

COMMENTS ON WORKING PAPER # 3

STATE:	Republic of Panama
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GENERAL	COMMENT
Process, Timing & Effective Date for Adoption of Proposals	<p>Panama commends the Secretariat, and all of the Member State delegates, for the progress already reflected in the amendments in WP3. Even though there are some points that need tweaking — and further debates will take place regarding reform — the amendments, generally speaking, are a step in the right direction, and Panama looks forward to moving the process forward with an eye to voting on proposed amendments in 2020.</p> <p>Panama applauds the decision to produce a fourth working paper, and hopes that this will help narrow any remaining debate or discussion. In Panama’s view, the aim at this juncture should be to bring the</p>

	<p>new rules into effect, on the understanding that such rules are first steps, and are open to future amendments.</p> <p>In addition, Panama appreciates the confirmation from the Secretariat that the Secretariat's comments in the working papers are not akin to <i>travaux</i>, and that they instead are simply one view (among many) of the reasoning for a particular rule. Given that, for some of the rules, Panama accepts the text but does not necessarily share the Secretariat's commentary, Panama supports the Secretariat's idea of memorializing a disclaimer about the nature of the comments in the working papers.</p>
Approach to gender neutral language in Spanish/French	Panama supports the consensus reached at the meetings in Washington.
Other:	

I. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
Introductory Note	
Chapter I - Procedures of the Administrative Council	
Regulation 1 - Date and Place of the Annual Meeting	
Regulation 2 - Notice of Meetings	
Regulation 3 - Agenda for Meetings	
Regulation 4 - Presiding Officer	
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Regulation 9 - Acting Secretary-General	
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Regulation 28 - Secretary	
Regulation 29 - Depositary Functions	
Chapter V - Immunities and Privileges	
Regulation 30 - Certificates of Official Travel	
Regulation 31 - Waiver of Immunities	
Chapter VI - Official Languages	
Regulation 32 - Languages of Regulations	

II. INSTITUTION RULES FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
Introductory Note	
Rule 1 - The Request	
Rule 2 - Contents of the Request	<p>Panama agrees with the many delegations that stated that any request for arbitration submitted by a juridical entity should be accompanied by a corporate diagram. Such a diagram would not be a burden for the claimant to find or create, and the requirement would go hand in hand with the objective of promoting efficiency.</p> <p>In any case, Panama encourages the Secretariat to rethink its view that the request for arbitration “does not play a role in the [actual] case,” as the tribunal is looking instead to the memorial and other submissions. In Panama’s experience, the RFA is very important for both the parties and for the tribunal. Among other things, it (1) can affect the agenda for the first session, and (2) will inform the discussion of any expedited objections.</p>
Rule 3 - Recommended Additional Information	
Rule 4 - Filing of the Request and Supporting Documents	
Rule 5 - Receipt of the Request and Routing of Written Communications	
Rule 6 - Review and Registration of the Request	
Rule 7 - Notice of Registration	
Rule 8 - Withdrawal of the Request	
Rule 9 - Final Provisions	

III. ARBITRATION RULES FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
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Chapter I - General Provisions	
Rule 1 - Application of Rules	
Rule 2 - General Duties	
Rule 3 - Party and Party Representative	
Rule 4 - Method of Filing	

Rule 5 - Supporting Documents	
Rule 6 - Routing of Documents	
Rule 7 - Procedural Languages, Translation and Interpretation	
Rule 8 - Correction of Errors	
Rule 9 - Calculation of Time Limits	
Rule 10 - Fixing Time Limits	
Rule 11 - Extension of Time Limits Applicable to Parties	
Rule 12 - Time Limits Applicable to the Tribunal	
Chapter II - Constitution of the Tribunal	
Rule 13 - General Provisions Regarding the Constitution of the Tribunal	In past annulment proceedings, parties have argued — and committees have held — that the titles of certain Rules may lend meaning to Article 52(1)(a) of the ICSID Convention (annulment for “improper constitution of the tribunal”). Accordingly, Panama is concerned that the title of draft Rule 13 may inadvertently expand the grounds for annulment. For example, the fact that one of the “general provisions regarding constitution” is that “[t]he Tribunal shall be constituted without delay” might suggest that a delay in constitution could serve to annul an award. In Panama’s view, this would not be an appropriate basis for annulment.
Rule 14 - Notice of Third-Party Funding	<p>Panama commends the introduction of an express rule requiring written notice of the existence of third-party funding. Further — and given the unfortunate events that transpired in one of Panama’s past cases — Panama appreciates the Secretariat’s inclusion of an ongoing disclosure requirement.</p> <p>In Panama’s view, it would also be useful to add a paragraph stating that the tribunal has the discretion to order additional TPF-related disclosures.</p>
Rule 15 - Method of Constituting the Tribunal	
Rule 16 - Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention	
Rule 17 - Assistance of the Secretary-General with Appointment	
Rule 18 - Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention	
Rule 19 - Acceptance of Appointment	

Rule 20 - Replacement of Arbitrators Prior to Constitution of the Tribunal	In paragraph 2 of the draft Rule, it states that “[a] replacement arbitrator shall be appointed . . . in accordance with the method by which the withdrawing or replaced arbitrator was appointed.” It is not clear to Panama what would happen in the case of a default appointment — <i>i.e.</i> , if ICSID would still make the appointment, or if the appointment would revert back to the party. This may be useful to clarify.
Rule 21 - Constitution of the Tribunal	
Chapter III - Disqualification of Arbitrators and Vacancies	
Rule 22 - Proposal for Disqualification of Arbitrators	
Rule 23 - Decision on the Proposal for Disqualification	
Rule 24 - Incapacity or Failure to Perform Duties	
Rule 25 - Resignation	
Rule 26 - Vacancy on the Tribunal	
Chapter IV - Conduct of the Proceeding	
Rule 27 - Orders and Decisions	
Rule 28 - Waiver	
Rule 29 - First Session	
Rule 30 - Written Submissions	<p>The draft Rule contains a textual loophole that Panama believes should be closed.</p> <p>In certain past cases, tribunals have cited the current analog of this Rule as the basis for allowing the claimant to submit a “rejoinder on jurisdiction.” The theory was that, by advancing an objection to jurisdiction, the respondent became the “requesting party” for purposes of this Rule. However, this theory is fundamentally flawed, for at least two reasons. <i>First</i>, it is akin to saying that, by advancing a merits defense, the respondent suddenly becomes the “requesting party” on the issue of merits. <i>Second</i>, the theory creates an imbalance between the two parties, as the claimant (a) is heard first <i>and</i> last, and (b) receives three written pleadings (as compared to the respondent’s two). To claim that parity exists, one would need to stake out the untenable position that the claimant — <i>i.e.</i>, the party that is “requesting” that jurisdiction be exercised — may avoid jurisdiction entirely in its memorial.</p> <p>To protect parity, and give proper effect to each party’s role in the case, Panama proposes the following revision:</p>

	“The Parties shall file the following written submissions: (a) a memorial by the claimant requesting party ; (b) a counter-memorial by the respondent other party ; and, unless the parties agree otherwise: (c) a reply by the claimant requesting party ; and (d) a rejoinder by the respondent other party .”
Rule 31 - Case Management Conference	
Rule 32 - Hearings	
Rule 33 - Quorum	
Rule 34 - Deliberations	
Rule 35 - Decisions Made by Majority Vote	
Chapter V - Evidence	
Rule 36 - Evidence: General Principles	
Rule 37 - Disputes Arising from Requests for Documents	Panama supports the consensus that emerged from the meetings in Washington — <i>i.e.</i> , that (1) this Rule should be reoriented to reflect the reality that there is no presumption in favor of document production, and (2) the Rule should identify items that are exempt from document production (<i>e.g.</i> , documents subject to attorney/client privilege; the file from an investigation pertaining to a third party).
Rule 38 - Witnesses and Experts	
Rule 39 - Tribunal-Appointed Experts	
Rule 40 - Visits and Inquiries	
Chapter VI - Special Procedures	
Rule 41 - Manifest Lack of Legal Merit	
Rule 42 - Bifurcation	<p>In draft Rule 42, paragraph 4 lists the following factors (among others): “(a) [whether] bifurcation would materially reduce the time and cost of the proceeding; (b) [whether] determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute”</p> <p>This standard is exceedingly high; in essence, it would require the respondent to prove the point that it is seeking to bifurcate in order to obtain bifurcation. Yet the conventional wisdom is that a decision on bifurcation is a <u>decision on bifurcation</u>, and not a decision on the merits of the objection/threshold issue.</p> <p>Panama proposes that, as past tribunals have found, the factors should be framed in terms of whether bifurcation “could materially reduce the time and cost of the proceeding,” and whether “determination of the questions to be bifurcated could dispose of all or a substantial portion of the dispute.”</p>

Rule 43 - Preliminary Objections	In draft Rule 43, the text of paragraph 5 appears to suggest that, even in circumstances in which bifurcation has not been requested, the parties are to submit two separate types of memorials — namely, memorials on the merits and memorials on jurisdiction. This approach seems inefficient. Panama proposes that, as is customary in a non-bifurcated scenarios, the parties submit plenary pleadings, instead of two sets of memorials.
Rule 44 - Bifurcation of Preliminary Objections	For the reasons explained above, in connection with Rule 42, the factors should be framed in terms of whether bifurcation “ <i>could</i> materially reduce the time and cost of the proceeding,” and whether “determination of the questions to be bifurcated <i>could</i> dispose of all or a substantial portion of the dispute.”
Rule 45 - Consolidation or Coordination of Arbitrations	
Rule 46 - Provisional Measures	In draft Rule 46, one of the factors is “whether the measures are urgent and necessary” — a phrase that is used in the case law, but which is not accurate or grammatically correct. It is not the <i>measures</i> that must be “urgent,” but rather the <i>need</i> for the measures. If the standard is to become a part of the Rules, then the standard should be accurately recorded. Panama proposes that the Rule be revised to state: “whether the measures are urgently necessary.”
Rule 47 - Ancillary Claims	In draft Rule 47, certain deadlines are described by reference to the “reply” and the “counter-memorial.” This language also appears in the 2006 Arbitration Rules. In the new version, however, the references could lead to confusion. Because WP3 adverts to two different types of replies/counter-memorials, the terms “reply” and “counter-memorial” are now ambiguous.
Rule 48 - Default	
Chapter VII - Costs	
Rule 49 - Costs of the Proceeding	
Rule 50 - Statement of and Submission on Costs	
Rule 51 - Decisions on Costs	
Rule 52 - Security for Costs	<p>ICSID proceedings are costly, and — for States — they are taxpayer funded. Many tribunals have held that a State should not need to pay for the cost of defending itself against an unmeritorious claim. But collecting from a claimant is difficult, and some costs awards are never recovered. Panama accordingly applauds the Secretariat’s decision to create a rule that expressly addresses the issue of security for costs.</p> <p>In addition, Panama wishes to express its satisfaction: (1) that the Rule identifies third-party funding as a relevant factor; (2) that the rule enables tribunals to “order” security for costs; and (3) that “urgency” and “necessity” are not hardwired into the standard.</p>

	With respect to paragraph 2(a) (“the request shall specify the circumstances that require security for costs”), Panama notes that the word “require” would seem to upset the balance intended. Panama would suggest revising the paragraph to state: “the circumstances that <i>justify</i> security for costs.”
Chapter VIII - Suspension, Settlement and Discontinuance	
Rule 53 - Suspension of the Proceeding	
Rule 54 - Settlement and Discontinuance	
Rule 55 - Discontinuance at Request of a Party	
Rule 56 - Discontinuance for Failure of Parties to Act	
Chapter IX - The Award	
Rule 57 - Timing of the Award	
Rule 58 - Contents of the Award	
Rule 59 - Rendering of the Award	
Rule 60 - Supplementary Decision and Rectification	
Chapter X - Publication, Access to Proceedings and Non-Disputing Party Submissions	
Rule 61 - Publication of Awards and Decisions on Annulment	
Rule 62 - Publication of Orders and Decisions	
Rule 63 - Publication of Documents Filed in the Proceeding	In WP2, Arbitration Rule 63 had stated that, “[u]pon [the] request of a party, the Centre shall publish any document which that party filed in the proceeding, with redactions agreed to the parties and jointly notified to the Secretary-General.” (emphasis added). The text that appears in bold has been removed in WP3, and Panama is concerned that the current rule could lead to abuse (<i>e.g.</i> , one of the parties could force the publication of its opponent’s pleadings, witness statements or other documents submitted in the proceedings in circumstances when there is no other legal requirement to do so).
Rule 64 - Observation of Hearings	
Rule 65 - Confidential or Protected Information	
Rule 66 - Submission of Non-Disputing Parties	
Rule 67 - Participation of Non-Disputing Treaty Party	
Chapter XI - Interpretation, Revision and Annulment of the Award	
Rule 68 - The Application	

Rule 69 - Interpretation or Revision: Reconstitution of the Tribunal	
Rule 70 - Annulment: Appointment of the ad hoc Committee	
Rule 71 - Procedure Applicable to Interpretation, Revision and Annulment	
Rule 72 - Stay of Enforcement of the Award	
Rule 73 - Resubmission of Dispute after an Annulment	Whereas the 2006 Rules rightly provide that, “[i]f the original award had only been annulled in part, the new Tribunal [in a resubmission proceeding] shall not reconsider any portion of the award not so annulled,” draft Rule 73 currently states that, “[i]f the original Award was annulled in part, the new Tribunal shall consider the aspect(s) of the resubmitted dispute pertaining to the annulled portion of the Award.” In Panama’s view, this revision weakens the force of Article 53(1) of the ICSID Convention. Panama would propose amending the draft text to state: “If the original Award was annulled in part, the new Tribunal shall only consider the aspect(s) of the resubmitted dispute pertaining to the annulled portion of the Award.”
Chapter XII - Expedited Arbitration	
Rule 74 - Consent of Parties to Expedited Arbitration	
Rule 75 - Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration	
Rule 76 - Appointment of Sole Arbitrator for Expedited Arbitration	
Rule 77 - Appointment of Three-Member Tribunal for Expedited Arbitration	
Rule 78 - Acceptance of Appointment in Expedited Arbitration	
Rule 79 - First Session in Expedited Arbitration	
Rule 80 - Procedural Schedule in Expedited Arbitration	
Rule 81 - Default in Expedited Arbitration	
Rule 82 - Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration	
Rule 83 - Procedural Schedule for Interpretation, Revision or Annulment in Expedited Arbitration	

Rule 84 - Resubmission of a Dispute after Annulment in Expedited Arbitration	
Rule 85 - Opting Out of Expedited Arbitration	

IV. CONCILIATION RULES FOR ICSID CONVENTION PROCEEDINGS	COMMENT ON PROVISION
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Rule 2 - Party and Party Representative	
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Rule 4 - Supporting Documents	
Rule 5 - Routing of Documents	
Rule 6 - Procedural Languages, Translation and Interpretation	
Rule 7 - Calculation of Time Limits	
Rule 8 - Costs of the Proceeding	
Rule 9 - Confidentiality of the Conciliation	
Rule 10 - Use of Information in Other Proceedings	
Chapter II - Constitution of the Commission	
Rule 11 - General Provisions, Number of Conciliators and Method of Constitution	
Rule 12 - Notice of Third-Party Funding	
Rule 13 - Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention	
Rule 14 - Assistance of the Secretary-General with Appointment	
Rule 15 - Appointment of Conciliators by the Chair in Accordance with Article 30 of the Convention	
Rule 16 - Acceptance of Appointment	

Rule 17 - Replacement of Conciliators Prior to Constitution of the Commission	
Rule 18 - Constitution of the Commission	
Chapter III - Disqualification of Conciliators and Vacancies	
Rule 19 - Proposal for Disqualification of Conciliators	
Rule 20 - Decision on the Proposal for Disqualification	
Rule 21 - Incapacity or Failure to Perform Duties	
Rule 22 - Resignation	
Rule 23 - Vacancy on the Commission	
Chapter IV - Conduct of the Conciliation	
Rule 24 - Functions of the Commission	
Rule 25 - General Duties of the Commission	
Rule 26 - Orders, Decisions and Agreements	
Rule 27 - Quorum	
Rule 28 - Deliberations	
Rule 29 - Cooperation of the Parties	
Rule 30 - Written Statements	
Rule 31 - First Session	
Rule 32 - Meetings	
Rule 33 - Preliminary Objections	
Chapter V - Termination of the Conciliation	
Rule 34 - Discontinuance Prior to the Constitution of the Commission	
Rule 35 - Report Noting the Parties' Agreement	
Rule 36 - Report Noting the Failure of the Parties to Reach Agreement	
Rule 37 - Report Recording the Failure of a Party to Appear or Participate	
Rule 38 - The Report	
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Article 3 - Convention Not Applicable	
Article 4 - Final Provisions	

VI. (ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS	COMMENT ON PROVISION
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Regulation 8 - Consequences of Default in Payment	
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VII. (ADDITIONAL FACILITY) ARBITRATION RULES (ANNEX B)	COMMENT ON PROVISION
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Rule 21 - General Provisions Regarding the Constitution of the Tribunal	
Rule 22 - Qualifications of Arbitrators	
Rule 23 - Notice of Third-Party Funding	
Rule 24 - Method of Constituting the Tribunal	
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Rule 66 - Discontinuance for Failure of Parties to Act	
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Rule 74 - Observation of Hearings	
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Rule 80 - Appointment of Sole Arbitrator for Expedited Arbitration	
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