

ICSID Rules Amendment Process
Comments on Proposal for Amendments
Austria

Austria welcomes the current process to amend ICSID's rules and procedures and is supportive of modernising the rules and making the process increasingly time and cost effective.

Please find below Austria's detailed comments on the Proposal for Amendment of the ICSID Rules. Kindly consider them in addition to the official comments to be submitted on behalf of the European Union and its Member States, which are clearly supported by Austria.

I. ADMINISTRATIVE AND FINANCIAL REGULATIONS

Chapter I – Procedures of the Administrative Council

Regulation 3 – Agenda for Meetings

- The deadline for submitting agenda items has been changed from 7 days prior to a meeting to 14 days prior to a meeting. Member States therefore have 7 days less time to place items on the agenda. Member States must be notified together with the agenda at least 42 days before the deadline. This leaves only 28 instead of 35 days to submit agenda items. The period of 7 days should therefore be maintained.

Chapter IV – General Functions of the Secretariat

Regulation 22 – Publication

- The current provision regarding the publication of information and documents only allows for documents such as "Arbitral awards and minutes and other records of proceedings" to be published with the consent of the parties. Proposed Amended Regulation 22, however, allows the publication of "documents generated in proceedings" without the consent of the parties in accordance with the applicable rules.
- Firstly, it should be clarified which rules are the "applicable rules" for the publication of documents. Are they based on international law or national law, and if so, whose

national law? From an Austrian point of view, the national law of the respondent state should be taken into account.

- Secondly, it should also be noted that Austrian law provides for strict confidentiality obligations, such as banking secrecy and data protection. Therefore, publications should be treated with caution, and consent of the parties should continue to be required.

Chapter V – Immunities and Privileges

Regulation 29 – Waiver of Immunities

- With regard to the waiver of immunities, no changes were proposed in the Working Paper. However, compared to the current version of the administrative and financial regulations, several “and’s” were added to the bulleted list in each paragraph. For the sake of clarity the insertions of “and” should be omitted.

II. INSTITUTION RULES – ICSID CONVENTION PROCEEDINGS

Rule 3 – Recommended Additional Information

- Proposed Amended Institution Rule 3(b) recommends that the Request for Arbitration include proposals on the number of arbitrators and the method of their appointment, absent a prior agreement. Such proposals are “recommended” rather than merely treated as “optional information” as in current Rule 3 Institution Rules. Proposals are still not treated as a required element of the Request for Arbitration. Proposed Rule 22 Arbitration Rules merely sets out a 60 day period for the parties to agree on a method of constituting the Tribunal, but does not set out a framework for the process. [See: Vol. 3, paras 106-124, 273-278]
- The proposed changes insufficiently address Austria’s proposal. It may be preferable if proposals on the number of arbitrators and the method of their appointment, absent a prior agreement, were introduced as a required element of the Request for Arbitration (e.g., introduced in proposed Rule 2(1) Institution Rules rather than in proposed Rule 3 Institution Rules).

Rule 4 – Filing of the Request and Supporting Documents

- Proposed Amended Institution Rule 4(1) stipulates that the Request for Arbitration shall be filed electronically. This obviates the need to clarify the number of (paper) copies needed (as none would be required).
- The proposed changes address Austria's proposal by modernising the method of filing and discarding a requirement of paper copies.

Rule 5 – Receipt of the Request and Routing of Written Communications

- Proposed Amended Arbitration Rule 5(4) stipulates that "(...) *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.*" This addresses Austria's proposal to reflect the existing practice.
- For the sake of consistency, Rule 5 (a) should read: "[...] to the requesting party or the requesting parties;" Cf. Rule 1 (2) which clarified that several parties can submit one request.

III. RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

Chapter II – Conduct of the Proceeding

Rule 2 – Meaning of Party and Party Representation

- Rule 2 defines the terms "party" and "representative(s)". Note No. 145 to Rule 2 explains that if a new representative acts for a party and has not submitted a proxy, he will be asked to submit one before receiving documents.
- Rule does not include the obligation for a new representative to submit a power of attorney without delay or at the latest upon submission of documents. In order to be time-efficient, such a provision should be included.

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

- Rule 8 deals with time limits. The parties may, pursuant to para. 1, by mutual agreement, extend non-binding time limits. In the event that the counterparty does not agree, no unilateral extension of time is provided for.

- However, this should be possible, since the acquisition of information and the complexity of the procedure are often time-consuming. An extension of time should not be subject to consent of the other party, but should be authorised by the Tribunal upon on a justified request.

Rule 14 – Case Management Conference

- Rule 14 is based on the currently valid Rule 21 of the Arbitration Rules. According to para. 2 of the current Rule 21, a Case Management Conference can be convened to conclude a settlement at the request of the parties.
- This possibility is no longer provided for in the proposal for amendments; however, in order to speed up the arbitration this possibility should be retained.

Rule 19 – Payment of Advances and Costs of the Proceeding

- Rule 19 determines 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.
- While the behaviour of the parties should be taken into account for the distribution of the costs, it would be a welcome addition to include a possibility to apply for cost separation in order to be able to clearly allocate culpably incurred costs to one party, while distributing the remainder in accordance with the criteria set out in para. 4.
- It should be considered to also include the costs of staff evidence into Rule 19.

Chapter III – Constitution of the Tribunal

Chapter III of the proposed amended Arbitration Rules streamlines the process of the constitution of ICSID tribunals, has the potential to shorten the time needed to constitute ICSID tribunals, and takes account of recent treaty practice and reforms of arbitral rules applicable in investment arbitration.

Rule 21 – Disclosure of Third-party Funding

- Proposed Amended Arbitration Rule 21 ((AF) Arbitration Rule 32) requires the parties to disclose whether they are third party funded and the identity of the third party funder. The obligation applies throughout the proceedings. Arbitrators are required to disclose relationships with the third party funders.
- A significant number of investment arbitrations is funded by commercial third-party funders pursuant to various third-party funding models. Mandatory disclosure

requirements regarding the existence and identity of a third-party funder are appropriate to avoid undisclosed conflicts of interest between the funder and an arbitrator. Such disclosure requirements are therefore increasingly included in investment treaties and arbitral rules applicable in investment arbitration (*see, e.g.,* 2018 EU-Singapore Investment Protection Agreement, Art. 3.8; 2017 SIAC Investment Arbitration Rules, Rules 24, 33, 35; *see also* ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (2017), para. 24) and should also be included in the Amended ICSID Arbitration Rules.

- Given the numerous forms third-party funding may take, the broad definition of third party funding included in Amended Arbitration Rules 21(1), which includes non-profit funding and certain types of insurance, is appropriate. It is unclear whether the disclosure obligation also applies to representatives of the parties. Amended Arbitration Rule 2 provides that "*party' may include, where the context so admits: [...] (b) an authorized representative of a party.*" Amended Arbitration Rule 21(1) defines a third party funder as a "*person that is not a party to the dispute.*" It is not entirely clear that representatives of a party are included in Amended Arbitration Rule 21(1). In line with the 2018 ICCA TPF Report, for purposes of disclosure, third party funders that are already subject to separate disclosure obligations, such as party representatives, should be excluded from the definition of third party funders.

Rule 22 – Method of Constituting the Tribunal

- The proposed amendments are in many respects in line with the Republic of Austria's September 18, 2017 Initial Comments and improve the efficiency of the process of constituting ICSID tribunals.
- Amended Arbitration Rule 22 eliminates the inefficient, multi-step process for the parties to agree on the method for the constitution of the tribunal set forth in current Arbitration Rule 2.
- Proposed Amended Arbitration Rule 22 provides that the default formula under Article 37(2)(b) Convention will apply automatically 60 days after the date of registration of the Request for Arbitration, failing parties agreement on number of arbitrators and the method of their appointment. This is in line with Austria's proposal.

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

- Amended Arbitration Rule 23 also eliminates the current, multi-step process for the appointment of arbitrators under the default formula set forth in Article 37(2)(b) of the ICSID Convention (current Arbitration Rule 3), which has caused significant delay in the constitution of ICSID tribunals.
- Proposed Amended Arbitration Rule 23 stipulates that *“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.”* It does not provide for any default procedure to achieve that objective and does not provide any time limits. This is not in line with Austria’s proposal. It may be considered if setting out a default procedure with specified time limits for appointing arbitrators would enhance the process.

Rule 25 – Appointment of Arbitrators by the Chairman of the Administrative Council in Accordance with Article 38 of the Convention

- Proposed Amended Arbitration Rule 25(1) essentially corresponds to current Rule 4(1) Arbitration Rules. While this reflects Article 38 Convention, it may be considered if imposing a deadline for the parties to request the Chairman to appoint the arbitrator(s) would not add to efficiency of the constitution of the Tribunal.

Rule 26 – Acceptance of Appointment

- Proposed Amended Arbitration Rule 26(3)(b) requires an arbitrator to 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. Proposed Arbitrator Declaration (see Vol. 3, Schedule 2, item 4) requires an arbitrator to confirm that they disclose:
 - a. their 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 [Rule 21(2) of the Arbitration Rules/ Rule 32(2) of the (Additional Facility) Arbitration Rules].
 - b. investor-State cases in which they have been involved as counsel, conciliator, arbitrator, *ad hoc* Committee member, Fact-Finding Committee member, mediator, or expert; and
 - c. other circumstances that might reasonably cause their independence or impartiality to be questioned.
- Further, the Synopsis indicates that "*ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators. This will ensure a consistent Code of Conduct across all the major sets of rules used for ISDS, and can be incorporated into the ICSID declarations made by arbitrators at the start of a case.*" (Vol. 1, para. 33; see also Vol. 3, para. 298).
 - The proposed changes sufficiently address Austria's proposal. The introduction of a code of ethics for ICSID and UNCITRAL investor-State disputes will be welcome. An arbitrator's disclosure requirements in Item 4(b) of Arbitrator Declaration may be expanded to cover not only investor-State cases, but also other matters, including inter-State cases and commercial arbitration cases.

Chapter IV – Disqualification of arbitrators and vacancies

Rule 29 – Proposal for Disqualification of Arbitrators & Rule 30 – Decision on the Proposal for Disqualification

- Austria's proposal that a party proposing the disqualification should be able to do so prior to the constitution of the Tribunal has not been implemented, since proposed Rule 29(2)(a) Arbitration Rules foresees that any proposal shall be filed after the constitution of the Tribunal.
- Austria's proposal that the parties should have an express right to submit observations on a proposal to disqualify has been implemented in proposed Rule 29(2)(b)-(d) Arbitration Rules.
- Austria's proposal that there be a stay of proceedings in case of a proposal to disqualify should not be mandatory has been implemented in proposed Rule 29(3) Arbitration Rules (which stipulates that the "*proceeding shall continue while the proposal is pending unless it is suspended, in whole or in part, by agreement of the parties.*")

- The proposed changes partially address Austria's proposal. It remains to be considered whether a party proposing the disqualification should be able to do so prior to the constitution of the Tribunal to expedite the process and allow the Tribunal to decide on it the moment it is constituted.
- Austria's proposal to introduce a time limit for proposing the disqualification of an arbitrator has been implemented in proposed Rule 29(2)(a) Arbitration Rules (which stipulates that "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" (emphasis added).)
- Austria's proposal to introduce a time limit for the decision on the proposal of the disqualification has been implemented in proposed Rule 30(3) Arbitration Rules (which stipulates that 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)" (emphasis added).)
- Therefore, the proposed changes sufficiently address Austria's proposal. The proposed amendments significantly improve the procedure for the disqualification of arbitrators by setting strict deadlines for challenging an arbitrator. They also mitigate the potential disruptive effects of challenges by abolishing the mandatory suspension of proceedings following an arbitrator challenge. The proposed amendments accord with the Republic of Austria's September 18, 2017 Initial Comments. However, the seven-day deadline for the party responding to a challenge to file a response (Amended Arbitration Rule 29(2)(c)) is very short. Consideration should be given to extending the deadline to 14 days, or to 21 days in the case of public holidays of one party.

Chapter V – Initial Procedures

Amended Arbitration Rules 35- 37 elaborate on current Arbitration Rule 41. The proposed separation adds conceptual clarity.

Rule 35 – Manifest Lack of Legal Merit

- Amended Arbitration Rule 35 clarifies that an objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence.

- Austria's proposal that the Arbitration Rules clarify whether a preliminary objection under current Rule 41(5) Arbitration Rules may pertain to jurisdiction of the Tribunal (and not only the merits) has been implemented in amended Arbitration Rule 35(1) (which stipulates that the "*objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.*"). The proposed changes sufficiently address Austria's proposal.
- Amended Arbitration Rule 35(2) requires a party to file a request for an objection for manifest lack of legal merit no later than 30 days after the constitution of the tribunal. Serious consideration should be given to extending this time period to at least 60 days and/or authorizing the tribunal to extend the time limit.
- Amended Arbitration Rule 35 allows a party object that a claim is manifestly without legal merit and no further guidance of the legal test is provided. The proposed changes do not address Austria's proposal. It may be considered whether the Arbitration Rules would benefit from clarifying the legal test required to successfully object to a claim under proposed Amended Arbitration Rule 35.

Rule 36 – Preliminary objections

- In accordance with current Arbitration Rule 41, proposed Amended Arbitration Rule 36 is limited to preliminary objections that a dispute is not within the jurisdiction of the Centre, or for other reasons not within the competence of the tribunal. ICSID tribunals are divided over whether certain conditions precedent in investor-State arbitration clauses, such as requirements to attempt to settle a dispute amicably for a certain period of time prior to resort to arbitration, raise jurisdictional or admissibility issues.
- Consideration should be given to extending Amended Arbitration Rule 36 to objections to the admissibility of a claim, in particular in light of the deadline introduced for the filing of a request for bifurcation relating to "*a preliminary objection*" in Amended Arbitration Rule 37. For example, as currently drafted, a request for bifurcation of an objection based on claimant's failure to satisfy a waiting period prescribed by an investor-State arbitration clause would have to be filed within 30 days after the filing of the memorial on the merits if considered to be a jurisdictional objection, but could be filed later if considered to be an objection to admissibility.

Rule 37 – Bifurcation

- The requirement that a respondent State file a request for bifurcation relating to a jurisdictional objection within 30 days after the filing of the memorial on the merits provides the respondent State with a rather short period of time to analyze the memorial on the merits to determine the jurisdictional objections that may be raised and whether the jurisdictional objections identified on the basis of the memorial on the merits lend themselves to bifurcation, in particular if the Request for Arbitration is short and accompanied by little supporting evidence. Consideration should be given to extending this period to 60 days and authorizing tribunals to extend the period based on a reasoned request.

Rule 38 – Consolidation or Coordination on Consent of Parties

- Amended Arbitration Rule 38 allows parties to two or more pending arbitrations administered by ICSID to agree to consolidate or coordinate these arbitrations and proposed Amended Arbitration Rule 38BIS allows a party to request full or partial consolidation of two or more arbitrations pending under the Arbitration Rules, which can be ordered by a Consolidating Arbitrator. Rule 38BIS Arbitration Rules introducing a mandatory consolidation by order is not recommended by the Working Group (and is therefore not included in the consolidated draft proposed Arbitration Rules; see Vol. 2). [See Vol. 3, paras 405-417 and Vol. 3, Schedule 7]
- The proposed consolidation provisions may somewhat contribute to avoiding inconsistent and conflicting decisions and achieve cost savings. The proposed mandatory consolidation (Amended Arbitration Rule 38BIS) however raises conceptual problems.

Voluntary Consolidation

- Amended Arbitration Rule 38 provides for consolidation with consent of the parties of proceedings of two or more pending arbitrations administered by ICSID, including arbitrations conducted under different arbitral rules, or *ad hoc* arbitrations. Amended Arbitration Rule 38 largely corresponds to existing practice of ICSID tribunals and is included for the sake of clarity.

Mandatory Consolidation

- Amended Arbitration Rule 38BIS providing for mandatory consolidation is proposed in the Working Paper for discussion, but not included in the Consolidated Draft Rules. Mandatory consolidation could be ordered upon unilateral request for consolidation by a single “Consolidating Arbitrator” to be selected by the Secretary-General from the ICSID Panel of Arbitrators.

- Proposed Amended Arbitration Rule 38 BIS resembles the consolidation provisions included in numerous investment treaties, such as Article 1126 NAFTA.
- The ICSID Convention does not contemplate consolidation, and mandatory consolidation may subject the parties to the jurisdiction of an arbitral tribunal for which they may not be in a position to appoint an arbitrator, which is inconsistent with one of the principal features of arbitration, including ICSID arbitration. The Contracting Parties to investment treaties that provide for ICSID arbitration without providing for consolidation consented to submit disputes to ICSID arbitration on the basis that they may appoint an arbitrator to the tribunal that will decide claims brought against them. Serious consideration should be given to the question whether consent to mandatory consolidation should be required in the instrument that contains the respondent State's consent to ICSID arbitration, as opposed to assuming such consent from the fact that the Contracting Parties previously agreed to ICSID arbitration.
- The expected benefits of mandatory consolidation, avoidance of inconsistent awards and duplication of proceedings, may be limited since proposed Amended Arbitration Rule 38BIS would apply only to arbitrations pending under the ICSID Convention Arbitration Rules, thus excluding parallel proceedings under different arbitral rules.
- Query whether introducing provisions for mandatory consolidation by order would be of interest – this provision is for discussion of members, and is not currently proposed for inclusion unless Member States so indicate.

Chapter VI – Evidence

Rule 41 – Witnesses and Experts

- Proposed Amended Arbitration Rule 41 introduces detailed provisions regarding requests for bifurcation in that it specifies the procedure to be followed in case of such a request. It does not however specify the grounds which the tribunal should take into account when deciding the requests for bifurcation (the commentary to the amendments explains that *“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.”
(Vol. 3, p. 189, para. 401)).

- The proposed changes partially address Austria’s proposal to specify the rules regarding the requests for bifurcation.

Chapter VII – Publication, access to proceedings and non-disputing party submissions

Rule 44 – Publication of Awards and Decisions on Annulment

- The publication of decisions depends on the agreement of the parties. However, para. 2 provides for a “fiction of consent”, whereby the consent of the parties is assumed, unless a rejection of the publication is filed within 60 days. For security reasons, the provision should be reworded in such a way that consent must be actively given and not by fiction of consent.
- Para. 3 describes the procedure if the consent of the parties is not given. In this case, extracts from the legal assessment will be sent to the parties before publication, who will then have the opportunity to comment. However, it should be made clear that these extracts are treated in accordance with national needs for confidentiality and in such a way that nothing that a party does not wish to have published is published.

Rule 47 – Observation of Hearings

- Amended Arbitration Rule 47 provides for the Tribunal to establish procedures to prevent the disclosure of confidential information to persons observing the hearings and for every party to be able to exclude the public from hearings. However, para. 3 provides that the recordings and transcripts of hearings will subsequently be published unless a party objects. For security reasons, the provision should be reworded in such a way that consent must be actively given and not by fiction of consent.

Rule 48 – Submission of Non-Disputing Parties & Rule 49 – Participation of Non-Disputing Treaty Party

- Proposed Amended Arbitration Rule 48 introduces rules regarding submissions of non-disputing parties. Further, Proposed Amended Arbitration Rule 49 introduces rules regarding participation of non-disputing treaty party. More details on non-disputing parties’ participation is included in Schedule 8 on Transparency.

- In line with the 2014 UNCITRAL Transparency Rules, Amended Arbitration Rule 49 confers on States and international organizations that are party to a treaty at issue in an ICSID arbitration the right to make written submissions on the interpretation and application of the treaty. This is an important innovation, which is in line with the 2014 UNCITRAL Transparency Rules. It counteracts distortions of the development of international law that may result from the pursuit of purely private interests by individuals and companies in arguing important questions of international law.
- Third party funding should also be a criterion of admissibility, which should be disclosed to the parties involved in the proceedings.
- The proposed changes address Austria's proposal to clarify rules on non-disputing party participation.

Chapter VIII – Special procedures

Rule 51 – Security for Costs

- Amended Arbitration Rule 51 clarifies that ICSID tribunals have the power to impose security for costs on claimants and empowers them to suspend and eventually discontinue the proceedings if a claimant fails to comply with an order for security for costs. These provisions are important to tackle abuse and regulate extra-judicial influences on the proceedings. Consideration should be given to authorize ICSID tribunals to order disclosure whether or not a third party funder has committed to undertake adverse cost liability for the tribunals to be in a position to take third party funding into consideration when ordering security for costs.

Chapter X – The award

Rule 59 – Timing of the Award

- Pursuant to Amended Arbitration Rule 59, awards must be rendered within 60 days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on other matters. Amended Arbitration Rule 59 may be expected to reduce the significant time taken by ICSID tribunals to issue their awards, on average more than a year between the last hearing and the issuance of the award, and is in line with the Republic of Austria's September 18, 2017 Initial Comments. However, Amended Arbitration Rule 59 must be read in conjunction with Amended Arbitration

Rule 8(3), which specifies that tribunals shall “use best efforts” to meet the time limits for orders, decisions and awards. The proposed time-limits are adequate, but in light of the significant delays in the issuance of awards, it consideration should be given to strengthening the Secretary-General’s role in overseeing compliance with the time limits.

Chapter XII – Expedited Arbitration

Rule 69 – Consent of Parties to Expedited Arbitration

- Taking into account of the need for coordination with the ministries, the suggested deadlines are difficult to meet. However, the provisions relating to the accelerated procedure will only apply if the parties agree. Since an accelerated procedure can therefore be avoided, the short deadlines are not discussed in more detail.
- One of proposed changes is introduction of expedited proceedings (“EA”) – see proposed Rules 69-75 Arbitration Rules. The commentary to the proposed changes explains that: “*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.*” (Vol. 3, p. 297, para. 666).
- The proposed changes may be considered in the context of Austria’s proposal to facilitate SME’s access to arbitration. They do not however address pro bono representation of SMEs.

IV. RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS (CONCILIATION RULES)

Chapter I – General Provisions

Rule 2 – Meaning of Party and Party Representation

- See comments for Rule 2 of Part III RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES).

Chapter II – Constitution of the Commission

Rule 14 – Acceptance of Appointment

- Lit a and b (currently c and d) in paragraph 3 need to be corrected.

VI. ANNEX A: (ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS

Chapter II – General Functions of the Secretariat

Regulation 4 – The Registers

- As noted in Comment Nr. 1483, publishing too much information may be detrimental to the purpose. For this reason, information should only be published with extreme restrictions.

VII. ANNEX B: (ADDITIONAL FACILITY) ARBITRATION RULES

Chapter V – Disqualification of Arbitrators and Vacancies

Rule 39 – Disqualification of Arbitrators

- The deadline is very short. Consideration should be given to extending the deadline to 14 days, or to 21 days in the case of public holidays of one party.

Chapter VI – Initial Procedures

Rule 45 – Manifest Lack of Legal Merit & Rule 46 – Preliminary objection

- See comments for Rule 35 of Part III RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

Chapter VIII – Publication, access to proceedings and non-disputing party submissions

Rule 54 – Publication of Awards, Orders and Decisions

- This provision is critical in the sense of secrecy. The consequence of not agreeing with the parties cannot be that ICSID publishes the decision entirely. It must be

demanded that in the case of a lack of agreement between the parties, the decision may not be (entirely) published.

Rule 56 – Observation of Hearings & Rule 57 – Submission of Non-disputing Parties

- See comments for Rule 47 and Rule 48 of Part III RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

Chapter XII – Expedited Arbitration

Rule 73 – Consent of Parties to Expedited Arbitration

- See comments for Rule 69 of Part III RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES)

VIII. ANNEX C: ADDITIONAL FACILITY RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS ((ADDITIONAL FACILITY) CONCILIATION RULES)

Chapter I – General Provisions

Rule 1 – Application of Rules

- The numbering of the paragraphs should be corrected.

Chapter II – Institution of the Proceedings

Rule 6 – Receipt of the Request

- See comments for Rule 5 of Part II INSTITUTION RULES – ICSID CONVENTION PROCEEDINGS.

Chapter III – General Procedural Provisions

Rule 10 – Meaning of Party and Party Representation

- See comments for Rule 2 of Part IV RULES OF PROCEDURE FOR CONCILIATION PROCEEDINGS (CONCILIATION RULES).

Chapter V – Disqualification of Conciliators and Vacancies

Rule 25 – Proposal for Disqualification of Conciliators & Rule 26 – Decision on the Proposal for Disqualification

- The numbering of the paragraphs should be corrected.

X. ANNEX E: (ADDITIONAL FACILITY) MEDIATION RULES

Chapter IV – Conduct of the Mediation

Rule 16 – Confidentiality of the Mediation and Use of Information in Other Proceedings

- The numbering of the paragraphs should be corrected.

ADDITIONAL COMMENTS AND SUGGESTIONS

In addition to the above comments, please also find some additional comments and suggestions below, which specifically refer to the initial comments on the proposal for amendments to the ICSID rules submitted to ICSID by the Austrian Federal Ministry of Finance on September 18, 2017.

Other issues

- No proposed changes introduced to indicate that the Administrative Council of ICSID may issue “interpretative resolutions” on issues regarding the application of the ICSID Convention;
- No proposed changes introduced to establish a permanent consultative body / consultative mechanism, whereby such a body would issue, at the request of a Tribunal, preliminary rulings on issues regarding the application of the ICSID Convention;
- No proposed changes introduced to establish an appellate mechanism;

- While the proposed Arbitration Rules 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 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.
- Enhancing transparency appears to be one of the goals for the ICSID amendment – for example, proposed Rule 34(4)(k)-(l) Arbitration Rules invites the parties and Tribunal to discuss the details of publication of case materials and the protection of confidential information and proposed Rules 44-49 Arbitration Rules would:
 - i. increase the number of Awards published in ICSID Convention arbitration;
 - ii. maintain the requirement for ICSID to publish extracts of Awards in ICSID Convention arbitration, absent party consent to publish;
 - iii. require publication of Awards in ICSID AF arbitration;
 - iv. require publication of orders and decisions in both ICSID Convention and AF arbitrations;
 - v. include a process for redaction of Awards, orders and decisions, and to obtain a Tribunal decision on disputed redactions; and
 - vi. allow parties to publish other documents they filed in an arbitration, with agreed upon redactions (see Vol. 3, p. 949). Schedule 8 on Transparency (see Vol. 3, pp. 933-974) discusses in detail various aspects of enhancing transparency of the proceedings, including access to hearings and non-disputing party participation.