)(a).</td>
</tr>
</tbody>
</table>

341. Proposed AR 32 addresses resignation of arbitrators. The proposed rule simplifies the language used.
342. **First**, proposed AR 32(1) retains the arbitrator’s obligation to notify both the Tribunal and the Secretary-General of the resignation. Current AR 8 does not expressly require an arbitrator to provide reasons for resignation. Current AR 8(2), however, provides that the other arbitrators shall consider the reasons for the resignation, if the resigning arbitrator was appointed by one of the parties.

343. Proposed AR 32(1) requires that reasons be provided for the resignation, regardless of how the resigning arbitrator was appointed and, consequently, regardless of whether the resignation requires the consent of the other members of the Tribunal.

344. **Second**, proposed AR 32(2) deals with the particularities of a resignation by a party-appointed arbitrator. Article 56(3) of the Convention requires the Tribunal to consent to the resignation of any party-appointed arbitrator, failing which the vacancy will be filled by the Chairman of the Administrative Council instead of following the original method of appointment. This provision seeks to prevent collusion between the resigning arbitrator and the appointing party. Proposed AR 32(2) simplifies the wording in current AR 8(2) by referring only to the notification of consent.

**RULE 33 – VACANCY ON THE TRIBUNAL**

**CURRENT RELATED PROVISIONS:** Convention Art. 56

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**Rule 33**

**Vacancy on the Tribunal**

(1) The Secretary-General shall notify the parties of any vacancy on the Tribunal.

(2) The proceeding shall be suspended from the date of notice of the vacancy until the vacancy is filled.

(3) A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Chairman shall fill the following vacancies from the Panel of Arbitrators:

(a) a vacancy caused by the resignation of a party-appointed arbitrator without the consent of the other members of the Tribunal; or

(b) a vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. A newly appointed arbitrator may require that any portion of a hearing be recommenced if necessary to decide a pending matter.
Article 33
Vacance au sein du Tribunal

(1) Le ou la Secrétaire général(e) notifie aux parties toute vacance au sein du Tribunal.

(2) L’instance est suspendue de la date de la notification de la vacance jusqu’à ce que la vacance ait été remplie.

(3) Une vacance au sein du Tribunal est remplie selon la méthode utilisée pour procéder à la nomination initiale, étant toutefois entendu que le ou la Président(e) du Conseil administratif remplit les vacances suivantes en nommant des personnes figurant sur la liste des arbitres :

(a) une vacance résultant de la démission d’un(e) arbitre nommé(e) par une partie sans le consentement des autres membres du Tribunal ; ou

(b) une vacance qui n’a pas été remplie dans un délai de 45 jours à compter de la notification de la vacance.

(4) Dès qu’une vacance a été remplie et que le Tribunal a été reconstitué, l’instance reprend au point où elle était arrivée au moment où la vacance a été notifiée. Un(e) arbitre nouvellement nommé(e) peut requérir que toute partie d’une audience soit recommencée, si cela est nécessaire à la détermination d’une question pendante.

Regla 33
Vacante en el Tribunal

(1) El o la Secretario(a) General notificará a las partes cualquier vacante en el Tribunal.

(2) El procedimiento se suspenderá desde la fecha de notificación de la vacante hasta suplir la vacante.

(3) Cualquier vacante en el Tribunal se suplirá siguiendo el método utilizado para realizar el nombramiento original, excepto que el o la Presidente(a) del Consejo Administrativo suplirá las siguientes vacantes de entre las personas que figuran en la Lista de Árbitros:

(a) una vacante producida por la renuncia de un árbitro nombrado por una de las partes sin el consentimiento de los otros miembros del Tribunal; o

(b) una vacante que no se ha suplido dentro de los 45 días siguientes a la notificación de la vacante.

(4) Una vez que se haya suplido una vacante y el Tribunal se haya reconstituido, el procedimiento continuará a partir de la etapa a la que se había llegado cuando se
Current AR 10, 11 and 12 regulate vacancies on the Tribunal resulting from the disqualification, death, incapacity or resignation of arbitrators. Proposed AR 33 combines and simplifies AR 10-12.

**First,** proposed AR 33(1) simplifies the wording of current AR 11(1) related to the notification of vacancies by the Secretary-General to the parties.

**Second,** proposed AR 33(2), much like current AR 10(2), establishes the suspension of the proceeding from the date of notification of a vacancy on the Tribunal until the vacancy has been filled.

**Third,** proposed AR 33(3) determines how vacancies are filled. The proposed AR does not change the content of the current AR but simplifies the language. Effectively, vacancies continue to be filled through the original method except where: (a) the co-arbitrators do not consent to the resignation of a party-appointed arbitrator; or (b) the vacancy has not been filled within 45 days after its notification. In both cases, the vacancy will be filled by the Chairman with arbitrators selected from the Panel of Arbitrators. A difference from current AR 11(2)(b) is that any appointments by the Chairman under scenario (b) will happen automatically upon the expiry of 45 days after the notice of vacancy, whereas the current rule requires a party to expressly request that the vacancy be filled by the Chairman.

**Fourth,** proposed AR 33(4) deals with the resumption of the proceeding once the vacancy has been filled. The proposed AR contains few changes from the current rules except to clarify the procedure. It refers to the reconstitution of the Tribunal as a step prior to the resumption of the proceeding, establishes that the resumed proceeding will continue from the time of notification of the vacancy (as opposed to the moment when the vacancy occurred as in the current AR), and gives the newly appointed arbitrator the right to request that any portion of a hearing (as opposed to the “oral procedure” in current AR 12) be recommenced if necessary to decide a pending matter.

**CHAPTER V - INITIAL PROCEDURES**

This new chapter entitled “Initial Procedures” incorporates the steps which take place immediately after the Tribunal is constituted and certain procedures which are available to the parties at an early stage in the process. They stem from current AR 13, 20 and 41.
Chapter V
Initial Procedures

Rule 34
First Session

(1) Subject to paragraph (2), the Tribunal shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).

(2) The first session shall be held within 60 days after the Tribunal’s constitution or such other period as the parties may agree. If the President of the Tribunal determines that it is not possible to convene the parties and the other members within this period, the first session shall be held solely among the Tribunal members after consulting with the parties in writing on the matters listed in paragraph (4).

(3) The first session may be held in person or remotely, by any means that the Tribunal deems appropriate. The agenda, method and date of the first session shall be determined by the President of the Tribunal after consulting with the other members and the parties.

(4) Before the first session, the Tribunal shall circulate an agenda to the parties and invite their views on procedural matters, including:

(a) the applicable arbitration rules;

(b) the number of members required to constitute a quorum of the Tribunal;

(c) the division of advances payable pursuant to the Administrative and Financial Regulation 14(5);

(d) the procedural language(s), translation and interpretation;

(e) the method of filing and routing of written communications;

(f) the number, type and format of written submissions;

(g) the place of hearings;
(h) the scope, timing and procedure for requests for production of documents between the parties, if any;

(i) the procedural calendar, including written submissions, hearings, the Tribunal’s orders, decisions and the Award;

(j) the manner of keeping the recordings and transcripts of hearings;

(k) the publication of documents and recordings; and

(l) the protection of confidential information.

(5) The Tribunal shall issue an order recording the parties’ agreements and any Tribunal decisions on the procedure within 15 days after the later of the first session or the last written submission on procedural matters addressed at the first session.

Chapitre V
Procédures initiales

Article 34
Première session

(1) Sous réserve du paragraphe (2), le Tribunal tient sa première session avec les parties pour traiter des questions de procédure, notamment celles qui sont énumérées au paragraphe (4).

(2) La première session se tient dans les 60 jours suivant la constitution du Tribunal ou tout autre délai convenu entre les parties. Si le ou la Président(e) du Tribunal estime qu’il n’est pas possible de convoquer les parties et les autres membres dans ce délai, la première session se tient uniquement entre les membres du Tribunal après consultation des parties par écrit sur les questions énumérées au paragraphe (4).

(3) La première session peut se tenir en personne ou à distance, par tous moyens que le Tribunal juge appropriés. L’ordre du jour, les modalités et la date de la première session sont déterminés par le ou la Président(e) du Tribunal après consultation des autres membres et des parties.

(4) Préalablement à la première session, le Tribunal communique un ordre du jour aux parties et les invite à lui faire part de leurs observations sur les questions de procédure, notamment :

(a) le règlement d’arbitrage applicable ;

(b) le nombre de membres requis pour constituer le quorum au sein du Tribunal ;
(c) la répartition des avances devant être payées conformément à l’article 14(5) du Règlement administratif et financier ;

(d) la ou les langue(s) de la procédure, la traduction et l’interprétation ;

(e) les modalités de dépôt et de transmission des communications écrites ;

(f) le nombre, la nature et le format des écritures ;

(g) le lieu des audiences ;

(h) la portée des éventuelles demandes de production de documents entre les parties, ainsi que les délais et la procédure qui leur sont applicables ;

(i) le calendrier de la procédure, notamment les écritures, les audiences, les ordonnances, les décisions et la sentence du Tribunal ;

(j) les modalités d’enregistrement et de transcription des audiences ;

(k) la publication de documents et enregistrements ; et

(l) la protection des informations confidentielles.

(5) Le Tribunal rend une ordonnance prenant acte des accords des parties et de toutes décisions du Tribunal sur la procédure dans un délai de 15 jours à compter de la plus tardive des dates suivantes, soit la date de la première session, soit celle des dernières écritures relatives aux questions de procédure traitées lors de la première session.

Capítulo V
Actuaciones Iniciales

Regla 34
Primera Sesión

(1) Sujeto a lo dispuesto en el párrafo (2), el Tribunal celebrará una primera sesión con las partes para abordar cuestiones procesales, lo cual incluye las cuestiones enumeradas en el párrafo (4).

(2) La primera sesión se celebrará dentro de los 60 días siguientes a la constitución del Tribunal, o cualquier otro plazo acordado por las partes. Si el o la Presidente(a) del Tribunal determina que no es posible convocar a las partes y a los otros miembros dentro de este plazo, la primera sesión se celebrará exclusivamente entre los miembros del Tribunal después de consultar a las partes por escrito respecto de la lista de cuestiones referidas en el párrafo (4).
(3) La primera sesión podrá celebrarse en persona o a distancia, por cualquier medio que el Tribunal estime apropiado. La agenda, la modalidad y la fecha de la primera sesión serán determinadas por el o la Presidente(a) del Tribunal previa consulta a los otros miembros y a las partes.

(4) Antes de la primera sesión, el Tribunal circulará una agenda a las partes y las invitará a presentar sus observaciones sobre cuestiones procesales, lo cual incluye:

(a) las reglas de arbitraje aplicables;

(b) el número de miembros necesario para constituir el quórum del Tribunal;

(c) la división de los anticipos que deban pagarse de conformidad con lo dispuesto en la Regla 14(5) del Reglamento Administrativo y Financiero;

(d) el(los) idioma(s) del procedimiento, traducción e interpretación;

(e) el método de presentación y transmisión de comunicaciones escritas;

(f) el número, tipo y formato de los escritos;

(g) el lugar de las audiencias;

(h) el alcance, los plazos y el procedimiento aplicables a las solicitudes de exhibición de documentos entre las partes, si las hubiera;

(i) el calendario procesal, lo cual incluye los escritos, audiencias, y las resoluciones, decisiones y el laudo del Tribunal;

(j) la modalidad de las grabaciones y transcripciones de las audiencias;

(k) la publicación de los documentos y las grabaciones; y

(l) la protección de información confidencial.

(5) El Tribunal emitirá una resolución mediante la cual se deje constancia de los acuerdos de las partes y las decisiones del Tribunal sobre el procedimiento dentro de los 15 días siguientes a lo que suceda de último, sea la primera sesión o el último escrito sobre cuestiones procesales abordadas en la primera sesión.

351. Proposed AR 34 merges current AR 13(1) and 20, which provide for a first session and a preliminary procedural consultation between the Tribunal and the parties to determine the procedure that will govern each case. The amendment consolidates the procedure under the two rules and codifies current practice.
352. **Consolidation of AR 13(1) and 20.** Current AR 20 refers to a “Preliminary Procedural Consultation” to ascertain the parties’ positions on procedural questions. Current AR 13(1) addresses the scheduling and location of sessions, including the Tribunal’s “first session,” which must be held within 60 days after the constitution of the Tribunal unless the parties agree otherwise. In practice, the “first session” and the “preliminary procedural consultation” are carried out as a single process with only one meeting. This process is consolidated in proposed AR 34.

353. **Scheduling of the First Session.** No change has been made to the 60-day deadline to hold the first session, and the parties may extend that deadline by agreement. In practice, it is sometimes difficult to coordinate the agendas of parties, arbitrators and counsel to find a common date for a first session (see Schedule 2 – Arbitrator Declaration - arbitrators are asked to confirm their availability for the case and their calendar when they accept the appointment). Where a first session with the parties is not feasible within the 60-day time limit and the parties do not agree on an extension, proposed AR 34(2) provides that the Tribunal may convene without the parties within the required time limit to consider the parties’ written procedural proposals. This codifies established practice.

354. **Means of Holding the First Session.** Current AR 13 indicates that the parties may agree on a venue for an in-person first session and that, if they do not agree, such meeting must be held at ICSID’s headquarters in Washington, D.C. in accordance with Art. 62 of the Convention. To promote efficiency and reduce costs, the Secretariat encourages holding the first session by video or telephone conference. In FY 2017, 80% of all first sessions were held in this manner. The sessions are typically less than a half-day long and the Tribunal will have received the parties’ views in advance.

355. **In view of this trend, it is reasonable to propose that first sessions be held by telephone or video conference, unless otherwise agreed. Some comments suggested that in-person first sessions should be mandatory to encourage in-depth discussion and pro-active case management. Proposed AR 34(3) allows the first session to be held by any means of communication, and the Tribunal will decide the appropriate means of holding the session in case of disagreement. This maintains flexibility to hold in-person first sessions.**

356. **Matters to be addressed at the First Session.** Current AR 20(1) identifies a number of procedural matters to be addressed during the preliminary procedural consultation. The ICSID Secretariat has developed a [template agenda](#) with these and other items typically addressed at the first session. Proposed AR 34(4) lists the key items which the parties and the Tribunal should consider to ensure an efficient process and clear expectations. The proposal deletes the reference in current AR 20(1)(d) to the number of copies to be filed, as the default is now electronic filing (see proposed AR 3). It also deletes current AR 20(1)(e) concerning the possibility of dispensing with the written or the oral procedure, as that is rarely exercised in practice. The WP proposes the addition of the below items.

357. **The applicable arbitration rules (proposed AR 34(4)(a)).** The parties may agree on the applicable arbitration rules and may tailor the rules to their case provided this does not conflict with the Convention, AFRs or any mandatory treaty provisions (see current AR 20(2)). In addition, the parties are now given the option to select an expedited process (see
Chapter XII – Expedited Arbitration and Schedule 9 on Time and Cost). It is important to clarify the rules applicable to the case as early as possible.

358. **The method of filing and routing of written communications (proposed AR 34(4)(e)).** Unless the parties agree otherwise, proposed AR 3 and 4 will govern the method of filing and routing of communications. Recognizing that the parties and the Tribunal may have other preferences, it is recommended that they discuss these at the first session.

359. **The number, type and format of written submissions (proposed AR 34(4)(f)).** While current AR 20(c) discusses the same matter, this item adds the question of the type of submissions that the parties will file. For example, it is recommended that the parties discuss whether they intend to file objections to jurisdiction, requests concerning refusals to produce documents, requests for bifurcation, and counter-claims.

360. **The place of hearings (proposed AR 34(4)(g)).** As provided in proposed AR 15, the parties can agree on any place for a hearing or hold it by means other than an in-person meeting, after consulting with the Tribunal and subject to adequate logistical arrangements. In practice, most hearings are held at the World Bank Group facilities in Paris or Washington. The place need not be the same for every hearing, and the default is the Secretariat’s seat when the parties do not agree on the location, in accordance with Art. 62 of the Convention. It is recommended that the parties and the Tribunal discuss the place that is the most cost-effective at the first session.

361. **The scope, timing and procedure for requests for production of documents (proposed AR 34(4)(h)).** This new item is intended to avoid any delay in the proceeding caused by unanticipated requests for production of documents. First, the general approach to document production should be addressed early in the proceeding, e.g., whether the Tribunal will allow requests for production of documents during the first round of pleadings, and whether the IBA Rules on the Taking of Evidence in International Arbitration (2010) will apply. Second, it is also useful to discuss the procedure, e.g., whether requests will be simultaneous, and the format for making requests (see e.g., Redfern Schedule). The Tribunal’s decision on disputes arising from the parties’ requests for production of documents is addressed in proposed AR 40, which is discussed under Chapter VI – Evidence.

362. **The procedural calendar, including written submissions, hearings and the Tribunal’s orders, decisions and the Award (proposed AR 34(4)(i)).** The Secretariat encourages parties and Tribunals to establish as detailed a procedural calendar as possible. This will allow the Tribunal Members and counsel to reserve time in their calendars and avoid conflicting commitments. First, the calendar should account for any anticipated written submissions, requests or other submissions. This should include potential preliminary objections, requests for bifurcation of the proceeding, requests for production of documents to be decided by the Tribunal, etc. Second, the procedural calendar should include the dates of hearings. A significant cause of delay in investment arbitration is the scheduling of hearings. Common availability is difficult to find if a hearing is scheduled with short notice. Therefore, hearing dates for the proceeding ought to be reserved in the first session. Third, the calendar should also estimate the timing for delivery of the Tribunal’s orders, decisions
and the Award. This is a new requirement that is intended to establish reasonable and shared expectations as to the length of the proceeding. The revision addresses unanimous comments received from Member States and the public that timeliness of rulings needs to be improved. In current practice, Tribunals often commit to updating the parties on the progress of the drafting of the Award and its timing. This proposed item takes that practice further to require Tribunals to enter the estimated delivery date of a decision, order and the Award in the procedural calendar.

363. If the parties agree to expedited arbitration (Chapter XII of AR), the procedural calendar is modified by proposed AR 75.

364. **Publication of documents and recordings and protection of confidential information (proposed AR 34(4)(k)-(l)).** This is also a new item, introduced in view of the proposals on access to documents, access to hearings and non-disputing party participation (see Schedule 8 on Transparency). The parties and Tribunal are invited to discuss the details of publication of case materials and the protection of confidential information, including the procedure for redaction of documents and decisions.

365. **Procedural Order No. 1.** Proposed AR 34(5) codifies the practice of issuing a first procedural order which contains the parties’ agreements and the Tribunal’s decisions from the first session. The order must be issued as soon as possible after the session, as it typically triggers time limits in the proceeding. In practice, it is often issued within days of the first session. The Tribunal must now ensure it is issued within 15 days after the later of the first session or the last written submission on any outstanding procedural matter addressed at the first session.

366. **Current AR 13(3), 16(2) and 20(2) have been moved to proposed AR 12 (Orders, Decisions and Agreements).** Current AR 13(4) is deleted because it does not reflect existing practice. Once the details of a session have been determined, the Tribunal notifies the parties through the ICSID Secretariat.
### Rule 35
**Manifest Lack of Legal Merit**

(1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.

(2) The following procedure shall apply:

(a) a party shall file a written submission no later than 30 days after the constitution of the Tribunal, specifying the grounds on which the objection is based, and including a statement of the relevant facts, law and arguments, with any supporting documents;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the objection;

(c) if a party files the objection before constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the objection, so that the Tribunal may consider the objection promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the objection within 60 days after the latest of:

   (i) the constitution of the Tribunal;

   (ii) the last written submission on the objection; or

   (iii) the last oral submission on the objection.

(3) The decision of the Tribunal shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 36 or to argue subsequently in the proceeding that a claim is without legal merit.

(4) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.
Article 35
Défaut manifeste de fondement juridique

(1) Une partie peut soulever une objection selon laquelle une demande est manifestement dénuée de fondement juridique. L’objection peut porter sur le fond de la demande, la compétence du Centre ou la compétence du Tribunal.

(2) La procédure suivante s’applique :

(a) une partie dépose des écritures dans un délai maximum de 30 jours après la constitution du Tribunal, en indiquant précisément les motifs sur lesquels l’objection est fondée, et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ;

(b) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l’objection ;

(c) si une partie soulève l’objection avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais relatifs aux écritures concernant l’objection, de telle sorte que le Tribunal puisse l’examiner dès sa constitution ; et

(d) le Tribunal rend sa décision concernant l’objection dans un délai de 60 jours à compter de la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à l’objection ; ou

(iii) la date de la dernière plaidoirie relative à l’objection.

(3) La décision du Tribunal ne porte en aucune manière atteinte au droit d’une partie de soulever une objection préliminaire conformément à l’article 36 ou de soutenir ultérieurement au cours de l’instance qu’une demande est dénuée de fondement juridique.

(4) Si le Tribunal décide que toutes les demandes sont manifestement dénuées de fondement juridique, il rend une sentence dans ce sens. Dans le cas contraire, le Tribunal rend une décision sur l’objection et fixe tout délai nécessaire à la poursuite de l’instance.
Regla 35
Manifiesta Falta de Mérito Jurídico

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

(2) Se aplicará el siguiente procedimiento:

(a) una parte deberá presentar un escrito a más tardar 30 días después de la constitución del Tribunal, especificando las causales en que se funda la excepción, e incluir una relación de los hechos pertinentes, el derecho y los argumentos, junto con cualquier documento de respaldo;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción;

(c) si una parte opone la excepción antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la excepción, de tal forma que el Tribunal pueda considerar la excepción con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la excepción dentro de los 60 días siguientes a lo que suceda de último, sea:

   (i) la constitución del Tribunal;

   (ii) el último escrito sobre la excepción; o

   (iii) la última presentación oral sobre la excepción.

(3) La decisión del Tribunal será sin perjuicio del derecho de una parte a oponer una excepción preliminar de conformidad con lo dispuesto en la Regla 36 o a argumentar posteriormente en el procedimiento que una reclamación carece de mérito jurídico.

(4) Si el Tribunal decide que todas las reclamaciones carecen manifiestamente de mérito jurídico, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión sobre la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

367. Current AR 41 contains all rules concerning preliminary objections, including: (i) the procedure for filing preliminary objections (AR 41(1)); (ii) bifurcation of distinct issues to be heard in separate phases of the proceeding (AR 41(4)); and (iii) the expedited procedure for dealing with objections that a claim is manifestly without legal merit (AR 41(5)). The
WP proposes to divide these into three different rules: AR 35, 36 and 37. They are included in this Chapter because they are typically considered at an early stage in the proceeding.

368. Proposed AR 35 is current AR 41(5). This Rule was adopted in 2006 to allow claims that manifestly lack legal merit to be dismissed early in the process before they unnecessarily consume the parties’ resources. This innovation has since been emulated by other arbitral institutions that have adopted similar provisions.

369. Since it was adopted, objections under current AR 41(5) and AR(AF) 45(6) have been raised in 27 cases, with Tribunals rendering three Awards upholding the objections in full and disposing of the case in its entirety. Some Tribunals have maintained these objections in part, rendering decisions that permit only part of the claim to advance (see e.g., *Emmis et al. v. Hungary* (ARB/12/2), *Decision on Respondent’s Objection under ICSID Arbitration Rule 41(5)* (March 11, 2013), and *Accession v. Hungary* (ARB/12/3), *Decision on Respondent’s Objection under Arbitration Rule 41(5)* (January 13, 2013)). Other Tribunals have rendered decisions dismissing these objections in their entirety (see e.g., *Eskosol v. Italy* (ARB/15/50), *Decision on Respondent’s Objection under ICSID Arbitration Rule 41(5)* (March 20, 2017)).

370. The procedure for dealing with the objection is designed to be completed at the first session (within 60 days of the Tribunal’s constitution or such other period as agreed by the parties) or promptly thereafter. In practice, parties have agreed on a longer process, with written and oral submissions ranging between 12 to 183 days from the Tribunal constitution, and Tribunal rulings being issued within an average of 149 days from the Tribunal constitution. Tribunals have generally taken more time to render Awards disposing of the case than decisions dismissing the objection.

371. Proposed changes to current AR 41(5) address: (i) the scope of application of the Rule; (ii) clarification of the procedure and the time limit for submitting an objection; and (iii) the timing of the Tribunal’s ruling.

372. The Scope of the Rule. Tribunals have uniformly employed a high standard for determining whether a claim manifestly lacks legal merit. For example, in *Trans-Global v. Jordan* (ARB/07/25), *Decision on Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules* (May 12, 2008), ¶¶ 88, 92). The Tribunal held that “the ordinary meaning of the word ‘manifestly’ requires the respondent to establish its objection clearly and obviously, with relative ease and despatch”.

373. A few Tribunals have questioned whether the Rule extends to jurisdictional objections, in addition to objections to the merits of a claim. Following the line of cases interpreting current AR 41(5) as applicable to merits and jurisdiction (see e.g., *Ansunv v. China* (ARB/14/25), *Award* (March 9, 2017)), proposed AR 35(1) now clarifies that the rule covers objections to jurisdiction and to the Tribunal’s competence.

374. Some comments suggested that the rule be extended to counterclaims and defences, i.e. objections by the claimant to a claim made by the respondent. However, this does not fit with the objective of the rule which is to dispose of the case at an early stage, as
counterclaims and defences are generally filed at a later stage of the proceeding. Under the current AR, a claimant may file preliminary objections concerning counterclaims and defences under current AR 41(1) or in the context of other scheduled submissions and may request that the Tribunal deal with them on an expedited basis.

375. **Time Limit for Filing the Objection and the Procedure.** Some comments raised concerns that the procedure for dealing with the objection might lead to increased delay and cost and could be abused. Current AR 41(5) provides that the objection must be filed within 30 days of the constitution of the Tribunal or at the latest before the Tribunal holds its first session. In practice, AR 41(5) objections are filed on average 28 days after the constitution of the Tribunal.

376. To expedite the process and make use of the time while the arbitrators are being appointed, the WP proposes to permit a party to file an objection under this rule at any time after the registration of the Request for arbitration, and no later than 30 days after the Tribunal’s constitution (proposed AR 35(2)(a)). If the objection is filed before the Tribunal is constituted, the Secretary-General will fix time limits for observations so that the Tribunal may deal with the objections as soon as possible after its constitution (AR 35(2)(c)). This proposal follows the procedure for dealing with early requests for provisional measures (see current AR 39(5)), which has worked well in practice.

377. In line with the current rule and practice, proposed AR 35 keeps the procedure flexible to allow the Tribunal and the parties to determine the number of submissions on the objection and whether a hearing is necessary. Proposed AR 35(2)(b) thus only specifies that the Tribunal is to fix the time limits for submissions on the objection. In practice, when a hearing is called for, the parties have typically agreed to extend the time for holding the first session beyond the 60 days and to combine the hearing on current AR 41(5) objections with the first session. This allowed for a longer briefing schedule, but also led to a longer procedure than the intended 60 days. The proposed rule keeps the option of extending the briefing schedule if necessary.

378. **Timing of the Tribunal’s Ruling.** To further address delay, proposed AR 35(2)(d) requires the Tribunal to rule on the objection within 60 days after the latest of the constitution of the Tribunal or the last written or oral submission on the objection. As noted in proposed AR 8(3), this is a “best efforts” obligation, however it is expected that the time limit will be met unless there are special circumstances (see explanation under proposed AR 8(3) in Chapter II – Conduct of the Proceeding). In practice, Tribunals have made their rulings on average within 53 days from the last submission on the objection.

379. **The Tribunal’s Ruling and Allocation of Costs.** Proposed AR 35(4) requires the Tribunal to render an Award if it upholds the objection that the claim is manifestly without legal merit, as is reflected in current AR 41(6). If the Tribunal rejects the objection or finds that only part of the claim manifestly lacks legal merit, it issues a decision and the proceeding continues. Some comments suggested that the rule should require the claimant to pay the respondent’s legal and other costs if the objection succeeds, as a deterrent to frivolous claims.
380. In practice, cost shifting is possible under the current rule although not expressly required, and two of the three Awards on current AR 41(5) awarded costs to the prevailing respondent. As the allocation of costs pertaining to an objection under this rule is covered in proposed AR 19, it is unnecessary to address costs in proposed AR 35. Proposed AR 19(4) lists factors to be considered by Tribunals when assessing costs, including the outcome (e.g., that the claim does or does not manifestly lack legal merit). It also allows a Tribunal to issue interim decisions on costs (proposed AR 19(3)), which would become enforceable upon rendering the Award.

381. The Procedure After the Tribunal’s Ruling. If a Tribunal holds that a claim is not manifestly without legal merit, proposed AR 35(3) clarifies that the objection may be raised in the ensuing proceeding. However, such objection would be decided under the usual standards for burden of proof and assessment of evidence, after full briefing by parties. If the objection concerns the jurisdiction of the Tribunal or its competence, the respondent may also raise it as a preliminary objection under proposed AR 36 and request bifurcation under proposed AR 37. The Tribunal will fix any necessary time limits for the further procedure (proposed AR 35(4)). The basic steps in an application to dismiss a claim for manifest lack of legal merit are shown below.

**Manifest Lack of Legal Merit Objection – Rule 35**

- Tribunal Constitution
- Within 30 days
- Party files objection that claim manifestly lacks legal merit (Rule 35(2)(a))
- Secretary-General schedules submissions (if no Tribunal constituted) (Rule 35(2)(c))
- Tribunal schedules submissions (Rule 35(2)(b))
- Parties file submissions
- Within 60 days
- Tribunal ruling (Rule 35(4))
Rule 36
Preliminary Objections

(1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal.

(2) The following procedure shall apply:

(a) a preliminary objection shall be made as soon as possible. Unless the facts on which the objection is based are unknown to the party at the relevant time, the objection shall be made no later than:

( ) the date to file the counter-memorial if the objection relates to the main claim; or

( ) the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim;

( ) the party shall file a written submission, specifying the grounds on which the preliminary objection is based and including a statement of relevant facts, law and arguments, with any supporting documents; and

( ) the Tribunal shall fix time limits for written or oral submissions, as required, on the preliminary objection.

(3) The Tribunal may address a preliminary objection in a separate phase of the proceeding pursuant to Rule 37 or join the objection to the merits. If the Tribunal decides to address the preliminary objection in a separate phase, it may suspend the proceeding on the merits.

( ) If a party files a preliminary objection it shall also file its counter-memorial on the merits, or file its next written submission after an ancillary claim is raised if the objection relates to the ancillary claim, unless the Tribunal has ordered otherwise.

( ) The Tribunal may at any time on its own initiative consider whether a claim is within the jurisdiction of the Centre or within its own competence.
(6) The Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.

(7) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within its competence, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.

**Article 36**

**Objections préliminaires**

(1) Une partie peut soulever une objection préliminaire fondée sur le motif que le différend ou toute demande accessoire ne ressortit pas à la compétence du Centre ou, pour toute autre raison, à celle du Tribunal.

(2) La procédure suivante s’applique :

   (a) une objection préliminaire est soulevée aussitôt que possible. Sauf si les faits sur lesquels l’objection est fondée sont inconnus de la partie au moment considéré, l’objection est soulevée au plus tard :

      ( ) à la date fixée pour le dépôt du contre-mémoire si l’objection se rapporte à la demande principale ; ou

      ( ) à la date fixée pour le dépôt des écritures suivantes après qu’une demande accessoire soit soulevée, si l’objection se rapporte à la demande accessoire ;

   ( ) la partie dépose des écritures indiquant précisément les motifs sur lesquels l’objection est fondée et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ; et

   ( ) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l’objection préliminaire.

(3) Le Tribunal peut traiter une objection préliminaire au cours d’une phase distincte de l’instance conformément à l’article 37 ou l’examiner avec les questions de fond. Si le Tribunal décide de traiter l’objection préliminaire au cours d’une phase distincte, il peut suspendre la procédure sur le fond.

   ( ) Si une partie soulève une objection préliminaire, elle dépose également son contre-mémoire sur le fond, ou ses écritures suivantes après qu’une demande accessoire soit soulevée, si l’objection se rapporte à la demande accessoire, sauf instructions contraires du Tribunal.
Le Tribunal peut, à tout moment et de sa propre initiative, examiner si une demande ressortit à la compétence du Centre ou à sa propre compétence.

Le Tribunal rend sa décision concernant l’objection préliminaire dans un délai de 180 jours à compter des dernières écritures ou plaidoiries relatives à l’objection.

Si le Tribunal décide qu’un différend ne ressortit pas à la compétence du Centre ni, pour toutes autres raisons, à sa propre compétence, il rend une sentence dans ce sens. Dans le cas contraire, le Tribunal rend une décision sur l’objection et fixe tout délai nécessaire à la poursuite de l’instance.

Regla 36
Excepciones Preliminares

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

(2) Se aplicará el siguiente procedimiento:

(a) una excepción preliminar deberá oponerse lo antes posible. A menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción, la excepción deberá oponerse a más tardar:

( ) en la fecha de presentación del memorial de contestación si la excepción se refiere a la reclamación principal; o

( ) en la fecha de presentación del escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere a la demanda subordinada;

( ) la parte deberá presentar un escrito, especificando las causales en las cuales se funda la excepción preliminar e incluir una relación de los hechos pertinentes, el derecho y los argumentos junto con cualquier documento de respaldo; y

( ) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción preliminar.

(3) El Tribunal podrá pronunciarse sobre una excepción preliminar en una fase separada del procedimiento de conformidad con lo dispuesto en la Regla 37 o conjuntamente con las cuestiones de fondo. Si el Tribunal decide pronunciarse sobre la excepción preliminar en una fase separada, podrá suspender el procedimiento sobre las cuestiones de fondo.
Si una parte opone una excepción preliminar, también deberá presentar su memorial de contestación sobre el fondo, o presentar el escrito inmediatamente posterior a la presentación de una demanda subordinada si la excepción se refiere a la demanda subordinada, salvo resolución en contrario del Tribunal.

El Tribunal podrá en cualquier momento considerar de oficio si una reclamación se encuentra dentro de la jurisdicción del Centro o es de su propia competencia.

El Tribunal emitirá su decisión relativa a la excepción preliminar dentro de los 180 días siguientes a lo que suceda de último, sea la presentación de un escrito, o bien, una presentación oral sobre la excepción.

Si el Tribunal decide que la diferencia no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de su propia competencia, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión relativa a la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

382. Preliminary objections are common in ICSID cases and are typically raised by the respondent early in the process. They mostly concern the Tribunal’s jurisdiction and the admissibility of the claim. The claimant may also raise preliminary objections to ancillary claims made by the respondent, for example, a counter-claim.

383. When a preliminary objection is raised, the Tribunal may: (i) deal with the objection as a preliminary question, with or without suspending consideration of the merits; or (ii) join the objection to the merits of the dispute. How to deal with the objection is typically discussed at the first session. The timing implications are discussed in Schedule 9 on Time and Cost.

384. Proposed AR 36 updates current AR 41 language and revises the procedure to reflect current practice.

385. First, in line with current practice, the parties and the Tribunal may agree on the time limit for filing the preliminary objection, which is to be filed as early as possible under current AR 41(1). If the parties are unable to agree on the time for filing the preliminary objection, the respondent must file the objection at the latest by the date fixed by the Tribunal to file the counter-memorial on the merits. Some comments suggested moving up the deadline for filing jurisdictional objections or giving the Tribunal discretion to fix this deadline. The WP proposes to keep the existing time limit (proposed AR 36(2)(a)(i)), but requires that a party file a request for bifurcation within 30 days after the memorial on the merits (see proposed AR 37(2)(a)).

386. Second, proposed AR 36(3) confirms that the Tribunal may deal with the objection as a preliminary question in a bifurcated proceeding or join it to the merits. The rule also proposes to delete the reference to a suspension of the proceeding on the merits upon the formal raising of the objection. In practice, the Tribunal addresses the question of
bifurcation before deciding whether to suspend the merits. The WP proposes to allow Tribunal discretion to consult with the parties and to decide when suspension of the proceeding is appropriate. If all jurisdictional objections are to be addressed in a separate phase of the proceeding before the merits, the proceeding on the merits will likely be suspended unless the parties agree otherwise.

387. Third, proposed AR 36(4) provides that a party filing a preliminary objection must also file its counter-memorial on the merits, unless the Tribunal has ordered bifurcation under proposed AR 37. This is a new provision that is intended to promote efficiency and fairness, avoiding delay due to late requests for bifurcation. In view of proposed AR 37(2)(d) requiring a party to file a request for bifurcation within 30 days after the memorial on the merits (most likely before the counter-memorial), it is expected that jurisdictional objections will be filed together with the counter-memorial only when the moving party does not wish to bifurcate jurisdiction from the merits. The moving party may thus not avoid filing the counter-memorial if the jurisdictional objections are filed at a late stage.

388. Fourth, proposed AR 36(5) mirrors current AR 41(2). In accordance with proposed AR 11(2), the Tribunal must consult with the parties before deciding on its own initiative that a claim is not within the jurisdiction of the Centre or within its own competence.

389. Fifth, some comments suggested a time limit for the Tribunal’s decision on the preliminary objection. The issues before the Tribunal vary in scope, complexity, and the number of pleadings and supporting documents. A review of the cases where a decision on jurisdiction was rendered between January 1, 2016 and June 30, 2017 shows that decisions on jurisdiction have taken on average 185 days from the last submission. In line with this data and comments received, the WP proposes in AR 36(6) and AR 59(1)(b) that the Tribunal issue a decision or Award on the objection within 180 days after the last written or oral submission. As noted above, this is a “best efforts” obligation pursuant to proposed AR 8(3).

**RULE 37 – BIFURCATION**

**CURRENT RELATED PROVISIONS: AR 41**

<table>
<thead>
<tr>
<th>Rule 37</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bifurcation</strong></td>
</tr>
<tr>
<td>(1) A party may request that a question be addressed in a separate phase of the proceeding (“request for bifurcation”).</td>
</tr>
<tr>
<td>(2) The following procedure shall apply:</td>
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<tr>
<td>(a) if the request for bifurcation relates to a preliminary objection, a party shall file the request within 30 days after the filing of the memorial on the merits or, if the</td>
</tr>
</tbody>
</table>

185
objection relates to an ancillary claim, within 30 days after the filing of the written submission containing the ancillary claim, unless the facts on which the objection is based are unknown to the party at the relevant time;

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

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

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

(3) The Tribunal may at any time on its own initiative decide whether a question is to be addressed in a separate phase of the proceeding.

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

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**Article 37**

**Bifurcation**

(1) Une partie peut demander qu’une question soit traitée au cours d’une phase distincte de l’instance (« demande de bifurcation »).

(2) La procédure suivante s’applique :

   (a) si la demande de bifurcation se rapporte à une objection préliminaire, une partie présente la demande dans un délai de 30 jours suivant le dépôt du mémoire sur le fond ou, si l’objection se rapporte à une demande accessoire dans un délai de 30 jours suivant le dépôt des écritures contenant la demande accessoire, sauf si les faits sur lesquels l’objection est fondée sont inconnus de la partie au moment considéré ;

   (b) la demande de bifurcation précise les questions devant faire l’objet de la bifurcation ;

   (c) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant la demande de bifurcation ; et

   (d) le Tribunal rend sa décision concernant une demande de bifurcation dans un délai de 30 jours à compter des dernières écritures ou plaidoiries relatives à la demande.
(3) Le Tribunal peut, à tout moment et de sa propre initiative, décider si une question doit être traitée au cours d’une phase distincte de l’instance.

(4) Pour déterminer s’il se prononce en faveur de la bifurcation, le Tribunal tient compte de l’ensemble des circonstances pertinentes, notamment il examine si la bifurcation réduirait de manière significative la durée et le coût de l’instance.

Regla 37
Bifurcación

(1) Una parte podrá solicitar que una cuestión sea abordada en una fase separada del procedimiento (“solicitud de bifurcación”).

(2) Se aplicará el siguiente procedimiento:

(a) si la solicitud de bifurcación se refiere a una excepción preliminar, una parte presentará la solicitud dentro de los 30 días siguientes a la presentación del memorial sobre el fondo o, si la excepción se refiere a una demanda subordinada, dentro de los 30 días siguientes a la presentación del escrito que contenga la demanda subordinada, a menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción;

(b) la solicitud de bifurcación deberá especificar las cuestiones que deben bifurcarse;

(c) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de bifurcación; y

(d) el Tribunal emitirá su decisión sobre una solicitud de bifurcación dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.

(3) El Tribunal podrá en cualquier momento decidir de oficio si una cuestión debe abordarse en una fase separada del procedimiento.

(4) Al momento de determinar si corresponde bifurcar, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye si la bifurcación reduciría sustancialmente el tiempo y costo del procedimiento.

Bifurcation refers to the consideration of distinct issues for preliminary determination in a separate phase of the proceeding. Requests for bifurcation typically concern the separation of jurisdictional issues from the merits of the dispute. They may be made by claimants but are most often made by respondents. From January 2000 through December 2017, there were 115 decisions on bifurcation. The Tribunal may also hear other issues in separate
phases, for example, bifurcating consideration of the merits into liability and quantum phases.

391. The possibility of bifurcation is foreseen in current AR 41(4), but the rule does not provide any further detail. Proposed AR 37 follows suggestions to include a stand-alone provision on bifurcation and to provide more guidance on the timing, procedure and factors to be considered.

392. Several Member States commented that bifurcation should be allowed more often, or automatically, when jurisdictional objections are raised. The WP does not propose automatic bifurcation because the facts of each case are relevant to determining whether bifurcation is appropriate.

393. ICSID case law has uniformly held that there is no presumption in favour of bifurcation, and has identified certain factors to be considered. For jurisdictional objections these factors include: (i) whether the objection is closely intertwined with the merits of the claim; (ii) whether the objection is capable of disposing of the entire case; (iii) whether the objection has merit and is not frivolous; and (iv) whether procedural economy would be served by dealing with the objection prior to the merits (see e.g., Tulip v. Turkey (ARB/11/28), Decision on Bifurcated Jurisdictional Issue (March 5, 2013), and Emnis et al. v. Hungary (ARB/12/2), Decision on Respondent’s Application for Bifurcation (July 13, 2013)). The last factor addresses whether bifurcation would materially reduce time and cost, and applies to all bifurcation scenarios. This test is incorporated into the proposed rule. Time and cost savings are likely if the proceeding on jurisdiction leads to an Award on jurisdiction disposing of the case. However, if jurisdiction is upheld and the case continues on the merits, the proceeding could be longer and more expensive (see Schedule 9 on Time and Cost). Therefore, the WP proposes to maintain the current discretion of Tribunals to decide whether to bifurcate depending on the circumstances of each case.

394. The Request for Bifurcation. Proposed AR 37(1) allows the parties to request bifurcation of preliminary objections and other matters, e.g., dealing with liability before quantifying damages. Proposed AR 37 is intended to cover all types of requests for bifurcation.

395. Tribunal Ordered Bifurcation. The Tribunal may sometimes conclude on its own initiative that bifurcation of a particular issue is appropriate or that a particular issue should be joined to the merits after bifurcation. Proposed AR 37(3) reflects the discretion of the Tribunal to order bifurcation in such circumstances or to join the bifurcated issue to the merits, after hearing the parties’ views (see proposed AR 11(2)). The provision anticipates that the Tribunal will apply the standard for bifurcation indicated in proposed AR 37(4).

396. Timing of Requests for Bifurcation. Typically, requests concerning bifurcation of jurisdictional objections are made earlier than other requests for bifurcation, but there is no time limit for the request in the current AR. In practice, the deadline for a request for bifurcation often corresponds to the deadline for raising an objection to jurisdiction, although requests for bifurcation are increasingly filed before the objections. Several comments suggested that a time limit be introduced for requests to bifurcate to address delay.
Proposed AR 37(2)(a) requires the parties to file a request for bifurcation within 30 days after the memorial on the merits or on the ancillary claim. A review of the 60 cases which led to decisions on bifurcation issued between May 30, 2014 and December 14, 2017 showed that requests for bifurcation concerning jurisdictional objections are made before filing the counter-memorial on the merits in approximately 73% of the cases and are filed on average 37 days after the memorial on the merits.

As indicated in proposed AR 37(2)(b), the request for bifurcation should specify the issues that the party wishes the Tribunal to hear in a separate phase to allow the Tribunal to determine whether bifurcation is appropriate in the circumstances.

The Procedure. The Tribunal will establish a procedural calendar to deal with the request for bifurcation (see proposed AR 37(2)(c)). Typically, Tribunals have allowed one round of submissions on bifurcation, with short time limits. Proposed AR 37(2)(d) addresses delay in the issuance of a decision on bifurcation. Based on a review of the 60 cases referred to above, decisions on bifurcation have taken on average 28 days from the last submission, with a range of 2 to 159 days depending on the circumstances of the case. Typically, where concurrent applications were pending before the Tribunal, the decision took longer (e.g., proposals for disqualification or requests for provisional measures). In the vast majority of cases (46 cases), however, the decision on bifurcation was rendered less than 40 days after the last submission.

In line with the average length and with comments received concerning timeliness of rulings, the WP proposes a deadline of 30 days from the last submission for the Tribunal to issue its decision. The Tribunal and the parties are encouraged to discuss the timing of potential requests for bifurcation, observations on the requests, and the Tribunal’s decision at the first session.

Factors to Be Considered by Tribunal. Several comments suggested that the AR provide guidance regarding the factors to be considered by Tribunals when considering a request for bifurcation. These may vary depending on the nature of the issues to be heard in a separate phase. As mentioned above, a common factor is whether the bifurcation would reduce time and cost. Because other factors are specific to bifurcation of preliminary objections, proposed AR 37(4) only includes that factor.

Suspension of the proceeding. One Member State commented that suspension of the proceeding on the merits should be automatic if the Tribunal decides to bifurcate jurisdictional objections. The 2006 Rules made suspension of the merits discretionary. This was an amendment to previous versions of the AR under which suspension was mandatory, and addressed the possibility of an objection that a claim manifestly lacks legal merit, which is automatically bifurcated under current AR 41(5) (meaning there can be no suspension if the objection concerns the merits).

In practice, most Tribunals do suspend the proceeding on the merits when they grant bifurcation of an objection to jurisdiction. However, the practical implication is minimal and only serves to confirm that certain time limits for pleadings dealing with other matters
are suspended. In some cases, the parties agree to proceed with the merits of the case on a slower track.

404. The main steps in an application to bifurcate are as follows:

**Bifurcation – Rule 37**

1. **Filing of memorial on merits**
2. **Filing of written submission with ancillary claim**

- **Within 30 days**

3. **Request for bifurcation (Rule 37(1))**
4. **Tribunal fixes time limits for written or oral submissions (Rule 37(2)(c))**
5. **Party submissions**

- **Within 30 days**

6. **Tribunal decision (Rule 37(2)(d))**
Rule 38
Consolidation or Coordination on Consent of Parties

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

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

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

Article 38
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.

Regla 38
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.
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.

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 solicitada promoviera una resolución justa y eficiente de la totalidad o de algunas de las reclamaciones planteadas en los arbitrajes.

Schedule 7 to the WP provides a detailed overview of Multiparty Claims and Consolidation. It identifies existing procedural mechanisms at ICSID that facilitate the resolution of related investment claims in a like and cost-effective manner, including ancillary and counterclaims (see proposed AR 52) and multiparty claims (see proposed IR 1 and 8, and AR 2), and explains proposed Rule 38.

The Schedule addresses two options for consolidation: (i) voluntary consolidation with party consent (proposed AR 38); and (ii) mandatory consolidation by a Tribunal (proposed AR 38BIS), and discusses the rationale for each option. While both varieties of consolidation could be incorporated in the Rules, the WP only proposes voluntary consolidation. The proposed Rule should be read in conjunction with Schedule 7 to understand how consolidation has been achieved in ICSID-administered arbitrations to date and how the proposed mechanism could help parties maximize potential efficiency gains.

The ICSID Convention and the current AR do not address consolidation of claims. Proposed AR 38 provides for voluntary consolidation and coordination of proceedings on consent of the parties. This allows parties to consent to consolidation, or where not available, to coordinate aspects of related cases.

By offering both consolidation and coordination, the proposed rule takes a broader approach than most consolidation rules. The intent is to offer a wider variety of mechanisms for joint resolution of disputes, and not to be limited to formal consolidation of claims.

Proposed AR 38(1) provides that parties in two or more pending arbitrations that were commenced separately, but are all administered by the Centre, may agree to consolidate or coordinate these arbitrations, subject to applicable jurisdictional limitations (see Schedule 7 for examples from current practice).

This includes arbitrations under the ICSID Convention, ICSID Additional Facility, UNCITRAL Arbitration Rules, or ad hoc arbitration. It demonstrates another advantage of a rule under the auspices of ICSID: it allows parties to coordinate, and in some circumstances to consolidate, claims commenced under different sets of rules.

Proposed AR 38(2) requires the parties to those arbitrations to provide the Secretary-General with written terms of reference, detailing the terms of consolidation or...
coordination to which they would consent. This ensures clarity about the scope of consolidation or coordination and gives the Secretary-General an opportunity to ensure that the proposed terms of reference are workable and can be implemented by the Centre.

412. Under proposed AR 38(3), the Secretary-General will take all necessary administrative steps to implement the agreement of the parties. The administrative steps will depend on the agreed terms and could include appointing the same arbitrators to hear otherwise separate arbitrations, organizing joint hearings, or ensuring that the Award(s) are rendered simultaneously. When arbitration claims are consolidated, in full or in part, the Secretary-General may appoint the same Secretary to the Tribunal (see proposed AFR 25) to facilitate efficient procedural coordination.

413. If the parties agree to full consolidation, two or more pending arbitrations would be combined into one arbitration, with one set of pleadings, a common Tribunal, a common hearing and a single Award rendered. In a partial consolidation, only some claims would be brought together in the consolidated proceeding while the remaining claims would stay with the individual Tribunals to allow for individual determination of certain matters in each of the related proceedings.

414. Alternatively, parties might agree to have distinct stages of related cases proceed together, although the claims remain separate. While sometimes called partial consolidation, procedural alignment or case coordination more accurately describes this approach. In practice, this approach has been used the most frequently (see Schedule 7 for further information).

415. Proposed AR 38BIS is a draft of a potential mandatory consolidation provision for discussion (see also Schedule 7). This mandatory consolidation provision is not incorporated in the consolidated draft rule texts, pending a decision by Member States on whether they want to include mandatory consolidation in the ICSID Rules. While mandatory consolidation has obvious benefits in reducing arbitration costs and ensuring consistent Awards, both claimants and respondents may be reluctant to allow parallel claims to be joined against their will.

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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
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(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.

416. Draft AR 38BIS is provided for consideration by Member States. It is based on the numerous investment treaties that include consolidation provisions, some of which may mandate consolidation of all or part of related investment claims submitted to international arbitration on the basis of a treaty (see Schedule 7 for an overview of relevant investment treaties).

417. Any proposal in the ICSID Rules on mandatory consolidation would have to address several considerations, and Schedule 7 identifies the architecture for designing such a provision.
CHAPTER VI - EVIDENCE

RULE 39 – EVIDENCE: GENERAL PRINCIPLE

CURRENT RELATED PROVISIONS: Convention Art. 43; AR 33-37

Chapter VI
Evidence

Rule 39
Evidence: General Principle

The Tribunal shall determine the admissibility and probative value of the evidence adduced.

Chapitre VI
La preuve

Article 39
La preuve : principe général

Le Tribunal est juge de la recevabilité et de la valeur probatoire de tous moyens de preuve invoqués.

Capítulo VI
Prueba

Regla 39
La Prueba: Principio General

El Tribunal determinará la admisibilidad y el valor probatorio de los medios de prueba invocados.

418. Evidentiary issues are decided by Tribunals or agreed to by the parties on a case by case basis. The ICSID rules on presentation of evidence have worked well in most instances but prevailing practice is not always reflected in the wording of the current AR. The AR have therefore been updated to reflect existing practice.

419. In particular, current AR 33 on the marshalling of evidence does not reflect case practice and portions of it overlap with other Rules, notably current AR 24 on supporting
The WP proposes to delete current AR 33. The contents of current AR 33 that are still relevant are incorporated in a series of rules concerning evidence (proposed AR 39-43).

420. Proposed AR 39 is now titled “Evidence: General Principle” and sets out the general principle that the Tribunal is the sole judge of the admissibility and probative value of the evidence. This applies to all evidence in a proceeding, including written evidence and oral testimony.

421. Current AR 34(2)(a) concerning Tribunal orders to produce evidence is now addressed in AR 40(2). Current AR 34(2)(b) and current AR 37(1), which deal with site visits and inquiries, are moved to a stand-alone proposed AR 43 devoted to visits and inquiries.

422. Current AR 34(4) is proposed for deletion. It is not necessary to specify that expenses related to the production of evidence are part of the parties’ costs, as all expenses incurred in connection with the proceeding are part of the parties’ costs pursuant to Art. 61(2) of the Convention. The Tribunal has overall discretion to allocate such costs between the parties (see proposed AR 19).

**Rule 40 – Tribunal Order to Produce Documents or Other Evidence**

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<th>CURRENT RELATED PROVISIONS:</th>
<th>Convention Art. 43; AR 33-34</th>
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**Rule 40**

**Tribunal Order to Produce Documents or Other Evidence**

(1) The Tribunal shall decide any dispute arising out of a party’s request for production of documents or other evidence. In doing so, it shall consider all relevant circumstances including the scope and timeliness of the request, the relevance of the documents and evidence requested, the time and burden of production and any objections raised by the other party.

(2) The Tribunal may at any time on its own initiative order a party to produce documents or other evidence.

**Article 40**

**Ordonnance du Tribunal aux fins de produire des documents ou autres moyens de preuve**

(1) Le Tribunal statue sur tout différend découlant de la demande de production de documents ou d’autres moyens de preuve présentée par une partie. À cet effet, il tient compte de l’ensemble des circonstances pertinentes, notamment l’étendue et la ponctualité de la demande, la pertinence des documents et preuves demandés, les
délais de production et le fardeau que représente une telle production ainsi que toutes objections soulevées par l’autre partie.

(2) Le Tribunal peut, à tout moment et de sa propre initiative, ordonner à une partie de produire tous documents ou autres moyens de preuve.

Regla 40
Resolución del Tribunal sobre Exhibición de Documentos u Otros Medios de Prueba

(1) El Tribunal decidirá cualquier diferencia que surja a partir de la solicitud de exhibición de documentos u otros medios de prueba presentada por una parte. Al hacerlo, considerará todas las circunstancias pertinentes lo cual incluye el alcance y la prontitud de la solicitud, la relevancia de los documentos y los medios de prueba solicitados, el momento y la carga de proporcionar los documentos, así como las excepciones opuestas por la otra parte.

(2) El Tribunal podrá en cualquier momento ordenar de oficio a una parte que exhiba documentos u otros medios de prueba.

423. Most of the comments received on evidence concerned document production requests between the parties and, in particular, the time and cost of the document production process. There are no guidelines in the current AR concerning the conduct of document production. In many cases, ICSID Tribunals have been guided by the 2010 International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration. Tribunals also regularly use Redfern Schedules to address objections to production of documents.

424. A new item for document production requests between parties is included in proposed AR 34 as a procedural matter to be considered during the first session.

425. Proposed AR 40 combines the Tribunal’s power to decide disputes that may arise out of the parties’ document production requests (proposed AR 40(1)), with the Tribunal’s power to order the parties to produce documents or other evidence (proposed AR 40(2)).

426. Parties frequently ask Tribunals to decide disputes regarding document production. For example, the Tribunal may have to rule on whether a refusal to produce is justified or whether reliance on a privilege is well-founded. Proposed AR 40(1) allows the Tribunal to decide an application concerning a refusal to produce documents, and sets out criteria to guide Tribunals in the exercise of this discretion. The criteria considered include the scope and timeliness of the request and the burden of production. They also include the relevance of the requested documents to the dispute. Under the ICSID Convention and Rules, the term “relevance” is broad enough to encompass other criteria taken into consideration when assessing a refusal to produce documents; in particular, the weight and materiality of the documents or evidence requested (see e.g., Churchill Mining and Planet Mining Pty
Among the suggestions received on document production were to have Tribunals more actively case-manage document production requests between the parties, for example, by convening meetings to confer on the scope of document production. This can be done pursuant to proposed AR 14 on case management conferences.

Proposed AR 40(2) reiterates the authority of Tribunals to require a party to produce documents or other evidence at any stage. The term “documents or other evidence” is used to ensure that the requests cover different types of evidence including documentary evidence, expert reports and witness testimony.

**RULE 41 – WITNESSES AND EXPERTS**

**CURRENT RELATED PROVISIONS:** Convention Art. 43; AR 33-36

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**Rule 41**

**Witnesses and Experts**

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.

(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(7) Each witness shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”
(8) Each expert shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”

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**Article 41**

**Témoins et experts**

(1) Une partie qui entend se fonder sur des preuves fournies par un témoin soumet une déclaration écrite de ce témoin. La déclaration identifie le témoin, contient son témoignage et est signée et datée.

(2) Un témoin qui a soumis une déclaration écrite peut être appelé en vue d’être interrogé lors d’une audience.

(3) Le Tribunal détermine la manière dont l’interrogatoire est conduit.

(4) Tout témoin est interrogé devant le Tribunal, par les parties et sous le contrôle du ou de la Président(e). Tout membre du Tribunal peut lui poser des questions.

(5) L’interrogatoire d’un témoin se déroule en personne, à moins que le Tribunal ne décide que d’autres modalités d’interrogatoire sont appropriées compte tenu des circonstances.

(6) Les paragraphes (1) - (5) s’appliquent, avec les modifications qui s’imposent, aux moyens de preuve fournis par un expert.

(7) Avant de témoigner, tout témoin fait la déclaration suivante :

« Je m’engage solennellement, sur mon honneur et sur ma conscience, à dire la vérité, toute la vérité et rien que la vérité ». 

(8) Avant de témoigner, tout expert fait la déclaration suivante :

« Je m’engage solennellement, sur mon honneur et sur ma conscience, à faire ma déposition en toute sincérité ».

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**Regla 41**

**Testigos y Peritos(as)**

(1) La parte que pretenda invocar prueba aportada por un o una testigo deberá presentar una declaración escrita de ese(a) testigo. La declaración deberá identificar al o a la testigo, contener su testimonio, estar firmada y fechada.
(2) Un o una testigo que haya presentado una declaración escrita podrá ser interrogado(a) durante una audiencia.

(3) El Tribunal determinará la manera en que se lleve a cabo el interrogatorio.

(4) Un o una testigo será interrogado(a) por las partes ante el Tribunal, bajo el control del o de la Presidente(a). Cualquier miembro del Tribunal podrá formularle preguntas al o a la testigo.

(5) Un o una testigo podrá ser interrogado(a) en persona salvo que el Tribunal determine que otro medio para conducir el interrogatorio es apropiado en las circunstancias del caso.

(6) Los párrafos (1)-(5) serán aplicables a la prueba aportada por un(a) perito(a) con las modificaciones necesarias.

(7) Antes de su interrogatorio, cada testigo hará la siguiente declaración:

   “Declaro solemnemente, por mi honor y conciencia, que diré la verdad, toda la verdad y solo la verdad”.

(8) Antes de su interrogatorio, cada perito(a) hará la siguiente declaración:

   “Declaro solemnemente, por mi honor y conciencia, que lo que manifestaré estará de acuerdo con lo que sinceramente creo”.

429. Current AR 35 and 36 do not reflect established practice concerning witness and expert evidence. In practice, parties invariably file written witness statements and expert reports in advance of the hearing. These are usually filed with the pleading to which they relate. There is no specific form requirement for a witness statement or expert report, other than that it must be in writing, identify the witness or expert, describe the testimony of the witness or expert, and be signed and dated. The statement or report need not be notarized.

430. Parties are entitled to call witnesses and experts to testify at a hearing, but are not required to do so. Typically, each party selects the witnesses and experts whom it wishes to cross-examine at the hearing. The written statements of the witnesses and experts who have not been called for cross-examination will stand as their evidence in chief, i.e., taken “as read”. The witnesses and experts to be called, the subject of their testimony, the procedure for examination, the time allotted to each witness and other specific details are decided by the Tribunal in consultation with the parties, usually at the pre-hearing organizational call. Sometimes, a party may be allowed a brief direct examination of its own witness or expert, even if that person has not been called by the other party or the Tribunal.
431. Proposed AR 41 simplifies current AR 35 and 36, and combines the rules concerning witnesses in one provision. The title of AR 35 has been changed to reflect its current content. As drafted, the proposal represents well-established arbitral practice.

432. Some comments suggested that the amended rules should address witness conferencing and other methods of examination. Witness conferencing allows two (or more) witnesses on the same topic to present their oral evidence simultaneously, allowing the Tribunal and parties to compare the responses of each witness on the same question. It is most frequently used with experts, but can also be used with fact witnesses. Proposed AR 41(3) contemplates and accommodates different methods of examination including witness conferencing, hence the technique is not expressly addressed by the proposed AR.

433. Similarly, some comments suggested express provisions on protection of witnesses. Proposed AR 41(3) allows the Tribunal to make orders necessary to ensure efficient presentation of evidence, which would include orders to ensure the protection of witnesses, hence this is also not expressly addressed.

434. Proposed AR 41(4) and (5) maintain the usual rule that witnesses who are called for examination at a hearing are examined in person by the parties and before the Tribunal. However, it allows the Tribunal to order otherwise if justified by the circumstances. For example, the Tribunal might order a witness to be examined by video-conference if the witness is unable to travel to the hearing. Other situations pertaining to witness evidence or examination are generally addressed in Procedural Order No. 1.

435. Proposed AR 41(7) and (8) reiterate the usual form of oath for fact and expert witnesses.

**Rule 42 – Tribunal-Appointed Experts**

**CURRENT RELATED PROVISIONS**: Convention Art. 43; AR 33-36

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<th>Rule 42</th>
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<tr>
<td><strong>Tribunal-Appointed Experts</strong></td>
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<tr>
<td>(1) The Tribunal may appoint one or more independent experts to report to it on specific matters.</td>
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<td>(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference of the expert.</td>
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<tr>
<td>(3) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.</td>
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(4) The parties shall have the right to make written or oral submissions on the report of the Tribunal-appointed expert.

(5) Rule 41(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal-appointed expert.

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**Article 42**

**Experts nommés par le Tribunal**

(1) Le Tribunal peut nommer un ou plusieurs experts indépendants chargés de lui présenter un rapport sur des questions particulières.

(2) Le Tribunal consulte les parties sur la nomination d’un expert, y compris sur sa mission.

(3) Les parties communiquent à l’expert nommé par le Tribunal toutes informations, tous documents ou toutes autres preuves que l’expert peut demander. Le Tribunal statue sur tout différend relatif aux preuves demandées par l’expert nommé par le Tribunal.

(4) Les parties ont le droit de déposer des écritures ou de plaider sur le rapport de l’expert nommé par le Tribunal.

(5) L’article 41(1) - (5) et (8) s’applique, avec les modifications qui s’imposent, à l’expert nommé par le Tribunal.

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**Regla 42**

**Peritos(as) Nombrados(as) por el Tribunal**

(1) El Tribunal podrá nombrar a uno(a) o más peritos(as) independientes para que lo informen acerca de cuestiones específicas.

(2) El Tribunal consultará a las partes respecto del nombramiento de un(a) perito(a), lo cual incluye respecto de los términos de referencia del o de la perito(a).

(3) Las partes le proporcionarán al o a la perito(a) nombrado(a) por el Tribunal cualquier información, documento u otra prueba que el o la perito(a) pueda solicitar. El Tribunal decidirá cualquier diferencia relativa a la prueba requerida por el o la perito(a) nombrado por el Tribunal.

(4) Las partes tendrán derecho a presentar escritos o realizar presentaciones orales sobre el informe del o de la perito(a) nombrado(a) por el Tribunal.
Proposed AR 42 is a new rule. It reflects ICSID practice on Tribunal appointment of independent experts to assist the arbitrators with specific issues raised in the arbitration. Tribunal-appointed experts have been relied on for a variety of issues, including data verification, environmental assessment and calculation of compensatory damages. The proposed AR expressly gives the Tribunal the power to appoint its own expert(s) after consulting with the parties. It encompasses the selection, appointment and role played by Tribunal-appointed experts and ensures the parties’ participation in the process. The proposed rule is broad enough to allow for the adoption of various selection and appointment techniques developed in practice and that the Tribunal may wish to apply (e.g. expert-teaming).

**Rule 43 – Visits and Inquiries**

**Current Related Provisions:** Convention Art. 43; AR 34, 37

**Rule 43**

**Visits and Inquiries**

(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party’s request, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.

**Article 43**

**Transports sur les lieux et enquêtes**

(1) Le Tribunal peut ordonner un transport sur les lieux ayant un lien avec le différend, de sa propre initiative ou à la demande d’une partie, s’il estime ce transport nécessaire, et il peut procéder à des enquêtes sur place si nécessaire.

(2) L’ordonnance définit la portée du transport sur les lieux et l’objet de l’enquête, la procédure à suivre, les délais applicables et autres conditions.
Regla 43
Visitas e Investigaciones

(1) El Tribunal podrá ordenar, de oficio o a solicitud de una de las partes, una visita a cualquier lugar relacionado con la diferencia, si estima la visita necesaria, y una vez en el lugar podrá realizar investigaciones según corresponda.

(2) La resolución definirá el alcance de la visita y el objeto de cualquier investigación, el procedimiento que se deberá seguir, los plazos aplicables y demás términos.

(3) Las partes tendrán derecho a participar en cualquier visita o investigación.

437. Current AR 37(1) regulates the conduct of site visits and inquiries pursuant to Art. 43(b) of the Convention and current AR 34(2)(b). The WP proposes to combine the text of current AR 34(2)(b) and AR 37(1) in a stand-alone provision on the conduct of visits and inquiries.

438. Proposed AR 43(1) expressly states that a site visit may be ordered either on the Tribunal’s own initiative or upon a party’s request. The parties are entitled to participate in a site visit.

CHAPTER VII - PUBLICATION, ACCESS TO PROCEEDINGS AND NON-DISPUTING PARTY SUBMISSIONS

439. Schedule 8 to this WP is a detailed overview of the transparency provisions proposed for the ICSID rules amendment. It explains the current provisions, the proposals made, and the rationale for such proposals. Proposed AR 44-49 should be read in conjunction with this Schedule to understand the broader scheme proposed for transparency.

RULE 44 – PUBLICATION OF AWARDS AND DECISIONS ON ANNULMENT

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

440. Parties may address publication of Awards in their individual treaties, contracts or laws, or by ratifying the United Nations Convention on Transparency in Treaty Based Investor-State Arbitration (2017) (Mauritius Convention). They may also agree with the other party to a case-specific approach to publication of Awards. However, if parties do not do so, the ICSID Rules will govern publication of Awards.

441. Article 48(5) of the ICSID Convention states that the Centre shall not publish Awards without the consent of the parties. Article 48 cannot be changed without amendment, and
hence constrains the extent to which a rule could allow publication of Awards in Convention arbitration without party consent. If both parties do not consent to publication of the Award, current AR 48(4) allows ICSID to publish excerpts of the legal reasoning in the Award.

442. Proposed AR 44(1) reiterates that Awards will be published with party consent. It makes clear that in this context, “Award” includes supplementary rulings on Awards as well as decisions on annulment. This reflects current practice.

443. Proposed AR 44(2) is a new provision. It deems the parties to have consented to publication of an Award if they do object to its publication, in writing, within 60 days after dispatch of the Award. The proposed deeming of consent does not prejudice the parties in that it gives them a clear and simple way to maintain an objection to publication should they wish to do so.

444. At the same time, proposed AR 44(2) requires a timely and unambiguous decision on whether parties consent to publish the Award. If consent is refused, proposed AR 44(2) allows the Centre to prepare excerpts immediately and hence publish them earlier than otherwise might have been the case.

445. Proposed AR 44(3) maintains the current rule that the Centre will prepare and publish excerpts of the legal reasoning in the Award if the parties do not consent to publication. However, it now establishes a procedure to do so, with clear time frames attached. The procedure proposed allows the parties to agree on redactions from the excerpts, to ensure that confidentiality is respected.

**RULE 45 – PUBLICATION OF ORDERS AND DECISIONS**

**CURRENT RELATED PROVISIONS:** AFR 22, 23

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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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208
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.

446. As in the case of Awards, parties may address publication of orders and decisions in their individual treaties, contracts or laws, by ratifying the Mauritius Convention, or by case-specific agreements. However, if parties do not do so, the ICSID Rules will govern publication of decisions and orders by tribunals.

447. Unlike for Awards, there is no requirement in the ICSID Convention or the AR requiring party consent to publication of orders and decisions. As a result, they may be published by either party (subject to any confidentiality undertakings in the arbitration) and by the Centre.

448. Proposed AR 45 recognizes that parties are free to publish orders and decisions, but that there may well be legitimate claims to confidentiality in these. As a result, proposed AR 45 establishes a 60-day period after dispatch of the decision or order for the parties to agree on publication and to provide the Centre with the document, jointly redacted if necessary. The fact that parties must jointly redact the document should ensure that redactions are properly limited.
In any event, proposed AR 45 allows the parties to refer disputes on redaction of orders and decisions to the Tribunal. ICSID will then publish the decision or order.

If parties fail to provide any notice within the 60-day period after dispatch, ICSID will automatically publish the order or decision in full.

This provision should result in publication of a greater number of orders and decisions, while preserving the ability of the parties to protect legitimately confidential information that might be in such documents. It also allows ICSID to publish orders or decisions which have been jointly redacted by the parties.

**CURRENT RELATED PROVISIONS: AFR 22, 23**

**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.

Numerous documents other than Awards, orders and decisions are generated in an arbitration. These include memorials, witness statements, expert opinions and exhibits.
453. Again, parties may address publication of such documents in their individual treaties, contracts or laws, by ratifying the *Mauritius Convention*, or by case-specific agreements. However, if parties do not do so, the ICSID Rules will govern publication of orders and decisions. There is currently no ICSID rule preventing publication of these documents, although it is often addressed in a first session.

454. Proposed AR 46 allows parties to provide a copy of such documents to ICSID, with mutually agreed redaction, for publication. This ensures that ICSID can publish an accurate document which does not breach confidences of either party.

**RULE 47 – OBSERVATION OF HEARINGS**

**CURRENT RELATED PROVISIONS: AR 32**

<table>
<thead>
<tr>
<th>Rule 47</th>
<th>Observation of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td></td>
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<tr>
<td>(2) The Tribunal shall establish procedures to prevent the disclosure of confidential information to persons observing the hearings.</td>
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<tr>
<td>(3) The Centre shall publish recordings and transcripts of hearings, unless either party objects.</td>
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<table>
<thead>
<tr>
<th>Article 47</th>
<th>Observation des audiences</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Le Tribunal permet à des personnes, outre les parties, leurs représentants, les témoins et experts au cours de leurs dépositions, et les autres personnes assistant le Tribunal, d’observer les audiences, sauf si l’une des parties s’y oppose.</td>
<td></td>
</tr>
<tr>
<td>(2) Le Tribunal met en place des procédures pour empêcher la divulgation d’informations confidentielles aux personnes qui observent les audiences.</td>
<td></td>
</tr>
<tr>
<td>(3) Le Centre publie les enregistrements et les transcriptions des audiences, sauf si l’une des parties s’y oppose.</td>
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</tbody>
</table>
Regla 47
Observación de las Audiencias

(1) El Tribunal permitirá que otras personas además de las partes, sus representantes, testigos y peritos(as) durante su testimonio, así como las personas que asistan al Tribunal observen las audiencias, a menos que cualquiera de las partes se oponga.

(2) El Tribunal establecerá procedimientos para prevenir la revelación de información de carácter confidencial a las personas que observen las audiencias.

(3) El Centro publicará las grabaciones y transcripciones de las audiencias, a menos que cualquiera de las partes se oponga.

455. Parties also regulate observation of hearings in their individual treaties, by accession to the Mauritius Convention, or by case-specific agreement. Many States have treaty-specific provisions addressing access to hearings. These range from full access, to access with permission of both parties or of the respondent, to no access at all. Such provisions take precedence over the ICSID rules on attendance at hearings.

456. Proposed AR 47(1) maintains the current Rule allowing public access to hearings unless either party objects.

457. Proposed AR 47(2) requires the Tribunal to take necessary steps to preserve confidentiality during a hearing. Schedule 8 describes how the Centre provides for public access to hearings in person or through broadcast or webcast, and how it ensures confidential portions of a hearing remain closed.

458. Proposed AR 47(3) is a new provision, and requires publication of recordings or transcript of a hearing unless either party objects. This mirrors proposed AR 47(1) and provides a further method of allowing access to hearings. The Centre maintains a library of hearing videos on its public website and these are also accessible through the relevant case webpage (see e.g., BSG Resources Ltd v Republic of Guinea (ARB/14/22)).

RULE 48 – SUBMISSION OF NON-DISPUTING PARTIES

CURRENT RELATED PROVISIONS: AR 37(2)

Rule 48
Submission of Non-disputing Parties

(1) Any person or entity that is not a disputing party (“non-disputing party”) may apply
(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.
Article 48
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.
Regla 48
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.
Proposed AR 48 addresses non-disputing party (NDP) participation. Again, the ICSID Rules apply only to the extent that a treaty-specific or case-specific provision does not apply.

NDP provisions first appeared in the ICSID Rules pursuant to the 2006 amendments. Since then, over 60 cases have addressed non-disputing participation (see table on Decisions on Non-disputing Party Participation in ICSID Cases). The proposed rules in this WP build off the 2006 rules, and make some changes based on practice and experience to date.

Schedule 8 addresses NDP participation and describes the history, practice and rationale for these proposals in detail.

Proposed AR 48(1) allows any party that is not a disputing party to apply for permission to file an NDP submission. This maintains the two-step process in the current rules whereby permission to file must be obtained prior to filing the substantive submission addressing the point in issue.

Proposed AR 48(2)(a)–(c) retain the criteria for obtaining permission to file an NDP submission found in the 2006 rules. In addition, two criteria arising from caselaw and some new treaties are added.

Proposed AR 48(2)(d) requires further information about the entity applying to file the submission. This will allow parties and the Tribunal to better assess the perspective and expertise of the proposed NDP and whether there are any relationships between the proposed NDP and any party.

Similarly, proposed AR 48(2)(e) is new, and reflects comments received from States or applied in some cases and new treaties. It requires a proposed NDP to state whether it is receiving financial or other assistance in filing the submission. While such assistance is not a bar to participation, it bears on the perspective which that NDP might have.

Proposed AR 48(3) allows disputing parties to file observations on whether the NDP should be allowed to file a written submission. It expressly notes that such observations may address both whether such participation should be granted and if so, on what conditions. This reflects existing practice, where disputing parties address both the potential to participate and whether conditions should be imposed on such participation.

Proposed AR 48(4) is related to proposed AR 48(3) in that it addresses some of the potential conditions for NDP participation in greater detail than did the prior rules. It maintains the
general conditions in the prior rules, that the NDP submission not unduly burden or unfairly prejudice the disputing parties.

468. Proposed AR 48(4)(a) and (b) expressly note the potential for conditions as to the length and filing dates of the NDP submission. This is intended to remind Tribunals and parties to address these points, preferably early in the process.

469. Proposed AR 48(4)(c) gives the Tribunal discretion to order the NDP to contribute funds as a pre-condition to filing an NDP submission. This is a new provision, and reflects the comments of many parties and of several Tribunals on the extent to which an NDP submission may significantly increase costs in the case. The proposed AR gives the Tribunal discretion to order a contribution; it may decide not to do so given the financial capacity of an NDP or their public mandate. On the other hand, some NDP may have a commercial purpose or financial capacity to contribute, and in these cases, Tribunals might consider such a pre-condition as appropriate. Any such pre-condition must be linked to the actual increased cost attributable to the participation of the NDP.

470. Proposed AR 48(5) addresses an inconsistency in the caselaw. Some Tribunals have ordered disputing parties to provide documents to NDP to ensure the NDP submission is focused. In some cases, these have been redacted and non-public documents. Other Tribunals have refused to order access to documents, noting that NDP participation is a limited right to make a written submission, and not a greater right to access party documents or otherwise be a participant in the arbitration. Proposed AR 48(5) allows the Tribunal to order production of case documents, but either party may object to such production. As a result, parties are not faced with the possibility of having to provide an NDP with a confidential document.

471. Finally, proposed AR 48(6) allows disputing parties to make observations on the submissions of NDP that are granted the right to file a written submission. This reflects current practice.

**RULE 49 – PARTICIPATION OF NON-DISPUTING TREATY PARTY**

**CURRENT RELATED PROVISIONS:** AR 37(2)

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**Rule 49**

Participation of Non-disputing Treaty Party

(1) The Tribunal shall permit a Party to a treaty that is not a party to the dispute (“non-disputing Treaty Party”) to make a written submission on the application or interpretation of a treaty at issue in the dispute.
Article 49
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.

3. Les parties ont le droit de présenter des observations sur les écritures de la Partie à un Traité non contestante.

Regla 49
Participación de una Parte No Contendiente del Tratado

1. El Tribunal permitirá que una parte de un tratado que no sea parte en la diferencia (“parte no contendiente del tratado”) presente un escrito sobre la aplicación o interpretación de un tratado objeto de la diferencia.

2. Un Tribunal podrá permitir que una parte no contendiente del tratado presente un escrito sobre cualquier otra cuestión dentro del ámbito de la diferencia, de conformidad con el procedimiento establecido en la Regla 48.

3. Las partes tendrán derecho a presentar observaciones sobre el escrito de la parte no contendiente del tratado.

472. Proposed AR 49 is a new provision. It allows a non-disputing Treaty Party (NDTP) to make a submission on a question of interpretation or application of a treaty as a matter of right. It is inspired by various modern investment treaties which specifically confer this right on non-disputing State parties and REIO signatories to the treaty. It is proposed for consideration as many older treaties do not contain such a provision, and States, investors and Tribunals sometimes need the perspective of the other Treaty Party to understand an issue fully.
Proposed AR 49 would only apply to arguments on the interpretation or application of the treaty, where the other Treaty Party would be expected to have relevant knowledge. It does not apply to participation for other purposes, in which case the State or REIO would have to apply under proposed AR 48 for permission to participate and would have to meet the conditions in that rule.

CHAPTER VIII - SPECIAL PROCEDURES

The proposed Chapter on Special Procedures includes provisions that may be used in proceedings depending on the circumstances of each case. This Chapter is currently titled “Particular Procedures” and includes the provisions on Preliminary Objections and Settlement and Discontinuance. The rule on Preliminary Objections has been moved to Chapter V on Initial Procedures to emphasize that such objections must be raised as soon as possible in the proceeding (see proposed AR 35-37). The rules on Settlement and Discontinuance are now in a special Chapter (see Chapter IX – Suspension and Discontinuance).

The remaining provisions in the proposed Chapter concern provisional measures (current AR 39), a new provision on security for costs, ancillary claims (current AR 40) and default (current AR 42).

RULE 50 – PROVISIONAL MEASURES

CURRENT RELATED PROVISIONS: Convention Art. 47; AR 39

Chapter VIII
Special Procedures

Rule 50
Provisional Measures

(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party’s rights, including measures to:

(a) prevent action that is likely to cause:

(i) current or imminent harm to the other party; or

(ii) prejudice to the arbitral process;

(b) maintain or restore the status quo pending determination of the dispute; and

(c) preserve evidence that may be relevant to the resolution of the dispute.
The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:
   
   (i) the constitution of the Tribunal;

   (ii) the last written submission on the request; or

   (iii) the last oral submission on the request.

In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances. The Tribunal shall only recommend provisional measures if it determines that they are urgent and necessary.

The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.

A party must promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.

The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party’s request.

A party may request any judicial or other authority to order provisional measures if such recourse is available in the instrument recording the parties’ consent to arbitration.
Chapitre VIII
Procédures particulières

Article 50
Mesures conservatoires

(1) Une partie peut à tout moment requérir du Tribunal qu’il recommande des mesures conservatoires pour préserver les droits de cette partie, notamment des mesures destinées à :

(a) empêcher un acte susceptible de :

   (i) causer un dommage réel ou imminent à l’autre partie ; ou
   (ii) porter préjudice au processus arbitral ;

(b) maintenir ou rétablir le statu quo en attendant que le différend soit tranché ; et

(c) préserver des moyens de preuve susceptibles d’être pertinents pour le règlement du différend.

(2) La procédure suivante s’applique :

(a) la requête spécifie les droits devant être préservés, les mesures sollicitées et les circonstances qui rendent ces mesures nécessaires ;

(b) le Tribunal fixe les délais dans lesquels les écritures ou plaidoiries, le cas échéant, relatives à la requête doivent être présentées ;

(c) si une partie sollicite des mesures conservatoires avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais dans lesquels les écritures relatives à la requête doivent être présentées, de sorte que le Tribunal puisse examiner la requête sans délai après sa constitution ; et

(d) le Tribunal rend sa décision sur la requête dans les 30 jours suivant la plus tardive des dates suivantes :

   (i) la date de la constitution du Tribunal ;
   (ii) la date des dernières écritures relatives à la requête ; ou
   (iii) la date des dernières plaidoiries relatives à la requête.
(3) Afin de décider s’il recommande des mesures conservatoires, le Tribunal tient compte de l’ensemble des circonstances pertinentes. Le Tribunal ne recommande des mesures conservatoires que s’il détermine qu’elles sont urgentes et nécessaires.

(4) Le Tribunal peut recommander des mesures conservatoires de sa propre initiative. Il peut également recommander des mesures conservatoires différentes de celles sollicitées par une partie.

(5) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a recommandé des mesures conservatoires.

(6) Le Tribunal peut à tout moment modifier ou révoquer les mesures conservatoires, de sa propre initiative ou à la demande d’une partie.

(7) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a recommandé des mesures conservatoires.

### Capítulo VIII
Procedimientos Especiales

**Regla 50**
Medidas Provisionales

(2) En cualquier momento, cualquiera de las partes puede solicitar que el Tribunal recomiende la adopción de medidas provisionales para salvaguardar sus derechos, lo cual incluye medidas para:

(a) impedir acciones que probablemente ocasionen:

   (i) un daño actual o inminente a la otra parte; o

   (ii) un menoscabo al proceso arbitral;

(b) mantener o restablecer el status quo hasta que se decida la diferencia; y

(c) preservar los medios de prueba que pudieran ser relevantes para la resolución de la diferencia.

(3) Se aplicará el siguiente procedimiento:

(a) la solicitud deberá especificar los derechos que se salvaguardarán, las medidas solicitadas, y las circunstancias que requieren la adopción de tales medidas;
(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de medidas provisionales;

(c) si una parte solicita medidas provisionales antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la solicitud, de tal forma que el Tribunal pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(4) Al momento de decidir si recomienda medidas provisionales, el Tribunal deberá considerar todas las circunstancias pertinentes. El Tribunal solamente recomendará que se adopten medidas provisionales si determina que estas son urgentes y necesarias.

(5) El Tribunal podrá recomendar medidas provisionales de oficio. El Tribunal también podrá recomendar medidas provisionales distintas de aquellas solicitadas por una parte.

(6) Una parte deberá revelar con prontitud cualquier cambio sustancial en las circunstancias en las que el Tribunal recomendó las medidas provisionales.

(7) El Tribunal podrá modificar o revocar las medidas provisionales en cualquier momento, de oficio o a solicitud de una de las partes.

(8) Una parte podrá solicitar a cualquier autoridad judicial o de otra naturaleza que adopte medidas provisionales si dicho recurso se encuentra disponible en el instrumento que refleje el consentimiento de las partes al arbitraje.

476. Provisional measures are usually requested by one of the parties to require the other party to maintain or restore the status quo or preserve evidence, or to refrain from acting in a manner that could harm the applicant or the proceeding pending the final decision of the Tribunal. Under Art. 47 of the Convention, a Tribunal can recommend provisional measures, but no definition or applicable criteria are provided to guide Tribunals in exercising this power. Article 47 is the result of a compromise during drafting between proponents of powerful provisional measures with binding effect and sanctions for non-compliance, and States that did not want any such provision.
Current AR 39, which implements Art. 47 of the Convention, was amended in 1984 and 2006. The 1984 amendment to current AR 39(6) included the possibility of requesting provisional measures from national courts if allowed by the instrument of consent to arbitration. The 2006 amendment reflected in current AR 39(5) allowed parties to submit a request for provisional measures prior to the constitution of the Tribunal with a briefing schedule fixed by the Secretary-General so that the Tribunal could decide the request soon after its constitution.

Comments received from Member States mainly suggested stricter criteria to grant provisional measures or to exclude measures seen as interfering with State sovereignty. Comments also called for clarification of the nature of the measures that could be granted and the binding nature of a Tribunal recommendation. Comments received from the public called for specific criteria to reconsider a decision on provisional measures and the introduction of an emergency arbitration procedure in the ICSID system.

Nature of Measures. Article 47 and current AR 39 do not specify the type of measures that can be requested. However, they establish that the purpose of provisional measures is to preserve the parties’ procedural or substantive rights. These rights include preservation of the status quo and non-aggravation of the dispute, preservation of the procedural integrity of the proceedings (including access to and preservation of evidence), the exclusivity of ICSID proceedings under Art. 26 of the Convention, and preventing frustration of the anticipated Award.

Proposed AR 50(1)(a) to (c) provides a non-exhaustive list of provisional measures that a party may request from a Tribunal. This list is consistent with existing practice and mirrors existing arbitration rules, such as the UNCITRAL Arbitration Rules (2010), except that security for costs is addressed by a stand-alone provision (see below). The amendment proposed provides greater certainty about the measures that can be requested while maintaining flexibility for Tribunals and parties.

The WP does not propose to limit the type of measures that can be granted. Tribunals have been cautious in dealing with States’ sovereign powers. For example, it is recognized that the right and duty to conduct criminal investigations and prosecutions is a sovereign prerogative of a State and that there is a “high threshold” before ICSID Tribunals recommend provisional measures in such a context (see e.g., Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Kazakhstan (ARB/13/13), Decision on the Claimant’s Request for Provisional Measures (December 4, 2014), ¶135; Churchill Mining v. Indonesia (ARB/12/14 and 12/40), Procedural Order No. 14 (December 22, 2014), ¶72). In a few instances, Tribunals have found that the preservation of the status quo or the integrity of the proceedings warranted a stay of criminal proceedings because of exceptional circumstances (see e.g., Hydro v. Albania (ARB/15/28), Order on Provisional Measures (March 3, 2016), ¶3.41; and Quiborax S.A. and Non-Metallic Minerals S.A. v. Bolivia (ARB/06/2), Decision on Provisional Measures (February 26, 2010), ¶164). Those exceptional circumstances are difficult to codify and the WP therefore proposes to leave them to the appreciation of Tribunals after hearing both parties.
Criteria for Recommending Provisional Measures. Proposed AR 50(2)(a) reprises the current wording of AR 39(1) which provides that the request shall specify the rights to be preserved, the measures requested and the circumstances that require such measures. In practice, an applicant must establish the urgency and necessity of the measures. Some Tribunals also require that the applicant show *prima facie* jurisdiction of the Tribunal a *prima facie* case on the merits. Tribunals also sometimes require that the measure be proportionate, known as the “balance of interests” or “convenience” test.

Proposed AR 50(3) specifies that the Tribunal must consider all the circumstances and imposes the requirements of urgency and necessity, which have uniformly been required in cases to date. However, the proposed rule does not incorporate certain other criteria, such as a requirement to demonstrate “irreparable harm,” or a “risk thereof,” or “harm not adequately reparable by an award of damages”, as these have not been uniformly adopted in investment cases and may not be suitable in every circumstance.

Procedure. The WP clarifies the procedure to request provisional measures.

First, proposed AR 50(2) deals with the handling of the request. Proposed AR 50(2)(b) states that the Tribunal fixes time limits for submissions regarding the request. Proposed AR 50(2)(c) reprises current AR 39(5) allowing the Secretary-General to automatically fix the calendar for submissions on receipt of a request for provisional measures prior to the constitution of the Tribunal. The requirement to ask the Tribunal to set time limits is deleted as it appeared futile. The Tribunal can require further observations once constituted and can also require a hearing if needed.

Proposed AR 50(2)(d) echoes current AR 39(2) in that priority is given to a request, and imposes a deadline of 30 days on the Tribunal to issue its recommendation. This deadline runs either from the constitution of the Tribunal contemplated in proposed AR 50(2)(d), if the Tribunal does not require further observations from the parties, or from the last oral or written submissions on the request, whichever is the latest.

Second, as in current AR 39, proposed AR 50(4) concerns the general power of the Tribunal with respect to provisional measures and clarifies that the Tribunal has discretion to impose measures other than those requested by a party.

Third, proposed AR 50(5) is partly new and relates to the modification or revocation of the measures. It requires the parties to provide information on any material change in the circumstances that led the Tribunal to grant the request. As under current AR 39(3), proposed AR 50(6) states that a Tribunal can modify or revoke the measures, even on its own initiative.

Fourth, proposed AR 50(7) clarifies and modernizes the language of current AR 39(6) to the effect that the parties can submit a request for provisional measures to a national court if the instrument recording the parties’ consent (e.g. a bilateral investment treaty, investment agreement, etc) so allows.

Decision is a Recommendation. As indicated above, some comments requested that the nature of Tribunals’ decisions be clarified. Under Art. 47 of the ICSID Convention, the
drafters expressly provided that a Tribunal recommends provisional measures. Various Tribunals have ruled that recommend equates to order, although some have pointed out the difference between the two. Some treaties address this issue expressly. For example, NAFTA Art. 1134 provides that the Tribunal may “order” an interim measure, and that “[f]or purposes of this paragraph, an order includes a recommendation”. As the term recommend appears in the Convention, it can only be modified through a Convention amendment.

491. Some comments also suggested elaborating on the term recommend by specifying the consequences of any default. However, taking into consideration the contentious debates during the drafting of the Convention and the objection of some States to binding provisional measures, the WP does not propose a new provision in this regard. At the same time, Tribunals remain free to draw inferences from the failure of a party to follow a recommendation for provisional measures.

492. Emergency Provisional Measures. Some comments suggested the introduction of emergency procedures in the ICSID system, arguing that the constitution of an ICSID Tribunal can be lengthy and that there is a risk of irreparable harm if a matter is not treated with urgency during that time. The WP does not propose such a mechanism. The tight schedule required for emergency arbitration could raise due process issues in cases involving States. Such a mechanism would in any event require an opt-in scheme, namely that both parties consent to the application of rules on emergency application. It is also worth noting that the trend in the latest BITs and FTAs is to allow a request for provisional measures before domestic courts prior to constitution of the Tribunal, hence offering possible urgent relief to the claimant pending the constitution of a Tribunal.

**RULE 51 – SECURITY FOR COSTS**

**CURRENT RELATED PROVISIONS:** Convention Art. 47; AFR 14; AR 16, 38, 39, 54

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**Rule 51**

**Security for Costs**

(1) A party may request that the Tribunal order the other party to provide security for the costs of the proceeding and determine the appropriate terms for provision of the security.

(2) The following procedure shall apply:

(a) the request shall specify the circumstances that require security for costs;

(b) the Tribunal shall fix time limits for written or oral submissions, as required, on the request;
(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request, so that the Tribunal may consider the request promptly upon its constitution; and

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

   (i) the constitution of the Tribunal;

   (ii) the last written submission on the request; or

   (iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider the party’s ability to comply with an adverse decision on costs and any other relevant circumstances.

(4) If a party fails to comply with an order for security for costs, the Tribunal may suspend the proceeding until the security is provided. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(5) A party must promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(6) The Tribunal may at any time modify or revoke its order for security for costs, on its own initiative or upon a party’s request.

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Article 51

Garantie du paiement des frais

(1) Une partie peut requérir du Tribunal qu’il ordonne à l’autre partie de fournir une garantie relative aux frais de la procédure et de déterminer les conditions appropriées pour qu’une telle garantie soit fournie.

(2) La procédure suivante s’applique :

   (a) la requête précise les circonstances exigeant la garantie pour le paiement des frais ;

   (b) le Tribunal fixe les délais dans lesquels les écrivures ou plaidoiries, le cas échéant, relatives à la requête doivent être présentées ;

   (c) si une partie sollicite une garantie pour le paiement des frais avant la constitution du Tribunal, le ou la Secrétaire général(e) fixe les délais dans lesquels les
écritures relatives à la requête doivent être présentées, afin que le Tribunal puisse examiner la requête dans les plus brefs délais après sa constitution ; et

(d) le Tribunal rend sa décision concernant la requête dans les 30 jours suivant la plus tardive des dates suivantes :

(i) la date de la constitution du Tribunal ;

(ii) la date des dernières écritures relatives à la requête ; ou

(iii) la date des dernières plaidoiries relatives à la requête.

(3) Afin de déterminer s’il ordonne à une partie de fournir une garantie pour le paiement des frais, le Tribunal tient compte de la capacité de cette partie à se conformer à une décision la condamnant à payer les frais ainsi que de toutes autres circonstances pertinentes.

(4) Si une partie ne se conforme pas à une ordonnance lui imposant de fournir une garantie pour le paiement des frais, le Tribunal peut suspendre la procédure jusqu’à ce que cette garantie soit fournie. Si la procédure est suspendue pendant plus de 90 jours, le Tribunal peut, après consultation des parties, ordonner la fin de l’instance.

(5) Une partie doit divulguer dans les plus brefs délais tout changement important dans les circonstances sur le fondement desquelles le Tribunal a ordonné que la garantie pour le paiement des frais soit fournie.

(6) Le Tribunal peut à tout moment modifier ou révoquer son ordonnance imposant que la garantie pour le paiement des frais soit fournie, de sa propre initiative ou à la demande d’une partie.

Regla 51
Garantía por Costos

(1) Una parte podrá solicitar que el Tribunal ordene que la otra parte otorgue una garantía por costos del procedimiento y determine los términos adecuados para el otorgamiento de dicha garantía.

(2) Se aplicará el siguiente procedimiento:

(a) la solicitud especificará las circunstancias que requieran una garantía por costos;

(b) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud;
(c) si una parte solicita una garantía por costos antes de la constitución del Tribunal, el o la Secretario(a) General deberá fijar plazos para los escritos sobre la solicitud, de tal forma que el Tribunal pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal emitirá la decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(3) Al determinar si le ordena a una parte que otorgue una garantía por costos, el Tribunal deberá considerar la capacidad que tiene dicha parte para cumplir con una decisión adversa en materia de costos y cualquier otra circunstancia relevante.

(4) Si una parte incumpliera una orden de garantía por costos, el Tribunal podrá suspender el procedimiento hasta que se otorgue la garantía. Si el procedimiento se suspendiera durante más de 90 días, el Tribunal podrá, previa consulta a las partes, ordenar la discontinuación del procedimiento.

(5) Una parte deberá revelar con prontitud cualquier cambio sustancial en las circunstancias en las que el Tribunal ordenó la garantía por costos.

(6) El Tribunal podrá en cualquier momento modificar o revocar la orden de garantía por costos de oficio o a solicitud de una de las partes.

The form of relief known as “security for costs” addresses the risk that a party may not comply with a costs award rendered against it. An order for security for costs requires a party to provide a security to cover the estimated costs that the other party will incur in the proceeding, including arbitration costs and legal fees. The security may be a deposit into an escrow account, a letter of credit, a bank guarantee or another form of financial security.

Security for costs are normally ordered early in the proceeding. At the conclusion of the case, depending on the Tribunal’s decision on costs, the security will either be returned to the party that posted it or collected by the other party.

Security for costs must be distinguished from other forms of security, which are addressed elsewhere in the ARs. For example, pre-judgment security relating to an anticipated damages award (i.e., security for an Award) may be requested by a claimant under proposed AR 50 on provisional measures if the circumstances allow (e.g., to maintain the status quo between the parties). More commonly, in the context of an annulment...
proceeding, the Committee may order a party to provide security as a condition of the stay of enforcement of the Award (see proposed AR 67 on Stay of Enforcement).

496. **Policy Considerations.** The question of whether security for costs should be ordered in a specific case depends on the circumstances of that case and the applicable rules. Yet there is also a broader policy level discussion concerning whether the remedy should be granted in international dispute settlement proceedings only rarely, or whether it should be more readily available.

497. The policy arguments most often raised in favor of security for costs include the following:

- Security for costs ordered against a claimant may balance the positions of the parties. On the one hand, a claimant can choose whether to incur the costs of pursuing a claim based on an assessment of the strength of its case, the likelihood of success, and the prospect of recovery on an Award in its favor. On the other hand, a respondent must either incur costs to defend against the claim or accept the risk of an adverse award.

- Similarly, in the investor-State arbitration context, security for costs may address the perceived imbalance in the parties’ ability to enforce an Award. State respondents are less likely to be judgment-proof than individual or corporate claimants which may have insufficient assets as a result of bankruptcy, corporate structuring, or otherwise.

- When a court or Tribunal has the power to allocate the costs of the proceeding among the parties, it also must have the power to order security for costs to ensure that its award of costs is given effect.

- While the risk that security for costs will deter valid claims is an important concern, it is not a reason to restrict access to the remedy generally. Rather, it is one of several factors that a court or Tribunal must consider in deciding whether to grant a specific request for security for costs.

- The perceived risk of non-compliance with costs awards has increased with growing reliance on third-party funding. Third-party funding arrangements may allow impecunious claimants to pursue claims. The funder will benefit if such a claimant prevails, but if the case is lost, the funder may avoid liability for any costs awarded in favor of the respondent.

498. The main arguments made against security for costs are as follows:

- Making security for costs more available to respondents may deter meritorious claims. In this way, a claimant that is unable to post a security to cover the respondent’s expected costs will be deprived of its access to justice and potentially to obtain recourse on its claim.

- Security for costs also raises concerns about fairness. It may be perceived as punishing a claimant for financial difficulties that are unrelated to the proceeding. In some instances, those difficulties may even be the result of the respondent’s actions, which
form the basis of the claimant’s claim. Requiring a claimant to post security for a future costs award prior to an assessment of its claims could compound the claimant’s financial distress.

- A party’s right to recover its costs materializes only once it receives a favorable costs award from the Tribunal, often in connection with having prevailed in the case. Thus, deciding an application for security for costs can be perceived as requiring the Tribunal to prejudge the merits of the case and the future allocation of costs.

- In international dispute settlement proceedings, parties come from a range of legal systems that treat security for costs differently. In this context, the permissive use of security for costs disfavors parties from jurisdictions where security for costs is not available as a matter of domestic law.

- Third-party funding does not necessarily indicate a party’s inability or unwillingness to pay a costs award.

499. **ICSID Practice.** Currently, neither the Convention nor the Arbitration Rules expressly address security for costs. Because security for costs can be considered a form of interim relief, it has generally been requested and decided under current AR 39 governing provisional measures, and by reference to the Tribunal’s inherent powers under Art. 44 of the Convention in annulment proceedings.

500. Accordingly, parties requesting security for costs have been required to establish that the legal standard for provisional measures has been met. The threshold element of this test, discussed above in relation to AR 50, is the existence of a right in need of protection. The prevailing view has been that Tribunals have the power to order security for costs as a provisional measure to preserve a party’s (hypothetical) right to an eventual costs award. However, a small number of Tribunals have arrived at the opposite conclusion.

501. Tribunals have also required the requesting party to prove that it will suffer serious or irreparable harm if an order of security for costs is not granted, and that the security is “urgent” and “necessary”. In undertaking this analysis, Tribunals have considered factors such as: whether the other party has insufficient assets to cover a costs award, has failed to comply with past costs awards or other obligations, or may act in bad faith to shield assets. Evidence of “exceptional circumstances” is routinely required.

502. In practice, it has been difficult for parties requesting security for costs to meet this burden. As of July 2018, there has been only one public decision granting an application for security for costs (RSM Production Corporation v. Saint Lucia (ARB/12/10), Decision on Saint Lucia’s Request for Security for Costs (August 13, 2014)). In that case, the Tribunal’s decision was based on its finding that the claimant: (a) had a proven history of non-compliance with costs awards due to its unwillingness or inability to pay; (b) had admitted that it did not have sufficient financial resources to fund its case; and (c) was funded by an unknown third party which the Tribunal considered might not comply with a possible costs award rendered in favor of the respondent.
503. Recent Developments. Express references to security for costs have become more common in international arbitration rules and in international investment treaties as a result of recent rule amendments and treaty negotiations.

504. For example, the 2010 UNCITRAL Arbitration Rules include a non-exhaustive list of possible interim measures, including measures that “provide a means of preserving assets out of which a subsequent award may be satisfied” (Art. 26(2)). It is understood that “award” in this context includes costs awards, and that security for costs would therefore fall within this provision. Both the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules and the 2017 Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules include an independent provision on security for costs. The 2017 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) include a provision which expressly empowers the Tribunal to order security for costs and to “stay or dismiss a party’s claims in whole or in part” if that party fails to comply with such an order. It also sets out circumstances that the Tribunal “shall have regard to” in deciding whether to order security (Art. 38). In contrast, the 2017 Arbitration Rules of the International Chamber of Commerce (ICC) do not refer expressly to security for costs.

505. Recent treaty negotiations have also led to the inclusion of provisions on security for costs in the investment chapters of the EU-Vietnam FTA (Art. 22) and the EU-Mexico FTA (Art. 22) drafts. Both expressly empower the Tribunal to order security for costs “if there are reasonable grounds to believe that the claimant risks not being able to honor a possible decision on costs issued against [it]” and to suspend or terminate the proceeding if a claimant fails to comply with the order within 30 days.

506. Comments Received. ICSID received nearly twenty submissions on security for costs, primarily from Member States, but also from a few organizations and individuals. The submissions proposed various amendments to the ICSID Rules.

507. Several States suggested that the parties’ right to request security for costs should be codified, either as a provisional measure or separately. A few States and commentators proposed specifying the criteria Tribunals should consider in deciding a request for security for costs, including:

- the existence of reasonable grounds to believe there is a risk of the claimant not being able to honor a possible costs award in favor of the respondent;

- whether the request for arbitration has been filed by multiple claimants; or

- the existence and scope of third-party funding and whether the arrangement provides for the funder to pay an adverse costs order against the claimant.

508. In contrast, one commentator expressed the view that the way in which a claimant chooses to fund its ICSID claim is not a matter which should concern the respondent or a Tribunal.
Some States suggested that the perceived strict standard for an order of security for costs should be lowered, and that the Tribunal should be permitted to suspend or discontinue the proceeding if a claimant does not comply with an order for security for costs within 30 days.

One State proposed that the obligation to pay all costs of the proceedings should transfer to the claimant if:

- the claimant does not submit evidence of sufficient funds to pay the full costs of the proceedings or an agreement providing that a third party will cover the full costs of the proceedings within 15 days after the constitution of the Tribunal;
- the claimant is in default on a costs award or any other monetary obligation issued by an ICSID Tribunal;
- the claimant fails to pay the first advance payment to ICSID within the period established by the Secretary General; or
- the respondent demonstrates that the claimant has committed an abuse of process in any arbitral proceeding, or that it is a shell company without sufficient assets to cover the full costs of the proceedings.

Another State similarly suggested that the claimant should be required to post security for costs if it cannot demonstrate in the Request for arbitration that it has sufficient resources to pay the other party’s costs, or if it has failed to comply with a costs award in other investment arbitrations.

Overall, the comments of Member States reflect a central concern: the risk that claimants will fail to comply with costs awards. In practice, successful respondents have been awarded costs in many ICSID cases. As part of this amendment process, and at the request of Panama, ICSID conducted a survey on compliance with and enforcement of such costs awards, the results of which are available on ICSID’s website.

Proposals. Any express reference to security for costs in the AR must balance the rights of the parties. Specifically, it should address the risk of non-compliance with costs awards while preserving the right to resolve disputes through ICSID arbitration. At the same time, it must be sufficiently flexible to apply fairly and effectively across the diverse range of ICSID cases.

The WP proposes a new stand-alone provision, AR 51, to address security for costs in accordance with these principles. It provides guidance to Tribunals on security for costs without affecting their approach to provisional measures (proposed AR 50). In this way, the proposal treats security for costs as a unique form of relief, reflecting the view that a Tribunal’s power to order security for costs flows not only from Art. 47 of the Convention, but also is connected to its power to allocate the costs of the proceeding among the parties.

Accordingly, proposed AR 51(1) states that the Tribunal may order a party to provide security for the costs of the proceeding. One question for Member States is whether the
term “order” is preferable to the term “recommend”. As discussed above in relation to provisional measures, proposed AR 50 aligns with the language of Art. 47 of the Convention by stating that a Tribunal may “recommend” provisional measures. If security for costs is included in a separate provision that is not required to align with Article 47, the use of the term “order” would be consistent with the Convention.

516. The use of the term “order” may be preferable in a separate provision on security for costs if Member States wish to expressly empower the Tribunal to suspend or discontinue the proceeding as a possible consequence of non-compliance with an order for security for costs (see the discussion of proposed AR 51(3) below).

517. Several other aspects of AR 51(1) should be noted. It allows security for costs orders to be made against either party. This flexibility ensures that the provision can apply effectively in all circumstances, including, for example, when a respondent raises counterclaims.

518. Proposed AR 51(1) also specifies that security for costs may be ordered only upon the request of a party. This recognizes the unique nature of security for costs. While it is sensible for the Tribunal to have the power to call for certain forms of relief on its own initiative (e.g., provisional measures for the preservation of evidence), there is no scenario in which the Tribunal needs this power with respect to security for costs. As any security ordered will be in favor of a party, it is reasonable to require that party to determine whether it wants a security and, if so, to make a reasoned request.

519. Proposed AR 51(1) refers to “security for the costs of the proceeding”. This phrase “costs of the proceeding” is defined in AR 19(2) (Costs of the Proceeding) as the legal fees and expenses incurred by the parties in connection with the proceeding, the fees and expenses of the Tribunal, and the administrative charges and other direct costs of the Centre.

520. Proposed AR 51(1) also specifies that the Tribunal is to determine the appropriate terms for provision of the security. The relevant “terms” could include, for example, the form of security (e.g., a bank guarantee or a letter of credit), the duration of the security, the issuer of the security, other specific requirements, and the party that is to bear the cost of the security. In many cases, Tribunals may consult with the parties to determine what terms are available and appropriate.

521. Proposed AR 51(2) sets forth the procedure for a request for security for costs, which is similar to the procedure for a request for provisional measures under proposed AR 50 and a request for stay of enforcement of an Award under proposed AR 65.

522. First, proposed AR 51(2)(a) states that the request must specify the circumstances that require an order of security for costs.

523. Second, proposed AR 51(2)(b) requires that the Tribunal fix time limits for the submissions on the request.

524. Third, proposed AR 51(2)(c) addresses the situation in which the request for security for costs precedes the constitution of the Tribunal. It states that the Secretary-General is to fix time limits for observations on the request, so that the Tribunal can consider the parties’
submissions promptly after it is constituted. This provision does not, however, prevent the Tribunal from instructing the parties to make further submissions on the request.

525. Fourth, AR 51(2)(d) limits the time to issue the Tribunal’s decision to 30 days, starting either from the constitution of the Tribunal or the parties’ last oral or written submissions on the request, whichever is later. This time limit is intended to promote time and cost efficiency with respect to a request for security for costs without compromising the Tribunal’s ability to fully consider the parties’ submissions in reaching its decision.

526. Proposed AR 51(3) addresses the criteria relevant to a Tribunal’s decision on a request for security for costs. The Tribunal is required to consider two broad criteria. The aim is to provide general guidelines for Tribunals without inhibiting the flexibility they will need to address a vast range of factual circumstances.

527. The Tribunal must consider a party’s ability to comply with an adverse decision on costs. This reflects current practice; Tribunals have consistently analyzed whether the relevant party has sufficient assets to satisfy a potential costs award. Importantly, however, Tribunals have not found that a lack of assets alone justifies granting security for costs. As discussed above, there must be other circumstances present, such as a history of noncompliance with legal orders or bad faith.

528. The Tribunal must also take into account “any other relevant circumstances”. This broad formulation allows a Tribunal to consider any additional circumstances that weigh in favor of security for costs, including those mentioned above. In addition, it permits the Tribunal to take into account circumstances that may weigh against an order for security for costs, such as its effect on the party’s ability to pursue its case in good faith.

529. The proposal avoids more specific mandatory criteria because: (i) the relevance of certain criteria varies on a case-by-case basis; (ii) currently, there is insufficient case experience with security for costs in investment arbitration to devise a comprehensive list of mandatory criteria; and (iii) specific criteria could become outdated and compromise the longevity of the provision.

530. Consistent with this approach, proposed AR 51(3) does not refer expressly to TPF. Instead, it is drafted in general terms that would cover TPF or any other funding arrangement to the extent that such arrangement: (i) reflects on the party’s ability to comply with an adverse decision on costs; or (ii) is a circumstance relevant to assessing the appropriateness of the security. Under proposed AR 21, parties are under a continuing obligation to disclose the existence of TPF immediately upon registration of the request for arbitration. As a consequence, this fact will be available to a party seeking security for costs and to the Tribunal that must decide the application. The Tribunal can then make further inquiries as needed.

531. Proposed AR 51(4) raises another important policy question for Member States: Should the ICSID rules identify the consequence of a party’s failure to comply with an order for security for costs, and if so, what is the appropriate consequence? The new provision proposes that the Tribunal have the power to stay the proceeding until the security is
provided. If the proceeding is stayed for more than 90 days, the Tribunal may discontinue the proceeding after consulting with the parties. This procedure is again permissive, not mandatory; the Tribunal has discretion to determine whether to follow it in a particular case.

532. In assessing this proposal, Member States may wish to consider the following points:

- Proposed AR 51(4) would be unique within the AR, which otherwise give the Tribunal the power to discontinue the proceedings only with the (deemed) agreement or acquiescence of the parties (see proposed AR 55-58).

- In the context of security for costs, many of the tools normally employed by Tribunals to address non-compliance with an order may be ineffective. For example, a Tribunal is unable to draw adverse inferences on factual issues based on a party’s failure to post security. Most notably, a Tribunal’s allocation of costs against the non-complying party may be ineffective, as that party may be unable or unwilling to pay the costs award.

- Most arbitration rules, even those that expressly refer to the Tribunal’s power to order security for costs, do not specify the consequence of non-compliance with such an order. The 2017 SCC Arbitration Rules are an exception to this. They provide that the Tribunal may stay or dismiss a party’s claims in whole or in part if that party fails to comply with an order to provide security.

- A small number of recent treaty negotiations have resulted in provisions that allow the Tribunal to suspend or dismiss the case if a claimant fails to comply with an order for security for costs (see EU-Vietnam FTA and EU-Mexico FTA (not yet in force)).

533. Finally, proposed AR 51(5) and (6) concern modification or revocation of an order for security for costs. Proposed AR 51(6) mirrors AR 50(6), which relates to the modification or revocation of a recommendation for provisional measures. Under this proposal, once the Tribunal has issued an order for security for costs, it is expressly permitted to modify or revoke the order, either on the request of a party or on its own initiative. The Tribunal can thus ensure the effectiveness of its order or take account of a change in the circumstances on which the order was based. To assist the Tribunal in this regard, proposed AR 51(5) requires the parties to inform the Tribunal of any material change in those circumstances.

**Rule 52 – Ancillary Claims**

**Current Related Provisions:** Convention Art. 46; AR 31(1), 40, 41(1)
### Rule 52
#### Ancillary Claims

1. Unless the parties agree otherwise, a party may file an incidental or additional claim or a counter-claim (“ancillary claim”) arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.

2. An incidental or additional claim shall be presented no later than the date to file the reply, and a counter-claim shall be presented no later than the date to file the counter-memorial, unless the Tribunal decides otherwise.

### Article 52
#### Demandes accessoires

1. Sauf accord contraire des parties, une partie peut déposer une demande incidente, additionnelle ou reconventionnelle (« demande accessoire ») se rapportant directement à l’objet du différend, à condition que cette demande accessoire soit couverte par le consentement des parties et qu’elle relève de la compétence du Centre.

2. Une demande incidente ou additionnelle est présentée au plus tard à la date prévue pour le dépôt de la réponse, et une demande reconventionnelle est présentée au plus tard à la date prévue pour le dépôt du contre-mémoire, sauf si le Tribunal en décide autrement.

### Regla 52
#### Demandas Subordinadas

1. Salvo acuerdo en contrario de las partes, cualquiera de ellas podrá presentar una demanda incidental o adicional o una demanda reconvencional (“demanda subordinada”) que se relacione directamente con el objeto de la diferencia, siempre que la demanda subordinada esté dentro del ámbito del consentimiento de las partes y de la jurisdicción del Centro.

2. Toda demanda incidental o adicional se presentará a más tardar en la fecha de presentación de la réplica, y toda reconvención se presentará a más tardar en la fecha de presentación del memorial de contestación, salvo decisión en contrario del Tribunal.

534. Counterclaims and other ancillary claims have always been available under Art. 46 the Convention, which is mirrored in current AR 40. These provisions allow Tribunals to
address closely related claims in a single proceeding. Certain requirements must be met, namely that the relevant claim: (i) arises directly out of the same subject-matter as the main dispute; (ii) is covered by the consent of the parties; and (iii) falls within the jurisdiction of the Centre under Art. 25 of the Convention.

535. In addition, ancillary claims must be filed within certain time limits. Incidental and additional claims are submitted by the moving party and must be filed no later than with that party’s reply (filed in accordance with current AR 31(1)(c)). Counterclaims are submitted by the other party and must be filed no later than with that party’s counter-memorial (to be filed in accordance with current AR 31(1)(b)). If there is an objection to an ancillary claim, it should be filed no later than with the rejoinder (filed in accordance with current AR 31(1)(d)).

536. Counterclaims have not been very common in practice and have predominantly been raised in cases under investment contracts (see e.g., Amco Asia Corporation and others v. Republic of Indonesia (ARB/81/1), Award (November 20, 1984)). In most cases under investment treaties, Tribunals dealing with counterclaims found that they did not have jurisdiction over the counterclaim because this was not foreseen by the treaty (see e.g., Gavazzi v. Romania (ARB/12/25), Award (April 18, 2017)). However, some Tribunals have allowed a counterclaim in an investment treaty case and have ruled on its merits (see e.g., Burlington v. Ecuador (ARB/08/5), Decision on Counterclaims (February 7, 2017) and Decision on Reconsideration and Award (February 7, 2017)).

537. In recent years, some investment treaties have provided for the possibility of a respondent State filing a counterclaim under certain circumstances. For example, Art. 9.19.2 of the CPTPP provides: “When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant”.

538. Counter-claims could become increasingly relevant under investment treaties that include reciprocal obligations for the investor and the State.

539. Few comments were received on current AR 40. One Member State suggested addressing counterclaims to ensure greater equality between the parties. Since the requirements to admit an ancillary claim are stated in the ICSID Convention, the WP does not propose to amend the current AR 40 requirements, which simply reflect the text of the Convention.

540. A comment by a member of the public noted that counterclaims may require additional briefing (a second round of submissions) and that this should be addressed in current AR 31. This is in line with current practice and the AR, as both parties typically are given the opportunity to file two rounds of submissions on questions related to jurisdiction or the merits. In view of this practice, the WP does not propose any change to AR 31 (see proposed AR 13).

541. The WP does propose an amendment to current AR 40(2) dealing with the time limit for filing an ancillary claim. The proposal in AR 52(2) anchors the time limit to the date
originally scheduled for the filing of the counter-memorial and reply, as opposed to the date these pleadings are actually filed. This change is made to promote efficiency and avoid abuse.

**RULE 53 – DEFAULT**

**CURRENT RELATED PROVISIONS:** Convention Art. 45; AR 42

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**Rule 53**

**Default**

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.

(4) If the default relates to a first session or hearing, the Tribunal may set the grace period as follows:

   (a) reschedule the first session or hearing to a date within 60 days after the original date;

   (b) proceed with the first session or hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the first session or hearing; or

   (c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the first session or hearing.

(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).

(6) A party’s default shall not be deemed an admission of the assertions made by the other party.
(7) The Tribunal may invite the party appearing to file observations, produce evidence or make oral submissions.

(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering an Award.

Article 53
Défaut

(1) Une partie est en défaut si elle ne comparaît pas ou s’abstient de faire valoir ses prétentions ou qu’elle fait savoir qu’elle ne comparaîtra pas ou s’abstiendra de faire valoir ses prétentions.

(2) Si une partie est en défaut à une quelconque étape de l’instance, l’autre partie peut demander au Tribunal de considérer les questions qui lui sont soumises et de rendre une sentence.

(3) Dès réception de la requête visée au paragraphe (2), le Tribunal la notifie à la partie en défaut et lui accorde un délai de grâce pour remédier au défaut, sauf s’il considère que celle-ci n’a pas l’intention de comparaître ou de faire valoir ses prétentions. Le délai de grâce ne doit pas excéder 60 jours, sauf consentement de l’autre partie.

(4) Si le défaut concerne une première session ou audience, le Tribunal peut fixer le délai de grâce de la manière suivante :

(a) reporter la première session ou audience à une date devant se situer dans les 60 jours de la date initiale ;

(b) tenir la première session ou audience en l’absence de la partie en défaut et fixer un délai pour le dépôt par celle-ci d’écritures dans les 60 jours suivant la première session ou audience ; ou

(c) annuler l’audience et fixer un délai pour que les parties déposent des écritures dans les 60 jours suivant la date initiale de la première session ou audience.

(5) Si le défaut concerne une autre étape prévue de la procédure, le Tribunal peut fixer le délai de grâce pour remédier au défaut en fixant un nouveau délai permettant à la partie en défaut de procéder à cette étape dans les 60 jours suivant la date de la notification de défaut visée au paragraphe (3).

(6) Le défaut d’une partie ne vaut pas acquiescement par celle-ci aux allégations de l’autre partie.

240
(7) Le Tribunal peut inviter la partie qui comparaît à déposer des observations, à produire des moyens de preuve ou à fournir des explications orales.

(8) Si la partie en défaut n’agit pas dans le délai de grâce ou si un tel délai n’est pas accordé, le Tribunal examine la compétence du Centre et sa propre compétence avant de se prononcer sur les questions qui lui sont soumises et de rendre une sentence.

Regla 53

Rebeldía

(1) Una parte se encuentra en rebeldía si no compareciera, o se abstuviera de presentar sus argumentos y reclamaciones, o indicara que no comparecerá ni presentará sus argumentos y reclamaciones.

(2) Si una de las partes se encuentra en rebeldía en cualquier etapa del procedimiento, la otra parte podrá solicitarle al Tribunal que aborde las cuestiones que se han sometido a su consideración y dicte un laudo.

(3) Inmediatamente después de que reciba la solicitud a la que se hace referencia en el párrafo (2), el Tribunal notificará tal solicitud a la parte en rebeldía y le otorgará un periodo de gracia para que subsane la rebeldía, a menos que considere que esa parte no tiene la intención de comparecer o de presentar sus argumentos y reclamaciones. El período de gracia no excederá 60 días sin el consentimiento de la otra parte.

(4) Si la rebeldía estuviera relacionada con una primera sesión o audiencia, el Tribunal podrá fijar el período de gracia de la siguiente manera:

(a) reprogramar la primera sesión o audiencia para una fecha dentro de los 60 días siguientes a la fecha original;

(b) seguir adelante con la primera sesión o audiencia en ausencia de la parte en rebeldía y fijar un plazo para que la parte en rebeldía presente un escrito dentro de los 60 días siguientes a la primera sesión o audiencia; o

(c) cancelar la audiencia y fijar un plazo para que las partes presenten escritos dentro de los 60 días siguientes a la fecha original de la primera sesión o audiencia.

(5) Si la rebeldía estuviera relacionada con otra etapa procesal programada, el Tribunal podrá establecer el periodo de gracia fijando un nuevo plazo para que la parte en rebeldía cumpla con esa etapa procesal dentro de los 60 días siguientes a la fecha de notificación de la rebeldía a la que se hace referencia en el párrafo (3).

(6) La rebeldía de una parte no supondrá la admisión de las alegaciones de la otra parte.
Art. 45 of the Convention and AR 42 address a party’s failure to participate in the proceeding (referred to as “default”). AR 42 establishes a procedure that allows the arbitration to proceed, and the Tribunal to render an Award, when a party is in default. The Tribunal may initiate this procedure upon the request of the non-defaulting party. In practice, this rule has not frequently been invoked.

Proposed AR 53 clarifies current AR 42, revises the procedure to reflect practice, and provides further guidance to parties and Tribunals.

First, proposed AR 53(1) and (2) clarify and expand on the content of current AR 42(1). Proposed AR 53(1) clearly defines the scope of the rule by specifying when a party is in default. It expressly covers the situation in which a party indicates in advance of a procedural step that it does not intend to appear or to present its case. In the interest of efficiency, the other party may submit a request under current AR 42(2) at any time after such an indication; it is not required to wait until the relevant time limit expires. In turn, proposed AR 53(2) specifies that a party may request the default procedure only if the circumstances for default referred to in AR 53(1) are met. It follows that the Tribunal retains the discretion not to adopt the default procedure if the request does not sufficiently identify such circumstances.

Second, the proposal revises the guidance provided in relation to the “grace period.” Proposed AR 53(3) maintains the general requirement that before the Tribunal may consider the dispute and render an Award, it must grant the defaulting party a grace period not exceeding 60 days. As an exception, the Tribunal is not required to set a grace period if it determines that the party will not appear or present its case in the proceeding. Proposed AR 53(4) and (5) offer Tribunals practical, non-mandatory guidance on setting a grace period when the default relates to a hearing and when it relates to another scheduled procedural step. The proposal recognizes that the circumstances of default vary widely across cases, and that the Tribunal should have the flexibility to set a grace period that is fair and efficient in light of the relevant circumstances.

The remaining revisions reflected in proposed AR 53(6)-(7) modernize and streamline the text of the rule.
CHAPTER IX - SUSPENSION AND DISCONTINUANCE

547. The WP proposes to introduce a new provision on suspension and to streamline the Rules concerning settlement and discontinuance of the proceeding.

548. **Suspension.** The current Rules recognize various examples of automatic suspension, *i.e.*, suspension pending a decision on the proposal for the disqualification of an arbitrator (current AR 9(6)), or during a vacancy on the Tribunal (current AR 10(2)). The Rules also give a Tribunal discretion to suspend the proceeding. For instance, the Tribunal may suspend the proceeding on the merits when jurisdictional objections are raised (current AR 41(3)), or on the motion of the Secretary-General until an overdue advance payment towards the costs of the proceeding has been made (current AFR 14(3)(d)).

549. Proceedings may also be suspended by agreement of the parties or in the discretion of the Tribunal. Parties often agree to a suspension while they are negotiating a settlement of the dispute. In addition, any party may ask the Tribunal to suspend the proceeding, for instance, to give it time to appoint new counsel. A party may also apply for suspension pending the outcome of a related proceeding which could affect the ICSID arbitration.

550. In addition to the proposed Rules on suspension set out below, a proceeding may also be suspended under proposed AR 51, which deals with the Tribunal’s authority to order security for costs. Further, a proceeding may be suspended by the Secretary-General pursuant to proposed AFR 14(5)(e)(ii) if the parties fail to make payments to defray the costs of the proceeding.

551. **Settlement and Discontinuance.** Proceedings are discontinued before the Award is rendered in roughly 36% of the cases. The proposed amendments streamline the current discontinuance Rules (current AR 43-45), but do not alter the substance of these provisions.

**RULE 54 – SUSPENSION**

CURRENT RELATED PROVISIONS: AR 9(6), 10(2); AFR 14(3)(d)

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Chapter IX  
Suspension and Discontinuance  

Rule 54  
Suspension

(1) Except as otherwise provided in the Administrative and Financial Regulations or these Rules, the Tribunal may suspend the proceeding on:

(a) agreement of the parties;
(b) request of a party; or

(c) its own initiative.

(2) The Tribunal shall give the parties the opportunity to make observations before ordering the suspension of the proceeding pursuant to paragraph (1)(b) or (c).

(3) In its order recording the suspension of the proceeding the Tribunal shall specify:

(a) the period of the suspension;

(b) any appropriate conditions; and

(c) a modified procedural calendar to take effect on resumption of the proceeding.

(4) The Tribunal may extend the period of the suspension prior to its expiry, on its own initiative or upon a party’s request.

(5) The Secretary-General shall suspend the proceedings pursuant to paragraph (1)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any conditions agreed to by the parties.
(b) toutes conditions appropriées ; et

(c) un calendrier de la procédure modifié devant prendre effet dès la reprise de l’instance.

(4) Le Tribunal peut prolonger la durée de la suspension avant son expiration, de sa propre initiative ou à la demande d’une partie.

(5) Si le Tribunal n’a pas encore été constitué ou qu’il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) suspend l’instance conformément au paragraphe (1)(a). Les parties informent le ou la Secrétaire général(e) de la durée de la suspension et de toutes conditions convenues entre les parties.

Capítulo IX
Suspensión y Discontinuación

Regla 54
Suspensión

(1) Salvo disposición en contrario establecida en el Reglamento Administrativo y Financiero o en estas Reglas, el Tribunal podrá suspender el procedimiento en las siguientes circunstancias:

(a) por acuerdo de las partes;

(b) a solicitud de una de las partes; o

(c) de oficio.

(2) El Tribunal brindará a las partes la oportunidad de formular observaciones antes de ordenar la suspensión del procedimiento de conformidad con lo dispuesto en el párrafo (1)(b) o (c).

(3) En su resolución suspendiendo el procedimiento, el Tribunal deberá especificar lo siguiente:

(a) el período de la suspensión;

(b) cualquier condición pertinente; y

(c) un calendario procesal modificado que surtirá efecto con la reanudación del procedimiento.
Proposed AR 54 introduces a new Rule to codify the practice concerning suspension of proceedings.

553. Proposed AR 54(1) and (2) allow the Tribunal to suspend the proceeding on request of a party or on its own initiative, after giving the parties a reasonable opportunity to make observations. The proceeding may also be suspended by agreement of the parties, with the approval of the Tribunal. In most cases, the parties’ agreement to suspend is automatically approved. However, the Tribunal may attach conditions to its approval. For example, ICSID Tribunals frequently require the parties to provide regular updates on the status of their settlement negotiations and on any agreement to further extend the agreed period of suspension.

554. Pursuant to proposed AR 54(3), the suspension order of the Tribunal must specify the suspension period and provide an adjusted procedural calendar for the resumed proceeding. The modified procedural calendar applies automatically after the suspension period has expired. The Tribunal may therefore decide any matter that was completely briefed before the suspension once the proceeding resumes. Similarly, the parties must comply with filings and other steps in the procedural calendar upon expiry of the suspension.

**RULE 55 – SETTLEMENT AND DISCONTINUANCE**

**CURRENT RELATED PROVISIONS: AR 43**

**Rule 55**

**Settlement and Discontinuance**

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.

(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or
(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

<table>
<thead>
<tr>
<th>Article 55</th>
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<tbody>
<tr>
<td><strong>Règlement amiable et désistement</strong></td>
</tr>
<tr>
<td>(1) Si les parties notifient au Tribunal qu’elles sont convenues de se désister, le Tribunal rend une ordonnance prenant acte de la fin de l’instance.</td>
</tr>
<tr>
<td>(2) Si les parties sont d’accord pour régler le différend à l’amiable avant que la sentence ne soit rendue, le Tribunal :</td>
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<tr>
<td>(a) rend une ordonnance prenant acte de la fin de l’instance, si les parties le demandent ; ou</td>
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<tr>
<td>(b) peut procéder à l’incorporation du règlement amiable dans une sentence, si les parties déposent le texte complet et signé de leur règlement amiable et demandent au Tribunal de l’incorporer dans une sentence.</td>
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<tr>
<td>(3) Si le Tribunal n’a pas encore été constitué ou qu’il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) rend l’ordonnance visée aux paragraphes (1) et (2)(a).</td>
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<th>Regla 55</th>
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<tr>
<td><strong>Avenencia y Discontinuación</strong></td>
</tr>
<tr>
<td>(1) Si las partes notificaran al Tribunal que han acordado discontinuar el procedimiento, el Tribunal emitirá una resolución que deje constancia de la discontinuación.</td>
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<tr>
<td>(2) Si las partes acordaran avenirse respecto de la diferencia antes de que se dicte el laudo, el Tribunal:</td>
</tr>
<tr>
<td>(a) deberá emitir una resolución que deje constancia de la discontinuación del procedimiento, si las partes así lo solicitaran; o</td>
</tr>
<tr>
<td>(b) podrá plasmar la avenencia en la forma de un laudo, si las partes presentan el texto completo y firmado de su avenimiento y solicitan al Tribunal que incorpore dicho avenimiento en un laudo.</td>
</tr>
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</table>
Current AR 43(1) deals with discontinuance of a proceeding by agreement of the parties. Under the current text, the parties’ request may be made either: (i) when they “agree on a settlement of the dispute”; or (ii) when they agree to discontinue the proceeding for any other reason. Current AR 43(2) provides that the settlement agreement may be embodied in an Award, which facilitates enforcement of the settlement. Thus, the parties can decide whether to ask the Tribunal to issue a discontinuance order or an Award on agreed terms embodying the settlement.

Under current AR 43(1), a party agreement to discontinue is possible “before the award is rendered”. The mutatis mutandis application of current AR 43 to post-Award proceedings pursuant to current AR 53 left an element of uncertainty as to the proper application of current AR 43 in such proceedings. A suggestion was received to clarify that once the Tribunal has rendered its Award, the parties may not “settle the dispute” in annulment proceedings.

Proposed AR 55 addresses these issues. First, proposed AR 55(1) is now dedicated solely to discontinuance based on the procedural agreement of the parties to discontinue the proceeding. The provision is not concerned with the underlying reasons for the discontinuance and no longer provides that the request is to be made prior to rendering the Award. Proposed AR 55(1) is therefore clearly applicable to any type of proceeding conducted under the ICSID Arbitration Rules, including post-Award proceedings.

Second, a separate provision – proposed AR 55(2) – deals with the manner in which the Tribunal gives effect to an agreed settlement of the dispute during the arbitration and prior to rendering the Award. The wording of the provision makes clear that an annulment Committee may not render a consent Award, given its limited powers to review the Award on the grounds of annulment in Art. 52 of the ICSID Convention. Under proposed AR 55(2)(a), the parties may request that the Tribunal issue an order taking note of the discontinuance due to the parties’ settlement of the dispute. If the parties wish the fact of the agreed settlement to remain undisclosed, they may instead proceed under proposed AR 55(1) and discontinue the proceeding.

Third, current AR 43(2) is renumbered as proposed AR 55(2)(b). The proposed AR provides for an enforceable consent Award that embodies the parties’ agreed terms. The language of current AR 43(1) and (2) has been revised to fit the new structure of the proposed Rule, but the changes are stylistic only.

Fourth, proposed AR 55(3) allows the Secretary-General to issue an order noting the discontinuance, not only prior to the Tribunal’s constitution (as is currently permitted), but also during any vacancy on the Tribunal, e.g., following the resignation of one of its members. The proposal improves efficiency by obviating the need to reconstitute a
truncated Tribunal merely to issue a discontinuance order. The change is also justifiable given the consensual character of the discontinuance under proposed AR 55.

**Rule 56 – Discontinuance at Request of a Party**

**Current Related Provisions:** AR 44

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**Rule 56**

Discontinuance at Request of a Party

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

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**Article 56**

Désistement sur requête d’une partie

(1) Si une partie requiert le désistement de l’instance, le Tribunal fixe un délai dans lequel l’autre partie peut s’opposer à ce désistement. Si aucune objection n’est soulevée par écrit dans ce délai, l’autre partie est réputée avoir accepté le désistement et le Tribunal rend une ordonnance prenant acte de la fin de l’instance. Si une objection est soulevée par écrit dans ce délai, l’instance continue.

(2) Si le Tribunal n’a pas encore été constitué ou qu’il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) fixe le délai et rend l’ordonnance visés au paragraphe (1).

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**Regla 56**

Discontinuación a Solicitud de una de las Partes

(1) Si una de las partes solicita la discontinuación del procedimiento, el Tribunal fijará el plazo dentro del cual la otra parte podrá oponerse a la discontinuación. Si no se formula objeción alguna por escrito dentro del plazo fijado, se entenderá que la otra parte ha consentido a la discontinuación y el Tribunal emitirá una resolución que
deje constancia de la discontinuación del procedimiento. Si se formula alguna objeción escrita dentro del plazo fijado, el procedimiento continuará.

(2) El o la Secretario(a) General fijará el plazo y emitirá la resolución a la que se hace referencia en el párrafo (1) si aún no se ha constituido el Tribunal o si existe una vacante en el Tribunal.

561. Current AR 44 deals with discontinuance of a proceeding at the request of one party, to which the opposing party does not object.

562. Current AR 44 has been renumbered as proposed AR 56(1) with some language modifications. The WP proposes to delete the requirement that a briefing schedule fixed for party observations take the form of a formal “order”. Finally, it is proposed that the word “any” be added before the word “objection” in the last sentence to introduce a necessary clarification, explained below.

563. Pursuant to current AR 44, if the opposing party objects to discontinuance, the proceeding continues. Frequently, rather than stating a straightforward ‘objection’, the opposing party attaches conditions to its consent to the proposed discontinuance. In most cases, conditions concern the costs of the proceeding, but there could be other conditions. Such conditions are treated by the Tribunal as ‘objections’ to the discontinuance because the discontinuance order pursuant to this provision merely reflects the consensual character of the discontinuance. If conditions have been notified, the proceeding continues. Should the parties wish to recover costs, they may prefer to proceed to an Award which benefits from the enforcement regime of the ICSID Convention.

564. The powers of the Secretary-General under current AR 44 are now reflected in proposed AR 56(2). The Secretary-General exercises the same powers as the Tribunal with respect to the discontinuance, not only prior to the Tribunal’s constitution (as currently permitted by AR 44), but also during any vacancy on the Tribunal. The rationale for this change is the same as for the parallel provision in proposed AR 55(3).

RULE 57 – DISCONTINUANCE FOR FAILURE OF PARTIES TO ACT

CURRENT RELATED PROVISIONS: Convention Art. 38, 45; AFR 14; AR 4(1), 42

Rule 57
Discontinuance for Failure of Parties to Act

(1) If the parties fail to take any steps in the proceeding for more than 150 days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.
(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal may issue an order taking note of the discontinuance.

(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.

(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

**Article 57**

**Désistement pour cause d’inactivité des parties**

(1) Si les parties n’accomplissent aucune démarche relative à l’instance pendant 150 jours, le Tribunal leur adresse une notification les informant du délai écoulé depuis la dernière démarche accomplie dans l’instance.

(2) Si les parties n’accomplissent aucune démarche dans les 30 jours suivant la notification visée au paragraphe (1), elles sont réputées s’être désistées et le Tribunal peut rendre une ordonnance prenant acte de la fin de l’instance.

(3) Si l’une ou l’autre des parties accomplit une démarche dans les 30 jours suivant la notification visée au paragraphe (1), l’instance continue.

(4) Si le Tribunal n’a pas encore été constitué ou qu’il existe une vacance au sein du Tribunal, le ou la Secrétaire général(e) adresse la notification et rend l’ordonnance visées aux paragraphes (1) et (2).

**Regla 57**

**Discontinuación por Inacción de las Partes**

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

(2) Si las partes omiten actuar dentro de los 30 días siguientes a la notificación a la que se hace referencia en el párrafo (1), se entenderá que las partes han discontinuado el procedimiento, y el Tribunal podrá emitir una resolución dejando constancia de la discontinuación.
Current AR 45 deals with discontinuance when all parties fail to take any step in the proceeding for a specified period of time.

In ICSID arbitration, either party’s failure to take steps does not prevent the arbitration from advancing, as long as the opposing party acts to ensure the continuation of the proceeding. Specific powers that enable the arbitration to continue, despite the failure of a non-complying party to act, are provided in the ICSID Convention and the AR, for example, the right of either party to unilaterally request the constitution of the Tribunal by the Chairman of the Administrative Council (Art. 38 of the Convention and current AR 4(1)); the right to request that the Tribunal deal with the questions submitted to it and render an Award (Art. 45 of the Convention and current AR 42); or the right of a party to make an outstanding advance payment, if the other party does not pay advances (current AFR 14(3)(d)). Such rules apply equally to the parties.

Pursuant to current AR 45, the presumption that the parties have abandoned the proceeding arises only when all parties remain inactive. In such circumstances, the continuation of the proceeding becomes impossible and the Rule directs the Tribunal, after notifying the parties of its intent to discontinue, to issue an order taking note of the discontinuance of the proceeding.

The Rule has sometimes been taken as the equivalent of an involuntary dismissal of court actions due to the plaintiff’s ‘failure to prosecute’ its claim under national law, when the defendant may move to dismiss the action or any claim against it.

The application of current AR 45 is not dependent on a party’s request to discontinue the proceeding. In practice, when the claimant fails to take steps to continue the proceeding, the respondent is normally content to have the proceeding discontinued without a decision on the merits. In that event, the parties may consider a discontinuance pursuant to either current AR 43(1) or AR 44. If the respondent has counter-claims or claims for costs against the claimant, the proceeding must continue. To ensure the continuation of the proceeding, the respondent may request that the Tribunal deal with these claims and render an Award pursuant to current AR 42 (“Default”).

Preliminary suggestions received from Member States and commentators relating to current AR 45 primarily concerned the allocation of costs against the party that initiated the arbitration when it subsequently failed to act in the proceeding.
Current AR 45 (proposed AR 57) has remained substantially the same with some language modification. The words “or such period as they may agree with the approval of the Tribunal” have been deleted, but a similar concept is provided under proposed AR 54(1)(a) on suspension by agreement of the parties.

Proposed AR 57 introduces a procedure to facilitate application of current AR 45. Proposed AR 57(1) establishes an obligation on the Tribunal to notify the parties of the status of the proceeding if 150 days have elapsed without either party taking any step in the proceeding. As proposed in AR 57(2), the advance notice allows the parties to act within 30 days of the notice to prevent the issuance of a discontinuance order.

Proposed AR 57(4) makes it clear that the Secretary-General may exercise the same powers as the Tribunal with respect to the discontinuance not only prior to the Tribunal’s constitution (as permitted by current AR 45), but also during any vacancy on the Tribunal. The rationale for this change is the same as for the parallel provision in proposed AR 56(2).

**RULE 58 – DISCONTINUANCE FOR FAILURE TO PAY**

**CURRENT RELATED PROVISIONS:** AFR 14

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**Rule 58**  
**Discontinuance for Failure to Pay**

If the parties fail to make payments to defray the costs of the proceeding as required by Administrative and Financial Regulation 14, the proceeding may be discontinued pursuant to that Regulation.

**Article 58**  
**Fin de l’instance pour défaut de paiement**

Si les parties ne procèdent pas, comme l’exige l’article 14 du Règlement administratif et financier, au paiement des montants destinés à couvrir les frais de la procédure, la fin de l’instance peut être prononcée conformément à cet article.

**Regla 58**  
**Discontinuación por Falta de Pago**

Si las partes no realizan los pagos para sufragar los costos del procedimiento tal como lo exige la Regla 14 del Reglamento Administrativo y Financiero, podrá discontinuarse el procedimiento de conformidad con lo dispuesto en dicha Regla.
Proposed AR 58 is a new provision that notes the possibility of discontinuance because of the parties’ failure to pay.

In summary, there are five types of discontinuance under the proposed AR.

**Ways to Discontinue the Proceeding Under the Arbitration Rules – Rule 51, 55-58**

- **Rule 51(4)**: For failure to comply with an order for security of costs
- **Rule 55**:
  - Rule 55(1): On agreement by the parties
  - Rule 55(2)(a): On settlement of the dispute
  - Rule 55(2)(b): By Award embodying settlement of the dispute
- **Rule 56**: At the request of a party if there is no objection by the other party
- **Rule 57**: For failure of the parties to act over a prolonged period
- **Rule 58 & AFR 14(5)(e)**: For failure of the parties to make payments towards the costs of the proceeding

**CHAPTER X - THE AWARD**

This proposed Chapter X is current Chapter VI – The Award, and includes provisions from current Chapter IV – Written and Oral Procedures. It concerns all provisions relating to the preparation and rendering of the Award, as well as any supplementary decisions and rectifications of the Award after it is rendered.

**First**, the WP proposes to delete current AR 38 (Closure of Proceeding), which provides that a proceeding will be declared closed after presentation of the case by the parties is completed. Current AR 38 allows Tribunals to reopen the proceeding, but only on an exceptional basis.

Presently, the closure of the proceeding has three main purposes: (i) it triggers the 120-day deadline for the Tribunal to render the Award (see current AR 46); (ii) it sets a time limit
for parties to submit a proposal for disqualification of an arbitrator (see current AR 9(1)); and (iii) it provides that once the proceeding is closed, the parties cannot file further evidence unless the Tribunal decides to reopen the proceeding on the basis of exceptional circumstances (see current AR 38(2)).

579. In practice, the closure of the proceeding usually does not occur until the Award is drafted and ready to be rendered. When the Tribunal deals with jurisdictional objections which have been bifurcated from the merits of the dispute, the proceeding is only declared closed if the Tribunal renders an Award dismissing jurisdiction (i.e., disposing of the case). Such closure typically occurs on the same date as the Award so that the outcome of the ruling is not revealed to the parties before the Award is rendered or the Decision on Jurisdiction is issued.

580. The late timing of the closure of the proceeding has been commented on by Member States and the public. Suggestions have been made to require closure of the proceeding after a particular step in the proceeding, for example, at the end of the oral procedure or after the last written submission. The comments focused on the timing of the Award rather than the other effects of the closure on the proceeding.

581. To address the first purpose which current AR 38 was intended to fulfill, the WP proposes to require the Tribunal to issue the Award as soon as possible and in any event within 60 days, 180 days, or 240 days after the last major procedural step in the proceeding depending on the applicable Rule (see proposed AR 59 discussed below). This would replace the Tribunal’s discretion to determine when the presentation of the case is completed and would create a clear expectation concerning the time within which the Award is to be rendered. While the prescribed time limit is a “best efforts” obligation under proposed AR 8(3), it is expected that Tribunals will meet the applicable time limit unless there are special circumstances.

582. With regard to the second purpose identified above, the proposed amendments to current AR 9 (Disqualification of Arbitrators) delete the reference to the filing of a proposal “before the proceeding is declared closed”. Accordingly, deleting current AR 38 would have no impact on the amended version of current AR 9. Rather, a proposal to disqualify could be submitted until the Award is rendered, as long as the proposal meets the requirement of timeliness in proposed AR 29(2).

583. With respect to the third purpose identified above, ICSID’s draft Procedural Order No. 1 template, item 16.3, addresses this matter by establishing that parties shall not submit additional evidence after their last authorized submission without requesting leave from the Tribunal. Proposed AR 13(4) also addresses this issue by providing that Tribunals shall grant leave to file unscheduled written submissions or evidence upon a party’s timely and reasoned application and only if these are necessary in view of all relevant circumstances.

584. The Secretariat currently employs several complementary practices to ensure expeditious completion of Awards. For example, it strongly encourages Tribunals to deliberate immediately after the hearing, to set aside days for deliberation in advance, and to provide the parties with regular updates on the expected date of rendering the Award. If proposed
AR 59 is accepted, ICSID will adopt an additional practice of requiring that the Tribunal send a letter to the parties within 30 days after the last hearing or the filing of the last submission informing them that the Tribunal considers that it has been sufficiently briefed by the parties and that it does not require further evidence. This would further encourage Tribunals to promptly review the whole file after the hearing or last submission and pose any additional questions to the parties to expedite the Tribunal’s deliberations.

**RULE 59 – TIMING OF THE AWARD**

CURRENT RELATED PROVISIONS: Convention Art. 48; AR 47, 48

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Chapter X  
The Award  

Rule 59  
Timing of the Award  

(1) The Tribunal shall render the Award as soon as possible and in any event no later than:  

(a) 60 days after the last written or oral submission if the Award is rendered pursuant to Rule 35(4);  

(b) 180 days after the last written or oral submission if the Award is rendered pursuant to Rule 36(7); or  

(c) 240 days after the last written or oral submission on all other matters.  

(2) A statement of costs filed in accordance with Rule 19(3) shall not be considered a submission for the purposes of calculating the time limits referred to in paragraph (1).  

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Chapitre X  
La sentence  

Article 59  
Délai pour rendre la sentence  

(1) Le Tribunal rend la sentence dès que possible et, en tout état de cause, au plus tard :  

(a) 60 jours après la dernière écriture ou la dernière plaidoirie si la sentence est rendue conformément à l’article 35(4);
(b) 180 jours après la dernière écriture ou la dernière plaidoirie si la sentence est rendue conformément à l’article 36(7) ; ou

(c) 240 jours après la dernière écriture ou la dernière plaidoirie relative à toutes autres questions.

(2) Un état des frais déposé conformément à l’article 19(3) n’est pas considéré comme une écriture aux fins du calcul des délais visés au paragraphe (1).

Capítulo X
El Laudo

Regla 59
Plazos para el Laudo

(1) El Tribunal dictará el laudo lo antes posible y, en cualquier caso, a más tardar:

(a) 60 días después del último escrito o presentación oral si el laudo se dictara de conformidad con lo dispuesto en la Regla 35(4);

(b) 180 días después del último escrito o presentación oral si el laudo se dictara de conformidad con lo dispuesto en la Regla 36(7); o

(c) 240 días después del último escrito o presentación oral sobre cualquier otra cuestión.

(2) Cualquier declaración sobre los costos presentada de conformidad con la Regla 19(3) no será considerada una presentación a efectos de calcular los plazos al que se hace referencia en el párrafo (1).

585. Proposed AR 59 revises current AR 46, which deals with the preparation and timing of the Award. Under the current Rule, the Award must be rendered within 120 days after the closure of the proceeding. However, Tribunals typically do not close the proceedings until the Award is almost finalized, hence this provision rarely limits the time for deciding the matter.

586. ICSID received numerous comments from parties, States and the public to the effect that Tribunals generally take too long to render Awards. The latest available numbers based on all ICSID arbitration proceedings which concluded with an Award during the past 15 years demonstrate that the average duration from registration of the case until the rendering of the Award was approximately 49 months (see also the detailed review of cases that concluded with an Award in the period from January 1, 2015 to June 30, 2017 in Schedule 9 on Time and Cost). Commentators suggest that Tribunals be required to render Awards within 6 to 12 months after the final hearing or final written submission. The proposal in
AR 59 sets clear expectations on Tribunal members to render the Award in a timely manner while maintaining flexibility based on the circumstances of each case and the application of other proposed AR.

587. Proposed AR 59(1) requires the Award to be rendered as soon as possible and in any event within 60 days (two months) if the Award is rendered pursuant to proposed AR 35(4) on Manifest Lack of Legal Merit, within 180 days (six months) if the Award is rendered pursuant to proposed AR 36(7) on Preliminary Objection, or within 240 days (eight months) after the last written or oral submission on all other matters (e.g., hearing on the merits, post-hearing briefs, additional evidence, answering Tribunal questions, etc). Proposed AR 59(2) specifies that a cost submission or statement of costs filed pursuant to proposed AR 19(3) (current AR 28) would not be considered a submission for the purposes of calculating the time under proposed AR 59(1). Final cost submissions are typically filed at the very end of the process after all other submissions.

588. The proposed rule recognizes that the time required to render an Award may vary depending on the circumstances of each case and the scope of the parties’ claims. The Award may take more time if pleadings and supporting documents are substantial, or if the parties make requests that require the Tribunal’s attention during the deliberation period (e.g., a request for provisional measures or a proposal for disqualification). However, it establishes an expectation that the Tribunal will set aside adequate time to prepare the Award and will render the Award within an outer limit of 240 days. The rule is complemented by proposed AR 16(4), which provides that the Tribunal must deliberate immediately after the last written or oral submission on any matter for decision.

589. The time limit of 240 days is a “best efforts” obligation under proposed AR 8(3) (Time Limits Specified by the Convention and these Rules or Fixed by the Secretary-General). If a Tribunal is unable to render the Award within the applicable period, it should advise the parties before the expiry of the period of the circumstances that are causing the delay and provide an estimate of the time when the Award will be ready. In any event, consistent with current practice, Tribunals should provide the parties with regular updates regarding their progress on the Award and should include an estimate concerning the timing of the Award. This practice is typically reflected in draft Procedural Order No. 1.

590. The amendment seeks to ensure Awards are issued more expeditiously and in a specified amount of time based on the scope of the claims and issues before the Tribunal, and complements the general duty in proposed AR 11(3) that the Tribunal and the parties must conduct the proceeding in an expeditious and cost-effective manner (see Chapter II – Conduct of the Proceeding).

RUL E 60 – CONTENTS OF THE AWARD

CURRENT RELATED PROVISIONS: Convention Art. 48; AR 28, 46, 48
Rule 60
Contents of the Award

(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;

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

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

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

(e) the dates and place(s) of the first session and the hearings;

(f) a brief summary of the proceeding;

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

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

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

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

(2) The Award shall be signed by the members of the Tribunal who voted for it. It may be signed by electronic means if the parties agree.

(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.

Article 60
Contenu de la sentence

(1) La sentence est rendue par écrit et contient :

(a) la désignation précise de chaque partie ;

(b) les noms des représentants des parties ;
(c) une déclaration selon laquelle le Tribunal a été constitué en vertu de la Convention, et la description de la façon dont il a été constitué ;

(d) le nom de chaque membre du Tribunal et l’autorité ayant nommé chacun d’eux ;

(e) les dates et le(s) lieu(x) de la première session et des audiences ;

(f) un bref résumé de la procédure ;

(g) un exposé des faits pertinents, tels qu’ils sont établis par le Tribunal ;

(h) un bref résumé des prétentions des parties, y compris des demandes présentées ;

(i) la décision du Tribunal sur chaque question qui lui a été soumise et les motifs sur lesquels la sentence est fondée ; et

(j) un état des frais de la procédure, y compris les honoraires et frais de chaque membre du Tribunal et une décision motivée relative à la répartition des frais de la procédure.

(2) La sentence est signée par les membres du Tribunal qui se sont prononcés en sa faveur. Elle peut être signée par voie électronique, si les parties sont d’accord.

(3) Tout membre du Tribunal peut joindre à la sentence son opinion individuelle ou une mention de son dissentiment avant que la sentence ne soit rendue.

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<table>
<thead>
<tr>
<th>Regla 60</th>
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<tr>
<td><strong>Contenido del Laudo</strong></td>
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</tbody>
</table>

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

   (a) la identificación de cada parte de manera precisa;

   (b) el nombre de los representantes de las partes;

   (c) una declaración de que el Tribunal ha sido constituido de conformidad con lo dispuesto en el Convenio, y una descripción del método de su constitución;

   (d) el nombre de cada miembro del Tribunal y de la persona que designó a cada uno;

   (e) las fechas y el o los lugar(es) de la primera sesión y de las audiencias;

   (f) un breve resumen del procedimiento;
proposals. Proposed AR 60 is current AR 47 with some modifications.

592. The main amendments in proposed AR 60 are: (i) to clarify the required contents of the Award; (ii) to clarify that the Award need not be detailed with regard to the summary of the proceeding and the parties’ submissions; (iii) to clarify that the Award need only contain the reasons upon which it is based; and (iv) to delete the requirement that the Award indicate the date of the arbitrators’ signatures and provide for the possibility of electronic signatures.

593. First, the amendments in proposed AR 60(1)(b) and (e) reflect definition changes included in proposed AR 2 (Meaning of Party and Party Representation) and proposed AR 34 and 15 (First Session and Hearings).

594. Second, the amendments in proposed AR 60(1)(f), (g) and (h) contribute to the efficient preparation of the Award by limiting the required level of detail in certain parts of the Award. As a result, there need only be brief summaries of the proceeding (the procedural history) and the parties’ submissions, and the Award need only include those facts found by the Tribunal to be “relevant” for its decisions. These and other changes should shorten the Award-writing process and will help Tribunals meet the target date for rendering the Award.

595. Third, proposed AR 60(1)(i) addresses the need to provide reasoning. The WP proposes to keep the requirement, consistent with Art. 48(3) of the Convention, that the Tribunal decide on every question submitted to it. The proposed amendment is intended to better reflect Art. 48(3) of the Convention, which requires that the Award contain the ‘reasons upon which the Award is based’ rather than the ‘reasons for the decision of the Tribunal on every
question submitted to it.’ This does not reflect a change of substance as the provision must be interpreted in line with the Convention.

596. **Fourth**, to reflect current practice and enhance transparency, proposed AR 60(1)(j) requires the Award to contain a detailed financial statement of the case account, including a breakdown of the fees and expenses of each member of the Tribunal. It also requires a reasoned decision regarding the allocation of the costs of the proceeding made in accordance with proposed AR 19(3).

597. **Fifth**, the Rule proposes to delete the requirement that the Award indicate the date of signature of each arbitrator. The signatures are not relevant for the purposes of the date of the Award or any time limits specified by the Rules. The relevant date is the date of dispatch of the Award, and that date appears on the cover page of the Award.

598. **Sixth**, the possibility of using electronic signatures has also been considered. Some jurisdictions do not accept electronic signatures as a legally valid form of acceptance and authentication, which might pose problems for the enforcement of awards in those countries. However, electronic signatures are gaining acceptance across different jurisdictions and proposed AR 60(2) therefore allows their use if both parties agree. This is already an established practice for procedural orders and decisions. Adoption of this practice would expedite the dispatch of the Award, as it is otherwise often circulated to three different locations.

599. No substantive amendment is proposed to current AR 47(3). Individual opinions and statements of dissent may be attached to the Award. There has sometimes been delay in rendering the Award to accommodate additional time needed to complete an individual opinion or statement of dissent. Given the time requirement in proposed AR 59 for rendering the Award, Tribunals should factor in any potential individual opinion or statement of dissent in the preparation and timing of the Award. This may entail fixing reasonable time limits within which an opinion or dissent may be prepared, and rendering the Award (signed by the whole Tribunal or by the majority members who voted for it) without the individual opinion or statement if the time limit is not met. The ICSID Secretariat will prepare a practice note for the preparation of the Award to provide guidance to Tribunals in the deliberation phase.

**RULE 61 – RENDERING OF THE AWARD**

**CURRENT RELATED PROVISIONS**: Convention Art. 49(1); AR 46, 47, 48

<table>
<thead>
<tr>
<th>Rule 61</th>
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<tr>
<td><strong>Rendering of the Award</strong></td>
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<tr>
<td>(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:</td>
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(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.

(2) The Award shall be deemed to have been rendered on the date of dispatch.

(3) The Secretary-General shall provide additional certified copies of the Award to a party upon request.

### Article 61
**Prononcé de la sentence**

1. Après signature de la sentence par les membres du Tribunal qui se sont prononcés en sa faveur, le ou la Secrétaire général(e) doit, dans les plus brefs délais :
   
   (a) envoyer à chaque partie une copie certifiée conforme de la sentence, ainsi que de toute opinion individuelle et mention du dissentiment, en indiquant la date d’envoi sur la sentence ; et

   (b) déposer la sentence aux archives du Centre, en y joignant toute opinion individuelle et toute mention de dissentiment.

2. La sentence est réputée avoir été rendue à la date d’envoi.

3. Le ou la Secrétaire général(e) fournit à une partie, sur demande, des copies certifiées conformes supplémentaires de la sentence.

### Regla 61
**Comunicación del Laudo**

1. Una vez que el laudo haya sido firmado por los miembros del Tribunal que votaron en su favor, el o la Secretario(a) General deberá, a la brevedad:

   (a) enviar una copia certificada del laudo a cada una de las partes, junto con las opiniones individuales y disidencias, indicando la fecha del envío del laudo; y

   (b) depositar el laudo en los archivos del Centro, junto con las opiniones individuales y disidencias.

2. Se considerará que el laudo ha sido dictado en la fecha de envío.
600. The WP does not propose any substantive changes to current AR 48, except for the revision and relocation of the provision concerning publication in current AR 48(4). Specific provisions on publication of the Award are included in proposed Chapter VII – Access to Proceedings and Non-Disputing Party Submissions, AR 44.

601. The date of the Award for all relevant purposes, including post-Award remedies under current AR 49-52, is the date of its dispatch as provided in current AR 48(2) and Art. 49(1) of the Convention. The Award is dispatched by electronic means and certified copies are dispatched by courier on the same date. That date is noted on the cover page of the Award.

602. Given that the Award typically exists in electronic format and may be signed electronically, there is no need to refer to an original text of the Award (suggesting a hard copy original) as distinguished from copies of that text. In accordance with Art. 49 of the Convention, proposed AR 61 provides that the Secretary-General will continue to dispatch authenticated, certified copies of the Award to the parties and to provide them with additional certified copies of the Award upon request.

603. A number of post-Award recourses are available, as described in Chapter X and Chapter XI of the Rules, and in the table below.

<table>
<thead>
<tr>
<th>REMEDY</th>
<th>TIME LIMIT FOR FILING</th>
<th>TRIBUNAL / COMMITTEE</th>
<th>RESULT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplementary Decision or Rectification of Award (Rule 62)</td>
<td>Within <strong>45 days</strong> after date Award was rendered</td>
<td>Original Tribunal (Rule 62)</td>
<td>Decision <strong>within 60 days</strong> after last written or oral submission on request (Rule 62)</td>
</tr>
<tr>
<td>Interpretation of Award (Rule 63)</td>
<td><strong>Any time</strong> after dispatch of Award</td>
<td>Original Tribunal (Rule 64)</td>
<td>Decision <strong>within 120 days</strong> after last written or oral submission on request (Rule 66)</td>
</tr>
<tr>
<td>Revision of Award</td>
<td>Within <strong>90 days</strong> after discovery of a fact of such a nature as to decisively affect Award</td>
<td>Original Tribunal</td>
<td>Decision <strong>within 120 days</strong> after last written or oral submission on request</td>
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<td><strong>(Rule 63)</strong></td>
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<td><strong>(Rule 64)</strong></td>
<td><strong>(Rule 66)</strong></td>
</tr>
<tr>
<td>Annulment</td>
<td><strong>Within <strong>120 days</strong> after date Award was rendered</strong> or **Within <strong>120 days</strong> after discovery of corruption on part of Tribunal member and within <strong>3 years</strong> of date Award was rendered</td>
<td><strong>Ad hoc Committee</strong></td>
<td>Decision <strong>within 120 days</strong> after last written or oral submission on request</td>
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**Rule 62 – Supplementary Decision and Rectification**

**CURRENT RELATED PROVISIONS:** Convention Art. 49(2); AFR 26; AR 46-48

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**Rule 62**

**Supplementary Decision and Rectification**

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 30 days after rendering the Award.

(2) A party requesting a supplementary decision on, or the rectification of, an Award pursuant to Article 49(2) of the Convention shall file the request with the Secretary-General within 45 days after the Award was rendered and pay the lodging fee published in the schedule of fees.

(3) The request referred to in paragraph (2) shall:

   (a) identify the Award to which it relates;

   (b) be signed by each requesting party or its representative and be dated; and

   (c) specify:

      (i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award; and
(ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award.

(4) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request to the other party;

(b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (2); and

(c) notify the parties of the registration or refusal to register.

(5) As soon as the request is registered, the Secretariat shall transmit the request and the notice of registration to each member of the Tribunal.

(6) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(7) Rules 60-61 shall apply to any decision of the Tribunal pursuant to this Rule.

(8) The Tribunal shall issue the supplementary decision or rectification within 60 days after the last written or oral submission on the request.

(9) The date of dispatch of the supplementary decision or rectification shall be the relevant date for the purposes of calculating the time limits specified in Articles 51(2) and 52(2) of the Convention.

(10) A supplementary decision or rectification under this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.

**Article 62**

**Décision supplémentaire et rectification**

(1) Un Tribunal peut rectifier de sa propre initiative toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence dans les 30 jours suivant le prononcé de la sentence.

(2) Une partie qui demande une décision supplémentaire ou la rectification d’une sentence conformément à l’article 49(2) de la Convention dépose une requête à cet effet auprès du ou de la Secrétaire général(e) dans les 45 jours suivant le prononcé de la sentence et s’acquitte du droit de dépôt publié dans le barème des frais.

(3) La requête visée au paragraphe (2) :
(a) identifie la sentence visée ;

(b) est signée par chaque partie requérante ou son représentant et est datée ; et

(c) indique précisément :

(i) s’agissant d’une requête aux fins d’obtention d’une décision supplémentaire, toute question sur laquelle le Tribunal a omis de se prononcer dans sa sentence ; et

(ii) s’agissant d’une requête aux fins de rectification, toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence.

(4) Dès réception de la requête et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre la requête à l’autre partie ;

(b) enregistrer la requête ou refuser de l’enregistrer si elle n’est pas présentée dans le délai visé au paragraphe (2) ; et

(c) aviser les parties de l’enregistrement ou du refus d’enregistrement.

(5) Dès que la requête est enregistrée, le Secrétariat la transmet à chaque membre du Tribunal avec la notification de l’enregistrement.

(6) Le ou la Président(e) du Tribunal détermine la procédure à suivre pour l’examen de la requête, après consultation des autres membres du Tribunal et des parties.

(7) Les articles 60 - 61 s’appliquent à toute décision du Tribunal rendue en vertu du présent article.

(8) Le Tribunal rend la décision supplémentaire ou la rectification dans les 60 jours suivant les dernières écritures ou plaidoiries sur la requête.

(9) La date d’envoi de la décision supplémentaire ou de la rectification est la date prise en compte aux fins du calcul des délais indiqués aux articles 51(2) et 52(2) de la Convention.

(10) La décision supplémentaire ou la rectification en vertu du présent article fait partie intégrante de la sentence et figure sur toutes les copies certifiées conformes de la sentence.
Regla 62
Decisión Suplementaria y Rectificación

(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 30 días siguientes a la fecha en que se haya dictado el laudo.

(2) Una parte que solicite una decisión suplementaria o la rectificación de un laudo de conformidad con lo dispuesto en el Artículo 49(2) del Convenio, deberá presentar la solicitud al o a la Secretario(a) General dentro de los 45 días siguientes a la fecha en que se haya dictado el laudo y pagar el derecho de presentación publicado en el arancel de derechos.

(3) La solicitud deberá:

(a) identificar el laudo de que se trata;

(b) estar fechada y firmada por cada una de las partes solicitantes o su(s) representante(s); y

(c) especificar:

(i) con respecto a una solicitud de decisión suplementaria, toda cuestión que el Tribunal hubiera omitido decidir en el laudo; y

(ii) con respecto a una solicitud de rectificación, errores de forma, aritméticos o similares en el laudo.

(4) Inmediatamente después de recibir la solicitud y el derecho de presentación, el o la Secretario(a) General deberá, con prontitud:

(a) enviar la solicitud a la otra parte;

(b) registrar la solicitud, o rechazar el registro si la solicitud no se realiza dentro del plazo al que se hace referencia en el párrafo (2); y

(c) notificar a las partes el registro o la denegación del registro.

(5) En cuanto se registre la solicitud, el Secretariado enviará la solicitud y la notificación del registro a cada uno(a) de los o las miembros del Tribunal.

(6) El o la Presidente(a) del Tribunal determinará el procedimiento para considerar la solicitud, previa consulta a los otros miembros del Tribunal y a las partes.
(7) Las Reglas 60-61 serán aplicables a cualquier decisión del Tribunal de conformidad con lo dispuesto en esta Regla.

(8) El Tribunal emitirá la decisión suplementaria o rectificación dentro de los 60 días siguientes a lo que suceda más tarde, sea esto, el último escrito o bien la última presentación oral sobre la solicitud.

(9) La fecha de envío de la decisión suplementaria o rectificación será la fecha relevante a los fines del cálculo de los plazos especificados en los Artículos 51(2) y 52(2) del Convenio.

(10) Una decisión suplementaria o rectificación en virtud de esta Regla formará parte del laudo y se reflejará en todas las copias certificadas del laudo.

604. Proposed AR 62 concerns a request for supplementary decision and rectification of the Award made pursuant to Art. 49(2) of the Convention and current AR 49. Current AR 49 is amended to clarify the requirements and contents of this type of request, and to align it with proposed similar provisions in the Institution Rules (see IR 2 – Contents of the Request) and AR Chapter XI – Interpretation, Revision and Annulment of the Award.

605. Requests for supplementary decisions or rectification are not uncommon. Most of them relate to arithmetical errors in the Award or omissions in the operative part of the Award, and other inadvertent errors (e.g., relating to the interest rate, see Getma Int’l and others v. Guinea (ARB/11/29), Decision on Claimants’ Request for Supplementary Decision of the Award (December 13, 2016)). A party may request both a supplementary decision and rectification concerning the Award in the same request. This type of request must be made within 45 days after the Award is rendered and is most often dealt with on the basis of written submissions without a hearing. The time required to address the request depends on the nature of the alleged omission or error in the Award and the parties’ agreement on the procedural calendar.

606. Proposed AR 62(1) is new. It allows a Tribunal to rectify any clerical, arithmetical or similar error on its own initiative within 30 days after rendering the Award. The provision is intended to make obvious corrections without requiring the parties to bring a motion for rectification. A Tribunal proposing to rectify on its own initiative would consult the parties on any proposed Tribunal-initiated rectification (see proposed AR 11(2)).

607. Proposed AR 62(2)(c)(ii) requires that a request for rectification specify “any clerical, arithmetical or similar error in the Award”. The wording in Art. 49(2) of the Convention differs slightly in English, French and Spanish. The wording in proposed Rule 62(1) is intended to harmonize the provision and reflect the meaning and scope of rectification.

608. Proposed AR 62(3)(b) includes the possibility (currently in AR 49(5)), that the request is not registered if it is filed more than 45 days after the Award was rendered.
609. Proposed AR 62(4) is current AR 60(2)(d). Unlike in Interpretation and Revision proceedings, a decision can only be made by the Tribunal that rendered the Award and the Tribunal is therefore reconvened. The steps in proposed AR 62(4) and (5) typically take 1-2 days if the lodging fee has been received.

610. Proposed AR 62(6) simplifies current AR 60(3) and reflects the current practice that the President consults with the other members of the Tribunal and the parties to find an agreement on the procedure for considering the request. This includes determining whether the members of the Tribunal need to meet in person, either alone or with the parties.

611. Proposed AR 62(7) is current AR 49(4) with the omission of “mutatis mutandis,” which is not necessary.

612. Proposed AR 62(8) provides a time limit of 60 days for the Tribunal to issue the supplementary decision or rectification following the last written or oral submission on the request.

613. Proposed AR 62(9) clarifies that the date of dispatch of the supplementary decision or rectification is the relevant date to start the time limits for the post-Award remedies of annulment and revision, as provided in Art. 49(2) of the Convention.

614. Finally, proposed AR 62(10) specifies that the Decision on supplementary decision and rectification will be reflected on all certified copies of the Award, so that it is clear in any possible subsequent enforcement proceeding that the Award was supplemented or rectified (see also proposed AFR 26).

CHAPTER XI - INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

615. Current AR 50-55 apply to the post-Award remedies of interpretation, revision, and annulment. They establish the requirements for filing and registration of an application, the procedure and rules applicable to these remedies, requests for stay of enforcement of the Award, and the resubmission of the dispute after an annulment.

616. The amendments discussed below in proposed AR 63-68 streamline these rules, in particular the filing and registration of the application, and some of the further rules of procedure governing interpretation, revision and annulment proceedings. The proposed amendments also codify ICSID practice in relation to post-Award remedy proceedings.

RULE 63 – THE APPLICATION

CURRENT RELATED PROVISIONS: Convention Art. 50-52; AR 50
Chapter XI
Interpretation, Revision and Annulment of the Award

Rule 63
The Application

(1) A party applying for interpretation, revision or annulment of an Award shall file the application with the Secretary-General, together with any supporting documents and pay the lodging fee published in the schedule of fees.

(2) The application shall:

(a) identify the Award to which it relates;

(b) be in a procedural language used in the original proceeding;

(c) be signed by each applicant or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) include the contents and be filed within the time limits referred to in paragraphs (3)-(5).

(3) An application for interpretation made pursuant to Article 50(1) of the Convention may be filed at any time after the dispatch of the Award and shall specify the points in dispute concerning the meaning or scope of the Award.

(4) An application for revision made pursuant to Article 51(1) of the Convention shall be filed within 90 days after the discovery of a fact of such a nature as decisively to affect the Award, and in any event within three years after the Award (or any supplementary decision on or rectification of the Award) was rendered. The application shall specify:

(a) the change sought in the Award;

(b) the newly discovered fact that decisively affects the Award; and

(c) evidence that when the Award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant’s ignorance of that fact was not due to negligence.

(5) An application for annulment made pursuant to Article 52(1) of the Convention shall:
(a) be filed within 120 days after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered if the application is based on any of the grounds in Article 52(1)(a), (b), (d) or (e) of the Convention; or

(b) be filed within 120 days after the discovery of corruption on the part of a member of the Tribunal and in any event within three years after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered, if the application is based on Article 52(1)(c) of the Convention; and

(c) specify the grounds on which it is based, limited to the grounds in Article 52(1)(a)-(e) of the Convention, and the reasons in support of each ground.

(6) Upon receiving an application and the lodging fee, the Secretary-General shall promptly:

(a) transmit the application and the supporting documents to the other party;

(b) register the application, or refuse registration if the application is not made within the relevant time limits referred to in paragraphs (3) or (4); and

(c) notify the parties of the registration or refusal to register.

(7) The last date for filing an application under this Rule shall be determined in accordance with Rule 7. A complete application and evidence of payment of the lodging fee must be filed by such date.

(8) An applicant may withdraw from its application before it has been registered by filing a written notice of withdrawal with the Secretary-General. The Secretariat shall promptly notify the parties of the withdrawal, unless the application has not yet been transmitted to the other party pursuant to paragraph (5)(a).

Chapitre XI
Interprétation, révision et annulation de la sentence

Article 63
La demande

(1) Une partie qui demande l’interprétation, la révision ou l’annulation d’une sentence dépose une demande à cet effet auprès du ou de la Secrétaire général(e), avec tous documents justificatifs, et s’acquitte du droit de dépôt publié dans le barème des frais. La demande :

(a) identifie la sentence visée ;
(b) est rédigée dans une langue de la procédure utilisée dans l’instance initiale ;
(c) est signée par chaque partie requérante ou son représentant et est datée ;
(d) comprend la preuve de l’habilitation à agir du représentant ; et
(e) contient les mentions et est déposée dans les délais indiqués aux paragraphes (3) - (5).

(2) Une demande en interprétation introduite conformément à l'article 50(1) de la Convention peut être déposée à tout moment après l’envoi de la sentence et indique précisément les points en litige concernant le sens ou la portée de la sentence.

(3) Une demande en révision introduite conformément à l’article 51(1) de la Convention est déposée dans les 90 jours suivant la découverte d’un fait de nature à exercer une influence décisive sur la sentence, et, en tout état de cause, dans les trois ans suivant le prononcé de la sentence (ou toute décision supplémentaire ou rectification de la sentence). La demande indique précisément :

(a) la modification souhaitée dans la sentence ;
(b) le fait nouveau découvert qui exerce une influence décisive sur la sentence ; et
(c) la preuve que, avant le prononcé de la sentence, ce fait ait été inconnu du Tribunal et de la partie requérante et qu’il n’y a pas eu, de la part de celle-ci, faute à l’ignorer.

(4) Une demande en annulation introduite conformément à l’article 52(1) de la Convention :

(a) est déposée dans les 120 jours suivant la date du prononcé de la sentence (ou toute décision supplémentaire ou rectification de la sentence), si la demande est fondée sur l’un quelconque des motifs visés à l’article 52(1)(a), (b), (d) ou (e) de la Convention ; ou

(b) est déposée dans les 120 jours suivant la découverte de la corruption de la part d’un membre du Tribunal et, en tout état de cause, dans les trois ans suivant la date du prononcé de la sentence (ou toute décision supplémentaire ou rectification de la sentence), si la demande est fondée sur l’article 52(1)(c) de la Convention ; et

(c) indique précisément les motifs sur lesquels elle est fondée, qui ne peuvent être que ceux indiqués à l’article 52(1)(a) - (e) de la Convention, et les raisons à l’appui de chaque motif.
(5) Dès réception d’une demande et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre à l’autre partie la demande et les documents justificatifs ;

(b) enregistrer la demande ou refuser de l’enregistrer si elle n’est pas présentée dans les délais applicables visés aux paragraphes (4) ou (5) ; et

(c) aviser les parties de l’enregistrement ou du refus d’enregistrement.

(6) La date butoir pour déposer une demande conformément au présent article est déterminée conformément à l’article 7. Une demande complète et la preuve du paiement du droit de dépôt doivent être déposées au plus tard à cette date.

(7) Une partie requérante peut retirer sa demande avant qu’elle n’ait été enregistrée, en déposant une notification écrite de retrait auprès du ou de la Secrétaire général(e). Le Secrétariat avise les parties du retrait dans les plus brefs délais, sauf si la demande n’a pas encore été transmise à l’autre partie conformément au paragraphe (5)(a).

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Capítulo XI
Aclaración, Revisión y Anulación del Laudo

Regla 63
La Solicitud

(1) Una parte que solicite la aclaración, revisión o anulación de un laudo deberá presentar la solicitud al o a la Secretario(a) General, junto con cualquier documento de respaldo y pagará el derecho de presentación publicado en el arancel de derechos.

(2) La solicitud deberá:

(a) identificar el laudo de que se trata;

(b) estar en un idioma procesal utilizado en el procedimiento original;

(c) estar fechada y firmada por cada una de las solicitantes o su(s) representante(s);

(d) estar acompañada de prueba del poder de representación de cada representante; e

(e) incluir los contenidos y estar presentada dentro de los plazos a los que se hace referencia en los párrafos (3)-(5).

(3) Una solicitud de aclaración realizada de conformidad con lo dispuesto en el Artículo 50(1) del Convenio podrá ser presentada en cualquier momento después del envío
del laudo y especificará los puntos controvertidos relativos al sentido o alcance del laudo.

(4) Una solicitud de revisión realizada de conformidad con lo dispuesto en el Artículo 51(1) del Convenio deberá presentarse dentro de los 90 días siguientes a que se tome conocimiento del hecho que, por su naturaleza, afecte de manera decisiva el laudo, y en cualquier caso dentro de los tres años siguientes a la fecha en que se hubiera dictado el laudo (o cualquier decisión suplementaria o rectificación posterior del mismo). La solicitud especificará:

(a) el cambio que se pretende en el laudo;

(b) el nuevo hecho del que se tomó conocimiento que afecta de manera decisiva al laudo; y

(c) prueba de que al momento de dictarse el laudo, el Tribunal y el o la solicitante no tenían conocimiento del hecho, y que el desconocimiento del hecho por parte del o de la solicitante no fue por negligencia.

(5) Una solicitud de anulación realizada de conformidad con lo dispuesto en el Artículo 52(1) del Convenio deberá:

(a) ser presentada dentro de los 120 días siguientes a la fecha en que se dictó el laudo (o cualquier decisión suplementaria o rectificación posterior del mismo) si la solicitud estuviera basada en cualquier de las causales previstas en el Artículo 52(1)(a), (b), (d) o (e) del Convenio; o

(b) ser presentada dentro de los 120 días siguientes a que se tome conocimiento de la existencia de corrupción de parte de un miembro del Tribunal y en cualquier caso dentro de los tres años siguientes a la fecha en que se hubiera dictado el laudo (o cualquier decisión suplementaria o rectificación posterior del mismo), si la solicitud estuviera basada en el Artículo 52(1)(c) del Convenio; y

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

(6) Inmediatamente después de recibir una solicitud y el derecho de presentación, el o la Secretario(a) General deberá, con prontitud:

(a) enviar la solicitud y los documentos de respaldo a la otra parte;

(b) registrar la solicitud, o rechazar el registro si la solicitud no se realiza dentro del plazo al que se hace referencia en los párrafos (4) o (5); y

(c) notificar a las partes el registro o la denegación del registro.
(7) La última fecha para la presentación de una solicitud en virtud de esta Regla se determinará de conformidad con la Regla 7. Deberá presentarse una solicitud completa y la prueba del pago del derecho de presentación a más tardar en esa fecha.

(8) Un(a) solicitante podrá retirarse de la solicitud antes que ésta sea registrada mediante la presentación de una notificación escrita del retiro al o a la Secretario(a) General. El Secretariado notificará sin demora a las partes sobre el retiro, a menos que la solicitud no se hubiese enviado aún a la otra parte de conformidad con lo dispuesto en el párrafo (5)(a).

617. Proposed AR 63, current AR 50, and the subsequent rules in this Chapter implement the procedures in Art. 50-52 of the Convention.

618. The IR do not apply to post-Award proceedings. However, the rules relating to the filing and registration of a post-Award application are analogous to the filing of a Request for arbitration under the IR, with the notable exception of the review process. There is no review similar the review pursuant to Art. 36 of the ICSID Convention concerning an application under current AR 50, and the Secretary-General may only refuse to register an application if it is filed after the expiry of the applicable time limit. The Centre may nevertheless request that an application which does not conform to the formal requirements in proposed AR 63 be supplemented before registration.

619. The purpose of the proposed amendments is to clarify the filing requirements and to ensure that applicants file a complete application to expedite the registration process. Where relevant, the proposed amendments mirror the proposed amendments to the IR (see e.g. proposed AR 63(2)(c), (d) and (e), and AR 63(5)).

620. First, proposed AR 63(1) lists the formal requirements for filing an application for interpretation, revision and annulment of the Award.

621. As provided in proposed AR 66(1) and (2) and based on current practice, the arbitration rules and the parties’ agreements in Procedural Order No. 1 in the original proceeding also apply to the post-Award remedy proceedings, unless otherwise agreed or directed, and to the extent they are relevant given the particular remedy. The application should therefore be drawn up and filed in the procedural language(s) used in the original proceeding. This is clarified in proposed AR 63(2)(b).

622. The parties sometimes change counsel in post-Award remedy proceedings, or their power of attorney does not extend to such proceedings. Proposed AR 63(2)(c) and (d) require proof of authority to act. This could refer to the original power of attorney if counsel for the post-Award remedy proceeding is the same and the original power of attorney extends to the relevant post-Award remedy. A party may be asked to provide an updated power of attorney before documents from the record are provided to its counsel in the post-Award remedy proceeding.
Proposed AR 63(2)(e) reflects the proposal in proposed AR 3(1) that all pleadings and
supporting documents be filed electronically unless otherwise agreed or ordered. If the
parties agreed to file hard copies in the original proceeding in addition to electronic filing,
the application should be filed also in hard copy. The Secretary-General may require that
the application be filed in an alternative format for transmittal to the other party. This may
be necessary where the other party is no longer represented by counsel in the original
proceeding and there is no electronic mail address on file for that party.

Second, proposed AR 63(2)-(5) specify the content requirements for each type of
application and its time limit. For example, proposed AR 63(3) specifies that an application
for interpretation may be filed at any time after the dispatch of the Award, and only needs
to specify the points in dispute concerning the meaning or scope of the Award.

Third, proposed AR 63(5) states that an application for annulment must specify the
grounds under Art. 52(1) of the Convention on which it is based and include the reasons in
support of each ground. This addresses possible objections to the admissibility of any
particular ground for annulment concerning the Award which was not mentioned in the
application. It will reduce the need for multiple rounds of written submissions after the
constitution of the Committee (see current AR 50(1)(e)(iii)). Any admissibility objection
must be addressed by the ad hoc Committee once it is constituted, as the Secretary-
General’s power to review an application is limited.

Fourth, proposed AR 63(6) clarifies the steps following receipt of the application and
lodging fee through to the notice of registration or refusal to register. The Secretary-
General’s power to refuse registration is limited to applications that are not filed within the
applicable time limit.

Fifth, proposed AR 63(8) addresses the withdrawal of application before it is registered.
This is analogous to current IR 8. Following registration, the rules on discontinuance apply
as in original arbitration proceedings.
**Rule 64**  
*Interpretation or Revision: Reconstitution of the Tribunal*

(1) As soon as an application for the interpretation or revision of an Award is registered, the Secretary-General shall:

(a) transmit the notice of registration, the application and any supporting documents to each member of the original Tribunal; and

(b) request each member of the Tribunal to inform the Secretary-General within 10 days whether that member can take part in the consideration of the application.

(2) If all members of the Tribunal can take part in the consideration of the application, the Secretary-General shall notify the Tribunal and the parties of the reconstitution of the Tribunal.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall invite the parties to constitute a new Tribunal without delay. The new Tribunal shall have the same number of arbitrators and be appointed by the same method as the original Tribunal.

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**Article 64**  
*Interprétation ou révision : reconstitution du Tribunal*

(1) Dès l’enregistrement d’une demande en interprétation ou en révision d’une sentence, le ou la Secrétaire général(e) :

(a) transmet la notification d’enregistrement, la demande et tous documents justificatifs à chaque membre du Tribunal initial ; et

(b) demande à chaque membre du Tribunal de lui faire savoir dans un délai de 10 jours s’il ou elle peut participer à l’examen de la demande.

(2) Si tous les membres du Tribunal peuvent participer à l’examen de la demande, le ou la Secrétaire général(e) notifie au Tribunal et aux parties que le Tribunal est reconstitué.
(3) Si le Tribunal ne peut pas être reconstitué conformément au paragraphe (2), le Secrétaire général invite les parties à constituer sans délai un nouveau Tribunal. Le nouveau Tribunal comprend le même nombre d’arbitres et est constitué selon la même méthode que le Tribunal initial.

Regla 64
Aclaración o Revisión: Reconstitución del Tribunal

(1) En cuanto se registre la solicitud de aclaración o revisión de un laudo, el o la Secretario(a) General deberá:

(a) enviar la notificación de registro, la solicitud y cualquier documento de respaldo a cada miembro del Tribunal; y

(b) solicitar a cada miembro del Tribunal que le informe al o a la Secretario(a) General dentro de los 10 días siguientes si ese miembro puede participar en la consideración de la solicitud.

(2) Si todos los miembros del Tribunal pueden participar en la consideración de la solicitud, el o la Secretario(a) General notificará al Tribunal y a las partes que el Tribunal ha sido reconstituido.

(3) Si el Tribunal no pudiera reconstituirse de conformidad con el párrafo (2), el o la Secretario(a) General instará a las partes a que constituyan un nuevo Tribunal sin demora. El nuevo Tribunal tendrá el mismo número de árbitros y será constituido siguiendo el mismo método que el Tribunal original.

628. The language of proposed AR 64, current AR 51, is simplified but there are no substantive changes to the provision. Proposed AR 64(1)(b) reflects the assumption that the original Tribunal will be reconstituted unless a member is not able to take part in the proceeding.
**Rule 65**  
Annulment: Appointment of *ad hoc* Committee

1. As soon as an application for annulment of an Award is registered, the Chairman shall appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

2. Each member of the Committee shall provide a signed declaration in accordance with Rule 26.

3. The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment.

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**Article 65**  
Annulation : nomination d’un Comité *ad hoc*

1. Dès l’enregistrement d’une demande en annulation d’une sentence, le ou la Président(e) du Conseil administratif procède à la nomination d’un Comité *ad hoc* conformément à l’article 52(3) de la Convention.


3. Le Comité est réputé constitué à la date à laquelle le ou la Secrétaire général(e) notifie aux parties que tous les membres ont accepté leur nomination.

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**Regla 65**  
Anulación: Nombramiento del Comité ad hoc

1. En cuanto se registre una solicitud de anulación de un laudo, el o la Presidente(a) del Consejo Administrativo nombrará un Comité *ad hoc* de conformidad con el Artículo 52(3) del Convenio.

2. Cada miembro del Comité deberá proporcionar una declaración firmada de conformidad con la Regla 26.
(3) El Comité se considerará constituido en la fecha en que el o la Secretario(a) General notifíque a las partes que todos sus miembros han aceptado su nombramiento.

629. Proposed AR 65 is current AR 52 and has minor modifications to language.

630. Proposed AR 65 addresses the constitution of an ad hoc Committee of three persons appointed by the Chairman of the Administrative Council from the Panel of Arbitrators, following the registration of an application for annulment. Paragraph (3) prescribes the date of constitution of the Committee and requires each member to sign a declaration (see Schedule 4 – Ad Hoc Committee Member Declaration) similar to that specified in proposed AR 26, current AR 6(2).

631. Comments were received from some Member States and the public requesting that the qualifications of ad hoc Committee members be enhanced compared to those required of Tribunal Members.

632. The Centre is required to select ad hoc Committee members based on the qualifications mandated by Art. 14 of the ICSID Convention, which are equally applicable to arbitrators. In addition to these general qualifications, Committee members cannot have the same nationalities as the parties or the original Tribunal members, and cannot be designated to the Panel of Arbitrators by the State party to the dispute or the State of the national who is a party to the dispute (see Art. 52(3) of the Convention). The potential inclusion of additional qualifications applicable only to panellists appointed to annulment proceedings would thus require an amendment to the Convention.

633. The process by which each Member State identifies and selects Panel designees remains within the discretion of that State. The Centre encourages Member States to continue designating candidates with qualifications appropriate for both arbitrators and annulment Committee members.

634. Further details concerning the appointment of Committee members, including the names and origins of the appointees, may be found in ICSID’s Background Paper on Annulment (2016).

**RULE 66 – PROCEDURE APPLICABLE TO INTERPRETATION, REVISION AND ANNULMENT**

**CURRENT RELATED PROVISIONS: AR 53**
Rule 66
Procedure Applicable to Interpretation, Revision and Annulment

(1) Except as provided below, the provisions of these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee.

(2) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall apply to a proceeding under this Rule, with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.

(3) In addition to the application, the written procedure shall consist of one round of written submissions, unless the parties agree or the Tribunal or Committee orders otherwise.

(4) A hearing shall be held upon the request of either party, or if ordered by the Tribunal or Committee.

(5) The Tribunal or Committee shall issue its decision within 120 days after the last written or oral submission on the application.

Article 66
Procédure applicable à l'interprétation, la révision et l’annulation

(1) Sous réserve des dispositions ci-dessous, les dispositions du présent Règlement s’appliquent, avec les modifications qui s’imposent, à toute procédure relative à l’interprétation, la révision ou l’annulation d’une sentence et à la décision du Tribunal ou du Comité.

(2) Les accords et ordonnances en matière de procédure sur les questions traitées au cours de la première session du Tribunal initial s’appliquent, avec les modifications qui s’imposent, à une procédure introduite selon le présent article, sauf si les parties en conviennent autrement ou sauf instructions contraires du Tribunal ou du Comité.

(3) Outre la demande, la procédure écrite comprend un seul échange d’écritures, sauf si les parties en conviennent ou le Tribunal ou le Comité en décide autrement.

(4) Une audience se tient à la demande de l’une ou l’autre des parties ou si le Tribunal ou le Comité l’ordonne.

(5) Le Tribunal ou le Comité rend sa décision dans les 120 jours suivant les dernières écrítures ou plaidoiries sur la demande.
Regla 66
Procedimiento Aplicable a la Aclaración, Revisión y Anulación

(1) Salvo lo dispuesto a continuación, estas Reglas se aplicarán, con las modificaciones necesarias, a todo procedimiento relacionado con la aclaración, revisión o anulación de un laudo y a la decisión del Tribunal o Comité.

(2) Los acuerdos y resoluciones procesales sobre cuestiones abordadas durante la primera sesión del Tribunal original serán aplicables a un procedimiento en virtud de esta Regla, con las modificaciones necesarias, salvo acuerdo de las partes o resolución del Tribunal o Comité en contrario.

(3) Además de la solicitud, el procedimiento escrito constará de una ronda de escritos, salvo acuerdo de las partes o resolución del Tribunal o Comité en contrario.

(4) Se celebrará una audiencia a petición de cualquiera de las partes, o si lo resolviera el Tribunal o Comité.

(5) El Tribunal o Comité emitirá su decisión dentro de los 120 días siguientes al último escrito o presentación oral sobre la solicitud.

635. Proposed AR 66 is current AR 53 with amendments simplifying the text, clarifying the applicable rules and procedure, and addressing efficiency of the process.

636. First, given the nature of post-Award proceedings, not all rules in an original arbitration proceeding are applicable. The legal and the factual issues will be fewer and more specific. Art. 52(4) of the Convention provides that certain provisions of the Convention will apply mutatis mutandis, with the necessary changes taking into account the particular remedy at hand. Similarly, the AR will apply with the necessary changes in view of the procedure before the Tribunal or Committee. This is provided in proposed AR 66(1).

637. Second, proposed AR 66(2) reflects the practice that the relevant body may assume that the parties’ procedural agreements in the original proceeding will apply to the post-Award remedy proceeding, unless the parties agree otherwise. For example, if the parties agreed on the Arbitration Rules of 2006 in the original proceeding, the 2006 Rules are presumed to apply to the post-Award proceeding. This also applies to the method of filing (electronic or hard copy pursuant to proposed AR 3).

638. Third, given the limited nature of post-Award remedies, there may be no need for more than one round of written submissions in annulment proceedings. Proposed AR 66(3) addresses the difference in scope of the original proceeding and post-Award remedies. It proposes to limit the number of pleadings in the written procedure to one round, unless the parties agree or the Tribunal or Committee orders another round.
Fourth, the rule does not assume that a hearing will be held but proposed AR 66(4) maintains the possibility of a hearing if either party or the Tribunal or Committee thinks it would be useful. Hearings on annulment are often limited to oral submissions by counsel and do not require examination of witnesses and experts. They provide an opportunity for the Committee to pose questions; however, these may also be put in writing.

A suggestion was also made to clarify the admission of new evidence and document production in the context of annulment proceedings, and to completely exclude new evidence. However, while annulment is not an appeal and new evidence is thus not needed to prove a claim, it may be relevant, for example to a request for stay of enforcement of an Award or in a revision proceeding. Current practice is to ascertain the parties’ views on this matter at the first session and to state in annulment cases that the Committee expects that the parties will primarily refer to the evidentiary record of the original proceeding. Therefore, no amendment is proposed to address new evidence in annulment proceedings.

Fifth, proposed AR 66(5) requires the Tribunal or Committee to issue its decision within 120 days after the last written or oral submission on the application in an effort to encourage the expeditious resolution of the matter (see Schedule 9 on Time and Costs for an overview of time limits in the proposed Rules and related measures).

**Rule 67 – Stay of Enforcement of the Award**

**CURRENT RELATED PROVISIONS:** Convention Art. 50(2), 51(4), 52(5), 53(1); AR 54

**Rule 67**

*Stay of Enforcement of the Award*

(1) A party to an interpretation, revision or annulment proceeding may request a stay of enforcement of all or part of the Award at any time before the final decision on the application.

(2) If the stay is requested in the application for revision or annulment of an Award, enforcement shall be stayed provisionally by the Secretary-General until the Tribunal or Committee decides on the request.

(3) The following procedure shall apply:

(a) the request shall specify the circumstances that require the stay;

(b) the Tribunal or Committee shall fix time limits for written or oral submissions, as required, on the request;

(c) if a party files the request before the constitution of the Tribunal or Committee, the Secretary-General shall fix time limits for written submissions on the
request, so that the Tribunal or Committee may consider the request promptly upon its constitution; and

(d) the Tribunal or Committee shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal or Committee;

(ii) the last written submission on the request; or

(iii) the last oral submission on the request.

(4) If a Tribunal or Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.

(5) A party must promptly disclose to the Tribunal or Committee any change in the circumstances upon which the enforcement was stayed.

(6) The Tribunal or Committee may at any time modify or terminate a stay of enforcement, on its own initiative or upon a party’s request.

(7) A stay of enforcement shall terminate on the date of dispatch of the decision on the application for interpretation, revision or annulment, or on the date of discontinuance of the proceeding.

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**Article 67**

**Suspension de l’exécution de la sentence**

(1) Une partie à une instance en interprétation, révision ou annulation peut requérir qu’il soit sursis à l’exécution de tout ou partie de la sentence à tout moment avant qu’il ait été définitivement statué sur la demande.

(2) Si la suspension est sollicitée dans la demande en révision ou annulation de la sentence, l’exécution est provisoirement suspendue par le ou la Secrétaire général(e) jusqu’à ce que le Tribunal ou le Comité ait statué sur la requête.

(3) La procédure suivante s’applique :

(a) la requête précise les circonstances qui exigent la suspension ;

(b) le Tribunal ou le Comité fixe les délais relatifs aux écritures ou plaidoiries, le cas échéant, concernant la requête ;

(c) si une partie dépose la requête avant la constitution du Tribunal ou du Comité, le ou la Secrétaire général(e) fixe les délais pour le dépôt des écritures relatives à la
requête, de sorte que le Tribunal ou le Comité puisse l’examiner dans les plus brefs délais après sa constitution ; et

(d) le Tribunal ou le Comité rend sa décision sur la requête dans un délai de 30 jours à compter de la plus tardive des dates suivantes :

   (i) la date de constitution du Tribunal ou du Comité ;

   (ii) la date des dernières écritures relatives à la requête ; ou

   (iii) la date des dernières plaidoiries relatives à la requête.

(4) Si un Tribunal ou un Comité décide de suspendre l’exécution de la sentence, il peut imposer des conditions pour la suspension, ou la levée de la suspension, au regard de l’ensemble des circonstances pertinentes.

(5) Une partie doit divulguer dans les plus brefs délais au Tribunal ou au Comité tout changement dans les circonstances sur le fondement desquelles l’exécution a été suspendue.

(6) Le Tribunal ou le Comité peut à tout moment modifier ou mettre fin à une suspension d’exécution, de sa propre initiative ou à la demande d’une partie.

(7) Une suspension d’exécution prend fin à la date d’envoi de la décision sur la demande en interprétation, révision ou annulation, ou à la date de la fin de l’instance.

Regla 67
Suspensión de la Ejecución del Laudo

(1) Una parte de un procedimiento de aclaración, revisión o anulación podrá solicitar una suspensión de la ejecución de una parte o de todo el laudo en cualquier momento antes que se emita la decisión final sobre la solicitud.

(2) Si se solicitara la suspensión en la solicitud de revisión o de anulación de un laudo, se suspenderá la ejecución de manera provisional por el o la Secretaria General hasta que el Tribunal o el Comité decida sobre la solicitud.

(3) Se aplicará el siguiente procedimiento:

   (a) la solicitud especificará las circunstancias que requieren la suspensión;

   (b) el Tribunal o Comité deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud;
(c) si una parte presenta la solicitud antes de la constitución del Tribunal o Comité, el o la Secretario(a) General fijará los plazos para los escritos sobre la solicitud, de modo tal que el Tribunal o Comité pueda considerar la solicitud con prontitud una vez constituido; y

(d) el Tribunal o Comité emitirá su decisión sobre la solicitud dentro de los 30 días siguientes a lo que suceda de último, sea:

(i) la constitución del Tribunal o Comité;

(ii) el último escrito sobre la solicitud; o

(iii) la última presentación oral sobre la solicitud.

(4) Si un Tribunal o Comité decide suspender la ejecución del laudo, podrá imponer condiciones para la suspensión, o para el levantamiento de la suspensión, tomando en consideración todas las circunstancias relevantes.

(5) Una parte deberá revelar al Tribunal o Comité con prontitud cualquier cambio en las circunstancias en las que se suspendió la ejecución.

(6) El Tribunal o Comité podrá, en cualquier momento, modificar o poner término a una suspensión de la ejecución, de oficio o a solicitud de una de las partes.

(7) Una suspensión de la ejecución terminará en la fecha de envío de la decisión sobre la solicitud de aclaración, revisión o anulación, o en la fecha de discontinuación del procedimiento.

642. Proposed AR 67 is current AR 54. The proposed amendments simplify the text, codify practice, clarify procedure and address efficiency of process.

643. First, the Convention establishes that enforcement shall be stayed whenever a request is included in an application for the revision or annulment of an Award. However, the Convention also requires that the Tribunal or Committee decide that request. These two mandates are accommodated through a stay that is put in place “provisionally” until the Tribunal or Committee decides a request included in the application for annulment or revision of the Award. A stay of enforcement may otherwise be requested at any time until there is a decision on the application that puts an end to the proceeding, without a provisional stay in place. Proposed AR 67(1) and (2) provides for these scenarios. In both scenarios, the request for stay of enforcement must specify the circumstances that justify the stay in accordance with proposed AR 67(3)(a).

644. Second, the WP clarifies and simplifies the procedure to decide the stay. The current rule establishes two procedures to decide a stay of enforcement request: (i) a default procedure according to which consideration of the request is given priority (current AR 54(1)); and
(ii) an expedited procedure with a fixed deadline for the decision (current AR 54(2)). The latter only applies if either party requests the procedure. The fact that these two procedures could potentially apply to the same request has resulted in inconsistent application of the rule. In addition, Committees have found it difficult to decide the stay within the shorter time limit as they also need to be briefed in writing and, potentially, at a hearing. The Centre has received comments from Member States and the public concerning the interplay of these two procedures and requesting that the rule be clarified.

In response to these comments, proposed AR 67(3) addresses procedure. These paragraphs provide for only one procedure applicable to all stay of enforcement requests. This provision also clarifies that the party requesting the stay must establish the circumstances that require it, regardless of whether the request is in the application and will lead to a provisional stay of enforcement (proposed AR 67(3)(a)).

To maintain the same expediency as the current rule while increasing the time available to Tribunals and Committees to consider the request, the proposed amendment requires that a schedule of submissions be established before the constitution of the Tribunal or Committee if the request is filed before the constitution (proposed AR 67(3)(c)). It further anchors the start of the deadline of 30 days for a decision on the request to the last written or oral submission or, if the last submission was received before the constitution of the Tribunal or Committee, the date of constitution (proposed AR 67(3)(d)).

Third, the Convention does not indicate whether a stay of enforcement can be subject to conditions, and the current rule does not address this matter. While several Committees have issued conditional stays of enforcement, the silence in the Convention and the Rules has resulted in inconsistent interpretations and been the subject of comment from the public.

Proposed AR 67(4) codifies and regulates the practice of conditionally staying enforcement if: (i) a stay is required by the circumstances; and (ii) the condition(s) is necessary in light of the circumstances. The condition should not amount to compliance with the terms of the Award (see Art. 53(1) of the Convention, which establishes the obligation to comply with the Award “except to the extent that enforcement shall have been stayed”, and should address other circumstances that warrant the condition(s). A conditional stay is typically not an alternative to not staying enforcement, but an exercise of Tribunal or Committee discretion, having already determined that a stay is required.

Fourth, proposed AR 67(5) deals with the subsequent alteration of a stay of enforcement decided by a Tribunal or Committee, as reflected in current AR 54(3). The proposed amendments introduce a disclosure obligation on the parties. Proposed AR 67(6) clarifies that a Tribunal or Committee has discretion to alter a stay of enforcement on its own initiative. The purpose of the requirement that both parties disclose any material change in the circumstances on which enforcement was stayed is to address questions of fairness, and to provide consistent procedure with the rule on provisional measures (see proposed AR 50 in Chapter VIII – Special Procedures).

288
650. *Fifth*, proposed AR 67(7) addresses the termination of any stay of enforcement still in place when the interpretation, revision or annulment proceeding terminates. The proposed rule clarifies that a stay of enforcement terminates with the proceeding, regardless of whether the proceeding concludes with a final decision on the application or is otherwise discontinued.

651. The proposed rule also eliminates the potential to continue a stay of enforcement beyond a decision annulling an Award in full or in part. This amendment better reflects Art. 52(5) of the Convention, which provides that enforcement may be stayed while the Committee’s decision on the application for annulment is “pending”.

**Rule 68 – Resubmission of Dispute after an Annulment**

**CURRENT RELATED PROVISIONS:** Convention Art. 52(6); AR 55

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**Rule 68**  
**Resubmission of Dispute after an Annulment**

(1) If a Committee annuls all or part of an Award, either party may file with the Secretary-General a request to resubmit the dispute to a new Tribunal, together with any supporting documents and pay the lodging fee published in the schedule of fees. The request shall:

(a) identify the Award to which it relates;

(b) be in a procedural language used in the original proceeding;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) specify which aspect(s) of the dispute is resubmitted to the new Tribunal.

(2) Upon receiving a request for resubmission and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request and the supporting documents to the other party;

(b) register the request;

(c) notify the parties of the registration; and

(d) invite the parties to constitute a new Tribunal without delay, which shall have the same number of arbitrators, and be appointed by the same method as the
(3) If the original Award was annulled in part, the new Tribunal shall only reconsider that part of the dispute pertaining to the annulled portion of the Award.

(4) Except as otherwise provided in paragraphs (1)-(3), these Rules shall apply to the resubmission proceeding.

(5) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall apply to the resubmission proceeding, with necessary modifications, unless the parties agree or the new Tribunal orders otherwise.

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Article 68

Nouvel examen d’un différend après une annulation

(1) Si un Comité annule une sentence en totalité ou en partie, l’une ou l’autre des parties peut déposer auprès du ou de la Secrétaire général(e) une requête aux fins de soumettre le différend à un nouveau Tribunal, avec tous documents justificatifs, et s’acquitter du droit de dépôt publié dans le barème des frais. La requête :

(a) identifie la sentence visée ;

(b) est rédigée dans une langue de la procédure utilisée dans l’instance initiale ;

(c) est signée par chaque partie requérante ou son représentant et est datée ;

(d) comprend la preuve de l’habilitation à agir de tout représentant ; et

(e) précise quel(s) aspect(s) du différend doi(ven)t être soumis au nouveau Tribunal.

(2) Dès réception de la requête en nouvel examen et du droit de dépôt, le ou la Secrétaire général(e) doit, dans les plus brefs délais :

(a) transmettre à l’autre partie la requête et les documents justificatifs ;

(b) enregistrer la requête ;

(c) aviser les parties de l’enregistrement ; et

(d) inviter les parties à constituer sans délai un nouveau Tribunal, qui comprend le même nombre d’arbitres et est nommé selon la même méthode que le Tribunal initial.

(3) Si la sentence initiale a été annulée en partie, le nouveau Tribunal n’examine que la partie du différend relatif à la partie annulée de la sentence.
Sauf dispositions contraires des paragraphes (1) - (3), le présent Règlement s’applique à une instance de nouvel examen.

Les accords et ordonnances en matière de procédure sur les questions traitées au cours de la première session du Tribunal initial s’appliquent, avec les modifications qui s’imposent, à une instance de nouvel examen, sauf si les parties en conviennent autrement ou sauf instructions contraires du nouveau Tribunal.

Regla 68
Nueva Sumisión de una Diferencia después de la Anulación

(1) Si un Comité anulara total o parcialmente un laudo, cada parte podrá presentar al o a la Secretario(a) General una solicitud para que se someta la diferencia a un nuevo Tribunal, junto con cualquier documento de respaldo y pagar el derecho de presentación publicado en el arancel de derechos. La solicitud deberá:

(a) identificar el laudo de que se trata;

(b) estar en un idioma procesal utilizado en el procedimiento original;

(c) estar fechada y firmada por cada una de las partes solicitantes o su(s) representante(s);

(d) estar acompañada de prueba del poder de representación del representante; y

(e) especificar qué aspecto(s) de la diferencia ha(n) de someterse al nuevo Tribunal.

(2) Inmediatamente después de recibir una solicitud de nueva sumisión y el derecho de presentación, el o la Secretario(a) General, deberá con prontitud:

(a) enviar la solicitud y los documentos de respaldo a la otra parte;

(b) registrar la solicitud;

(c) notificar a las partes el registro; e

(d) invitar a las partes a que constituyan, sin demora, un nuevo Tribunal que tendrá la misma cantidad de árbitros y será constituido siguiendo el mismo método que el Tribunal original.

(3) Si el laudo original fuera anulado en parte, el nuevo Tribunal solo reconsiderará aquella parte de la diferencia que corresponda a la parte anulada del laudo.

(4) Salvo disposición en contrario establecida en los párrafos (1)-(3), estas Reglas se
(5) Los acuerdos y resoluciones procesales sobre cuestiones abordadas durante la primera sesión del Tribunal original serán aplicables al procedimiento de nueva sumisión con las modificaciones necesarias, salvo acuerdo de las partes o resolución del nuevo Tribunal en contrario.

652. Proposed AR 68 implements Art. 52(6) of the Convention and addresses the resubmission of a dispute to a new Tribunal following a full or partial annulment of an Award. To date, disputes have been resubmitted in eight cases. There is no time limit for resubmission of a dispute, and the Secretary-General cannot refuse registration if the request is filed and the lodging fee is paid.

653. Proposed AR 68 suggests the same type of amendments as proposed AR 63 concerning the request for resubmission and the procedure to be applied to a resubmission proceeding. Proposed AR 68 also deletes the reference to a possible stay of enforcement in current AR 55(3). Issues that may arise in the context of a resubmission (such as the scope of the new Tribunal’s mandate or the admissibility of new claims and counterclaims) are, as in current practice, left to be decided on a case-by-case basis by Tribunals.

654. Consistent with the amendments to AR 54 on stay of enforcement, the proposed AR 68 eliminates the possibility of staying or continuing to stay enforcement of the Award during the resubmission proceeding.

CHAPTER XII - EXPEDITED ARBITRATION

655. The expedited procedures in this Chapter allow an arbitration to conclude within 470-530 days after the date of registration of the Request for arbitration. They provide for a Sole Arbitrator or three-member Tribunal to be appointed on an expedited basis, and for all matters to be heard in a single proceeding before the Tribunal without bifurcation. The Arbitration Rules in Chapters I-XI apply to an expedited arbitration under this Chapter, except as expressly modified or excluded by Chapter XII.

656. The background and reasons for adopting expedited arbitration (“EA”) provisions are explained in the Schedule concerning time and cost (see Schedule 9 – Addressing Time and Cost in ICSID Arbitration). EA addresses comments received from Member States and the public that investment arbitrations are too long and too costly.

657. The EA provisions focus on reducing the length of three main phases in an arbitration with long durations (see Schedule 9): (i) the establishment of the Tribunal; (ii) written procedures, especially interlocutory applications; and (iii) rendering the Award. These areas are also addressed in Chapters I-XI of the AR. However, the EA go a step further in that they offer a stand-alone expedited process, with clear deadlines on the time of a process
from the registration of the Request for arbitration, to rendering the Award and any post-Award remedies.

658. By comparison, AR Chapters I-XI enable parties to agree on case-specific timelines for constituting the Tribunal and the procedural time-table for their case. It is important to maintain these options, since the Convention allows for party agreement on such matters and the procedural calendar of any given case may differ depending on the issues involved in the case. Party autonomy on these matters also recognizes that the complexity of cases may vary, for example depending on whether a case is based on consent to arbitration in an investment contract or in an investment law or treaty, on the underlying circumstances or the legal questions for decision.

659. Investment arbitrations can also follow a variety of scenarios. For example, a respondent might raise objections to the jurisdiction of the Tribunal which may be heard as a preliminary matter in a bifurcated proceeding or joined to the merits of the case. A respondent might raise objections that the claim manifestly lacks legal merit early on in the process, leading to an automatic bifurcation of the matter for an early decision; and questions of liability and damage may be heard in different phases. The parties might suspend a case to pursue settlement negotiations or mediation. All of these tracks affect the overall time to conclude the case.

660. The EA provide less flexibility to change time frames, but more certainty as to the timing of the process. Parties can agree on the number of arbitrators – a Sole Arbitrator or three-member Tribunal – but have an expedited method to appoint these arbitrators, including time limits for their appointment. The procedural calendar maintains two rounds of submissions and a hearing as provided in proposed AR 13(1) and 15, but joins all issues in one proceeding without the possibility of bifurcation. The Award is still an ICSID Convention Award and must comply with the requirements for such Awards, but must be rendered on an expedited basis. To meet these time limits, the EA regulates filing dates and limits the length of written submissions. Tribunals may also employ complementary case management techniques to address timing.

661. The following table shows the basic steps in the process and the timeline for an EA with a Sole Arbitrator. As can be seen from this table, the parties are able to complete all briefing and get to a hearing on merits and jurisdiction within one year.

<table>
<thead>
<tr>
<th>Day No. (Cumulative No. of Days)</th>
<th>Step in the Proceeding</th>
<th>No. of Days for Step</th>
<th>Rule Reference (Proposed Provision)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Day 1</td>
<td>Registration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Day 20</td>
<td>Agreement on EA</td>
<td>20 after registration</td>
<td>Rule 69(3)</td>
</tr>
<tr>
<td>Day 30</td>
<td>Agreement on number of arbitrators and method</td>
<td>30 after registration</td>
<td>Rule 70(2)</td>
</tr>
<tr>
<td>Day 50</td>
<td>Parties appoint Sole Arbitrator (SA)</td>
<td>20</td>
<td>Rule 71(a)</td>
</tr>
<tr>
<td>Day 60</td>
<td>SA accepts appointment / constitution of Tribunal</td>
<td>10</td>
<td>Rule 71(b)</td>
</tr>
<tr>
<td>Day 90</td>
<td>First session</td>
<td>30</td>
<td>Rule 74</td>
</tr>
<tr>
<td>Day 150</td>
<td>Claimant(s)’ memorial</td>
<td>60</td>
<td>Rule 75(1)(a)</td>
</tr>
</tbody>
</table>
662. The time limits in the EA are ambitious but on a slower track than expedited procedures in commercial arbitration rules, which typically provide for an arbitration to conclude within 6 months (see Schedule 9). The EA endeavour to strike a balance between an expedited procedure under commercial arbitration rules and a realistic schedule for investment disputes given their special characteristics.

663. Electing an EA necessarily means parties and counsel have to make certain compromises. First, parties and counsel must be prepared to limit the length of submissions and the number of separate procedural applications they bring (e.g. requests for provisional measures and production of documents). Practice has shown that many arbitrations are delayed due to the high number of procedural applications made by the parties during the proceeding. By definition, an arbitration cannot be expedited if there are numerous disputes as to refusals to produce documents, special procedures, and the like. As a result, the approach of counsel will be vital to making the EA effective.

664. Second, parties must be prepared to merge all matters before the Tribunal in one procedural schedule. There is no option to bifurcate proceedings or have parallel schedules. If a party wishes to raise objections to jurisdiction, these would need to be included in that party’s counter-memorial or reply (see proposed AR 36 and 52) and heard jointly with the other issues in dispute at the hearing.

665. Third, the Tribunal must be available to conduct the proceeding under the EA. An expedited proceeding means the Tribunal must devote significant time from the moment it is constituted until the Award is rendered, i.e. during a period of approximately 450-500 days. Candidates for appointment should therefore be prepared to meet the shorter deadlines of the EA and case manage the process.

666. The EA is particularly apt for cases where parties are mindful of costs. For example, an EA might be especially suitable for investment contract disputes of small and medium-sized enterprises (“SMEs”). Instead of referring to commercial arbitration rules in their arbitration agreements because of time and cost considerations, SMEs and other parties who need an expedited arbitration in an investor-State dispute context would now have the option to select the EA.

667. States may also refer to the EA in their investment laws and treaties for disputes concerning certain categories of investors or disputes. For example, the CETA includes specific provisions regarding investment disputes involving SMEs (see CETA Art. 8.19(3), 8.23(5),
8.27(9)). This could complement the efforts to promote international investment among SMEs.

**RULE 69 – CONSENT OF PARTIES TO EXPEDITED ARBITRATION**

**CURRENT RELATED PROVISIONS:** Conv. Art. 44

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**Chapter XII**  
**Expedited Arbitration**

**Rule 69**  
**Consent of Parties to Expedited Arbitration**

(1) The parties to an arbitration conducted under the ICSID Convention may consent to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by following the procedure in paragraph (2).

(2) The parties shall jointly notify the Secretariat in writing of their consent to an expedited arbitration in accordance with this Chapter. Such notice must be received within 20 days after the date of registration of the Request for arbitration.

(3) Chapters I-XI of the Arbitration Rules shall apply to an expedited arbitration except that:

(a) Rules 8(1), 22, 23, 25, 35, 37, 38, 42, and 43 do not apply in an expedited arbitration pursuant to this Chapter; and

(b) Rules 26, 30, 34, 36, 40, 53, 59, 62 and 66, as modified by Rules 70-78, apply in an expedited arbitration pursuant to this Chapter.

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**Chapitre XII – Arbitrage Accéléré**

**Article 69**  
**Consentement des parties à un arbitrage accéléré**

(1) Les parties à un arbitrage conduit sur le fondement de la Convention du CIRDI peuvent consentir à accélérer l’arbitrage conformément au présent chapitre (« arbitrage accéléré ») en suivant la procédure indiquée au paragraphe (2).

(2) Les parties notifient conjointement par écrit au Secrétariat leur consentement à un arbitrage accéléré conformément au présent chapitre. Cette notification doit être
reçue dans un délai de 20 jours à compter de la date de l’enregistrement de la requête d’arbitrage.

(3) Les chapitres I à XI du Règlement d’arbitrage s’appliquent à un arbitrage accéléré, étant toutefois entendu que :

(a) les articles 8(1), 22, 23, 25, 35, 37, 38, 42 et 43 ne s’appliquent pas à un arbitrage accéléré sur le fondement du présent chapitre ; et

(b) les articles 26, 30, 34, 36, 40, 53, 59, 62 et 66, modifiés par les articles 70 - 78, s’appliquent à un arbitrage accéléré sur le fondement du présent chapitre.

Capítulo XII
Arbitraje Expedito

Regla 69
Consentimiento de las Partes a un Arbitraje Expedito

(1) Las partes de un arbitraje tramitado en virtud del Convenio del CIADI pueden consentir a que dicho arbitraje sea conducido con mayor rapidez de conformidad con este Capítulo (“arbitraje expedito”) siguiendo el procedimiento descrito en el párrafo (2).

(2) Las partes notificarán al Secretariado, en forma conjunta y por escrito su consentimiento a un arbitraje expedito de conformidad con este Capítulo. Dicha notificación debe recibirse dentro de los 20 días siguientes a la fecha de registro de la solicitud de arbitraje.

(3) Los Capítulos I-XI de las Reglas de Arbitraje serán de aplicación a un arbitraje expedito salvo que:

(a) Las Reglas 8(1), 22, 23, 25, 35, 37, 38, 42 y 43 no son aplicables en un arbitraje expedito de conformidad con lo dispuesto en este Capítulo; y

(b) Las Reglas 26, 30, 34, 36, 40, 53, 59, 62 y 66, según fueran modificadas por las Reglas 70-78, son aplicables en un arbitraje expedito de conformidad con lo dispuesto en este Capítulo.

668. The EA do not apply automatically, and Tribunals cannot apply them without the express consent of the parties. Parties need to agree in writing to the application of Chapter XII of the Arbitration Rules (proposed AR 69(1)). Such agreement is in addition to the agreement to arbitrate under the ICSID Convention.

669. An EA arbitration clause in a contract could be formulated as follows:
The [Government]/[name of constituent subdivision or agency] of name of Contracting State and name of investor hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the “Centre”) any dispute arising out of this agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the “Convention”). The Parties agree to apply Chapter XII of the [2019] Arbitration Rules of the Centre (Expedited Arbitration) to the arbitration proceeding.

670. A reference to the EA could also be contained in a State’s offer to arbitrate in an investment treaty or contract. By accepting that offer, the investor would agree to arbitration under Chapter XII of the AR.

671. If the parties agree to apply the EA in their arbitration agreement, such agreement will be notified to the Centre with the filing of the Request for arbitration, and the EA will apply immediately from the date of registration of the Request.

672. Alternatively, even if the EA is not noted in the investment instrument, the parties can agree to apply it in a specific case by mutual agreement. In this instance, the parties would agree to apply the EA after the dispute has arisen, within 20 days after the date of registration. If so, they must notify the Secretary-General of their agreement, and the EA will apply from the date of the notice (proposed AR 69(2)).

673. An EA remains an arbitration under the ICSID Convention, hence the framework and mandatory provisions of the Convention apply. Chapter XII incorporates all of the provisions of the AR (and thus the Convention), and expressly lists those that are excluded (proposed AR 69(3)(a)). The excluded provisions are: proposed AR 8(1) (the option for parties to agree to extend a time limit), 22 (method of constituting the Tribunal), 23 (appointment of arbitrators to a Tribunal constituted in accordance with Art. 37(2)(b) of the Convention), 25 (appointment of arbitrators by the Chairman of the Administrative Council in accordance with Art. 38 of the Convention), 35 (Manifest Lack of Legal Merit), 37 (Bifurcation), 38 (Consolidation on Consent of Parties), 42 (Tribunal-appointed experts), and 43 (visits and inquiries).

674. The EA also lists the provisions of the AR which apply as modified by Chapter XII (proposed AR 69(3)(b)). These provisions are: proposed AR 26 (acceptance of appointment), 30 (decision on the proposal for disqualification), 34 (first session), 36 (preliminary objection), 40 (Tribunal order to produce documents or other evidence), 53 (default), 59 (timing of the Award), 62 (supplementary decision and rectification) and 66 (procedure applicable to interpretation, revision and annulment). The exclusions and modifications are explained below.
Rule 70
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 71 or a three-member Tribunal appointed pursuant to Rule 72.

(2) The parties shall jointly notify the Secretariat in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of registration of the Request for arbitration.

(3) If the parties do not notify the Secretariat of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed in accordance with Rule 71.

(4) An appointment under Rules 71-72 shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the Convention.

Article 70
Nombre d’arbitres et méthode de constitution du Tribunal dans un arbitrage accéléré

(1) Le Tribunal dans un arbitrage accéléré comprend un(e) arbitre unique nommé(e) conformément à l’article 71 ou trois membres nommés conformément à l’article 72.

(2) Dans les 30 jours suivant la date de l’enregistrement de la requête d’arbitrage, les parties notifient conjointement par écrit au Secrétariat si elles ont choisi un(e) arbitre unique ou un Tribunal composé de trois membres.

(3) Si les parties ne notifient pas leur choix au Secrétariat dans le délai visé au paragraphe (2), le Tribunal comprend un(e) arbitre unique devant être nommé(e) conformément à l’article 71.

(4) Toute nomination effectuée en application des articles 71 - 72 est réputée constituer une nomination selon la méthode convenue entre les parties conformément à l’article 37(2)(a) de la Convention.
Regla 70
Número de Árbitros y Método de Constitución del Tribunal para el Arbitraje Expedito

(1) El Tribunal en un arbitraje expedito estará compuesto por un o una Árbitro Único nombrado de conformidad con lo dispuesto en la Regla 71 o de un Tribunal de tres miembros nombrados de conformidad con lo dispuesto en la Regla 72.

(2) Las partes notificarán en forma conjunta y por escrito al Secretariado su elección de un o una Árbitro Único o de un Tribunal de tres miembros dentro de los 30 días siguientes a la fecha de registro de la solicitud de arbitraje.

(3) Si las partes no notificaran al Secretariado su elección dentro del plazo al que se hace referencia en el párrafo (2), el Tribunal estará compuesto por un o una Árbitro Único que será nombrado de conformidad con la Regla 71.

(4) Un nombramiento de conformidad con lo dispuesto en las Reglas 71-72 será considerado un nombramiento de conformidad con el método acordado por las partes según lo dispuesto en el Artículo 37(2)(a) del Convenio.

The parties electing to apply the EA are given two options for the Tribunal: a Sole Arbitrator or a three-member Tribunal (proposed AR 70(1)). Typically, a proceeding conducted by a Sole Arbitrator is more expeditious than a proceeding with several arbitrators. Although the AR envisage the possibility of a Sole Arbitrator, parties may prefer three-member Tribunals in investment arbitrations. This is also the default option under Art. 37(2)(b) of the Convention, if the parties do not agree on the number of arbitrators and the method of constituting the Tribunal. Therefore, the EA keep the option of a three-member Tribunal, but provide for a Sole Arbitrator as a default if the parties fail to agree on either option (proposed AR 70(3)).

The parties must notify the Centre of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after registration of the Request for arbitration (proposed AR 70(2)). This means that if they agree on the application of the EA on the last day allowed (20 days after registration), they will have 10 further days to make the election between a sole or a three-person Tribunal.

The Tribunal will be constituted in accordance with the method provided in proposed AR 71 or 72. Such agreement is considered an agreement on the number of arbitrators and the method of constituting the Tribunal in accordance with Art. 37(2)(a) of the Convention. Because the methods in AR 71 and 72 lead to constitution of the Tribunal, there is no need to apply the default provision in Art. 37(2)(b) of the Convention or to resort to Art. 38 of the Convention for the appointment by the Chairman of the Administrative Council of any missing arbitrators. Therefore, AR 22, 23 and 25 do not apply.
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration
– Rule 69 & 70

Rule 71 – Appointment of Sole Arbitrator for Expedited Arbitration

CURRENT RELATED PROVISIONS: Conv. Art. 37, AR 2, 3

Rule 71
Appointment of Sole Arbitrator for Expedited Arbitration

(1) A Sole Arbitrator in an expedited arbitration shall be appointed in accordance with the following procedure:

(a) The parties shall jointly advise the Secretary-General in writing of their agreement on a Sole Arbitrator and shall provide the appointee’s name,
nationality(ies) and contact information within 20 days after the notice referred to in Rule 70(2); and

(b) The Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(2) The Secretary-General shall appoint the Sole Arbitrator if:

(a) the parties do not agree on the Sole Arbitrator within the time limit referred to in paragraph (1)(a);

(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator;

(c) the appointee does not accept the appointment within the time limit referred to in Rule 73; or

(d) the appointee declines the appointment.

(3) The following procedure shall apply to an appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73; and

(e) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.
Article 71
Nomination d’un(e) arbitre unique dans un arbitrage accéléré

(1) Un(e) arbitre unique dans un arbitrage accéléré est nommé(e) conformément à la procédure suivante :

(a) les parties notifient conjointement par écrit au ou à la Secrétarie général(e) leur accord sur l’arbitre unique et indiquent le nom, la ou les nationalité(s) et les coordonnées de la personne nommée, dans les 20 jours suivant la notification visée à l’article 70(2) ; et

(b) le ou la Secrétarie général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception conformément à l’article 73 ;

(2) Le ou la Secrétarie général(e) nomme l’arbitre unique si :

(a) les parties ne se mettent pas d’accord sur l’arbitre unique dans le délai visé au paragraphe (1)(a) ;

(b) les parties notifient au ou à la Secrétarie général(e) qu’elles ne parviennent pas à se mettre d’accord sur l’arbitre unique ;

(c) la personne nommée n’accepte pas sa nomination dans le délai visé à l’article 73 ; ou

(d) la personne nommée refuse sa nomination.

(3) La procédure suivante s’applique à la nomination par le ou la Secrétarie général(e) de l’arbitre unique en application du paragraphe (2) :

(a) le ou la Secrétarie général(e) transmet aux parties une liste de cinq candidat(e)s en vue de la nomination d’un(e) arbitre unique, dans les 10 jours suivant l’événement pertinent visé au paragraphe (2) ;

(b) chaque partie peut rayer un seul nom de la liste et classe les autres candidat(e)s par ordre de préférence, puis transmet ce classement au ou à la Secrétarie général(e) dans les 10 jours suivant la réception de la liste ;

(c) le ou la Secrétarie général(e) informe les parties du résultat des classements le jour ouvré suivant la réception des classements et nomme le ou la candidat(e) le (la) mieux classé(e). Si plusieurs candidat(e)s obtiennent le premier rang, le ou la Secrétarie général(e) choisit l’un(e) d’entre eux (elles) ;
Regla 71
Nombramiento de un o una Árbitro Único para el Arbitraje Expedito

(1) Un o una Árbitro Único en un arbitraje expedito será nombrado de conformidad con el siguiente procedimiento:

(a) las partes notificarán en forma conjunta y por escrito al o a la Secretario(a) General de su acuerdo respecto del o de la Árbitro Único y le proporcionarán el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada dentro de los 20 días siguientes a la notificación a la que se hace referencia en la Regla 70(2); y

(b) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73;

(2) El o la Secretario(a) General nombrará al o a la Árbitro Único si:

(a) las partes no se ponen de acuerdo sobre el o a la Árbitro Único a ser nombrado dentro del plazo al que se hace referencia en el párrafo (1)(a);

(b) las partes le notifican al o a la Secretario(a) General que no pueden llegar a un acuerdo sobre el o la Árbitro Único a ser nombrado;

(c) la persona nombrada no acepta el nombramiento dentro del plazo al que se hace referencia en la Regla 73; o

(d) la persona nombrada rechaza el nombramiento.

(3) El siguiente procedimiento será aplicable al nombramiento del o de la Árbitro Único por el o la Secretario(a) General de conformidad con lo dispuesto en el párrafo (2):

(a) el o la Secretario(a) General enviará a las partes, dentro de los 10 días siguientes al hecho relevante al que se hace referencia en el párrafo (2), una lista de cinco candidatos(as) para el nombramiento del o de la Árbitro Único;
(b) cada una de las partes podrá tachar un nombre de la lista, y calificará a los o las candidatos(as) restantes por orden de preferencia y enviará dicha calificación al o a la Secretario(a) General dentro de los 10 días siguientes a la recepción de la lista;

c) el o la Secretario(a) General informará a las partes del resultado de las calificaciones el día hábil inmediatamente posterior a la recepción de las calificaciones y nombrará al o a la candidato(a) que tenga la calificación más alta. Si dos o más candidatos(as) obtienen la calificación más alta, el o la Secretario(a) General seleccionará a uno o una de ellos(as);

d) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73; y

e) si el o la candidato(a) seleccionado no aceptara el nombramiento, el o la Secretario(a) General seleccionará al o a la candidato(a) que haya obtenido la siguiente mejor calificación.

The parties are invited to agree on their nominee within 20 days after the parties’ notice of their election to have a Sole Arbitrator under proposed AR 71. This Rule also applies if they fail to agree on the number of arbitrators or do not notify the Secretary-General of their election within the relevant time period under proposed AR 70.

If the parties do not advise the Secretary-General of their agreed upon Sole Arbitrator within the 20 days, the Sole Arbitrator will be appointed by the Secretary-General of ICSID (proposed AR 71(2)).

If the Secretary-General is to make the appointment, the parties will receive a list of 5 candidates within 10 days after the expiry of the time limit for the appointment. These candidates will be contacted to ensure there is no conflict and they are willing to conduct an expedited arbitration. The parties then rank the candidates in the order of preference (1-5, giving the highest number to the most preferred candidate) and send the list back to the Secretary-General within 10 days of receipt of the list. The highest ranked candidate is appointed, or, if there is a tie, the Secretary-General selects one of the tied candidates. As soon as the appointee is selected, the Secretary-General seeks their acceptance under proposed AR 26, but the appointee must accept within 10 days (proposed AR 70(3) and 73).

This procedure means that the Tribunal consisting of a Sole Arbitrator would be constituted within 60 days (in case of party agreement) and 91 days (in case of a list ranking procedure) after the date of registration.
Rule 72
Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator (“co-arbitrators”) within 20 days after the notice referred to in Rule 70(2) and shall notify the Secretary-General of the appointees’ names, nationalities and contact information within such time;

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(c) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of acceptance of both appointments made pursuant to paragraph (1)(a) and shall notify the Secretary-General of the appointee’s name, nationality(ies) and contact information within such time; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the time limits referred to in paragraph (1)(a) or (c);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal;

(c) an appointee does not accept the appointment within the time limit referred to in Rule 73; or

(d) an appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators not yet appointed pursuant to paragraphs (1) and (2):
(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed, after consulting as far as possible with the parties. The Secretary-General shall use best efforts to make the co-arbitrator appointment(s) within 15 days after the relevant event in paragraph (2);

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73;

(c) as soon as both co-arbitrators have accepted their appointment, or within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(d) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(e) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them;

(f) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 73; and

(g) if the selected candidate does not accept the appointment, the Secretary-General shall select the next highest-ranked candidate.

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**Article 72**

Nomination d’un Tribunal composé de trois membres dans un arbitrage accéléré

(1) Un Tribunal composé de trois membres est nommé conformément à la procédure suivante :

(a) chaque partie nomme un(e) arbitre (« co-arbitres ») dans les 20 jours suivant la notification visée à l’article 70(2) et notifie au ou à la Secrétaire générale le nom, la ou les nationalité(s) et les coordonnées de chacune des personnes nommées, dans ce même délai ;

(b) le ou la Secrétaire générale adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l’article 73 ;
(c) les parties nomment conjointement le ou la Président(e) du Tribunal dans les 20 jours suivant la réception de l’acceptation des deux nominations effectuées conformément au paragraphe (1)(a) et notifient au ou à la Secrétaire général(e) le nom, la ou les nationalité(s) et les coordonnées de la personne nommée, dans ce même délai ; et

(d) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception conformément à l’article 73.

(2) Le ou la Secrétaire général(e) nomme les arbitres non encore nommé(e)s si :

(a) une nomination n’est pas effectuée dans les délais visés au paragraphe (1)(a) ou (c) ;

(b) les parties notifient au ou à la Secrétaire général(e) qu’elles ne parviennent pas à se mettre d’accord sur le ou la Président(e) du Tribunal ;

(c) une personne nommée n’accepte pas sa nomination dans le délai visé à l’article 73 ; ou

(d) une personne nommée refuse sa nomination.

(3) La procédure suivante s’applique à la nomination par le ou la Secrétaire général(e) de tou(te)s arbitres non encore nommé(e)s conformément aux paragraphes (1) et (2) :

(a) le ou la Secrétaire général(e) nomme en premier lieu le(s) co-arbitre(s) non encore nommé(e)(s), après consultation des parties dans la mesure du possible. Il ou elle déploie tous les efforts possibles pour procéder à la (aux) nomination(s) du (de la) ou des co-arbitre(s) dans un délai de 15 jours suivant l’événement pertinent visé au paragraphe (2) ;

(b) le ou la Secrétaire général(e) adresse immédiatement une demande à la personne nommée afin de savoir si elle accepte sa nomination et lui demande de répondre dans les 10 jours suivant réception, conformément à l’article 73 ;

(c) dès que les deux co-arbitres ont accepté leur nomination ou dans un délai de 10 jours suivant l’événement pertinent visé au paragraphe (2), le ou la Secrétaire général(e) transmet aux parties une liste de cinq candidat(e)s en vue de la nomination d’un ou d’une Président(e) du Tribunal ;

(d) chaque partie peut rayer un seul nom de la liste et classe les autres candidat(e)s par ordre de préférence, puis transmet ce classement au ou à la Secrétaire général(e) dans les 10 jours suivant la réception de la liste ;
Regla 72
Nombramiento de un Tribunal de Tres Miembros para el Arbitraje Expedito

(1) Un Tribunal de tres miembros será nombrado de conformidad con el siguiente procedimiento:

(a) cada una de las partes nombrará a un árbitro (“coárbitros”) dentro de los 20 días siguientes a la notificación a la que se hace referencia en la Regla 70(2) y notificará al o a la Secretario(a) General los nombres, la(s) nacionalidad(es) y la información de contacto de las personas nombradas dentro de dicho plazo;

(b) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73;

(c) las partes nombrarán en forma conjunta al Presidente del Tribunal dentro de los 20 días siguientes a la recepción de la aceptación de ambos nombramientos realizados de conformidad con lo dispuesto en el párrafo (1)(a) y notificarán al o a la Secretario(a) General el nombre, la(s) nacionalidad(es) y la información de contacto de la persona nombrada dentro de dicho plazo; y

(d) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73.

(2) El o la Secretario(a) General nombrará a los árbitros que aún no hayan sido nombrados si:

(a) un nombramiento no se realiza dentro de los plazos a los que se hace referencia en el párrafo (1)(a) o (c);
(b) las partes notifican al o a la Secretario(a) General que no pueden llegar a un acuerdo sobre el Presidente del Tribunal;

(c) una de las personas nombradas no acepta el nombramiento dentro del plazo al que se hace referencia en la Regla 73; o

(d) una de las personas nombradas rechaza el nombramiento.

(3) El siguiente procedimiento será aplicable al nombramiento por parte del o de la Secretario(a) General de los árbitros que aún no hayan sido nombrados de conformidad con lo dispuesto en los párrafos (1) y (2):

(a) el o la Secretario(a) General nombrará en primer lugar al o a los o las coárbitro(s) que aún no hayan sido nombrados, previa consulta, en la medida de lo posible, a las partes. El o la Secretario(a) General hará lo posible para realizar el o los nombramiento(s) del o de los coárbitro(s) dentro de los 15 días siguientes al hecho relevante al que se hace referencia en el párrafo (2);

(b) el o la Secretario(a) General le trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73;

(c) tan pronto como ambos coárbitros hayan aceptado sus nombramientos, o dentro de los 10 días siguientes al hecho relevante al que se hace referencia en el párrafo (2), el o la Secretario(a) General enviará a las partes una lista de cinco candidatos(as) para su nombramiento como Presidente del Tribunal;

(d) cada una de las partes podrá tachar un nombre de la lista, y calificará a los o las candidatos(as) restantes por orden de preferencia y enviará dicha calificación al o a la Secretario(a) General dentro de los 10 días siguientes a la recepción de la lista;

(e) el o la Secretario(a) General informará a las partes del resultado de las calificaciones el día hábil inmediatamente posterior a la recepción de las calificaciones y nombrará al o las candidato(a) que tenga la mejor calificación. Si dos o más candidatos(as) obtienen la mejor calificación, el o la Secretario(a) General seleccionará a uno de ellos;

(f) el o la Secretario(a) General trasmitirá inmediatamente a la persona nombrada la solicitud de aceptación de su nombramiento y solicitará su respuesta dentro de los 10 días siguientes a la recepción de la solicitud de conformidad con la Regla 73; y
Proposed AR 72 applies if the parties agree on a three-member Tribunal and notify their agreement to the Secretary-General within 30 days after the date of registration.

Under this method, each party is invited to appoint an arbitrator within 20 days after the date of the notice to apply Rule 72. The parties notify the Secretary-General of their respective appointment, and the Secretary-General seeks the appointees’ acceptance, which must be provided within 10 days in accordance with proposed AR 73. After both co-arbitrators have accepted their appointment, the parties are invited to agree on the President of the Tribunal within 20 days. Thus, if all arbitrators accept their appointments on the last date allowed (day 10), the constitution of the Tribunal is completed within 90 days after the date of registration.

If an arbitrator or the President is not appointed within the relevant time limit, or the appointee does not accept or declines the appointment, the Secretary-General will appoint the missing arbitrator(s). With regard to a co-arbitrator, the Secretary-General consults with the parties and uses best efforts to make the appointment within 15 days after the event triggering the default appointment. With regard to the President of the Tribunal, the Secretary-General follows the same list-ranking procedure as for the appointment of a Sole Arbitrator. This procedure means that, where the parties failed to agree on a President (the most likely default scenario) the Tribunal would be constituted within 121 days after the date of registration.

**Rule 73 – Acceptance of Appointment by Arbitrators in Expedited Arbitration**

**Current Related Provisions:** AR 5, 6
Article 73
Acceptation des nominations dans un arbitrage accéléré

Un(e) arbitre nommé(e) dans un arbitrage accéléré doit accepter sa nomination et remettre une déclaration conformément à l’article 26(3) dans les 10 jours suivant la réception de la demande d’acceptation.

Proposed AR 26(3) provides that an appointee must accept the appointment and provide a signed declaration within 20 days after the request for acceptance. In order to expedite the constitution of the Tribunal, this time limit is shortened to 10 days. Prospective candidates will be made aware of this Rule prior to their appointment and ensure that they comply with it, as the failure to do so would mean a default appointment by the Secretary-General.

RULE 74 – FIRST SESSION IN EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: AR 13, 20

Rule 74
First Session in Expedited Arbitration

(1) The Tribunal shall hold a first session pursuant to Rule 34 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication unless both parties and the Tribunal agree it shall be held in person.
Article 74
Première session dans un arbitrage accéléré

(1) Le Tribunal tient une première session conformément à l’article 34 dans les 30 jours suivant la constitution du Tribunal.

(2) La première session se tient par téléphone ou par tous moyens de communication électroniques, à moins que les deux parties et le Tribunal ne conviennent de la tenir en personne.

Regla 74
Primera Sesión en el Arbitraje Expedito

(1) El Tribunal celebrará una primera sesión de conformidad con lo dispuesto en la Regla 34 dentro de los 30 días siguientes a la constitución del Tribunal.

(2) La primera sesión se celebrará por vía telefónica o a través de medios electrónicos de comunicación salvo que ambas partes y el Tribunal acuerden que deberá celebrarse en persona.

686. Under proposed AR 34, the first session is to be held within 60 days after the constitution of the Tribunal or such other period as the parties may agree. In an expedited arbitration, the time limit is shortened to 30 days after constitution without the option to agree on a longer period (proposed AR 74(1)). The idea is to start the time limits for submissions under proposed AR 75 as soon as possible, which are triggered by the date of the first session.

687. The method for holding the first session is by telephone or electronic means, unless both parties and the Tribunal agree that it should be held in-person (proposed AR 74(2)). This avoids unnecessary costs and time associated with holding an in-person session.

RULE 75 – THE PROCEDURAL SCHEDULE IN EXPEDITED ARBITRATION

CURRENT RELATED PROVISIONS: AR 31, 32

Rule 75
The Procedural Schedule in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply in the expedited arbitration:
(a) the requesting party shall file a memorial within 60 days after the first session, unless the Request for arbitration is to be considered the memorial pursuant to Rule 13(2);

(b) the other party shall file a counter-memorial within 60 days after the date of filing the memorial, or within 60 days after the first session if the requesting party has elected to use the Request for arbitration as its memorial pursuant to Rule 13(2);

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;

(d) the requesting party shall file a reply within 40 days after the date of filing of the counter-memorial;

(e) the other party shall file a rejoinder within 40 days after the date of filing of the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of costs within 10 days after the last day of the hearing referred to in paragraph (1)(g), and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counter-claim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents or other evidence pursuant to Rule 40(1). The Tribunal shall decide such applications based on written submissions and without an in-person hearing.

(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule in paragraph (1), unless the Tribunal determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.
Article 75
Calendrier de la procédure dans un arbitrage accéléré

(1) Le calendrier suivant relatif aux écritures et à l’audience est applicable dans un arbitrage accéléré :

(a) la partie requérante dépose un mémoire dans les 60 jours suivant la première session, sauf si la requête d’arbitrage doit être considérée comme le mémoire conformément à l’article 13(2) ;

(b) l’autre partie dépose un contre-mémoire dans les 60 jours suivant la date de dépôt du mémoire, ou dans les 60 jours suivant la première session si la partie requérante a choisi d’utiliser la requête d’arbitrage comme son mémoire conformément à l’article 13(2) ;

(c) le mémoire et le contre-mémoire visés au paragraphe (1)(a) et (b) ne doivent pas dépasser 200 pages ;

(d) la partie requérante dépose une réponse dans les 40 jours suivant la date de dépôt du contre-mémoire ;

(e) l’autre partie dépose une réplique dans les 40 jours suivant la date de dépôt de la réponse ;

(f) la réponse et la réplique visées au paragraphe (1)(d) et (e) ne doivent pas dépasser 100 pages ;

(g) l’audience se tient dans les 60 jours suivant le dépôt des dernières écritures ;

(h) les parties déposent chacune un état des frais dans les 10 jours suivant le dernier jour de l’audience visée au paragraphe (1)(g) ; et

(i) le Tribunal rend une sentence dès que possible et, en tout état de cause, au plus tard 120 jours après l’audience visée au paragraphe (1)(g).

(2) Toute objection préliminaire ou toute demande reconventionnelle, incidente ou additionnelle est jointe au calendrier principal visé au paragraphe (1). Le Tribunal ajuste le calendrier si une partie soulève une telle question, en tenant compte de la nature accélérée de la procédure.

(3) Le Tribunal peut prolonger les délais indiqués au paragraphe (1)(a) et (b) d’une durée maximale de 30 jours si une partie demande au Tribunal de statuer sur un différend découlant d’une demande de production de documents ou d’autres moyens de preuve conformément à l’article 40(1). Le Tribunal statue sur une telle demande sur le fondement d’écritures et sans tenir d’audience en personne.
(4) Les délais applicables aux écritures autres que celles visées aux paragraphes (1) - (3) courent parallèlement à ceux du calendrier principal visé au paragraphe (1), à moins que le Tribunal ne décide que des circonstances exceptionnelles justifient la suspension du calendrier principal. Pour fixer les délais pour ces écritures, le Tribunal tient compte de la nature accélérée de la procédure.

Regla 75
El Calendario Procesal en el Arbitraje Expedito

(1) El siguiente calendario será aplicable para la presentación de los escritos y para la audiencia en el arbitraje expedito:

(a) la parte solicitante presentará un memorial dentro de los 60 días siguientes a la primera sesión, salvo que la solicitud de arbitraje haya de considerarse como el memorial de conformidad con lo dispuesto en la Regla 13(2);

(b) la otra parte presentará un memorial de contestación dentro de los 60 días siguientes a la fecha de presentación del memorial, o dentro de los 60 días siguientes a la primera sesión si la parte solicitante ha elegido utilizar la solicitud de arbitraje como su memorial de conformidad con lo dispuesto en la Regla 13(2);

(c) el memorial y el memorial de contestación a los que se hace referencia en el párrafo (1)(a) y (b) tendrán una extensión de no más de 200 páginas;

(d) la parte solicitante presentará una réplica dentro de los 40 días siguientes a la fecha de presentación del memorial de contestación;

(e) la otra parte presentará una dúplica dentro de los 40 días siguientes a la fecha de presentación de la réplica;

(f) la réplica y la dúplica a las que se hace referencia en el párrafo (1)(d) y (e) tendrán una extensión de no más de 100 páginas;

(g) la audiencia se celebrará dentro de los 60 días siguientes a la presentación del último escrito;

(h) las partes presentarán declaraciones sobre los costos dentro de los 10 días siguientes al último día de la audiencia a la que se hace referencia en el párrafo (1)(g); y
(i) el Tribunal dictará el laudo lo antes posible y, en cualquier caso, a más tardar 120 días después de la celebración de la audiencia a la que se hace referencia en el párrafo (1)(g).

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

(3) El Tribunal podrá prorrogar los plazos previstos en el párrafo (1)(a) y (b) por un máximo de 30 días si alguna de las partes solicita que el Tribunal resuelva una diferencia que surja de las solicitudes de exhibición de documentos u otras pruebas de conformidad con lo dispuesto en la Regla 40(1). El Tribunal decidirá estas solicitudes sobre la base de escritos y sin una audiencia en persona.

(4) Cualquier calendario para las presentaciones además de aquellas a las que se hace referencia en los párrafos (1)-(3) transcurrirá en paralelo al calendario principal previsto en el párrafo (1), salvo que el Tribunal determine que existen circunstancias excepcionales que justifiquen la suspensión del calendario principal. Al fijar los plazos para dichas presentaciones, el Tribunal tomará en consideración la naturaleza expedita del proceso.

688. The EA provides a fixed schedule of submissions, the hearing and the Award in proposed AR 75.

689. The schedule contemplates a joint proceeding on all matters before the Tribunal. It does not allow the bifurcation of the proceeding under proposed AR 37 or an objection that the claim manifestly lacks legal merit under proposed AR 35. These provisions are excluded under proposed AR 69.

690. Thus, if a party believes that it has a strong case for disposing of the claim on the basis of manifest lack of legal merit, it may wish to have the objection addressed under the procedure in proposed AR 35 and not consent to the EA.

691. However, in cases where there the parties believe that the issues might appropriately be heard jointly in one proceeding and wish to have a speedy result, they should consider the application of the EA.

692. Written Submissions. With regard to the written submissions, the first submission (the memorial) is to be filed by the requesting party (claimant) within 60 days after the first session. The claimant may also choose to consider its Request for arbitration as the memorial, in which case it would be the respondent’s turn to file a counter-memorial within 60 days after the first session. Otherwise, the respondent is to file the counter-memorial within 60 days after the date of filing the memorial. Thus, the first round of submissions is completed within a maximum of 4 months after the first session (proposed AR 75(1)(a)
and (b)). The length of the memorial and counter-memorial cannot exceed 200 pages per submission (proposed AR 75(1)(c)).

If the respondent has preliminary objections under proposed AR 36 (e.g. objections to jurisdiction) or a counter-claim under proposed AR 52, it must file those with the counter-memorial foreseen by proposed AR 75(1)(b), in accordance with proposed AR 36(2) and 52(2). In such case, the Tribunal must consider adjusting the schedule to ensure both parties are allowed an opportunity to brief on the preliminary objection or counter-claim, taking into account the nature of the expedited process (proposed AR 75(3)).

The second round of submissions are to be filed within 30 days after the counter-memorial (claimant’s reply) and 30 days after the reply (respondent’s rejoinder). The length of the reply and rejoinder cannot exceed 100 pages per submission (proposed AR 75(1)(f)). If there are preliminary objections, counter-claims or incidental or additional claims, there may be a further opportunity to address those after the respondent’s rejoinder in accordance with the Tribunal’s discretion in proposed AR 75(2). In principle, there are two rounds of pleadings on all matters before the Tribunal.

Requests for production of documents. Proposed AR 75(3) allows the Tribunal to determine the procedure to address requests by a party for production of documents by the other party. This includes any decision by the Tribunal addressing disputes arising from the requests pursuant to AR 40(1). Such procedure is typically discussed at the first session and included in the procedural calendar for the case. Proposed AR 75(3) provides that the Tribunal may extend the main procedural schedule by up to 30 days if required to address disputed production requests. It also provides that requests for production of documents will be decided based on written submissions only.

Other procedural applications. Proposed AR 75(4) foresees that any other time limits for any type of other written submissions (e.g. requests for provisional measures, security for costs, proposals for disqualification) run in parallel with the main procedural calendar. In other words, the main procedural calendar is unaffected by any unscheduled request or other submission. As noted above, it is expected that parties will limit this type of application in an EA to ensure the Award may be rendered on schedule.

The hearing. The hearing is to be held within 60 days after the last written submission (proposed AR 75(1)(g)). This means that the hearing must be held within 9 months after the first session. The EA anticipates only one hearing, which is to deal with all matters before the Tribunal.

Statements of Costs. The parties are to file their statements of costs within 10 days after the final hearing day (proposed AR 75(1)(h)).

The Award. The Tribunal must render the Award within 120 days after the hearing, which is the date of the last submission (proposed AR 75(1)(i)). In accordance with proposed AR 8(3), this is a best-effort obligation which Tribunals are expected to meet, especially in an EA, unless there are special circumstances that are notified to the parties prior to the expiry of the deadline.
700. The following chart shows the procedural steps from the constitution of the Tribunal up to the Award. This process would take 410 days.

**Procedural Schedule in an Expedited Arbitration – Rule 74-75**

1. **Tribunal Constituted under Rule 71 or 72**
   - Within 30 days

2. **First Session (Rule 74(1))**
   - Within 60 days

3. **Requesting party files memorial (Rule 75(1)(a))**
   - Within 60 days

4. **Other party files counter-memorial (Rule 75(1)(b))**
   - Within 60 days

5. **Requesting party files reply (Rule 75(1)(d))**
   - Within 40 days

6. **Other party files rejoinder (Rule 75(1)(e))**
   - Within 60 days

7. **Hearing (Rule 75(1)(g))**
   - Within 10 days
   - As soon as possible, and no later than within 120 days

8. **Parties file statements of costs (Rule 75(1)(h))**

9. **Award rendered (Rule 75(1)(i))**
## Rule 76 – Default during Expedited Arbitration

**CURRENT RELATED PROVISIONS:** Conv. Art. 45; AR 42

### Rule 76

**Default during Expedited Arbitration**

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 53.

### Article 76

**Défaut au cours d’un arbitrage accéléré**

Le Tribunal peut accorder à une partie en défaut un délai de grâce ne devant pas excéder 30 jours, conformément à l’article 53.

### Regla 76

**Rebeldía durante el Arbitraje Expedito**

Un Tribunal podrá otorgarle a una parte en rebeldía un período de gracia que no supere los 30 días de conformidad con lo dispuesto en la Regla 53.

701. If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award (Art. 45(2) of the Convention). Proposed AR 53 dealing with a party’s default provides for a grace period of 60 days to cure the default. Proposed AR 76 modifies AR 53 in that the grace period is shortened to 30 days.

702. If the defaulting party fails to act within the grace period, the Tribunal examines the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering the Award (proposed AR 53(8)).

## Rule 77 – The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

**CURRENT RELATED PROVISIONS:** Conv. Art. 49(2); AR 49
Rule 77
The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 62 within 30 days after the last written or oral submission on the request.

Article 77
Calendrier de la procédure applicable à une décision supplémentaire et une rectification dans une procédure accélérée

(1) Un Tribunal peut rectifier de sa propre initiative toute erreur cléricale, arithmétique ou de nature similaire contenue dans la sentence dans les 15 jours suivant le prononcé de la sentence.

(2) Le Tribunal rend une décision supplémentaire ou une rectification conformément à l’article 62 dans les 30 jours suivant les dernières écritures ou plaidoiries sur la requête.

Regla 77
El Calendario Procesal para la Decisión Suplementaria y la Rectificación en el Arbitraje Expedito

(1) El Tribunal podrá rectificar cualquier error de forma, aritmético o similar en el laudo por iniciativa propia dentro de los 15 días siguientes a la fecha en que se haya dictado el laudo.

(2) El Tribunal emitirá una decisión suplementaria o rectificación de conformidad con lo dispuesto en la Regla 62 dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.

703. Proposed AR 77(1) allows a Tribunal to rectify any clerical, arithmetical or similar error on its own initiative within 15 days after rendering the Award compared to 30 days in proposed 62(1). The provision is intended to make obvious corrections without requiring the parties to bring a motion for rectification. A Tribunal proposing to rectify on its own initiative would consult the parties on any proposed Tribunal-initiated rectification (see proposed AR 11(2)).

704. The time limit for filing a request for supplementary decision or rectification of an Award applies as provided in proposed AR 62, which is based on a mandatory provision in Art.
49(2) of the Convention. Proposed AR 62 provides that the Tribunal must issue a supplementary decision or rectification within 60 days after the last written or oral submission on the request, while proposed AR 77 shortens the time for issuing the decision to 30 days.

**RULE 78 – THE PROCEDURAL SCHEDULE FOR AN APPLICATION FOR INTERPRETATION, REVISION OR ANNULMENT OF AN AWARD RENDERED IN EXPEDITED ARBITRATION**

**Rule 78**

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

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) The following schedule for written submissions and the hearing shall apply to the procedure relating to an interpretation, revision or annulment of an Award rendered in an expedited arbitration:

(a) the applicant shall file a memorial on interpretation, revision or annulment within 30 days after the first session;

(b) the other party shall file a counter-memorial on interpretation, revision or annulment within 30 days after the memorial;

(c) a hearing shall be held within 45 days after the date for filing the counter-memorial;

(d) the parties shall file statements of costs within 5 days after the last day of the hearing referred to in paragraph (2)(c); and

(e) the Tribunal or Committee shall render the decision on interpretation, revision or annulment as soon as possible, and in any event no later than 60 days after the hearing referred to in paragraph (2)(c).

(3) Any schedule for submissions other than those referred to in paragraph (2) shall run in parallel with the main schedule, unless the Tribunal or Committee determines that there are exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal or Committee shall take into account the expedited nature of the process.
Article 78
Calendrier de la procédure applicable à une demande en interprétation, révision ou annulation d’une sentence rendue dans un arbitrage accéléré

(1) La procédure relative à l’interprétation, la révision ou l’annulation d’une sentence rendue dans un arbitrage accéléré se déroule selon le calendrier suivant applicable aux écritures et à l’audience :

(a) la partie requérante dépose un mémoire sur l’interprétation, la révision ou l’annulation dans les 30 jours suivant la première session ;

(b) l’autre partie dépose un contre-mémoire sur l’interprétation, la révision ou l’annulation dans les 30 jours suivant la date de dépôt du mémoire ;

(c) une audience se tient dans les 45 jours suivant la date de dépôt du contre-mémoire ;

(d) les parties déposent chacune un état des frais dans les 5 jours suivant le dernier jour de l’audience visée au paragraphe (2)(c) ; et

(e) le Tribunal ou le Comité rend sa décision sur l’interprétation, la révision ou l’annulation dès que possible et, en tout état de cause, au plus tard 60 jours après l’audience visée au paragraphe (2)(c).

(2) Les délais applicables aux écritures autres que celles visées au paragraphe (2) courent parallèlement à ceux du calendrier principal, à moins que le Tribunal ou le Comité ne décide que des circonstances exceptionnelles justifient la suspension du calendrier principal. Pour fixer les délais pour ces écritures, le Tribunal tient compte de la nature accélérée de la procédure.

Regla 78
El Calendario Procesal para una Solicitud de Aclaración, Revisión o Anulación de un Laudo Dictado en el Arbitraje Expedito

(1) El siguiente calendario será aplicable para la presentación de los escritos y la audiencia en el procedimiento relacionado con una aclaración, revisión o anulación de un laudo dictado en un arbitraje expedito:

(a) el solicitante presentará un memorial sobre la aclaración, revisión o anulación dentro de los 30 días siguientes a la primera sesión;

(b) la otra parte presentará un memorial de contestación sobre la aclaración, revisión o anulación dentro de los 30 días siguientes al memorial;
(c) se celebrará una audiencia dentro de los 45 días siguientes a la fecha establecida para la presentación del memorial de contestación;

(d) las partes presentarán declaraciones sobre los costos dentro de los 5 días siguientes al último día de la audiencia a la que se hace referencia en el párrafo (1)(c); y

(e) el Tribunal o Comité emitirá su decisión sobre aclaración, revisión o anulación lo antes posible y, en cualquier caso, a más tardar 60 días después de la audiencia a la que se hace referencia en el párrafo (1)(c).

(2) Cualquier calendario para presentaciones además de aquellas a las que se hace referencia en el párrafo (1) transcurrirá en paralelo al calendario principal, salvo que el Tribunal o Comité determine que existen circunstancias excepcionales que justifiquen la suspensión del calendario principal. Al fijar los plazos para dichos escritos, el Tribunal o Comité tomará en consideración la naturaleza expedita del proceso.

705. Proposed AR 78 addresses the procedural schedule in post-Award remedy proceedings under Chapter XI of the AR. The proposed Rule is complementary to the streamlining of the procedures dealing with applications for interpretation, revision and annulment. It fixes the procedural schedule to address such applications, anticipating only one round of submissions (with a 30-day time limit), and a hearing held within 45 days after the last written submission. The time limit for the Tribunal’s or Committee’s decision is shorter than under proposed AR 66(5) and must be issued within 60 days after the hearing. This means that post-remedy proceedings would be concluded within 8 months from registration of the relevant application. The following chart illustrates the procedural steps.
PROCEDURAL SCHEDULE FOR AN INTERPRETATION, REVISION OR ANNULMENT PROCEEDING IN EXPEDITED ARBITRATION – RULE 78

Award rendered under Rule 75(1)(i)

Within 120 days

Application for Annulment (Conv. Art. 52(2))

Within 30 days

Constitution of Committee (Conv. Art. 52(3))

Within 30 days

First Session (Rule 74)

Within 30 days

Applicant's memorial (Rule 78(1)(a))

Within 30 days

Other party's counter-memorial (Rule 78(1)(b))

Within 45 days

Hearing (Rule 78(1)(c))

Within 60 days after last submission

Parties' statements of costs (Rule 78(1)(d))

Decision on Annulment (Rule 78(1)(e))

Within 5 days
**RULE 79 – RESUBMISSION OF A DISPUTE AFTER AN ANNULMENT IN EXPEDITED ARBITRATION**

<table>
<thead>
<tr>
<th>Rule 79</th>
<th>Nouvel examen d’un différend après une annulation dans un arbitrage accéléré</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resubmission of a Dispute after an Annulment in Expedited Arbitration</td>
<td>Le consentement des parties donné conformément à l’article 69 ne s’applique pas au nouvel examen du différend.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Regla 79</th>
<th>Nueva Sumisión de una Diferencia después de la Anulación en el Arbitraje Expedito</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>El consentimiento otorgado por las partes de conformidad con lo dispuesto en la Regla 69 no será aplicable a la nueva sumisión de la diferencia.</td>
</tr>
</tbody>
</table>

706. Proposed AR 79 clarifies that the parties’ agreement to apply the EA does not extend to resubmission proceedings after the annulment of an Award. The parties are nevertheless free to agree on the application of the EA to such proceeding under proposed AR 69.