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By e-mail

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Dear Ms Kinnear

Comments on ICSID Rule Update

As practitioners with significant experience in investor-state arbitrations under the ICSID Convention and the ICSID Additional Facility Rules we welcome ICSID's initiative in updating the ICSID Rules and Administrative Regulations. We also commend the ICSID Secretariat for the diligent and thoughtful way in which they have presented the proposals to the public and engaged in dialogue with states, practitioners, and other stakeholders about the proposals. Having had the opportunity to participate in that public dialogue, we also wished to provide the Secretariat with certain comments and suggestions concerning the draft Arbitration Rules published by ICSID on 2 August 2018.

The comments and suggestions have been put forward by various individual practitioners within our firm and should not be taken to reflect the views of the firm or any of its clients. They are intended to be of practical assistance in contributing to the objectives of the rule amendment process as set out by ICSID, *i.e.*, to modernise the Rules based on experience, to improve time and cost effectiveness while maintaining due process, and to harness technologies to reduce the environmental footprint of arbitration proceedings.

The comments are set out in two sections: *first*, we offer some general observations about the Arbitration Rules and how they relate to the Convention; *second*, we offer comments about specific provisions of the draft Arbitration Rules.

I. GENERAL COMMENTS AND RELATIONSHIP BETWEEN THE RULES AND THE CONVENTION

An inherent feature of the old and new Rules is the need to follow the Convention. In a number of places, the Rules and the Convention cover the same topics, but with the Rules providing greater detail. In a number of places, the Rules repeat verbatim certain provisions of the Convention, but sometimes in a different order and combined with other text. The present Rules do not contain any cross-references to the relevant provisions of the Convention. For experienced practitioners, this does not present a serious difficulty, but for new participants in the ICSID process, it might be helpful to include cross-references in the final version of the Rules as ICSID has already done in its working paper in addition to (or instead of) repetition of the language of the Convention so that they can immediately have to hand all of the relevant provisions.

Consider, for example, the provisions on the content of an award:

Convention – Article 48	**Draft Rules – Rule 60**
(1) The Tribunal shall decide questions by a majority of the votes of all its members. (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it. (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based. (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent. (5) The Centre shall not publish the award without the consent of the parties.	(1) The Award shall be in writing and shall contain: […] (i) the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based; […] (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.

As the colour-coding illustrates, the provisions of the Convention have been reproduced, but in a different order, interspersed with other text, and in the case of the discussion of an individual opinion (highlighted blue), different wording is used in the Rule.

One way of dealing with such situations would be for the Rules not to repeat provisions of the Convention but instead refer back to them and add in the additional procedural elements: for example, Rule 60 could say something to the effect that "*The Award shall comply with Articles 48-49 of the Convention. In addition, […]*". Such an approach would have the benefit of avoiding any interpretive difficulties that could arise out of a discrepancy between the wording of the Convention and the Rules. One drawback, however, is that the Rules would be less self-contained.

An alternative that would require less extensive amendments to the existing text and retain the self-contained features of the current Rules could be to include margin or parenthetical references for each Rule referring to the relevant Articles of the Convention that the Rule implements.

One additional general observation concerns the structure. Since the Convention and the Rules need to be applied together, it may be helpful, to the extent possible, if the structure of the Rules were to mirror the structure of the Convention. The table below shows the sequencing of topics in the Convention and Draft Rules. We set out some suggestions below the table.

Convention	**Draft Rules**
Chapter IV - Arbitration	Chapter I - General Provisions
Section 1 - Request for Arbitration	Chapter II - Conduct of the Proceeding
Section 2 - Constitution of the Tribunal	Chapter III - Constitution of the Tribunal
Section 3 - Powers and Functions of the Tribunal	Chapter IV - Disqualification of Arbitrators and Vacancies
Section 4 - The Award	Chapter V - Initial Procedures
Section 5 - Interpretation, Revision and Annulment of the Award	Chapter VI – Evidence
Section 6 - Recognition and Enforcement of the Award	Chapter VII - Publication, Access to Proceedings and Non-Disputing Party Submissions
Chapter V- Replacement and Disqualification of Conciliators and Arbitrators	Chapter VIII - Special Procedures
Chapter VI - Cost of Proceedings	Chapter IX - Suspension and Discontinuance
Chapter VII - Place of Proceedings	Chapter X - The Award
	Chapter XI - Interpretation, Revision and Annulment of the Award
	Chapter XII - Expedited Arbitration

Chapter I - General Provisions

This chapter contains only one rule, which concerns the scope of application, so perhaps the chapter should instead be called “Scope of Application”.

Chapter II - Conduct of the Proceeding

It would seem logical to move this chapter after the Rules dealing with tribunal constitution and replacement of arbitrators. It is also unclear why the Rules concerning evidence are not contained within this chapter. It might be helpful to break this Chapter into Sections dealing with particular aspects of the procedure.

Chapter III - Constitution of the Tribunal
Chapter IV - Disqualification of Arbitrators and Vacancies

Consider merging these two Chapters as both deal with the appointment of arbitrators.

Chapter V - Initial Procedures

The logic of having this as a separate Chapter is not entirely clear. Rule 34 (first session), Rule 37 (bifurcation) and Rule 38 (consolidation) seem to fit more logically within the Chapter on “Conduct of the Proceedings”. In contrast, Rule 35 (manifest lack of legal merit) and Rule 36 (preliminary objections) seem to belong more logically with the Rules dealing

with "Special Procedures". In this connection, we note that in the current Rules these topics are handled under the rubric of "Particular Procedures".

Chapter VI – Evidence

As noted above, it is unclear why these Rules are not within "Conduct of the Proceedings".

II. COMMENTS ON SPECIFIC PROVISIONS OF THE DRAFT RULES

Rule 2 – Meaning of Party and Party Representation

We note an inconsistency between the use of the phrase "Party Representation" in the title and the use of the word "representative" in Rule 2(1)(b) and 2(2). To avoid any uncertainty, you may wish to amend the title of Rule 2 to "Meaning of Party and Party Representative". We also offer for your consideration the following amendments to Rule 2(2) for clarity:

> *(2) Each party may be represented or assisted by agents, counsel ~~or~~, advocates or other advisors ("representative(s)"), whose names, capacity and proof of authority to act on behalf of that party shall be notified by that party to the Secretariat and the other party or parties.*

Rule 3 – Method of Filing

Rule 3 provides for electronic submissions as the default. This is largely what already happens in practice, although the arbitrators often request the parties to provide them with hard copies of the submissions and exhibits which generate large printing costs. Further steps towards electronic documents and paper-free hearings could provide further cost savings while reducing the environmental footprint. For example, electronic filing could be made the default provision in ICSID's model Procedural Order No.1.[1]

Rule 4 – Routing of Written Communications

For clarity, we offer for consideration the following amendment to Rule 4(1)(a):

> *(a) the parties may communicate directly with each other, provided that the Secretariat is copied on all communications to be introduced into the record of the proceeding;*

It may be useful to include a limited exception clause in Rule 4(1)(c) to cater for the possibility of *ex parte* communications specifically authorized by the tribunal, *e.g.*, in the context of document production or interim measures:

> *(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, except if the Tribunal otherwise authorizes.*

[1] We note that ICSID's Working Paper includes a link to draft Procedural Order No.1 at ¶¶ 146-147 but proposed Art.13 does not currently include such a provision.

Rule 5 – Procedural Languages, Translation and Interpretation

As compared to the previous Rule 22, it seems to encourage bilingual proceedings in which all documents would need to be submitted in both languages. In our experience, this is wasteful in terms of translation costs, and where documents are printed, effectively doubles the cost and environmental footprint. The Rules might instead encourage Tribunals to keep translations to the minimum necessary.

In addition, for clarity, we offer for your consideration the following amendments to Rule 5(4), 5(6) and 5(7):

> *(4) …. If the translation is disputed, the Tribunal shall resolve the dispute and may for that purpose require a certified translation.*
>
> *(6) …. The recordings and transcripts of a hearing shall be made ~~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 one or both of the procedural language(s) used at the hearing, as may be directed by the Tribunal.*

Rule 6 – Correction of Errors and Deficiencies

To encourage parties to offer corrections to errors as soon as possible, we offer for consideration the following amendment to Rule 6(1):

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

Rule 8 – Time Limits Specified by the Convention and these Rules or Fixed by the Secretary General

For clarity, we offer the following suggested amendments to Rule 8(3):

> *(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 of the date when it anticipates the order, decision or Award will be issued~~delivered~~.*

Rule 11 – General Duties

Rule 11(4) codifies the generally accepted duty of the parties to cooperate with the orders and decisions of the tribunal, a duty previously recorded in the Rules only in relation to orders of document production under current Rule 34(3). While Rule 11(4) is thus broader than current Rule 34(3) it contains no analog to the passage of current Rule 34(3), which requires the tribunal to "take formal note of the failure of a party to comply with its obligations … and of

any reasons given for this failure." While this provision does not *require* the tribunal to draw adverse inferences where insufficient reasons are given for a failure to produce, it does provide a clear anchor in the Rules for the drawing of adverse inferences. In order to ensure that this amendment is not interpreted as eliminating or reducing the discretion of a tribunal to draw adverse inferences, consideration should be given to including within the Arbitration Rules (presumably in what is now draft Rule 40 on document production) language similar to that of Article 9(5) of the IBA Rules, which expressly affirms the discretionary power of a tribunal to draw an adverse inference where a party fails to produce any document ordered to be produced by a tribunal.

As there may be circumstances where it is not feasible for the tribunal to consult with the parties before making an order or decision on its own initiative, it may be helpful to add the following language to Rule 11(2):

> *(2) The Tribunal shall insofar as practicable 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.*

As presently drafted, Rule 11(4) appears to presuppose that party cooperation is required to implement Tribunal decisions, whereas often implementation rests with only one party, whose good faith is essential to effective implementation. We therefore offer for consideration the following amendments to Rule 11(4):

> *(4) The parties shall cooperate and~~in~~ implement~~ing~~ in good faith the Tribunal's orders and decisions.*

Rule 12 – Orders, Decisions and Agreements

We offer for consideration the following technical changes to Rule 12(2) and 12(3):

> *(2) Orders and decisions may be taken in any appropriate form chosen by the Tribunal and communicated to the parties 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 applicable law, the Convention and the Administrative and Financial Regulations.*

Rule 13 – Written Submissions and Observations

The revision of the Rules is an appropriate opportunity to introduce a requirement for a Response, consistent with all other major Arbitration Rules. There is no evidence that respondents are averse to such a requirement, and it would have major benefits: more efficient case-planning at the First Session; more certainty as to a potential default on the part of the respondent(s); additional justification for the procedure in Rule 35 (strike-out); additional justification for the requirement that objections to jurisdiction or admissibility must be set out in the Counter-Memorial at the latest.

The reference to "any supporting documents" in Rule 13(1) is both vague as to what is meant and arguably suggests that is optional. For clarity and to conform to standard procedural practices, we offer for consideration the following amendment:

> *(1) The parties shall file the following written submissions, accompanied by all factual exhibits, witness evidence, expert evidence, and legal authorities~~with any supporting documents~~, within the time limits fixed by the Tribunal:*

New sub-paragraph 2 provides that a Claimant may elect to have the Request for arbitration be considered as its memorial. This possibility may be useful in some cases, however, in our experience, it is important to specify the time at which this election may be made. To be a fair and efficient election, this should not be before the initial exchanges that may inform the election (or cause a party to reconsider an early election), but the election must be made early enough to be taken into account in discussing the procedural timetable at the First Session. Accordingly, we offer for consideration language below that would require this election to be made at the First Session:

> *(2) The requesting party may at the First Session elect to have the Request for arbitration considered as the memorial.*

New sub-paragraph 4 requires prior tribunal leave before a party may make unscheduled submissions. This is a welcome codification of best practice. The drafting, however, is confusing, since the paragraph starts with mandatory language "the Tribunal shall grant leave" but then qualifies this with the phrase that such leave will be granted "only if these are necessary". To avoid any confusion, we suggest the following alternative language for Rule 13(4) for your consideration:

> *(4) ~~The Tribunal shall grant leave to file u~~Unscheduled written submissions, observations or supporting documents may not be filed without prior leave from the Tribunal. The Tribunal may grant such leave upon a timely and reasoned application ~~and only~~ if it deems the filing~~these are~~ necessary in view of all relevant circumstances.*

Rule 14 – Case Management Conference

The introduction of this rule is a welcome invitation to tribunals to use active case management. However we note that items (a) and (b) in the list of reasons appear superfluous, since clause (c) encompasses within it any issue the tribunal might wish to raise, including those referred to in (a) and (b). In these circumstances, the inclusion of items (a) and (b) risks giving the Rule a more limited ambit. We also note that the first phrase identifies expedition as the sole object of such CMCs; however, in our experience, cost-effectiveness is an equally pertinent purpose. While it might go without saying, it may be helpful to clarify that the Rule concerns CMCs other than (and hence, after) the First Session. In light of the above, alternative wording for Rule 14 could be:

> *With a view to conducting ~~expediting~~ the proceeding in an expeditious and cost-effective manner, the Tribunal may convene a case management conference with the parties at any appropriate time after the First Session to address any procedural or substantive issue related to the resolution of the dispute.*

Rule 15– Hearings

In respect of Rule 15(2) it is not clear to us that this direction should be made by the presiding arbitrator alone, and in practice it never is, so the following change could be advisable:

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

We query whether the inclusion of Rule 15(4) is necessary as it goes without saying and it is not clear that it settles a difficulty that has actually arisen in practice.

Rule 16 – Deliberations

It may be helpful to incorporate within Rule 16(2) a reference to the Tribunal's duty to conduct the proceeding in an expeditious and cost-effective manner to make it plain that "convenience" denotes efficiency rather than personal preferences:

> *(2) The Tribunal may deliberate at any place it considers convenient with due regard to the Tribunal's duties under Rule 11(3).*

Rule 16(3) leaves it unclear what form the tribunal's "decision" to admit someone to its deliberations will take and whether it will be communicated to the parties. In practice, the only other person that a tribunal might ordinarily decide to include in deliberations would be the ICSID Secretary or a tribunal assistant – notably to assist the tribunal with references to the record/pleadings and to take notes of deliberations – and a tribunal-appointed expert. To that end, we propose the following substitute language, which is meant to allow for the possibility to have present other persons but to make clear that they would be "present" but not "taking part" in the deliberations. This latter part of the provision may be seen as unnecessary micro-management, hence we have bracketed it for further consideration in that light.

> *(3) Only members of the Tribunal shall take part in its deliberations. No other person shall be ~~admitted~~ present during deliberations unless the Tribunal so decides ~~otherwise~~ and gives notice to the parties.*

Rule 19 – Payment of Advances and Costs of the Proceeding

Rule 19(4) provides welcome confirmation that tribunals have a duty to allocate the costs and provides clear guidance that the tribunal should consider the parties' conduct of the proceedings and their success on particular issues and overall in determining the allocation. The complexity of the proceedings, a factor now set out in Rule 19(4)(c), is ordinarily taken into account as part of the assessment of the reasonableness of the costs claimed (Rule 19(4)(d)), rather than as an independent factor. We therefore offer for consideration alternative language that would merge 19(4)(c) and (d), as well as address some technical points in Rules 19(1), 19(5) and 19(6):

> *(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. Unless special circumstances justify an exception, advances shall be made in equal portions as between the requesting and respondent 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, taking into account the complexity of the issues.

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

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

The amendments to 19(1) and (6) are (hopefully) self-explanatory, but a word of justification is required in respect of 19(5). We have deleted the term *interim* as it may lead to disputes over whether such decisions may later be revisited, whereas we understand the intent of the rules is for such cost decisions to be final, not provisional, albeit partial, in the sense that they would relate to part of the proceeding only.

Rule 20 – General Provisions Regarding the Constitution of the Tribunal

Rule 20(1) places the onus on the parties to "constitute a Tribunal without delay"; however the Parties cannot constitute a tribunal on their own: ICSID and the nominees are also involved in the process. Alternatives would be (i) to phrase the Rule in the passive voice, i.e., "the Tribunal shall be constituted without delay", or (ii) to impose a duty on all involved to cooperate in constituting the Tribunal without delay, i.e. "the parties, Secretariat, Secretary-General, and any persons nominated as arbitrators shall cooperate in constituting a Tribunal without delay".

There is a tension between Rules 20(2) and 20(3) insofar as Rule 20(3) would permit each side to appoint an arbitrator of its own nationality (with the other side's agreement), with the presiding arbitrator to be selected by an appointing authority, but such a result would conflict with Rule 20(2). Consideration should be given to replacing Rule 20(2) with a provision that would exclude nationals of a party from being appointed as sole arbitrator or presiding arbitrator absent agreement of the parties.

Rule 21 – Disclosure of Third-party Funding

In respect of Rule 21(1), the term *material* may be too broad, capturing (for example) the supply of pro bono advice. We understand that the intention is to capture forms of aid that are *equivalent* to monetary support and we propose substituting "equivalent" for "material".

We understand that the purpose of Rule 21's mandatory requirement to disclose third party funding is to allow any disclosures required to ensure the independence and impartiality of the

arbitrators. Assuming this is the case, it may be helpful to include language to this effect in the rule, perhaps an introductory phrase in paragraph 21(2) to read:

> *(2) With a view to ensuring that the arbitrators and parties are in a position to make a timely assessment of any matters that could affect an arbitrator's independence or impartiality, a~~A~~ party shall file …*

In view of the link between this Rule and Rule 26 on the arbitrators' acceptances of their appointments, it may be helpful to put this rule adjacent to Rule 26.

Rule 26 – Acceptance of Appointment

Rule 26 expands the scope of declarations by arbitrators: ICSID's working paper makes clear that the uniform code of conduct for arbitrators in ISDS will be incorporated once it is finalized. Adopting a consistent code of arbitrator ethics for ISDS equally applicable under ICSID and UNCITRAL Rules will be a remarkable and welcome achievement.

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

It is suggested paragraph 27(1)(b) be removed as it may lend itself to tactical gamesmanship, permitting the parties to substitute arbitrators in view of the identity of the other side's appointee.

Rule 34 – First Session

In our experience, there are cases in which it is only after the first substantive exchange that the parties and the tribunal understand enough about the case to identify genuine opportunities for procedural innovation and efficiency. In such cases, this would be a useful time to have a CMC and to discuss the remainder of the procedural calendar, including the amount of time required for further written submissions, likely duration of hearings, and any opportunities for efficiency gains by breaking down the issues in dispute for sequential or parallel briefing and resolution.

In this context, it may be worth considering the possibility of including within Rule 34(5) language that would make clear that the tribunal retains discretion to reserve its decision on procedural matters where appropriate. Thus, Rule 34(5) could be amended by inserting the underlined text as indicated:

> *(5) The Tribunal shall issue an order recording the parties' agreements and any Tribunal decisions on the procedure, as well as any points on which the Tribunal has reserved its decision, within 15 days …*

Rules 35, 36 and 37 – Manifest Lack of Legal Merit, Preliminary Objections and Bifurcation

Although there have been three fully successful and three partly successful applications under current Rule 41(5), it has not proven to be a viable mechanism for resolving unmeritorious claims in an expeditious way. The current proposed changes will reduce the scope for using such applications for the purposes of delay.

However we suggest further changes are needed in order to render it a more effective case management tool and to harmonize Rule 35 with the tribunal's new case management powers under proposed Rule 14, in relation to which we understand Rule 35 to be simply a specific instance. The simplest option would be to remove the word "manifest" from the standard which is not found in the ICSID Convention and has caused more confusion than clarity.[2] A "lack of legal merit" standard would allow for an expedited decision on, for example, whether the pleaded allegations, if true, actually state a valid claim.

The current structure of Rules 35-37 is limited in scope and one-sided insofar as it currently provides a mechanism only for preliminary resolution of certain issues raised by the respondent State. A mechanism that encouraged early resolution of any preliminary issue whose resolution could materially improve efficiency would not only be more balanced but would be more likely to focus the minds of parties and tribunal members on the questions of efficiency that should be driving questions of structuring the tribunal's decision-making.

On a related drafting point, Rule 36 may generate confusion by its use of the words "preliminary", "jurisdictional" and "competence", while omitting any reference to "admissibility". It is also unclear why objections of jurisdiction or competence (or admissibility) should be described as "preliminary", as this language seems to prejudge the decision about bifurcation. Equally unclear is why "preliminary" should be joined to the word "objections" – Article 41 of the Convention refers to the Tribunal's discretion to determine whether a "jurisdictional objection" should be dealt with as a "preliminary *question*".

One way to resolve these issues would be would be to merge the "lack of legal merit" standard under Rule 35 within the scope of an expanded version of Rule 37 that would address in a more general way the tribunal's authority to identify issues for early decision that can dispense with a claim, defence, or parts thereof and thus offer more possibilities for efficient case-management. Any needed elements from Rule 36 could also be included in this single Rule dealing with "Separate phases for preliminary or other discrete questions".

One implication of this approach would be that the tribunal would have discretion as to whether to address any proposed issue in a preliminary phase – a discretion that is presently lacking in relation to applications to dismiss a claim for "manifest lack of legal merit" and would continue to be lacking under current draft Rule 35.

ICSID may also consider a number of revisions to Rule 36. For example, as noted in relation to Rule 13, there is a risk that some might construe the word *documents* too narrowly, a risk that would be avoided if it were replaced with the broader phrase *evidential materials*, as documentary evidence is one species only of evidence, as is in fact recognized in Rule 75(2).

In respect of 36(5), we understand the principal intention here is to capture the power of the Tribunal to consider *sua sponte* its jurisdiction. When the Tribunal may do so—the draft provision says "at any time"—is less important as the matter is fully covered by Rule 11(2) and the procedural schedule that will be set out at the First Session and in CMCs. We therefore suggest that "at any time" be deleted.

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[2] See for example *Trans-Global v. Jordan* (ARB/07/25), Decision on Respondent Objection Under Rule 41(5) of the ICSID Arbitration Rules ¶ 88 and c.f. *MOL v. Croatia* (ARB/13/32), Decision on Respondent's Application under ICSID Arbitration Rule 41(5) ¶ 45.

Finally, the following amendments to Rule 36(2)(i) and (ii)and 36(7) could enhance clarity:

> *(i) the date to file the counter-memorial if the objection relates to the main Claim (as defined in Rule 52); or*
>
> *(ii) the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim (as defined in Rule 52);*
>
> *(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 to adjudicate, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision to adjudicate on the objection and fix any time limit necessary for the further conduct of the proceeding.*

Rule 38 – Consolidation or Coordination on Consent of the Parties

The introduction of a specific rule permitting parties to consolidate or coordinate proceedings is welcome progress. The duty of consultation in Rule 11(2) does not expressly extend to the Secretary-General, hence we propose the following addition (which merely codifies normal practice):

> *(3) The Secretary-General, having consulted with the parties and the tribunals involved, 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.*

Rule 39 – Evidence

We understand the purpose of the provision is to affirm the tribunal's discretion and note that there is a risk that this purpose may be undermined or at least clouded by the use of the mandatory phrase "shall determine". This risk could be eliminated by retaining the language of the current Rule 34(1) or amending the text to read something like "*The Tribunal shall have discretion to determine…*"

Rule 40 – Document production

Document production is one of the most costly and time-consuming aspects of arbitration proceedings, and Rule 40 could do more to ensure that document production is focused and no more costly than necessary. A particularly significant change in Rule 40 is the lowering of the standard for a tribunal to order production. Article 43 of the ICSID Convention and Rule 34(2) of the current ICSID Rules grant the tribunal the power to order production where "necessary". In practice, this has generally been understood to be identical to the phrase "relevant to the case and material to its outcome" found in the IBA Rules. However, Rule 40 directs the tribunal to consider only "the relevance of the requested documents and evidence", and not also to require materiality, thus opening the door to significantly more numerous and expansive document requests.

The existing laconic text has been generally working in practice, with parties and tribunals filling the gap by reference to international practice and/or the IBA Rules that attempt to

codify that practice. In this context, we would counsel prudence in making any changes to the language. In this respect, as noted in separate correspondence, the IBA are presently considering whether amendments to the existing IBA Rules are necessary, and it may be helpful for ICSID to benefit from any insights that emerge from that review process.

We also note that Rule 40 is also silent about when and how requests to produce are to be made and decided. While Rule 34(h) provides for this topic to be addressed at the First Session, it would be helpful if Rule 40 made clear (like the IBA Rules do) that, absent exceptional circumstances, requests to produce may only be made at the time foreseen in the procedural calendar. As drafted, Rule 40(1) risks being interpreted as allowing parties to request documents at any point and requiring the tribunal to rule on such applications if they are disputed.

Rule 41 – Witnesses and Experts

The phrase "another means of examination" is ambiguous as to whether it seeks to capture a different process altogether (*e.g.*, correspondence with the witness under the control of the Tribunal) or just appearance via video- or telephonic conference. The latter appears more likely, and is captured by the alternative wording "non-personal appearance":

> *(5) A witness shall be examined in person unless the Tribunal determines that ~~another means of examination~~ a different process or non-personal appearance is appropriate in the circumstances.*

We also propose a new paragraph 41(9) be added to the effect that: "In the event of a dispute whether a person is to be regarded as a witness or an expert, the Tribunal shall decide." This provision would cover cases where a party proffers testimony as expert opinion but the other side disputes the characterization on the basis that the witness is in fact testifying as to facts and not opinion.

Rule 42 – Tribunal Appointed Experts

The current wording ("including . . .") is indicative rather than exclusive. It may be helpful for ICSID to take this opportunity to provide more specific guidance to parties and tribunals by way of the suggested language below:

> *(2) The Tribunal shall consult with the parties on the appointment of an expert, including on*
>
> *(a) disclosures (if any) required to be made by the expert,*
>
> *(b) his or her identity*
>
> *(c) the discipline(s) which require expert evidence, and*
>
> *(d) the terms of reference of the expert.*

Rule 44 – Publication of Awards and Decisions on Annulment

This new provision is a welcome effort to address concerns about transparency. It appears to strike the right balance by making publication the default rule, while allowing parties to

protect genuinely confidential or sensitive information from disclosure but without preventing the legal reasoning from being made publicly available.

Rule 46 – Publication of Documents Filed by a Party

We urge that further consideration be given to this proposed Rule. The pleadings of one party will inevitably disclose positions and evidence adduced by the other party, which may well not wish for its pleadings to be published. One way to resolve this may be to amend the final clause to say "*with any redactions agreed to by the parties or required by the other party to safeguard the confidentiality of that party's submissions, observations or other documents*".

Rule 47 – Observation of Hearings

ICSID has taken laudable steps to update the Rules so as to address criticism directed at the lack of transparency in investor-state arbitration. In contrast to Rule 44, Rule 47 arguably does not go far enough in establishing a default rule in favour of transparency, as it still provides for hearings to be private unless a party objects, thus effectively giving either party a veto. By contrast, the UNCITRAL Rules provide for hearings to be public unless the parties agree otherwise.

We also offer for consideration broader wording for Rule 47(1) (i) to take account of the reality that parties include various assistants and client representatives in hearing delegations and that the opposing party ordinarily has no authority to object to the inclusion of such persons, and (ii) preserve the Tribunal's discretion as to the attendance of witnesses and experts prior to or after their testimony.

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

Rule 50 – Provisional Measures

We query whether to preserve the historical term *recommend* in Rule 50(1), which lends itself to ambiguity. We suggest instead the neutral term *issue*, which is without prejudice to the question once debated under Article 47 of the Convention of whether provisional measures so issued are mere recommendations or orders.

As presently drafted, Rule 50(3) could be (mis-)read as suggesting that urgency and necessity are the only considerations; accordingly, we suggest alternative language that would clarify this:

> *(3) In deciding whether to issue~~recommend~~ provisional measures, the Tribunal shall consider all relevant circumstances. ~~The Tribunal shall only recommend~~, including whether provisional measures ~~if it determines that they~~ are urgent and necessary.*

As drafted, it is not clear whether the power of the tribunal to issue measures "on its own initiative" under Rule 50(4) is in any event conditioned upon a request of a party (in which case the matter is covered by the second sentence of paragraph (4)) or a power that is entirely discretionary, without need for an originating request by a party (in which case it should be

set out in paragraph (1) for clarity). The latter would be unprecedented and, so far as we are aware, without an analogue in the UNCITRAL Model Law or other Arbitration Rules.

We also propose a small revision to Rule 50(5) for the purpose of clarity by substituting the word "must" with "is under the continuing duty to".

The reference in Rule 50(7) to recourse being "available in the instrument recording the parties' consent" may lead to confusion, as the instrument does not make such recourse available, it simply permits or precludes it. It would therefore be clearer if the Rule provided "if such recourse is permitted by…".

Finally, we propose the insertion of a new Rule 50(8) that provides for compensation in case interim measures appear at a later stage in the proceedings not to have been warranted, similar to Article 26(8) of the UNCITRAL Rules 2013.

Rule 53 – Default

The aims of defining "default" and preventing a defaulting party from obstructing the proceedings could potentially be better given effect with the following amendments to Rule 53(1) and (2):

> *(1) A party is in default if it fails to appear or present its case through a scheduled submission or at a scheduled hearing, 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 without further submission from the defaulting party.*

We suggest that Rule 53(4) and 53(5)—well-intentioned as they are—be reconsidered. Read against the background of Rule 8, these provisions may provide an incentive to default and thereby gain a grace period rather than just having one's submission disregarded as untimely.

Rule 55 – Settlement and Discontinuance

As presently drafted, Rule 55 does not call for the Tribunal to address costs. This could be expressly provided for with the following amendment to Rule 55(2)(a):

> *(a) shall issue an order taking note of the discontinuance of the proceeding and addressing the costs of the arbitration, if the parties so request; or*

Rule 59 & 60 – Timing and Content of the Award

The deadlines proposed are realistic and achievable and hopefully will have a salutary effect. As noted in the general comments, we query the necessity of including provisions of the Convention within Rule 60. To the extent that this repetition is retained, consideration should be given to whether Rule 60(i) might be expanded to help clarify confusion surrounding the reference in Article 48(3) of the Convention to the tribunal being required to "deal with every question submitted to it", language that has already spurred a number of annulment applications.

In most cases, large numbers of "questions" are submitted to tribunals that are simply not material to the resolution of the dispute. Often the resolution of one factual or legal question in a particular way obviates the need to decide other questions – indeed the provisions of the Rules on bifurcation presuppose this reality. Compliance with the duty to conduct the proceeding in an expeditious and cost-effective manner militates against dealing with every point that could arguably be described as a "question" regardless of its relevance to the outcome of the dispute.

The settled view appears to be that failure to address every question was not to be grounds for annulment but rather to be grounds for a request for a supplemental decision under Article 49(2).[3] With a view toward improving efficiency and reducing the scope for meritless annulment applications, consideration should be given to including within the Rules a clarification that would make clear that Article 49(2) is the remedy for a perceived failure to deal with a "question" and perhaps that also draws from annulment jurisprudence recognising (a) that the "questions" a tribunal must answer are the material ones, *i.e.*, those that determine "the Parties' rights and liabilities"[4], and (b) that not all questions need be dealt with explicitly, as some questions may be dealt with "implicitly".[5]

Finally, we query whether it is wise to eliminate altogether the requirement to close the proceedings as required under previous Rule 38. We fully support the idea of setting deadlines from the last written or oral submission. Nevertheless, the closure of the proceedings indicates the point in time where the tribunal closes the file, whereupon nothing further is ordinarily to be submitted. ICSID may wish to consider the incorporation of a provision along the lines of Article 31 of the UNCITRAL Rules.

Chapter XII – Expedited Proceedings

We welcome the introduction of expedited proceedings under Draft Rules 69-79. While it remains unclear whether a substantial number of parties will agree to such proceedings, we note that, at the very least, the explicit inclusion of shorter timeframes within the Rules may have a positive gravitational pull towards shorter timeframes even in non-expedited proceedings.

* * *

We hope that these comments and suggestions will be of interest and help to you. We would be happy to engage in further dialogue with the ICSID Secretariat as the Rules update process continues.

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3 See, e.g., *Duke Energy*, Annulment Decision, ¶ 228.

4 *CDC v Seychelles*, Annulment Decision, ¶ 57.

5 See, e.g., *Vivendi I*, Annulment Decision, ¶ 87; *Azurix*, Annulment Decision, ¶ 240.

Yours sincerely,

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Scott Vesel