Fordham International Arbitration Conference

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**Jeffrey A. Cohen**  
Managing Principal, Analysis Group  
Mr. Cohen is Managing Principal of the Chicago office of Analysis Group. He has over 30 years’ experience as an expert in international arbitration, valuation, antitrust, intellectual property, and securities, and has testified in arbitration and federal courts on many aspects of economic damages. He has worked across a wide range of industries, including health care, software and technology, financial services, energy, transportation, and entertainment. His clients include significant multinational corporations as well as various government entities.

Mr. Cohen is the author of Intangible Assets: Valuation and Economic Benefit and a contributor to the American Bar Association publication Proving Antitrust Damages. Mr. Cohen holds both a B.A. in political science and an M.B.A. in finance and strategy from the University of Chicago.

His most recent publication is entitled, In All Probability: An Economic Reading of Damages Under Factory at Chorzów, forthcoming in ICSID Review - Foreign Investment Law Journal.

**Santiago Dellepiane**  
Managing Director, Berkeley Research Group  
Santiago Dellepiane is a Managing Director with Berkeley Research Group and Co-Chair of its Economics & Damages practice. He has worked extensively as an economist and valuation analyst, and as a consultant for utilities and regulated and nonregulated businesses.

His work involves economic analysis, valuation, business advisory, regulatory analysis, and damages assessment.

Mr. Dellepiane has provided written and oral testimony or expert advice in more than thirty-five cases involving valuation, regulatory, damages, and other issues before the ICC, ICSID, UNCITRAL, and ICDR tribunals, and before Canadian courts (Superior Court of Justice of Ontario and Court of Queen’s Bench of Alberta). In 2016, he led a team of damages experts working for the Ministry of Foreign Affairs of Japan on investor-state dispute settlement.

Mr. Dellepiane’s research on damages in contractual and treaty breaches was published in Oxford University Press’ Damages in International Arbitration. He is also a contributor to books published by the National Autonomous University of Mexico and by ICCA. He speaks regularly at conferences on damages issues. He has been recognized for several years among the world’s top arbitration expert witnesses and as a thought leader by Who’s Who Legal.

**Donald Francis Donovan**  
Partner, Debevoise & Plimpton LLP  
Donald Francis Donovan is Co-Head of the International Disputes and Public International Law Groups at Debevoise & Plimpton LLP and serves as counsel before courts in the United States, international arbitration tribunals, and international courts.

He is widely regarded as one of the leading international arbitration practitioners and practicing international lawyers in the world. Mr. Donovan recently served as President of the International Court of Arbitration (ICCA) (2016-2018) and of the American Society of International Law (ASIL) (2012-2014), having previously served as Chair of the Institute for Transnational Arbitration (ITA). He serves as a Member of the US Department of State’s Advisory Committee on International Law, a Member of the Advisory Committees of the American Law Institute for the Restatement of Foreign Relations Law of the United States and for the Restatement of the US Law of International Arbitration, and a Member of the Board of Human Rights First and Chair of its Litigation Committee.

He teaches International Investment Law and Arbitration at the New York University School of Law and Tsinghua University School of Law in Beijing.

Mr. Donovan joined Debevoise after serving as law clerk to Associate Justice Harry A. Blackmun of the U.S. Supreme Court and as legal assistant to Judge Howard M. Holtzmann of the Iran-United States Claims Tribunal.

**Alexander G. Fessas**  
Secretary General, ICC International Court of Arbitration  
Alexander G. Fessas is the Secretary General of the ICC International Court of Arbitration.

As Secretary General, he is responsible for the operational management and coordination of the ICC Court’s Secretariat and other dispute resolution services in Paris, Hong Kong, New York, Sao Paolo and Singapore.

He joined the Secretariat in late 2011 and held consecutive positions in three case management teams, of which two as counsel. Prior to his appointment as Secretary General, he was the Secretariat’s Managing Counsel over a three-year term.

He read law at the University of Athens, Greece having specialized in international commercial transactions and conflict of laws. Prior to joining the ICC Court, he practised as counsel out of Athens where he established a sole practice in 2008. He was previously an associate at an Athens-based law firm. During the same period, he was also the editor-in-chief of the Revue hellénique de droit international.

He is admitted to the Athens Bar and speaks English, French and Greek.

**Nicholas Fletcher QC**  
Independent Arbitrator, 4 New Square  
Nicholas Fletcher QC is an independent arbitrator based in London. Nic is admitted to practice in England & Wales and in New York. After spending 3 years practising in New York in the 1980s, Nic joined Clifford Chance in London and was a partner in that firm’s international arbitration practice. He then became Head of International Arbitration at Berwin Leighton Paisner before joining 4 New Square Chambers to sit exclusively as arbitrator. Nic has over 35 years’ experience as both counsel and arbitrator in international commercial disputes. He has acted as presiding arbitrator, sole arbitrator and panel member in arbitrations conducted under a broad range of institutional and procedural rules and on ad hoc basis. As arbitrator and previously as counsel, Nic has experience of a wide variety of commercial disputes, including M&A and shareholder disputes, financial instruments, pharmaceuticals, energy and natural resources, offshore engineering and construction matters. He is a member of the of the ICC’s Task Force on the New York Convention and the ICC’s UK national committee, a trustee of the Foundation for International Arbitration Advocacy and the rapporteur for England for the Institute of Transnational Arbitration. He is also consultant editor of the recently published Guide to the IBA Rules on the Taking of Evidence in International Arbitration.

**Athina Fouchard Papad Stratiou**  
Of Counsel, Eversheds Sutherland  
Athina Fouchard Papad Stratiou, Counsel at Eversheds Sutherland (Paris), specializes in international arbitration, commercial and investment. She also has significant experience in Africa-related arbitration.

Athina is listed as a “Future Leader” of the international arbitration market in France by Who’s Who Legal (2018, 2019, 2020) and as one of the ten “Rising Stars” in commercial arbitration for France by Euromoney’s Expert Guides (2019).

For over twelve years, she has acted as counsel or arbitrator in arbitrations in various sectors, such as energy, telecommunications, mining and construction. Her experience includes arbitrations under
Facebook cancelled its plans to issue those days before trial was to begin. Mr. Sacks teaches a Continuing Legal Education course on damages featuring several valuation case studies, has taught classes to attorneys on valuation and served as a panelist on damages at industry conferences. Mr. Sacks received his B.A. in mathematical economics from Columbia University and his M.A. in economics from the University of Chicago.

Laurence Shore
Partner, BonelliErede
Laurence Shore is a partner in the BonelliErede-Milan office, and is the head of the firm’s international arbitration practice group. Laurence began his career as a litigation associate at Williams & Connolly in Washington, D.C., and subsequently worked in London and New York City in the arbitration field, before moving to BonelliErede. He is qualified in D.C., Virginia, and New York, and is also a solicitor of the Senior Courts of England and Wales. Laurence received his law degree from Emory University, where he was editor-in-chief of the Emory Law Journal. He has a doctorate in American History from Johns Hopkins University. Laurence is a co-author of International Investment Arbitration: Substantive Principles, published by Oxford University Press (second edition, 2017).

Robert H. Smit
Independent Arbitrator
Robert H. Smit is an independent arbitrator in international commercial and investment treaty arbitrations seated around the world. Mr. Smit is an Adjunct Professor of Law at Columbia Law School, where he teaches courses and seminars on international arbitration and transnational litigation. He retired Litigation Partner at Simpson Thacher & Bartlett LLP, where he Co-Chaired the Firm’s International Arbitration and Dispute Resolution Practice. Mr. Smit is also Co-Editor-in-Chief of the American Review of International Arbitration; Member of the ICC Commission on Arbitration; and Adviser to the American Law Institute’s Restatement (Third) of the U.S. Law of International Arbitration. He is also former U.S. Member of the ICC International Court of Arbitration; Chair of the New York City Bar Association’s International Commercial Disputes Committee; Chair of the CPR Arbitration Committee; and Vice-Chair of the IBA’s International Arbitration and ADR Committee.

Greig Taylor
Managing Director, AlixPartners, LLP
Greig is an experienced testifying financial and accounting expert witness with more than 20 years of experience in resolving disputes involving accounting, valuation, and economic damages. His experience includes breach-of-contract and loss-of-profits claims, expropriations, minority-shareholder and joint-venture disputes, and claims arising following acquisitions and sales of businesses.

Greig has testified in numerous international arbitrations under various institutions such as the ICC, AAA-ICDR, ICSID, SIAC and ICAA, as well as in ad hoc proceedings under UNCITRAL rules and free-trade agreements. He has also provided litigation consulting involving forensic accounting and financial investigations under various accounting and legal protocols.

Greig is listed in The International Who’s Who of Commercial Arbitration since 2014 as a leading expert witness, and most recently as a Thought Leader for Arbitration 2018 and Global Elite Thought Leader for 2019. Greig is also recognized by Who’s Who Legal for Economic Consulting – Quantum of Damages since 2016.

Eric P. Tuchmann
Senior Vice President, General Counsel and Corporate Secretary, AAA - ICDR
Eric P. Tuchmann is Senior Vice President, General Counsel and Corporate Secretary for the American Arbitration Association (AAA) and its international division, the International Centre for Dispute Resolution (ICDR). In that capacity, he oversees the ICDR’s operations, strategy and policies. In addition, he manages the organization’s legal and governance affairs, including litigation and regulatory matters involving the AAA-ICDR and its arbitrators and mediators. Mr. Tuchmann served as counsel of record on numerous amicus curiae briefs filed in various courts and cited by the Supreme Court of the United States, and has been involved in various policy initiatives related to alternative dispute resolution. He analyzes domestic and international legal developments impacting the field, serves as an observer to various UNCITRAL working groups, and speaks frequently on arbitration and mediation topics. Mr. Tuchmann previously served as the AAA’s Associate General Counsel, and has managed the ICDR and other offices within the organization.

Jacomijn van Haersolte-van Hof
Director General of the LCIA
On 1 July 2014, Jackie van Haersolte-van Hof became Director General of the LCIA. Previously, she practised as a counsel and arbitrator in The Hague, at her GAR 100 boutique HaersolteHof. She set up HaersolteHof in 2008 after three years as counsel in the international arbitration group at Freshfields Bruckhaus Deringer in Amsterdam.

She was previously with Amsterdam firm De Brauw Blackstone Westbroek from 2000 to 2004, and before that Loeff Claeys Verbeke in Rotterdam, which she joined on her qualification in 1992. She has sat as arbitrator in cases under the ICCSD, ICSID, LCIA and UNCITRAL Rules, as well as those of the Netherlands Arbitration Institute (NAI), and UNUM, the Institute of Transport, Arbitration & Mediation, and at the Royal Dutch Grain and Feed Trade Association, based in the Netherlands. She is on the ICSID roster of arbitrators and sat on ad hoc committee.

She was also involved in setting up the arbitral process for the Claims Resolution Tribunal in Zurich, which analysed claims from Holocaust survivors over dormant accounts in Swiss banks.

She is a professor of arbitration law at University of Leiden and a member of GAR’s editorial board. Her 1992 PhD thesis on the application of the UNCITRAL rules by Iran-US Claims Tribunal was one of the first books to be published on the subject.

Anne Marie Whitesell
Professor, Georgetown University Law Center
Anne Marie Whitesell is Professor, LL.M. Program and Faculty Director, Program on International Arbitration and Dispute Resolution at Georgetown University Law Center in Washington D.C.

Prior to joining Georgetown, she practised with the law firm Dechert LLP in Washington and Paris.

Ms Whitesell was Secretary General of the ICC International Court of Arbitration from 2001 to 2007. She also previously taught at the Université de Paris I, the Institut de Droit Comparé and Georgetown. Ms Whitesell has practised with law firms in both the United States and in France, and has acted as arbitrator and counsel in numerous international arbitration cases. She serves as a member of various boards and committees related to dispute resolution and is the Director of the Alternative Dispute Resolution Center of the International Law Institute.

Ms Whitesell received her A.B. from Smith College, her J.D. from the University of Virginia School of Law and her Doctorate in Law from the Université de Paris I, Panthéon-Sorbonne. She is admitted to the New York State Bar, the District of Columbia Bar and the US District Courts for the Southern and Eastern Districts of New York.
Prior to joining Eversheds Sutherland, Athina worked at the arbitration boutique Lazareff Le Bars, specializing in Africa-related arbitration, and at Freshfields Bruckhaus Deringer LLP in Paris. She has also served as in-house counsel in the Office of International Standards and Legal Affairs of UNESCO. 

She is the Co-Chair of AfriArb, an association of professionals focusing on Africa-related arbitration; the vice-Chair of the Steering Committee of CIArb YMG; a member of the ICC Arbitration Commission, the think-tank of the ICC; and a board member of the Arbitration Committee of ICC Greece. 

She is registered with the Bar in Paris and in Athens and works in English, French and Greek. She also has a good knowledge of Spanish. 

Jennifer Glasser 
Partner, White & Case LLP 

Jennifer Glasser is a Partner in White & Case’s No. 1 ranked International Arbitration group. Based in New York, Ms. Glasser represents corporate clients from across the globe in institutional and ad hoc arbitrations involving common and civil laws, as well as sovereigns in investor-state disputes. Ms. Glasser also advises on international contract drafting, public international law and U.S. court proceedings in aid of arbitration. Her experience covers a wide range of industries including energy, oil and gas, manufacturing, mining, financial services and technology. 

Ms. Glasser is the co-editor of The CPR Corporate Counsel Manual for Cross-Border Dispute Resolution, a comprehensive manual on drafting international ADR clauses and managing cross-border ADR. She is the Vice Chair of the Arbitration Committee of the International Institute for Conflict Prevention and Resolution (CPR), co-chair of CPR’s Transparency Task Force and a member of CPR’s Cybersecurity Task Force. 

Before entering private practice, Ms. Glasser clerked for Judge Koen Lenaerts at the Court of Justice of the European Union and was resident in the Paris office of White & Case. 

Thomas D. Halket 
Independent Arbitrator 

President, Chartered Institute of Arbitrators 
A Chartered Arbitrator, Fellow of the Chartered Institute of Arbitrators, Fellow of the College of Commercial Arbitrators and a member of arbitral panels around the world, Thomas Halket has been an arbitrator for over 30 years. He is the President of Chartered Institute of Arbitrators, an Adjunct Professor at Fordham Law School where he teaches courses on International Arbitration and on IP transactions and an independent ADR neutral and adviser. Earlier in his career, he was a partner at Bingham McCutchen and prior to that a partner at Hughes, Hubbard & Reed. He is a frequent speaker and writer on ADR matters. He co-authored and edited a book on the arbitration of international IP disputes, about to go into its second edition, and is a co-author of a book on the arbitration of IP disputes in the U.S. 

Hon. Faith S. Hochberg 
Principal, Hochberg ADR 

Judge Hochberg served over 15 years as a federal judge in the District of New Jersey. In 2015, she founded Hochberg ADR (www.JudgeHochberg.com), based in New York, to provide Mediation, Arbitration and strategic Advisory services to counsel in the U.S. and internationally. Judge Hochberg also serves as a Court-Appointed Monitor in an international cybersecurity case, and as a court-appointed Special Master in both a Trade Secrets/Patent case and an Antitrust MLD. 

Judge Hochberg previously served as The United States Attorney for the District of New Jersey, and prior to that, she was Deputy Assistant Secretary of the U.S. Treasury Department. She has twice been confirmed by the U.S. Senate. Judge Hochberg has also spent many years in the private practice of law; as Legal Assistant to the Chairwoman of the SEC, and as a top official in a bank regulatory agency. Judge Hochberg is known for her broad expertise in all complex cases: class actions, corporate contract, insurance, banking & financial institutions, securities, antitrust, pharmaceutical patent, and all intellectual property litigation. She is listed on the rosters of AAA, JICDR, Federal Arbitration, CPR, WICO, IICC and ICDR and is a Fellow of the College of Commercial Arbitrators. 

In her community, Judge Hochberg serves on the Advisory Board of the Innovation Center for Law & Technology, at New York Law School. 

Judge Hochberg graduated from Harvard Law School, magna cum laude, where she was an Editor of the Harvard Law Review, and earned a B.A., summa cum laude, from Tufts University. She was elected to Phi Beta Kappa. She also attended the London School of Economics. 

In her few moments of spare time, Judge Hochberg is an artist whose paintings and wearable art have been shown in galleries, boutiques and museum stores. 

Meg Kinnear 
Secretary-General, International Centre for Settlement of Investment Disputes (ICSID) 

Meg Kinnear is currently the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank. She was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for the conduct of all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, Ms. Kinnear was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. 

From October 1996 to April 1999, Ms. Kinnear was Executive Assistant to the Deputy Minister of Justice of Canada. Prior to this, Ms. Kinnear was Counsel at the Civil Litigation Section of the Canadian Department of Justice (from June 1984 to October 1996) where she appeared before federal and provincial courts as well as domestic arbitration panels. 

Ms. Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. She received a Bachelor of Arts (B.A.) from Queen’s University in 1978, a Bachelor of Laws (LL.B.) from McGill University in 1981, and a Master of Laws (LL.M.) from the University of Virginia in 1982. 


Isabel Kunsman 
Managing Director, AlixPartners, LLP 

Mrs. Isabel Santos Kunsman is a Managing Director at AlixPartners’ Washington DC office. Isabel is a skilled expert witness on quantum, with more than 20 years of experience focused on valuation and financial matters. She specializes in high stakes Investor State arbitrations and regulatory disputes in Latin America. She has been regularly retained as a quantum and valuation expert to provide testimony in both English and Spanish in various jurisdictions including ICSID, UNCITRAL, and the ICC. She has worked on behalf of States and investors in nearly equal proportion on matters involving expropriations and breach of contract disputes. The matters Mrs. Kunsman has helped clients and arbitral tribunals resolve have required valuations of complex financial instruments, concessions and companies in sectors including banking, infrastructure, energy and mining. 

Mrs. Kunsman holds an MBA from Georgetown University and a Bachelor of Science in Finance and Economics from the Georgetown University School of Foreign Service.

Julian D M Lew QC 
Independent Arbitrator 

Professor, Queen Mary University of London 

Professor Lew is a full-time arbitrator of international commercial and investment disputes at Twenty Essex based in London. Prof. Lew’s involvement with arbitration as an academic, counsel and arbitrator spans more than 40 years. He accepts appointments as a sole, presiding and co-arbitrator in arbitrations under all the major arbitral rules and institutions. His professional experience includes international transactions affecting investments; sale and purchase of corporate entities and assets; joint ventures, oil and gas exploration and development and production agreements, research and development and promotions of pharmaceutical and chemical products, mining and concession arrangements; distribution, agency, licensing agreements, infrastructure and construction projects, international trade finance, trading arrangements with developing countries, EC law and arbitration arising out of all such transactions. 

Prof. Lew is a former partner and Head of the International Arbitration Practice Group of what is now Herbert Smith Freebils. He is Professor of International Arbitration and Head of the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. 

Melissa Magliana 
Partner, Lalive 

Melissa Magliana is a partner at LALIVE in Zurich specializing in international commercial arbitration. 

With experience in both common and civil law jurisdictions and holding legal degrees in US and Swiss law, she advises and represents clients in ad hoc and institutional arbitration proceedings under all major rules of arbitration. She also acts as sole arbitrator, co-arbitrator and as chair of arbitral tribunals and advises on other forms of dispute resolution and related proceedings, such as mediation and international legal assistance. 

Melissa Magliana was the 2016 recipient of the ASA Prize for Advocacy in International Commercial Arbitration and has been recommended by several directories for her work in commercial arbitration. 

Before joining LALIVE, Melissa Magliana clerked for The Hon. Carol Bagley Amon at the United States District Court for the Eastern District of New York and was Counsel in arbitration and litigation at a leading Swiss law firm. She graduated from Princeton University in 1999 and received her Juris Doctor from the Columbia University School of Law in 2004. In 2014, she obtained a Swiss law degree from the University of Lucerne School of Law. 

Dr. Meloria Meschi 
Senior Managing Director, FTI Consulting, Inc. 

Dr Meloria Meschi is a Partner and Senior Managing Director in FTI's Economic and Financial Consulting practice, and is based in London. A double PhD in Economic Policy and Economics-Econometrics, Meloria has over 20 years' experience in applying economic and statistical analysis to complex litigation, regulatory, and policy issues across a broad range of industries. Meloria is recognized by Who's Who Legal: Consulting Experts as a leading individual in the Quantum of Damages category, recognized for her "exceptional economic competencies", and by Who's Who Legal: Arbitration Experts as a leading expert, highly rated "for her excellent work on valuations relating to fraud". 

An experienced witness, Meloria has been appointed as an expert in statistics or economics in disputes before the courts of England, Norway, Italy and South Africa and arbitral tribunals in New York, Hong Kong, Toronto, London, New Delhi and Stockholm. 

Meloria has published numerous articles in international journals. In March 2005, her joint paper on the impact of mobile telecommunication on economic development was placed on the front page of The Economist. She is a faculty member for the Masters in Arbitration and Regulation, University of Rome, teaching on costs estimation, efficiency benchmarking and other regulatory topics.
INTRODUCTION

The last several years have produced an explosion of academic treatments of international commercial arbitration. However, the overwhelming majority of this literature considers jurisdictional and procedural matters. Since most international arbitral awards are confidential, little is known about the decisions of international arbitrators on the merits of international commercial disputes. Much of the literature implicitly acknowledges that international arbitrators might approach matters of substantive law differently than national court judges do. However, this intuition remains inchoate and non-specific.

A comprehensive treatment of the decisions of international arbitrators on matters of substantive law is not only beyond the scope of this article, but is probably impossible. There are too many variables to make accurate generalisations (different arbitrators, different governing law, different procedural rules, etc.) and in any event the researcher lacks access to a sufficient number of awards. However, useful insights can be gained from more specific studies. One issue that arises frequently in international arbitrations and is of particular interest to practitioners is contractual

* Assistant Professor, Faculty of Law, Queen's University. This article is adapted from one chapter of a book forthcoming from Oxford University Press, The Culture of International Arbitration and the Evolution of Contract Law. I am grateful to OUP for permitting me to publish some of my findings here. The editors would like to thank Jeremie Kohn of Wilmer Cutler Pickering Hale and Dorr LLP, London, for his careful checking of the translation.
After all, every international commercial arbitration arises out of a contract.

This article considers the available awards in which international arbitrators interpreted a commercial contract. It seeks to answer two questions. First, to what extent do arbitral tribunals follow the interpretive methods dictated by the governing law? Secondly, when arbitral tribunals do not follow that law, or when they act as amiables compositeurs or apply general principles, what interpretive methods do they prefer?

A review of the available awards identified 53 awards in which the arbitral tribunal interpreted the contract—that is, where the tribunal determined what obligations were created by the contract.¹ This article does not deal with instances where the breaching party relied on an excuse, such as force majeure, unconscionability or changed circumstances (rebus sic stantibus), because the pleading of an excuse requires a concession that a breach of contract has occurred. In such cases (unless excuse is pleaded in the alternative), there is no disagreement as to the meaning of the contract. Similarly, this article does not consider disputes over the existence or validity of a contract, or where the contractual term being interpreted is a dispute resolution clause that requires a concession that a breach of contract has occurred (rebus sic stantibus), because the pleading of an excuse requires a concession that a breach of contract has occurred.

In the comparative context, it is helpful to put the issue of contractual interpretation into comparative context.

Neither the traditional common law nor the traditional civil law model is found in its pure form in modern practice, but an essential difference in perspective persists:

"On one [civilian] view, it is the intention of the promisor which counts; this is justified by the principle of private autonomy which treats the free will of legal persons as the source and measure of legal consequences... On the other [common law] view, priority is given to the external phenomenon of expression... the internal will of the promisor is treated as significant only in so far as

REFERENCES

¹ Cet article ne traite pas des cas où la partie en défaut a invoqué une force majeure, une lésion inopinée ou des circonstances changeantes (rebus sic stantibus), car cela implique d'admettre qu'il existe une violation du contrat. 

INTERNATIONAL COMMERCIAL ARBITRATORS' APPROACHES TO CONTRACTUAL INTERPRETATION
it coincides with the normal objective meaning that a reasonable man would attribute to its expression.\textsuperscript{13}\textsuperscript{13}

For common law judges, "the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind."\textsuperscript{14} Or, in Corbin’s phrasing, a contract’s "legal operation must ... be in accordance with the meaning that the words convey to the court, not the meaning that the parties intended to convey".\textsuperscript{5} The opposing view is exemplified by art.133 of the German BGB: "the true intention shall be sought without regard to the [contract’s] literal meaning."\textsuperscript{6}

The common law focuses on the “plain meaning” of the final agreement between the parties, and exclusionary rules work to shut out evidence extrinsic to the written contract: evidence of the parties’ communications and actions before, contemporaneous with, and subsequent to the conclusion of the contract, and of their subjective intent or understanding of what the contract meant. Because the exclusionary rules can have unjust or absurd effects, a number of exceptions have been developed. The result is a complex set of overlapping rules and exceptions. The civil law has no counterparts to these rules. It admits all relevant extrinsic evidence and charges the adjudicator to assign evidence more or less weight, according to its reliability and relevance.

This description is necessarily oversimplified, and common law courts are now significantly more friendly to the inclusion of extrinsic evidence than in the past. In any given case, therefore, civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable. The common law’s dedication to objective interpretation is such that, even after accounting for the various exceptions, there are three classes of evidence that, generally speaking, the civil law and common law courts may ultimately reach the same interpretation. However, the underlying doctrines remain irreconcilable.

Arbitral tribunals may also be called upon to interpret contracts governed by one of the international contract law instruments, most prominently the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). All of the major international contract law instruments except the (now practically defunct) Uniform Law for International Sales (ULIS) contain clauses that specify the method of interpretation and the admissibility of extrinsic evidence. The international contract...
relative to contracts of international law are tant amount to common law. They demand that the arbiters to interpret the contracts subjectively; namely, that for the freedom of contract, the arbitrator also to resolve these contractual disputes, it is necessary that another party to understand this sense or, at all the more, that the text must be interpreted in such a way that a certain subjectivity may not be regarded as a de facto exclusion of the extrinsic evidence. For instance, if the sentence is focused on the literal meaning of the contract, it is then impossible to know if the extrinsic evidence has been excluded for legal reasons, or was never introduced by the parties, or was presented in an unconvincing manner and discounted, or was unnecessary because the contractual text was clear. Moreover, most of the awards are published in extracted form, and it is possible that relevant discussions were excluded from the published extract. Nevertheless, despite these caveats, certain patterns can be observed.

In theory, the available awards ought to be neatly divisible into four distinct categories, based on the applicable law. Awards governed by common law would begin with an objective interpretation of the plain meaning of the contract and exclude extrinsic evidence. Awards governed by civil law would employ subjective interpretation of contractual terms and liberally admit extrinsic evidence. The same would be true of awards governed by an international contract law instrument. Awards adjudicated under amiable composition or governed by general principles of international law will not necessarily employ the same interpretive methods because tribunals may differ as to the fair result in a given case or as to the content of the relevant general principles. In those cases, and in cases where the tribunal makes no explicit analysis of the law applicable to contractual interpretation, tribunals must be following some method of contractual interpretation, although they do not always make that method explicit. Whatever that method is, its source is likely to be some assumption as to customary practices in arbitration or general principles of international law applicable to the admission of evidence.

ANALYSE DES SENTENCES PUBLIEES

Etant donné le champ assez réduit de l'étude (53 sentences) et le fait que les arbitrages ne détaillent pas toujours les raisons pour lesquelles ils ont pris en compte ou non les preuves extrinsèques, il est difficile de se prononcer sur les préférences des arbitres. Il ne faut pas accorder trop d'importance aux sentences dans lesquelles le point de vue de l'arbitre sur la preuve extrinsèque n'est pas explicitement développé. Par exemple, si la sentence se fonde exclusivement sur le sens littéral du contrat, il est alors impossible de savoir si la preuve extrinsèque a été exclue pour des raisons juridiques, ou parce qu'elle a été présentée de façon peu convaincante, ou si elle n'a pas été nécessaire car les termes du contrat étaient clairs. De plus, la plupart du temps, seuls des extraits de sentences sont publiés, il est donc possible que les débats sur les preuves extrinsèques ne figurent pas dans les extraits publiés. Malgré ces réserves, il est néanmoins possible de relever certains aspects communs à ces sentences.

En théorie, les sentences devraient pouvoir être classées en quatre catégories distinctes en fonction du droit applicable. Les sentences rendues conformément au droit d'un pays de droit international devraient généralement débuter par une interprétation objective du contrat et exclure toute preuve extrinsèque. Les sentences rendues conformément au droit de la civil law devraient, elles, commencer par une interprétation objective du contrat et admettre de façon plus large les preuves extrinsèques. Il en irait de même pour les sentences rendues conformément aux règles de droit international des contrats. Les sentences rendues par un tribunal statuant en matière de droit international ne précisent pas nécessairement les mêmes méthodes. Ainsi pour des raisons similaires, les tribunaux ne parviennent pas forcément au même résultat et n'interprètent pas les préférences juridiques applicables à l'espèce du même façon. Dans ces cas-là, ainsi que dans tous ceux dans lesquels le tribunal ne fait aucune analyse explicite du droit applicable au contrat, le tribunal adopte nécessairement une méthode d'interprétation du contrat sans pour autant en préciser les contours. Quelle que soit cette méthode, elle trouve probablement sa source dans des présuppositions quant aux usagers en arbitrage ou aux préférences juridiques de droit international applicables aux conditions d'admission de la preuve.

ANALYSIS OF PUBLISHED AWARDS

Given this study's small sample size (53 awards) and the fact that most arbitrators do not state their reasons for considering or failing to consider extrinsic evidence, no firm statement can be made about the "preferences" of international arbitrators. Care must be taken not to read too much into the awards where the arbitrator's view of the extrinsic evidence is not explicitly discussed. For example, if the award focuses solely on the language of the contract, it is impossible to tell whether extrinsic evidence was excluded on legal grounds, or was never introduced by the parties, or was presented in an unconvincing manner and discounted, or was unnecessary because the contractual text was clear. Moreover, most of the awards are published in extracted form, and it is possible that relevant discussions were excluded from the published extract. Nevertheless, despite these caveats, certain patterns can be observed.

In theory, the available awards ought to be neatly divisible into four distinct categories, based on the applicable law. Awards governed by common law would begin with an objective interpretation of the plain meaning of the contract and exclude extrinsic evidence. Awards governed by civil law would employ subjective interpretation of contractual terms and liberally admit extrinsic evidence. The same would be true of awards governed by an international contract law instrument. Awards adjudicated under amiable composition or governed by general principles of international law will not necessarily employ the same interpretive methods because tribunals may differ as to the fair result in a given case or as to the content of the relevant general principles. In those cases, and in cases where the tribunal makes no explicit analysis of the law applicable to contractual interpretation, tribunals must be following some method of contractual interpretation, although they do not always make that method explicit. Whatever that method is, its source is likely to be some assumption as to customary practices in arbitration or general principles of international law applicable to the admission of evidence.
As to the source of those principles, current arbitral practice resembles—and in fact owes much to—the practices established by public international law tribunals, principally the International Court of Justice (ICJ) and its predecessor, the Permanent International Court of Justice (PCIJ). These international tribunals have traditionally:

"... taken the view that they should hear and consider everything that each party has to say concerning the dispute. The tribunal itself determines the relevance, materiality and probative value of all evidence submitted by the parties...".9

The International Bar Association has promulgated a set of Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules), which exemplify arbitration’s inclusionary bias.10 The IBA Rules contain no provision relating to the interpretation of contracts. They state only that: “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence.”11 Such evidentiary rules are procedural in character and ought not to affect contractual interpretation, which is a matter of substantive law in both common law and civil law jurisdictions. Nevertheless, DiMatteo’s pronouncement that international tribunals are “freed of the limitations of the parol evidence rule” represents a widespread attitude.12

**Awards applying the law of common law jurisdictions**

Of the 53 published awards, seven involved cases where the applicable substantive law was that of a common law jurisdiction. Table 1 summarises the results:

---

<table>
<thead>
<tr>
<th>Award</th>
<th>Applicable Law and Tribunal Composition (where stated)</th>
<th>Mode of Interpretation and Treatment of Extrinsic Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Case No.4555 of 198513</td>
<td>Not stated, but clearly the law of a US state. Sole American arbitrator.</td>
<td>Declared that it would proceed by an objective method of interpretation. Applied the parol evidence rule, but cited an exception in order to admit evidence of a trade usage. However, also admitted other extrinsic evidence of one party’s subjective understanding of a term of the contract.</td>
</tr>
<tr>
<td>ICC Case No.4975 of 198814</td>
<td>English law. Three English barristers.</td>
<td>Declared that it would proceed by an objective method of interpretation. Citing relevant English case law, ruled that evidence of preliminary negotiations could be considered, but only as part of the surrounding circumstances of the contract.</td>
</tr>
</tbody>
</table>
The picture presented by these seven awards is not consistent. In three, the tribunal proceeded according to the letter of the applicable substantive law, following an objective method of interpretation and treating evidence in accordance with the applicable rules. In the others, the tribunal admitted some extrinsic evidence of the parties' subjective intent.

The three awards in the first category are unremarkable: the tribunals applied substantive law in the same way that courts in England or the United States would have. In ICC Cases

Tableau 1

<table>
<thead>
<tr>
<th>Affaire CCI No.849 de 1990</th>
<th>Droit du New Hampshire (application du Code commercial uniforme)</th>
<th>Le tribunal arbitral a déclaré avoir procédé à une interprétation objective et avoir retenu la preuve extrinsèque de l'intention des parties.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affaire CCI No.8564 de 1996</td>
<td>Droit du New Hampshire (application du Code commercial uniforme)</td>
<td>Le tribunal arbitral a déclaré avoir procédé à une interprétation objective et avoir retenu la preuve extrinsèque de l'intention des parties.</td>
</tr>
<tr>
<td>Affaire CCI No.8772 de 2003</td>
<td>Droit anglais.</td>
<td>Le tribunal arbitral a déclaré suivre une méthode d'interprétation objective donnant la primeauté au texte « clair et non équivoque » du terme contractual objet du litige. A admi et retenu comme preuve déterminante les déclarations d'un témoin ayant participé aux négociations contratuels.</td>
</tr>
<tr>
<td>Affaire CCI No.7722 de 1999</td>
<td>Droit de l'Illinois (application du Code commercial uniforme)</td>
<td>Le tribunal arbitral a appliqué une méthode d'interprétation objective. A exclu la preuve extrinsèque sur le fondement de l'article n° 2-202 du Code commercial uniforme qui prévoit expressément la parol evidence rule. A retenu comme preuve les usages commerciaux conformément à l'article 202(a), qui autorise l'admission de la preuve des usages tant que ces usages ne sont pas en contradiction avec le sens literal du contrat.</td>
</tr>
<tr>
<td>Affaire CCI No.6955 de 1993</td>
<td>Droit de l'Illinois (application du Code commercial uniforme)</td>
<td>Le tribunal arbitral a appliqué une méthode d'interprétation objective. A exclu la preuve extrinsèque sur le fondement de l'article n° 2-202 du Code commercial uniforme qui prévoit expressément la parol evidence rule. A retenu comme preuve les usages commerciaux conformément à l'article 202(a), qui autorise l'admission de la preuve des usages tant que ces usages ne sont pas en contradiction avec le sens literal du contrat.</td>
</tr>
</tbody>
</table>

Table 1

Ces sept affaires ne présentent pas une image cohérente. Dans trois cas, le tribunal a suivi à la lettre le droit applicable au fond, en respectant une méthode d'interprétation objective et en tenant en compte les preuves conformément aux règles applicables. Dans les autres cas, le tribunal a retenu des preuves extrinsèques de l'intention subjective des parties.

Les trois sentences de la première catégorie ne présentent pas d'intérêt majeur: les tribunaux arbitraux ont fait une application du droit matériel.

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Nos 4975 and 6955, the tribunals cited appropriate authorities for the exclusionary rules they then applied—in the former, the two then-leading English cases on the use of extrinsic evidence,29 and in the latter, the relevant provisions of the Uniform Commercial Code.30 In ICC Case No.8694, the tribunal cited no legal rule to support its interpretation of the contract but did explicate a mode of interpretation consistent with the applicable New Hampshire law.

ICC Case No.7722 is difficult to characterise because the applicable law was that of an unidentified Middle Eastern country. However, citations in the award to case law from several common law jurisdictions make it likely that the unstated country is itself a common law jurisdiction. The tribunal did not declare its adherence to any particular method of interpretation, but did cite a statute of the unidentified country that directs adjudicators to consider all the circumstances surrounding the conclusion of the contract, including the parties' correspondence. On the other hand, the tribunal also cited case law from the unidentified country that gives priority to the written text of the contract; if the text has an identifiable clear meaning, that meaning will be applied. It is therefore possible that the unidentified country's rules on contractual interpretation differ from traditional common law methods.

In the other three cases, the tribunals declared their adherence to common law methods of interpretation but then proceeded to admit evidence that a common law court would almost certainly have excluded.

In ICC Case No.5946, the sole arbitrator stated that New York law would apply to interpret the contract. He held that the plain meaning of the disputed term was both clear and decisive, but then considered extrinsic evidence of the parties' negotiations without explaining why it was admissible. The arbitrator found that the extrinsic evidence did not change the result, but a New York court is not likely to have admitted it.

In ICC Case No.4555, the dispute centred on the meaning of the word "unconditional" in the contract. The arbitrator stated that his intention, in interpreting the contract, was to "place substantial weight on the objective, commonly understood meaning of the contract language actually employed, and to give less weight to unarticulated and undocumented understandings". The arbitrator allowed that "[t]his meaning of the term could be overridden by persuasive evidence of standard commercial usage or the clear intent of the parties", a citation from a well-known (if dated) American treatise, Williston on Contracts.

Thus far, the arbitrator had followed the approach that an American court would likely have followed. However, he then identified to the extent that the tribunals étatiques anglois ou américains auraient fait. Dans les affaires CCI No.4975 et No.6955, les tribunaux citent les fondements légaux applicables pour les règles d'exclusion qu'ils appliquent ensuite. Dans la première affaire, ils font référence aux deux arrêtés anglais majeurs en matière d'utilisation de la preuve extrinsèque ; et dans la seconde, les dispositions du Code commercial uniforme en la matière. Dans l'affaire No.8694, le tribunal arbitral ne cite aucun fondement légal spécifique mais suit une méthode compatible avec le droit du New Hampshire.

L'affaire CCI No.7722 est plus difficile à analyser car le droit applicable en l'espèce est celui d'un État du Moyen-Orient non identifié. Néanmoins, les arbitres citent en référence des arrêtés relevant de juridictions de common law, il semble donc plausible que cet État soit un État de common law. Le tribunal arbitral ne déclare pas adhérer à une quelconque méthode d'interprétation, cependant il mentionne une loi d'un pays non identifié qui conduit les arbitrés à prendre en compte toutes les circonstances entourant la conclusion du contrat, y compris la correspondance des parties. Par ailleurs, le tribunal fait aussi référence à une jurisprudence d'un pays non identifié qui rend prioritaire l'interprétation littérale du contrat ; si le texte du contrat est clair et sans équivoque, il faut l'appliquer à la lettre. Sur ce point, il est possible que les règles de ce pays diffèrent de celles des pays de common law.

Dans les trois autres affaires, les tribunaux ont déclaré adhérer aux méthodes d'interprétation des contrats issues du droit des juridictions de common law mais malgré cela, ils ont admis des preuves qu'un tribunal étatique de common law aurait très certainement exclues.

Dans l'affaire CCI No.5946, l'arbitre unique a prévu que le droit de New York s'appliquerait à l'interprétation du contrat. Il soutient que le sens premier des termes du contrat au cœur du contentieux est clair et déterminant, mais il a pourtant examiné la preuve extrinsèque : les négociations des parties, sans préciser les raisons pour lesquelles cet élément de preuve était admissible. L'arbitre a considéré que cette preuve extrinsèque ne changeait pas l'issue de l'affaire, mais un tribunal de New York ne l'aurait très certainement pas admise.

Dans l'affaire CCI No.4555, le contentieux se concentre sur le sens à donner au terme « inconditionnel » dans le contrat. L'arbitre exprime son intention, dans l'interprétation du contrat, de « donner un poids significatif au sens objectif et communément partagé des termes employés dans le contrat et de donner moins d'importance aux éléments non justifiés et sans lien avec l'affaire ». L'arbitre reconnaît que « le sens des mots pourrait être altéré si on apportait une preuve suffisamment convaincante d'usages commerciaux différents ou d'une intention autre des parties », citant ainsi un passage du célèbre manuel de droit américain Williston on Contracts.

Jusqu'ici l'arbitre avait suivi une approche identique à celle d'un tribunal américain. Cependant, il a ensuite...
admis un témoignage affirmant que le demandeur croyait que la lettre de crédit était conforme aux exigences posées par le contrat, admettant ainsi une preuve subjective extrinsèque qu'un tribunal étranger aurait très certainement exclu. L’arbitre, en vint probablement à la conclusion que la preuve de l’accord exprès voulu par les parties avait plus de poids que la preuve de l’intention subjective d’une des parties, mais un tribunal étranger américain n’aurait très probablement pas admis une telle preuve de toute manière.

Enfin, dans l’affaire CCI No.12172, le droit applicable était le droit anglais. Cependant, lors de l’audience, l’arbitre a pris en compte les déclarations d’un témoin « directement en charge des négociations avec le défendeur ». Ce témoin a apporté la preuve de ses impressions personnelles sur ce qui avait été conclu pendant les négociations. En qualifiant le témoin de « crédible », l’arbitre accepte son témoignage comme une preuve décisive pour certains aspects du litige. L’arbitre a aussi pris en compte des extraits de la correspondance des parties qu’un tribunal anglais aurait très certainement exclus et tenus pour inadmissibles car constituant une preuve orale.

Les sentences faisant application du droit d’un pays de civil law
La plus grande partie des affaires, 33 sur 53, faisait application au fond d’un droit de civil law. Le tableau 2 présente les résultats de l’étude.

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Droit applicable et composition du tribunal (séïge du tribunal)</th>
<th>Méthode d’interprétation et traitement de la preuve extrinsèque</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affaire CCI No.1434 de 1976</td>
<td>Droit français.</td>
<td>Le tribunal arbitral a cité les principes d’interprétation du Code civil français et a admis la preuve extrinsèque, mais a considéré que cet élément ne pouvait pas s’ajouter à une interprétation des textes de l’accord.</td>
</tr>
<tr>
<td>Affaire CCI No.2708 de 1976</td>
<td>Droit français.</td>
<td>Le tribunal arbitral a estimé que les documents écrits étaient clairs, mais a aussi relevé un certain nombre d’usages commerciaux. A admis la preuve extrinsèque, mais l’a considérée comme ne pouvant pas suffisamment la volonté des parties de déroger à l’usage.</td>
</tr>
</tbody>
</table>

admitted testimony to the effect that the claimant believed that the letter of credit it opened conformed to the requirements of the contract, thus allowing into the record subjective, extrinsic evidence that a court would likely have excluded. The arbitrator did eventually find that evidence of the parties’ expressed agreement held more weight than evidence of one party’s subjective intent, but an American court is unlikely to have admitted such direct evidence of party intent in the first place.

Finally, inICC Case No.12172, the applicable law was English. However, at the hearing, the sole arbitrator considered the testimony of a witness “directly responsible for negotiating the contract with the Respondent”. This witness gave evidence on his impressions of what was agreed during the parties’ negotiations. Describing the witness as “credible”, the arbitrator accepted his evidence as decisive on one of the points of dispute between the parties. The arbitrator also considered elements of the parties’ correspondence that an English court would likely have held to be inadmissible parol evidence.

Awards applying the law of civil law jurisdictions
The largest group of the published awards, 23 of the 53, involved application of the substantive law of a civil law jurisdiction. Table 2 summarises the results:

<table>
<thead>
<tr>
<th>Award</th>
<th>Applicable Law and Tribunal Composition (where stated)</th>
<th>Mode of Interpretation and Treatment of Extrinsic Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Case No.1250 of 1964</td>
<td>Lebanese law (based on French law). French Chair and Lebanese and Swedish co-arbitrators.</td>
<td>Decided based on text of the contract alone. No reasoning given in the extract.</td>
</tr>
<tr>
<td>ICC Case No.1434 of 1975</td>
<td>French law.</td>
<td>Cited the French Civil Code for principles of interpretation, admitted extrinsic evidence, but found that the evidence did not prove either side’s interpretation of the contract. Applied a third interpretation, which it found in the text of the contract.</td>
</tr>
<tr>
<td>ICC Case No.2708 of 1976</td>
<td>French law.</td>
<td>Found written document to be clear but also found relevant trade usage. Admitted extrinsic evidence, but found it insufficient to show that parties derogated from the usage.</td>
</tr>
<tr>
<td>ICC Case No.3055 of 1980</td>
<td>Swiss law.</td>
<td>Decided based on text of the contract alone. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
</tbody>
</table>
### INTERNATIONAL COMMERCIAL ARBITRATORS’ APPROACHES TO CONTRACTUAL INTERPRETATION

<table>
<thead>
<tr>
<th>Case</th>
<th>Jurisdiction</th>
<th>Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Case No.3130 of 1980&lt;sup&gt;28&lt;/sup&gt;</td>
<td>French law. Sole French arbitrator.</td>
<td>Decided based on text of the contract alone, including expressly incorporated INCOTERM. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.3894 of 1981&lt;sup&gt;29&lt;/sup&gt;</td>
<td>West German law.</td>
<td>Decided based on text of the contract alone, including expressly incorporated INCOTERM. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.4131 of 1982&lt;sup&gt;30&lt;/sup&gt;</td>
<td>French law. Dutch chair and two French co-arbitrators.</td>
<td>Admitted and considered a variety of extrinsic evidence, basing its decision largely on the parties’ negotiations and their subsequent conduct. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.5080 of 1985&lt;sup&gt;31&lt;/sup&gt;</td>
<td>Swiss law. Sole Swiss arbitrator.</td>
<td>Admitted extrinsic evidence of the parties’ negotiations, which was dispositive of their intent. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.5485 of 1987&lt;sup&gt;32&lt;/sup&gt;</td>
<td>Spanish law. Spanish chair and two Spanish co-arbitrators.</td>
<td>Admitted extrinsic evidence of parties’ subjective intentions, but found disputed contractual term to be clear on its face. Citing the maxim in claris non fit interpretatio, applied a provision of the Spanish civil code that embodies it, interpreted the term literally and discounted the extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No. 5505 of 1987&lt;sup&gt;33&lt;/sup&gt;</td>
<td>Swiss law. Sole Swiss arbitrator.</td>
<td>Declared its intention to follow Swiss rules of interpretation. Held that available extrinsic evidence was insufficient to establish the parties’ true common intention, so interpreted the clause “objectively”.</td>
</tr>
<tr>
<td>ICC Cases Nos 6515 and 6516 (joined) of 1994&lt;sup&gt;34&lt;/sup&gt;</td>
<td>Greek law.</td>
<td>Decided based on text of the contract alone. Neither party adduced any extrinsic evidence, nor did the tribunal request its production.</td>
</tr>
<tr>
<td>ICC Case No.6227 of 1991&lt;sup&gt;35&lt;/sup&gt;</td>
<td>Turkish law (adopted Swiss law).</td>
<td>Declared its intention to follow Swiss rules of interpretation. Held that the disputed term was vague and extrinsic evidence did not clarify it, but found term was implied by international trade usages.</td>
</tr>
<tr>
<td>ICC Case No.6653 of 1993&lt;sup&gt;36&lt;/sup&gt;</td>
<td>French law.</td>
<td>Admitted extrinsic evidence of parties’ negotiations, which was decisive.</td>
</tr>
<tr>
<td>Affaire CCI No.5485 de 1987</td>
<td>Droit espagnol. Président français et deux co-arbitres espagnols.</td>
<td>Le tribunal arbitral a admis la preuve extrinsèque de l’intention subjective des parties, mais a considéré que les termes du contrat en jeu étaient suffisamment clairs. Citant la maxim “in claris non fit interpretatio” et l’article du Code civil espagnol qui le contient, a interprété les termes de manière littérale et écarté la preuve extrinsèque.</td>
</tr>
<tr>
<td>Affaire CCI No.5505 de 1987</td>
<td>Droit suisse. Arbitre unique suisse.</td>
<td>Le tribunal arbitral a exprimé son intention de respecter les règles du droit suisse en matière d’interprétation. Il a considéré que les preuves extrinsèques disponibles dans cette affaire n’étaient pas suffisantes pour établir la véritable intention commune des parties ; a donc interprété la clause de manière objective.</td>
</tr>
<tr>
<td>Affaires CCI Nos 6515 et 6516 (jointes) de 1994</td>
<td>Droit gréc.</td>
<td>Le tribunal arbitral a pris sa décision sur le seul fondement du texte du contrat. Aucune des deux parties n’a fourni de preuve extrinsèque, le tribunal n’a pas non plus ordonné la production de telles preuves.</td>
</tr>
<tr>
<td>Affaire CCI No.6227 de 1991</td>
<td>Droit turc (ayant adopté le droit suisse).</td>
<td>Le tribunal arbitral a exprimé son intention d’appliquer les règles du droit suisse en matière d’interprétation. Il a considéré que le terme litigieux était vague et que la preuve extrinsèque ne suffisait pas à le rendre plus clair. A décidé que le terme litigieux était induit par les usages du commerce international.</td>
</tr>
<tr>
<td>Affaire CCI No.6653 de 1993</td>
<td>Droit français.</td>
<td>Le tribunal arbitral a admis la preuve extrinsèque du contenu des négociations, preuve qui s’est révélée être déterminante.</td>
</tr>
<tr>
<td>Case</td>
<td>Law</td>
<td>Description</td>
</tr>
<tr>
<td>------</td>
<td>-----</td>
<td>-------------</td>
</tr>
<tr>
<td>ICC Case No.6673 of 1992</td>
<td>French law</td>
<td>Decided based on text of the contract alone. Unclear whether extrinsic evidence was considered.</td>
</tr>
<tr>
<td>ICC Case No.7518 of 1994</td>
<td>Portuguese law</td>
<td>Declared it would proceed by a subjective method of interpretation. Admitted extrinsic evidence of one party’s undeclared subjective intent, negotiations and subsequent conduct. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.7792 of 1994</td>
<td>Spanish law</td>
<td>Analysed terms of the contract, then admitted extrinsic evidence of the parties’ negotiations, which were decisive. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.9443 of 1998</td>
<td>French law</td>
<td>Found that the plain meaning of the contract could not be enforced, as contrary to general principles of French law and international commerce. Applied a meaning consistent with those principles. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.10188 of 1999</td>
<td>German law</td>
<td>Declared that it would follow German methods of interpretation, citing BGB s 133. Found that the contract contained a gap. Admitted extrinsic evidence of prior dealings between the parties and of the negotiations to fill the gap.</td>
</tr>
<tr>
<td>ICC Case No.11440 of 2003</td>
<td>German law</td>
<td>Declared that it would follow German methods of interpretation, citing BGB s 133, 157. Admitted but discounted extrinsic evidence, because it could determine “the will the parties presumably had” from the available materials.</td>
</tr>
<tr>
<td>ICC Case No.11776 of 2002</td>
<td>French law</td>
<td>Decided based on text of the contract alone. Unclear whether extrinsic evidence was considered.</td>
</tr>
<tr>
<td>ICC Case No.12745</td>
<td>French law</td>
<td>Declared that it would follow French methods of interpretation. Began with the plain meaning of the contract, including expert witness testimony on the correct translation of Italian phrases in the contract. Admitted extrinsic evidence of the negotiators’ understandings of the meaning of the text.</td>
</tr>
</tbody>
</table>
There was little discussion of the rules of admissibility in the awards applying national civil laws. This is to be expected; civil law systems generally do not possess rules that specifically regulate the admission of extrinsic evidence. In no case was extrinsic evidence excluded, and all of the tribunals appear to have followed a subjective method of interpretation. In less than half the awards (10), the tribunal did not discuss any extrinsic evidence, in each case because the tribunal found the contract to be clear on its face.47 In three awards, the tribunals admitted extrinsic evidence but declined to consider it because the contract was clear.48 In other words, the tribunals found that the evidence proffered could not be used to overcome the ordinary meaning of a clearly-drafted contractual term.

In several awards, the tribunals considered extrinsic evidence but discounted it because the contract was clear. This approach appears to be taken for granted—all but two of the tribunals that adopted it did so without separate justification. The only tribunals to cite a legal basis for this textualist approach were those in ICC Case Nos 5485 and 13278. The contracts in both cases were governed by Spanish law, and both tribunals cited the same provisions of the Spanish Civil Code that, if a contractual term is clear and leaves no doubt as to the intention of the parties, it should be interpreted literally. Such an approach is consistent with that which a Spanish court would have taken: admitting extrinsic evidence but discounting it when it conflicts with the plain meaning of a clear contractual term.

This pattern—first looking at whether the written contract, in its context, is clear, and then if necessary examining extrinsic

Il y a très peu de discussions sur les règles d'admissibilité de la preuve dans les sentences faisant application de droits nationaux de civil law. Cela était prévisible ; les systèmes de civil law n'ont pas en général de règles qui traitent spécifiquement de l'admissibilité de la preuve extrinsèque. Dans aucun des cas la preuve extrinsèque a été exclue, et tous les tribunaux semblent avoir suivi une méthode d'interprétation subjective. Dans moins de la moitié des sentences (dix), le tribunal n'a pas étudié la preuve extrinsèque car il a considéré à chaque fois que les termes du contrat étaient suffisamment clairs.

Dans trois sentences, le tribunal a admis et analysé la preuve extrinsèque mais ne l'a pas prise en compte, considérant que les termes du contrat étaient clairs. Dans ces cas-là, soit les parties n'ont pas proposé toute preuve extrinsèque, soit le tribunal n'a pas trouvé que les preuves extrinsèques produites étaient suffisamment convaincantes pour modifier le sens commun des termes d'un contrat rédigé de façon claire.

Dans plusieurs sentences, le tribunal semble avoir écarté la preuve extrinsèque car les termes du contrat étaient suffisamment clairs. Cette approche semble être acquise — tous sauf deux tribunaux l’ayant adoptés l’ont fait sans justification particulière. Les seuls tribunaux qui ont cité un fondement pour cette approche d'interprétation littérale sont ceux des affaires CCI No.5485 et No.13278. Dans ces deux affaires, les contrats étaient soumis au droit espagnol et les deux tribunaux ont cité les mêmes dispositions du Code civil espagnol, selon lesquelles, si une disposition contractuelle est claire et ne laisse aucun doute quant à l'intention des parties, elle doit être interprétée de façon littérale. Une telle approche est conforme à celle qui aurait eue un tribunal espagnol : la preuve extrinsèque est admise, mais elle est écartée si elle entre en conflit avec le sens premier des termes du contrat quand ils sont clairs.

Ce schéma — voir d'abord si les termes du contrat dans leur contexte sont clairs, pour ensuite examiner la...
More distinctly civilian in their approach are cases where the tribunal considered extrinsic evidence regardless of the clarity or completeness of the written contract. In every case applying a national civil law in which extrinsic evidence was admitted, the tribunal considered evidence of the parties' subjective intentions, ranging from draft contracts and other negotiation correspondence, to witness testimony about the negotiators' understandings, to internal memoranda of one party, to ancillary contracts concluded between the parties. In four awards, the tribunal considered evidence of one or both parties' subsequent conduct.

Taken together, these awards tend to show that, when applying the law of civil law countries, tribunals will not hesitate to consider any extrinsic evidence that may be helpful in determining the intent of the parties. However, none of the tribunals sought out such evidence on their own motion.

Tribunals were similarly consistent in expressing their fidelity to the principle of subjective interpretation. In eight awards, the tribunal expressly declared its intention to seek the "true intention" of the parties or otherwise indicated that it would proceed by a subjective interpretive method. In some of these cases, the tribunal cited the articles of the relevant civil code that express the principle of subjectivity.

All of the awards applying the civil law adhered to subjective interpretation, except for two awards where the tribunal found that there was insufficient evidence to determine the parties' true intent. In civil law jurisdictions, when the true intent of the parties cannot be determined, even with the help of relevant usages, implied terms, and evidence of the parties' prior negotiations and subsequent conduct, courts will determine the parties' "hypothetical" intention by application of a reasonableness standard—in other words, objective interpretation. The tribunals proceeded in a manner consistent with that of a domestic court applying civil law principles.

**Awards applying international contract law instruments**

Eight of the 53 published awards involved the application of an international contract law instrument as the substantive law of the contract. Table 3 summarises the results:
### Table 3

<table>
<thead>
<tr>
<th>Award</th>
<th>Applicable Law and Tribunal Composition (where stated)</th>
<th>Mode of Interpretation and Treatment of Extrinsic Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Case No.6309 of 1991</td>
<td>The ULIS, via West German private international law.</td>
<td>Did not refer to lack of interpretive guidance from the ULIS. Admitted extrinsic evidence of the parties’ negotiations and of other documents. Did not discuss admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.7585 of 1994</td>
<td>The CISG, as express choice of the parties.</td>
<td>Decided based on text of the contract alone, which it characterised as clear. Unclear whether either party sought to introduce extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.7645 of 1995</td>
<td>The CISG, via Austrian private international law.</td>
<td>Declared that it would proceed by the methods contained in CISG art.8, but resolved dispute without reference to extrinsic evidence.</td>
</tr>
<tr>
<td>ICC Case No.8324 of 1995</td>
<td>The CISG, via French private international law.</td>
<td>Declared that it would proceed by the methods contained in CISG art.8. Considered the plain meaning of the contract, but also admitted a variety of extrinsic evidence. Did not discuss admissibility.</td>
</tr>
<tr>
<td>ICC Case No.8782 of 1997</td>
<td>The CISG, via Danish private international law.</td>
<td>Admitted extrinsic evidence of negotiations and subsequent conduct. Did not discuss admissibility.</td>
</tr>
<tr>
<td>ICC Case No.8817 of 1997</td>
<td>The CISG, via Spanish private international law.</td>
<td>Admitted extrinsic evidence of the parties’ negotiations and subsequent conduct. Did not discuss admissibility.</td>
</tr>
<tr>
<td>ICC Case No.10377 of 2002</td>
<td>The CISG, as express choice of the parties.</td>
<td>Decided based on text of the contract and evidence of a trade usage, proved by testimony from an expert appointed by the tribunal.</td>
</tr>
<tr>
<td>ICC Case No.12173</td>
<td>The Swiss law.</td>
<td>Cited expert report on contractual interpretation under the CISG. On the basis of this report, started with the text of the contract, then considered extrinsic evidence of the parties’ negotiations.</td>
</tr>
</tbody>
</table>

### Tableau 3

Le traitement de la preuve extrinsèque est cohérent dans toutes ces sentences. Dans chaque cas, la preuve extrinsèque a été admise ; elle a été expressément mentionnée dans six des huit sentences. Dans les deux dernières sentences, les tribunaux ont admis la preuve extrinsèque, mais ne se sont pas fondés sur cette dernière pour rendre leur décision car le contrat était « clair ». Les autres sentences appliquant la CVIM suivent scrupuleusement les règles prévues par cette Convention.

The treatment of extrinsic evidence is consistent in these awards. In every case, extrinsic evidence was admitted; it was specifically mentioned in six of the eight awards. In the other two, the tribunals admitted extrinsic evidence but did not rely on it to reach a decision because the contract was “clear.” The other awards applying the CISG follow its rules closely.
La sentence dans l’affaire CCI No.6309, dans laquelle la Convention ULIS est la loi applicable, revêt une importance particulière car cette dernière ne contient pas de dispositions concernant l’interprétation des contrats ou l’admissibilité des preuves extrinsèques. Le demandeur s’était engagé à vendre au défendeur un système d’ascenseurs pour un immeuble de bureaux. Le demandeur avait joint à son offre une copie des Conditions Générales de l’Association allemande des Entreprises de Constructions Mécaniques (« les Conditions VDMA »). Cependant, ces dernières ne furent pasJointes à la « confirmation de commande » que le demandeur envoya après avoir reçu l’acceptation du défendeur. Le défendeur plaça que les Conditions VDMA n’avaient pas été incorporées au contrat. L’arbitre unique admit la preuve extrinsèque et jugea que le défendeur devait avoir été au courant des Conditions VDMA car elles avaient été jointes à l’offre du demandeur. L’absence d’objection de sa part aux Conditions VDMA a eu pour conséquence qu’elles sont devenues partie intégrante des obligations du contrat. Malheureusement, la sentence ne s’exprime pas sur l’admissibilité de cette preuve.

**Sentences appliquant des principes généraux ou déclarant aucun droit matériel applicable**

Six des 53 sentences publiées mettaient en jeu l’application des principes généraux de droit international au fond du contrat. Pour le besoin de la présente étude, ces sentences ont été placées dans la même catégorie que les huit sentences qui ne faisaient pas d’appréciations sur le droit matériel. Lorsque l’interprétation se fait sans référence au droit applicable au fond, le tribunal a probablement fondé sa méthode interprétative sur ce qu’il considérait comme appartenant aux principes généraux de droit international commercial. Le tableau 4 présente les résultats:

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Droit applicable et composition du tribunal (quand indiqué)</th>
<th>Méthodes d’interprétation et traitement des preuves extrinsèques</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affaire CCI No.2103 de 1972</td>
<td>Aucun droit déclaré applicable au fond.</td>
<td>Le tribunal arbitral a admis la preuve extrinsèque des négociations des parties mais en a fait abstraction. A décrit le contrat comme étant « clair et explicite », et l’a donc interprété de façon littérale.</td>
</tr>
<tr>
<td>Affaire CCI No.2291 de 1975</td>
<td>Aucun droit déclaré applicable au fond.</td>
<td>Le tribunal arbitral a pris sa décision sur la base de la preuve extrinsèque des négociations, ce qui était justifié car le contrat avait été conclu lors par un échange de courriers.</td>
</tr>
<tr>
<td>Affaire CCI No.2478 de 1974</td>
<td>Aucun droit déclaré applicable au fond.</td>
<td>Le tribunal arbitral a pris sa décision sur la seule base du contrat.</td>
</tr>
<tr>
<td>Affaire CCI No.3267, sentence partielle de 1979</td>
<td>Amiable composition, Président suisse et deux co-arbitres français.</td>
<td>Contrat de type « Anglo-américain » très détaillé, le tribunal arbitral a interprété sans faire référence à une preuve extrinsèque. A classé le contrat selon son type et en a déduit des dispositions implicites.</td>
</tr>
</tbody>
</table>

The award in ICC Case No.6309, where the ULIS was the applicable law, is of interest because the ULIS contains no provision relating to the interpretation of contracts or to the admissibility of extrinsic evidence. The claimant contracted to sell to the respondent a lift system for an office building. The claimant had attached to its offer a copy of the General Conditions of the Association of German Mechanical Construction Firms (“the VDMA Conditions”). However, these were not attached to the “order confirmation” that the claimant sent after receiving the respondent’s acceptance. The respondent argued that the VDMA Conditions had not been incorporated into the contract. The sole arbitrator admitted extrinsic evidence, and held that the respondent must have been aware of the VDMA Conditions because of their attachment to the claimant’s offer. Its failure to object to the VDMA Conditions meant that they became binding obligations of the contract. Unfortunately, the award does not address the admissibility of this evidence.

**Awards applying general principles or stating no applicable substantive law**

Six of the 53 published awards involved application of general principles of international law to the substance of the contract. For the purposes of this analysis, these have been placed in the same category as the eight awards that contained no discussion of substantive law. When interpretation occurs without any reference to substantive law, the tribunal must have drawn its interpretive method from what it saw as the general principles of international commercial law. Table 4 summarises the results:

<table>
<thead>
<tr>
<th>Award</th>
<th>Applicable Law and Tribunal Composition (where stated)</th>
<th>Mode of Interpretation and Treatment of Extrinsic Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Case No.2103 of 1972</td>
<td>No applicable law stated.</td>
<td>Admitted extrinsic evidence of parties’ negotiations but discounted it. Found the contract to be “clear and explicit” so interpreted according to its plain meaning.</td>
</tr>
<tr>
<td>ICC Case No.2291 of 1975</td>
<td>No applicable law stated.</td>
<td>Decided based on extrinsic evidence of negotiations, justified because contract was concluded by exchange of correspondence.</td>
</tr>
<tr>
<td>ICC Case No.2478 of 1974</td>
<td>No applicable law stated.</td>
<td>Decided based on text of contract alone.</td>
</tr>
<tr>
<td>Case No.</td>
<td>Facts</td>
<td>Interpretation/Conclusion</td>
</tr>
<tr>
<td>----------</td>
<td>-------</td>
<td>----------------------------</td>
</tr>
<tr>
<td>3820</td>
<td>Sole of the contract because it conflicted with rules on documentary credits expressly incorporated into the contract.</td>
<td>Refused to apply literal reading of the contract.</td>
</tr>
<tr>
<td>6281</td>
<td>Parties' negotiations. Did not address admissibility of extrinsic evidence.</td>
<td>Decided based on &quot;reasonableness&quot; alone, without reference to the text of the contract or extrinsic evidence.</td>
</tr>
<tr>
<td>6378</td>
<td>&quot;The common usages of international commerce, also called lex mercatoria&quot;. Sole arbitrator.</td>
<td>Interpreted the contract according to its ordinary meaning and the type of contract it was, then considered extrinsic evidence of parties' negotiations and prior course of dealing. Did not address admissibility of extrinsic evidence.</td>
</tr>
<tr>
<td>6378</td>
<td>No applicable law.</td>
<td>Admitted extrinsic evidence of parties' negotiations. Did not address admissibility.</td>
</tr>
<tr>
<td>8035</td>
<td>No applicable law.</td>
<td>Admitted extrinsic evidence of parties' negotiations and of trade usages. Did not address admissibility.</td>
</tr>
<tr>
<td>12127</td>
<td>Began with analysis of a &quot;combination of various provisions of the contract&quot; to find the subjective intention of parties.</td>
<td>Began with analysis of the text of the contract. Held to be decisive according to witness testimony of parties' understandings of the contract's meaning. Did not discuss admissibility.</td>
</tr>
</tbody>
</table>

States: Sole, Dutch arbitrator.

ICC Case No.3820 of 1981

- No applicable law stated. Sole of the contract because it conflicted with rules on documentary credits expressly incorporated into the contract. Noted that result reached would be "understandable and acceptable" in international trade.

ICC Case No.6281 of 1989

- No applicable law stated. Decided based on "reasonableness" alone, without reference to the text of the contract or extrinsic evidence.

ICC Case No.8035 of 1995

- No applicable law stated. Admitted extrinsic evidence of parties' negotiations and of trade usages. Did not address admissibility.

ICC Case No.12127 of 2003

- Began with analysis of a "combination of various provisions of the contract" to find the subjective intention of parties. Considered extrinsic evidence of parties' negotiations. Did not address admissibility.

ICC Case No.12421/MS of 2005

- Began with analysis of the text of the contract. Held to be decisive according to witness testimony of parties' understandings of the contract's meaning. Did not discuss admissibility.

Affaire CCI No.3820 of 1981

- No applicable law. Refused to apply literal reading of the contract. Held to be "understandable and acceptable" in international trade.

Affaire CCI No.6281 of 1989

- No applicable law. Decided based on "reasonableness" alone, without reference to the text of the contract or extrinsic evidence.

Affaire CCI No.8035 of 1995

- No applicable law. Admitted extrinsic evidence of parties' negotiations and of trade usages. Did not address admissibility.

Affaire CCI No.12127 of 2003

- Began with analysis of a "combination of various provisions of the contract" to find the subjective intention of parties. Considered extrinsic evidence of parties' negotiations. Did not address admissibility.

Affaire CCI No.12421/MS of 2005

- No applicable law. Began with analysis of the text of the contract. Held to be decisive according to witness testimony of parties' understandings of the contract's meaning. Did not discuss admissibility.

- No applicable law. Began with analysis of the text of the contract. Held to be decisive according to witness testimony of parties' understandings of the contract's meaning. Did not discuss admissibility.

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- No applicable law. Began with analysis of the text of the contract. Held to be decisive according to witness testimony of parties' understandings of the contract's meaning. Did not discuss admissibility.
Les cas comportant une application de principes généraux de droit international matériel — principalement ceux dans lesquels les arbitres statuent en amiables compositeurs — fournissent les indications les plus claires sur le processus de pensée des tribunaux du commerce international ; ces principes donnent aux tribunaux la plus grande latitude pour appliquer les règles qu’ils considèrent appropriées. Néanmoins, ce sont uniquement dans l’affaire CCI No.13129 et dans l’arbitrage Eurotunnel que les tribunaux ont explicitement discuté la question de savoir quelles règles ils allaient appliquer à l’interprétation des contrats et à l’utilisation de la preuve extrinsèque.

Le tribunal Eurotunnel, composé de cinq membres, convoqués sous l’auspice de la Cour permanente d’arbitrage, était constitué d’arbitres reconnus issus de juridictions de common law et de civil law. Le tribunal fut invité à interpréter un traité et un contrat, et il appliqua les règles interprétatives de la Convention de Vienne sur le droit des traités (CVDT) aux deux. Le tribunal commença par analyser le sens ordinaire du contrat selon les parties, tenant compte du contexte, puis procédant à une « interprétation complémentaire » sur la base de preuves extrinsèques. Les deux parties souhaitaient introduire la preuve extrinsèque de leurs négociations, ce que le tribunal a admis tout en signalant qu’il la considérait avec « grande précaution ». Cette approche est fidèle aux règles posées dans la CVDT.

Dans l’affaire CCI No.13129, l’arbitre unique, malgré des « réserves quant à l’existence réelle de quoi que ce soit qui puisse être qualifié de lex mercatoria », appliqua les principes généraux car il ne trouva pas de raisons d’appliquer un droit national particulier. Néanmoins, il nota que l’application du droit anglais — le seul droit national susceptible d’être en relation avec le contrat — conduirait probablement au même résultat.


Le tribunal arbitral a déclaré qu’il procéderait selon une méthode d’interprétation subjective. Il indiqua qu’une « approche stricte et légaliste » était inopportune. A considéré les preuves extrinsèques de la correspondance échangée entre les parties avant et après la conclusion du contrat.

Cases involving the application of general principles of substantive international law and those involving amiable composition provide the clearest evidence of the thought processes of international commercial tribunals; these circumstances give tribunals the greatest latitude to apply whatever rules they consider appropriate. However, only in ICC Case No.13129 and the Eurotunnel arbitration did the tribunals discuss explicitly what rules they would apply with respect to the interpretation of the contract and the use of extrinsic evidence.

The five-member Eurotunnel tribunal, convened under the auspices of the Permanent Court of Arbitration, was composed of prominent arbitrators from both civil and common law backgrounds. It was called upon to interpret both a treaty and a contract, and applied the interpretive rules of the Vienna Convention on the Law of Treaties (VCLT) to both. The tribunal began with the ordinary meaning of the parties’ contract, viewed in its context, and then made a “supplementary interpretation” based on extrinsic evidence. Both parties sought to introduce extrinsic evidence of their negotiations, which the tribunal admitted with the caveat that it would consider this evidence with “due caution”. This approach follows the rules set out in the VCLT.

In ICC Case No.13129, the sole arbitrator, despite “reservations as to the real existence of anything that can be described as lex mercatoria”, applied general principles because he could not find any reason to apply any national law. However, he noted that application of English law—the only national law plausibly connected to the contract—would likely lead to the same outcome.

The arbitrator decided that a “strict, legalistic” approach to interpretation was inappropriate. This was justified by the
“common sense” nature of general principles and by two factors specific to the contract: that it was negotiated between traders and without the assistance of lawyers, and that the contract was concluded in English between negotiators whose native languages were not English. Accordingly, the arbitrator explained, “What is necessary is to read the contract [including] the parties’ negotiations, as a whole with a view to ascertaining the parties’ true intentions.”

The lack of reasoning in the published extracts of the other awards applying general principles leaves the reader with no choice but to attempt to divine the tribunals’ approaches from the results reached in their awards, much as a civil law court attempts to divine the tribunals’ true intentions from their outward expressions of intent. Taking the 14 awards as a group, six generalisations can be made:

- Tribunals see their primary interpretive task as to discern the true common intention of the parties. 82
- Tribunals begin by examining the natural and ordinary meaning of the contractual terms in dispute. 83
- Tribunals faced with an apparently clear contractual term are unlikely to allow extrinsic evidence of the parties’ intentions to overtake the natural meaning. 84
- In contrast to their treatment of subjective extrinsic evidence, tribunals will broadly enforce practices established between the parties and trade usages that may contradict the apparent meaning of the contract; tribunals are particularly likely to take such an approach with codified usages like the INCOTERMS or widely-adopted standard contractual terms. 85
- Tribunals which are free to choose the applicable law and those acting as amiables compositeurs do not prohibit parties from introducing whatever extrinsic evidence the parties may think relevant, including direct evidence of subjective intent and evidence of subsequent conduct. 86
- Although tribunals acting under all major arbitral rules have the power to request the production of extrinsic evidence, they rarely exercise this power.

TRENDS DISCERNABLE IN THE PUBLISHED AWARDS

DeRaIns writes:

“The interpretation of contracts is one of the areas in which international commercial arbitrators are most inclined to disengage from national laws in order to resort to general principles of law.” 87

Le marque de raisonnement dans les extraits publiés des autres sentences appliquant des principes généraux ne laisse au lecteur aucun autre choix que d’essayer de deviner l’approche du tribunal en partant des résultats obtenus dans leurs sentences, un peu comme un tribunal étatique de civil law le ferait pour essayer de discerner la réelle et commune intention des parties après leurs intentions manifestes. En considérant les 14 sentences comme un ensemble, on peut relever les points suivants:

- Les tribunaux considèrent que le but premier de leur mission d’interprétation est de mettre en lumière la véritable et commune intention des parties.
- Les tribunaux commencent par examiner le sens naturel et ordinaire des termes contractuels légaux.
- Les tribunaux confrontés à des termes contractuels paraissant clairs ont peu de chance d’autoriser des preuves extrinsèques de l’intention des parties pour supplanter le sens naturel de ces termes.
- Contrairement à la manière dont ils traitent les preuves subjectives extrinsèques, les tribunaux ont tendance à donner globalement effet aux pratiques établies entre les parties et aux usages du commerce qui peuvent alors être en contradiction avec le sens apparent du contrat ; les tribunaux sont particulièrement susceptibles d’adopter cette approche en ce qui concerne des usages << codifiés >>, comme par exemple les INCOTERMS ou des dispositions contractuelles standards largement reconnues.
- Les tribunaux qui sont libres de choisir le droit applicable (en particulier ceux statuant en amiables compositeurs) n’interdisent pas aux parties de produire des preuves extrinsèques de toute sorte, y compris les preuves directes de leurs intentions subjectives et de leur comportement ultérieur.
- Bien que les tribunaux établis selon tous les principaux règlements d’arbitrage aient le pouvoir d’exiger la production de preuves extrinsèques, ils utilisent rarement cette possibilité.

LES TENDANCES QUI SE DESSINENT DANS LES SENTENCES PUBLIEES

DeRaIns a écrit :

« L’interprétation des contrats est une des matières dans laquelle les arbitres du commerce international sont les plus enclins à se détacher des droits nationaux pour avoir recours aux principes généraux du droit ». 

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Les résultats de cette étude montrent en effet que les arbitres ont tendance à facilement faire référence à des maximes ou canons d’interprétation communément acceptés, tels que in claris non fit interpretatio, contra proferentem, ou encore le principe de bonne foi. Pourtant, lorsqu’il s’agit d’interprétation contractuelle, ils tendent à respecter les règles du droit national applicable. Plus significatif encore, dans les affaires où les arbitres n’appliquent pas un droit matériel précis, ou quand aucun droit national en particulier ne s’applique au fond, ils ont tendance à interpréter les contrats en suivant une approche cohérente avec celle qu’ont pu avoir d’autres arbitres avant eux, sans pour autant qu’elle soit identique à celle d’un droit national particulier.

Dans 39 sentences, the right applicable is a droit national ou un texte codifié de droit international des contrats (le plus souvent, la CVIM). Dans toutes les affaires, exceptées trois, le tribunal arbitral a suivi une méthode d’interprétation conforme à celle du droit applicable. On peut donc raisonnablement affirmer que la grande majorité des tribunaux arbitraux internationaux suivent fidèlement les règles d’interprétation contractuelle contenues dans le droit applicable. Cependant, l’examen général de ces décisions masque un point important: Dans toutes les affaires dans lesquelles le droit applicable était un texte codifié de droit international, ou un droit d’une juridiction de civil law, le tribunal a pris soin d’apporter à la lettre la méthode d’interprétation recommandée par les textes. Cependant, il en va différemment pour les sentences qui font application d’un droit de common law: dans trois sentences sur sept, le tribunal arbitral a suivi une méthode d’interprétation subjective et a admis la preuve extrinsèque qu’un tribunal étatique aurait probablement exclue.

Malgré la taille restreinte de l’échantillon, il semble qu’un biais « civiliste » se dessine. Deux facteurs supplémentaires viennent soutenir cette observation. Premièrement, la Convention ULIS, promulguée en 1964, ne contient aucune règle quant à l’interprétation des contrats; en revanche, tous les textes de droit international des contrats rédigés plus récemment invitent à avoir recours à une forme subjective d’interprétation et à admettre un large éventail de preuves extrinsèques. Deuxièmement, et plus important encore car facteur apportant une preuve directe des préférences des arbitres du commerce international, tous les tribunaux statuant selon des principes généraux ou en amiable comproisseur se montraient prêts à adopter la méthode d’interprétation subjective et à admettre des preuves extrinsèques. Il n’est pas surprenant que l’un entraîne l’autre: la méthode d’interprétation subjective conduit nécessairement à l’admission de preuves témoignant de l’intention subjective des parties. Néanmoins, il n’est pas question ici d’un règne de la subjectivité; ces tribunaux tendent à donner la primauté au texte du contrat, mais ils admettent et prennent en compte la preuve extrinsèque dans les hypothèses où elle leur est soumise.

En général, les tribunaux semblent avoir écarté ou n’avoir pas tenu compte de la preuve extrinsèque uniquement dans les cas où ils pouvaient parvenir à une interprétation satisfaisante du contrat en se fondant sur le seul texte contractuel. À l’inverse, dans tous les cas où la preuve extrinsèque était mentionnée, The results of this survey indicate that arbitrators are indeed quick to refer to generally-accepted maxims or canons of construction, such as in claris non fit interpretatio, contra proferentem and good faith, but when it comes to contractual interpretation, international arbitrators tend to stick to the rules in the applicable national law. More importantly, in the cases where arbitrators do not follow the applicable rules precisely, or where no national substantive law applies, they tend to interpret contracts according to an approach that is consistent with other arbitrators, but not identical to any given national law.

In 39 awards, the applicable law was a national law or codified international contract law instrument (usually the CISG). In all but three of those cases, the tribunal employed an interpretive method consistent with the applicable law. It is therefore fair to conclude that the great majority of international arbitral tribunals faithfully follow the rules of contractual interpretation contained in the applicable law. However, looking at the overall number obscures an important point. In all cases where the applicable law was an international contract law instrument or the law of a civil law jurisdiction, the tribunal accurately applied the prescribed method of interpretation. However, the same was not true of the awards applying the law of a common law jurisdiction; in three out of seven such awards, the tribunal interpreted the contract subjectively and admitted extrinsic evidence that a court would likely have excluded.98

Despite the small sample size, it seems fair to conclude that a civil law bias is developing. This observation is reinforced by two additional factors. First, the ULIS, promulgated in 1964, has no rules on the interpretation of contracts, but all of the more recently drafted international contract law instruments call for subjective interpretation and admit a wide range of extrinsic evidence.99

Second—and more important, because it provides direct evidence of the preferences of international commercial arbitrators—all of the tribunals acting under general principles or amiable composition were receptive to the subjective method of interpretation and the admission of extrinsic evidence. It is not surprising that these should go together; subjective interpretation necessitates the admission of evidence of the parties’ subjective intentions. Nevertheless, pure subjectivity does not reign; these tribunals tended to give primacy to the written text of a contract, but they admitted and considered extrinsic evidence in all cases where it was submitted.90

In general, tribunals seem to have discounted or declined to consider extrinsic evidence only in those cases where they were able to reach a satisfactory interpretation based on the words of the contract alone. Conversely, in all of the cases where extrinsic evidence was mentioned, either the
contractual term at issue was vague or ambiguous or a party sought to introduce extrinsic evidence that contradicted the plain language of the contract. Thus, tribunals do not actively seek extrinsic evidence to interpret contracts, but do consider it when it is necessary or when the parties adduce it.\textsuperscript{91}

Taken together, these trends indicate that international arbitral tribunals are primarily concerned with discerning the true (subjective) common intention of the parties, and will restrict themselves to objective interpretation only when the applicable law is that of a common law jurisdiction (and even then, not always). Tribunals tend to see the written contract as the best evidence of the parties’ true intent, and consider extrinsic evidence only if they think it necessary to determine that intent.

This trend has implications for both contract drafting and advocacy before international arbitral tribunals. Contract drafters, especially those trained in common law jurisdictions, should be aware that international arbitral tribunals are likely to consider all materials that may help to reveal the subjective understandings of the parties, even the applicable law is that of a common law jurisdiction. Accordingly, if a party wants to ensure that draft contracts or other such extrinsic evidence do not carry weight in an eventual dispute, an entire agreement clause should be included in the contract. In addition, contract negotiators should be directed to maintain copies of any contemporaneous notes and correspondence. Notes, in particular, may help to prove the party’s subjective intention at the time of contracting and increase the credibility of witness evidence.

When a dispute does arise, counsel appearing in international arbitrations should similarly be aware that international arbitral tribunals (including some applying the substantive law of common law jurisdictions) are unlikely to respond positively to arguments that they must exclude extrinsic evidence from the record. Counsel should therefore be willing to make use of any materials that support their preferred interpretation of the contract—indeed, they should introduce and seek production of such evidence, because tribunals are unlikely to do so on their own motion. If a party will benefit from a literal interpretation of the contract’s text, it would most likely be served by an argument that the plain meaning of the text is the best evidence of the true intention of the parties, so that any contradictory extrinsic evidence should be excluded or, alternatively, discounted.

soit les termes du contrat n’étaient pas clairs et ambigus, soit la partie avait produit la preuve extrinsèque pour montrer qu’elle était en contradiction avec le texte même du contrat. Ainsi, les tribunaux ne recherchent pas de façon active la preuve extrinsèque pour interpréter les contrats, mais la prennent en compte quand cela est nécessaire ou quand les parties ont soumis une telle preuve.

Prises dans leur ensemble, ces tendances montrent que les tribunaux arbitraux internationaux ont avant tout le souci de distinguer la véritable intention commune (subjective) des parties, et qu’ils se limitent à utiliser des documents que les parties auront à révéler si ces documents sont actuellement voulu conclure avec ce contrat, même s’il s’agit d’un droit applicable de droit common law. Par conséquent, si une partie veut s’assurer que les différents projets de contrats et autres preuves extrinsèques ne soient pas pris en compte lors d’une éventualité contentieux, il est conseillé d’inclure dans le contrat une clause d’intégralité. De plus, il devrait être demandé à tous les négociateurs de contrats de garder une copie de toutes les notes et correspondances échangées. Les notes, en particulier, peuvent se révéler utiles à prouver l’intention subjective d’une partie au moment de la signature, et accroître ainsi la crédibilité de la preuve testimoniale.

Si un contentieux naît, l’avocat représentant son client dans les arbitrages internationaux devrait de même être conscient que les tribunaux arbitraux internationaux (y compris ceux qui appliquent un droit de common law au fond) seront peu enclins à répondre positivement aux arguments selon lesquels ils doivent exclure les preuves extrinsèques du dossier. Les avocats doivent être ainsi prêts à utiliser tous les documents qui viendront appuyer l’interprétation du contrat qui sert au mieux l’intérêt de leurs clients. Ils devront en effet produire ces preuves et chercher à en obtenir la production par la partie adverse, car les tribunaux ne le feront pas d’eux-mêmes. Si une des parties veut au contraire tirer profit d’une interprétation littérale du contrat, il conviendra alors de développer l’argument selon lequel le sens premier du texte est la meilleure preuve de la véritable intention des parties, afin que toute preuve extrinsèque contraire soit exclue, ou du moins écartée.
Notes

1. There is no discussion below of the tribunals' choice of law. Few of the 53 awards contained any choice of law analysis, in most cases because the contract contained a choice of law provision or the parties otherwise agreed as to the applicable law.


5. AL Corbin, "The Interpretation of Words and the Parol Evidence Rule" (1964) 50 Cornell L.Q. 161.


9. R Pietrowski, “Evidence in International Arbitration” (2006) 22(3) J. Int’l Arb. 373 at 378. See, e.g., this statement of ICJ President Spender (Australia) in ruling on an objection to the admission of testimonial evidence during proceedings on the South-West Africa cases (Second Phase): “The evidence will remain on the record; the Court is quite able to evaluate evidence... This court is not bound by the strict rules of evidence applicable in municipal courts and if the evidence established by the witness does not sufficiently convey that the evidence is reliable in point of fact, then the Court, of course, deals with it accordingly when it comes to its deliberation.” [1966] ICJ Rep, Pleadings, Vol 10, 122; Vol 11, 460.


11. Art.9(1).


20. ICC Cases Nos 4975, 6955 and 8694.

21. ICC Case Nos 4555, 5946, 7722, and 12172.

22. Prenn v Simmonds [1971] 1 W.L.R. 1381 (HL) and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity) [1976] 1 W.L.R. 988 (HL).

23. UCC s.2-202, which sets out the parol evidence rule, and s.1-205, which sets out rules for the pleading and proof of trade usages.


47. ICC Cases Nos 1250, 3055, 3130, 3894, 5485, 6515/6516, 6673, 9443, 11440 and 11776.
48. ICC Cases Nos 2708, 6515/6516 and 11440.
49. ICC Cases Nos 1434, 4131, 5080, 5505, 6527, 6653, 7518, 10188 and 13278, and the Netherlands Arbitration Institute award.
50. ICC Case No.12745.
51. ICC Case No.7518.
52. ICC Case No.13278.
53. ICC Cases Nos 4131, 6527, 7518 and 13278.
54. ICC Cases Nos 1434, 5505, 6527, 7518, 10188, 11440, 12745 and 13278.
55. ICC Cases Nos 1434 and 5505.
64. ICC Cases Nos 7585 and 7645.
65. ICC Cases Nos 8324, 8782, 8817, 10377 and 12173.
80. An Australian chair, with one English, two French, and one French-Canadian co-arbitrators.
81. Eurotunnel at [94].
82. Most of the tribunals, including one applying the law of a common law jurisdiction, either declared this to be their goal or cited national law statutory or case law expressing this core principle of subjective interpretation.
83. This occurred in all of the awards.
84. ICC Cases Nos 2103, 2478 and 3267 and Eurotunnel.
85. ICC Cases Nos 3267, 3820, 5963, 7722, 8035 and 13129.
86. This occurred in none of the awards where the applicable law was not stated, the tribunal applied general principles or lex mercatoria, or the tribunal acted as amiable compositeur.
88. ICC Cases Nos 4555, 5946 and 12172.
89. It should also be noted that, beginning in the 1970s, the common law jurisdictions have themselves shifted toward greater acceptance of extrinsic evidence, although they still stop short of permitting evidence of prior drafts of a contract and the parties’ subjective understandings of the contract’s meaning.
90. In one case decided under common law where extrinsic evidence was admitted, the sole American arbitrator seems to have subscribed to this methodology. The award states that “unarticulated and undocumented understandings” can be considered, but should be given “less weight” than “the objective ... meaning of the contract language”. ICC Case No.4555 of 1985 (1986) XI Ybk. Comm. Arb. 140.
91. In contrast, several tribunals did on their own motion seek and apply evidence of trade usages. For example, in ICC Case No.10377, the tribunal appointed its own expert to testify as to the content of a trade usage.
Principles of interpretation of contracts under English law and their application in international arbitration

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**Abstract**

This article discusses the interpretation of contracts in international arbitration, looking first at the current position on the interpretation of contracts as established by the English courts. It then considers whether an international arbitration tribunal construing a contract is, in fact and/or in practice, constrained by the governing law. It will further consider the influences upon a tribunal in reaching a conclusion as to how a contract should be interpreted and the general approach taken by an international arbitral tribunal to questions of interpretation of contracts. The article concludes that parties are arguably not well-served if they cannot predict with some certainty how a tribunal will approach a particular issue but that this lack of certainty is a trade-off that parties are willing to make in opting for international arbitration.
1. THE SAME ISSUE VIEWED THROUGH DIFFERENT LENSES

Almost invariably, deciding an international arbitration will involve interpreting the provisions of a contract. Interpretation of a contract is simply shorthand for determining what the parties to the contract meant when they chose that language, but, as we know from people’s different reactions to music, drama, and the media, people can reach at very different conclusions when faced with the same experience. The difficulty that participants in international arbitration face where a dispute turns on a question of interpretation is in predicting how a diverse tribunal will approach the issue.

Different approaches to the conduct of arbitrations, different legal backgrounds, and different reactions to the subliminal effects of anchoring, priming, and the ability or otherwise to disregard the precluded evidence or argument means that counsel in international arbitration are shooting in the dark when it comes to advising clients as to how a tribunal may rule. Whilst it is difficult to gather statistics on this issue, the perceived wisdom is that, for a variety of reasons, arbitrations do not settle as frequently as court proceedings.¹ One reason behind this is the unpredictability of arbitrations caused by the flexibility of the process, which is also, of course, one of its major selling points. As is well known, all the major international arbitration institutional rules are not lengthy tomes, but slim pamphlets, but this requires the tribunal to actively exercise its discretion to fill in the blanks. It is axiomatic that it is difficult to predict with certainty how discretion will be exercised. Further, although contractual interpretation is key to almost every international arbitration, the extent to which tribunals do have or should have recourse to the principles of contractual interpretation in the governing law in practice is much less evident. Commentators have described the ‘widespread attitude’ among international arbitration practitioners that the governing law does not matter much, if it matters at all.² Counsel are therefore left to guess how a tribunal might approach an issue and to hope that their client’s interpretation is to be preferred.

2. THE INTERPRETATION OF CONTRACTS UNDER ENGLISH LAW

When it comes to selecting a governing law of an agreement, parties have an almost unlimited choice. English law is one of the most commonly chosen governing laws in commercial contracts, often, it is said, because it provides relative certainty of outcome in its application to the factual circumstances surrounding the agreement. In the words of Lord Hodge ‘One of the attractions of English law as a legal system for foreign commercial matters is its stability and
continuity, particularly in contractual interpretation'.

English law is relatively certain for several reasons: it is well-developed and reasonably precise, there is a system of binding authority in place, so the same issue raised between different parties under a different set of facts should be decided in the same way, and there is a clear set of principles to be applied when a clause’s meaning is disputed. Given the popularity of English law, international arbitration tribunals frequently find themselves grappling with principles of interpretation in the face of parties arguing that they are or are not (depending on that party’s position) bound by them.

So, what are the principles of interpretation of contracts under English law? It seems hard to believe that it is 20 years since Lord Hoffman’s seminal judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society but before discussing that decision, a principle enunciated by Lord Halsbury a century earlier should be highlighted, namely that the starting point for interpretation is to determine the main purpose of the contract and that provisions should be rejected if they are inconsistent with that purpose. Often when parties are arguing about the meaning of particular clause, the trees are lost in the wood and this basic concept is forgotten. ‘Looking at the whole of the instrument and seeing what one must regard... as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract’ (Lord Halsbury)

It is impossible to interpret contract clauses in isolation, but tribunals are often effectively urged to do so. Only a full understanding of the complete agreement between the parties will give the tribunal sufficient comfort to rule on the interpretation of a particular clause. The starting point is always the language of the contract. The basic premise under English law that words should be given their ordinary and natural meaning was re-stated in Pink Floyd Music Limited v EMI Records Limited. Where there is uncertainty as, by definition, there generally is if a dispute has reached arbitration, then the tribunal will need to consider the principles of contractual interpretation as developed by the English courts. For Lord Hoffman’s judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society is broadly seen as giving English judges more leeway in contract interpretation, he opined: ‘the meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean’. A Court of Appeal case shortly after the Investors Compensation Case reinforced the need to ‘look at all the relevant background information’ when interpreting a contract. Relevant background information is generally seen as a consideration of what the parties would (or should) have known in the situation they were in at the time of agreeing the contract.

Lord Neuberger in Arnold v Britton stated that when interpreting a written contract, the court need to identify the intention of the parties by reference to ‘what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'. According to
Lord Neuberger, proper contractual interpretation was achieved by ‘focussing on the meaning of the relevant words, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions’. Lord Neuberger considered that while common or business sense was a factor, it should not undermine the language in the contract. He felt that commercial common sense should not be invoked retrospectively only once it has become clear that the bargain ‘has worked out badly, or even disastrously, for one of the parties’. In the subsequent decision of the Supreme Court in Wood v Sureterm Direct Ltd10 Lord Hodge stated that interpretation is not merely a ‘literalist exercise focused solely on... the wording’ but required consideration of the contract as a whole, taking into account the wider context and commercial purpose of the agreement, and business common sense. He considered that contractual interpretation was an ‘iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial Page 5 consequences are investigated’.

The approach re–iterated in Arnold v Britton and Wood v Sureterm Direct will not, of course, be unfamiliar to international arbitration tribunals interpreting contracts under English law. Yet, the extent to which tribunals in fact confine themselves to an approach established by the national courts of the governing law is less clear cut.

3. HOW DO INTERNATIONAL ARBITRATION TRIBUNALS APPROACH CONTRACT INTERPRETATION IN PRACTICE?

Contract interpretation is far from an exact science. Arbitral tribunals are occasionally criticized as having too much ‘grey hair’ but this area, perhaps more than any other, is one where experience shows. Yet are tribunals too willing to depart from strict principles of contractual interpretation as laid down by the governing law or are tribunals not, in fact, required to apply those principles anyway? Alternatively, are tribunals unconsciously departing from these strict principles because of the way in which arbitrations are argued?

Taking the first point, whether tribunals are too willing to depart from the strict application of the governing law: this issue is often encapsulated in an often–expressed desire on the part of counsel to ascertain whether an arbitrator will adopt a ‘black letter’ approach or not. The issue really comes down to the old question, whether an arbitrator sees themselves as a private judge...
In 2015, Professor Joshua Karton conducted a detailed study into the role of arbitrators adjudicating international commercial disputes. In the study he reviewed published international arbitral awards and interviewed leading commercial arbitrators about their practices. Karton concluded that the practice of interpreting contracts without reference to the governing law’s rules of interpretation is widespread. Karton found that when the governing law did not fit the arbitrators’ preferred method of interpretation, a tribunal would ‘depart from the law or “creatively interpret it” to make it fit’. His findings were supported by patterns of decisions in published awards and the consistency of responses given by the arbitrators he interviewed. As Karton conceded ‘robust generalization’ about international commercial arbitration cannot be made; however, it certainly seems that commercial arbitrators, particularly those in tribunals comprising arbitrators of differing legal backgrounds, see themselves more as dispute resolvers than as private judges and act accordingly. Karton’s research showed that arbitrators’ ‘preferred interpretative method’ was ‘subjective interpretation supported by liberal consideration of extrinsic evidence, but with priority given to the plain meaning of clearly drafted terms’. Certainly, the first part of this approach is not necessarily entirely consistent with the established principles of contractual interpretation under English law. However, the English courts have also emphasized the need for a commercial approach, within reason, so the international arbitrator approach is not necessarily contradictory either. In Antaios Compania Naviera SA v Salen Rederierna AB: ‘if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense’ (Lord Diplock). This approach is one that will be familiar to all international arbitrators. As one of the (anonymous) arbitrators interviewed by Karton put it: ‘it is fundamental to arbitration that it should solve disputes according to commercial practice and common sense, arriving at a result considered fair in a particular business community’. Karton also quotes a leading London-based arbitrator, who, when asked about their approach to interpreting contracts, replied that there are only two rules of interpretation: ‘Common sense is one. Commercial sense is the other.’ In his Bailii lecture in 2016, Lord Justice Thomas, the Lord Chief Justice, noted that in one Court of Appeal case Lord Denning expressed the view that ‘a commercial arbitrator was more likely to be better placed to interpret the contract in a commercial sense than a judge and in a one off case probably more likely to be right than a judge’. In choosing arbitration, parties are choosing an arbitral approach to deciding disputes. Although that approach may not always adhere rigorously to the governing law, it is, it could be argued, what the parties signed up for in selecting arbitration.

Looking at the second point, does the governing law matter that much anyway? The sentiment ‘I would uphold the law for no other reason than to protect myself’ (attributed to Thomas More) is a pragmatic one but do arbitral tribunals need this protection at all or are they free to enjoy the ‘law’s protection’ that is often attributed to them? In this regard, arbitrators appointed
in an arbitration with its seat in England and determining an arbitration under English law have an additional concern, namely the effect of section 69 of the Arbitration Act 1996. This states that, unless agreed otherwise, a party to a proceeding may ‘appeal to the court on a question of law arising out of an award made in the proceedings’. The effect of adopting the provisions of all the major international institutional rules is to exclude this right to appeal, therefore the issue only arises in a situation in which the seat of the arbitration is in England or Wales, the governing law is English law and the parties have either not adopted institutional rules, or have adopted the LMAA\textsuperscript{16} rules which do not exclude section 69, or have expressly preserved the right to appeal. Further, there are procedural hurdles to clear before the appeal can be heard. The applicant must obtain the agreement of the other parties or, alternatively, the leave of the court. Leave to appeal will only be given if the court is satisfied that the determination of the question will substantially affect the rights of one or more of the parties, that the question was put to the tribunal and that the decision of the tribunal on the question is obviously wrong or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt and it is just and proper in all the circumstances for the court to determine the question. From the above it will come as no surprise that appeals under section 69 are few and far between and successful appeals are extremely rare indeed. Yet the mere existence of the possibility of an appeal under section 69 may mean that arbitral tribunals who have this constraint, approach the issue of the governing law more conservatively than those who are not so constrained.

Addressing the third point above, is there a further argument that tribunals are unconsciously departing from strict principles because of the way in which arbitrations are argued? Even in situations where a tribunal is, for whatever reason, applying the principles of the governing law perhaps more strictly than is usual in international arbitration, the way in which arbitrations are pleaded and the way evidence is introduced in international arbitration may affect the tribunal’s ruling, whether the tribunal is aware of this or not. In interpreting contracts under English law, a tribunal should not consider (absent particular circumstances which are beyond the scope of this article) the subjective views of the parties, negotiations between the parties, and post-contractual behaviour. Yet, how easy is it in fact to ignore these key parts of a commercial relationship once they have been introduced in evidence by the parties?

Although there are reasonably clear rules under English law on what should not be taken into account, research shows how difficult it is to exclude evidence once it has been introduced. In international arbitration there is a tendency to include everything and then re-assert the objecting party that the tribunal will ‘give the evidence the weight it deserves’. This approach of anchoring,\textsuperscript{17} amongst other things. A frequently cited example of the effect of anchoring is the study in which researchers asked participants whether Mahatma Gandhi died before or after the age of 9 or whether he died before or after the age of 140. The
average of answers given to the two questions differed by 17 years, correlating, of course, to the number given in the question, even though the numbers were obviously erroneous. The same effect was reported when asking participants when Albert Einstein first visited the USA. Completely irrelevant anchors such as references to 1215 and 1992 caused anchoring effects which were just as strong as more plausible anchors.\(^\text{18}\) In a further study, participants were expressly informed that they were going to be ‘anchored’ but even when they were told about the anchor, they were still unable to avoid its effect.\(^\text{19}\) The ability of the judicial mind to disregard evidence has also been tested, with one study finding that only 75 per cent of judges who saw a recall notice (an inadmissible subsequent remedial measure) ruled for the defense while 100 per cent of the judges who had not seen it did so.\(^\text{20}\) Similarly, people may not realize the extent to which they can be influenced by seemingly inconsequential details, or ‘primed’ by certain words. For example, if the conversation has been about food our mind will fill in the blank ‘SO_P’ with a U but if we have been talking about cleanliness we will fill in the blank ‘SO_P’ with an A. If we are given a list of words from which to make a sentence, when we walk out of the room we will walk more slowly if those words included ‘Florida’, ‘lonely’, and ‘wrinkle’.\(^\text{21}\) All these studies cast doubt on an arbitrator’s ability to disregard evidence that, according to the principles of interpretation of the governing law, should not be considered when interpreting the agreement reached by the parties.

The challenge faced by arbitrators is to apply the law to the facts within this complex framework and to do so in such a way as to provide a degree of predictability to counsel as to how the tribunal will approach a particular issue. Arbitrators are not jurists. Arbitrators are primarily chosen for their experience in the relevant industry and less so for their familiarity with the substantive law of the dispute. The tendency to admit all evidence (for fear of a challenge to the award) undermines strict principles of contractual interpretation and the mind’s inability to really disregard information must not be underestimated. The fact that arbitrators are heavily involved with the dispute from inception may also mean that it is more likely that arbitrators seek to ‘make sense’ of a commercial relationship or endeavour to balance, in some way, the competing interests of the parties. All these issues simply underline the differences between international arbitration and national court proceedings.

4. DELIVERING WHAT THE PARTIES WANT

Although parties are not necessarily well-served if they cannot predict with some certainty how a tribunal will approach a particular issue, it appears that the lack of predictability does not overly concern users of international arbitration. International arbitration is in an enviable position. An overwhelming 99 per cent of respondents to the 2018 Queen Mary/White & Case Survey on International Arbitration said they would recommend international arbitration to
resolve cross-border disputes in the future. Whilst there are, of course, gripes about delays and escalating costs, on the whole it appears that arbitration is delivering what the parties want and that the approach taken by arbitrators to principles of contractual interpretation is part of this. There are many things that international arbitration awards do not do and that parties do not want international arbitration tribunals to do. Tribunals do not develop the law. Awards are not definitive rulings on the scope and interpretation of contractual clauses, financial instruments, or other legally binding agreements. Awards do not articulate rights or responsibilities. What international arbitration tribunals do, is provide a final binding and, in the vast majority of cases, a definitive determination of a dispute. Quite simply, they provide closure to the parties and they provide this through a flexible process and with party input into arbitrator selection. The trade-off for these positives is that counsel may struggle on occasion to predict how a tribunal might rule. Parties are clearly willing to make this trade-off.

Footnotes


5 [2010] EWCA Civ 1429.

6 Investors Compensation Scheme Ltd (n 3).


8 [2015] UKSC 36.


Karton (n 2).


‘Anchoring or focalism is a term used in psychology to describe the common human tendency to rely too heavily, or “anchor,” on one trait or piece of information when making decisions. During normal decision making, individuals anchor, or overly rely, on specific information or a specific value and then adjust to that value to account for other elements of the circumstance. Usually once the anchor is set, there is a bias toward that value.’ (ScienceDaily). See <https://www.sciencedaily.com/terms/anchoring.htm> accessed 7 December 2018.


As described in Blink by Malcolm Gladwell, researchers gave students a test, requiring them to read five words and make a four-word sentence out of them. The students were then sent to do another test in an office down the hall. Unbeknownst to them, walking the hall was the real experiment. Included in the list were words like ‘worried’, ‘Florida’, ‘old’, ‘lonely’, ‘gray’, ‘bingo’ and ‘wrinkle’. Students who had been primed with these words took significantly longer to walk down the hall than those not primed with the ‘old’ words.

Arbitration in space disputes

An inconvenient truth: the complexity problem and limits to justice

Binding non-signatories to arbitration agreements—who are persons ‘claiming through or under’ a party?

28 USC § 1782—looking for consensus

Tribunal Secretaries in International Arbitration, by J. Ole Jensen
Federal Act
on the Amendment of the Swiss Civil Code
(Part Five: The Code of Obligations)
of 30 March 1911 (Status as of 1 November 2019)

The Federal Assembly of the Swiss Confederation,
having considered the Dispatches of the Federal Council dated 3 March 1905 and 1 June 19091
decrees:

Division One: General Provisions
Title One: Creation of Obligations
Section One: Obligations arising by Contract

Art. 1

1 The conclusion of a contract requires a mutual expression of intent by the parties.
2 The expression of intent may be express or implied.

Art. 2

1 Where the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms.
2 In the event of failure to reach agreement on such secondary terms, the court must determine them with due regard to the nature of the transaction.
3 The foregoing is subject to the provisions governing the form of contracts.

AS 27 317 and BS 2 199
1 BBl 1905 II 1, 1909 III 747, 1911 I 695
2 Where the parties stipulate a written form without elaborating further, the provisions governing the written form as required by law apply to satisfaction of that requirement.

Art. 17
An acknowledgment of debt is valid even if it does not state the cause of the obligation.

Art. 18
1 When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.
2 A debtor may not plead simulation as a defence against a third party who has become his creditor in reliance on a written acknowledgment of debt.

Art. 19
1 The terms of a contract may be freely determined within the limits of the law.
2 Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms of wording or where deviation from the legally prescribed terms would contravene public policy, morality or rights of personal privacy.

Art. 20
1 A contract is void if its terms are impossible, unlawful or immoral.
2 However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them.

Art. 21
1 Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party’s exploitation of the other’s straitened circumstances, inexperience or thoughtlessness, the injured party may declare within one year that he will not honour the contract and demand restitution of any performance already made.
2 The one-year period commences on conclusion of the contract.
Swiss Civil Code

of 10 December 1907 (Status as of 1 January 2019)

The Federal Assembly of the Swiss Confederation,
based on Article 64 of the Federal Constitution1,2
and having considered the Dispatch of the Federal Council dated 28 May 19043,
decrees:

Introduction

Art. 1
1 The law applies according to its wording or interpretation to all legal
questions for which it contains a provision.
2 In the absence of a provision, the court4 shall decide in accordance
with customary law and, in the absence of customary law, in accord-
ance with the rule that it would make as legislator.
3 In doing so, the court shall follow established doctrine and case law.

Art. 2
1 Every person must act in good faith in the exercise of his or her
rights and in the performance of his or her obligations.
2 The manifest abuse of a right is not protected by law.

Art. 3
1 Where the law makes a legal effect conditional on the good faith of a
person, there shall be a presumption of good faith.

AS 24 233, 27 207 and BS 2 3
1 [BS 1 3]. This provision corresponds to Art. 122 of the Federal Constitution of 18 April
1999 (SR 101).
2 Amended by Annex No. 2 of the Civil Jurisdiction Act of 24 March 2000, in force since
3 BBl 1904 IV 1, 1907 VI 367
4 Term in accordance with No I 1 of the FA of 26 June 1998, in force since 1 Jan. 2000
(AS 1999 1118; BBl 1996 I 1). This amendment is taken into consideration throughout the
Code.
§ 133 Auslegung einer Willenserklärung
Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.

Translation (unofficial translation provided on the website of the German Ministry of Justice):

| Section 133 |
| Interpretaion of a declaration of intent |
| When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration. |

§ 157 Auslegung von Verträgen
Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.

Translation:

| Section 157 |
| Interpretation of contracts |
| Contracts are to be interpreted as required by good faith, taking customary practice into consideration. |
JUDGMENT

Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan (Respondent)

before

Lord Hope, Deputy President
Lord Saville
Lord Mance
Lord Collins
Lord Clarke

JUDGMENT GIVEN ON

3 November 2010

Heard on 28, 29 and 30 June 2010
Appellant
Hilary Heilbron QC
Klaus Reichert
(Instructed by Kearns & Co)

Respondent
Toby Landau QC
(Instructed by Watson, Farley & Williams)
LORD MANCE

Introduction

1. This appeal arises from steps taken by the appellant, Dallah Real Estate and Tourism Holding Company (“Dallah”), to enforce in England a final award dated 23 June 2006 made in its favour in the sum of US$20,588,040 against the Government of Pakistan (“the Government”) by an International Chamber of Commerce (“ICC”) arbitral tribunal sitting in Paris. The Government has hitherto succeeded in resisting enforcement on the ground that “the arbitration agreement was not valid … under the law of the country where the award was made” (Arbitration Act 1996, s.103(2)(b), reflecting Article V(1)(a) of the New York Convention), that is under French law. Dallah now appeals.

2. The award was made against the Government on the basis that it was “a true party” to an Agreement dated 10 September 1996 expressed to be made between and signed on behalf of Dallah and Awami Hajj Trust (“the Trust”). The Agreement contains an arbitration clause referring disputes or differences between Dallah and the Trust to ICC arbitration. The tribunal in a first partial award dated 26 June 2001 concluded that the Government was a true party to the Agreement and as such bound by the arbitration clause, and so that the tribunal had jurisdiction to determine Dallah’s claim against the Government. The central issue before the English courts is whether the Government can establish that, applying French law principles, there was no such “common intention” on the part of the Government and Dallah as would make the Government a party.

3. Dallah is a member of a group providing services for the Holy Places in Saudi Arabia. It had had long-standing commercial relations with the Government. By letter dated 15 February 1995, Mr Shezi Nackvi, a senior director in the Dallah group, made a proposal to the Government to provide housing for pilgrims on a 55-year lease with associated financing. The Government approved the proposal in principle, and a Memorandum of Understanding (“MOU”) was concluded on 24 July 1995. Land was to be purchased and housing facilities were to be constructed at a total cost not exceeding US$242 million and the Government was to take a 99-year lease subject to Dallah arranging the necessary financing to be “secured by the Borrower designated by THE GOVERNMENT under the Sovereign Guarantee of THE GOVERNMENT”. The lease and financing terms were to be communicated to the Government within 30 days for approval, and Dallah was to supply detailed specifications within 60 days of the date of such approval.
4. In the event, Dallah in November 1995 acquired a larger and more expensive plot of land than the MOU contemplated, and the timetable was also not maintained. Further, on 21 January 1996 the President of Pakistan promulgated Ordinance No VII establishing the Trust with effect from 14 February 1996. Under article 89(2) of the Constitution of Pakistan, an Ordinance so promulgated “shall stand repealed at the expiration of four months from its promulgation”, although, under the same article, it should before then have been laid before Parliament, upon which it would have taken effect as a bill. In the event, Parliament appears never to have been involved, but further Ordinances were promulgated to recreate and continue the Trust, viz Ordinance No XLIX of 1996 on a date unknown (presumably prior to 21 May 1996) and No LXXXI of 1996 on 12 August 1996.

5. Under each Ordinance the Trust was to maintain a fund with a trustee bank, to be financed from contributions and savings by pilgrims (Hujjaj) and philanthropists, as well as by any income from investments or property. The Ordinances also assigned functions within the Trust to various public officers. They prescribed, in particular, that the secretary of the Ministry of Religious Affairs (“MORA”) should act as secretary of the Board of Trustees and (unless some other person of integrity was appointed) as Managing Trustee of the Trust.

6. On 29 February 1996 Dallah wrote to the secretary of MORA with a revised proposal, increasing the cost to US$345 million to take account of the larger plot purchased, setting out options for a new legal and financial structure and stating:

“Legal issues

In order to comply with the legal requirements of the various entities involved, the structure will be as follows:

a) Government of Pakistan to set up AWAMI HAJJ TRUST

b) Trust will borrow the US$100 Million from Dallah Albaraka

c) Trust will make a down payment of US$100 million to Albaraka
d) Trust will enter into a lease to use these buildings during the Hajj period”

Annex A detailed the financial structure:

“Loan terms for down payment of US $ 100 Million – Approx 30% of project cost

Amount: US $ 100 Million

Borrower: Awami Hajj Trust

Guarantor: Government of Pakistan”

7. On 3 April 1996 Dallah instructed its lawyers, Orr, Dignam & Co. that “the current shape of the transaction” involved an agreement to be entered into between Dallah and the Trust on terms which it described. Further negotiations with the Government led to the signing of the Agreement between Dallah and the Trust on 10 September 1996. The Agreement reflected the increased cost of $345 million, out of which it provided that:

“the Trust shall pay a lump sum of U.S. $ 100 [million] …. to Dallah by way of advance ..... subject to (i) Dallah arranging through one of its affiliates a U.S. Dollar 100 [million] Financing Facility for the Trust against a guarantee of the Government of Pakistan, ..... (iii) A counter guarantee issued by the Trust and Al-Baraka Islamic Investment Bank, E.C., Bahrain, ..... appointed by the Board of Trustees pursuant to Section 8 of the Awami Hajj Trust Ordinance, 1996 in favour of the Government of Pakistan.”

Clause 27 provided that:

“The Trust may assign or transfer its rights and obligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah.”
The Agreement made no other references to the Government and was in terms introducing and setting out mutual obligations on the part of Dallah and the Trust. These included the arbitration clause:

“23. Any dispute or difference of any kind whatsoever between the Trust and Dallah arising out of or in connection with this Agreement shall be settled by arbitration held under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris, by three arbitrators appointed under such Rules.”

8. On 6 November 1996 Ms Benazir Bhutto’s government fell from power, and was replaced by that of Mr Nawaz Sharif. No further Ordinance was promulgated, and the Trust accordingly ceased to exist as a legal entity at midnight on 11 December 1996. It will be necessary to look in detail at correspondence as well as three sets of proceedings in Pakistan which took place during the following years.

9. Dallah invoked ICC arbitration against the Government on 19 May 1998, nominating Lord Mustill as its arbitrator. It is common ground that the Government has throughout the arbitration denied being party to any arbitration agreement, maintained a jurisdictional reservation and not done anything to submit to the jurisdiction of the tribunal or waive its sovereign immunity. The ICC under its Rules appointed Justice Dr Nassim Hasan Shah to act as the Government’s arbitrator and Dr Ghaleb Mahmassani to chair the tribunal. Terms of Reference, in which the Government refused to join, were signed by the arbitrators and Dallah in March 1999 and approved by the ICC in April 1999. The tribunal issued its first partial award on its own jurisdiction on 26 June 2001. A second partial award on liability was issued on 19 January 2004 and the final award on 23 June 2006.

10. Leave to enforce the final award in England was given by Order of Christopher Clarke J dated 9 October 2006 on a without notice application by Dallah. The Government’s application to set aside the leave led to a three day hearing with oral evidence before Aikens J in July 2008. His judgment setting aside the Order is dated 1 August 2008: [2008] EWHC 1901 (Comm); [2009] 1 All ER (Comm) 505. A further three day hearing led to the Court of Appeal’s dismissal of Dallah’s appeal on 20 July 2009 ([2009] EWCA Civ 755; [2010] 1 AER 592), against which the present appeal lies. On 19 August 2009, Dallah filed an application in the French courts for enforcement of the final award, and, on 12 January 2010, it sought a stay of the present appeal pending the outcome of its French application. On 21 December 2009, the Government applied in France to set aside all three awards. It was in time to do this, since, under French law, the limitation period for
doing so only starts to run one month after “official notification of the award bearing an enforcement order”.

The issue and the principles governing its resolution

11. The “validity” of the arbitration agreement depends in the present case upon whether there existed between Dallah and the Government any relevant arbitration agreement at all. Dallah’s case is that the Government has at all times been an unnamed party to the Agreement containing the arbitration clause. Before the English courts, this case has been founded on a submission that it was the common intention of the parties that the Government should be such a party to the Agreement. Before the arbitral tribunal Dallah put the matter differently. It argued that either the Trust was the alter ego of the Government or the Government was the successor to the Trust or to the rights and obligations which the Trust had under the Agreement prior to its demise. Neither of these ways of putting the case is now pursued. Dallah did not argue before Aikens J that the Trust was the Government’s alter ego (judgment, para 58, footnote 21), and it merely submitted that, if and so far as the Government behaved as if it were a successor to the Trust, this was relevant to the issue of common intention (judgment, paras 94-96).

12. The issue regarding the existence of any relevant arbitration agreement falls to be determined by the Supreme Court as a United Kingdom court under provisions of national law which are contained in the Arbitration Act 1996 and reflect Article V(1)(a) of the New York Convention. The parties’ submissions before the Supreme Court proceeded on the basis that, under s.103(2)(b) of the 1996 Act and Article V(1)(a) of the Convention, the onus was and is on the Government to prove that it was not party to any such arbitration agreement. This was so, although the arbitration agreement upon which Dallah relies consists in an arbitration clause in the Agreement which on its face only applies as between Dallah and the Trust. There was no challenge to, and no attempt to distinguish, the reasoning on this point in Dardana Limited v Yukos Oil Company [2002] EWCA Civ 543; [2002] 1 All ER (Comm) 819, paras 10-12, and I therefore proceed on the same basis as the parties’ submissions.

13. S.103(2)(b) and article V(1)(a) raise a number of questions:

(a) what is meant by “the law of the country where the award was made”?

(b) what are the provisions of that law as regards the existence and validity of an arbitration agreement?
(c) what is the nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such law?

and, in particular,

(d) what is the relevance of the fact that the arbitral tribunal has itself ruled on the issue of its own jurisdiction?

\( (a) \) The law of the country where the award was made.

14. It is common ground that the award was made in France and French law is relevant. But it is also common ground that this does not mean the French law that would be applied in relation to a purely domestic arbitration. In relation to an international arbitration, the experts on French law called before Aikens J by Dallah and the Government agreed in their Joint Memorandum (para 2.8) that:

“Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration …. need not be assessed on the basis of a national law, be it the law applicable to the main contract or any other law, and can be determined according to rules of transnational law”.


“… en vertu d’une règle matérielle du droit international de l’arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s’apprécient, sous réserve des règles impératives du droit français et de l’ordre public international, d’après la commune volonté des parties, sans qu’il soit nécessaire de se référer à une loi étatique ….”

15. This language suggests that arbitration agreements derive their existence, validity and effect from supra-national law, without it being necessary to refer to
any national law. If so, that would not avoid the need to have regard to French law as “the law of the country where the award was made” under Article V(1)(a) of the Convention and s.103(2)(b) of the 1996 Act. The Cour de Cassation is, however, a national court, giving a French legal view of international arbitration; and Dallah and the Government agree that the true analysis is that French law recognises transnational principles as potentially applicable to determine the existence, validity and effectiveness of an international arbitration agreement, such principles being part of French law. As Miss Heilbron QC representing Dallah put it, “transnational law is part of French law”. Mr Landau QC representing the Government now accepts this analysis (although in his written case, para 157, he appeared to take issue with it and Aikens J, para 93, in fact disregarded transnational law on the basis that it was not part of French law, but relevant only under French conflict of laws principles and so not within Article V(1)(a) and s.103(2)(b)).

16. Since the point is common ground, I merely record that Mr Landau referred the Court to Pierre Mayer’s note on Ducler in Kluwer Arbitration, explaining the rationale of the Paris Court of Appeal decisions as being to confine the restrictive provisions of article 2061 of the French Civil Code to internal contracts. He also referred to Fouchard, Gaillard, Goldman’s International Commercial Arbitration (1999) (Kluwer), para 440, describing as ‘somewhat unfortunate’ the terminology used in (French) decisions referring to an arbitration agreement as autonomous from ‘any national law’ and as having its ‘own effectiveness’, and observing that “a contract can only be valid by reference to a law that recognises such validity”. Finally, in response to a 1977 commentary, suggesting that the validity of an arbitration clause in an international contract “resulted solely from the will of the parties, independently of any reference to the law of the main contract, and to any national law” and describing this as “the ultimate pinnacle of autonomy”, Poudret and Besson’s Comparative Law of International Arbitration 2nd ed (2007), para 180 also said that:

“… it is only the first two aspects, i.e. indifference to the fate of the main contract and the possibility of being submitted to a separate law, that flow logically from the principle of separability. The latter by no means implies that the arbitration agreement is independent of any national law. The real justification of this regime lies elsewhere: as Philippe Fouchard emphasises in his note on the Menicucci judgment, the aim is to remove the obstacles which certain laws, including French law, bring to the development of international arbitration. Although the judgment does not say so, this new conception of separability implies abandoning the conflict of laws approach in favour of material rules, which are in reality part of French law and not of any international or transnational system. We shall see this point with the Dalico judgment.”
In the light of the common ground between the parties, it is also unnecessary to engage with the competing representations of international arbitration lucidly discussed in Gaillard’s *Legal Theory of International Arbitration* (2010) pp. 13-66. Whatever the juridical underpinning or autonomy of their role from the viewpoint of international arbitrators, the present case involves an application to enforce in the forum of a national court, subject to principles defined by s.103 of the 1996 Act and Article V of the New York Convention, upon the effect of which there is substantial, though not complete, agreement between the parties now before the Supreme Court.

(b) The provisions of that law as regards the existence and validity of an arbitration agreement.

17. The parties’ experts on French law were agreed that a French court would apply a test of common intention to an issue of jurisdiction. Dallah’s expert, M. Derains, said this in his written report (p.14):

> “Thus, my Experts’ opinion is that it is open to an arbitral tribunal seating in Paris in an international arbitration to find that the arbitration agreement is governed by transnational law. Yet, the arbitrators must also look for the common will of the parties, express or implied, since it is a substantive rule of French law that the Courts will apply when controlling the jurisdiction of the arbitrators.”

In para 2.9 of a joint memorandum to which Aikens J referred in paras 85 et seq of his judgment, the experts agreed upon the following statement:

> “Under French law, in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the said agreement and, as a result, by the arbitration clause therein. The existence of a common intention of the parties is determined in the light of the facts of the case. To this effect, the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement”.

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18. The experts’ agreement summarises a *jurisprudence constante* in the French courts. The Cour de Cassation endorsed a test of common intention in the case of *Dalico* (para 14 above). M. Derains endorsed its application to issues such as that in the present case. Aikens J had cited to him the leading decisions of the Paris Court of Appeal spelling out the principle in greater detail in a series of cases concerning international arbitrations: *Société Isover-Saint-Gobain v Société Dow Chemical* [1984] 1 Rev Arb 98 (21 October 1983), *Co. tunisienne de Navigation v Société Comptoir commercial André* [1990] 3 Rev Arb 675 (28 November 1989) and *Orri v Société des Lubrifiants Elf Aquitaine* [1992] Jur Fr 95 (11 January 1990). In the last case, the Court put the position as follows:

“Selon les usages du commerce international, la clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d’en étendre l’application aux parties directement impliquées dans l’exécution du contrat et les litiges qui peuvent en résulter, dès lors qu’il est établi que leur situation contractuelle, leurs activités et les relations commerciales habituelles existent entre les parties font présumer qu’elles ont accepté la clause d’arbitrage dont elles connaissaient l’existence et la portée, bien qu’elles n’aient pas été signataires du contrat qui la stipulait.”

In translation:

“According to the customary practices of international trade, the arbitration clause inserted into an international contract has its own validity and effectiveness which require that its application be extended to the parties directly involved in the performance of the contract and any disputes which may result therefrom, provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope, even though they were not signatories of the contract containing it”.

This then is the test which must be satisfied before the French court will conclude that a third person is an unnamed party to an international arbitration agreement. It is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied.
19. Aikens J recorded that the experts were also agreed that: (i) “when the court is looking for the common intention of all the potential parties to the arbitration agreement, it is seeking to ascertain the subjective intention of each of the parties, through their objective conduct. The court will consider all the facts of the case, starting at the beginning of the chronology and going on to the end and looking at the facts in the round” (para 87); (ii) “when a French court is considering the question of the common intention of the parties, it will take into account ‘good faith’” (para 90); and (iii) under French law a state entering into an arbitration agreement thereby waives its immunity, both from jurisdiction (as under English law: State Immunity Act 1978, s.9(1) and Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2006] EWCA Civ 1529; [2007] QB 886) and (unlike English law) also from execution (para 91). However the experts disagreed as to whether the last point had any relevance when considering whether a state had entered into such an agreement. In the light of their conflicting evidence on this point, Aikens J found that: (iv) “the correct analysis of French law is that when the court is ascertaining the subjective intention of the potential state party to the arbitration agreement, it will be in mind the fact that the potential state party to the arbitration agreement would lose its state immunity if it were to become a party to the arbitration agreement” (para 91).

(c) The nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement existed under such law, and

(d) the relevance of the fact that the arbitral tribunal has itself ruled on the issue of its own jurisdiction.

20. These questions are here linked. Miss Heilbron’s primary submission on question (c) is that the only court with any standing to undertake a full examination of the tribunal’s jurisdiction would be a French court on an application to set aside the award for lack of jurisdiction. An example of the French courts’ willingness to do this is provided by République arabe d’Egypte v Southern Pacific Properties Ltd [1986] Ju Fr 75; [1987] Ju Fr 469 (12 July 1984, Paris Court of Appeal and 6 January 1987, Cour de Cassation) (the Pyramids case). Article 1502 of the French Code of Civil Procedure entitles a French court to refuse to recognise or enforce an arbitral award made in the absence of any arbitration agreement, while article 1504 entitles the court to set aside an award made in France in an international arbitration on the grounds provided in article 1502. An ICC arbitral tribunal sitting in Paris had held the Arab Republic of Egypt liable as being party to a contract signed between companies in the Southern Pacific group and the Egyptian General Organisation for Tourism and Hotels (“EGOTH”). On an application by Egypt to set aside the award, the Court of Cassation held that the Court of Appeal had been entitled under articles 1502 and 1504 “de rechercher en droit et en fait tous les elements concernant les vices en question” (to examine in law and in fact all the elements relevant to the alleged defects: p 470), and that it had on that basis been
up to the Court of Appeal to make up its own mind whether the arbitrators had exceeded their jurisdiction.

21. In Miss Heilbron’s submission, any enforcing court (other than the court of the seat of the arbitration) should adopt a different approach. It should do no more than “review” the tribunal’s jurisdiction and the precedent question whether there was ever any arbitration agreement binding on the Government. The nature of the suggested review should be “flexible and nuanced” according to the circumstances. Here, Miss Heilbron argues that the answer to question (d) militates in favour of a limited review. She submits that the tribunal had power to consider and rule on its own jurisdiction (Kompetenz-Kompetenz or compétence-compétence), that it did so after full and close examination, and that its first partial award on jurisdiction should be given strong “evidential” effect. In these circumstances, she submits, a court should refuse to become further involved, at least when the tribunal’s conclusions could be regarded on their face as plausible or “reasonably supportable”.

22. At times, Dallah has put its case regarding the first partial award even higher. In her oral submissions, Miss Heilbron went so far as to suggest that the first partial award was itself an award entitled to recognition and enforcement under the New York Convention. No application for its recognition or enforcement has in fact been made (the present proceedings concern only the final award), but, quite apart from that, the suggestion carries Dallah nowhere. First, (in the absence of any agreement to submit the question of arbitrability itself to arbitration) I do not regard the New York Convention as concerned with preliminary awards on jurisdiction. As Fouchard, Gaillard, Goldman’s International Commercial Arbitration, para 654, observes the Convention “does not cover the competence-competeence principle”. Dallah could not satisfy even the conditions of Article IV(1) of the Convention and s.102(1)(b) of the 1996 Act requiring the production of an agreement under which the parties agreed to submit the question of arbitrability to the tribunal - let alone resist an application under Article V(1)(a) and s.103(2)(b) on the ground that the parties had never agreed to submit that question to the binding jurisdiction of the tribunal. Second, Dallah’s case quotes extensively from Fouchard, Gaillard, Goldman, para 658, pointing out that arbitral tribunals are free to rule on their own jurisdiction, but ignores the ensuring para 659, which says, pertinently, that:

“Even today, the competence-competeence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators’ jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award.”
23. In its written case Dallah also argued that the first partial award gave rise, under English law, to an issue estoppel on the issue of jurisdiction, having regard to the Government’s deliberate decision not to institute proceedings in France to challenge the tribunal’s jurisdiction to make any of its awards. This was abandoned as a separate point by Miss Heilbron in her oral submissions before the Supreme Court, under reference to the Government’s recent application to set aside the tribunal’s awards in France. But, in my judgment, the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement.

24. Dallah’s stance on question (d) cannot therefore be accepted. Arbitration of the kind with which this appeal is concerned is consensual – the manifestation of parties’ choice to submit present or future issues between them to arbitration. Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them. Of course, it is possible for parties to agree to submit to arbitrators (as it is possible for them to agree to submit to a court) the very question of arbitrability - that is a question arising as to whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them. But such an agreement is not simply rare, it involves specific agreement (indeed “clear and unmistakable evidence” in the view of the United States Supreme Court in *First Options of Chicago, Inc. v Kaplan* 514 US 938, 944 (1995) per Breyer J), and, absent any agreement to submit the question of arbitrability itself to arbitration, “the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently”: ibid, per Breyer J, p.943.

25. Leaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration, the concept of competence-competence is “applied in slightly different ways around the world”, but it “says nothing about judicial review” and “it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator’s jurisdictional decision ….”: *China Minmetals Materials Import and Export Co., Ltd. v Chi Mei Corporation* 334 F 3d 274, 288 (2003), where some of the nuances (principally relating to the time at which courts review arbitrators’ jurisdiction) were examined. In *China Minmetals* it was again held, following *First Options*, that under United
States law the court “must make an independent determination of the agreement’s validity and therefore of the arbitrability of the dispute, at least in the absence of a waiver precluding the defense”: p 289. English law is well-established in the same sense, as Devlin J explained in *Christopher Brown Ltd v Genossenschaft Österreichischer [1954] 1 QB 8, 12-13*, in a passage quoted in the February 1994 Consultation Paper on Draft Clauses and Schedules of an Arbitration Bill of the DTI’s Departmental Advisory Committee (then chaired by Lord Steyn):

“It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else’s. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties.”

This coincides with the position in French law: paras 20 and 22 above.

26. An arbitral tribunal’s decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party’s challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator’s jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996, just as he would be entitled under s.72 if he had taken no part before the arbitrator: see e.g. *Azov Shipping Co. v Baltic Shipping Co. [1999]*
1 Lloyd’s Rep 68. The English and French legal positions thus coincide: see the *Pyramids* case (para 20 above).

27. The question is whether the position differs when an English court is asked to enforce a foreign award. There is an irony about Dallah’s stance that any enforcing court, other than the court of the seat, has a restricted role in reviewing an arbitral tribunal’s jurisdiction. The concept of transnational arbitration has been advocated in arbitral circles, and was no doubt recognised by French courts, in order so far as possible to underline the autonomy of international arbitration from the seat of arbitration or its national legal system. What matters in real terms is where an arbitration award can be enforced: see Gaillard’s *Legal Theory of International Arbitration*, (op. cit.) Chapter I. Yet Miss Heilbron’s submissions invoke in one and the same breath a transnational view and a view attaching a special and dominant significance to the law of the seat. They also invite the spectre of dual sets of proceedings, conducted in two different countries (that of the seat and that of enforcement) involving different levels of review in relation to essentially the same issue – whether the award should be enforced in the latter country.

28. It is true that Article V(1)(e) of the Convention and s.103(2)(f) of the 1996 Act recognise the courts of “the country in which, or under the law of which” an award was made as the courts where an application to set aside or suspend an award may appropriately be made; and also that Article VI and s.103(5) permit a court in any other country where recognition or enforcement of the award is sought to adjourn, if it considers it proper, pending resolution of any such application. But Article V(1)(a) and s.103(2)(b) are framed as free-standing and categoric alternative grounds to Article V(1)(e) of the Convention and s.103(2)(f) for resisting recognition or enforcement. Neither Article V(1)(a) nor s.103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc. existence) of the supposed arbitration agreement is in issue. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. Nor do Article VI and s.103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made.

29. None of this is in any way surprising. The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognise the tribunal’s activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to both parties is the enforceability of the award in the country where enforcement is sought. Since Dallah has chosen to seek
to enforce in England, it does not lie well in its mouth to complain that the Government ought to have taken steps in France. It is true that successful resistance by the Government to enforcement in England would not have the effect of setting aside the award in France. But that says nothing about whether there was actually any agreement by the Government to arbitrate in France or about whether the French award would actually prove binding in France if and when that question were to be examined there. Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No. 2)* [1985] 1 WLR 490). But that is a matter for the French courts to decide.

30. The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal – a comment made in view of Dallah’s repeated (but no more attractive for that) submission that weight should be given to the tribunal’s “eminence”, “high standing and great experience”. The scheme of the New York Convention, reflected in ss.101-103 of the 1996 Act may give limited *prima facie* credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s.103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen or thirty love up.

31. This is not to say that a court seised of an issue under Article V(1)(a) and s.103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination. Courts welcome useful assistance. The correct position is well-summarised by the following paragraph which I quote from the Government’s written case:

“233. Under s.103(2)(b) of the 1996 Act / Art V.1(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral
tribunal, if they are helpful, but it is neither bound nor restricted by them.”

The application of the above principles

32. The above principles have already been applied to the facts of this case at two previous instances. Not surprisingly, therefore, most of the emphasis of Dallah’s written case and oral submissions before the Supreme Court was on the submissions of principle which have already been considered. In the circumstances and in the light of the careful examination of the whole history in the courts below, it is unnecessary to go once again into every detail. Each of the courts below has paid close attention to the arbitral tribunal’s reasoning and conclusions, before concluding that the tribunal lacked jurisdiction to make the final award now sought to be enforced. Their examination of the case took place by reference to the same principles that a French court would, on the expert evidence, apply if and when called upon to examine the existence of an arbitration agreement between Dallah and the Government: see paras 17-20 above. It took account of the whole history, including the Government’s close involvement with and interest in the project from the original proposal onwards, the negotiation and signature of the MOU with the Government, the creation by the Government of the Trust and the re-structuring of the project to introduce the Trust, the negotiation and signature of the Agreement between Dallah and the Trust, the subsequent correspondence, the three sets of proceedings in Pakistan and the arbitration proceedings.

The tribunal’s approach

33. The arbitral tribunal set out its approach to the issue of jurisdiction in the opening paragraphs of its first partial award. Dallah and the Government had argued for a single law governing both arbitral jurisdiction and the substance of the issues: the law of Saudi Arabia in Dallah’s submission and the law of Pakistan in the Government’s. The tribunal distinguished between jurisdiction and substance, relying on the principle of autonomy of arbitral agreements, and rejected both the suggested national laws. It held (section III(I)) that:

“3. Judicial as well as Arbitral case law now clearly recognise that, as a result of the principle of autonomy, the rules of law, applicable to an arbitration agreement, may differ from those governing the main contract, and that, in the absence of specific indication by the parties, such rules need not be linked to a particular national law (French Cour de Cassation, 1er civ., Dec. 20, 1993, Dalico), but may consist of those transnational general principles which the
Arbitrators would consider to meet the fundamental requirements of justice in international trade.

Dr Justice Shah and Lord Mustill would not endorse without reservation the concept of a transnational procedural law independent of all national laws. They need not however pursue this, since it makes no difference to the result.

4. ..... in view of the autonomy of the Arbitration Agreement, the Tribunal believes that such Agreement is not to be assessed, as to its existence, validity and scope, neither under the laws of Saudi Arabia nor under those of Pakistan, nor under the rules of any other specific local law connected or not, to the present dispute.

By reason of the international character of the Arbitration Agreement coupled with the choice, under the main Agreement, of institutional arbitration under the ICC Rules without any reference in such Agreement to any national law, the Tribunal will decide on the matter of its jurisdiction and on all issues relating to the validity and scope of the Arbitration Agreement and therefore on whether the Defendant is a party to such Agreement and to this Arbitration, by reference to those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business.”

34. As to what this meant in practice, the tribunal noted (section III(III)(1)) that:

“a non-signatory may be bound by an arbitration agreement, by virtue of any one of a number of legal theories such as representation, assignment, succession, alter ego or the theory of group of companies”.

It recorded that Dallah’s primary case was that the Trust was an alter ego of the Government, but went on immediately to say that:

“To arbitrate this disputed issue, the Arbitral Tribunal believes that it is very difficult to reason exclusively on the basis of juristic and abstract legal principles and provisions and to decide such issue by merely relying on general considerations of legal theory.”
35. The tribunal then described the setting up and organisation of the Trust. It concluded that the rules and regulations provided in the Ordinance did “not contain sufficient evidence that would permit it to disregard the Trust’s legal entity and to consider that the Trust and the Government are one such entity”, and were “fully consistent with the general features of the regulations of public entities”, and that “Such control of the Trust by the Government is not, in itself, sufficiently pertinent to impair the distinct legal personality enjoyed by the Trust or to lead to the disregard of such personality, and therefore to the extension of the Arbitration Agreement from the Trust to the Government”. The tribunal, or Dr Shah and Lord Mustill, added that “particular caution must be observed where the party sought to be joined as defendant is a state or state body”.

36. The tribunal continued (section III(III)):

“5. In fact, any reply to the present issue relating to whether or not the Present Defendant is a Party to the Arbitration Agreement depends on the factual circumstances of the case and requires a close scrutiny of the conduct and of the actions of the parties before, during and after the implementation of the main Agreement in order to determine whether the Defendant may be, through its role in the negotiation, performance and termination of such Agreement, considered as a party thereto, and hence to the Arbitration Agreement.

The control exercised by the State over the Trust becomes, within that framework, an element of evidence of the interest and the role that the party exercising such control has in the performance of the agreement concluded by the Trust, and provides the backdrop for understanding the true intentions of the parties.

6. Arbitral as well as judicial case-law has widely recognised that, in international arbitration, the effects of the arbitration clause may extend to parties that did not actually sign the main contract but that were directly involved in the negotiation and performance of such contract, such involvement raising the presumption that the common intention of all parties was that the non-signatory party would be a true party to such contract and would be bound by the arbitration agreement.”

In the context of the award as a whole, the last paragraph must be a statement by the tribunal of one of the “transnational general principles and usages reflecting the
fundamental requirements of justice in international trade and the concept of good faith in business”, to which the tribunal had earlier referred in section III(I)(4).

37. In this light, the tribunal examined in turn the position prior to, at signature of, and during performance of the Agreement, and during the period after the Trust lapsed. At each point, it focused on the Government’s conduct. It considered that it was “clearly established” that the Trust was organically and operationally under the Government’s strict control, that its financial and administrative independence was largely theoretical, and that everything concerning the Agreement was at all times “performed by the [Government] concurrently with the Trust” and that “the Trust functions …. reverted back logically to” the Government, after the Trust ceased to exist (section III(III)(12-1). The tribunal’s examination led it to conclude (para 12-1) that:

“The Trust, in spite of its distinct legal personality in theory, appears thus in fact and in conduct to have been considered – and to have acted – as a part and a division of the Defendant to which it is fully assimilated, a temporary instrument that has been created by a political decision of the Defendant for specific activities which the Defendant wanted to perform, and which was cancelled also by a political decision of the Defendant. Therefore, the Trust appears as having been no more than the alter ego of the Defendant which appears, in substance, as the real party in interest, and therefore as the proper party to the Agreement and to the Arbitration with the Claimant”.

38. The tribunal went on (para 12-2) to say that the Government’s behaviour, as “in actual fact the party that was involved in the negotiation, implementation and termination of the Agreement …. before, during and after the existence of the Trust”, “shows and proves that the [Government] has always been – and considered itself to be – a true party to the Agreement ….”. The tribunal acknowledged (para 13) that “Certainly, many of the above mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section”, but it recorded that Dr Mahmassani believed that, when looked at “globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the Defendant is a true party to the Agreement”, and that “While joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line”. In paragraph 14, the tribunal recorded a further divergence of view, with Dr Mahmassani believing that “the general principle of good faith” “comforts the conclusion that the Trust is the alter ego of the Defendant”, but Dr Shah and Lord Mustill “not convinced that in matters not concerning the conduct of proceedings but rather the identification of those who should be participants in them, a duty of good faith can operate to
make someone a party to an arbitration who on other grounds could not be regarded as such”.

39. The tribunal’s ultimate conclusion on jurisdiction was thus expressed as a finding (in which two of the arbitrators only narrowly concurred) that the Trust was the alter ego of the Government, making the Government a “true party” to the Agreement. That, as I have said (para 11 above), is not now Dallah’s case. But Dallah points out that the tribunal’s reasoning for its ultimate finding, and the lengthy analysis of conduct and events which the tribunal undertook, can be traced back to para 6 of section (III)(III) of its award, where the tribunal identified a test of common intention to be derived from judicial and arbitral case-law. How these strands of thought relate is not to my mind clear. There is a considerable difference between a finding (and between the evidence relevant to a finding) that one of two contracting parties is the alter ego of a third person and a finding that it was the common intention of the other party to the contract that the third person should be a party to the contract made with the first party. The former depends on the characteristics and relationship of the first contracting party and the third person. The latter depends on a common intention on the part of the second contracting party and the third person (and possibly also on the part of the first contracting party, although no-one has suggested that the Trust in the present case did not concur in any common intention that Dallah and the Government may be found to have had). Since the tribunal focused throughout on the Trust and Government and their relationship and conduct, and ended with a conclusion that the former was the alter ego of the latter, it is not clear how far the tribunal was in fact examining or making any finding about any common intention of Dallah and the Government. If it was, the weight attaching to the finding is diminished by the tribunal’s failure to focus on Dallah’s intention. The hesitation of two of the arbitrators about the conclusion they reached also suggests the possibility that even a slight difference in the correct analysis of the relevant conduct and events could have led the tribunal overall to a different conclusion.

40. More fundamentally, if and so far as the tribunal was applying a test of common intention, the test which it expressed in section III(III)(6) differs, potentially significantly, from the principle recognised by the relevant French case-law on international arbitration. Although the tribunal must have viewed its test as a transnational general principle and usage, it appears likely that it also had the French case-law in mind. This is suggested by its use of the words “directly involved in” and “presumption”, by its earlier mention of the Dalico case (see para 18 above), and by its letter dated 29 November 2000 written (after the oral hearings before it on jurisdiction) raising the possibility that reasoning embodied in the French Pyramids case might be relevant on the issue of jurisdiction. In any event, in Dallah’s submission, the tribunal applied principles which accord “broadly” with French law. But, the French legal test, set out in para 18 above, is
that an international arbitration clause may be extended to non-signatories directly involved in the performance of a contract:

“provided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope”.

In contrast, under the test stated by the tribunal (para 36 above), direct involvement in the negotiation and performance of the contract is \textit{by itself} said to raise the presumption of a common intention that the non-signatory should be bound. The tribunal’s test represents, on its face, a low threshold, which, if correct, would raise a presumption that many third persons were party to contracts deliberately structured so that they were not party. Asked about the tribunal’s test, M. Vatier did not consider it accurate enough, adding that “the principles adopted were in general the principles that might be adopted in French law. But they are too general”. I consider that Aikens J was therefore correct to doubt (in para 148) whether the tribunal had applied a test which accords with that recognised under French law.

\textit{Analysis of the history}

41. I turn to the conduct of the Government and the events on which the tribunal relied. As to the Ordinance, the tribunal said that it regarded the Government’s “organic control” of the Trust as “an element of evidence as to the true intention of the Defendant to run and control directly and indirectly the activities of the Trust, and to view such Trust as one of its instruments”. Miss Heilbron accepts that Dallah cannot rely on the last ten words. Dallah is not advancing a case of agency, and the Ordinance does not support a case of agency. The tribunal’s comment at this point is on its face also inconsistent with the tribunal’s earlier references to the normality of the control established by the Ordinance (para 35 above).

42. As to the negotiations leading up the Agreement, the courts below were in my view correct to observe that the fact that the Government was itself involved in negotiations and in the MOU and remained interested throughout in the project does not itself mean that the Government (or Dallah) intended that the Government should be party to the Agreement deliberately structured so as to be made, after the Trust’s creation, between Dallah and the Trust. It does not appear that a French court would adopt any different attitude to governmental interest and involvement in the affairs of a state entity. An illustration of the careful analysis required in this context is provided by the decision of the Court of Appeal of Paris in the \textit{Pyramids}
case (above). Under Heads of Agreement signed by the Egyptian government through its Minister of Tourism, the Egyptian General Organisation for Tourism and Hotels (“EGOTH”) and the claimant, the government had committed itself to do the necessary work to acquire property near the Pyramids and EGOTH and the claimants undertook to form a company (to be owned 40/60 by EGOTH and the claimants) to develop a tourist centre on such property. A usufruct over the property was to be given to the company by the government and EGOTH, and the claimants were to be responsible for engineering, construction and architectural services, as well as financing. Subsequently, EGOTH and the claimants entered into a “Supplemental Agreement” which defined the project and their obligations and contained an ICC arbitration clause. Underneath their respective signatures on this agreement, the Minister of Tourism placed the words “approved, agreed and ratified by the Minister of Tourism” followed by his signature. A worldwide outcry led to the Egyptian authorities cancelling the project. The Paris Court of Appeal set aside an arbitral award against the state of Egypt, holding that the words and signature added by the Minister did not mean that the state was a party. They were added because the Ministry was responsible for supervising tourist sites and approving the creation of economic complexes and the creation, operation and management of hotels, and EGOTH and the claimants had specifically contemplated that their agreement would be subject to such approval. The added words and signature did not therefore indicate any intention to be bound and so to waive the state’s immunity.

43. Here, the structure of the Agreement made clear that the Government was distancing itself from any direct contractual involvement: see per Aikens J, para 129 and Moore-Bick LJ, para 32. The Government’s only role under the Agreement (in the absence of any assignment or transfer under clause 27) was to guarantee the Trust’s loan obligations and to receive a counter-guarantee from the Trust and its trustee bank. Dallah was throughout this period advised by lawyers, Orr, Dignam & Co. The tribunal confined itself in relation to the Agreement to statements that (a) it was the Government which decided to “delegate” to the Trust the finalisation, signature and implementation of the Agreement, (b) the Government was “contractually involved in the Agreement”, as the Government was “bound”, under Article 2, to give its guarantee and (c) clause 27 authorised the Trust to assign its rights and obligations to the Government without Dallah’s prior approval, such a clause being “normally used only when the assignee is very closely linked to the assignor or is under its total control ….” (no doubt true, but on its face irrelevant to the issue). The “delegate” and “bound” tend to beg the issue, and nothing in these statements lends any support to Dallah’s case that the Agreement evidences or is even consistent with an intention on the part of either Dallah or the Government that the Government should be party to the Agreement. Nowhere did the tribunal address the deliberate change in structure and in parties from the MOU to the Agreement, the potential significance of which must have been obvious to Dallah and its lawyers, but which they accepted without demur.
44. As to performance of the Agreement, between April 1996 and September 1996, exchanges between Dallah and the Ministry of Religious Affairs (“MORA”) of the Government culminated in agreement that one of Dallah’s associate companies, Al-Baraka Islamic Investment Bank Ltd., should be appointed trustee bank to manage the Trust’s fund as set out in each Ordinance (para 5 above), and in notification by letters dated 30 July and 9 September 1996 of such appointment by the Board of Trustees of the Trust. In subsequent letters dated 26 September and 4 November 1996, the MORA urged Mr Nackvi of the Dallah/Al-Baraka group to give wide publicity to the appointment and to the savings schemes proposed to be floated for the benefit of intending Hujjaj. By letter dated 22 October 1996 Dallah submitted to the MORA a specimen financing agreement for the Trust (never in fact approved or agreed), under one term of which the Trust would have confirmed that it was “under the control of” the Government. The Government’s position and involvement in all these respects is clear but understandable, and again adds little if any support to the case for saying that, despite the obvious inference to the contrary deriving from the Agreement itself, any party intended or believed that the Government should be or was party to the Agreement.

45. The fact that the Trust never itself acquired any assets is neutral, since its acquisition of any property always depended upon the arrangement of financing through Dallah, which never occurred, and its acquisition of other funds was to depend on the savings and philanthropic schemes to be arranged through its trustee bank under the Ordinances, the time for which never came. It is scarcely surprising that in these circumstances the Trust never itself acquired its own letter-paper, and letters recording its activity were, like those reporting decisions of its Board of Trustees, written on MORA letter-paper.

46. At the forefront of Dallah’s factual case before the Supreme Court, as below, were exchanges and events subsequent to the Trust’s demise. One letter in particular, dated 19 January 1997, was described in Dallah’s written case as playing “a pivotal role” in, and in Miss Heilbron’s oral submissions as “key” to the differing analyses of the tribunal and the courts below. The letter was written by Mr Lutfullah Mufti, signing himself simply as “Secretary”, on MORA letter-paper, and faxed to Dallah on 20 January 1997. It read:

“Pursuant to the above mentioned Agreement for the leasing of housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, you were required within ninety (90) days of the execution of the said Agreement to get the detailed specifications and drawings approved by the Trust. However, since you have failed to submit the specifications and drawings for the approval of the Trust to date you are in breach of a fundamental term of the Agreement which..."
tantamounts to a repudiation of the whole Agreement which repudiation is hereby accepted.

Moreover, the effectiveness of the Agreement was conditional upon your arranging the requisite financing facility amounting to U.S. $100,000,000.00 within thirty (30) days of the execution of the Agreement and your failure to do so has prevented the Agreement from becoming effective and as such there is no Agreement in law.

This is without prejudice to the rights and remedies which may be available to us under the law.”

47. Mr Lutfullah Mufti was secretary of MORA from 26 August 1993 to 19 December 1995 and from 23 December 1996 to 3 June 1998, and it will be recalled that, under each Ordinance, the secretary of MORA was at the same time secretary of the Trust. Also on 20 January 1997 Mr Mufti verified on oath the contents of a plaint issued in the name of the Trust as plaintiff to bring the first set of Pakistani proceedings against Dallah. The plaint set out the establishment of the Trust by Ordinance LXXXI of 1996 dated 12 August 1996 as a body having perpetual succession and asserted that Dallah had repudiated the Agreement by failing to submit detailed specifications and drawings within 90 days of the execution of the Agreement “which repudiation was accordingly accepted by the plaintiff vide its letter dated 19.01.1997”. The Trust sought a declaration that, in consequence of the accepted repudiation, the Agreement was “not binding and is of no consequence upon the rights of the plaintiff” and a permanent injunction restraining Dallah “from claiming any right against the plaintiff”. By an undated application, also verified by Mr Mufti, the Trust further sought an interlocutory injunction restraining Dallah “from representing or holding out itself to have any contractual relation with the applicant on the basis of the aforesaid repudiated Agreement”.

48. Dallah made an application against the Trust for a stay of the Trust’s proceedings in favour of arbitration under clause 23 of the Agreement. The application is missing from the bundle, but a written reply to it was put in on behalf of the Trust. This averred, in terms consistent with the stance taken in the plaint (though less obviously consistent with the principle of the separability of arbitration clauses), that since “the plaintiff has challenged the very validity and existence of the agreement dated 10.09.1996, the instant application is, therefore, not maintainable”. Mr Mufti deposed on oath that allegations evidently made by Dallah against the Trust in its application for a stay were “false” and that “the facts stated in the plaint are true and correct to the best of my knowledge and belief and are reiterated”. In early 1998, the first set of Pakistan proceedings were brought to an end by a judgment which commenced by recording that:
“Counsel for the defendant had objected at the last date of hearing that Awami Haj Trust was established [under section] 3 of the Awami Haj Trust Ordinance, 1996 but at the time of institution of this suit Ordinance had elapsed, there was no more ordinance in the field and suit has been filed on behalf of same which was formed under the Ordinance after the lapse of Ordinance. Awami Haj Trust is plaintiff in this suit. After the lapse of Ordinance, the present plaintiff was no more a legal person in the eye of law.”

The judge went on to record and reject the submission of counsel appearing for the Trust that the Trust continued to be able to file suit in respect of things done during the life of the Trust, adding:

“Moreover the things done during the Ordinance can be sued and can sue by the parent department for which this Ordinance was issued by the government and that was ministry for religious affairs. Suit should have been filed by the Ministry of religious affairs. …… Before parting with this Order, I observe that the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any. Since the suit has not been filed by the legal person. The present plaintiff is no more a plaintiff in the eye of the law. Suit is dismissed. ….”

49. Dallah invoked ICC arbitration against the Government on 19 May 1998, on the basis that the Government was party to the Agreement. Notice of Dallah’s request for arbitration was received by the Government on 29 May 1998, and on 2 June 1998 a second Pakistani suit was filed in the Government’s name against Dallah, verified once again by Mr Mufti. Its terms were clearly drawn from those of the first suit, but it started by reciting that the Trust established under Ordinance No. LXXXI of 1996 “no longer remained in field” after the lapse of the Ordinance after four months, and that “The present suit is, therefore, being filed by Pakistan who issued the said Ordinance”. The plaint went on to recite the Agreement, variously referring to “the parties” to it, to the Trust as a party, to “the plaintiff Trust”, to “the plaintiff” and to Dallah’s alleged repudiation “which repudiation was accordingly accepted by the plaintiff vide its letter dated 19.01.1997”. It further asserted that, on account of such repudiation, the Agreement “is no longer binding on the plaintiff” and then:

“14. That in January 1997, Awami Hajj Trust instituted a civil suit for declaration and permanent injunction against the defendant which suit was, however, dismissed vide order dated 21.02.1998 on the ground that after the lapse of the Ordinance, Awami Hajj Trust was no more a legal person and it could neither sue or be sued. The
learned civil court, however observed that “liabilities and duties against the defendant can be agitated by the Government of Pakistan” [sic].”

50. The plaint concluded by praying for a declaratory decree in favour of the plaintiff that the Agreement “stands repudiated on account of default of the defendant … and the same, as such, is not binding and is of no consequence upon the rights of the plaintiff” and by seeking a permanent injunction restraining Dallah “from claiming any right against the plaintiff under the said Agreement or representing or holding out that it has any contractual relationship with the plaintiff”. An interim injunction in the same terms was obtained on 2 June 1998. On 5 June 1998 the Government, through its advocates, wrote to the ICC informing it of the proceedings and the interim injunction as well as relying on s.35 of the Pakistan Arbitration Act 1940 in support of a contention that any further proceedings in the ICC arbitration would be “invalid” in the light of the Pakistan proceedings.

51. Dallah responded to the second set of Pakistan proceedings on 12 June 1998 with an application for a stay for arbitration, asserting that “the contract, admitted by the Plaintiff, which is complete, valid and fully effective between the parties, contains the following clause 23 …”, which was then set out. It pointed out, no doubt correctly, that the Government’s plaint must be seen as a riposte to the recently notified request for ICC arbitration. The Government replied on 27 June 1998 to the effect that “there is no valid and effective Agreement between the parties. The application, as such, is incompetent and is liable to be dismissed”. On 15 August 1998 the Government’s advocates informed the ICC that the Government “has already declined to submit to the jurisdiction of the International Court of Arbitration” and spelled out that:

“There is no contract or any arbitration agreement between our client and Dallah …. The contract and the arbitration agreement referred to by the Claimant were entered into between the Claimant and Awami Hajj Trust. The Trust has already ceased to exist after expiry of the period of the Ordinance under which it was established”.

52. By a judgment dated 18 September 1998, the judge in the second set of Pakistan proceedings dismissed Dallah’s application for a stay for arbitration on the ground that Dallah had “neither alleged nor placed on record any instrument of transfer of rights and obligations of the Trust in the name of the [Government]”, which was not therefore prima facie bound by the Agreement dated 10 September 1996. Dallah appealed on the ground that the Government was “successor” to the Trust, but on 14 January 1999 the Government withdrew its suit, as it was apparently entitled to, in view of its commencement of the third set of Pakistani
proceedings. Dallah has disclaimed, both before the tribunal and before the English courts, any suggestion that these short-lived and abortive proceedings could give rise to any estoppel on the issue of the tribunal’s jurisdiction. But Dallah relies on them in support of its current case of common intention.

53. In the third set of proceedings the Government claimed against Dallah declarations to the effect, inter alia, that it was not successor to the Trust, had not taken over the Trust’s responsibilities and was not a party to the Agreement or any arbitration agreement with Dallah. The claim was made under s.33 of the Arbitration Act 1940, which entitles a party to an arbitration agreement or any person claiming under such party to claim relief. Dallah’s response was that, since the Government was denying that it was party to an arbitration agreement, it had no locus standi to make the claim. This response was upheld by judgment dated 19 June 1999, against the Government’s argument that the purpose of s.33 was to enable a party alleged to be party to an arbitration agreement to seek the relief it claimed. An appeal by the Government to the Lahore High Court was dismissed, again on the basis that the Government was not a party to the Agreement or arbitration agreement. An appeal to the Pakistan Supreme Court has apparently remained unresolved.

54. No evidence was adduced from Mr Mufti before Aikens J. Aikens J said, in relation to the letter dated 19 January 1997 that, “logically” Mr Mufti “must, in fact, have been writing the letter in his capacity of Secretary to MORA, whatever he may have thought at the time”, but Aikens J found it “possible to get a clearer indication of the state of mind of the [Government] at this stage” by reference to the proceedings begun by Mr Mufti on 20 January 1997 (paras 117, 119). These indicated, in Aikens J’s view, that Mr Mufti thought that the Trust had rights it could enforce, and that there was no intention on the part of the Government to be bound by the Agreement or to step into the shoes of the Trust (para 119). The Court of Appeal took a slightly different view. It observed that the fact that, after the Trust ceased to exist, Mr Mufti could not have been writing (as opposed, I add, to purporting to write) as secretary to the Board of Trustees did not necessarily mean that he was writing on behalf of the Government or that the Government viewed itself as a party to the Agreement (Moore-Bick LJ, para 36). Moore-Bick LJ continued: “If, as I think likely, the letter was written in ignorance that the Trust had ceased to exist, it is almost certain that Dallah was equally unaware of the fact and that it was read and understood as written on behalf of the Trust”.

55. Miss Heilbron challenges this reasoning as regards the Government, and invites attention to the letter on its face and to the Government’s stance in the second set of Pakistan proceedings. But one obvious explanation of the letter, read with the first set of proceedings of which it was clearly the precursor, is that neither Mr Mufti nor indeed Dallah was at that stage conscious of the drastic effect under Pakistan law of the failure to repromulgate the Ordinance. Even if Mr Mufti
was aware of the Trust’s demise, he may well have believed (and one may understand why) that this could not affect the Trust’s right to litigate matters arising during and out of the Trust’s existence – which was the stance taken by counsel for the Trust when Dallah eventually realised and pointed out that the Trust had lapsed. However that may be, it seems clear that Mr Mufti was in January 1997 acting on the basis that and as if the Trust existed. Further, Dallah clearly cannot have appreciated that the Trust had ceased to exist until a late stage in the course of the first set of Pakistan proceedings.

56. The arbitral tribunal regarded the letter dated 19 January 1997 as “very significant because it confirmed in the clearest way possible that the Defendant [the Government], after the elapse of the Trust, regarded the Agreement with the Claimant as its own and considered itself as a party to such Agreement” (para 11-1). It went on to say that the Government’s position in the arbitration:

“did not deal with the substance and contents of such letter, but was rather limited to a formal and very general challenge of the validity of said letter, on the ground that such letter was absolutely unauthorised, illegal and of no legal effect because all office bearers of the Trust, including the Secretary, had ceased to have any authority to act for the defunct Trust. Such challenge is however completely unfounded as the signatory of the letter of 19.1.97, Mr Lutfallah Mufti, did not sign such letter in his capacity as official of the Trust, to which anyhow the letter makes no reference at all, but in his capacity as Secretary of the Defendant i.e. the Ministry of Religious Affairs which is an integral part of the Government of Pakistan. As such, the signatory of the letter engages and binds the Government, as he has continued to bind it during the whole previous period where the Trust was in existence.”

57. Several features of the arbitral tribunal’s reliance on the letter are notable. First, the tribunal did not put the letter in its context. It did not mention the first set of proceedings at all in addressing the letter’s significance. In fact, it referred to those proceedings only once in its whole award. That was much earlier in para 5(c) where it recited three short submissions by the Government “With respect to the effect of the legal proceedings in Pakistan”. The first such submission read:

“The 1\textsuperscript{st} [sic] January 1997 suit: Pakistan was not a party to such suit and as such it is not bound by any observation made by the Court in the said suit instituted by the defunct Trust”.
(In making this submission, the Government was evidently seeking to rebut a possible argument that it might be bound by the (obiter) observations of the judge in his judgment at the end of the first set of proceedings to the effect that “the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any”. It has not been, and could not have been suggested in the present proceedings that these observations in any way bind the Government.)

58. Secondly, the tribunal rejected any idea that Mr Mufti was, when writing the letter, acting in a manner which was “absolutely unauthorised, illegal and of no legal effect”. But that, on any view, was precisely what Mr Mufti can be seen, with hindsight, to have been doing, on the same day as the letter was faxed, by commencing the first set of proceedings in the Trust’s name.

59. Thirdly, the tribunal’s comments on the letter assume that the Government or Mr Mufti on its behalf was aware of the “elapse of the Trust” and believed that this ended any possibility of the Trust taking any legal stance or proceedings. That, for reasons I have indicated, cannot have been the case. He must at least have believed that it was still possible for action to be taken in the Trust’s name in respect of matters arising from the Agreement.

60. Fourth, the tribunal, in this context as in others, did not address Dallah’s state of mind, or its objective manifestation - an important point when considering a test based on common intention.

61. The letter dated 19 January 1997 and faxed on 20 January 1997 cannot be read in a vacuum, particularly when the issue is whether the parties shared a common intention, manifested objectively, to treat the Government as a or the real party to the Agreement and arbitration clause. Read in the objectively established context which I have indicated, it is clear that it was written and intended as a letter setting out the Trust’s position by someone who believed that the Trust continued either to exist or at least to have a sufficient existence in law to enable it to take a position on matters arising when the Ordinance was in force. This is precisely how the plaint of 20 January 1997 put the matter when it said that the “repudiation was accordingly accepted by the plaintiff [i.e. the Trust] vide its letter dated 19.01.1997”. It makes no sense to suppose that Mr Mufti on one and the same day sent a letter intended to set out the Government’s position and caused proceedings to be issued by the Trust on the basis that the letter was intended to set out the Trust’s position. That Dallah also believed that the Trust continued to exist, certainly in a manner sufficient to enable it to pursue the proceedings, is confirmed by Dallah’s application to stay the Trust’s proceedings pending arbitration and is also (as I understood her) admitted by Miss Heilbron.
62. The arbitral tribunal also relied on the second set of Pakistan proceedings and on the Government’s letter dated 5 June 1998 to the tribunal. It saw Mr Mufti’s verification on oath of the plaint dated 2 June 1998 as an admission providing “another piece of evidence to be added to the other pieces, as to the fact that the [Government] has always been – and has considered itself – a party to the agreement”, and the letter as an admission “that it was a party to such Agreement and that it could accept repudiation of the Agreement by [Dallah]” (para 11-2). Aikens J and the Court of Appeal did not accept this analysis. They considered that the second set of proceedings viewed overall was premised on the basis that the Government had succeeded to the Trust’s rights and obligations upon the Trust’s demise, not that the Government had been a party to it always or at any previous date. The Government was taking up the suggestion of the judge who, when determining the first set of proceedings, had remarked that “the liabilities and duties against the present defendant can be agitated by the Ministry of Religious affairs government of Pakistan if any”. In my opinion this analysis is clearly correct. If the search is for confirmation of an intention to be or belief that the Government was party to the Agreement throughout, the second set of proceedings does not therefore advance the matter. Nor does the letter dated 5 June 1998. This was written to draw express attention to the second set of proceedings, and it recorded and attached a copy of the Pakistan judge’s injunction in them restraining Dallah “from representing or holding out itself to have contractual relations with the applicant on the basis of the disputed contract”.

63. Further, nothing affirmed by the Government during the second set of proceedings or in the letter throws any light on Dallah’s intention at any prior date, or therefore assists the case that there was any “common” intention that the Government should “always” be party to the Agreement.

64. If the search is for an admission in or after June1998 that the Agreement or arbitration clause was binding on the Government, this is equally lacking. The Government’s case in the second set of proceedings, and the gist of the injunction and the letter dated 5 June 1998 was that, although the Government could “agitate” the former Trust’s rights and liabilities, the Government’s acceptance of Dallah’s alleged repudiation meant that the Agreement “as such, is not binding and is of no consequence upon the rights of the [Government]” (plaint of 20 January 1997). However questionable the proposition that an accepted repudiation renders the whole agreement (let alone an arbitration clause) “not binding”, that was the Government’s case, and such a case is inconsistent with an intention to be party to the Agreement or agreement clause in or after June 1998. Further and in any event, a very short time afterwards on 15 August 1998 the Government wrote to the tribunal making clear also its current position that it had never been party to any contract or arbitration agreement with Dallah. Even if the Government could be treated in June as having made any relevant, short-lived admission, it would in context and in the overall course of events be incapable of giving rise to any real
inference that the Government had always intended or been intended to be a party to the Agreement.

65. Finally, the search for a subjective common intention under the principle recognised by the French courts must be undertaken by examining, and so through the prism of, the parties’ conduct. Account will in that sense necessarily be taken of good faith. The tribunal also described the “transnational general principles and usages”, which it decided to apply, as “reflecting the fundamental requirements of justice in international trade and the concept of good faith in business” (award, section III (I)(4)), and this must also be true of the principle recognised by the French courts. As both Aikens J (para 130) and Moore-Bick LJ (para 45) said, and in agreement on this point with Justice Dr Shah and Lord Mustill, if conduct interpreted as it would be understood in good faith does not indicate any such common intention, then it is impossible to see how “… a duty of good faith can operate to make someone a party to an arbitration who on other grounds could not be regarded as such” (award, section (III)(III)(14)). This remains so, whatever comments might or might not be made about the Government’s conduct in allowing the Trust to lapse without providing for the position following its lapse.

66. In my view, the third re-examination by this court, in the light of the whole history, of the issue whether the Government was party to the Agreement, and so to its arbitration clause, leads to no different answer to that reached in the courts below. The arbitral tribunal’s contrary reasoning is neither conclusive nor on examination persuasive in a contrary sense. As to the law, it is far from clear that the tribunal was directing its mind to common intention and, if it was, it approached the issue of common intention in terms differing significantly from those which a French court would adopt. In any event, as to the facts, there are a number of important respects in which the tribunal’s analysis of the Government’s conduct and the course of events cannot be accepted, and this is most notably so in relation to the significance of the letter dated 19 January 1997 and the second set of proceedings in Pakistan. The upshot is that the course of events does not justify a conclusion that it was Dallah’s and the Government’s common intention or belief that the Government should be or was a party to the Agreement, when the Agreement was deliberately structured to be, and was agreed, between Dallah and the Trust.

Discretion

67. Dallah has a fall-back argument, which has also failed in both courts below. It is that s.103(2) of the 1996 Act and Article V(1) of the New York Convention state that “Recognition and enforcement of the award may be refused” if the person against whom such is sought proves (or furnishes proof of) one of the specified matters. So, Miss Heilbron submits, it is open to a court which finds that
there was no agreement to arbitrate to hold that an award made in purported pursuance of the non-existent agreement should nonetheless be enforced. In *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819 I suggested that the word “may” could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused (paras 8 and 18). I also suggested as possible examples of such circumstances another agreement or estoppel.

68. S.103(2) and Article V in fact cover a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke such discretion as the word “may” contains than it could be in any case where the objection is that there was never any applicable arbitration agreement between the parties to the award. Article II of the Convention and ss.100(2) and 102(1) of the 1996 Act serve to underline the (in any event obviously fundamental) requirement that there should be a valid and existing arbitration agreement behind an award sought to be enforced or recognised. Absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word “may” enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognised and applied to determine that issue.

69. The factors relied upon by Dallah in support of its suggestion that a discretion should be exercised to enforce the present award amount for the most part to repetition of Dallah’s arguments for saying that there was an arbitration agreement binding on the Government, or that an English court should do no more than consider whether there was a plausible or reasonably supportable basis for its case or for the tribunal’s conclusion that it had jurisdiction. But Dallah has lost on such points, and it is impossible to re-deploy them here. The application of s.103(2) and Article V(1) must be approached on the basis that there was no arbitration agreement binding on the Government and that the tribunal acted without jurisdiction. General complaints that the Government did not behave well, unrelated to any known legal principle, are equally unavailing in a context where the Government has proved that it was not party to any arbitration agreement. There is here no scope for reliance upon any discretion to refuse enforcement which the word “may” may perhaps in some other contexts provide.

*Conclusion*

70. It follows that Aikens J and the Court of Appeal were right in the conclusions they reached and that Dallah’s appeal to this Court must be dismissed.
I Introduction

71. I agree that this appeal from the excellent judgments of Aikens J [2009] 1 All ER (Comm) 505 and the Court of Appeal [2010] 2 WLR 805 (with Moore-Bick and Rix LJJ giving the reasons) should be dismissed. Because of the international importance of the issues on the appeal, I set out the steps which have led me to that conclusion.

72. The final award is a Convention award which prima facie is entitled to enforcement in England under the Arbitration Act 1996, section 101(2). The principal issue is whether the courts below were right to find that the Government has proved that on the proper application of French law (as the law of the country where the award was made, since there is no indication in the Agreement as to the law governing the arbitration agreement), it is not bound by the arbitration agreement. To avoid any misunderstanding, it is important to dispel at once the mistaken notion (which has, it would appear, gained currency in the international arbitration world) that this is a case in which the courts below have recognised that the arbitral tribunal had correctly applied the correct legal test under French law. On the contrary, one of the principal questions before all courts in this jurisdiction has been whether the tribunal had applied French law principles correctly or at all.

73. The main issue involves consideration of these questions: (a) the role of the doctrine that the arbitral tribunal has power to determine its own jurisdiction, or Kompetenz-Kompetenz, or compétence-compétence; (b) the application of arbitration agreements to non-signatories (including States) in French law, and the role of transnational law or rules of law in French law; (c) whether renvoi is permitted under the New York Convention (and therefore the 1996 Act) and whether the application by an English court of a reference by French law to transnational law or rules of law is a case of renvoi.

74. There is also a subsidiary issue as to whether, even if the Government has proved that it is not bound by the arbitration agreement, the court should exercise its discretion (“… enforcement may be refused …”) to enforce the award.

75. By Article V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958:

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party
furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) … the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; …”

76. The New York Convention is given effect in the United Kingdom by Part III of the Arbitration Act 1996 (England and Wales and Northern Ireland) and by sections 18 to 22 of the Arbitration (Scotland) Act 2010. Article V(1)(a) of the New York Convention is transposed in England and Wales and Northern Ireland by section 103 of the 1996 Act, which provides:

“(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

…

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

…”

77. Although Article V(1)(a) (and section 103(2)(b)) deals expressly only with the case where the arbitration agreement is not valid, the consistent international practice shows that there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement. Thus in Dardana Ltd v Yukos Oil Co [2002] 2 Lloyd’s Rep 326 it was accepted by the Court of Appeal that section 103(2)(b) applied in a case where the question was whether a Swedish award was enforceable in England against Yukos on the basis that, although it was not a signatory, it had by its conduct rendered itself an additional party to the contract containing the arbitration agreement. In Sarhank Group v Oracle Corp, 404 F 3d 657 (2d Cir 2005) the issue, on the enforcement of an Egyptian award, was
whether a non-signatory parent company was bound by an arbitration agreement on the basis that its subsidiary, which had signed the agreement, was a mere shell; and in *China Minmetals Materials Import and Export Co Ltd v Chei Mei Corp*, 334 F 3d 274 (3d Cir 2003) enforcement of a Chinese award was resisted on the ground that the agreement was a forgery. See also Born, *International Commercial Arbitration* (2009), pp 2778-2779.

78. In this case, because there was no “indication” by the parties of the law to which the arbitration agreement was subject, French law as the law of the country where the award was made, is the applicable law, subject to the relevance of transnational law or transnational rules under French law.

II The applicable principles

*Kompetenz-Kompetenz or compétence-compétence as a general principle*

79. A central part of this appeal concerns the authority to be given to the decision of the arbitral tribunal as to its own jurisdiction, and the relevance in this connection of the doctrine of Kompetenz-Kompetenz or compétence-compétence. These terms may be comparatively new but the essence of what they express is old.

80. The principle was well established in international arbitration under public international law by the 18\(^{th}\) century. In the famous case of *The Betsy* (1797) the question was raised as to the power of the commissioners under the Mixed Commissions organised under the Jay Treaty between United States and Great Britain of 19 November 1794 to determine their own jurisdiction. On 26 December 1796 Lord Loughborough LC had a meeting at his house with the American Commissioners and the American Ambassador. The Lord Chancellor expressed the view “that the doubt respecting the authority of the commissioners to settle their own jurisdiction, was absurd; and that they must necessarily decide upon cases being within, or without, their competency”: Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Vol 1 (1898), p 327. While the point was under discussion, the American Commissioners filed opinions. Mr. Christopher Gore, the eminent American Commissioner, said: “A power to decide whether a Claim preferred to this Board is within its Jurisdiction, appears to me inherent in its very Constitution, and indispensably necessary to the discharge of any of its duties”: Moore, op cit, Vol.3 (1898), p 2278.
81. The principle has been recognised by the Permanent Court of International Justice and the International Court of Justice: Rosenne, *The Law and Practice of the International Court 1920-1996* (3rd ed 1997), Vol II, pp 846 et seq. In the Advisory Opinion on the *Interpretation of the Greco-Turkish Agreement* (1928) Series B No 16, 20, the Permanent Court of International Justice said: “as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction ... ”. In the *Nottebohm case* (*Liechtenstein v Guatemala*), 1953 ICJ Rep 111, 119, the International Court of Justice, after referring to the *Alabama* case in 1872, and the views of the rapporteur of the Hague Convention of 1899 for the Pacific Settlement of International Disputes, said: “it has been generally recognised... that... an international tribunal has the right to decide as to its own jurisdiction”.

82. The principle has been recognised also by the European Court of Justice. In *West Tankers Inc v Allianz SpA (formerly Ras Riunione Adriatica di Sicurta SpA)* (Case C-185/07) [2009] ECR I-663, [2009] AC 1138, para 57, it referred to “… the general principle that every court is entitled to examine its own jurisdiction (doctrine of ‘Kompetenz-Kompetenz’).”

83. The principle that a tribunal has jurisdiction to determine its own jurisdiction does not deal with, or still less answer, the question whether the tribunal’s determination of its own jurisdiction is subject to review, or, if it is subject to review, what that level of review is or should be. Thus the International Court’s decision on jurisdiction is not subject to recourse, although the State which denies its jurisdiction may decline to take any part at all in the proceedings (as in the *Fisheries Jurisdiction* cases (*Federal Republic of Germany v Iceland; United Kingdom v Iceland*), 1972-1974), or to take any further part after it has failed in its objections to the jurisdiction (as in *Military and Paramilitary Activities in and against Nicaragua case* (*Nicaragua v United States*), 1986). By contrast, a decision of an ICSID tribunal (which “shall be the judge of its own competence”: Article 41(1) of the ICSID Convention) is subject to annulment on the grounds (inter alia) that the tribunal manifestly exceeded its powers (article 52(1)(b)), which includes lack of jurisdiction: *Klöckner v Cameroon*, Decision on Annulment, 2 ICSID Rep 95; Schreuer, *The ICSID Convention: A Commentary* (2nd ed 2009), pp 943-947.

**The principle in international commercial arbitration**

84. So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependant upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat
may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. Nor does it follow that the question of jurisdiction may not be re-examined by the supervisory court of the seat in a challenge to the tribunal’s ruling on jurisdiction. Still less does it mean that when the award comes to be enforced in another country, the foreign court may not re-examine the jurisdiction of the tribunal.

85. Thus Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. But by article 34(2) an arbitral award may be set aside by the court of the seat if an applicant furnishes proof that the agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the seat (and see also article 36(1)(a)(i)). Articles V and VI of the European Convention on International Commercial Arbitration of 1961 also preserve the respective rights of the tribunal and of the court to consider the question of the jurisdiction of the arbitrator.

**Comparative procedure**

86. Consequently in most national systems, arbitral tribunals are entitled to consider their own jurisdiction, and to do so in the form of an award. But the last word as to whether or not an alleged arbitral tribunal actually has jurisdiction will lie with a court, either in a challenge brought before the courts of the arbitral seat, where the determination may be set aside or annulled, or in a challenge to recognition or enforcement abroad. The degree of scrutiny, particularly as regards the factual enquiry, will depend on national law, subject to applicable international conventions.

87. There was sometimes said to be a rule in German law that an arbitral tribunal had the power to make a final ruling on its jurisdiction without any court control, but if it ever existed, there is no longer any such rule: Poudret and Besson, *Comparative Law of International Arbitration* (2nd ed 2007), para 457; Born, *International Commercial Arbitration*, vol I (2009), pp 907-910.

88. In France the combined effect of articles 1458, 1466 and 1495 of the New Code of Civil Procedure (“NCPC”) is that, in an international arbitration conducted in France, the tribunal has power to rule on its jurisdiction if it is challenged. If judicial proceedings are brought in alleged breach of an arbitration agreement the court must declare that it has no jurisdiction unless the jurisdiction agreement is manifestly a nullity: Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (ed Gaillard and Savage 1999), paras 655, 672; Delvolvé,

89. But the position is different once the arbitral tribunal has ruled on its jurisdiction. Its decision is not final and can be reviewed by the court hearing an action to set it aside. The French Cour d’appel seised of an action for annulment of an award made in France for lack of jurisdiction, or seised with an issue relating to the jurisdiction of a foreign tribunal or an appeal against an exequatur granted in respect of a foreign award, has the widest power to investigate the facts: Fouchard, Gaillard, Goldman, paras 1605 to 1614; Delvolvé, Pointon and Rouche, para 426. In the Pyramids case (*République Arabe d’Egypte v Southern Pacific Properties Ltd*, Paris Cour d’appel, 12 July 1984 (1985) 10 Yb Comm Arb 113; Cour de cassation, 6 January 1987 (1987) 26 ILM 1004) the question was whether a distinguished tribunal had been entitled to find that Egypt (as opposed to a State-owned entity responsible for tourism) was a party to an arbitration agreement. The Cour d’appel said that the arbitral tribunal had no power finally to decide the issue of its jurisdiction; if it decided the issue of the existence or of the validity of the arbitration agreement, nevertheless it only decided this question subject to the decision of the court on an application for the annulment of the award pursuant to article 1504, NCPC. The Cour de cassation confirmed that the Cour d’appel had been entitled “de rechercher en droit et en fait tous les éléments concernant les vices en question … en particulier, il lui appartient d’interpréter le contrat pour apprécier elle-même si l’arbitre a statué sans convention d’arbitrage.” (“to examine as a matter of law and as a matter of fact all circumstances relevant to the alleged defects … in particular, it is for the court to construe the contract in order to determine itself whether the arbitrator ruled in the absence of an arbitration agreement.”)

90. *First Options of Chicago Inc v Kaplan*, 514 US 938 (1995) was not an international case. It concerned the application of the Federal Arbitration Act to an award of an arbitral panel of the Philadelphia Stock Exchange. The question was whether the federal District Court should independently decide whether the arbitral panel had jurisdiction. The United States Supreme Court drew a distinction between the case where the parties had agreed to submit the arbitrability question itself to arbitration, and the case where they had not. In the former case the court should give considerable leeway to the arbitrator, setting aside the award only in certain narrow circumstances, but (at 943, per Breyer J):

“If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should
decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently”.

91. That flowed inexorably from the fact that arbitration was simply a matter of contract between the parties and was a way to resolve those disputes, but only those disputes, that the parties had agreed to submit to arbitration.

92. This decision was applied in the international context, in connection with the enforcement of a CIETAC award, in China Minmetals Materials Import and Export Co Ltd v Chei Mei Corp, 334 F 3d 274 (3d Cir 2003) in which Minmetals, a Chinese corporation, sought to enforce a CIETAC award against Chei Mei, a New Jersey corporation. Chei Mei resisted enforcement on the ground that the contract containing the arbitration clause had been forged. The tribunal had held that Chei Mei failed to show that the contracts were forged, but that even if its signature and stamp had been forged, it had taken various steps which confirmed its adherence to the arbitration agreement. The Court of Appeals for the Third Circuit decided that the court asked to enforce an award may determine independently the arbitrability of the dispute. After an illuminating discussion of the doctrine of compétence-compétence and kompetenz-kompetenz, it concluded (at 288, citing Park, Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators (1997) 8 Am Rev Int Arb 133, 140-142) that “it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator’s jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed.” The court said (ibid): “After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it.”

**The position in England**

93. Prior to the 1996 Act the leading authority in England was Christopher Brown Ltd v Genossenschaft Österreichischer [1954] 1 QB 8, in which Devlin J said (at pp 12-13):

“… It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and
everybody else’s. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties.”

94. The DTI Departmental Advisory Committee in its February 1994 Report on a draft Arbitration Bill said:

“[The German] doctrine of Kompetenz-Kompetenz resolves logical difficulties in legal systems where the jurisdiction of state courts and the jurisdiction of arbitrators under a valid arbitration agreement are mutually exclusive in legal theory. In these legal systems, the state courts must ‘dismiss’ legal proceedings brought in violation of a valid arbitration agreement, thereby retaining no competence over the parties – but in the case of an invalid or non-existent arbitration agreement, the arbitrators can have no jurisdiction at all. Who then decides what and in what order – in the absence of a suitable doctrine of Kompetenz-Kompetenz? In contrast, the courts of most common law countries (including England) merely ‘stay’ legal proceedings because in legal theory an arbitration agreement can never oust the Court’s jurisdiction over the parties; and this logical problem over jurisdiction has not arisen in the same form …

For these reasons, the law and practice of English arbitration does not require an express doctrine of Kompetenz-Kompetenz. English law achieves the same result as the German doctrine by a different route. … [T]he practice of arbitration tribunals determining their own jurisdiction, subject to the final decision of the English Court, has long been settled in England ..” (Ch III, pp 4-5)

95. The position in England under the Arbitration Act 1996 as regards arbitrations the seat of which is in England is as follows. By section 30(1) of the 1996 Act, which is headed “Competence of tribunal to rule on its own jurisdiction”
the arbitral tribunal may rule on its own substantive jurisdiction, including the question whether there is a valid arbitration agreement. By section 30(2) any such ruling may be challenged (among other circumstances) in accordance with the provisions of the Act. Section 32 gives the court jurisdiction to determine any preliminary point on jurisdiction but only if made with the agreement of all parties or with the permission of the tribunal, and the court is satisfied (among other conditions) that there is good reason why the matter should be decided by the court. By section 67 a party to arbitral proceedings may challenge any award of the tribunal as to its substantive jurisdiction but the arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court is pending in relation to an award as to jurisdiction. The equivalent provisions in Scotland are in the Arbitration (Scotland) Act 2010, Sched 1, Rules 19, 42 (not limited to jurisdiction), and 67.

96. The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal’s jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyd’s Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, eg, Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm), [2004] 1 Lloyd’s Rep 603) and is plainly right.

97. Where there is an application to stay proceedings under section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate: Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency [2000] 1 Lloyd’s Rep 522 (CA) (English arbitration); Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 4) [2007] EWCA Civ 1124, [2008] 1 Lloyd’s Rep 1 (Malaysian arbitration). So also where an injunction was refused restraining an arbitrator from ruling on his own jurisdiction in a Geneva arbitration, the Court of Appeal recognised that the arbitrator could consider the question of his own jurisdiction, but that would only be a first step in determining that question, whether the subsequent steps took place in Switzerland or in England: Weissfisch v Julius [2006] EWCA Civ 218, [2006] 1 Lloyd’s Rep 716, para 32.

98. Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal’s jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and
enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal’s jurisdiction by the enforcing court: see, e.g. *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886, para 104; *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, 48, per Kaplan J.

**The application of the principles in the present case**

99. Dallah’s argument is that the enforcing court, faced with a decision by the tribunal that it has jurisdiction, should only conduct a limited review. The argument is essentially this: (1) The arbitral tribunal remained a competent tribunal to determine its own jurisdiction, whether or not it determined it wrongly. (2) The first partial award was made with jurisdiction i.e. the Kompetenz-Kompetenz jurisdiction, even if (on the English court’s view) the later awards relating to the merits were subsequently found to be made without substantive jurisdiction. (3) It is universally accepted that an enforcing court cannot review the merits of an award, and a *de novo* rehearing at the enforcement stage (by contrast with an application to set aside at the seat of the arbitration) adds a fact-finding layer to the process which was not envisaged by those drafting the New York Convention and which undermines the finality and efficiency of the system. (4) The review envisaged by the New York Convention is premised on the need to ensure that there is not a grave departure from the basic precepts of international arbitration and fairness and basic concepts of justice. (5) The award is itself an evidential element of the reviewing process, and deference must be given to such an award by the reviewing/enforcing court. (6) The degree of deference may vary according to many factors, for example, the experience of the tribunal or the nature of the underlying decision, such as whether it was one of fact or law or mixed fact and law, and enforcing courts must be particularly wary where, as here, the underlying decision is fact-based or a case of mixed fact and law. (7) Where, as here, there is no dispute as to the underlying facts or law such that the decision is one upon which different tribunals can legitimately come to different conclusions, enforcing national courts should be slow to substitute their own interpretation unless it can be shown that the tribunal’s decision was unsustainable, and this is particularly so where, as in this case, the resisting party has offered no new evidence. (8) In essence the issue in this case is whether the English court should refuse to enforce the award on the basis that its views and interpretation of the same facts, applying the same principles of law, should be preferred to the decision of a former Law Lord and a doyen of international arbitration, a former Chief Justice of Pakistan and an eminent Lebanese lawyer.
Dallah relies in particular on international authorities relating to applications to annul awards on the basis that the matters decided by the arbitral tribunal exceeded the scope of the submission to arbitration: article V(1)(c) of the New York Convention; article 34 of the UNCITRAL Model Law. In *Parsons & Whittimore Overseas Co Inc v Soc Gén de l’Industrie du Papier*, 508 F 2d 969 (2d Cir 1974) the Court of Appeals for the Second Circuit, in dealing with an attack on a Convention award based on Article V(1)(c), said (at p 976) that the objecting party must “overcome a powerful presumption that the arbitral body acted within its powers.” That statement was applied by the British Columbia Court of Appeal, in a case under article 34 of the Model Law as enacted by the International Commercial Arbitration Act, SBC 1986: *Quintette Coal Ltd v Nippon Steel Corp* [1991] 1 WWR 219 (BCCA).

These cases are of no assistance in the context of a challenge based on the initial jurisdiction of the tribunal and in particular when it is said that a party did not agree to arbitration. Nor is any assistance to be derived from Dallah’s concept of “deference” to the tribunal’s decision. There is simply no basis for departing from the plain language of article V(1)(a) as incorporated by section 103(2)(b). It is true that the trend, both national and international, is to limit reconsideration of the findings of arbitral tribunals, both in fact and in law. It is also true that the Convention introduced a “pro-enforcement” policy for the recognition and enforcement of arbitral awards. The New York Convention took a number of significant steps to promote the enforceability of awards. The Geneva Convention placed upon the party seeking enforcement the burden of proving the conditions necessary for enforcement, one of which was that the award had to have become “final” in the country in which it was made. In practice in some countries it was thought that that could be done only by producing an order for leave to enforce (such as an exequatur) and then seeking a similar order in the country in which enforcement was sought, hence the notion of “double exequatur” (but in England it was decided, as late as 1959, that a foreign order was not required for the enforcement of a Geneva Convention award under the Arbitration Act 1950, section 37: *Union Nationale des Co-opératives Agricoles des Céréales v Robert Catterall & Co Ltd* [1959] 2 QB 44). The New York Convention does not require double exequatur and the burden of proving the grounds for non-enforcement is firmly on the party resisting enforcement. Those grounds are exhaustive.

But article V safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal. As van den Berg, *The New York Arbitration Convention of 1958* (1981) puts it, at p 265: “In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award: the invalidity of the arbitration agreement, the violation of due process, the award *extra* or *ultra petita*, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the non-binding force of the award, the setting aside of the award in the
country of origin, and the violation of public policy.” In Kanoria v Guinness [2006] 1 Lloyd’s Rep 701, 706, May LJ said that section 103(2) concerns matters that go to the “fundamental structural integrity of the arbitration proceedings.”

103. Nor is there anything to support Dallah’s theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement; and that the exclusivity of the supervisory court in this regard ensures uniformity of application of the Convention. There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

104. It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal’s decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made.

**Arbitration agreements and non-signatories: groups of companies/State-owned entities and States**


106. The issue has arisen frequently in two contexts: the first is the context of groups of companies where non-signatories in the group may seek to take advantage of the arbitration agreement, or where the other party may seek to bind them to it. The second context is where a State-owned entity with separate legal personality is the signatory and it is sought to bind the State to the arbitration agreement. Arbitration is a consensual process, and in each type of case the result will depend on a combination of (a) the applicable law; (b) the legal principle which that law uses to supply the answer (which may include agency, alter ego, estoppel, third-party beneficiary); and (c) the facts of the individual case.

107. One of the decisions in the field of groups of companies best known internationally is the Dow Chemical case in France, which arose in the context of
the setting aside of a French award. The arbitrators (Professors Sanders, Goldman and Vasseur: (1984) 9 Yb Comm Arb 131) decided that non-signatory companies in a group could rely on an arbitration clause in contracts between Isover St Gobain and two Dow Chemical group companies. The tribunal said that a group of companies constituted one and the same economic reality (une réalité économique unique) of which the tribunal should take account when it ruled on its jurisdiction. It decided that it was the mutual intention of all parties that the group companies should have been real parties to the agreement. They relied in particular on the fact that group companies participated in the conclusion, performance and termination of the contract, and on the economic reality and needs of international commerce. The Paris Cour d’appel rejected an application to set aside the award: the effect of the ICC Rules was that the tribunal was bound to take account of the will of the parties and of trade usages; in the light of the agreements and of the documents exchanged in the course of their conclusion and termination, the tribunal had given relevant and consistent reasons for deciding that it was the joint intention of the parties that Dow Chemicals France and Dow Chemical Company had been parties to the agreements (and therefore to the arbitration agreements) although they had not physically signed them. The court also mentioned that as a subsidiary reason the tribunal had invoked the notion of the “group of companies,” which had not been seriously disputed by Isover St-Gobain: Soc. Isover Saint-Gobain v Soc. Dow Chemical France, 21 October 1983, 1984 Rev Arb 98. For other cases see, eg, Redfern and Hunter, International Arbitration (5th ed 2009, ed Blackaby and Partasides), paras 2.44-2.45; Wilske, Shore and Ahrens, The “Group of Companies Doctrine” – Where is it heading? (2006) 17 Am Rev Int Arb 73.

108. As regards States, the Pyramids case (République Arabe d’Egypte v Southern Pacific Properties Ltd, above, para 89) was also a case of setting aside rather than enforcement of a foreign award. A company incorporated in Hong Kong (“SPP”) signed an agreement with an Egyptian state owned entity responsible for tourism (“ÉGOTH”). The contract referred to a pre-existing framework contract between the same parties and the Egyptian Government concerning the construction of two tourist centres, one of which was located near the Pyramids. The contract contained an ICC arbitration clause with Paris as the seat. The last page of the agreement contained the words “approved, agreed and ratified” followed by the signature of the Egyptian Minister for Tourism. After political opposition to the project, the Egyptian authorities cancelled it, and SPP initiated arbitration proceedings against both EGOTH and Egypt. The arbitral tribunal, with Professor Giorgio Bernini as Chairman, ruled that it had jurisdiction, because, although acceptance of an arbitration clause had to be clear and unequivocal, there was no ambiguity since the Government, in becoming a party to the agreement, could not reasonably have doubted that it would be bound by the arbitration clause contained in it. The Egyptian Government brought proceedings in France to set aside the award. The combined effect of articles 1502 and 1504, NCPC, is that the French court may set aside an award made in France in an international arbitration on the ground that there is no arbitration agreement. The
Paris Cour d’appel held that the Government was not a party to the arbitration agreement because the words under the Minister’s signature were to be read in the light of Egyptian legislation which simply gave the Minister the power to approve construction and in the light of a declaration by the signatories that the obligations assumed by EGOTH would be subject to approval by the relevant government authorities. Subsequently an ICSID Tribunal found that it had jurisdiction and awarded the claimants $27m: 3 ICSID Rep 131 and 189. See also the Westland case in the Swiss courts, involving the application of an arbitration agreement in a contract between Westland Helicopters and the Arab Organisation for Industrialisation to the organisation’s member States: (1991) 16 Yb Comm Arb 174; and Lew, Mistelis and Kröll, Comparative International Commercial Arbitration (2003), paras 27-26 et seq; Westland Helicopters Ltd v Arab Organisation for Industrialisation [1995] QB 282.

109. An example in England of a foreign award prior to the present case is Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2) [2006] EWCA Civ 1529, [2007] QB 886, where the Court of Appeal, after a review of the principal arbitral decisions, confirmed (at para 81 et seq) that a government is not to be taken to be a party to an agreement or to have submitted to arbitration simply because it has put forward a state organisation to contract with a foreign investor. But on the facts the Government had agreed to ICC arbitration in Denmark.

French law and transnational law

110. The Joint Memorandum of the experts stated (para 2.8):

“Under French law, the existence, validity and effectiveness of an arbitration agreement in an international arbitration need not be assessed on the basis of national law, be it the law applicable to the main contract or any other law and can be determined according to rules of transnational law. To this extent, it is open to an international arbitral tribunal the seat of which is in Paris to find that the arbitration agreement is governed by transnational law.”

111. The notion in French law that an arbitration clause may be valid independently of a reference to national law goes back to the decisions of the Cour de cassation in Hecht v Buisman’s, 4 July 1972, 1974 Rev Crit 82 and of the Paris Cour d’appel in Menicucci v Mahieux, 13 December 1975, 1976 Rev Crit 507: see Fouchard, Gaillard, Goldman, para 418; Poudret and Besson, para 180. In the Dow Chemical case the Paris Cour d’appel (21 October 1983, 1984 Rev Arb 98) said that the arbitral tribunal could decide on its competence without reference to
French law, and could rely on the notion of the “group of companies” as a customary practice in international trade.

112. In the Dalico case (Municipalité de Khoms El Mergeb v Soc Dalico, 20 December 1993, 1994 Rev Arb 116) the Cour de cassation was concerned with an application to set aside an award in which an arbitral tribunal had upheld the existence and validity of an arbitration clause in a document annexed to a works contract between a Libyan municipal authority and a Danish company (“Dalico”). The main contract was subject to Libyan law and stipulated standard terms and conditions, amplified or amended by an annex, which formed part of the contract. The standard terms and conditions conferred jurisdiction on the Libyan courts, but the annex amended them by providing for international arbitration. Dalico referred the dispute to arbitration and obtained an award against the Libyan municipal authority.

113. An action to set aside the award was brought before the Paris Cour d’appel. The court dismissed the application to set aside, relying in particular on the fact that the principle of the autonomy of the arbitration agreement “confirms the independence of the arbitration clause, not only from the substantive provisions of the contract to which it relates, but also from a domestic law applicable to that contract”. The court held that the wording of the documents revealed the parties’ intention to submit their dispute to arbitration.

114. The Cour de cassation dismissed an appeal, emphasising that the Cour d’appel justified its decision in law by establishing the existence of the arbitration agreement without reference to Libyan law, which governed the contract. The Cour de cassation said, at p 117: “… en vertu d’une règle matérielle du droit international de l’arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s’apprécient, sous réserve des règles imperatives de droit français et de l’ordre public international, d’après la commune volonté des parties, sans qu’il soit nécessaire de se référer à une loi étatique ….” (“by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties’ common intention, there being no need to refer to any national law.”). On this case see Fouchard, Gaillard, Goldman, paras 388, 452.

115. The fact that the experts were agreed that an arbitral tribunal with a French seat may apply transnational law or transnational rules to the validity of an arbitration agreement does not mean that a French court would not be applying French law or that it is no longer a French arbitration. It simply means that the
arbitration agreement is no longer affected by the idiosyncrasies of local law, and its validity is examined solely by reference to the French conception of international public policy: Fouchard, Gaillard, Goldman, paras 420, 441. As Poudret and Besson put it (at para 181):

“The result of this case law is that the arbitration agreement is subjected to a material rule which recognises its validity provided it does not violate international public policy. Although this has been the subject of controversy, the rule is an international rule of French law and not a transnational rule.”

116. Nor could there be any suggestion that the application of transnational law or transnational rules could displace the applicability in England, under article V(1)(a) of the New York Convention as enacted by section 103(2)(b) of the 1996 Act, of the law of the place where the award is made.

117. This case does not therefore raise the controversial question of delocalisation of the arbitral process which has been current since the 1950s. It started with the pioneering work of Professor Berthold Goldman, Professor Pierre Lalive and Professor Clive Schmitthoff, which was mainly devoted to the question of disconnecting the substantive governing law in international commercial arbitration from national substantive law. It expanded to promotion of the notion that international arbitration is, or should be, free from the controls of national law, or as Lord Mustill put it in *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52, “a self-contained juridical system, by its very nature separate from national systems of law”: see, among many others, Lew, *Achieving the Dream: Autonomous Arbitration* (2006) 22 Arb Int 179; Gaillard, *Legal Theory of International Arbitration* (2010); Paulsson, *Arbitration in Three Dimensions* (LSE Law, Society and Economy Working Papers 2/2010); the older material cited in Dicey, Morris and Collins, *The Conflict of Laws* (14th ed 2006), para 16-032; and the cases on the enforcement in France of awards which have been annulled in the country where they were rendered on the basis that they were international awards which were not integrated in the legal system of that country, e.g. *Soc PT Putrabali Adyamulia v Soc Rena Holding*, Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299, and below at para 129.

**Non-signatories: the principle in French law**

118. One of the odd features of this case is that there is nothing in the experts’ reports which suggests that there is any relevant difference between French arbitration law in non-international cases and the principle in such cases as *Dalico*. When counsel was asked at the hearing of this appeal what difference it made,
there was no satisfactory answer. No doubt that is because common intention would serve equally to answer the question in a non-international case: cf Loquin, *Arbitrage*, para 18, in *Juris-Classeur Procédure Civile*, Fasc 1032. As M Yves Derains (Dallah’s expert) put it in his report, the arbitrators may find that the arbitration agreement is governed by transnational law, but the arbitrators must also look for the common will of the parties, express or implied, since it is a substantive rule of French law that the courts will apply when examining the jurisdiction of the arbitrators.

119. There was, in the event, a large measure of agreement between the experts on French law who appeared before Aikens J, M le Bâtonnier Vatier for the Government and M Yves Derains for Dallah. In their Joint Memorandum they agreed that in order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the agreement and, as a result, by the arbitration clause; the existence of a common intention of the parties is determined in the light of the facts of the case; the courts will consider the involvement and behaviour of all the parties during the negotiation, performance and, if applicable, termination of the underlying agreement. When a French court has to determine the existence and effectiveness of an arbitration agreement, and when for these purposes it must decide whether the agreement extends to a party who was neither a signatory nor a named party, it examines all the factual elements necessary to decide whether that agreement is binding upon that person. The fact that an arbitration agreement is entered into by a State-owned entity does not mean that it binds the State, and whether the State is bound depends on the facts in the light of the principles.

120. The principle as expressed in the jurisprudence of the Paris Cour d’appel is as follows: “Selon les usages du commerce international, la clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d’en étendre l’application aux parties directement impliquées dans l’exécution du contrat et les litiges qui peuvent en résulter, dès lors qu’il est établi que leur situation contractuelle, leurs activités et les relations commerciales habituelles existant entre les parties font présumer qu’elles ont accepté la clause d’arbitrage dont elles connaissaient l’existence et la portée, bien qu’elles n’aient pas été signataires du contrat qui la stipulait”. (“According to international usage, an arbitration clause inserted in an international contract has a validity and an effectiveness of its own, such that the clause must be extended to parties directly implicated in the performance of the contract and in any disputes arising out of the contract, provided that it has been established that their respective contractual situations and existing usual commercial relations raise the presumption that they accepted the arbitration clause of whose existence and scope they were aware,

121. The principle applies equally where a non-signatory seeks the benefit of an arbitration agreement, as in Dalico itself and in Dow Chemicals.

122. The common intention of the parties means their subjective intention derived from the objective evidence. M le Bâtonnier Vatier, the Government’s expert, confirmed in his oral evidence that under French law the court must ascertain the “genuine,” subjective, intention of each party, but through its objective conduct, and M Yves Derains, Dallah’s expert, agreed. M Derains confirmed that in order for an act (such as the letter of termination) of the Government to have the effect of establishing the subjective intention on the Government’s part to be bound by the arbitration agreement, it would have to be a “conscious, deliberate act by the government”; that “anything less than a conscious and deliberate act of the government might make the letter less relevant”; and that the letter would not be relevant if it was written by mistake.

Renvoi

123. The parties were agreed before Aikens J that article V(1)(a) of the New York Convention established two conflict of laws rules. The first was the primary rule of party autonomy: the parties could choose the law which governed the validity of the arbitration agreement. In default of that agreement, the law by which to test validity was that of the country where the award to be enforced was made. Because they were to be treated as “uniform” conflict of laws rules, the reference to “the law of the country where the award was made” in article V(1)(a) of the New York Convention and the same words in section 103(2)(b) of the 1996 Act must be directed at that country’s substantive law rules, rather than its conflicts of law rules. Aikens J also drew support from section 46(2) in Part I of the 1996 Act, which defines “the law chosen by the parties” as “the substantive laws of that country and not its conflict of laws rules,” and which was specifically inserted to avoid the problems of renvoi: Mustill & Boyd, Commercial Arbitration, 2001 Companion (2001), p 328. Aikens J considered that the same approach was intended for section 103(2)(b) in Part III of the 1996 Act, and that he should have regard to French substantive law and not its conflict of laws rules (at para 78) and that the principle of French law that the existence of an arbitration agreement in an international context may be determined by transnational law was a French conflict of laws rule (at para 93).
124. It is likely that renvoi is excluded from the New York Convention: see van den Berg, *The New York Convention of 1958* (1981), p 291. But it does not follow that for an English court to test the jurisdiction of a Paris tribunal in an international commercial arbitration by reference to the transnational rule which a French court would apply is a case of renvoi. Renvoi is concerned with what happens when the English court refers an issue to a foreign system of law (here French law) and where under that country’s conflict of laws rules the issue is referred to another country’s law. That is not the case here. What French law does is to draw a distinction between domestic arbitrations in France, and international arbitrations in France. It applies certain rules to the former, and what it describes as transnational law or rules to the latter.

125. As mentioned above, the applicability of transnational rules or law (and there was no evidence on their content) would not make a difference in this case. But even if there were a difference, there is not, according to English notions, any reference on to another system of law. All that French law is doing is distinguishing between purely domestic cases and international cases and applying different rules to the latter. If a French court would apply different principles in an international case, for an English court to do what a French court would do in these circumstances is not the application of renvoi.

**Discretion**

126. The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement. This is apparent from the difference in wording between the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention. The Geneva Convention provided (article 1) that, to obtain recognition or enforcement, it was necessary that the award had been made in pursuance of a submission to arbitration which was valid under the law applicable thereto, and contained (article 2) mandatory grounds (“shall be refused”) for refusal of recognition and enforcement, including the ground that it contained decisions on matters beyond the scope of the submission to arbitration. Article V(1)(a) of the New York Convention (and section 103(2)(b) of the 1996 Act) provides: “Recognition and enforcement of the award may be refused …” See also van den Berg, p 265; Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics* (1998) 14 Arb Int 227.

127. Since section 103(2)(b) gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention. One example suggested by van den Berg, op cit, p 265, is where the party resisting enforcement is estopped from challenge, which was adopted by
Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd’s Rep 326, para 8. But, as Mance LJ emphasised at para 18, there is no arbitrary discretion: the use of the word “may” was designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in section 103(2). See also *Kanoria v Guinness* [2006] 1 Lloyd’s Rep 701, para 25 per Lord Phillips CJ. Another possible example would be where there has been no prejudice to the party resisting enforcement: *China Agribusiness Development Corpn v Balli Trading* [1998] 2 Lloyd’s Rep 76. But it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement.

128. There may, of course, in theory be cases where the English court would refuse to apply a foreign law which makes the arbitration agreement invalid where the foreign law outrages its sense of justice or decency (Scarman J’s phrase in *In the Estate of Fuld, decd (No 3)* [1968] P 675, 698), for example where it is discriminatory or arbitrary. The application of public policy in the New York Convention (article V(2)(b)) and the 1996 Act (section 103(3)) is limited to the non-recognition or enforcement of foreign awards. But the combination of (a) the use of public policy to refuse to recognise the application of the foreign law and (b) the discretion to recognise or enforce an award even if the arbitration agreement is invalid under the applicable law could be used to avoid the application of a foreign law which is contrary to the court’s sense of justice.

129. Only limited assistance can be obtained from those cases in which awards have been enforced abroad (in particular in France and the United States) notwithstanding that they have been set aside (or suspended) in the courts of the seat of arbitration. In France the leading decisions are *Pabalk Ticaret Sirketi v Norsolor*, Cour de cassation, 9 October 1984, 1985 Rev Crit 431; *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663, in which a Swiss award was enforced in France even though it had been set aside in Switzerland: “… the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside …” (at p 665); *République arabe d’Egypte v Chromalloy Aero Services*, Paris Cour d’appel, 14 January 1997 (1997) 22 Yb Comm Arb 691. Thus in *Soc PT Putrabali Adyamulia v Soc Rena Holding*, Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299, an award in an arbitration in England which had been set aside by the English court (see *PT Putrabali Adyamulia v Soc Est Epices* [2003] 2 Lloyd’s Rep 700) was enforced in France, on the basis that the award was an international award which did not form part of any national legal order. Those decisions do not rest on the discretion to allow recognition or enforcement notwithstanding that “the award … has been set aside … by a competent authority of the country in which … that award was made” (New York Convention, article V(1)(e)). They rest rather on the power of the enforcing court under the New York Convention, article VII(1), to apply laws

130. In the United States the courts have refused to enforce awards which have been set aside in the State in which the award was made, on the basis that the award does not exist to be enforced if it has been lawfully set aside by a competent authority in that State: *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (2d Cir 1999); *TermoRio SA ESP v Electranta SP*, 487 F 3d 928 (DC Cir 2007). But an Egyptian award which had been set aside by the Egyptian court was enforced because the parties had agreed that the award would not be the subject of recourse to the local courts: *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996). That decision was based both on the discretion in the New York Convention, article V(1) and on the power under article VII(1) (see *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 367 (5th Cir 2003)) and whether it was correctly decided was left open in *TermoRio SA ESP v Electranta SP*, ante, at p 937.

131. The power to enforce notwithstanding that the award has been set aside in the country of origin does not, of course, arise in this case. The only basis which Dallah puts forward for the exercise of discretion in its favour is the Government’s failure to resort to the French court to set aside the award. But Moore-Bick LJ was plainly right in the present case (at para 61) to say that the failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the courts of the seat would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction. There is certainly no basis for exercising the discretion in this case.

**III**  
**The application of the principles to the appeal**

132. The crucial facts have been set out fully by Lord Mance. The essential question is whether the Government has proved that there was no common intention (applying the French law principles) that it should be bound by the arbitration agreement. The essential points which lead to the inevitable conclusion that there was no such common intention are these.

133. First, throughout the transaction Dallah was advised by a leading firm of lawyers in Pakistan, Orr, Dignam & Co, which was responsible for the drafts of both the Memorandum of Understanding (“MoU”) which was concluded on 24 July 1995 between Dallah and the Government, and the Agreement of 10
September 1996 ("the Agreement") between Dallah and the Trust. It must go without saying that the firm well understood the difference between an agreement with a State entity, on the one hand, and the State itself, on the other.

134. Second, there was a clear change in the proposed transaction from an agreement with the State to an agreement with the Trust. The MoU was expressed to be made between Dallah and “the President of the Islamic Republic of Pakistan through the Ministry of Religious Affairs,” and it was signed “For and on behalf of The President of the Islamic Republic of Pakistan”. It was governed by Saudi Arabian law (clause 23). It provided for ad hoc arbitration with a Jeddah seat (clause 24), and contained an express waiver of sovereign immunity, including immunity from execution (clause 25).

135. Third, the Trust was established as “a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may by its name, sue and be sued.”

136. Fourth, the Agreement (including the arbitration agreement) was plainly an agreement between Dallah and the Trust, and the Government was referred to in the Agreement only in its capacity of guarantor of loans to the Trust. It described the parties as “Dallah Real Estate and Tourism Holding Company” and “Awami Hajj Trust...” (which is referred to as having been: “… established under Section 3 of the Awami Hajj Trust Ordinance, 1996 (Ordinance No VII of 1996)…” On the signature page, there are two signatories: Dallah and the “Awami Hajj Trust”. Shezi Nackvi signed on behalf of Dallah, and “Managing Trustee” (Zubair Kidwai) signed on behalf of the Trust. Clause 2 provided for the Trust to pay $100m to Dallah by way of advance, subject to (inter alia) Dallah providing a Financing Facility “against a guarantee of the Government of Pakistan” and the Trust and the Trustee Bank providing a counter guarantee “in favour of the Government of Pakistan.” By clause 27 it was provided: “The Trust may assign or transfer its rights and obligations under this Agreement to the Government of Pakistan without the prior consent in writing of Dallah.” The arbitration clause (article 23) related to “Any dispute or difference of any kind whatsoever between the Trust and Dallah …..” The parties amended the ICC model clause (which reads: “All disputes arising out of or in connection with the present contract shall be finally settled…”), in order to specify “the Trust” and “Dallah”.

137. Fifth, it was the Trust which immediately following the termination letter of 19 January 1997, commenced proceedings against Dallah in Islamabad (the “1997 Pakistan Proceedings”). The proceedings were for a declaration that the Trust had validly accepted Dallah’s repudiation of the Agreement between the Trust and Dallah on 19 January 1997. The contents of the pleading were verified on oath by Mr Muhammad Lutfullah Mufti. On the same day Mr Lutfullah Mufti made an
application in the name of the Trust for an interim injunction restraining Dallah from holding itself out to have any contractual relationship with the Trust. On 6 March 1997 Dallah filed an application to stay the action, given the existence of an arbitration agreement with the Trust. The Trust took preliminary objections against this application, among which was that the Trust had challenged the validity and existence of the Agreement. Mr Lutfullah Mufti, describing himself as “Secretary Board of Trustees Awami Hajj Trust/Secretary, Religious Affairs Division, Government of Pakistan” swore an affidavit verifying the objections by the Trust to the application.

138. There are only two serious contra-indications. The first is the fact that the termination letter was written, after the Trust had ceased to exist, by Mr. Lutfullah Mufti (who had been Secretary of the Board of Trustees of the Trust and its Managing Trustee, and who was also from time to time Secretary of the Ministry of Religious Affairs) under the letterhead of the Ministry of Religious Affairs, and signed as “Secretary.” There is nothing in the text of the letter to suggest that it was written on behalf of the Government. On the contrary, as Moore-Bick LJ said [2010] 2 WLR 805, para 36 (differing on this point from Aikens J, at para 117) all the internal indications are that it was written on behalf of the Trust. Thus the opening paragraph reads as follows:

“Pursuant to the above mentioned Agreement for the leasing of housing facilities in the holy city of Makkah, Kingdom of Saudi Arabia, you were required within ninety (90) days of the execution of the said Agreement to get the detailed specifications and drawings approved by the Trust. However, since you have failed to submit the specifications and drawings for the approval of the Trust to date you are in breach of a fundamental term of the Agreement which tantamounts to a repudiation of the whole Agreement which repudiation is hereby accepted.”

139. The second contra-indication is contained in the fact that the 1998 Pakistan Proceedings were commenced in the name of the Government. That was because, when the 1997 Pakistan Proceedings were dismissed by the Pakistan court on the ground that the Trust had ceased to exist as of 11 December 1996, the judge said that, on dissolution of the Trust suit should have been filed by the Ministry for Religious Affairs, apparently on the basis that the Government had succeeded to the rights and obligations of the Trust. On 18 September 1998, the Islamabad judge ruled that the Government was not the legal successor of the Trust, and so not bound by the Agreement or the arbitration agreement. On 14 January 1999, the Government applied voluntarily to withdraw the suit, which was granted on the same day.
140. Neither of these two matters, nor the other matters relied on, was sufficient to justify a finding of a common intention that the Government should be bound by the arbitration agreement. It is true that the principle of common intention in French law was similar to that articulated by the tribunal, but M Le Bâtonnier Vatier’s evidence made clear that there were significant differences. He accepted that the principles adopted by the tribunal were in general the principles that might be adopted in French law, but they were too general.

141. That is undoubtedly a valid criticism of the way in which the Tribunal sought to use material from the period prior to termination to justify its conclusion. The Tribunal first considered the conduct of the Government prior to the execution of the Agreement. It drew the conclusion that the organic control of the Government over the Trust, although insufficient to lead to the disregard of the separate legal entity of the Trust, constituted nevertheless an element of evidence as to the true intention of the Government to run and control directly and indirectly the activities of the Trust, and to view the Trust as one of its instruments. The Tribunal next considered the conduct of the Government at the time of execution of the Agreement. From that it drew the conclusion that the Government was “contractually involved in the Agreement, as the Government was bound, under article 2 thereof, to give its guarantee for the financial facility to be raised by [Dallah]” and that the Trust’s right to assign its rights and obligations to the Government was a provision which was normally used only where the assignee is closely linked to the assignor or is under its total control through ownership, management or otherwise. The Tribunal considered that during the lifetime of the Agreement the Government continued itself to handle matters relating to the Agreement and to act and conduct itself in a way which confirmed that it regarded the Agreement as its own. Government officials were actively involved in the implementation of the Agreement. The Government decided not to re-promulgate the Ordinance and therefore put an end to the Trust, and so the very existence of the Trust appeared to have been completely dependent on the Government.

142. None of these matters could possibly justify a finding that there was a common intention that the Government should be bound by the arbitration agreement.

143. The crucial finding was that after the dissolution of the Trust, the termination letter of 19 January 1997 was written on Ministry of Religious Affairs letterhead and signed by the Secretary of the Ministry, and confirmed in the clearest way possible that the Government regarded the Agreement with Dallah as its own and considered itself as a party to the Agreement and was entitled to exercise all rights and assume all responsibilities provided for under the Agreement. The signature of the letter could only be explained as evidence that the Government considered itself a party to the Agreement. But the Trust had no separate letterhead and it is plain from the surrounding circumstances, and
particularly the way in which the 1997 Pakistan proceedings were commenced on behalf of the Trust, and verified by Mr Lutfullah Mufti, that the letter was written on behalf of the Trust and in ignorance of its dissolution.

144. The tribunal ignored the 1997 Pakistan proceedings, and relied on the 1998 Pakistan proceedings to find that they showed that the Government considered itself as a party to the Agreement. But it is clear that those proceedings were commenced at the erroneous suggestion of the Pakistan judge and shed no light on whether the parties intended that the Government should be bound by the Agreement or the arbitration agreement.

145. Consequently on a proper application of French law as mandated by the New York Convention and the 1996 Act there was no material sufficient to justify the tribunal’s conclusion that the Government’s behaviour showed and proved that the Government had always been, and considered itself to be, a true party to the Agreement and therefore to the arbitration agreement. On the contrary, all of the material up to and including the termination letter shows that the common intention was that the parties were to be Dallah and the Trust. On the face of the Agreement the parties and the signatories were Dallah and the Trust. The Government’s role was as guarantor, and beneficiary of a counter-guarantee. The assignment clause showed that the Government was not a party. It permitted the Trust to assign or transfer its rights and obligations under the Agreement to the Government without the prior consent in writing of Dallah. The arbitration clause related to any dispute between the Trust and Dallah.

146. The weakness of the conclusion of the tribunal is underlined by this passage in the Award:

“Certainly, many of the above mentioned factual elements, if isolated and taken into a fragmented way, may not be construed as sufficiently conclusive for the purpose of this section. However, Dr Mahmassani believes that when all the relevant factual elements are looked into globally as a whole, such elements constitute a comprehensive set of evidence that may be relied upon to conclude that the Defendant is a true party to the Agreement with the Claimant and therefore a proper party to the dispute that has arisen with the Claimant under the present arbitration proceedings.

Whilst joining in this conclusion Dr Shah and Lord Mustill note that they do so with some hesitation, considering that the case lies very close to the line.”
147. Aikens J rejected the argument that the discretion should be exercised in favour of enforcement because of the Government’s failure to challenge the award in the French courts: Dallah had not submitted that the Government was estopped from challenging the jurisdiction of the tribunal; and the discretion would not be exercised where, as in this case, there was something unsound in the fundamental structural integrity of the ICC arbitration proceedings, namely that the Government did not agree to be bound by the arbitration agreement in clause 23 of the Agreement. There was no error of principle and the Court of Appeal was right not to interfere with the judge’s exercise of discretion.

LORD HOPE

148. The essential question in this case, as Lord Mance and Lord Collins explain in paras 2 and 132 of their judgments, is whether the Government of Pakistan has proved that there was no common intention (applying French law principles) between it and Dallah that it should be bound by the arbitration agreement. This is a matter which goes to the root of the question whether there was jurisdiction to make the award. As such, it must be for the court to determine. It cannot be left to the determination of the arbitrators.

149. For the reasons set out in the opinions of Lord Mance and Lord Collins, I agree that the facts point inevitably to the conclusion that there was no such common intention. As Lord Mance says in para 66, the agreement was deliberately structured to be, and was agreed, between Dallah and the Trust. I also agree that the Court of Appeal was right not to interfere with the judge’s exercise of his discretion to refuse enforcement of the award. I too would dismiss the appeal.

LORD SAVILLE

150. In his judgment Lord Mance has set out in detail the facts of this case and no purpose would be served by repeating them in this judgment.

151. The case concerns an application by Dallah Real Estate and Tourism Holding Company to enforce in this country an ICC arbitration award dated 23rd June 2006 against the Ministry of Religious Affairs of the Government of Pakistan. The amount of the award was US$20,588,040. The application was opposed by the Ministry of Religious Affairs on the grounds that there was no arbitration agreement between the parties, so that the award was unenforceable.
152. The award was a New York Convention Award within the meaning of Section 100 of the Arbitration Act 1996 and was made in Paris.

153. Section 103(1) of the Arbitration Act 1996 provides that recognition and enforcement of a New York Convention Award “shall not be refused except in the following cases.” The following sub-sections set out the cases in question. Section 103(2) contains a number of these cases and provides that recognition or enforcement of the award may be refused if the person against whom it is invoked proves (so far as the case relevant to these proceedings is concerned) “that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.” (Section 103(2) (b)) (emphases added).

154. The arbitrators considered the question of their jurisdiction before dealing with the merits of the claim and concluded that the Ministry of Religious Affairs of the Government of Pakistan was party to an arbitration agreement with Dallah Real Estate and Tourism Holding Company, for the reasons contained in what they described as a Partial Award dated 26th June 2001.

155. It was common ground that the question whether or not the Ministry of Religious Affairs was a party to the arbitration agreement relied upon by Dallah Real Estate and Tourism Holding Company, under which the ICC award was made, was to be determined under Section 103(2)(b) of the Arbitration Act 1996, and that the law to be applied was French law, being the law of the place where the award was made.

156. After a trial, during which both parties tendered expert evidence on French law, Aikens J (as he then was) held that the Ministry of Religious Affairs was not party to the arbitration agreement and refused to enforce the award. The Court of Appeal upheld his decision. Dallah Real Estate and Tourism Holding Company now appeal to the Supreme Court.

157. In their written case Dallah Real Estate and Tourism Holding Company submitted that the first issue for resolution by the Supreme Court concerned the nature and standard of review to be undertaken by an enforcing court when considering recognition and enforcement of a New York Convention award; and further submitted that the court should accord a high degree of deference and weight to the award of the arbitrators that there was an arbitration agreement between the parties.
In the present case the arbitrators have made a ruling, as they were doubtless entitled to do under the doctrine of kompetenz-kompetenz, that there was an arbitration agreement between the parties, so that they were able to hear and decide the merits of the case, which they then proceeded to do. However, under Section 103 of the Arbitration Act 1996 (as under the New York Convention itself) the person against whom the award was invoked has the right to seek to prove that there was no arbitration agreement between the parties, so that in fact the arbitrators had no power to make an award. The question at issue before the court, therefore, was whether the person challenging the enforcement of the award could prove there was no such agreement.

In these circumstances, I am of the view that to take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations; for without some such agreement such a ruling cannot have any status at all. As the Departmental Advisory Committee on Arbitration Law put it in paragraph 1.38 of its 1996 Report on the Arbitration Bill, an arbitral tribunal may rule on its own jurisdiction but cannot be the final arbiter of jurisdiction, “for this would provide a classic case of pulling oneself up by one’s own bootstraps.”

In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself. I accept, as an accurate summary of the legal position, the way it was put in the written case of the Ministry of Religious Affairs:

“Under s103(2)(b) of the 1996 Act / Art V.1(a) NYC, when the issue is initial consent to arbitration, the Court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the Court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them.”

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161. In short, as was held in *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corporation* (2003) 334 F3d 274, a decision of the United States Court of Appeals (3rd Circuit), the court must make an independent determination of the question whether there was an arbitration agreement between the parties.

162. In the present case, for the reasons given by Lord Mance and Lord Collins (and the courts below), the Ministry of Religious Affairs has succeeded in showing that no arbitration agreement existed to which it was party and that there were no other grounds for enforcing the award. I would accordingly dismiss this appeal.

**LORD CLARKE**

163. I agree that this appeal should be dismissed for the reasons given by the other members of the court. Both Lord Mance and Lord Collins have analysed the relevant principles so fully and so expertly that it would be inappropriate self-indulgence for me to attempt a detailed analysis of my own.
Modernizing ICSID’s Rules for Investment Dispute Resolution

Meg Kinnear
Meg Kinnear was elected Secretary-General of ICSID in 2009. Previously, Ms. Kinnear served as General Counsel (1999-2006), Senior General Counsel (2006-2009) and Director General of the Trade Law Bureau of Canada, a joint legal unit of the Departments of Justice and of Foreign Affairs and International Trade of Canada. She also served as Executive Assistant to the Deputy Minister of Justice of Canada (1996-1999) and as litigation counsel in the Canadian Department of Justice (1984-1996).

The International Centre for Settlement of Investment Disputes (ICSID or ‘the Centre’) is amending the Rules and Regulations under the ICSID Convention and Additional Facility. These are the most widely used procedural rules in investor-State dispute settlement. It marks the fourth time the ICSID Rules have been updated, and is expected to result in the most comprehensive changes to date. The process has involved extensive consultation with the 154 Member States to the ICSID Convention, the legal profession and the public. ICSID working papers published in August 2018 and March 2019 proposed specific textual changes to the rules, and have formed the basis for discussion and input from stakeholders. Ultimately, a package of amendments is expected to be tabled before the ICSID Administrative Council (the Centre’s governing body) in 2019 or 2020.

Introduction

Established in 1966, the International Centre for Settlement of Investment Disputes (ICSID) promotes international investment by providing an effective, de-politicized system for the resolution and enforcement of disputes between States and foreign investors. As of 12 April 2019, ICSID counted 163 signatories to its founding Convention, of which 154 were Contracting States.1

As ICSID’s membership has expanded, so too has demand for its services. In 2018, ICSID administered a record 279 cases, representing approximately 40% of the Centre’s total caseload since 1966.2 The growth in ICSID cases is correlated with the expansion of foreign direct investment in recent decades, which has increased the need for a trusted and impartial system for resolving cross-border investment disputes. It is also connected to new bilateral and multilateral investment treaties, investment contracts, and domestic laws that provide for ICSID dispute settlement.3 ICSID has been integrated into these instruments that provide the basis for State consent to arbitration under the ICSID Convention and Additional Facility Rules.4 Finally, it is attributable to the unparalleled reputation of ICSID for its expertise, administrative services, global facilities, competitive cost structure, and bespoke rules of procedure.

This article concerns the process currently underway to further modernize ICSID rules and regulations. The term ‘ICSID rules’ is used here to refer to the specialized rules for ICSID dispute settlement. These are:

> Administrative and Financial Regulations, which concern the procedures of ICSID’s governing body, the Administrative Council; the functions of the ICSID Secretariat; and the finances of ICSID and the cases it administers;

> Institution Rules, which address the initiation of arbitration and conciliation under the ICSID Convention. They apply to the period between filing a request for arbitration or conciliation to the dispatch of the notice of registration;

> Arbitration and Conciliation Rules under the ICSID Convention, which establish the process to be followed in arbitrations or conciliations between investors and Member States to the ICSID Convention (‘ICSID Member States’);

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1 Information on ICSID signatories and Contracting States is available at https://icsid.worldbank.org/en/Pages/about/Member-States.aspx.


4 A bilateral or multilateral treaty is the basis of consent in about 75% of ICSID cases, while contracts and investment laws account for about 15% and 10% respectively. For more information, see ICSID Caseload - Statistics at https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx
Arbitration, Conciliation and Fact-Finding under the ICSID Additional Facility (‘Additional Facility Rules’), which currently apply to arbitrations and conciliations between investors and States, at least one of which is not a member of ICSID or a national of a Member State. The Additional Facility also includes rules for fact-finding, which offer States and foreign nationals the opportunity to constitute a committee to make objective findings of fact that could resolve a legal dispute between the parties.

Amendments to the ICSID rules

ICSID Member States have the authority to amend ICSID’s administrative and financial regulations and the rules of procedure that apply to ICSID cases—and have exercised this right at three points in the past.5 The most recent changes were introduced in 2006 and included:

> Strengthened disclosure requirements for arbitrators;6
> A new provision that provides for the possibility of holding open hearings;7
> Expanded transparency provisions to publish awards as soon as possible;8
> The opportunity for non-disputing parties to file submissions (amicus curiae briefs);9
> The possibility for a respondent to obtain an early dismissal of a case due to its manifest lack of legal merit.10

These amendments have been widely emulated in the rules of other arbitral institutions, in newly negotiated investment treaties, and in parts of the Mauritius Convention and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

In late 2016, ICSID began preparing for its fourth update to the rules. From the start, the process has been grounded in extensive consultation with ICSID Member States, the legal profession and the wider public. An initial round of input in 2017 generated ideas on the types of rule changes that should be considered. ICSID also asked Member States to nominate one or more representatives to the rule amendment project: officials with knowledge and responsibility for the portfolio who could contribute substantively and authoritatively on behalf of their government.

The comments received from States, the legal profession and the public fed into a working paper published in August 2018 (Working Paper #1: Proposals for Amendment of the ICSID Rules), which presented the proposed amended rules in full, together with an explanation of the changes and the rationale behind them in ICSID’s three official languages (English, French and Spanish).11 ICSID subsequently held over 50 consultations with Member States and the public, and received over a hundred written submissions on the proposals.12 Based on this input, ICSID published an updated working paper in March 2019 (Working Paper #2: Proposals for Amendment of the ICSID Rules).

The suggested amendments in the working papers encompass the full set of ICSID rules and regulations described above. They do not, however, include changes to the ICSID Convention which would require unanimous approval from ICSID’s 154 Member States. In contrast, changes to the ICSID Regulations and Rules require two-thirds approval of the membership, and the Additional Facility Rules need a simple majority. Nonetheless, the process of considering changes to the ICSID rules has been helpful in drawing attention to areas of the ICSID Convention where changes may also be deemed desirable. Should ICSID Member States express an interest in pursuing changes to the Convention, this can be done at a subsequent stage.

Highlights of the proposed amendments

What changes are proposed to the ICSID rules? The proposals are too numerous to fully describe, but the highlights include the following provisions.13

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5 Article 6(1) of the ICSID Convention authorizes the ICSID Administrative Council to adopt administrative and financial regulations for the Centre and rules of procedure for the institution and conduct of arbitration and conciliation proceedings.

6 Arbitration Rule 6(2), and Art. 13(2) of the Additional Facility Rules.

7 Arbitration Rule 32(2), and Art. 39(2) of the Additional Facility Rules.

8 Arbitration Rule 48(4), and Art. 53(3) of the Additional Facility Rules.

9 Arbitration Rule 37(2), and Art. 41(3) of the Additional Facility Rules.

10 Arbitration Rule 41(5), and Art. 45(6) of the Additional Facility Rules.

11 All materials related to the amendment process, including the working papers, are available at https://icsid.worldbank.org/en/Amendments.


Modernized drafting and sequencing of provisions

Provisions have been re-drafted using plain language and gender-neutral terms (e.g. references to the Chairman have been changed to Chair). The sequencing of provisions has also been reordered so that they better reflect the chronology of an ICSID case. Overall, the revised rules will be more user-friendly.

Time and cost reduction measures

A substantial focus of the amendments is to reduce the time and cost of proceedings, recognizing that success in this will depend upon the joint efforts of counsel, tribunal members and the institution.

First, general rules are introduced to address the time and cost of proceedings. For example, a new provision obliges the tribunal and the parties to conduct the proceeding in an expeditious and cost-effective manner, and clarifies the parties’ and tribunal’s discretion to modify time limits. Also, by default, all filing would be electronic. Moving from hard-copy to electronic filing would not only expedite the process, but would also significantly reduce the environmental footprint of ICSID proceedings.

Second, tribunals are encouraged to be active case managers where possible. For example, the tribunal may convene a case management conference at any time to identify uncontested facts, narrow the issues in dispute, or address any other procedural or substantive matter.

Third, specific timelines for various steps are reduced, requiring counsel to advance the case in an expeditious way. For example, an objection that a claim manifestly lacks legal merit could be filed before constitution of the tribunal, and must be filed within 30 days after constitution; preliminary objections would need to be filed as soon as possible, and no later than the date to file the counter-memorial; and a request for bifurcation would need to be made within 30 days after the filing of the memorial on the merits (if it relates to a preliminary objection).

Fourth, new timelines are proposed for issuing decisions, orders and awards. Most procedural orders and decisions, such as a decision on provisional measures, must be issued within 30 days after the last submission. 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 if it has been bifurcated, and 240 days after the last submission on all other matters.

Fifth, an optional expedited arbitration process is proposed, which the parties could opt into at any time. Under the expedited rules, the parties could opt for a sole arbitrator or three-person tribunal; however, if they do not jointly advise of their agreement within 30 days after registration, they would be deemed to have selected a sole arbitrator. Once the tribunal is constituted, a streamlined procedural calendar requires that the first session would be held within 30 days, and memorials and counter-memorials would each be filed in 60 days and limited to 200 pages, while replies and rejoinders may each be filed in 40 days and are limited to 100 pages. The hearing would be held within 60 days after the last written submission. The entire process is designed to conclude within a maximum of a year-and-a-half, which is around two years shorter than the average duration of an arbitration case under the current rules. The parties may also agree to opt out of the expedited rules at any point.

Increased transparency through publication of awards, decision and orders

Under the proposed rules, all orders and decisions in ICSID Convention cases and all orders, decisions and awards under the Additional Facility Rules would be published, with redactions agreed to by the parties. The effect of these changes will be to provide the public and facility users with greater access to procedural and substantive decisions. Over time, this increased access will contribute to the development of a more cohesive jurisprudence, answering a concern voiced by various commentators.

As always, if parties have treaty-specific provisions on transparency, these provisions will form the applicable regime. Similarly, if the Mauritius Convention applies as between the parties, it will govern transparency in the proceedings. The proposed ICSID rules, therefore, provide a baseline level of transparency, but States may set a higher, or different, level of transparency if they wish.

Disclosure of third-party funding

ICSID received diverse comments on third-party funding, ranging from recommendations to prohibit it entirely, to allowing it without any constraint or disclosure. Given the divergent views, ICSID has not taken a position on third-party funding per se. But the Centre has recognized that potential conflicts of interest can arise between arbitrators and third-party funders, and these are best avoided through disclosure
of the existence of such funding arrangements by both parties. A new proposed rule would therefore oblige the parties to disclose whether they have third-party funding, and if so, the name of the funder. This information would be provided to potential arbitrators prior to appointment to avoid inadvertent conflicts of interest.

**New rule on security for costs**

Security for costs addresses the risk that a party does not comply with a potential costs award against it. It does so by requiring a party to provide a security to cover the estimated costs that the other party will incur in the proceeding. Security for costs may be requested by a claimant or respondent and would be available in original arbitration proceedings as well as in annulment proceedings. The new, stand-alone, rule would allow a tribunal to order a party asserting a claim or counter claim to provide security for costs. The rule states that in exercising its discretion to order security for costs, the tribunal must consider the relevant party's ability and willingness to comply with an adverse decision on costs, any effect of providing security for costs on the party's ability to pursue a claim, the party's conduct, and any other relevant circumstances.

**Disqualification of arbitrators**

Disqualification of arbitrators is a topic that has been extensively debated and the proposed rules address a number of the issues that have been raised. One relates to the timing of a challenge. Under the proposals, a challenge would need to be filed within 21 days after the challenging party first knew or should have known of the facts that led to the challenge; if the challenging party knew of the facts before constitution, it must file the proposal to disqualify within 21 days after constitution. If the challenged member is disqualified, a decision taken by the tribunal during the pendency of the challenge may be reconsidered by the new tribunal upon a party’s request. Finally, an enhanced declaration of independence and impartiality is proposed for arbitrators, which elaborates on the types of disclosure required.

**Rules for mediation, conciliation and fact-finding**

ICSID's rules for conciliation under both the Convention and Additional Facility have been amended significantly, aiming to introduce greater flexibility into the process. The Additional Facility’s rules for fact-finding are also completely revised to be more user-friendly and cost-effective. Finally, ICSID has proposed an entirely new set of rules for mediation. The new mediation rules align with the trend amongst States of including mediation in investment treaties, either as a pre-condition to arbitration, as a stand-alone mechanism, or for use in parallel with other dispute settlement mechanisms. The mediation rules have also been designed to complement the Singapore Mediation Convention, which will open for signature in 2019. This Convention facilitates the enforcement of international settlement agreements arising from mediation, including in the sphere of investor-State mediation. Notably, the mediation and fact-finding rules are standalone—in other words separate from the ICSID Convention and Additional Facility Rules. This underscores their status as rules that can be used alone, or in conjunction with an arbitration case, and that use of these rules is fully by consent of the parties and not hindered by jurisdictional issues such as whether a party is a national of a Member State.

**Expanded Access to the Additional Facility**

The proposed rules extend the availability of Additional Facility Rules to all cases where ICSID Convention arbitration or conciliation is not available. The proposed Additional Facility rules also provide regional economic integration organizations (REIOs), such as the European Union, with access to dispute settlement under the Additional Facility Rules, reflecting the fact that increasingly States are negotiating investment agreements as regional entities.

**Next steps**

Following further consultation on the proposals laid out in ‘Working Paper #2’, ICSID is planning to present a package of amendments for a vote by ICSID Member States at the fall annual meeting of the Administrative Council in 2019 or 2020. Once adopted, the amended rules will apply to all cases based on consent given after the new rules are brought into force. As with past amendments, this round of changes will place ICSID at the forefront of investment arbitration procedure. Together with the numerous steps that States are taking to modernize the substantive obligations in their investment treaties and free trade agreements, the ICSID rule amendments reflect a steady evolution of international investment law.

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16 The United Nations Commission on International Trade Law approved the final draft of the Convention on International Settlement Agreements Resulting from Mediation on 26 June 2018. A signing ceremony is planned for 1 August 2019, and the Convention will come into force once it is ratified by at least three UN Member States. The Convention is available at http://undocs.org/en/A/RES/73/198.
PROPOSALS FOR AMENDMENT OF THE ICSID RULES
International Centre for Settlement of Investment Disputes

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank’s objective of promoting international investment.

ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for State-State disputes under investment treaties and free trade agreements, and as an administrative registry.
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<td>(AF)AFR</td>
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1. ICSID is proposing a comprehensive amendment of the rules governing arbitration and conciliation under the ICSID Convention and ICSID Additional Facility, as well as new stand-alone rules for fact-finding and mediation in investment disputes.

2. This amendment process began in October 2016 with an initial survey of stakeholders on topics to be addressed in the amended rules. ICSID has subsequently published a survey on recovery of costs, released two working papers with draft proposals for amendment, and issued compilations of comments received on each of the working papers. In addition, ICSID has held two extensive in-person consultations with States and has made more than 75 presentations to individuals, stakeholder groups, counsel, arbitrators and government officials.

3. Working Paper #3 (WP #3) contains the latest iteration of the proposed amended rules based on comments received by August 15, 2019. It is available in the three official languages of ICSID: English (Volume 1), French (Volume 2), and Spanish (Volume 3).

4. Volume 1 of WP #3 contains the proposed English text in “clean copy” format of each rule in a green box, followed by the text in “track change” format and an explanation of changes made. Volume 2 contains the proposed rules in French in a pink box with text in “clean copy” and “track change” format. Similarly, Volume 3 contains the proposed rules in Spanish in a blue box with text also in “clean copy” and “track change” format.

5. The explanation of changes found in Volume 1 of WP #3 addresses substantive points only. Minor changes made to streamline the text or for grammatical purposes are not expressly addressed in the explanations but are shown in the “track change” versions. In addition, the French and Spanish versions incorporate comments made with respect to translation; these changes are also not explained individually but are evident in the “track change” versions.

6. As should be expected, there are significantly fewer changes in WP #3 than in the prior working papers, reflecting developing consensus on the amendments through the consultation process. The text in WP #3 offers a modern, sophisticated and balanced set of investment dispute settlement rules that will ensure both due process and an effective process.

7. ICSID will hold the next in-person consultation with Member States on WP #3 from November 11-15, 2019. Our goal is for the November consultation to be the final, or at least penultimate, consultation before the amended rules are placed before the Administrative Council for a vote.

Meg Kinnear,
ICSID Secretary-General
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I. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ICSID CONVENTION PROCEEDINGS (ADMINISTRATIVE AND FINANCIAL REGULATIONS)

Introductory Note

The Administrative and Financial Regulations for ICSID Convention Proceedings (Administrative and Financial Regulations) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention.

These Regulations concern the functioning of ICSID as an international institution. They also contain provisions that apply generally in proceedings and are complementary to the Convention and the Institution, Conciliation and Arbitration Rules, adopted pursuant to Article 6(1)(b) and (c) of the Convention.

Chapter I
Procedures of the Administrative Council

Regulation 1
Date and Place of the Annual Meeting

The Annual Meeting of the Administrative Council shall take place in conjunction with the Annual Meeting of the Board of Governors of the International Bank for Reconstruction and Development (“Bank”), unless the Council specifies otherwise.

Regulation 2
Notice of Meetings

(1) The Secretary-General shall give each member notice of the time and place of meetings of the Administrative Council by any rapid means of communication. This notice shall be dispatched not less than 42 days prior to the date set for such meeting, except that in urgent cases notice shall be sufficient if dispatched not less than 10 days prior to the date of the meeting.

(2) Any meeting of the Administrative Council at which no quorum is present may be adjourned by a majority of the members present and notice of the adjourned meeting need not be given.
Regulation 3
Agenda for Meetings

(1) The Secretary-General shall prepare an agenda for each meeting of the Administrative Council under the direction of the Chairman of the Administrative Council (“Chair”) and shall transmit the agenda to each member with notice of the meeting.

(2) Additional subjects may be placed on the agenda by any member by giving notice thereof to the Secretary-General not less than 7 days prior to the date set for such meeting.

(3) In special circumstances the Chair, or the Secretary-General after consulting with the Chair, may at any time place additional subjects on the agenda for a meeting of the Administrative Council.

(4) The Secretary-General shall promptly give each member notice of additional subjects on the agenda.

(5) The Administrative Council may authorize any subject to be placed on the agenda at any time even though the notice required by this Regulation has not been given.

Regulation 4
Presiding Officer

(1) The Chair shall be the Presiding Officer at meetings of the Administrative Council.

(2) The Chair shall designate a Vice-President of the Bank to preside over all or any part of a meeting if the Chair is unable to preside.

Regulation 5
Secretary of the Council

(1) The Secretary-General shall serve as Secretary of the Administrative Council.

(2) Except as otherwise directed by the Administrative Council, the Secretary-General, in consultation with the Chair, shall make all arrangements for meetings of the Council and may coordinate with appropriate officers of the Bank for this purpose.

(3) The Secretary-General shall present the annual report on the operation of the Centre to each Annual Meeting of the Administrative Council for its approval pursuant to
Article 6(1)(g) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”).

(4) The Secretary-General shall publish the annual report and a summary record of the proceedings of the Administrative Council.

### Regulation 6
**Attendance at Meetings**

(1) The Secretary-General and the Deputy Secretaries-General may attend all meetings of the Administrative Council.

(2) The Secretary-General, in consultation with the Chair, may invite observers to attend any meeting of the Administrative Council.

### Regulation 7
**Voting**

(1) Except as otherwise provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. The Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but shall require a formal vote upon the request of any member. The written text of the motion shall be distributed to the members if a formal vote is required.

(2) No member of the Administrative Council may vote by proxy or by any method other than in person, but a member may designate a temporary alternate to vote at any meeting at which the regular alternate is not present.

(3) Between Annual Meetings, the Chair may call a special meeting or request that the Administrative Council vote by correspondence on a motion. The Secretary-General shall transmit the request for a vote by correspondence to each member with the text of the motion to be voted upon. Votes shall be cast within 45 days after such transmission, unless a longer period is approved by the Chair. Upon expiry of the established period, the Secretary-General shall record the results and notify all members of the outcome. The motion shall be considered lost if the replies received do not include those of a majority of the members.

(4) If all Contracting States are not represented at a meeting of the Administrative Council and the votes necessary to adopt a proposed decision by a majority of two-thirds of the members of the Council are not obtained, the Council, with the concurrence of the Chair, may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members
shall be solicited in accordance with paragraph (3). Votes registered at the meeting may be changed by the member before the expiry of the voting period established pursuant to paragraph (3).

Chapter II
The Secretariat

Regulation 8
Election of the Secretary-General and Deputy Secretaries-General

In proposing to the Administrative Council one or more candidates for the office of Secretary-General or Deputy Secretary-General, the Chair shall also make proposals with respect to their term and conditions of employment.

Regulation 9
Acting Secretary-General

(1) If there is more than one Deputy Secretary-General, the Chair may propose to the Administrative Council the order in which the Deputies shall act as Secretary-General pursuant to Article 10(3) of the Convention. In the absence of such a decision by the Administrative Council, the Secretary-General shall determine the order in which the Deputies shall act as Secretary-General.

(2) The Secretary-General shall designate the member of the staff of the Centre who shall act as Secretary-General during the absence or inability to act of the Secretary-General and the Deputy Secretaries-General. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chair shall designate the member of the staff who shall act as the Secretary-General.

Regulation 10
Appointment of Staff Members

The Secretary-General shall appoint the staff of the Centre. Appointments may be made directly or by secondment.
Regulation 11
Conditions of Employment

(1) The conditions of employment of the staff of the Centre shall be the same as those of the staff of the Bank.

(2) The Secretary-General shall make arrangements with the Bank, within the framework of the general administrative arrangements approved by the Administrative Council pursuant to Article 6(1)(d) of the Convention, for the participation of members of the Secretariat in the Staff Retirement Plan of the Bank and in other facilities and contractual arrangements established for the benefit of the staff of the Bank.

Regulation 12
Authority of the Secretary-General

(1) Deputy Secretaries-General and the staff of the Centre shall act solely under the direction of the Secretary-General.

(2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. Deputy Secretaries-General may only be dismissed with the concurrence of the Administrative Council.

Regulation 13
Incompatibility of Functions

The Secretary-General, the Deputy Secretaries-General and the staff of the Centre may not serve on the Panels of Conciliators or of Arbitrators, or as members of any Commission, Tribunal or Committee.
Chapter III
Financial Provisions

Regulation 14
Fees, Allowances and Charges

(1) Each member of a Commission, Tribunal or Committee shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a hearing, meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a hearing, meeting or session held away from the member’s place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing, meeting or session is held; and

(iii) a per diem allowance for each day the member spends away from their place of residence.

(2) The Secretary-General, with the approval of the Chair, shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Commission, Tribunal or Committee and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties to the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) members of Commissions, Tribunals and Committees, and any assistants approved by the parties;

(b) witnesses and experts called by a Commission, Tribunal or Committee who have not been presented by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any hearing, meeting or session held outside an ICSID facility.
(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission, Tribunal or Committee, unless the parties have made sufficient payments to defray the costs of the proceeding.

**Regulation 15**  
**Payments to the Centre**

(1) To enable the Centre to pay the costs referred to in Regulation 14, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for arbitration or conciliation, the Secretary-General shall request the claimant(s) to make a payment to defray the estimated costs of the proceeding through the first session of the Commission or Tribunal, which shall be considered partial payment by the claimant(s) of the payment referred to in paragraph (1)(b);

(b) upon constitution of a Commission, Tribunal or Committee, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding.

(2) In conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c). In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal’s final decision on costs pursuant to Article 61(2) of the Convention.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(4) This Regulation shall apply to requests for a supplementary decision on or rectification of an Award, an application for interpretation or revision of an Award, and a request for resubmission of the dispute.

(5) This Regulation shall apply to an application for annulment of an Award, except that the applicant shall be solely responsible for making the payments requested by the Secretary-General.
Regulation 16
Consequences of Default in Payment

(1) The payments referred to in Regulation 15 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

(a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Commission, Tribunal or Committee if constituted; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Commission, Tribunal or Committee if constituted.

Regulation 17
Special Services

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

Regulation 18
Fee for Lodging Requests

The party or parties (if a request is filed jointly) wishing to institute an arbitration or conciliation proceeding, or requesting a supplementary decision, rectification, interpretation, revision or annulment of an Award, or resubmission of a dispute, shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.
**Regulation 19**  
**The Budget**

(1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of the following year.

(2) Before the end of each fiscal year, the Secretary-General shall prepare a budget indicating expected expenditures of the Centre (excepting those to be incurred on a reimbursable basis) and expected revenues (excepting reimbursements) for the following fiscal year. The budget shall be submitted for adoption by the Administrative Council at its next Annual Meeting in accordance with Article 6(1)(f) of the Convention.

(3) If the Secretary-General determines during the fiscal year that the expected expenditures will exceed those authorized in the budget, or wishes to incur expenditures not previously authorized, the Secretary-General shall prepare a supplementary budget in consultation with the Chair and submit it to the Administrative Council for adoption, in accordance with Regulation 7.

(4) The adoption of a budget constitutes authority for the Secretary-General to make expenditures and incur obligations for the purposes and within the limits specified in the budget. Unless otherwise provided by the Administrative Council, the Secretary-General may exceed the amount specified for any given budget item, provided that the total amount of the budget is not exceeded.

(5) Pending the adoption of the budget by the Administrative Council, the Secretary-General may incur expenditures for the purposes and within the limits specified in the budget submitted, up to one quarter of the amount authorized to be expended in the previous fiscal year but in no event exceeding the amount that the Bank has agreed to make available for the current fiscal year.

**Regulation 20**  
**Assessment of Contributions**

(1) Any excess of expected expenditures over expected revenues shall be assessed on the Contracting States. Each State that is not a member of the Bank shall be assessed a fraction of the total assessment equal to the fraction of the budget of the International Court of Justice that it would have to bear if that budget were divided only among the Contracting States in proportion to the then current scale of contributions applicable to the budget of the Court; the balance of the total assessment shall be divided among the Contracting States that are members of the Bank in proportion to their respective subscription to the capital stock of the Bank. The assessments shall be calculated by the Secretary-General immediately after the
adoption of the annual budget, on the basis of the then current membership of the Centre, and shall be promptly communicated to all Contracting States. The assessments shall be payable as soon as they are communicated.

(2) On the adoption of a supplementary budget, the Secretary-General shall immediately calculate supplementary assessments, which shall be payable as soon as they are communicated to the Contracting States.

(3) A State which is party to the Convention during any part of a fiscal year shall be assessed for the entire fiscal year. If a State becomes a party to the Convention after the assessments for a given fiscal year have been calculated, its assessment shall be calculated by the application of the same appropriate factor as was applied in calculating the original assessments, and no recalculation of the assessments of the other Contracting States shall be made.

(4) If, after the close of a fiscal year, it is determined that there is a cash surplus, such surplus shall, unless the Administrative Council decides otherwise, be credited to the Contracting States in proportion to the assessed contributions they had paid for that fiscal year. These credits shall be made with respect to the assessments for the fiscal year commencing two years after the end of the fiscal year to which the surplus pertains.

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**Regulation 21**

**Audits**

The Secretary-General shall have an audit of the accounts of the Centre made once each year and on the basis of this audit submit a financial statement to the Administrative Council for consideration at the Annual Meeting.

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**Regulation 22**

**Administration of Proceedings**

The ICSID Secretariat is the only entity authorized to administer proceedings conducted under the Convention.
Chapter IV
General Functions of the Secretariat

Regulation 23
List of Contracting States

The Secretary-General shall maintain and publish a list of the Contracting States (including former Contracting States, showing the date on which their notice of denunciation was received by the depositary), indicating for each:

(a) the date on which the Convention entered into force with respect to it;

(b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;

(c) any designation pursuant to Article 25(1) of the Convention of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;

(d) any notification pursuant to Article 25(3) of the Convention that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;

(e) any notification pursuant to Article 25(4) of the Convention of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;

(f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention;

(g) any legislative or other measures taken pursuant to Article 69 of the Convention for making the provisions of the Convention effective in the territories of the State and communicated by the State to the Centre; and

(h) the name, address and contact details of the authority in each State to which documents should be notified, as reported by the State.
Regulation 24
Panels of Conciliators and of Arbitrators

(1) The Secretary-General shall invite each Contracting State to make its designations to the Panels of Conciliators and of Arbitrators if a designation has not been made or the period of a designation has expired.

(2) Each designation made by a Contracting State or by the Chair shall indicate the designee’s name, contact information, nationality and qualifications, with particular reference to competence in the fields of law, commerce, industry or finance.

(3) The Secretary-General shall immediately inform a designee of their designation, the designating authority, and the end of the designation period, and shall request confirmation that the designee is willing to serve.

(4) The Secretary-General shall maintain and publish lists naming the members of the Panels of Conciliators and of Arbitrators, indicating the contact information, nationality, end of the designation period, designating authority and qualifications of each member.

Regulation 25
Publication

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

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

(b) documents generated in proceedings, in accordance with the rules applicable to the individual proceeding.

Regulation 26
The Registers

The Secretary-General shall maintain and publish a Register for each case containing all significant data concerning the institution, conduct and disposition of the proceeding, including the economic sector involved, the names of the parties and their representatives, and the method of constitution and membership of each Commission, Tribunal and Committee.
**Regulation 27**

**Communications with Contracting States**

(1) Unless a specific channel of communication is notified by the State concerned, all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State’s representative on the Administrative Council and sent by rapid means of communication.

(2) The time limits referred to in Articles 65 and 66 of the Convention and Regulations 2, 3 and 7 shall be calculated from the date on which the Secretary-General transmits or receives the relevant document. The date of transmittal or receipt shall be excluded from the calculation.

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**Regulation 28**

**Secretary**

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from the Secretariat and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the Rules applicable to individual proceedings or assigned to the Secretary-General by the Convention, and delegated to the Secretary; and

(b) assist the parties and the Commission, Tribunal or Committee with all aspects of the proceeding, including the expeditious and cost-effective conduct of the proceeding.

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**Regulation 29**

**Depositary Functions**

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for arbitration, conciliation, supplementary decision, rectification, interpretation, revision or applications for annulment;

(b) all written submissions, written statements, observations, supporting documents and communications filed in a proceeding;
(c) the minutes, recordings and transcripts of hearings, meetings or sessions in a proceeding; and

(d) any order, decision, Report or Award by a Commission, Tribunal or Committee.

(2) Subject to the applicable rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties. Certified copies of the documents referred to in paragraph (1)(d) shall reflect any supplementary decision, rectification, interpretation, revision or annulment and any stay of enforcement in effect.

Chapter V
Immunities and Privileges

Regulation 30
Certificates of Official Travel

The Secretary-General may issue certificates of official travel to members of Commissions, Tribunals or Committees, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Convention.

Regulation 31
Waiver of Immunities

(1) The Secretary-General may waive the immunity of:

(a) the Centre; and

(b) members of the Secretariat.

(2) The Chair may waive the immunity of:

(a) the Secretary-General and any Deputy Secretary-General;

(b) members of a Commission, Tribunal or Committee; and
(c) the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in a proceeding, if the Commission, Tribunal or Committee concerned recommends such waiver.

(3) The Administrative Council may waive the immunity of:

(a) the Chair and members of the Council;

(b) the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned; and

(c) the Centre or any person referred to in paragraphs (1) or (2).

(4) A waiver under paragraph (1) or (2) shall be made in writing by the Secretary-General or Chair, as applicable. A waiver under paragraph (3) shall be made by a decision of the Administrative Council in accordance with Article 7(2) of the Convention.

Chapter VI
Official Languages

Regulation 32
Languages of Regulations

(1) The official languages of the Centre are English, French and Spanish.

(2) The texts of these Regulations in each official language are equally authentic.

(3) The singular form of words in the Rules and Regulations made pursuant to the Convention include the plural form of that word, unless otherwise stated or required by the context of the provision.
# II. INSTITUTION RULES FOR ICSID CONVENTION PROCEEDINGS
## (INSTITUTION RULES)

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II. INSTITUTION RULES FOR ICSID CONVENTION PROCEEDINGS
(INSTITUTION RULES)

Introductory Note

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

The Institution Rules apply from the filing of a Request for arbitration or conciliation under the ICSID Convention to the date of registration or refusal to register. If a Request is registered, the Arbitration or Conciliation Rules apply to the subsequent procedure. The Institution Rules do not apply to the initiation of post-Award remedy proceedings, or to proceedings pursuant to the Additional Facility, the ICSID Fact-Finding Rules and the ICSID Mediation Rules.

Rule 1
The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) shall file a Request for arbitration or conciliation together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 2
Contents of the Request

(1) The Request shall:

(a) state whether it relates to an arbitration or conciliation proceeding;

(b) be in English, French or Spanish;

(c) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;
(d) be signed by each requesting party or its representative and be dated;

(e) attach proof of any representative’s authority to act; and

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) With regard to the jurisdiction of the Centre, the Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising directly out of the investment;

(b) with respect to each party’s consent to submit the dispute to arbitration or conciliation under the Convention:

(i) the instrument(s) in which each party’s consent is recorded;

(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date;

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;

(c) if a party is a natural person:

(i) information concerning that person’s nationality on both the date of consent and the date of the Request, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of the Contracting State party to the dispute either on the date of consent or the date of the Request;

(d) if a party is a juridical person:

(i) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and
(ii) if that party had the nationality of the Contracting State party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another Contracting State pursuant to Article 25(2)(b) of the Convention, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision or agency of a Contracting State:

(i) the State’s designation to the Centre pursuant to Article 25(1) of the Convention; and

(ii) supporting documents demonstrating the State’s approval of consent pursuant to Article 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.

---

**Rule 3**

**Recommended Additional Information**

It is recommended that the Request also contain any procedural proposals or agreements reached by the parties, including with respect to:

(a) the number and method of appointment of arbitrators or conciliators; and

(b) the procedural language(s).

---

**Rule 4**

**Filing of the Request and Supporting Documents**

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

(4) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.
Rule 5
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Rule 6
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall review the Request pursuant to Article 28(3) or 36(3) of the Convention.

(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 7
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators or conciliators, unless such information has already been provided, and to constitute a Tribunal or Commission without delay;

(d) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal or Commission in regard to jurisdiction of the Centre, competence of the Tribunal or Commission, and the merits; and
(e) remind the parties to make the disclosure required by Arbitration Rule 14 or Conciliation Rule 12.

**Rule 8**
**Withdrawal of the Request**

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 5(b).

**Rule 9**
**Final Provisions**

(1) The English, French and Spanish texts of these Rules are equally authentic.

(2) These Rules may be cited as the “Institution Rules” of the Centre.
### III. ARBITRATION RULES FOR ICSID CONVENTION PROCEEDINGS

**ARBITRATION RULES**

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(ARBITRATION RULES)

Introductory Note

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

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre.

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

Chapter I
General Provisions

Rule 1
Application of Rules

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

(2) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it does not conflict with the Convention or the Administrative and Financial Regulations.

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

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

Rule 2
General Duties

(1) The Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.
(2) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.

Rule 3  
Party and Party Representative

(1) For the purposes of these Rules, “party” includes, where the context so admits, all parties acting as claimant or as respondent.

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

Rule 4  
Method of Filing

(1) A document to be filed in the proceeding shall be filed with the Secretary-General, who shall acknowledge its receipt.

(2) Documents shall only be filed electronically, unless the Tribunal orders otherwise in special circumstances.

Rule 5  
Supporting Documents

(1) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the request, written submission, observations or communication to which they relate.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Tribunal or a party may require a fuller extract or a complete version of the document.

(3) If the authenticity of a supporting document is disputed, the Tribunal may order a party to provide a certified copy or to make the original available for examination.
### Rule 6
**Routing of Documents**

The Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other;

(b) the Tribunal, unless the parties communicate directly with the Tribunal on request of the Tribunal or by agreement of the parties; and

(c) the Chairman of the Administrative Council (“Chair”) if applicable.

### Rule 7
**Procedural Languages, Translation and Interpretation**

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

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written submissions, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may order a party to file such documents in both procedural languages.

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

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

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may order interpretation into the other procedural language.
(7) The testimony of a witness or an expert in a language other than a procedural language shall be interpreted into the procedural language(s) used at the hearing.

(8) The recordings and transcripts of a hearing shall be made in the procedural language(s) used at the hearing.

Rule 8
Correction of Errors

A party may correct an accidental error in a document promptly upon discovery and before the Award is rendered. The parties may refer any dispute regarding a correction to the Tribunal for determination.

Rule 9
Calculation of Time Limits

(1) References to time shall be determined based on the time at the seat of the Centre on the relevant date.

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

   (a) the Tribunal, or the Secretary-General if applicable, announces the period; or

   (b) the procedural step starting the period is taken.

(3) A time limit shall be satisfied if a procedural step is taken or a document is received by the Secretary-General on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

Rule 10
Fixing Time Limits

The Tribunal, or the Secretary-General if applicable, shall fix time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by the Convention or these Rules.
Rule 11

Extension of Time Limits Applicable to Parties

(1) The time limits in Articles 49, 51 and 52 of the Convention cannot be extended. An application or request filed after the expiry of such time limits shall be disregarded.

(2) A time limit prescribed by the Convention or these Rules, other than those referred to in paragraph (1), may only be extended by agreement of the parties. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise.

(3) A time limit fixed by the Tribunal or the Secretary-General may be extended by agreement of the parties or the Tribunal, or Secretary-General if applicable, upon reasoned application by either party made prior to its expiry. A procedural step taken or document received after the expiry of such time limit shall be disregarded unless the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet the time limit.

(4) The Tribunal may delegate to the President the power to extend time limits referred to in paragraph (3).

Rule 12

Time Limits Applicable to the Tribunal

(1) The Tribunal shall use best efforts to meet time limits to render orders, decisions and the Award.

(2) If the Tribunal cannot comply with an applicable time limit, it shall advise the parties of the special circumstances that justify the delay and the date when it anticipates rendering the order, decision or Award.
Chapter II  
Constitution of the Tribunal

Rule 13  
General Provisions Regarding the Constitution of the Tribunal

(1) The Tribunal shall be constituted without delay after registration of the Request for arbitration.

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

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

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

Rule 14  
Notice of Third-Party Funding

(1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit the notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).
Rule 15
Method of Constituting the Tribunal

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

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.

Rule 16
Appointment of Arbitrators to a Tribunal Constituted in Accordance with Article 37(2)(b) of the Convention

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.

Rule 17
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

Rule 18
Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention

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

(2) The Chair shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.
(3) The Chair shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

**Rule 19**

**Acceptance of Appointment**

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

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

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

   (a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each arbitrator and provide the signed declaration.

(5) The Secretary-General shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.

(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

**Rule 20**

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

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

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

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

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

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**Rule 21**

**Constitution of the Tribunal**

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

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

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**Chapter III**

**Disqualification of Arbitrators and Vacancies**

**Rule 22**

**Proposal for Disqualification of Arbitrators**

(1) A party may file a proposal to disqualify one or more arbitrators ("proposal") in accordance with the following procedure:

(a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of:

(i) the constitution of the Tribunal; or

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

(b) the proposal shall include the grounds on which it is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;
(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (1)(c); and

(e) each party may file a final written submission on the proposal within seven days after expiry of the time limit referred to in paragraph (1)(d).

(2) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

Rule 23
Decision on the Proposal for Disqualification

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

(2) For the purposes of Article 58 of the Convention:

(a) if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and they shall be considered equally divided;

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

(3) The arbitrators not subject to the proposal and the Chair shall use best efforts to decide any proposal within 30 days after the later of the expiry of the time limit referred to in Rule 22(1)(e) or the notice in Rule 23(2)(a).

Rule 24
Incapacity or Failure to Perform Duties

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 22 and 23 shall apply.
Rule 25
Resignation

(1) An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation.

(2) If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General whether they consent to the arbitrator’s resignation for the purposes of Rule 26(3)(a).

Rule 26
Vacancy on the Tribunal

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

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

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

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

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

(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. Any portion of a hearing shall be recommenced if the newly appointed arbitrator considers it necessary to decide a pending matter.

Chapter IV
Conduct of the Proceeding

Rule 27
Orders and Decisions

(1) The Tribunal shall make the orders and decisions required for the conduct of the proceeding.
(2) Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Tribunal.

(3) The Tribunal shall consult with the parties prior to making an order or decision it is authorized by these Rules to make on its own initiative.

**Rule 28**

**Waiver**

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

**Rule 29**

**First Session**

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

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

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

(4) Before the first session, the Tribunal shall invite the parties’ views on procedural matters, including:

   (a) the applicable arbitration rules;

   (b) the division of advances payable pursuant to Administrative and Financial Regulation 15;

   (c) the procedural language(s), translation and interpretation;
(d) the method of filing and routing of documents;

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

(f) the place of hearings;

(g) whether there will be requests for production of documents as between the parties and if so, the scope, timing and procedure for such requests;

(h) the procedural calendar;

(i) the manner of making recordings and transcripts of hearings;

(j) the publication of documents and recordings;

(k) the treatment of confidential or protected information; and

(l) any other procedural matter raised by either party or the Tribunal.

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

Rule 30
Written Submissions

(1) The parties shall file the following written submissions:

(a) a memorial by the requesting party;

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

and, unless the parties agree otherwise:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

(2) A memorial shall contain a statement of the relevant facts, law and arguments, and the request for relief. A counter-memorial shall contain a statement of the relevant facts, including an admission or denial of facts stated in the memorial, and any necessary additional facts, a statement of law in reply to the memorial, arguments and the request for relief. A reply and rejoinder shall be limited to responding to the previous written submission.
(3) A party may file unscheduled written submissions, observations or supporting documents only after obtaining leave of the Tribunal, unless the filing of such documents is provided for by the Convention or these Rules. The Tribunal may grant such leave upon a timely and reasoned application if it finds such written submissions, observations or supporting documents are necessary in view of all relevant circumstances.

**Rule 31**

**Case Management Conference**

With a view to conducting an expeditious and cost-effective proceeding, the Tribunal shall convene one or more case management conferences with the parties at any time after the first session to:

(a) identify uncontested facts;

(b) clarify and narrow the issues in dispute; or

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

**Rule 32**

**Hearings**

(1) The Tribunal shall hold one or more hearings, unless the parties agree otherwise.

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

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

(4) Any member of the Tribunal may put questions to the parties and ask for explanations at any time during a hearing.
Rule 33
Quorum

The participation of a majority of the members of the Tribunal by any appropriate means of communication shall be required at the first session, case management conferences, hearings and deliberations, unless the parties agree otherwise.

Rule 34
Deliberations

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

(2) The Tribunal may deliberate at any place and by any means it considers appropriate.

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

(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.

Rule 35
Decisions Made by Majority Vote

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

Chapter V
Evidence

Rule 36
Evidence: General Principles

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

(2) Each party has the burden of proving the facts relied on to support its claim or defense.
(3) The Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.

Rule 37
Disputes Arising from Requests for Documents

The Tribunal shall decide any dispute arising out of a party’s objection to the other party’s request for production of documents. In deciding the dispute, the Tribunal shall consider all relevant circumstances, including:

(a) the scope and timeliness of the request;
(b) the relevance and materiality of the documents requested;
(c) the burden of production; and
(d) the basis of the objection.

Rule 38
Witnesses and Experts

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness, and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.

(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Each witness shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”
Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(8) Each expert shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”

Rule 39
Tribunal-Appointed Experts

(1) Unless the parties agree otherwise, the Tribunal may appoint one or more independent experts to report to it on specific matters within the scope of the dispute.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert.

(3) Upon accepting an appointment by the Tribunal, an expert shall provide a signed declaration in the form published by the Centre.

(4) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.

(5) The parties shall have the right to make written and oral submissions on the report of the Tribunal-appointed expert, as required.

(6) Rule 38 shall apply, with necessary modifications, to the Tribunal-appointed expert.

Rule 40
Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party’s request, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.
Chapter VI
Special Procedures

Rule 41
Manifest Lack of Legal Merit

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

(2) The following procedure shall apply:

(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;

(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;

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

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

(e) the Tribunal shall render its decision or Award on the objection within 60 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the objection.

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

(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit.
Rule 42  
Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").

(2) If a request for bifurcation relates to a preliminary objection, Rule 44 shall apply.

(3) The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 44:

(a) the request for bifurcation shall be filed as soon as possible;

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

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

(d) the Tribunal shall issue its decision on the request for bifurcation within 30 days after the later of the last written or oral submission on the request; and

(e) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and

(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

(5) If the Tribunal orders bifurcation pursuant to this Rule, it shall suspend the proceeding with respect to any questions to be addressed at a later phase, unless the parties agree otherwise or the Tribunal decides there are special circumstances that do not justify suspension.

(6) The Tribunal may at any time on its own initiative decide whether a question should be addressed in a separate phase of the proceeding.
Rule 43  
Preliminary Objections

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

(2) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.

(3) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits.

(4) If a party requests bifurcation of a preliminary objection, Rule 44 shall apply.

(5) If a party does not request bifurcation of a preliminary objection within the time limits referred to in Rule 44(1)(a) or the parties confirm that they will not request bifurcation, the objection shall be joined to the merits and the following procedure shall apply:

(a) the Tribunal shall fix time limits for written and oral submissions on the preliminary objection, as required;

(b) the memorial on the preliminary objection shall be filed:

   (i) by the date to file the counter-memorial on the merits;

   (ii) by the date to file the next written submission after an ancillary claim, if the objection relates to the ancillary claim; or

   (iii) as soon as possible after the facts on which the objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (5)(b)(i) and (ii);

(c) the party filing the memorial on preliminary objections shall also file its counter-memorial on the merits, or, if the objection relates to an ancillary claim, file its next written submission after the ancillary claim; and

(d) the Tribunal shall render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).

(6) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within the jurisdiction of the Centre or within its own competence.
Rule 44
Bifurcation of Preliminary Objections

(1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:

(a) unless the parties agree otherwise, the request for bifurcation shall be filed:

   (i) within 45 days after filing the memorial on the merits;

   (ii) within 45 days after filing the written submission containing the ancillary claim, if the objection relates to the ancillary claim; or

   (iii) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (1)(a)(i) and (ii);

(b) the request for bifurcation shall state the preliminary objection to which it relates;

(c) unless the parties agree otherwise, the proceeding on the merits shall be suspended until the Tribunal decides whether to bifurcate;

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

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

(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

(3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:

(a) suspend the proceeding on the merits, unless the parties agree otherwise, or the Tribunal decides there are special circumstances that do not justify suspension;
(b) fix time limits for written and oral submissions on the preliminary objection, as required;

(c) render its decision or Award on the preliminary objection within 180 days after the later of the last written or oral submission, in accordance with Rule 57(1)(b); and

(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

(4) If the Tribunal decides to join the preliminary objection to the merits, it shall:

(a) fix time limits for written and oral submissions on the preliminary objection, as required;

(b) modify any time limits for written and oral submissions on the merits, as required; and

(c) render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).

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**Rule 45**

**Consolidation or Coordination of Arbitrations**

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

(2) Consolidation joins all aspects of the arbitrations sought to be consolidated and results in a single Award. To be consolidated pursuant to this Rule, the arbitrations shall have been registered in accordance with the Convention and shall involve the same Contracting State (or constituent subdivision or agency of the Contracting State).

(3) Coordination aligns specific procedural aspects of each pending arbitration, but the arbitrations remain separate proceedings and each results in an individual Award.

(4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms for the conduct of the consolidated or coordinated proceeding(s) and consult with the Secretary-General to ensure that the proposed terms are capable of being implemented.
(5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the proposed terms to the Tribunal(s) constituted in the arbitrations. Such Tribunal(s) shall make any order or decision required to implement these terms.

Rule 46
Provisional Measures

(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party’s rights, including measures to:

(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;

(b) maintain or restore the status quo pending determination of the dispute; or

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

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

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

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the request.

(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including:

(a) whether the measures are urgent and necessary; and

(b) the effect that the measures may have on each party.
(4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.

(5) A party shall promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party’s request.

(7) A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties’ consent to arbitration.

Rule 47
Ancillary Claims

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”) arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise.

(3) The Tribunal shall fix time limits for written and oral submissions on the ancillary claim, as required.

Rule 48
Default

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it
is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.

(4) If the request in paragraph (2) relates to a failure to appear at a hearing, the Tribunal may:

(a) reschedule the hearing to a date within 60 days after the original date;

(b) proceed with the hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the hearing; or

(c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the hearing.

(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).

(6) A party’s default shall not be deemed an admission of the assertions made by the other party.

(7) The Tribunal may invite the party that is not in default to file observations, produce evidence or make oral submissions.

(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering an Award.

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Chapter VII
Costs

Rule 49
Costs of the Proceeding

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

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

(b) the fees and expenses of the Tribunal, Tribunal assistants approved by the parties and Tribunal-appointed experts; and
the administrative charges and direct costs of the Centre.

**Rule 50**

**Statement of and Submission on Costs**

The Tribunal shall request that each party file a statement of its costs and a written submission on the allocation of costs before allocating the costs of the proceeding between the parties.

**Rule 51**

**Decisions on Costs**

1. In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:
   
   (a) the outcome of the proceeding or any part of it;
   
   (b) the conduct of the parties 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.

2. The Tribunal may make an interim decision on costs at any time.

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

**Rule 52**

**Security for Costs**

1. Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.

2. The following procedure shall apply:
   
   (a) the request shall specify the circumstances that require security for costs;
(b) the Tribunal shall fix time limits for written and oral submissions on the request, as required;

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

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

   (i) the constitution of the Tribunal;

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

   (iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

   (a) that party’s ability to comply with an adverse decision on costs;

   (b) that party’s willingness to comply with an adverse decision on costs;

   (c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and

   (d) the conduct of the parties.

(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.

(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.

(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party’s request.
Chapter VIII
Suspension, Settlement and Discontinuance

Rule 53
Suspension of the Proceeding

(1) The Tribunal shall suspend the proceeding by agreement of the parties.

(2) The Tribunal may suspend the proceeding upon the request of either party or on its own initiative, except as otherwise provided in the Administrative and Financial Regulations or these Rules.

(3) The Tribunal shall give the parties the opportunity to make observations before ordering a suspension pursuant to paragraph (2).

(4) In its order suspending the proceeding, the Tribunal shall specify:
   
   (a) the period of the suspension;
   
   (b) any relevant terms; and
   
   (c) a modified procedural calendar to take effect on resumption of the proceeding, if necessary.

(5) The Tribunal shall extend the period of a suspension prior to its expiry by agreement of the parties.

(6) The Tribunal may extend the period of a suspension prior to its expiry, on its own initiative or upon a party’s request, after giving the parties an opportunity to make observations.

(7) The Secretary-General shall suspend the proceeding pursuant to paragraph (1) or extend the suspension pursuant to paragraph (5) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any terms agreed to by the parties.

Rule 54
Settlement and Discontinuance

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.
(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or

(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Rule 55
Discontinuance at Request of a Party

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Rule 56
Discontinuance for Failure of Parties to Act

(1) If the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.

(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal shall issue an order taking note of the discontinuance.

(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.
(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Chapter IX
The Award

Rule 57
Timing of the Award

(1) The Tribunal shall render the Award as soon as possible, and in any event no later than:

   (a) 60 days after the latest of the Tribunal constitution, the last written submission or the last oral submission, if the Award is rendered pursuant to Rule 41(3);

   (b) 180 days after the later of the last written or oral submission if the Award is rendered pursuant to Rule 44(3)(c); or

   (c) 240 days after the later of the last written or oral submission in all other cases.

(2) A statement of costs and submission on costs filed pursuant to Rule 50 shall not be considered a written submission for the purposes of paragraph (1).

Rule 58
Contents of the Award

(1) The Award shall be in writing and shall contain:

   (a) a precise designation of each party;

   (b) the names of the representatives of the parties;

   (c) a statement that the Tribunal was established in accordance with the Convention and a description of the method of its constitution;

   (d) the name of each member of the Tribunal and the appointing authority of each;

   (e) the dates and place(s) of the first session, case management conferences and hearings;

   (f) a brief summary of the proceeding;
(g) a statement of the relevant facts as found by the Tribunal;

(h) a brief summary of the submissions of the parties, including the relief sought;

(i) the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision on the allocation of costs.

(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.

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**Rule 59**

**Rendering of the Award**

(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.

(2) The Award shall be deemed to have been rendered on the date of dispatch of certified copies of the Award.

(3) The Secretary-General shall provide additional certified copies of the Award to a party upon request.

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**Rule 60**

**Supplementary Decision and Rectification**

(1) A party requesting a supplementary decision on, or the rectification of, an Award pursuant to Article 49(2) of the Convention shall file the request with the Secretary-
General and pay the lodging fee published in the schedule of fees within 45 days after the Award was rendered.

(2) The request referred to in paragraph (1) shall:

(a) identify the Award to which it relates;

(b) be signed by each requesting party or its representative and be dated;

(c) specify:

(i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award;

(ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award; and

(d) attach proof of payment of the lodging fee.

(3) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request to the other party;

(b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (1); and

(c) notify the parties of the registration or refusal to register.

(4) As soon as the request is registered, the Secretary-General shall transmit the request and the notice of registration to each member of the Tribunal.

(5) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(6) Rules 58-59 shall apply to any decision of the Tribunal pursuant to this Rule.

(7) The Tribunal shall issue a decision on the request for supplementary decision or rectification within 60 days after the later of the last written or oral submission on the request.

(8) The date of dispatch of certified copies of the supplementary decision or rectification shall be the relevant date for the purposes of calculating the time limits in Articles 51(2) and 52(2) of the Convention.
(9) A supplementary decision or rectification under this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.

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

Rule 61
Publication of Awards and Decisions on Annulment

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

(2) The parties may consent to publication of the full text or to a jointly redacted text of the documents referred to in paragraph (1).

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

(4) Absent consent of the parties in accordance with paragraphs (1)-(3), the Centre shall publish excerpts of the document. The following procedure shall apply to publication of excerpts:

(a) the Secretary-General shall propose excerpts to the parties within 60 days after the date upon which a party declines consent to publication of the document;

(b) the parties may send comments on the proposed excerpts to the Secretary-General within 60 days after their receipt; and

(c) the Secretary-General shall consider any comments received on the proposed excerpts, and publish excerpts within 30 days after receipt of such comments.

Rule 62
Publication of Orders and Decisions

(1) The Centre shall publish orders and decisions, with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order or decision is issued.

(2) If either party notifies the Secretary-General within the 60-day period referred to in paragraph (1) that the parties disagree on any proposed redactions, the Secretary-
General shall refer the order or decision to the Tribunal to determine any disputed redactions. The Centre shall publish the order or decision in accordance with the determination of the Tribunal.

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

**Rule 63
Publication of Documents Filed in the Proceeding**

(1) Upon request of either party, the Centre shall publish any document filed in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.

(2) Either party may refer any dispute regarding the publication or redaction of a document in paragraph (1) to the Tribunal for determination. The Centre shall publish the document in accordance with the determination of the Tribunal.

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

**Rule 64
Observation of Hearings**

(1) The Tribunal shall determine whether to allow persons in addition to the parties, their representatives, witnesses and experts during their testimony, and persons assisting the Tribunal, to observe hearings, after consulting with the parties.

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

(3) The Centre shall publish recordings or transcripts of those portions of hearings that were available for observation by the public in accordance with paragraphs (1) and (2), unless either party objects.

**Rule 65
Confidential or Protected Information**

For the purposes of Rules 61-64, confidential or protected information is information which:
Arbitration Rules

Rule 66
Submission of Non-Disputing Parties

(1) Any person or entity that is not a party to the dispute ("non-disputing party") may apply for permission to file a written submission in the proceeding. The application shall be made in a procedural language used in the proceeding.

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

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

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

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

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

(a) is protected from disclosure pursuant to the instrument of consent to arbitration;

(b) is protected from disclosure pursuant to the applicable law;

(c) is protected from disclosure in accordance with the orders and decisions of the Tribunal;

(d) is protected from disclosure by agreement of the parties;

(e) constitutes confidential business information;

(f) would impede law enforcement if disclosed to the public;

(g) would prejudice the essential security interests of the State if disclosed to the public;

(h) would aggravate the dispute between the parties if disclosed to the public; or

(i) would undermine the integrity of the arbitral process if disclosed to the public.
(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

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

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length or scope of the written submission and the time limit to file the submission.

(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the later of the last written or oral submission on the application.

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

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

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**Rule 67**

**Participation of Non-Disputing Treaty Party**

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

(2) The Tribunal may impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or scope of the submission and the time limit to file the submission.

(3) The parties shall have the right to make observations on the submission of the non-disputing Treaty Party.
Chapter XI
Interpretation, Revision and Annulment of the Award

Rule 68
The Application

(1) A party applying for interpretation, revision or annulment of an Award shall file the application with the Secretary-General, together with any supporting documents, and pay the lodging fee published in the schedule of fees.

(2) The application shall:

(a) identify the Award to which it relates;

(b) be in a language in which the Award was rendered or if the Award was not rendered in an official language of the Centre, be in an official language;

(c) be signed by each applicant or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) attach proof of payment of the lodging fee.

(3) An application for interpretation pursuant to Article 50(1) of the Convention may be filed at any time after the Award is rendered and shall specify the points in dispute concerning the meaning or scope of the Award.

(4) An application for revision pursuant to Article 51(1) of the Convention shall be filed within 90 days after the discovery of a fact of such a nature as decisively to affect the Award, and in any event within three years after the Award (or any supplementary decision on or rectification of the Award) was rendered. The application shall specify:

(a) the change sought in the Award;

(b) the newly discovered fact that decisively affects the Award; and

(c) that the fact was unknown to the Tribunal and to the applicant when the Award was rendered, and that the applicant’s ignorance of that fact was not due to negligence.

(5) An application for annulment pursuant to Article 52(1) of the Convention shall:
(a) be filed within 120 days after the Award (or any supplementary decision on or rectification of the Award) was rendered if the application is based on any of the grounds in Article 52(1)(a), (b), (d) or (e) of the Convention; or

(b) be filed within 120 days after the discovery of corruption on the part of a member of the Tribunal and in any event within three years after the Award (or any supplementary decision on or rectification of the Award) was rendered, if the application is based on Article 52(1)(c) of the Convention; and

(c) specify the grounds on which it is based, limited to the grounds in Article 52(1)(a)-(e) of the Convention, and the reasons in support of each ground.

(6) Upon receipt of an application and the lodging fee, the Secretary-General shall promptly:

(a) transmit the application and the supporting documents to the other party;

(b) register the application, or refuse registration if the application is not made within the time limits referred to in paragraphs (4) or (5); and

(c) notify the parties of the registration or refusal to register.

(7) At any time before registration, an applicant may notify the Secretary-General in writing of the withdrawal of the application or, if there is more than one applicant, that it is withdrawing from the application. The Secretary-General shall promptly notify the parties of the withdrawal, unless the application has not yet been transmitted to the other party pursuant to paragraph (6)(a).

**Rule 69**

**Interpretation or Revision: Reconstitution of the Tribunal**

(1) As soon as an application for the interpretation or revision of an Award is registered, the Secretary-General shall:

(a) transmit the notice of registration, the application and any supporting documents to each member of the original Tribunal; and

(b) request each member of the Tribunal to inform the Secretary-General within 10 days whether that member can take part in the consideration of the application.
(2) If all members of the Tribunal can take part in the consideration of the application, the Secretary-General shall notify the Tribunal and the parties of the reconstitution of the Tribunal.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall invite the parties to constitute a new Tribunal without delay. The new Tribunal shall have the same number of arbitrators and be appointed by the same method as the original Tribunal.

**Rule 70**

Annullment: Appointment of the *ad hoc* Committee

(1) As soon as an application for annulment of an Award is registered, the Chair shall appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

(2) Each member of the Committee shall provide a signed declaration in accordance with Rule 19.

(3) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointments.

**Rule 71**

Procedure Applicable to Interpretation, Revision and Annulment

(1) Except as provided below, these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee.

(2) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall continue to apply to an interpretation, revision or annulment proceeding, with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.

(3) In addition to the application, the written procedure shall consist of one round of written submissions in an interpretation or revision proceeding, and two rounds of written submissions in an annulment proceeding, unless the parties agree or the Tribunal or Committee orders otherwise.

(4) A hearing shall be held upon the request of either party, or if ordered by the Tribunal or Committee.
(5) The Tribunal or Committee shall issue its decision within 120 days after the later of the last written or oral submission on the application.

**Rule 72**

**Stay of Enforcement of the Award**

(1) A party to an interpretation, revision or annulment proceeding may request a stay of enforcement of all or part of the Award at any time before the final decision on the application.

(2) If the stay is requested in the application for revision or annulment of an Award, enforcement shall be stayed provisionally until the Tribunal or Committee decides on the request.

(3) The following procedure shall apply:

   (a) the request shall specify the circumstances that require the stay;

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

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

   (d) the Tribunal or Committee shall issue its decision on the request within 30 days after the latest of:

      (i) the constitution of the Tribunal or Committee;

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

      (iii) the last oral submission on the request.

(4) If a Tribunal or Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.

(5) A party shall promptly disclose to the Tribunal or Committee any change in the circumstances upon which the enforcement was stayed.

(6) The Tribunal or Committee may at any time modify or terminate a stay of enforcement, on its own initiative or upon a party’s request.
A stay of enforcement shall terminate on the date of dispatch of the decision on the application for interpretation, revision or annulment, or on the date of discontinuance of the proceeding.

**Rule 73**

**Resubmission of Dispute after an Annulment**

(1) If a Committee annuls all or part of an Award, either party may file with the Secretary-General a request to resubmit the dispute to a new Tribunal, together with any supporting documents, and pay the lodging fee published in the schedule of fees.

(2) The request shall:

   (a) identify the Award to which it relates;
   
   (b) be in an official language of the Centre;
   
   (c) be signed by each requesting party or its representative and be dated;
   
   (d) attach proof of any representative’s authority to act; and
   
   (e) specify which aspect(s) of the dispute is resubmitted to the new Tribunal.

(3) Upon receipt of a request for resubmission and the lodging fee, the Secretary-General shall promptly:

   (a) transmit the request and the supporting documents to the other party;
   
   (b) register the request;
   
   (c) notify the parties of the registration; and
   
   (d) invite the parties to constitute a new Tribunal without delay, which shall have the same number of arbitrators, and be appointed by the same method as the original Tribunal, unless the parties agree otherwise.

(4) If 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.

(5) Except as otherwise provided in paragraphs (1)-(4), these Rules shall apply to the resubmission proceeding.
The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall not apply to the resubmission proceeding, unless the parties agree otherwise.

Chapter XII
Expedited Arbitration

Rule 74
Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted under the Convention may consent at any time to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by jointly notifying the Secretary-General in writing of their consent.

(2) Chapters I-XI of the Arbitration Rules apply to an expedited arbitration except that:

(a) Rules 15, 16, 18, 39, 40, 41, 42, 44 and 45 do not apply in an expedited arbitration; and

(b) Rules 19, 22, 29, 37, 43, 48, 57, 60 and 71, as modified by Rules 75-83, apply in an expedited arbitration.

(3) If the parties consent to expedited arbitration after the constitution of the Tribunal pursuant to Chapter II, Rules 75-77 shall not apply, and the expedited arbitration shall proceed subject to all members of the Tribunal confirming their availability pursuant to Rule 78(2). If any arbitrator fails to confirm availability before the expiry of the applicable time limit, the arbitration shall proceed in accordance with Chapters I-XI.

Rule 75
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 76 or a three-member Tribunal appointed pursuant to Rule 77.

(2) The parties shall jointly notify the Secretary-General in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of the notice of consent referred to in Rule 74(1).
(3) If the parties do not notify the Secretary-General of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed pursuant to Rule 76.

(4) An appointment pursuant to Rules 76 or 77 shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the Convention.

**Rule 76**

**Appointment of Sole Arbitrator for Expedited Arbitration**

(1) The parties shall jointly appoint the Sole Arbitrator within 20 days after the notice referred to in Rule 75(2).

(2) The Secretary-General shall appoint the Sole Arbitrator if:

   (a) the parties do not appoint the Sole Arbitrator within the time limit referred to in paragraph (1);

   (b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator; or

   (c) the appointee declines the appointment or does not comply with Rule 78(1).

(3) The following procedure shall apply to an appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

   (a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

   (b) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

   (c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and

   (d) if the selected candidate declines the appointment or does not comply with Rule 78(1), the Secretary-General shall select the next highest-ranked candidate.
Rule 77
Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator ("co-arbitrator") within 20 days after the notice referred to in Rule 75(2); and

(b) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of the acceptances from both co-arbitrators.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the applicable time limit referred to in paragraph (1);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal; or

(c) an appointee declines the appointment or does not comply with Rule 78(1).

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators pursuant to paragraph (2):

(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed. The Secretary-General shall consult with the parties as far as possible and use best efforts to appoint the co-arbitrator(s) within 15 days after the relevant event in paragraph (2);

(b) within 10 day after the later of the date on which both co-arbitrators have accepted their appointments or the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(c) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(d) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and
(e) if the selected candidate declines the appointment or does not comply with Rule 78(1), the Secretary-General shall select the next highest-ranked candidate.

**Rule 78**

**Acceptance of Appointment in Expedited Arbitration**

(1) An arbitrator appointed pursuant to Rule 76 or 77 shall accept the appointment and provide a declaration pursuant to Rule 19(3) within 10 days after receipt of the request for acceptance.

(2) An arbitrator appointed to a Tribunal constituted pursuant to Chapter II shall confirm their availability to conduct an expedited arbitration within 10 days after receipt of the notice of consent pursuant to Rule 74(3).

**Rule 79**

**First Session in Expedited Arbitration**

(1) The Tribunal shall hold a first session pursuant to Rule 29 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication, unless both parties and the Tribunal agree it shall be held in person.

**Rule 80**

**Procedural Schedule in Expedited Arbitration**

(1) The following schedule for written submissions and the hearing shall apply in an expedited arbitration:

   (a) the claimant shall file a memorial within 60 days after the first session;

   (b) the respondent shall file a counter-memorial within 60 days after the date of filing the memorial;

   (c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;

   (d) the claimant shall file a reply within 40 days after the date of filing the counter-memorial;
(e) the respondent shall file a rejoinder within 40 days after the date of filing the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of their costs and written submissions on costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counterclaim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits referred to in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents pursuant to Rule 37. The Tribunal shall decide such applications based on written submissions and without an in-person hearing.

(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule referred to in paragraph (1), unless the Tribunal determines that there are special circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.

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**Rule 81**

**Default in Expedited Arbitration**

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 48.
Rule 82
Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 60 within 30 days after the later of the last written or oral submission on the request.

Rule 83
Procedural Schedule for Interpretation, Revision or Annulment in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply to the procedure relating to an interpretation, revision or annulment of an Award rendered in an expedited arbitration:

(a) the applicant shall file a memorial on interpretation, revision or annulment within 30 days after the first session;

(b) the other party shall file a counter-memorial on interpretation, revision or annulment within 30 days after the memorial;

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 100 pages in length;

(d) a hearing shall be held within 45 days after the date for filing the counter-memorial;

(e) the parties shall file statements of their costs and written submissions on costs within 5 days after the last day of the hearing referred to in paragraph (1)(d); and

(f) the Tribunal or Committee shall issue the decision on interpretation, revision or annulment as soon as possible, and in any event no later than 60 days after the hearing referred to in paragraph (1)(d).

(2) Any schedule for submissions other than those referred to in paragraph (1) shall run in parallel with the main schedule, unless the Tribunal or Committee determines that there are special circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal or Committee shall take into account the expedited nature of the process.
Rule 84
Resubmission of a Dispute after Annulment in Expedited Arbitration

The consent of the parties to expedited arbitration pursuant to Rule 74 shall not apply to resubmission of the dispute.

Rule 85
Opting Out of Expedited Arbitration

(1) The parties may opt out of an expedited arbitration at any time by jointly notifying the Tribunal and Secretary-General in writing of their agreement.

(2) Upon request of a party, the Tribunal may decide that an arbitration should no longer be expedited. In deciding the request, the Tribunal shall consider the complexity of the issues, the stage of the proceeding and all other relevant circumstances.

(3) The Tribunal, or the Secretary-General if a Tribunal has not been constituted, shall determine the further procedure pursuant to Chapters I-XI and fix any time limit necessary for the conduct of the proceeding.
# IV. CONCILIATION RULES FOR ICSID CONVENTION PROCEEDINGS
*(CONCILIATION RULES)*

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IV. CONCILIATION RULES FOR ICSID CONVENTION PROCEEDINGS
(CONCILIATION RULES)

 Introductory Note

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

The Conciliation Rules are supplemented by the Administrative and Financial Regulations of the Centre.

The Conciliation Rules apply from the date of registration of a Request for conciliation until termination of the conciliation.

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any conciliation proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) in accordance with Article 33 of the Convention.

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

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

Rule 2
Party and Party Representative

(1) For the purposes of these Rules, “party” includes, where the context so admits, all parties acting as claimant or as respondent.

(2) Each party may be represented or assisted by agents, counsel, advocates or other advisors, whose names and proof of authority to act shall be notified by that party to the Secretary-General (“representative(s)”).
Rule 3
Method of Filing

(1) A document to be filed in the proceeding shall be filed with the Secretary-General, who shall acknowledge its receipt.

(2) Documents shall only be filed electronically, unless the Commission orders otherwise in special circumstances.

Rule 4
Supporting Documents

(1) Supporting documents shall be filed together with the written statement, request, observations or communication to which they relate.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Commission or a party may require a fuller extract or a complete version of the document.

Rule 5
Routing of Documents

The Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other;

(b) the Commission, unless the parties communicate directly with the Commission on request of the Commission or by agreement of the parties; and

(c) the Chairman of the Administrative Council (“Chair”) if applicable.

Rule 6
Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the proceeding. The parties shall consult with the Commission and the Secretary-General regarding the use of a language that is not an official language of the Centre.
(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written statements, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Commission may order a party to file such documents in both procedural languages.

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

(5) Any document from the Commission or the Secretary-General shall be in a procedural language. In a proceeding with two procedural languages, the Commission or the Secretary-General if applicable, shall issue orders, decisions, recommendations and the Report in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Commission may order interpretation into the other procedural language.

**Rule 7**

**Calculation of Time Limits**

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

**Rule 8**

**Costs of the Proceeding**

(1) The fees and expenses of the Commission and the administrative charges and direct costs of the Centre incurred in connection with the proceeding shall be borne equally by the parties, in accordance with Article 61(1) of the Convention.

(2) Each party shall bear any other costs it incurs in connection with the proceeding.
Rule 9
Confidentiality of the Conciliation

(1) All information relating to the conciliation and all documents generated in or obtained during the conciliation shall be confidential, unless:

(a) the parties agree otherwise;

(b) the information is to be published by the Centre pursuant to Administrative and Financial Regulation 26;

(c) the information or document is independently available; or

(d) disclosure is required by law.

Rule 10
Use of Information in Other Proceedings

Unless the parties to the dispute agree otherwise pursuant to Article 35 of the Convention, a party shall not rely on any of the following in other proceedings:

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

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

Chapter II
Constitution of the Commission

Rule 11
General Provisions, Number of Conciliators and Method of Constitution

(1) The Commission shall be constituted without delay after registration of the Request for conciliation.

(2) The number of conciliators and the method of their appointment must be determined before the Secretary-General can act on any appointment proposed by a party.
(3) The parties shall endeavor to agree on a Sole Conciliator or any uneven number of conciliators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, either party may inform the Secretary-General that the Commission shall be constituted in accordance with Article 29(2)(b) of the Convention.

(4) References in these Rules to a Commission or a President of a Commission shall include a Sole Conciliator.

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**Rule 12**  
**Notice of Third-Party Funding**

(1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request for conciliation, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit a notice of third-party funding and any changes to such notice to the parties, and to any conciliator proposed for appointment or appointed in a proceeding for purposes of completing the conciliator declaration required by Rule 16(3)(b).

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**Rule 13**  
**Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention**

If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention, each party shall appoint a conciliator and the parties shall jointly appoint the President of the Commission.
Rule 14
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a Sole Conciliator or any uneven number of conciliators.

Rule 15
Appointment of Conciliators by the Chair in Accordance with Article 30 of the Convention

(1) If a Commission has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chair appoint the conciliator(s) who have not yet been appointed pursuant to Article 30 of the Convention.

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

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

Rule 16
Acceptance of Appointment

(1) A party appointing a conciliator shall notify the Secretary-General of the appointment and provide the appointee’s name, nationality(ies) and contact information.

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

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

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each conciliator and provide the signed declaration.

(5) The Secretary-General shall notify the parties if a conciliator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as conciliator in accordance with the method followed for the previous appointment.

(6) Each conciliator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the conciliator agree otherwise, a conciliator may not act as arbitrator, counsel, expert, judge, mediator, witness or in any other capacity in any other proceeding relating to the dispute that is the subject of the conciliation.

**Rule 17**
Replacement of Conciliators Prior to Constitution of the Commission

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

   (a) a conciliator may withdraw an acceptance;

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

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

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

**Rule 18**
Constitution of the Commission

(1) The Commission shall be deemed to be constituted on the date the Secretary-General notifies the parties that each conciliator has accepted the appointment.

(2) As soon as the Commission is constituted, the Secretary-General shall transmit the Request for conciliation, the supporting documents, the notice of registration and communications with the parties to each conciliator.
**Chapter III**
Disqualification of Conciliators and Vacancies

**Rule 19**
Proposal for Disqualification of Conciliators

(1) A party may file a proposal to disqualify one or more conciliators (“proposal”) in accordance with the following procedure:

(a) the proposal shall be filed after the constitution of the Commission and within 21 days after the later of:

(i) the constitution of the Commission; or

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

(b) the proposal shall include the grounds on which the proposal is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;

(d) the conciliator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (1)(c); and

(e) each party may file a final written submission on the proposal within seven days after expiry of the time limit referred to in paragraph (1)(d).

(2) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

**Rule 20**
Decision on the Proposal for Disqualification

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

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

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

(3) The conciliators not subject to the proposal and the Chair shall use best efforts to decide any proposal within 30 days after the later of the expiry of the time limit referred to in Rule 19(1)(e) or the notice in Rule 20(2)(a).

**Rule 21**

**Incapacity or Failure to Perform Duties**

If a conciliator becomes incapacitated or fails to perform the duties required of a conciliator, the procedure in Rules 19 and 20 shall apply.

**Rule 22**

**Resignation**

(1) A conciliator may resign by notifying the Secretary-General and the other members of the Commission and providing reasons for the resignation.

(2) If the conciliator was appointed by a party, the other members of the Commission shall promptly notify the Secretary-General whether they consent to the conciliator’s resignation for the purposes of Rule 23(3)(a).

**Rule 23**

**Vacancy on the Commission**

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

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

(3) A vacancy on the Commission shall be filled by the method used to make the original appointment, except that the Chair shall fill the following from the Panel of Conciliators:
(a) a vacancy caused by the resignation of a party-appointed conciliator without the consent of the other members of the Commission; or

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

(4) Once a vacancy has been filled and the Commission has been reconstituted, the conciliation shall continue from the point it had reached at the time the vacancy was notified.

Chapter IV
Conduct of the Conciliation

Rule 24
Functions of the Commission

(1) The Commission shall clarify the issues in dispute and assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) In order to bring about agreement between the parties, the Commission may, at any stage of the proceeding, after consulting with the parties, recommend:

(a) specific terms of settlement to the parties; or

(b) that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.

(3) Recommendations may be made orally or in writing. Either party may request that the Commission provide reasons for any recommendation. The Commission may invite each party to provide observations concerning any recommendation made.

(4) At any stage of the proceeding, the Commission may:

(a) request explanations, documents or other information from either party or other persons;

(b) communicate with the parties jointly or separately; or

(c) visit any place connected with the dispute or conduct inquiries with the agreement and participation of the parties.
Rule 25
General Duties of the Commission

(1) The Commission shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.

(2) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.

Rule 26
Orders, Decisions and Agreements

(1) The Commission shall make the orders and decisions required for the conduct of the conciliation.

(2) The Commission shall make decisions by a majority of the votes of all its members. Abstentions shall count as a negative vote.

(3) Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Commission.

(4) The Commission shall apply any agreement of the parties on procedural matters to the extent that it does not conflict with the Convention and the Administrative and Financial Regulations.

Rule 27
Quorum

The participation of a majority of the members of the Commission by any appropriate means of communication shall be required at the first session, meetings and deliberations, unless the parties agree otherwise.

Rule 28
Deliberations

(1) The deliberations of the Commission shall take place in private and remain confidential.
(2) The Commission may deliberate at any place and by any means it considers appropriate.

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

Rule 29
Cooperation of the Parties

(1) The parties shall cooperate with the Commission and with one another, and shall conduct the conciliation in good faith and in an expeditious and cost-effective manner.

(2) The parties shall provide all relevant explanations, documents or other information. They shall facilitate visits to any place connected with the dispute and the participation of other persons as requested by the Commission.

(3) The parties shall comply with any time limit agreed upon or fixed by the Commission.

(4) The parties shall give their most serious consideration to the Commission’s recommendations pursuant to Article 34(1) of the Convention.

Rule 30
Written Statements

(1) Each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views on these issues 30 days after the constitution of the Commission, or such longer time as the Commission may fix in consultation with the parties, but in any event before the first session.

(2) Either party may file further written statements at any stage of the conciliation within the time limits fixed by the Commission.

Rule 31
First Session

(1) The Commission shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).
(2) The first session may be held in person or remotely, by any means that the Commission deems appropriate. The agenda, method and date of the first session shall be determined by the Commission after consulting with the parties.

(3) The first session shall be held within 60 days after the Commission’s constitution or such other period as the parties may agree.

(4) Before the first session, the Commission shall invite the parties’ views on procedural matters, including:

(a) the applicable conciliation rules;

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

(c) the method of filing and routing of documents;

(d) a schedule for further written statements and meetings;

(e) the place and format of meetings between the Commission and the parties;

(f) the manner of recording or keeping minutes of meetings, if any;

(g) the treatment of confidential or protected information;

(h) the publication of documents;

(i) any agreement between the parties:

   (i) concerning the treatment of information disclosed by one party to the Commission by way of separate communication pursuant to Rule 24 (4)(b);

   (ii) not to initiate or pursue during the conciliation any other proceeding in respect of the dispute;

   (iii) concerning the application of prescription or limitation periods;

   (iv) concerning the disclosure of any settlement agreement resulting from the conciliation; and

   (v) pursuant to Article 35 of the Convention; and

(j) any other procedural matter raised by either party or the Commission.

(5) At the first session or within any other period determined by the Commission, each party shall:
(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

(6) The Commission shall issue summary minutes recording the parties’ agreements and the Commission’s decisions on the procedure within 15 days after the later of the first session or the last written statement on procedural matters addressed at the first session.

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**Rule 32**

Meetings

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

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

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

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

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**Rule 33**

Preliminary Objections

(1) A party may file a preliminary objection that the dispute is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Commission (“preliminary objection”).

(2) A party shall notify the Commission and the other party of its intent to file a preliminary objection as soon as possible. The objection shall be made no later than the date of the initial written statement referred to in Rule 30(1), unless the facts on which the objection is based are unknown to the party at the relevant time.

(3) The Commission may address a preliminary objection separately or with other issues in dispute. If the Commission decides to address the objection separately, it may suspend the conciliation on the other issues in dispute to the extent necessary to address the preliminary objection.
(4) The Commission may at any time on its own initiative consider whether the dispute is within the jurisdiction of the Centre or within its own competence.

(5) If the Commission decides that the dispute is not within the jurisdiction of the Centre or for other reasons is not within its competence, it shall close the proceeding and issue a Report to that effect, in which it shall state its reasons. Otherwise, the Commission shall issue a decision on the objection with brief reasons and fix any time limit necessary for the further conduct of the conciliation.

Chapter V
Termination of the Conciliation

Rule 34
Discontinuance Prior to the Constitution of the Commission

(1) If the parties notify the Secretary-General prior to the constitution of the Commission that they have agreed to discontinue the proceeding, the Secretary-General shall issue an order taking note of the discontinuance.

(2) If a party requests the discontinuance of the proceeding prior to the constitution of the Commission, the Secretary-General shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(3) If, prior to the constitution of the Commission, the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Secretary-General shall notify them of the time elapsed since the last step taken in the proceeding. If the parties fail to take a step within 30 days after the notice, they shall be deemed to have discontinued the proceeding and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If either party takes a step within 30 days after the Secretary-General’s notice, the proceeding shall continue.

Rule 35
Report Noting the Parties’ Agreement

(1) If the parties reach agreement on some or all of the issues in dispute, the Commission shall close the proceedings and issue its Report noting the issues in dispute and recording the issues upon which the parties have agreed.
(2) The parties may provide the Commission with the complete and signed text of their settlement agreement and may request that the Commission embody such settlement in the Report.

**Rule 36**

**Report Noting the Failure of the Parties to Reach Agreement**

At any stage of the proceeding, and after notice to the parties, the Commission shall close the proceedings and issue its Report noting the issues in dispute and recording that the parties have not reached agreement on the issues in dispute during the conciliation if:

(a) it appears to the Commission that there is no likelihood of agreement between the parties; or

(b) the parties advise the Commission that they have agreed to discontinue the conciliation.

**Rule 37**

**Report Recording the Failure of a Party to Appear or Participate**

If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceedings and issue its Report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

**Rule 38**

**The Report**

(1) The Report shall be in writing and shall contain, in addition to the information specified in Rules 35-37:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Commission was established under the Convention and a description of the method of its constitution;
Conciliation Rules

(d) the name of each member of the Commission and of the appointing authority of each;

(e) the dates and place(s) of the first session and the meetings of the Commission with the parties;

(f) a brief summary of the proceeding;

(g) the complete and signed text of the parties’ settlement agreement if requested by the parties pursuant to Rule 35 (2);

(h) a statement of the costs of the proceeding, including the fees and expenses of each member of the Commission and the costs to be paid by each party pursuant to Rule 8; and

(i) any agreement of the parties pursuant to Article 35 of the Convention.

(2) The Report shall be signed by the members of the Commission. It may be signed by electronic means if the parties agree. If a member does not sign the Report, such fact shall be recorded.

Rule 39
Issuance of the Report

(1) Once the Report has been signed by the members of the Commission, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.
V. THE ADDITIONAL FACILITY RULES

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V. THE ADDITIONAL FACILITY RULES

Introductory Note

Additional Facility proceedings are governed by the Additional Facility Rules, the Additional Facility Administrative and Financial Regulations (Annex A), and the relevant (Additional Facility) Arbitration (Annex B) or Conciliation (Annex C) Rules.

Article 1
Definitions

(1) “Secretariat” means the Secretariat of the Centre.

(2) “Centre” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.

(3) “Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 14, 1966.

(4) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.

(5) “National of another State” means, unless otherwise agreed:

(a) a natural or juridical person that, on the date of consent to the proceeding, is a national of a State other than the State party to the dispute, or of any constituent State of the REIO party to the dispute; or

(b) a juridical person that, on the date of consent to the proceeding, is a national of the State party to the dispute or of any constituent State of the REIO party to the dispute, and which the parties agree not to treat as a national of that State for the purpose of these Rules.

(6) “Request” means a request for arbitration or conciliation.

(7) “Contracting State” means a State for which the Convention is in force.
Article 2
Additional Facility Proceedings

(1) The Secretariat is authorized to administer arbitration and conciliation proceedings for the settlement of legal disputes arising out of an investment between a State or an REIO on the one hand, and a national of another State on the other hand, which the parties consent in writing to submit to the Centre if:

(a) none of the parties to the dispute is a Contracting State or a national of a Contracting State;

(b) either the State party to the dispute, or the State whose national is a party to the dispute, but not both, is a Contracting State; or

(c) an REIO is a party to the dispute.

(2) Reference to a State or an REIO includes a constituent subdivision of the State, or an agency of the State or the REIO. The State or the REIO must approve the consent of the constituent subdivision or agency which is a party to the proceeding pursuant to paragraph (1), unless the State or the REIO concerned notifies the Centre that no such approval is required.

(3) Arbitration and conciliation proceedings under these Rules shall be conducted in accordance with the (Additional Facility) Arbitration Rules (Annex B) or the (Additional Facility) Conciliation Rules (Annex C) respectively. The (Additional Facility) Administrative and Financial Regulations (Annex A) shall apply to such proceedings.

Article 3
Convention Not Applicable

The provisions of the Convention do not apply to the conduct of Additional Facility proceedings.
Article 4
Final Provisions

(1) The applicable Rules are those in force on the date of filing of the Request, unless the parties agree otherwise.

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

(3) These Rules may be cited as the “Additional Facility Rules” of the Centre.
VI. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ADDITIONAL FACILITY PROCEEDINGS (ANNEX A)
((ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS)

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((ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS)

Introductory Note

The (Additional Facility) Administrative and Financial Regulations apply to Additional Facility Arbitration and Conciliation proceedings and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

Chapter I  
General Provisions

Regulation 1  
Application of these Regulations

(1) These Regulations apply to arbitration and conciliation proceedings which the Secretariat of the Centre is authorized to administer pursuant to Article 2 of the Additional Facility Rules.

(2) The applicable Regulations are those in force on the date of filing the Request for arbitration or conciliation pursuant to the Additional Facility Rules.

(3) These Regulations may be referred to as the “(Additional Facility) Administrative and Financial Regulations” of the Centre (“Annex A” to the Additional Facility Rules).

Chapter II  
General Functions of the Secretariat

Regulation 2  
Secretary

The Secretary-General of the Centre shall appoint a Secretary for each Commission and Tribunal. The Secretary may be drawn from the Secretariat and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the (Additional Facility) Arbitration...
and Conciliation Rules applicable to individual proceedings and delegated to the Secretary; and

(b) assist the parties and the Commission or Tribunal with all aspects of the proceeding, including the expeditious and cost-effective conduct of the proceeding.

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**Regulation 3**

**The Registers**

The Secretary-General shall maintain and publish a Register for each case containing all significant data concerning the institution, conduct and disposition of the proceeding, including the economic sector involved, the names of the parties and their representatives, and the method of constitution and membership of each Commission or Tribunal.

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**Regulation 4**

**Depositary Functions**

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for arbitration, conciliation, supplementary decision, rectification or interpretation;

(b) all written submissions, written statements, observations, supporting documents and communications filed in a proceeding;

(c) the minutes, recordings and transcripts of hearings, meetings or sessions in a proceeding; and

(d) any order, decision, recommendation, Report or Award by a Commission or Tribunal.

(2) Subject to the applicable rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties. Certified copies of the documents referred to in paragraph (1)(d) shall reflect any supplementary decision, rectification or interpretation.
Regulation 5
Certificates of Official Travel

The Secretary-General may issue certificates of official travel to members of Commissions or Tribunals, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding pursuant to the ICSID Additional Facility Rules.

Chapter III
Financial Provisions

Regulation 6
Fees, Allowances and Charges

(1) Each member of a Commission or Tribunal shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a hearing, meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a hearing, meeting or session held away from the member’s place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing, meeting or session is held; and

(iii) a per diem allowance for each day the member spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Commission or Tribunal and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties to the Centre.
(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) members of Commissions and Tribunals, and any assistants approved by the parties;

(b) witnesses and experts called by a Commission or Tribunal who have not been presented by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any hearing, meeting or session held outside an ICSID facility.

(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission or Tribunal, unless the parties have made sufficient payments to defray the costs of the proceeding.

Regulation 7  
Payments to the Centre

(1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for arbitration or conciliation, the Secretary-General shall request the claimant(s) to make a payment to defray the estimated costs of the proceeding through the first session of the Commission or Tribunal, which shall be considered partial payment by the claimant(s) of the payment referred to in paragraph (1)(b);

(b) upon constitution of a Commission or Tribunal, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding.

(2) In conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division. In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal’s final decision on costs pursuant to Rule 69(1)(j) of the (Additional Facility) Arbitration Rules.
(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(4) This Regulation shall apply to requests for a supplementary decision on or rectification of an Award, and to an application for interpretation of an Award.

Regulation 8
Consequences of Default in Payment

(1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

(a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Commission or Tribunal if constituted; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Commission or Tribunal if constituted.

Regulation 9
Special Services

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.
**Regulation 10**

**Fee for Lodging Requests**

The party or parties (if a request is filed jointly) wishing to institute an arbitration or conciliation proceeding, or requesting a supplementary decision, rectification or interpretation of an Award, shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

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**Regulation 11**

**Administration of Proceedings**

The ICSID Secretariat is the only entity authorized to administer proceedings conducted pursuant to the Additional Facility Rules.

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**Chapter IV**

**Official Languages and Limitation of Liability**

**Regulation 12**

**Languages of Regulations**

(1) These Regulations are published in the official languages of the Centre, English, French and Spanish.

(2) The texts of these Regulations in each official language are equally authentic.

(3) The singular form of words in these Regulations and in the (Additional Facility) Arbitration and Conciliation Rules include the plural form of that word, unless otherwise stated or required by the context of the provision.

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**Regulation 13**

**Prohibition Against Testimony and Limitation of Liability**

(1) Unless required by applicable law or unless the parties and all the members of the Commission or Tribunal agree otherwise in writing, no member of the Commission or Tribunal shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the arbitration or conciliation proceeding.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no member of the Commission or Tribunal shall be liable for any act or omission in
connection with the exercise of their functions in the arbitration or conciliation proceeding, unless there is fraudulent or willful misconduct.
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INTRODUCTORY NOTE

The Arbitration Rules for Additional Facility Proceedings ((Additional Facility) Arbitration Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

The (Additional Facility) Arbitration Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations in Annex A.

The (Additional Facility) Arbitration Rules apply from the submission of a Request for arbitration until an Award is rendered and to any proceedings arising from a request for a supplementary decision on, rectification of, or interpretation of, an Award.

CHAPTER I

SCOPE

Rule 1

Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted pursuant to the Additional Facility Rules.

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-9.

(3) If any of these Rules, or any agreement pursuant to paragraph (2), conflicts with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

(4) The applicable (Additional Facility) Arbitration Rules are those in force on the date of filing the Request for arbitration, unless the parties agree otherwise.

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

(6) These Rules may be cited as the “(Additional Facility) Arbitration Rules” of the Centre.
Chapter II
Institution of Proceedings

Rule 2
The Request

(1) Any party wishing to institute arbitration proceedings pursuant to the Additional Facility Rules shall file a Request for arbitration together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 3
Contents of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising out of the investment;

(b) with respect to each party’s consent to submit the dispute to arbitration pursuant to the Additional Facility Rules:

(i) the instrument(s) in which each party’s consent is recorded;
(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date;

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;

c) if a party is a natural person:

(i) information concerning that person’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person is a national of a State other than the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent;

d) if a party is a juridical person:

(i) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;

e) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the approval of consent of the State or the REIO, unless the State or the REIO has notified the Centre that no such approval is required.
Rule 4
Recommended Additional Information

It is recommended that the Request also contain any procedural proposals or agreements reached by the parties, including with respect to:

(a) the number and method of appointment of arbitrators;
(b) the seat of arbitration;
(c) the law applicable to the dispute; and
(d) the procedural language(s).

Rule 5
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

(4) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.

Rule 6
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;
(b) transmit the Request to the other party upon receipt of the lodging fee; and
(c) act as the official channel of written communications between the parties.

**Rule 7**

**Review and Registration of the Request**

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

**Rule 8**

**Notice of Registration**

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators, unless such information has already been provided, and to constitute a Tribunal without delay;

(d) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal in regard to jurisdiction, competence of the Tribunal and the merits; and

(e) remind the parties to make the disclosure required by Rule 23.

**Rule 9**

**Withdrawal of the Request**

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the
parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 6(b).

Chapter III
General Provisions

Rule 10
General Duties

(1) The Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.

(2) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.

Rule 11
Party and Party Representative

(1) For the purposes of these Rules, “party” includes, where the context so admits, all parties acting as claimant or as respondent.

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

Rule 12
Method of Filing

(1) A document to be filed in the proceeding shall be filed with the Secretary-General, who shall acknowledge its receipt.

(2) Documents shall only be filed electronically, unless the Tribunal orders otherwise in special circumstances.
Rule 13
Supporting Documents

(1) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the request, written submission, observations or communication to which they relate.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Tribunal or a party may require a fuller extract or a complete version of the document.

(3) If the authenticity of a supporting document is disputed, the Tribunal may order a party to provide a certified copy or to make the original available for examination.

Rule 14
Routing of Documents

Following the registration of the Request pursuant to Rule 7, the Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other; and

(b) the Tribunal, unless the parties communicate directly with the Tribunal on request of the Tribunal or by agreement of the parties.

Rule 15
Procedural Languages, Translation and Interpretation

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

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written submissions, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may order a party to file such documents in both procedural languages.
(4) Supporting documents in a language other than a procedural language shall be accompanied by a translation into a procedural language. In a proceeding with two procedural languages, the Tribunal may order a party to translate any supporting document into both procedural languages. Translation of only the relevant part of a supporting document is sufficient, provided that the Tribunal may order a party to provide a fuller or a complete translation. If the translation is disputed, the Tribunal may order a party to provide a certified translation.

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

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may order interpretation into the other procedural language.

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

(8) The recordings and transcripts of a hearing shall be made in the procedural language(s) used at the hearing.

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**Rule 16**

**Correction of Errors**

A party may correct an accidental error in a document promptly upon discovery and before the Award is rendered. The parties may refer any dispute regarding a correction to the Tribunal for determination.

**Rule 17**

**Calculation of Time Limits**

(1) References to time shall be determined based on the time at the seat of the Centre on the relevant date.

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

(a) the Tribunal, or the Secretary-General if applicable, announces the period; or

(b) the procedural step starting the period is taken.
(3) A time limit shall be satisfied if a procedural step is taken or a document is received by the Secretary-General on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

Rule 18
Fixing Time Limits

The Tribunal, or the Secretary-General if applicable, shall fix time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by these Rules.

Rule 19
Extension of Time Limits Applicable to Parties

(1) A time limit prescribed by these Rules may only be extended by agreement of the parties. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise.

(2) A time limit fixed by the Tribunal or the Secretary-General may be extended by agreement of the parties or by the Tribunal, or Secretary-General if applicable, upon reasoned application by either party made prior to its expiry. A procedural step taken or a document received after the expiry of such time limit shall be disregarded unless the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet the time limit.

(3) The Tribunal may delegate to the President the power to extend time limits referred to in paragraph (2).

Rule 20
Time Limits Applicable to Tribunal

(1) The Tribunal shall use best efforts to meet time limits to render orders, decisions and the Award.

(2) If the Tribunal cannot comply with an applicable time limit, it shall advise the parties of the special circumstances that justify the delay and the date when it anticipates rendering the order, decision or Award.
Chapter IV
Constitution of the Tribunal

Rule 21
General Provisions Regarding the Constitution of the Tribunal

(1) The Tribunal shall be constituted without delay after registration of the Request.

(2) Unless otherwise agreed by the parties:

(a) the majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute, any constituent State of the REIO party to the dispute and the State whose national is a party to the dispute;

(b) a party may not appoint an arbitrator who is a national of the State party to the dispute, any constituent State of the REIO party to the dispute or the State whose national is a party to the dispute;

(c) arbitrators appointed by the Secretary-General shall not be nationals of the State party to the dispute, a constituent State of the REIO party to the dispute or the State whose national is a party to the dispute; and

(d) no person previously involved in the resolution of the dispute as a conciliator, judge, mediator or in a similar capacity may be appointed as an arbitrator.

(3) The composition of a Tribunal shall remain unchanged after it has been constituted, except as provided in Chapter V.

Rule 22
Qualifications of Arbitrators

Arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who are impartial and independent.

Rule 23
Notice of Third-Party Funding

(1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).
(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit a notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 27(3)(b).

**Rule 24**

*Method of Constituting the Tribunal*

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

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.

**Rule 25**

*Assistance of the Secretary-General with Appointment*

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

**Rule 26**

*Appointment of Arbitrators by the Secretary-General*

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

(2) The Secretary-General shall appoint the President of the Tribunal after appointing any members who have not yet been appointed.
(3) The Secretary-General shall consult with the parties as far as possible before appointing an arbitrator and shall use best efforts to appoint any arbitrator(s) within 30 days after receipt of the request to appoint.

Rule 27
Acceptance of Appointment

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

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

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

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each arbitrator and provide the signed declaration.

(5) The Secretary-General shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.

(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

Rule 28
Replacement of Arbitrators Prior to Constitution of the Tribunal

(1) At any time before the Tribunal is constituted:
(a) an arbitrator may withdraw an acceptance;
(b) a party may replace an arbitrator whom it appointed; or
(c) the parties may agree to replace any arbitrator.

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

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Rule 29
Constitution of the Tribunal

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

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

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Chapter V
Disqualification of Arbitrators and Vacancies

Rule 30
Proposal for Disqualification of Arbitrators

(1) A party may file a proposal to disqualify one or more arbitrators (“proposal”) on the following grounds:

(a) that the arbitrator was ineligible for appointment to the Tribunal pursuant to Rule 21(2)(a)-(c); or

(b) that circumstances exist that give rise to justifiable doubts as to the qualities of the arbitrator required by Rule 22.

(2) The following procedure shall apply:

(a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of:

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

(b) the proposal shall include the grounds on which it is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (2)(c); and

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

(3) If the other party agrees to the proposal prior to the dispatch of the decision referred to in Rule 31, the arbitrator shall resign in accordance with Rule 33.

(4) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

Rule 31
Decision on the Proposal for Disqualification

(1) The Secretary-General shall make the decision on the proposal.

(2) The Secretary-General shall use best efforts to decide any proposal within 30 days after the expiry of the time limit referred to in Rule 30(2)(e).

Rule 32
Incapacity or Failure to Perform Duties

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 30 and 31 shall apply.
### Rule 33
**Resignation**

An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal.

### Rule 34
**Vacancy on the Tribunal**

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

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

3. A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of vacancy.

4. Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. Any portion of a hearing shall be recommenced if the newly appointed arbitrator considers it necessary to decide a pending matter.

### Chapter VI
**Conduct of the Proceeding**

### Rule 35
**Orders, Decisions and Agreements**

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

2. Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Tribunal.

3. The Tribunal shall apply any agreement of the parties on procedural matters, subject to Rule 1(3), and to the extent that the agreement does not conflict with the (Additional Facility) Administrative and Financial Regulations.

4. The Tribunal shall consult with the parties prior to making an order or decision it is authorized by these Rules to make on its own initiative.
Rule 36
Waiver

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

Rule 37
Filling of Gaps

If a question of procedure arises which is not covered by these Rules or by any agreement of the parties, the Tribunal shall decide the question.

Rule 38
First Session

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

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

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

(4) Before the first session, the Tribunal shall invite the parties’ views on procedural matters, including:

(a) the applicable arbitration rules;

(b) the division of advances payable pursuant to (Additional Facility) Administrative and Financial Regulation 7;
(c) the procedural language(s), translation and interpretation;

d) the method of filing and routing of documents;

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

(f) the seat of arbitration;

(g) the place of hearings;

(h) whether there will be requests for production of documents as between the parties and, if so, the scope, timing and procedure for such requests;

(i) the procedural calendar;

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

(k) the publication of documents and recordings;

(l) the treatment of confidential or protected information; and

(m) any other procedural matter raised by either party or the Tribunal.

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

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**Rule 39**

**Written Submissions**

(1) The parties shall file the following written submissions:

(a) a memorial by the requesting party;

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

and, unless the parties agree otherwise:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

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

(3) A party may file unscheduled written submissions, observations, or supporting documents only after obtaining leave of the Tribunal, unless the filing of such documents is provided for by these Rules. The Tribunal may grant such leave upon a timely and reasoned application if it finds such written submissions, observations or supporting documents are necessary in view of all relevant circumstances.

Rule 40
Case Management Conferences

With a view to conducting an expeditious and cost-effective proceeding, the Tribunal shall convene one or more case management conferences with the parties at any time after the first session to:

(a) identify uncontested facts;

(b) clarify and narrow the issues in dispute; or

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

Rule 41
Seat of Arbitration

The seat of arbitration shall be agreed on by the parties or, absent agreement, shall be determined by the Tribunal having regard to the circumstances of the proceeding and after consulting with the parties.

Rule 42
Hearings

(1) The Tribunal shall hold one or more hearings, unless the parties agree otherwise.

(2) The President of the Tribunal shall determine the date, time and method of holding hearings, after consulting with the other members of the Tribunal and the parties.
(3) If a hearing is to be held in person, it may be held at any place agreed to by the parties after consulting with the Tribunal and the Secretary-General. If the parties do not agree on the place of a hearing, it shall be held at a place determined by the Tribunal.

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

Rule 43
Quorum
The participation of a majority of the members of the Tribunal by any appropriate means of communication shall be required at the first session, case management conferences, hearings and deliberations, unless the parties agree otherwise.

Rule 44
Deliberations
(1) The deliberations of the Tribunal shall take place in private and remain confidential.

(2) The Tribunal may deliberate at any place and by any means it considers appropriate.

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

(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.

Rule 45
Decisions Made by Majority Vote
The Tribunal shall make decisions by a majority of the votes of all its members. Abstention shall count as a negative vote.
Chapter VII
Evidence

Rule 46
Evidence: General Principles

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

(2) Each party has the burden of proving the facts relied on to support its claim or defense.

(3) The Tribunal may call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.

Rule 47
Disputes Arising from Requests for Documents

The Tribunal shall decide any dispute arising out of a party’s objection to the other party’s request for production of documents. In deciding the dispute, the Tribunal shall consider all relevant circumstances, including:

(a) the scope and timeliness of the request;

(b) the relevance and materiality of the documents requested;

(c) the burden of production; and

(d) the basis of the objection.

Rule 48
Witnesses and Experts

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness, and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.
(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Each witness shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”

(7) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(8) Each expert shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”

**Rule 49**

**Tribunal-Appointed Experts**

(1) Unless the parties agree otherwise, the Tribunal may appoint one or more independent experts to report to it on specific matters within the scope of the dispute.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert.

(3) Upon accepting an appointment by the Tribunal, an expert shall provide a signed declaration in the form published by the Centre.

(4) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.

(5) The parties shall have the right to make written and oral submissions on the report of the Tribunal-appointed expert, as required.

(6) Rule 48 shall apply, with necessary modifications, to the Tribunal-appointed expert.
Rule 50
Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party’s request, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.

Chapter VIII
Special Procedures

Rule 51
Manifest Lack of Legal Merit

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

(2) The following procedure shall apply:

(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;

(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;

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

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

(e) the Tribunal shall render its decision or Award on the objection within 60 days after the latest of:

(i) the constitution of the Tribunal;
(ii) the last written submission on the objection; or

(iii) the last oral submission on the objection.

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

(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 53 or to argue subsequently in the proceeding that a claim is without legal merit.

Rule 52
Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding (“request for bifurcation”).

(2) If a request for bifurcation relates to a preliminary objection, Rule 53 shall apply.

(3) The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 53:

(a) the request for bifurcation shall be filed as soon as possible;

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

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

(d) the Tribunal shall issue its decision on the request for bifurcation within 30 days after the later of the last written or oral submission on the request; and

(e) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and
(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

(5) If the Tribunal orders bifurcation pursuant to this Rule, it shall suspend the proceeding with respect to any questions to be addressed at a later phase, unless the parties agree otherwise or the Tribunal decides there are special circumstances that do not justify suspension.

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

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**Rule 53**

**Preliminary Objections**

(1) The Tribunal shall have the power to rule on its jurisdiction and competence. For the purposes of this Rule, an agreement providing for arbitration pursuant to the Additional Facility Rules shall be severable from the other terms of the contract in which it may have been included.

(2) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction or competence of the Tribunal (“preliminary objection”).

(3) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection as soon as possible.

(4) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits.

(5) If a party requests bifurcation of a preliminary objection, Rule 54 shall apply.

(6) If a party does not request bifurcation of a preliminary objection within the time limits referred to in Rule 54(1)(a) or the parties confirm that they will not request bifurcation, the objection shall be joined to the merits and the following procedure shall apply:

   (a) the Tribunal shall fix time limits for written and oral submissions on the preliminary objection, as required;

   (b) the memorial on the preliminary objection shall be filed:

      (i) by the date to file the counter-memorial on the merits;

      (ii) by the date to file the next written submission after an ancillary claim, if the objection relates to the ancillary claim; or
(iii) as soon as possible after the facts on which the objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (6)(b)(i) and (ii).

(c) the party filing the memorial on preliminary objections shall also file its counter-memorial on the merits, or, if the objection relates to an ancillary claim, file its next written submission after the ancillary claim; and

(d) the Tribunal shall render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 68(1)(c).

(7) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within its own jurisdiction and competence.

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**Rule 54**

**Bifurcation of Preliminary Objections**

(1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:

(a) unless the parties agree otherwise, the request for bifurcation shall be filed:

   (i) within 45 days after filing the memorial on the merits;

   (ii) within 45 days after filing the written submission containing the ancillary claim, if the objection relates to the ancillary claim; or

   (iii) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to that party on the dates referred to in paragraph (1)(a)(i) and (ii);

(b) the request for bifurcation shall state the preliminary objection to which it relates;

(c) unless the parties agree otherwise, the proceeding on the merits shall be suspended until the Tribunal decides whether to bifurcate;

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

(e) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the later of the last written or oral submission on the request.
(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

(3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:

(a) suspend the proceeding on the merits, unless the parties agree otherwise, or the Tribunal decides there are special circumstances that do not justify suspension;

(b) fix time limits for written and oral submissions on the preliminary objection, as required;

(c) render its decision or Award on the preliminary objection within 180 days after the later of the last written or oral submission, in accordance with Rule 68(1)(b); and

(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

(4) If the Tribunal decides to join the preliminary objection to the merits, it shall:

(a) fix time limits for written and oral submissions on the preliminary objection, as required;

(b) modify any time limits for written and oral submissions on the merits, as required; and

(c) render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 68(1)(c).

**Rule 55**

**Consolidation or Coordination of Arbitrations**

(1) Parties to two or more pending arbitrations administered by the Centre may agree to consolidate or coordinate these arbitrations.
(2) Consolidation joins all aspects of the arbitrations sought to be consolidated and results in a single Award. To be consolidated pursuant to this Rule, the arbitrations shall have been registered in accordance with these Rules and shall involve the same State or the same REIO (or constituent subdivision of the State or agency of the State or the REIO).

(3) Coordination aligns specific procedural aspects of each pending arbitration, but the arbitrations remain separate proceedings and each results in an individual Award.

(4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms for the conduct of the consolidated or coordinated proceeding(s) and consult with the Secretary-General to ensure that the proposed terms are capable of being implemented.

(5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the proposed terms to the Tribunal(s) constituted in the arbitrations. Such Tribunal(s) shall make any order or decision required to implement these terms.

Rule 56
Provisional Measures

(1) A party may at any time request that the Tribunal order provisional measures to preserve that party’s rights, including measures to:

(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;

(b) maintain or restore the status quo pending determination of the dispute; or

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

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

(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and
(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the request.

(3) In deciding whether to order provisional measures, the Tribunal shall consider all relevant circumstances, including:

(a) whether the measures are urgent and necessary; and

(b) the effect that the measures may have on each party.

(4) The Tribunal may order provisional measures on its own initiative. The Tribunal may also order provisional measures different from those requested by a party.

(5) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party’s request.

(7) A party may request any judicial or other authority to order interim or conservatory measures. Such a request shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

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**Rule 57**

**Ancillary Claims**

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”), provided that such ancillary claim is within the scope of the agreement of the parties.

(2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise.

(3) The Tribunal shall fix time limits for written and oral submissions on the ancillary claim, as required.
Rule 58
Default

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.

(4) If the request in paragraph (2) relates to a failure to appear at a hearing, the Tribunal may:
   
   (a) reschedule the hearing to a date within 60 days after the original date;
   
   (b) proceed with the hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the hearing; or
   
   (c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the hearing.

(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).

(6) A party’s default shall not be deemed an admission of the assertions made by the other party.

(7) The Tribunal may invite the party that is not in default to file observations, produce evidence or make oral submissions.

(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine whether the dispute is within its own jurisdiction and competence before deciding the questions submitted to it and rendering an Award.
Chapter IX
Costs

Rule 59
Costs of the Proceeding

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

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

(b) the fees and expenses of the Tribunal, Tribunal assistants approved by the parties
    and Tribunal-appointed experts; and

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

Rule 60
Statement of and Submission on Costs

The Tribunal shall request that each party file a statement of its costs and a written
submission on the allocation of costs before allocating the costs of the proceeding
between the parties.

Rule 61
Decisions on Costs

(1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant
circumstances, including:

(a) the outcome of the proceeding or any part of it;

(b) the conduct of the parties 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.

(2) The Tribunal may make an interim decision on costs at any time.
Rule 62
Security for Costs

(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.

(2) The following procedure shall apply:
   (a) the request shall specify the circumstances that require security for costs;
   (b) the Tribunal shall fix time limits for written and oral submissions on the request, as required;
   (c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and
   (d) the Tribunal shall issue its decision on the request within 30 days after the latest of:
      (i) the constitution of the Tribunal;
      (ii) the last written submission on the request; or
      (iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:
   (a) that party’s ability to comply with an adverse decision on costs;
   (b) that party’s willingness to comply with an adverse decision on costs;
   (c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and
   (d) the conduct of the parties.

(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.
(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and fix a time limit for compliance with the order.

(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party’s request.

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Chapter X
Suspension, Settlement and Discontinuance

Rule 63
Suspension of the Proceeding

(1) The Tribunal shall suspend the proceeding by agreement of the parties.

(2) The Tribunal may suspend the proceeding upon the request of either party or on its own initiative, except as otherwise provided in the (Additional Facility) Administrative and Financial Regulations or these Rules.

(3) The Tribunal shall give the parties the opportunity to make observations before ordering a suspension pursuant to paragraph (2).

(4) In its order suspending the proceeding, the Tribunal shall specify:

   (a) the period of the suspension;
   
   (b) any relevant terms; and
   
   (c) a modified procedural calendar to take effect on resumption of the proceeding, if necessary.

(5) The Tribunal shall extend the period of a suspension prior to its expiry by agreement of the parties.
(6) The Tribunal may extend the period of a suspension prior to its expiry, on its own initiative or upon a party’s request, after giving the parties an opportunity to make observations.

(7) The Secretary-General shall suspend the proceeding pursuant to paragraph (1) or extend the suspension pursuant to paragraph (5) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any terms agreed to by the parties.

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**Rule 64**

**Settlement and Discontinuance**

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.

(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

   (a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or

   (b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) An Award rendered pursuant to paragraph (2)(b) does not need to include the reasons on which it is based.

(4) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

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**Rule 65**

**Discontinuance at Request of a Party**

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.
(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Rule 66
Discontinuance for Failure of Parties to Act

(1) If the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.

(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal shall issue an order taking note of the discontinuance.

(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.

(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

Chapter XI
The Award

Rule 67
Applicable Law

(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply:

   (a) the law which it determines to be applicable; and

   (b) the rules of international law it considers applicable.

(2) The Tribunal may decide ex aequo et bono if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.
Rule 68
Timing of the Award

(1) The Tribunal shall render the Award as soon as possible, and in any event no later than:

(a) 60 days after the latest of the Tribunal constitution, the last written submission or the last oral submission, if the Award is rendered pursuant to Rule 51(4);

(b) 180 days after the later of the last written or oral submission if the Award is rendered pursuant to Rule 54(3)(c); or

(c) 240 days after the later of the last written or oral submission in all other cases.

(2) A statement of costs and submission on costs filed pursuant to with Rule 60 shall not be considered a written submission for the purposes of paragraph (1).

(3) The parties waive any time limits for rendering the Award which may be provided for by the law of the seat of arbitration.

Rule 69
Contents of the Award

(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Tribunal was established pursuant to these Rules and a description of the method of its constitution;

(d) the name of each member of the Tribunal and the appointing authority of each;

(e) the seat of arbitration, the dates and place(s) of the first session, case management conferences and hearings;

(f) a brief summary of the proceeding;

(g) a statement of the relevant facts as found by the Tribunal;

(h) a brief summary of the submissions of the parties, including the relief sought;
(i) the reasons on which the Award is based, unless the parties have agreed that no reasons are to be given; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision on the allocation of costs.

(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 and if allowed by the law of the seat of arbitration.

(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.

(4) The Award shall be final and binding on the parties.

**Rule 70**

**Rendering of the Award**

(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:

   (a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

   (b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.

(2) Upon request of the parties that the original text of the Award be filed or registered by the Tribunal pursuant to the law of the seat of arbitration, the Secretary-General shall do so on behalf of the Tribunal.

(3) The Award shall be deemed to have been made at the seat of arbitration and deemed to have been rendered on the date of dispatch of certified copies of the Award.

(4) The Secretary-General shall provide additional certified copies of the Award to a party upon request.
Rule 71
Supplementary Decision, Rectification and Interpretation of an Award

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 30 days after rendering the Award.

(2) A party may request a supplementary decision, rectification or interpretation of an Award by filing a request with the Secretary-General and paying the lodging fee published in the schedule of fees within 45 days after the Award was rendered.

(3) The request referred to in paragraph (2) shall:

(a) identify the Award to which it relates;

(b) be in an official language of the Centre used in the proceeding;

(c) be signed by each requesting party or its representative and be dated;

(d) specify:

(i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award;

(ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award;

(iii) with respect to a request for interpretation, the points in dispute concerning the meaning or scope of the Award; and

(e) attach proof of payment of the lodging fee.

(4) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request to the other party;

(b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (2); and

(c) notify the parties of the registration or refusal to register.

(5) As soon as the request is registered, the Secretary-General shall transmit the request and the notice of registration to each member of the Tribunal.
(6) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(7) Rules 69-70 shall apply to any decision of the Tribunal pursuant to this Rule.

(8) The Tribunal shall issue a decision on the request for supplementary decision, rectification or interpretation within 60 days after the later of the last written or oral submission on the request.

(9) A supplementary decision, rectification or interpretation pursuant to this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.

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

Rule 72
Publication of Orders, Decisions and Awards

(1) The Centre shall publish orders, decisions and Awards with any redactions agreed to by the parties and jointly notified to the Secretary-General within 60 days after the order, decision or Award is rendered.

(2) If either party notifies the Secretary-General within the 60-day period referred to in paragraph (1) that the parties disagree on any proposed redactions, the Secretary-General shall refer the order, decision or Award to the Tribunal to determine any disputed redactions. The Centre shall publish the order, decision or Award in accordance with the determination of the Tribunal.

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

Rule 73
Publication of Documents Filed in the Proceeding

(1) Upon request of either party, the Centre shall publish any document filed in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.

(2) Either party may refer any dispute regarding the publication or redaction of a document in paragraph (1) to the Tribunal for determination. The Centre shall publish the document in accordance with the determination of the Tribunal.
(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

Rule 74  
Observation of Hearings

(1) The Tribunal shall determine whether to allow persons in addition to the parties, their representatives, witnesses and experts during their testimony
(2)
(3)
(4) , and persons assisting the Tribunal, to observe hearings after consulting with the parties.
(5) The Tribunal shall establish procedures to prevent the disclosure of any confidential or protected information to persons observing the hearings.
(6) The Centre shall publish recordings or transcripts of those portions of hearings that were available for observation by the public in accordance with paragraphs (1) and (2), unless either party objects.

Rule 75  
Confidential or Protected Information

For the purposes of Rules 72-74, confidential or protected information is information which:

(a) is protected from disclosure pursuant to the instrument of consent to arbitration;
(b) is protected from disclosure pursuant to the applicable law;
(c) is protected from disclosure in accordance with the orders and decisions of the Tribunal;
(d) is protected from disclosure by agreement of the parties;
(e) constitutes confidential business information;
(f) would impede law enforcement if disclosed to the public;
(g) would prejudice the essential security interests of the State or the REIO if disclosed to the public;
(h) would aggravate the dispute between the parties if disclosed to the public; or
(i) would undermine the integrity of the arbitral process if disclosed to the public.

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Rule 76
Submission of Non-Disputing Parties

(1) Any person or entity that is not a party to the dispute (“non-disputing party”) may apply for permission to file a written submission in the proceeding. The application shall be made in a procedural language used in the proceeding.

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

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

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

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

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

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

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

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length or scope of the written submission and the time limit to file the submission.

(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the later of the last written or oral submission on the application.
(6) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.

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

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**Rule 77**  
*Participation of Non-Disputing Treaty Party*

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

(2) The Tribunal may impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or scope of the submission and the time limit to file the submission.

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

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**Chapter XIII**  
*Expedited Arbitration*

**Rule 78**  
*Consent of Parties to Expedited Arbitration*

(1) The parties to an arbitration conducted pursuant to these Rules may consent at any time to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by jointly notifying the Secretary-General in writing of their consent.

(2) Chapters I-XII of the (Additional Facility) Arbitration Rules apply to an expedited arbitration except that:

(a) Rules 24, 26, 49, 50, 51, 52, 54 and 55 do not apply in an expedited arbitration; and

(b) Rules 27, 31, 38, 47, 53, 58, 68 and 71, as modified by Rules 78-87, apply in an expedited arbitration.

(3) If the parties consent to expedited arbitration after the constitution of the Tribunal pursuant to Chapter IV, Rules 79-81 shall not apply, and the expedited arbitration shall proceed subject to all members of the Tribunal confirming their availability.
pursuant to Rule 82(2). If any arbitrator fails to confirm availability before the expiry of the applicable time limit, the arbitration shall proceed in accordance with Chapters I-XII.

**Rule 79**
**Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration**

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 80 or a three-member Tribunal appointed pursuant to Rule 81.

(2) The parties shall jointly notify the Secretary-General in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of the notice of consent referred to in Rule 78(1).

(3) If the parties do not notify the Secretary-General of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed pursuant to Rule 80.

(4) An appointment pursuant to Rules 80-81 shall be deemed an appointment in accordance with a method agreed by the parties.

**Rule 80**
**Appointment of Sole Arbitrator for Expedited Arbitration**

(1) The parties shall jointly appoint the Sole Arbitrator within 20 days after the notice referred to in Rule 79(2).

(2) The Secretary-General shall appoint the Sole Arbitrator if:

(a) the parties do not appoint the Sole Arbitrator within the time limit referred to in paragraph (1);

(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator; or

(c) the appointee declines the appointment or does not comply with Rule 82(1).

(3) The following procedure shall apply to the appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):
(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and

(d) if the selected candidate declines the appointment or does not comply with Rule 82(1), the Secretary-General shall select the next highest-ranked candidate.

**Rule 81**

**Appointment of Three-Member Tribunal for Expedited Arbitration**

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

   (a) each party shall appoint an arbitrator (“co-arbitrator”) within 20 days after the notice referred to in Rule 79(2); and

   (b) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of the acceptances from both co-arbitrators.

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

   (a) an appointment is not made within the applicable time limit referred to in paragraph (1);

   (b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal; or

   (c) an appointee declines the appointment or does not comply with Rule 82(1).

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators pursuant to paragraph (2):

   (a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed. The Secretary-General shall consult with the parties as far as possible and use.
best efforts to appoint the co-arbitrator(s) within 15 days after the relevant event in paragraph (2);

(b) after both co-arbitrators have accepted their appointments and within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(c) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(d) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and

(e) if the selected candidate declines the appointment or does not comply with Rule 82(1), the Secretary-General shall select the next highest-ranked candidate.

**Rule 82**  
Acceptance of Appointment in Expedited Arbitration

(1) An arbitrator appointed pursuant to Rule 84 or 85 shall accept the appointment and provide a declaration pursuant to Rule 27(3) within 10 days after receipt of the request for acceptance.

(2) An arbitrator appointed to a Tribunal constituted pursuant to Chapter IV shall confirm their availability to conduct an expedited arbitration within 10 days after receipt of the notice of consent pursuant to Rule 78(3).

**Rule 83**  
First Session in Expedited Arbitration

(1) The Tribunal shall hold a first session pursuant to Rule 38 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication, unless both parties and the Tribunal agree it shall be held in person.
### Rule 84

**Procedural Schedule in Expedited Arbitration**

1. The following schedule for written submissions and the hearing shall apply in an expedited arbitration:

   a. the claimant shall file a memorial within 60 days after the first session;
   b. the respondent shall file a counter-memorial within 60 days after the date of filing the memorial;
   c. the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;
   d. the claimant shall file a reply within 40 days after the date of filing the counter-memorial;
   e. the respondent shall file a rejoinder within 40 days after the date of filing the reply;
   f. the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;
   g. the hearing shall be held within 60 days after the last written submission is filed;
   h. the parties shall file statements of their costs and written submissions on costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and
   i. the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

2. Any preliminary objection, counterclaim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

3. The Tribunal may extend the time limits referred to in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents pursuant to Rule 47. The Tribunal shall decide such applications based on written submissions and without an in-person hearing.

4. Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule referred to in paragraph (1), unless the Tribunal determines that there are special circumstances that justify the suspension.
of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.

**Rule 85**

**Default in Expedited Arbitration**

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 58.

**Rule 86**

**Procedural Schedule for Supplementary Decision, Rectification and Interpretation in Expedited Arbitration**

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) A request for a supplementary decision, rectification or interpretation of an Award made pursuant to Rule 71 shall be filed within 15 days after the Award was rendered.

(3) The Tribunal shall issue a supplementary decision, rectification or interpretation of an Award pursuant to Rule 71 within 30 days after the later of the last written or oral submission on the request.

**Rule 87**

**Opting Out of Expedited Arbitration**

(1) The parties may opt out of an expedited arbitration at any time by jointly notifying the Tribunal and Secretary-General in writing of their agreement.

(2) Upon request of a party, the Tribunal may decide that an arbitration should no longer be expedited. In deciding the request, the Tribunal shall consider the complexity of the issues, the stage of the proceeding and all other relevant circumstances.

(3) The Tribunal, or the Secretary-General if a Tribunal has not been constituted, shall determine the further procedure pursuant to Chapters I-XII and fix any time limit necessary for the conduct of the proceeding.
VIII. CONCILIATION RULES FOR ADDITIONAL FACILITY PROCEEDINGS
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VIII. CONCILIATION RULES FOR ADDITIONAL FACILITY PROCEEDINGS
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Introductory Note

The Conciliation Rules for Additional Facility Proceedings ((Additional Facility) Conciliation Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

The (Additional Facility) Conciliation Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations in Annex A.

The (Additional Facility) Conciliation Rules apply from the submission of a Request for conciliation until termination of the conciliation.

Chapter I
Scope

Rule 1
Application of Rules

(1) These Rules shall apply to any conciliation proceeding conducted pursuant to the Additional Facility Rules.

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-9.

(3) If any of these Rules, or any agreement pursuant to paragraph (2), conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(4) The applicable (Additional Facility) Conciliation Rules are those in force on the date of filing the Request for conciliation, unless the parties agree otherwise.

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

(6) These Rules may be cited as the “(Additional Facility) Conciliation Rules” of the Centre.
Chapter II  
Institution of the Proceedings  

Rule 2  
The Request  

(1) Any party wishing to institute conciliation proceedings pursuant to the Additional Facility Rules shall file a Request for conciliation together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 3  
Contents of the Request  

(1) The Request shall:

   (a) be in English, French or Spanish;

   (b) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

   (c) be signed by each requesting party or its representative and be dated;

   (d) attach proof of any representative’s authority to act; and

   (e) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

   (a) a description of the investment, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising out of the investment;

   (b) with respect to each party’s consent to submit the dispute to conciliation pursuant to the Additional Facility Rules:

      (i) the instrument(s) in which each party’s consent is recorded;
(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date;

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;

(c) if a party is a natural person:

(i) information concerning that person’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person is a national of a State other than the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent;

(d) if a party is a juridical person:

(i) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the approval of consent of the State or the REIO, unless the State or the REIO has notified the Centre that no such approval is required.

Rule 4
Recommended Additional Information

It is recommended that the Request also contain any procedural proposals or agreements reached by the parties, including with respect to:
(a) the number and method of appointment of conciliators; and

(b) the procedural language(s).

Rule 5
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

(4) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.

Rule 6
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Rule 7
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.
(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 8
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of conciliators, unless such information has already been provided, and to constitute a Commission without delay;

(d) remind the parties that registration of the Request is without prejudice to the powers and functions of the Commission in regard to jurisdiction and competence of the Commission, and the issues in dispute; and

(e) remind the parties to make the disclosure required by Rule 21.

Rule 9
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 6(b).
Chapter III
General Provisions

Rule 10
Party and Party Representative

(1) For the purposes of these Rules, “party” includes, where the context so admits, all parties acting as claimant or as respondent.

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

Rule 11
Method of Filing

(1) A document to be filed in the proceeding shall be filed with the Secretary-General, who shall acknowledge its receipt.

(2) Documents shall only be filed electronically, unless the Commission orders otherwise in special circumstances.

Rule 12
Supporting Documents

(1) Supporting documents shall be filed together with the written statement, request, observations or communication to which they relate.

(2) An extract of a document may be filed as a supporting document if the extract is not misleading. The Commission or a party may require a fuller extract or a complete version of the document.

Rule 13
Routing of Document

Following the registration of the Request pursuant to Rule 7, the Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other; and
(b) the Commission, unless the parties communicate directly with the Commission on request of the Commission or by agreement of the parties.

**Rule 14**  
**Procedural Languages, Translation and Interpretation**

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

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written statements, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Commission may order a party to file such documents in both procedural languages.

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

(5) Any document from the Commission or the Secretary-General shall be in a procedural language. In a proceeding with two procedural languages, the Commission, or the Secretary-General if applicable, shall issue orders, decisions, recommendations and the Report in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Commission may order interpretation into the other procedural language.

**Rule 15**  
**Calculation of Time Limits**

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the
relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

**Rule 16**  
**Costs of the Proceeding**

Unless the parties agree otherwise, each party shall:

(a) pay one half of the fees and expenses of the Commission and the administrative charges and direct costs of the Centre; and

(b) bear any other costs it incurs in connection with the proceeding.

**Rule 17**  
**Confidentiality of the Conciliation**

(1) All information relating to the conciliation, and all documents generated in or obtained during the conciliation, shall be confidential, unless:

(a) the parties agree otherwise;

(b) the information is to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 3;

(c) the information or document is independently available; or

(d) disclosure is required by law.

**Rule 18**  
**Use of Information in Other Proceedings**

Unless the parties to the dispute agree otherwise, a party shall not rely on any of the following in other proceedings:

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

(b) the Report, order, decision or any recommendation made by the Commission in the conciliation.
Chapter IV
Constitution of the Commission

Rule 19
General Provisions, Number of Conciliators and Method of Constitution

(1) The Commission shall be constituted without delay after registration of the Request.

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

(3) The parties shall endeavor to agree on a Sole Conciliator or any uneven number of conciliators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, either party may inform the Secretary-General that the Commission shall consist of a Sole Conciliator, appointed by agreement of the parties.

(4) The composition of a Commission shall remain unchanged after it has been constituted, except as provided in Chapter V.

(5) References in these Rules to a Commission or a President of a Commission shall include a Sole Conciliator.

Rule 20
Qualifications of Conciliators

Conciliators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who are impartial and independent.

Rule 21
Notice of Third-Party Funding

(1) A party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall file the notice referred to in paragraph (1) with the Secretary-General upon registration of the Request, or immediately upon concluding a third-party
funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit a notice of third-party funding and any changes to such notice to the parties, and to any conciliator proposed for appointment or appointed in a proceeding for purposes of completing the declaration required by Rule 24(3)(b).

**Rule 22**

**Assistance of the Secretary-General with Appointment**

The parties may jointly request that the Secretary-General assist with the appointment of a Sole Conciliator or any uneven number of conciliators.

**Rule 23**

**Appointment of Conciliators by the Secretary-General**

(1) If a Commission has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Secretary-General appoint the conciliator(s) who have not yet been appointed.

(2) The Secretary-General shall appoint the President of the Commission after appointing any members who have not yet been appointed.

(3) The Secretary-General shall consult with the parties as far as possible before appointing a conciliator and shall use best efforts to appoint any conciliator(s) within 30 days after receipt of the request to appoint.

**Rule 24**

**Acceptance of Appointment**

(1) A party appointing a conciliator shall notify the Secretary-General of the appointment and provide the appointee’s name, nationality(ies) and contact information.

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).
(3) Within 20 days after receipt of the request for acceptance of an appointment, an appointee shall:

(a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each conciliator and provide the signed declaration.

(5) The Secretary-General shall notify the parties if a conciliator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as conciliator in accordance with the method followed for the previous appointment.

(6) Each conciliator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the conciliator agree otherwise, a conciliator may not act as arbitrator, counsel, expert, judge, mediator, witness or in any other capacity in any other proceeding relating to the dispute that is the subject of the conciliation.

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**Rule 25**

Replacement of Conciliators Prior to Constitution of the Commission

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

(a) a conciliator may withdraw an acceptance;

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

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

(2) A replacement conciliator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced conciliator was appointed.
Rule 25
Constitution of the Commission

(1) The Commission shall be deemed to be constituted on the date the Secretary-General notifies the parties that each conciliator has accepted the appointment.

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

Chapter V
Disqualification of Conciliators and Vacancies

Rule 27
Proposal for Disqualification of Conciliators

(1) A party may file a proposal to disqualify one or more conciliators ("proposal") on the ground that circumstances exist that give rise to justifiable doubts as to the qualities of the conciliator required by Rule 20.

(2) The following procedure shall apply:

(a) the proposal shall be filed after the constitution of the Commission and within 21 days after the later of:

(i) the constitution of the Commission; or

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

(b) the proposal shall include the grounds on which the proposal is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;

(d) the conciliator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (2)(c); and

(e) each party may file a final written submission on the proposal within seven days after expiry of the time limit referred to in paragraph (2)(d).
(3) If the other party agrees to the proposal prior to the dispatch of the decision referred to in Rule 28, the conciliator shall resign in accordance with Rule 30.

(4) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

**Rule 28**

**Decision on the Proposal for Disqualification**

(1) The Secretary-General shall make the decision on the proposal.

(2) The Secretary-General shall use best efforts to decide any proposal within 30 days after the expiry of the time limit referred to in Rule 27(2)(e).

**Rule 29**

**Incapacity or Failure to Perform Duties**

If a conciliator becomes incapacitated or fails to perform the duties required of a conciliator, the procedure in Rules 27 and 28 shall apply.

**Rule 30**

**Resignation**

(1) A conciliator may resign by notifying the Secretary-General and the other members of the Commission.

(2) A conciliator shall resign upon the joint request of the parties.

**Rule 31**

**Vacancy on the Commission**

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

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

Rule 32
Functions of the Commission

(1) The Commission shall clarify the issues in dispute and assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) In order to bring about agreement between the parties, the Commission may, at any stage of the proceeding, after consulting with the parties, recommend:

   (a) specific terms of settlement to the parties; or

   (b) that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.

(3) Recommendations may be made orally or in writing. Either party may request that the Commission provide reasons for any recommendation. The Commission may invite each party to provide observations concerning any recommendation made.

(4) At any stage of the proceeding, the Commission may:

   (a) request explanations, documents or other information from either party or other persons;

   (b) communicate with the parties jointly or separately; or

   (c) visit any place connected with the dispute or conduct inquiries with the agreement and participation of the parties.

(3) A vacancy on the Commission shall be filled by the method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Commission has been reconstituted, the conciliation shall continue from the point it had reached at the time the vacancy was notified.
Rule 33  
**General Duties of the Commission**

(1) The Commission shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.

(2) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.

Rule 34  
**Orders, Decisions and Agreements**

(1) The Commission shall make the orders and decisions required for the conduct of the conciliation.

(2) The Commission shall make decisions by a majority of the votes of all its members. Abstentions shall count as a negative vote.

(3) Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Commission.

(4) The Commission shall apply any agreement between of the parties on procedural matters, subject to Rule 1(3), and to the extent that the agreement does not conflict with the (Additional Facility) Administrative and Financial Regulations.

Rule 35  
**Quorum**

The participation of a majority of the members of the Commission by any appropriate means of communication shall be required at the first session, meetings and deliberations, unless the parties agree otherwise.

Rule 36  
**Deliberations**

(1) The deliberations of the Commission shall take place in private and remain confidential.
(2) The Commission may deliberate at any place and by any means it considers appropriate.

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

**Rule 37**
**Cooperation of the Parties**

(1) The parties shall cooperate with the Commission and with one another, and shall conduct the conciliation in good faith and in an expeditious and cost-effective manner.

(2) The parties shall provide all relevant explanations, documents or other information. They shall facilitate visits to any place connected with the dispute and the participation of other persons as requested by the Commission.

(3) The parties shall comply with any time limit agreed upon or fixed by the Commission.

(4) The parties shall give their most serious consideration to the Commission’s recommendations.

**Rule 38**
**Written Statements**

(1) Each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views on these issues 30 days after the constitution of the Commission, or such longer time as the Commission may fix in consultation with the parties, but in any event before the first session.

(2) Either party may file further written statements at any stage of the conciliation within the time limits fixed by the Commission.

**Rule 39**
**First Session**

(1) The Commission shall hold a first session with the parties to address the procedure, including the matters listed in paragraph (4).
(2) The first session may be held in person or remotely, by any means that the Commission deems appropriate. The agenda, method and date of the first session shall be determined by the Commission after consulting with the parties.

(3) The first session shall be held within 60 days after the Commission’s constitution or such other period as the parties may agree.

(4) Before the first session, the Commission shall invite the parties’ views on procedural matters, including:

(a) the applicable conciliation rules;

(b) the division of advances payable pursuant to (Additional Facility) Administrative and Financial Regulation 7;

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

(d) the method of filing and routing of documents;

(e) a schedule for further written statements and meetings;

(f) the place and format of meetings between the Commission and the parties;

(g) the manner of recording or keeping minutes of meetings, if any;

(h) the treatment of confidential or protected information;

(i) the publication of documents;

(j) any agreement between the parties:

   (i) concerning the treatment of information disclosed by one party to the Commission by way of separate communication pursuant to Rule 32(4)(b);

   (ii) not to initiate or pursue during the conciliation any other proceeding in respect of the dispute;

   (iii) concerning the application of prescription or limitation periods;

   (iv) concerning the disclosure of any settlement agreement resulting from the conciliation; and

   (v) pursuant to Rule 18; and

(k) any other procedural matter raised by either party or the Commission.
(5) At the first session or within any other period determined by the Commission, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

(6) The Commission shall issue summary minutes recording the parties’ agreements and the Commission’s decisions on the procedure within 15 days after the later of the first session or the last written statement on procedural matters addressed at the first session.

Rule 40
Meetings

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

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

(3) If a meeting is to be held in person, it may be held at any place agreed to by the parties after consulting with the Commission and the Secretary-General. If the parties do not agree on the place of a meeting, it shall be held at a place determined by the Commission.

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

Rule 41
Preliminary Objections

(1) A party may file a preliminary objection that the dispute is not within the jurisdiction or competence of the Commission (“preliminary objection”).

(2) A party shall notify the Commission and the other party of its intent to file a preliminary objection as soon as possible. The objection shall be made no later than the date of the initial written statement referred to in Rule 38(1), unless the facts on which the objection is based are unknown to the party at the relevant time.

(3) The Commission may address a preliminary objection separately or with other issues in dispute. If the Commission decides to address the objection separately, it may
(4) The Commission may at any time on its own initiative consider whether the dispute is within its own jurisdiction or competence.

(5) If the Commission decides that the dispute is not within its jurisdiction or competence, it shall issue a Report to that effect, in which it shall state its reasons. Otherwise, the Commission shall issue a decision on the objection with brief reasons and fix any time limit necessary for the further conduct of the conciliation.

Chapter VII
Termination of the Conciliation

Rule 42
Discontinuance Prior to the Constitution of the Commission

(1) If the parties notify the Secretary-General prior to the constitution of the Commission that they have agreed to discontinue the proceeding, the Secretary-General shall issue an order taking note of the discontinuance.

(2) If a party requests the discontinuance of the proceeding prior to the constitution of the Commission, the Secretary-General shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(3) If, prior to the constitution of the Commission, the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Secretary-General shall notify them of the time elapsed since the last step taken in the proceeding. If the parties fail to take a step within 30 days after the notice, they shall be deemed to have discontinued the proceeding and the Secretary-General shall issue an order taking note of the discontinuance. If either party takes a step within 30 days after the Secretary-General’s notice, the proceeding shall continue.
Rule 43
Report Noting the Parties’ Agreement

(1) If the parties reach agreement on some or all of the issues in dispute, the Commission shall issue its Report noting the issues in dispute and recording the issues upon which the parties have agreed.

(2) The parties may provide the Commission with the complete and signed text of their settlement agreement and may request that the Commission embody such settlement in the Report.

Rule 44
Report Noting the Failure of the Parties to Reach Agreement

At any stage of the proceeding, and after notice to the parties, the Commission shall issue its Report noting the issues in dispute and recording that the parties have not reached agreement on the issues in dispute during the conciliation if:

(a) it appears to the Commission that there is no likelihood of agreement between the parties; or

(b) the parties advise the Commission that they have agreed to discontinue the conciliation.

Rule 45
Report Recording the Failure of a Party to Appear or Participate

If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, issue its Report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Rule 46
The Report

(1) The Report shall be in writing and shall contain, in addition to the information specified in Rules 43-45:

(a) a precise designation of each party;
(b) the names of the representatives of the parties;

(c) a statement that the Commission was established pursuant to these Rules and a description of the method of its constitution;

(d) the name of each member of the Commission and of the appointing authority of each;

(e) the dates and place(s) of the first session and the meetings of the Commission with the parties;

(f) a brief summary of the proceeding;

(g) the complete and signed text of the parties’ settlement agreement if requested by the parties pursuant to Rule 43 (2);

(h) a statement of the costs of the proceeding, including the fees and expenses of each member of the Commission and the costs to be paid by each party pursuant to Rule 16; and

(i) any agreement of the parties pursuant to Rule 18.

(2) The Report shall be signed by the members of the Commission. It may be signed by electronic means if the parties agree. If a member does not sign the Report, such fact shall be recorded.

Rule 47
Issuance of the Report

(1) Once the Report has been signed by the members of the Commission, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.
IX. RULES FOR FACT-FINDING PROCEEDINGS  
(ICSID FACT-FINDING RULES) 

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IX. RULES FOR FACT-FINDING PROCEEDINGS
(ICSID FACT-FINDING RULES)

**Introductory Note**

The Rules for Fact-Finding Proceedings (ICSID Fact-Finding Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

The ICSID Fact-Finding Rules are supplemented by the (Fact-Finding) Administrative and Financial Regulations (Annex A).

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**Chapter I**

**General Provisions**

**Rule 1**

**Definitions**

1. “Secretariat” means the Secretariat of the Centre.

2. “Centre” or “ICSID” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

3. “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.

4. “Request” means a request for fact-finding together with the required supporting documents.

5. “Secretary-General” means the Secretary-General of the Centre.

6. “Party” includes, where the context so admits, all parties to the fact-finding. Each party may be represented or assisted by agents, counsel, advocates or other advisors whose names and proof of authority to act shall be notified by that party to the Secretary-General (“representative(s)”).

7. “Schedule of fees” means the schedule of fees published by the Secretary-General.
**Rule 2**

**Fact-Finding Proceedings**

(1) The Secretariat is authorized to administer fact-finding proceedings relating to an investment involving a State or an REIO, which the parties consent in writing to submit to the Centre.

(2) Reference to a State or an REIO includes a constituent subdivision of the State, or an agency of the State or the REIO. The State or the REIO must approve the consent of the constituent subdivision or agency which is a party to the fact-finding pursuant to paragraph (1), unless the State or the REIO concerned notifies the Centre that no such approval is required.

(3) The (Fact-Finding) Administrative and Financial Regulations, attached as Annex A, shall apply to proceedings pursuant to these Rules.

**Rule 3**

**Application of Rules**

(1) These Rules shall apply to any fact-finding proceeding conducted pursuant to Rule 2.

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-6.

(3) The applicable ICSID Fact-Finding Rules are those in force on the date of filing the Request, unless the parties agree otherwise.

(4) The texts of these Rules are equally authentic in English, French and Spanish.

(5) These Rules may be cited as the “ICSID Fact-Finding Rules.”
Chapter II
Institution of the Fact-Finding Proceeding

Rule 4
The Request

Parties wishing to institute a fact-finding proceeding pursuant to these Rules shall file a joint Request with the Secretary-General and pay the lodging fee published in the schedule of fees.

Rule 5
Contents and Filing of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the proceeding and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request, and attach the authorizations;

(g) indicate that the proceeding involves a State or an REIO, describe the investment to which the proceeding relates, and indicate the facts to be examined and the relevant circumstances;

(h) attach the agreement of the parties to have recourse to fact-finding pursuant to these Rules; and

(i) contain any proposals or agreements reached by the parties concerning the constitution of a Fact-Finding Committee (“Committee”), the qualifications of its member(s), its mandate and the procedure to be followed during the fact-finding.
Any supporting document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or complete translation of the document.

Rule 6  
Receipt and Registration of the Request

(1) The Secretary-General shall promptly acknowledge receipt of the Request.

(2) Upon receipt of the Request and the lodging fee, the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is within the scope of Rule 2(1).

(3) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(4) The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Secretary-General; and

(c) invite the parties to constitute a Committee without delay.

Chapter III  
The Fact-Finding Committee

Rule 7  
Qualifications of Members of the Committee

(1) Each member of a fact-finding Committee shall be impartial and independent of the parties.

(2) The parties may agree that a member of a Committee shall have particular qualifications or expertise.
### Rule 8
**Number of Members and Method of Constituting the Committee**

(1) The parties shall endeavor to agree on a sole or any uneven number of Committee members, and the method of their appointment. If the parties do not advise the Secretary-General of an agreement on the number of members and method of appointment within 30 days after the date of registration, the Committee shall consist of a sole member, appointed by agreement of the parties.

(2) The parties may jointly request that the Secretary-General assist with the appointment of any member at any time.

(3) If the parties are unable to appoint a sole member or any member of a Committee within 60 days after the date of registration, either party may request that the Secretary-General appoint the member(s) not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the member(s) and shall use best efforts to appoint any Committee member(s) within 30 days after receipt of the request to appoint.

(4) If no step has been taken by the parties to appoint the members of a Committee within 120 consecutive days after the date of registration, or such other period as the parties may agree, the Secretary-General shall notify the parties that the fact-finding is terminated.

### Rule 9
**Acceptance of Appointment**

(1) The parties shall notify the Secretary-General of the appointment of the members of the Committee and provide the names and contact information of the appointees.

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected.

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

   (a) accept the appointment; and

   (b) provide a signed declaration in the form published by the Centre, addressing matters including the appointee’s independence, impartiality, availability and commitment to maintain the confidentiality of the proceeding.
(4) The Secretary-General shall notify the parties of the acceptance of appointment by each member and provide the signed declaration.

(5) The Secretary-General shall notify the parties if an appointee fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed in accordance with the method followed for the previous appointment.

(6) Each member shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the Committee agree otherwise, a member may not act as arbitrator, conciliator, counsel, expert, judge, mediator, witness or in any other capacity in any other proceeding relating to circumstances examined during the fact-finding.

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**Rule 10**

**Constitution of the Committee**

The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that each member has accepted their appointment. As soon as the Committee is constituted, the Secretary-General shall transmit the Request, any supporting documents and the notice of registration to each member.

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**Chapter IV**

**Conduct of the Fact-Finding Proceeding**

**Rule 11**

**Sessions and Work of the Committee**

(1) Each party shall file a preliminary written statement of not more than 50 pages with the Secretary-General within 15 days after the date of constitution of the Committee, unless the parties agree otherwise. The preliminary statement shall address the party’s view on the mandate of the Committee, the scope of the inquiry, relevant documents, persons to be interviewed, site visits and any other relevant matters. The Secretary-General shall transmit the preliminary written statements to the Committee and the other party.

(2) The Committee shall hold a first session with the parties within 30 days after its constitution or such other period as the parties may agree.
(3) At the first session, the Committee shall determine the protocol for the fact-finding (“Protocol”) after consulting with the parties on procedural matters, including:

(a) the Committee’s mandate;

(b) the procedure for the conduct of the proceeding, such as the procedural languages, method of communication, place of sessions, the next steps in the proceeding, the treatment of confidential or protected information, documents to be provided, persons to be interviewed, site visits and any other procedural and administrative matters;

(c) whether the Report to be issued will be binding on the parties; and

(d) whether the Committee should make any recommendations in its Report.

(4) The Committee shall conduct the proceeding in accordance with the Protocol and take all steps necessary to discharge its mandate. To that end, it shall make all decisions required for the conduct of the proceeding.

(5) Any matters not provided for in these Rules or not previously agreed to by the parties shall be determined by agreement of the parties or, failing such agreement, by the Committee.

Rule 12
General Duties

(1) The Committee shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding. It shall conduct the proceeding in an expeditious and cost-effective manner and shall consult regularly with the parties on the conduct of the proceeding.

(2) The parties shall cooperate with the Committee and with one another and shall conduct the proceeding in good faith and in an expeditious and cost-effective manner. The parties shall endeavor to provide all relevant explanations, documents or other information requested by the Committee and participate in the sessions of the Committee. The parties shall use all available means to facilitate the Committee’s inquiry.
**Rule 13**
Calculation of Time Limits

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

**Rule 14**
Costs of the Proceeding

Unless the parties agree otherwise, each party shall:

(a) pay one half of the fees and expenses of the Committee and the administrative charges and direct costs of the Centre; and

(b) bear any other costs it incurs in connection with the proceeding.

**Rule 15**
Confidentiality of the Proceeding

(1) All information relating to the fact-finding proceeding, and all documents generated in or obtained during the proceeding, shall be confidential, unless:

(a) the parties agree otherwise;

(b) the information or document is independently available; or

(c) disclosure is required by law.

(2) The fact that the parties are seeking or have sought fact-finding shall not be confidential.
Rule 16
Use of Information in Other Proceedings

A party shall not rely in other proceedings on any positions taken, admissions made, or views expressed by the other party or the members of the Committee during the fact-finding proceeding, unless the parties agree otherwise.

Chapter V
Termination of the Fact-Finding Proceeding

Rule 17
Manner of Terminating the Proceeding

The proceeding shall terminate upon:

(a) the issuance of a notice by the Secretary-General pursuant to Rule 8(4);

(b) the issuance of a Report by the Committee; or

(c) a notice from the parties that they have agreed to conclude the proceeding.

Rule 18
Failure of a Party to Participate or Cooperate

If a party fails to participate in the proceeding or cooperate with the Committee, and the Committee determines that it is no longer able to discharge its mandate, the Committee shall, after notice to the parties, record the failure of that party to participate or cooperate in its Report.

Rule 19
Report of the Committee

(1) The Report shall be in writing and shall contain:

(a) the mandate of the Committee;

(b) the Protocol followed;

(c) a brief summary of the proceeding;
(d) a recommendation if requested by the parties; and

(e) the facts established by the Committee and the reasons why certain facts may not be considered as having been established; or

(f) an indication of the failure of a party to participate or cooperate pursuant to Rule 18.

(2) The Report shall be adopted by a majority of the members and signed by them. If a member does not sign the Report, such fact shall be recorded.

(3) Any member may attach a statement to the Report if the member disagrees on any of the facts found.

(4) Unless the parties agree otherwise, the Report of the Committee shall not be binding upon the parties, and the parties shall be free to give any effect to it.

**Rule 20**

**Issuance of the Report**

(1) Once the Report has been signed by the members of the Committee, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.
X. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR FACT-FINDING PROCEEDINGS (ANNEX A)

(FACT-FINDING) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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X. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR FACT-FINDING PROCEEDINGS (ANNEX A) ((FACT-FINDING) ADMINISTRATIVE AND FINANCIAL REGULATIONS)

Introductory Note

The (Fact-Finding) Administrative and Financial Regulations apply to fact-finding proceedings and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Regulation 7.

Chapter I
General Provisions

Regulation 1
Application of these Regulations

(1) These Regulations apply to fact-finding proceedings which the Secretariat of the Centre is authorized to administer pursuant to Rule 2 of the ICSID Fact-Finding Rules.

(2) The applicable Regulations are those in force on the date of filing the Request for fact-finding pursuant to the ICSID Fact-Finding Rules.

(3) These Regulations may be referred to as the “(Fact-Finding) Administrative and Financial Regulations” of the Centre (“Annex A” to the ICSID Fact-Finding Rules).

Chapter II
General Functions of the Secretariat

Regulation 2
Secretary

The Secretary-General of the Centre shall appoint a Secretary for each Fact-Finding Committee (“Committee”). The Secretary may be drawn from the Secretariat and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the ICSID Fact-Finding Rules applicable to individual proceedings and delegated to the Secretary; and
(b) assist the parties and the Committee with all aspects of the proceedings, including the expeditious and cost-effective conduct of the proceeding.

**Regulation 3**  
**The Registers**

The Secretary-General shall maintain a Register for each proceeding containing all significant data concerning the institution, conduct and disposition of the proceeding. The information in the Register shall not be published, unless the parties agree otherwise.

**Regulation 4**  
**Depositary Functions**

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for fact-finding;
(b) all documents and communications filed in a proceeding;
(c) any records of meetings or sessions in a proceeding; and
(d) any Report of the Committee.

(2) Subject to the ICSID Fact-Finding Rules and the agreement of the parties to the proceeding, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties.

**Regulation 5**  
**Certificates of Official Travel**

The Secretary-General may issue certificates of official travel to members of Committees, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding pursuant to the ICSID Fact-Finding Rules.
Chapter III
Financial Provisions

Regulation 6
Fees, Allowances and Charges

(1) Each member of a Committee shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a meeting or session held away from the member’s place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the meeting or session is held; and

(iii) a per diem allowance for each day the member spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Committee and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties to the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) Members of Committees and any assistants approved by the parties;

(b) witnesses and experts called by a Committee who have not been presented by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any meeting or session held outside an ICSID facility.
(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Committee, unless the parties have made sufficient payments to defray the costs of the proceeding.

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**Regulation 7**

**Payments to the Centre**

(1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:

   (a) upon registration of a Request for fact-finding, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the proceeding through the first session of the Committee;

   (b) upon constitution of a Committee, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

   (c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding.

(2) Each party shall pay one half of the payments referred to in paragraph (1), unless the parties agree on a different division.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

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**Regulation 8**

**Consequences of Default in Payment**

(1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

   (a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;
(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Committee if constituted; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Committee if constituted.

Regulation 9
Special Services

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

Regulation 10
Fee for Lodging Requests

The parties wishing to institute a fact-finding proceeding shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

Regulation 11
Administration of Proceedings

The ICSID Secretariat is the only entity authorized to administer fact-finding proceedings conducted pursuant to the ICSID Fact-Finding Rules.
Chapter IV
Official Languages and Limitation of Liability

Regulation 12
Languages of Regulations

(1) These Regulations are published in the official languages of the Centre, English, French and Spanish.

(2) The texts of these Regulations in each official language are equally authentic.

(3) The singular form of words in these Regulations and in the ICSID Fact-Finding Rules include the plural form of that word, unless otherwise stated or required by the context of the provision.

Regulation 13
Prohibition Against Testimony and Limitation of Liability

(1) Unless required by applicable law or unless the parties and all the members of the Committee agree otherwise in writing, no member of the Committee shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the fact-finding proceeding.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no member of the Committee shall be liable for any act or omission in connection with the exercise of their functions in the fact-finding proceeding, unless there is fraudulent or willful misconduct.
# XI. RULES FOR MEDIATION PROCEEDINGS
(ICSID MEDIATION RULES)

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XI. RULES FOR MEDIATION PROCEEDINGS
(ICSID MEDIATION RULES)

Introductory Note

The Rules for Mediation Proceedings (ICSID Mediation Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

The ICSID Mediation Rules are supplemented by the (Mediation) Administrative and Financial Regulations (Annex A).

Chapter I
General Provisions

Rule 1
Definitions

(1) “Secretariat” means the Secretariat of the Centre.

(2) “Centre” or “ICSID” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

(3) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.

(4) “Request” means a request for mediation together with the required supporting documents.

(5) “Secretary-General” means the Secretary-General of the Centre.

(6) “Party” includes, where the context so admits, all parties to the mediation. Each party may be represented or assisted by agents, counsel, advocates or other advisors whose names and proof of authority to act shall be notified by that party to the Secretary-General (“representative(s)”).

(7) “Schedule of fees” means the schedule of fees published by the Secretary-General.
Rule 2
Mediation Proceedings

(1) The Secretariat is authorized to administer mediations relating to an investment involving a State or an REIO, which the parties consent in writing to submit to the Centre.

(2) Reference to a State or an REIO includes a constituent subdivision of the State, or an agency of the State or the REIO. The State or the REIO must approve the consent of the constituent subdivision or agency which is a party to the mediation pursuant to paragraph (1), unless the State or the REIO concerned notifies the Centre that no such approval is required.

(3) The (Mediation) Administrative and Financial Regulations, attached as Annex A, shall apply to mediations pursuant to these Rules.

Rule 3
Application of Rules

(1) These Rules shall apply to any mediation conducted pursuant to Rule 2.

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-6.

(3) If any of these Rules, or any agreement pursuant to paragraph (2), conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(4) The applicable ICSID Mediation Rules are those in force on the date of filing the Request, unless the parties agree otherwise.

(5) The texts of these Rules are equally authentic in English, French and Spanish.

(6) These Rules may be cited as the “ICSID Mediation Rules”.

Chapter II
Institution of the Mediation

Rule 4
Institution of Mediation Based on Prior Party Agreement

(1) If the parties have agreed in writing to mediation pursuant to these Rules, any party wishing to institute a mediation shall file a Request with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the mediation.

(3) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the mediation and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request, and attach the authorizations;

(g) indicate that the mediation involves a State or an REIO, describe the investment to which the mediation relates, and include a brief statement of the issues in dispute;

(h) contain any proposals or agreements reached by the parties concerning the appointment and qualifications of the mediator and the procedure to be followed during the mediation; and

(i) attach the agreement of the parties to mediate pursuant to these Rules.

(4) Any supporting document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or complete translation of the document.
(5) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party; and

(b) transmit the Request to the other party upon receipt of the lodging fee.

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**Rule 5**

**Institution of Mediation Absent a Prior Party Agreement**

(1) If the parties have no prior written agreement to mediate pursuant to these Rules, any party wishing to institute a mediation shall file a Request with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request shall:

(a) comply with the requirements in Rule 4(3)(a)-(h);

(b) include an offer to the other party to mediate pursuant to these Rules; and

(c) request that the Secretary-General invite the other party to accept the offer to mediate.

(3) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) invite the other party to inform the Secretary-General within 60 days after transmittal of the Request whether it accepts the offer to mediate.

(4) If the other party informs the Secretary-General that it accepts the offer to mediate, the Secretary-General shall acknowledge receipt and transmit the acceptance of the offer to mediate to the requesting party.

(5) If the other party rejects the offer to mediate, or fails to accept the offer to mediate within the 60-day period referred to in paragraph (3)(c) or within such other period as the parties may agree, the Secretary-General shall acknowledge receipt and transmit any communication received to the requesting party and inform the parties that no further action will be taken on the Request.
Rule 6
Registration of the Request

(1) Upon receipt of:

(a) the lodging fee; and

(b) a Request pursuant to Rule 4 or a Request and an agreement to mediate pursuant to Rule 5;

the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is within the scope of Rule 2(1).

(2) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(3) The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the mediation will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Secretary-General; and

(c) invite the parties to appoint the mediator without delay.

Chapter III
General Procedural Provisions

Rule 7
Calculation of Time Limits

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.
Rule 8
Costs of the Mediation

Unless the parties agree otherwise, each party shall:

(a) pay one half of the fees and expenses of the mediator and the administrative charges and direct costs of the Centre; and

(b) bear any other costs it incurs in connection with the mediation.

Rule 9
Confidentiality of the Mediation

(1) All information relating to the mediation, and all documents generated in or obtained during the mediation shall be confidential, unless:

(a) the parties agree otherwise;

(b) the information or document is independently available; or

(c) disclosure is required by law.

(2) The fact that the parties are mediating or have mediated shall not be confidential.

Rule 10
Use of Information in Other Proceedings

A party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made, or views expressed by the other party or the mediator during the mediation, unless the parties agree otherwise.
Chapter IV
The Mediator

Rule 11
Qualifications of the Mediator

(1) The mediator shall be impartial and independent of the parties.

(2) The parties may agree that the mediator shall have particular qualifications or expertise.

Rule 12
Number of Mediators and Method of Appointment

(1) There shall be one mediator or two co-mediators. Each mediator shall be appointed by agreement of the parties. All references to “mediator” in these Rules shall include co-mediators, as applicable.

(2) If the parties do not advise the Secretary-General of an agreement on the number of mediators within 30 days after the date of registration, there shall be one mediator appointed by agreement of the parties.

(3) The parties may jointly request that the Secretary-General assist with the appointment of a mediator at any time.

(4) If the parties are unable to appoint the mediator within 60 days after the date of registration, either party may request that the Secretary-General appoint the mediator not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the mediator and shall use best efforts to appoint any mediator within 30 days after receipt of the request to appoint.

(5) If no step has been taken by the parties to appoint the mediator within 120 consecutive days after the date of registration, or such other period as the parties may agree, the Secretary-General shall notify the parties that the mediation is terminated.
Rule 13
Acceptance of Appointment

(1) The parties shall notify the Secretary-General of the appointment of the mediator and provide the name and contact information of the appointee.

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected.

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

(a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by the mediator and provide the signed declaration.

(5) The Secretary-General shall notify the parties if a mediator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as mediator in accordance with the method followed for the previous appointment.

(6) The mediator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the mediator agree otherwise, a mediator may not act as arbitrator, conciliator, counsel, expert, judge, witness or in any other capacity in any other proceeding relating to the issues in dispute in the mediation.

Rule 14
Transmittal of the Request

As soon as the mediator has, or both co-mediators have, accepted the appointment(s), the Secretary-General shall transmit the Request, any supporting documents and the notice of registration to each mediator and notify the parties of this transmittal.
Rule 15  
Resignation and Replacement of Mediator

(1) A mediator may resign by notifying the Secretary-General and the parties.

(2) A mediator shall resign:

(a) on the joint request of the parties; or

(b) if the mediator becomes incapacitated or fails to perform the duties required of a mediator.

(3) Following the resignation of a mediator, the Secretary-General shall notify the parties of the vacancy. A new mediator shall be appointed by the same method used to make the original appointment, except that:

(a) the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of the vacancy; or

(b) if a co-mediator resigns and the parties notify the Secretary-General within 45 days after the notice of the vacancy that they have agreed to continue the mediation with the remaining co-mediator acting as sole mediator, no new mediator shall be appointed.

Chapter V  
Conduct of the Mediation

Rule 16  
Role and Duties of the Mediator

(1) The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute. The mediator does not have the authority to impose a settlement on the parties.

(2) The mediator shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding.
Rule 17
Duties of the Parties

The parties shall cooperate with the mediator and with one another and shall conduct the mediation in good faith and in an expeditious and cost-effective manner.

Rule 18
Initial Written Statements

(1) Each party shall file a brief initial written statement with the Secretary-General describing the issues in dispute and its views on these issues and on the procedure to be followed during the mediation. These statements shall be filed within 15 days after the date of the transmittal of the Request pursuant to Rule 14, or such other period as the mediator may determine in consultation with the parties, and in any event before the first session.

(2) The Secretary-General shall transmit the initial written statements to the mediator and the other party.

Rule 19
First Session

(1) The mediator shall hold a first session with the parties within 30 days after the date of the transmittal of the Request pursuant to Rule 14 or such other period as the parties may agree.

(2) The agenda, method and date of the first session shall be determined by the mediator after consulting with the parties. In preparation for the first session, the mediator may meet and communicate with the parties jointly or separately.

(3) At the first session, the mediator shall determine the protocol for the conduct of the mediation (“Protocol”) after consulting with the parties on procedural matters, including:

(a) the procedural language(s);

(b) the method of communication;

(c) the place of meetings;

(d) the next steps in the proceeding;
(e) the treatment of confidential or protected information;

(f) the participation of other persons in the mediation;

(g) any agreement between the parties:

(i) concerning the treatment of information disclosed by one party to the mediator by separate communication pursuant to Rule 20(3);

(ii) not to initiate or pursue other proceedings in respect of the issues in dispute during the mediation;

(iii) concerning the application of prescription or limitation periods;

(iv) concerning the disclosure of any settlement agreement resulting from the mediation; and

(h) the division of advances payable pursuant to (Mediation) Administrative and Financial Regulation 7; and

(i) any other relevant procedural and administrative matters.

(4) At the first session or within any other period as the mediator may determine, each party shall:

(a) identify a representative who is authorized to settle the issues in dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

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**Rule 20**

**Conduct of the Mediation**

(1) The mediator shall conduct the mediation in accordance with the Protocol and shall take into account the views of the parties and the circumstances of the issues in dispute.

(2) The mediator shall conduct the mediation in good faith and in an expeditious and cost-effective manner.

(3) The mediator may meet and communicate with the parties jointly or separately. Such communication may be in person or in writing and by any appropriate means.
(4) Information received by the mediator from one party shall not be disclosed to the other party without authorization from the disclosing party.

(5) The mediator may request that the parties provide additional information or written statements.

(6) If requested by all parties, the mediator may make oral or written recommendations for the resolution of all or part of the issues in dispute.

(7) The mediator may obtain expert advice with the agreement of the parties.

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**Rule 21**

**Termination of the Mediation**

(1) The mediator, or the Secretary-General if no mediator has been appointed, shall issue a notice of termination of the mediation upon:

   (a) a notice from the parties that they have signed a settlement agreement;

   (b) a notice from the parties that they have agreed to terminate the mediation;

   (c) a notice of withdrawal by any party, unless the remaining parties agree to continue the mediation;

   (d) a determination by the mediator that there is no likelihood of resolution through the mediation; or

   (e) satisfaction of the requirements of Rule 12(5).

(2) The notice of termination shall contain a brief summary of the procedural steps and the basis for termination of the mediation pursuant to paragraph (1). The notice shall be dated and signed by the mediator or the Secretary-General, as applicable.

(3) The Secretary-General shall promptly dispatch a certified copy of the notice of termination to each party and deposit the notice in the archives of the Centre. The Secretary-General shall provide additional certified copies of the notice to a party upon request.
XII. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR MEDIATION
(ANNEX A)
(MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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XII. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR MEDIATION
(ANNEX A)
((MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS)

Introductory Note

The (Mediation) Administrative and Financial Regulations apply to mediation proceedings and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

Chapter I
General Provisions

Regulation 1
Application of these Regulations

(1) These Regulations apply to mediation proceedings which the Secretariat of the Centre is authorized to administer pursuant to Rule 2 of the ICSID Mediation Rules.

(2) The applicable Regulations are those in force on the date of filing the Request for mediation pursuant to the ICSID Mediation Rules.

(3) These Regulations may be referred to as the “(Mediation) Administrative and Financial Regulations” of the Centre (“Annex A” to the ICSID Mediation Rules).

Chapter II
General Functions of the Secretariat

Regulation 2
Secretary

The Secretary-General of the Centre shall appoint a Secretary for each mediation. The Secretary may be drawn from the Secretariat and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the ICSID Mediation Rules applicable to individual proceedings and delegated to the Secretary; and

(b) assist the parties and the mediator with all aspects of the proceeding, including the expeditious and cost-effective conduct of the proceeding.
**Regulation 3**  
**The Registers**

The Secretary-General shall maintain a Register for each mediation containing all significant data concerning the institution, conduct and disposition of the proceeding. The information in the Register shall not be published, unless the parties agree otherwise.

**Regulation 4**  
**Depositary Functions**

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for mediation;

(b) all documents and communications filed in a mediation;

(c) any records of meetings or sessions in a mediation; and

(d) any notice of termination of a mediation pursuant to ICSID Mediation Rule 21.

(2) Subject to the ICSID Mediation Rules and the agreement of the parties to the proceeding, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties.

**Regulation 5**  
**Certificates of Official Travel**

The Secretary-General may issue certificates of official travel to mediators, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding pursuant to the ICSID Mediation Rules.
Chapter III
Financial Provisions

Regulation 6
Fees, Allowances and Charges

(1) Each mediator shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a meeting or session held away from the place of residence of the mediator:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the meeting or session is held; and

(iii) a *per diem* allowance for each day the mediator spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the *per diem* allowance referred to in paragraph (1)(a) and (c). Any request by a mediator for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the transmittal of the Request for mediation to the mediator pursuant to ICSID Mediation Rule 14 and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties to the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) mediators and any assistants approved by the parties;

(b) any experts appointed by a mediator pursuant to ICSID Mediation Rule 20(7);

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any meeting or session held outside an ICSID facility.
(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the mediator, unless the parties have made sufficient payments to defray the costs of the proceeding.

Regulation 7
Payments to the Centre

(1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for mediation, the Secretary-General shall request the party(ies) instituting the mediation to make a payment to defray the estimated costs of the proceeding through the first session of the mediator, which shall be considered partial payment by the instituting party(ies) of the payment referred to in paragraph (1)(b);

(b) upon the transmittal of the Request for mediation pursuant to ICSID Mediation Rule 13, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding.

(2) Each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

Regulation 8
Consequences of Default in Payment

(1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

(a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;
(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the mediator if appointed; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the mediator if appointed.

Regulation 9
Special Services

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

Regulation 10
Fee for Lodging Requests

The party or parties (if a request is filed jointly) wishing to institute a mediation shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

Regulation 11
Administration of Proceedings

The ICSID Secretariat is the only entity authorized to administer mediation proceedings conducted pursuant to the ICSID Mediation Rules.
Chapter IV
Official Languages and Limitation of Liability

Regulation 12
Languages of Regulations

(1) These Regulations are published in the official languages of the Centre, English, French and Spanish.

(2) The texts of these Regulations in each official language are equally authentic.

(3) The singular form of words in these Regulations and in the ICSID Mediation Rules include the plural form of that word, unless otherwise stated or required by the context of the provision.

Regulation 13
Prohibition Against Testimony and Limitation of Liability

(1) Unless required by applicable law or unless the parties and the mediator agree otherwise in writing, no mediator shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the mediation.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no mediator shall be liable for any act or omission in connection with the exercise of their functions in the mediation, unless there is fraudulent or willful misconduct.
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SCHEDULE 1: SCHEDULE OF FEES [DRAFT]
(EFFECTIVE DATE TBD)

I. FEE FOR LODGING REQUESTS

1. Subject to paragraphs 2 and 3 below, the fee for lodging requests prescribed by the applicable Administrative and Financial Regulations is US$25,000. This non-refundable fee is payable to the Centre by a party: (a) requesting the institution of conciliation or arbitration proceedings under the Convention or the Additional Facility Rules; or (b) applying for annulment of an arbitral award rendered pursuant to the Convention.

2. A non-refundable fee of US$10,000 is payable to the Centre by any party: (a) requesting a supplementary decision to, or the rectification, interpretation or revision of, an arbitral award rendered pursuant to the Convention; (b) requesting a supplementary decision to, rectification or interpretation of, an arbitral award rendered pursuant to the Additional Facility Rules; or (c) requesting the resubmission of a dispute to a new Tribunal after the annulment of an arbitral award rendered pursuant to the Convention.

3. A non-refundable fee of US$3,000 is payable to the Centre by any party: (a) requesting the institution of fact-finding proceedings under the Fact-Finding Rules; or (b) requesting the institution of a mediation under the Mediation Rules.

II. FEES AND EXPENSES OF ARBITRATORS, CONCILIATORS, AD HOC COMMITTEE MEMBERS, FACT-FINDING COMMITTEE MEMBERS AND MEDIATORS

4. In addition to receiving reimbursement for any direct expenses reasonably incurred, arbitrators, conciliators, ad hoc Committee members, Fact-Finding Committee members and mediators are entitled to receive a fee of US$375 for each hour of work performed in connection with the proceedings including each hour spent in hearings, sessions and meetings, as well as per diem allowances and reimbursement of travel and other expenses within limits set forth in the applicable Administrative and Financial Regulation. Any request for a higher amount shall be made through the Secretary-General.

III. ADMINISTRATIVE CHARGES

5. An administrative charge of US$42,000 is levied by the Centre upon the registration of a request for arbitration, conciliation or post-award proceeding and annually thereafter. For cases registered before July 1, 2016, the annual administrative charge is levied by the Centre on the date of the constitution of the Conciliation Commission, Arbitral Tribunal, or ad hoc Committee concerned. The same annual charge applies to proceedings administered by the Centre under rules other than the ICSID Convention or Additional Facility Rules.

6. An administrative charge of [US$TBD] is levied by the Centre upon the registration of a request for mediation or a fact-finding proceeding and annually thereafter.
IV. PAYMENTS TO THE CENTRE

7. The administrative charge, the direct expenses incurred in connection with the proceedings, and the fees and expenses of the Commission, Tribunal, *ad hoc* Committee, Fact-Finding Committee or mediators are met from advance payments that the parties are periodically requested to make to the Centre under the applicable Administrative and Financial Regulation.

8. Any party may ask to be given advance notice that the Centre will be requesting a supplementary payment in a proceeding. Such a request should be addressed to the Secretary-General and should be made as early as possible in the proceeding.

V. APPOINTMENTS AND CHALLENGES IN PROCEEDINGS NOT CONDUCTED UNDER THE ICSID CONVENTION, ADDITIONAL FACILITY, FACT-FINDING OR MEDIATION RULES

9. A non-refundable fee of US$10,000 is payable to the Centre by a party requesting that the Secretary-General make an appointment in proceedings not conducted under the ICSID Convention, Additional Facility, Fact-Finding or Mediation Rules. This fee will be credited to the requesting party's share of the administrative charge if ICSID subsequently is selected to administer the proceeding.

10. A non-refundable fee of US$10,000 is payable to the Centre by a party requesting that the Secretary-General decide a disqualification proposal in proceedings not conducted under the ICSID Convention, Additional Facility, Fact-Finding or Mediation Rules.

VI. CHARGES FOR SPECIAL SERVICES

11. Under the applicable Administrative and Financial Regulation, a person asking the Centre to perform a special service must deposit in advance an amount sufficient to cover the resulting charges. The charges for such services are determined on the basis of the cost to ICSID of providing the service. Such services are additional to services provided by the Secretariat during the regular administration of cases or are services rendered to non-parties. For example, special services could include digitalizing or copying case records in a closed case. Any questions regarding such charges should be addressed to ICSID at icsidsecretariat@worldbank.org.
Members of Commissions, Tribunals, ad hoc Committees, Fact-Finding Committees and mediators in ICSID proceedings (referred to as “members” below) are entitled to receive an hourly fee, per diem allowance, and travel and other expense reimbursements referred to in Administrative and Financial Regulation 14, (Additional Facility) Administrative and Financial Regulation 6(1), (Fact-Finding) Administrative and Financial Regulation 6(1) or (Mediation) Administrative and Financial Regulation 6(1), as applicable. This memorandum explains those entitlements and how they are calculated, claimed and paid.

I. FEES

1. Members receive a fee for each hour of work performed in connection with the proceeding, including each hour spent participating in hearings, sessions and meetings.

2. When traveling for hearings, sessions or meetings held away from the member’s city of residence, the member receives a fee for each hour spent traveling, either by air or by ground, to and from the location of the hearing, session or meeting.

3. The amount of the hourly fee is US$375 per hour.

II. PER DIEM ALLOWANCE

4. Members are entitled to receive the flat-rate per diem allowances in paragraphs 5 and 6 below for each day they spend away from their city of residence while traveling in connection with a proceeding.

5. When overnight lodging is required, the amount of the per diem allowance is US$800 for each day. The allowance covers all personal expenses, including lodging, tax on lodging, service charges, meals, gratuities, in-city transportation (taxis, other means of transportation), laundry, personal communications and internet.

6. For day trips not requiring overnight lodging, the amount of the per diem allowance is US$200.

7. Members are entitled to claim the US$200 per diem allowance for each day of travel to and from the hearing, session or meeting, when lodging is not required, and for the day of return to their city of residence.

III. TRAVEL EXPENSES

8. When members are required to attend a hearing, session or meeting held away from their city of residence, they are entitled to claim reimbursement for the costs of air and ground transportation to and from the city where the hearing, session or meeting is held. Travel
must be arranged by the most direct route.

9. Members are authorized to travel at one class above economy. Reimbursement will be made based on the actual expenses incurred. Receipts and the passenger copy of the transport ticket or electronic boarding pass must be submitted with the claim for reimbursement.

10. Members may claim reimbursement for the costs of taxis to and from the points of departure and arrival, both at the city of residence and the city where the hearing, session or meeting is held. Receipts must be submitted with the claim for reimbursement.

11. If travel is undertaken in a privately-owned automobile, a mileage allowance will be paid at the rate of US$0.535 per mile/US$0.33 per km.

IV. OTHER REIMBURSABLE EXPENSES

12. Members are entitled to receive reimbursement for expenses reasonably incurred for the sole purpose of the proceeding. Such expenses may include, for example, courier costs and shredding case-related documents.

13. Claims for reimbursement of all expenses must be accompanied by receipts or other supporting documents.

V. CLAIMS AND PAYMENT

14. Claims for fees, *per diem* allowances and expenses should be submitted electronically to icsidpayments@worldbank.org using the Centre’s Claim for Fees and Expenses form.

15. Claims must be submitted regularly, and at least on a quarterly basis. Final claims must be submitted prior to the conclusion of the case.

16. A detailed breakdown of the work performed must be provided in the Claim form, and receipts or supporting documents for all expenses claimed must be attached.

17. A financial statement of the case account containing an itemized account of the fees and expenses of each member of the Commission, Tribunal, *ad hoc* Committee, Fact-Finding Committee or each mediator will be available to the parties at any time during the proceeding and upon conclusion of the proceeding.

18. Members are encouraged to share copies of their claim forms with one another during a proceeding to ensure it is conducted on a cost-effective basis.

19. Amounts paid to members do not include value added tax (VAT) or any other taxes and charges that might be applicable to the members’ fees and expenses. The recovery of any such taxes or charges is a matter solely between the member and the parties.
20. Claims are reviewed, processed and approved by the Secretariat, and payments are made by wire transfer to the accounts provided by the members. Typically, ICSID processes claims within 3-7 days of receipt of the claim.

21. Payment will be postponed if a Tribunal or Committee has not complied with applicable rules concerning time limits to render orders, decisions or Awards. Any payments postponed on this basis will be processed as soon as the Tribunal or Committee complies with the relevant rule.
SCHEDULE 3: ARBITRATOR DECLARATION

Case Name and No.: 

Arbitrator name: 

Arbitrator nationality(ies): 

I accept my appointment as arbitrator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Tribunal constituted by the International Centre for Settlement of Investment Disputes (“the Centre”) in this proceeding.

2. I am impartial and independent of the parties, and shall judge fairly, in accordance with the applicable law.

3. I shall not accept any instruction or compensation with regard to the arbitration from any source except as provided in the ICSID [Convention, Arbitration Rules and Administrative and Financial Regulations] or [Additional Facility Rules, Additional Facility Arbitration Rules and (Additional Facility) Administrative and Financial Regulations].

4. I understand that I am required to disclose:

   a. My professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. the parties’ representatives;
      iii. other members of the Tribunal (presently known); and
      iv. any third-party funder disclosed pursuant to [(ICSID Arbitration Rule 14 / (AF) Arbitration Rule 23)].

   b. Investor-State cases in which I have been or am currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert; and

   c. Other circumstances that might reasonably cause my independence or impartiality to be questioned.

[Select one]:

- A statement is attached.
- I have no such disclosures to make and attach no statement.
5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this arbitration, including the contents of any Award made by the Tribunal.

7. I will not engage in any *ex parte* communication concerning this arbitration with a party or its representative.

8. I have sufficient availability to perform my duties as arbitrator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules. My availability in the next 24 months, as currently known by me is [insert calendar].

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this arbitration.

10. I will adhere to the Memorandum on Fees and Expenses in ICSID Proceedings published by the Centre.

11. I attach my current *curriculum vitae*.

Signed [form to allow electronic signature]

Date
SCHEDULE 4: TRIBUNAL-APPOINTED EXPERT DECLARATION

Case Name and No.: [Redacted]
Expert name: [Redacted]
Expert nationality(ies): [Redacted]

I accept my appointment as a Tribunal-appointed expert in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve as a Tribunal-appointed expert in this proceeding.

2. I am impartial and independent of the parties and their representatives in this proceeding and shall report to the Tribunal on the matter(s) assigned to me in accordance with AR 39 of the ICSID Arbitration Rules ((AF) Arbitration Rule 49) and my terms of reference.

3. I understand that I am required to disclose:
   a. My professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. the parties’ representatives;
      iii. members of the Tribunal; and
      iv. any third-party funder disclosed pursuant to [(ICSID Arbitration Rule 14 / (AF) Arbitration Rule 23)].
   b. Investor-State cases in which I have been or am currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert; and
   c. Other circumstances that might reasonably cause my independence or impartiality to be questioned.

[Select one]:

- A statement is attached.
- I have no such disclosures to make and attach no statement.

4. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.
5. I shall keep confidential all information coming to my knowledge as a result of my participation in this arbitration, including the contents of any Award made by the Tribunal.

6. I will not engage in any *ex parte* communication concerning this arbitration with a party or their representatives.

7. I attach my current *curriculum vitae*.
SCHEDULE 5: AD HOC COMMITTEE MEMBER DECLARATION

Case Name and No.: 

Committee member name: 

Committee member nationality(ies): 

I accept my appointment as a Committee member in this annulment proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Committee constituted by the International Centre for Settlement of Investment Disputes (“the Centre”) in this proceeding.

2. I am impartial and independent of the parties, and shall judge fairly in accordance with the applicable law.

3. I shall not accept any instruction or compensation with regard to the annulment proceeding from any source except as provided in the ICSID Convention, Arbitration Rules and Administrative and Financial Regulations.

4. I understand that I am required to disclose:

   a. My professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. the parties’ representatives;
      iii. other members of the Committee (presently known); and
      iv. any third-party funder disclosed pursuant to (ICSID Arbitration Rule 14.
   b. Investor-State cases in which I have been or am currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert; and
   c. Other circumstances that might reasonably cause my independence or impartiality to be questioned.

[Select one]:

- [ ] A statement is attached.
- [ ] I have no such disclosures to make and attach no statement.
5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this annulment proceeding, including the contents of any Decision on Annulment made by the Committee.

7. I will not engage in any *ex parte* communication concerning this case with a party or its representative.

8. I have sufficient availability to perform my duties as a Committee member in an expeditious and cost-effective manner and in accordance with the time limits in the applicable arbitration rules. My availability in the next 24 months, as currently known by me is [insert calendar].

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this annulment proceeding.

10. I will adhere to the [Memorandum of Fees and Expenses in ICSID Proceedings](#) published by the Centre.

11. I attach my current *curriculum vitae*.

Signed [form to allow electronic signature]

Date
SCHEDULE 6: CONCILIATOR DECLARATION

Case Name and No.: 
Conciliator name: 
Conciliator nationality(ies): 

I accept my appointment as conciliator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Conciliation Commission constituted by the International Centre for Settlement of Investment Disputes ("the Centre") in this proceeding.

2. I am impartial and independent of the parties, and shall act fairly in accordance with the applicable rules.

3. I shall not accept any instruction or compensation with regard to the conciliation from any source except as provided in the ICSID [Convention, Conciliation Rules and Administrative and Financial Regulations] or [Additional Facility Rules, (Additional Facility) Conciliation Rules and (Additional Facility) Administrative and Financial Regulations].

4. I understand that I am required to disclose:

   a. My professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. the parties’ representatives;
      iii. other members of the Commission (presently known); and
      iv. any third-party funder disclosed pursuant to [(Conciliation Rule 12(1) / (AF) Conciliation Rule 21(1)].

   b. Investor-State cases in which I have been or am currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert; and

   c. Other circumstances that might reasonably cause my independence or impartiality to be questioned.

[Select one]:

- A statement is attached.
- I have no such disclosures to make and attach no statement.
5. I acknowledge that I have a continuing obligation to disclose any change in circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this conciliation, including the contents of any Report made by the Commission.

7. I will not have any *ex parte* communication concerning this conciliation with a party or its representative during the conciliation except as contemplated by the Minutes of the First Session, the applicable rules or any party agreement.

8. I have sufficient availability to perform my duties as conciliator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable conciliation rules. My availability in the next 24 months, as currently known by me is [insert calendar].

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this conciliation.

10. I will adhere to the Memorandum on Fees and Expenses in ICSID Proceedings published by the Centre.

11. I attach my current *curriculum vitae*.
SCHEDULE 7: FACT-FINDING COMMITTEE MEMBER DECLARATION

Case Name and No.:  
Committee member name:  
Committee member nationality(ies):  

I accept my appointment as a Committee member in this fact-finding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve on the Committee constituted by the International Centre for Settlement of Investment Disputes (“the Centre”) in this fact-finding.

2. I am impartial and independent of the parties, and shall discharge my mandate fairly.

3. I shall not accept any instruction or compensation with regard to the fact-finding from any source except as provided in the ICSID Fact-Finding Rules and (Fact-Finding) Administrative and Financial Regulations.

4. I understand that I am required to disclose:

   a. My professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. the parties’ representatives;
      iii. the other members of the Committee (presently known); and
   b. Other circumstances that might reasonably cause my independence or impartiality to be questioned.

   [Select one]:

   □ A statement is attached.

   □ I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.

6. I shall keep confidential all information coming to my knowledge as a result of my participation in this fact-finding, including the contents of any Report made by the Committee.
7. I will not engage in any *ex parte* communication concerning this fact-finding with a party or its representative.

8. I have sufficient availability to perform my duties as a Committee member in an expeditious and cost-effective manner. My availability in the next 24 months, as currently known by me is [insert calendar].

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this fact-finding.

10. I will adhere to the Memorandum on Fees and Expenses in ICSID Proceedings published by the Centre.

11. I attach my current *curriculum vitae*.

Signed [form to allow electronic signature]  

Date
SCHEDULE 8: MEDIATOR DECLARATION

Case Name and No.: 

Mediator name: 

Mediator nationality(ies): 

I accept my appointment as mediator in this proceeding and make the following declarations:

1. To the best of my knowledge, there is no reason why I should not serve as a mediator in this mediation administered by the Secretariat of the International Centre for Settlement of Investment Disputes (“the Centre”).

2. I am impartial and independent of the parties, and shall act fairly in accordance with the applicable rules.

3. I shall not accept any instruction or compensation with regard to the mediation from any source except as provided in the ICSID Mediation Rules and (Mediation) Administrative and Financial Regulations.

4. I understand that I am required to disclose:

   a. My professional, business and other significant relationships, within the past five years with:
      i. the parties;
      ii. the parties’ representatives;
      iii. the other co-mediator, if any.
   
   b. Investor-State cases in which I have been or am currently involved as counsel, conciliator, arbitrator, ad hoc Committee member, Fact-Finding Committee member, mediator or expert; and
   
   c. Other circumstances that might reasonably cause my independence or impartiality to be questioned.

[Select one]:

- [ ] A statement is attached.
- [ ] I have no such disclosures to make and attach no statement.

5. I acknowledge that I have a continuing obligation to disclose any change in circumstances which might cause my independence or impartiality to be questioned, and will promptly notify the Secretary-General of any such circumstances.
6. I shall keep confidential all information coming to my knowledge as a result of my participation in this mediation, including the contents of any Notice of Termination of the mediation.

7. I will not have any *ex-parte* communication concerning this mediation with a party or its representative during the mediation except as contemplated by the Protocol, the applicable rules or any party agreement.

8. I have sufficient availability to perform my duties as mediator in an expeditious and cost-effective manner and in accordance with the time limits in the applicable mediation rules. My availability in the next 24 months, as currently known by me is [insert calendar].

9. I confirm that I will not accept new commitments that would conflict with or interfere with my capacity to perform my duties in this mediation.

10. I will adhere to the Memorandum on Fees and Expenses in ICSID Proceedings published by the Centre.

11. I attach my current *curriculum vitae*.

Signed [form to allow electronic signature]

Date
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I. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ICSID CONVENTION PROCEEDINGS
(Administrative and Financial Regulations)

Introductory Note

The Administrative and Financial Regulations for ICSID Convention Proceedings (Administrative and Financial Regulations) were adopted by the Administrative Council of the Centre pursuant to Article 6(1)(a) of the ICSID Convention.

These Regulations concern the functioning of ICSID as an international institution. They also contain provisions that apply generally in proceedings and are complementary to the Convention and the Institution, Conciliation and Arbitration Rules, adopted pursuant to Article 6(1)(b) and (c) of the Convention.

Chapter I
Procedures of the Administrative Council

Regulation 1
Date and Place of the Annual Meeting

The Annual Meeting of the Administrative Council shall take place in conjunction with the Annual Meeting of the Board of Governors of the International Bank for Reconstruction and Development (“Bank”), unless the Council specifies otherwise.

Regulation 2
Notice of Meetings

(1) The Secretary-General shall give each member notice of the time and place of meetings of the Administrative Council by any rapid means of communication. This notice shall be dispatched not less than 42 days prior to the date set for such meeting, except that in urgent cases notice shall be sufficient if dispatched not less than 10 days prior to the date of the meeting.

(2) Any meeting of the Administrative Council at which no quorum is present may be adjourned by a majority of the members present and notice of the adjourned meeting need not be given.
### Regulation 3
**Agenda for Meetings**

1. The Secretary-General shall prepare an agenda for each meeting of the Administrative Council under the direction of the Chairman of the Administrative Council (“Chair”) and shall transmit the agenda to each member with notice of the meeting.

2. Additional subjects may be placed on the agenda by any member by giving notice thereof to the Secretary-General not less than 7 days prior to the date set for such meeting.

3. In special circumstances the Chair, or the Secretary-General after consulting with the Chair, may at any time place additional subjects on the agenda for a meeting of the Administrative Council.

4. The Secretary-General shall promptly give each member notice of additional subjects on the agenda.

5. The Administrative Council may authorize any subject to be placed on the agenda at any time even though the notice required by this Regulation has not been given.

### Regulation 4
**Presiding Officer**

1. The Chair shall be the Presiding Officer at meetings of the Administrative Council.

2. The Chair shall designate a Vice-President of the Bank to preside over all or any part of a meeting if the Chair is unable to preside.

### Regulation 5
**Secretary of the Council**

1. The Secretary-General shall serve as Secretary of the Administrative Council.

2. Except as otherwise directed by the Administrative Council, the Secretary-General, in consultation with the Chair, shall make all arrangements for meetings of the Council and may coordinate with appropriate officers of the Bank for this purpose.

3. The Secretary-General shall present the annual report on the operation of the Centre to each Annual Meeting of the Administrative Council for its approval pursuant to
Article 6(1)(g) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”).

(4) The Secretary-General shall publish the annual report and a summary record of the proceedings of the Administrative Council.

Regulation 6
Attendance at Meetings

(1) The Secretary-General and the Deputy Secretaries-General may attend all meetings of the Administrative Council.

(2) The Secretary-General, in consultation with the Chair, may invite observers to attend any meeting of the Administrative Council.

Regulation 7
Voting

(1) Except as otherwise provided in the Convention, all decisions of the Administrative Council shall be taken by a majority of the votes cast. The Presiding Officer may ascertain the sense of the meeting in lieu of a formal vote but shall require a formal vote upon the request of any member. The written text of the motion shall be distributed to the members if a formal vote is required.

(2) No member of the Administrative Council may vote by proxy or by any method other than in person, but a member may designate a temporary alternate to cast its vote at any meeting at which the regular alternate is not present.

(3) Between Annual Meetings, the Chair may call a special meeting or request that the Administrative Council vote by correspondence on a motion. The Secretary-General shall transmit the request for a vote by correspondence to each member with the text of the motion to be voted upon to each member. Votes shall be cast within 45 days after such transmission, unless a longer period is approved by the Chair. Upon expiry of the established period, the Secretary-General shall record the results and notify all members of the outcome. The motion shall be considered lost if the replies received do not include those of a majority of the members.

(4) If all Contracting States are not represented at a meeting of the Administrative Council and the votes necessary to adopt a proposed decision by a majority of two-thirds of the members of the Council are not obtained, the Council, with the concurrence of the Chair, may decide that the votes of those members of the Council represented at the meeting shall be registered and the votes of the absent members...
shall be solicited in accordance with paragraph (3). Votes registered at the meeting may be changed by the member before the expiry of the voting period established pursuant to paragraph (3).

1. A proposal to delete the last sentence of AFR 7(4) was not adopted (see WP # 2, Vol. 1, ¶ 10 for further detail).
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The Secretariat

Regulation 8
Election of the Secretary-General and Deputy Secretaries-General

In proposing to the Administrative Council one or more candidates for the office of Secretary-General or Deputy Secretary-General, the Chair shall also make proposals with respect to their term and conditions of employment.

Regulation 9
Acting Secretary-General

(1) If there is more than one Deputy Secretary-General, the Chair may propose to the Administrative Council the order in which the Deputies shall act as Secretary-General pursuant to Article 10(3) of the Convention. In the absence of such a decision by the Administrative Council, the Secretary-General shall determine the order in which the Deputies shall act as Secretary-General.

(2) The Secretary-General shall designate the member of the staff of the Centre who shall act as Secretary-General during the absence or inability to act of the Secretary-General and the Deputy Secretaries-General. If there should be a simultaneous vacancy in the offices of Secretary-General and Deputy Secretary-General, the Chair shall designate the member of the staff who shall act as the Secretary-General.

2. One State noted the importance of designating a replacement for the Secretary-General who has significant experience in ICSID proceedings given the duties of the Secretary-General under the Convention and relevant rules. This is clearly a factor considered by the Chair when the situation arises.

Regulation 10
Appointment of Staff Members

The Secretary-General shall appoint the staff of the Centre. Appointments may be made directly or by secondment.
Regulation 11
Conditions of Employment

(1) The conditions of employment of the staff of the Centre shall be the same as those of the staff of the Bank.

(2) The Secretary-General shall make arrangements with the Bank, within the framework of the general administrative arrangements approved by the Administrative Council pursuant to Article 6(1)(d) of the Convention, for the participation of members of the Secretariat in the Staff Retirement Plan of the Bank and in other facilities and contractual arrangements established for the benefit of the staff of the Bank.

Regulation 12
Authority of the Secretary-General

(1) Deputy Secretaries-General and the staff of the Centre shall act solely under the direction of the Secretary-General.

(2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. Deputy Secretaries-General may only be dismissed with the concurrence of the Administrative Council.

Regulation 13
Incompatibility of Functions

The Secretary-General, the Deputy Secretaries-General and the staff of the Centre may not serve on the Panels of Conciliators or of Arbitrators, or as members of any Commission, Tribunal or Committee.
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Financial Provisions

Regulation 14  
Fees, Allowances and Charges

(1) Each member of a Commission, Tribunal or Committee shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a hearing, meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a hearing, meeting or session held away from the member’s place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing, meeting or session is held; and

(iii) a per diem allowance for each day the member spends away from their place of residence.

(2) The Secretary-General, with the approval of the Chair, shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Commission, Tribunal or Committee and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties to for the services of the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) members of Commissions, Tribunals and Committees, and any assistants approved by the parties;

(b) witnesses and experts called by a Commission, Tribunal or Committee who have not been presented by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any hearing, meeting or session held outside an ICSID facility.
3. Numerous States and the public requested further steps to ensure compliance with the rules concerning timely rendering of orders, decisions and Awards. As noted in WP # 2, the Centre will track such non-compliance on its webpage (see WP # 2, Vol. 1, ¶ 22). In addition, WP # 3 proposes changes to the schedule of fees (Schedule 1) to postpone the processing of arbitrator invoices until the Tribunal or ad hoc Committee has complied with the relevant timelines, most notably those stipulated in AR 12, AR 57(1) and AR 71(5).

4. One State suggested including timeliness in the rules as a stated criterion for selection of arbitrators by the Secretary-General or the Chair. This is a relevant consideration in practice and will be noted on the Centre’s webpage addressing arbitrator selection. It is not included in the amended rules as the formal criteria are stated in Art. 14 of the Convention.

5. The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission, Tribunal or Committee, unless the parties have made sufficient payments to defray the costs of the proceeding.

Regulation 15 Payments to the Centre

(1) To enable the Centre to pay the costs referred to in Regulation 14, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for arbitration or conciliation, the Secretary-General shall request the claimant(s) to make a payment to defray the estimated costs of the proceeding through the first session of the Commission or Tribunal, which shall be considered partial payment by the claimant(s) of the payment referred to in paragraph (1)(b);

(b) upon constitution of a Commission, Tribunal or Committee, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding;

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding;

(d) the Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(2) In conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division. In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless a different division is agreed to by the parties or
ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal’s final decision on the payment of costs pursuant to Article 61(2) of the Convention.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(3)(4) This Regulation shall apply to requests for a supplementary decision on or rectification of an Award, and to an application for interpretation or revision of an Award, and a request for resubmission of the dispute.

(4)(5) This Regulation shall apply to an application for annulment of an Award, except that the applicant shall be solely responsible for making the payments requested by the Secretary-General.

5. One State requested interim financial statements identifying fees and expenses by individual arbitrators. This practice will be adopted and the amount each arbitrator bills individually will be detailed in the interim and final financial statements (see Schedule 2 – Memorandum of Fees and Expenses). In addition, new AR 58(1)(j) requires this information to be in the Award.

6. AFR 15(2) is amended to delete “unless the parties agree on a different division”, as this contradicts Art. 61 of the Convention.

**Regulation 16**

**Consequences of Default in Payment**

(1) The payments referred to in Regulation 15 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

   (a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

   (b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Commission, Tribunal or Committee if constituted; and

   (c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Commission, Tribunal or Committee if constituted.
7. Some States commented that the 30-day period in AFR 16(2)(a) does not provide sufficient advance notice for their internal budgeting processes. This can be addressed administratively. Specifically, the Memorandum of Fees and Expenses (Schedule 2) has been updated to expressly note that parties can arrange with the Centre to receive advance notice that a call for funds will be made. Thus, a party might ask that requests for advances be notified within a certain number of months before the next scheduled event in the case, at a regular interval, or otherwise. Therefore, no change to the proposed rule is required.

8. One State requested that AFR 16(2)(c) clarify that the 90-day period is 90 consecutive days; this has been incorporated.

| Regulation 17  
| Special Services  

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

9. One State asked for further elaboration of what is included in special services. A short note to this effect is added in the Schedule of Fees (Schedule 1).

| Regulation 18  
| Fee for Lodging Requests  

The party or parties (if a request is jointly) wishing to institute an arbitration or conciliation proceeding, or requesting a supplementary decision, rectification, interpretation, revision or annulment of an Award, or resubmission of a dispute, shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

| Regulation 19  
| The Budget  

(1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of the following year.

(2) Before the end of each fiscal year, the Secretary-General shall prepare a budget indicating expected expenditures of the Centre (except those to be incurred on a reimbursable basis) and expected revenues (excepting reimbursements) for the
following fiscal year. The budget shall be submitted for adoption by the Administrative Council at its next Annual Meeting in accordance with Article 6(1)(f) of the Convention.

(3) If the Secretary-General determines during the fiscal year that the expected expenditures will exceed those authorized in the budget, or wishes to incur expenditures not previously authorized, the Secretary-General shall prepare a supplementary budget in consultation with the Chair and submit it to the Administrative Council for adoption, in accordance with Regulation 7.

(4) The adoption of a budget constitutes authority for the Secretary-General to make expenditures and incur obligations for the purposes and within the limits specified in the budget. Unless otherwise provided by the Administrative Council, the Secretary-General may exceed the amount specified for any given budget item, provided that the total amount of the budget is not exceeded.

(5) Pending the adoption of the budget by the Administrative Council, the Secretary-General may incur expenditures for the purposes and within the limits specified in the budget submitted, up to one quarter of the amount authorized to be expended in the previous fiscal year but in no event exceeding the amount that the Bank has agreed to make available for the current fiscal year.

Regulation 20
Assessment of Contributions

(1) Any excess of expected expenditures over expected revenues shall be assessed on the Contracting States. Each State that is not a member of the Bank shall be assessed a fraction of the total assessment equal to the fraction of the budget of the International Court of Justice that it would have to bear if that budget were divided only among the Contracting States in proportion to the then current scale of contributions applicable to the budget of the Court; the balance of the total assessment shall be divided among the Contracting States that are members of the Bank in proportion to their respective subscription to the capital stock of the Bank. The assessments shall be calculated by the Secretary-General immediately after the adoption of the annual budget, on the basis of the then current membership of the Centre, and shall be promptly communicated to all Contracting States. The assessments shall be payable as soon as they are communicated.

(2) On the adoption of a supplementary budget, the Secretary-General shall immediately calculate supplementary assessments, which shall be payable as soon as they are communicated to the Contracting States.

(3) A State which is party to the Convention during any part of a fiscal year shall be assessed for the entire fiscal year. If a State becomes a party to the Convention after
the assessments for a given fiscal year have been calculated, its assessment shall be calculated by the application of the same appropriate factor as was applied in calculating the original assessments, and no recalculation of the assessments of the other Contracting States shall be made.

(4) If, after the close of a fiscal year, it is determined that there is a cash surplus, such surplus shall, unless the Administrative Council decides otherwise, be credited to the Contracting States in proportion to the assessed contributions they had paid for that fiscal year. These credits shall be made with respect to the assessments for the fiscal year commencing two years after the end of the fiscal year to which the surplus pertains.

**Regulation 21**

**Audits**

The Secretary-General shall have an audit of the accounts of the Centre made once each year and on the basis of this audit submit a financial statement to the Administrative Council for consideration at the Annual Meeting.

**Regulation 22**

**Administration of Proceedings**

The ICSID Secretariat is the only entity authorized to administer proceedings conducted under the ICSID Convention.
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General Functions of the Secretariat

Regulation 23
List of Contracting States

The Secretary-General shall maintain and publish a list of the Contracting States (including former Contracting States, showing the date on which their notice of denunciation was received by the depositary), indicating for each:

(a) the date on which the Convention entered into force with respect to it;

(b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;

(c) any designation pursuant to Article 25(1) of the Convention of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;

(d) any notification pursuant to Article 25(3) of the Convention that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;

(e) any notification pursuant to Article 25(4) of the Convention of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;

(f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention;

(g) any legislative or other measures taken pursuant to Article 69 of the Convention for making the provisions of the Convention effective in the territories of the State and communicated by the State to the Centre; and

(h) the name, address and contact details of the authority in each State to which documents should be notified, as reported by the State.
Regulation 24
Panels of Conciliators and of Arbitrators

(1) The Secretary-General shall invite each Contracting State to make its designations to the Panels of Conciliators and of Arbitrators if a designation has not been made or the period of a designation has expired.

(2) Each designation made by a Contracting State or by the Chair shall indicate the designee’s name, contact information, nationality and qualifications, with particular reference to competence in the fields of law, commerce, industry or finance.

(3) The Secretary-General shall immediately inform a designee of their designation, the designating authority, and the end of the designation period, and shall request confirmation that the designee is willing to serve.

(4) The Secretary-General shall maintain and publish lists naming the members of the Panels of Conciliators and of Arbitrators, indicating the contact information, nationality, end of the designation period, designating authority, and qualifications of each member.

10. One State proposed that States be required to make best efforts to respond within 90 days to a reminder to appoint to the Panels of Arbitrators and of Conciliators, and that States refrain from appointing persons concurrently holding public office, as these persons would be conflicted. ICSID proposes to include these points in its guidance for States on appointment of Panel members.

Regulation 25
Publication

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

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

(b) documents generated in proceedings, in accordance with the Rules applicable to the individual proceedings.

11. At the suggestion of several States, this regulation retains the form proposed in WP # 1 and # 2. AFR 25(b) recognizes that publication in a specific case may depend on a number of factors including the scope of consent of the parties, the procedural rules applicable and the applicable treaty.
Regulation 26
The Registers

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

Regulation 27
Communications with Contracting States

(1) Unless a specific channel of communication is notified by the State concerned, all communications required by the Convention or these Regulations to be sent to Contracting States shall be addressed to the State’s representative on the Administrative Council and sent by rapid means of communication.

(2) The time limits referred to in Articles 65 and 66 of the Convention and Regulations 2, 3 and 7 shall be calculated from the date on which the Secretary-General transmits or receives the relevant document. The date of transmittal or receipt shall be excluded from the calculation.

12. One State asked for further detail on the time limits applicable to the delivery of institutional documents, including with respect to the impact of weekends and holidays. AFR 27(2) has therefore been added. The proposed provision does not exclude weekend or holiday days in any State from the calculation, to ensure the same overall time is available to each Member State.

Regulation 28
Secretary

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from the Secretariat, and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the Rules applicable to individual proceedings or assigned to the Secretary-General by the Convention, and delegated to the Secretary; and
(b) assist the parties and the Commission, Tribunal or Committee with all aspects of the proceedings, including the expeditious and cost-effective conduct of the proceeding.

13. The additional language reflects a suggestion from States to reinforce the importance of timeliness. In practice, the Secretariat already encourages parties and Commissions, Tribunals and Committees to proceed in an expeditious fashion, and hence the addition reflects existing practice.

14. As requested by States, ICSID will draft an information note for its website with further information about the role of an ICSID Secretary.

**Regulation 29**

**Depositary Functions**

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for arbitration, conciliation, supplementary decisions, rectification, interpretation, revision or applications for annulment;

(b) all written submissions, written statements, observations, supporting documents and communications filed in a proceeding;

(c) the minutes, recordings and transcripts of hearings, meetings or sessions in a proceeding; and

(d) any order, decision, Report or Award by a Commission, Tribunal or Committee.

(2) Subject to the applicable rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties. Certified copies of the documents referred to in paragraph (1)(d) shall reflect any supplementary decision, rectification, interpretation, revision or annulment and any stay of enforcement in effect.

15. One State requested further detail in the rules on the period for archiving and the format of archived documents (electronic). ICSID maintains one copy of every case indefinitely, and follows the World Bank administrative procedures specifying the period and format of archiving, hence no change has been made to this rule.
I. ADMINISTRATIVE AND FINANCIAL REGULATIONS

Chapter V - Immunities and Privileges

Regulation 30 - Certificates of Official Travel
Regulation 31 - Waiver of Immunities
Chapter V
Immunities and Privileges

Regulation 30
Certificates of Official Travel

The Secretary-General may issue certificates of official travel to members of Commissions, Tribunals or Committees, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under the Convention.

16. The addition of “advisors” makes Regulation 30 and 31 consistent with the definition of “representative” in AR 3 and CR 2.

Regulation 31
Waiver of Immunities

(1) The Secretary-General may waive the immunity of:

   (a) the Centre; and

   (b) members of the Secretariat.

(2) The Chair may waive the immunity of:

   (a) the Secretary-General and any Deputy Secretary-General;

   (b) members of a Commission, Tribunal or Committee; and

   (c) the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in a proceeding, if the Commission, Tribunal or Committee concerned recommends such waiver.

(3) The Administrative Council may waive the immunity of:

   (a) the Chair and members of the Council;

   (b) the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned; and

   (c) the Centre or any person referred to in paragraphs (1) or (2).
(4) A waiver under paragraphs (1) or (2) shall be made in writing by the Secretary-General or Chair, as applicable. A waiver under paragraph (3) shall be made by a decision of the Administrative Council in accordance with Article 7(2) of the Convention.
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Chapter VI
Official Languages

Regulation 32
Languages of Regulations

(1) The official languages of the Centre are English, French and Spanish.

(2) The texts of these Regulations in each official language are equally authentic.

(3) The singular form of words in the Rules and Regulations made pursuant to the Convention include the plural form of that word, unless otherwise stated or required by the context of the provision.
# II. INSTITUTION RULES FOR ICSID CONVENTION PROCEEDINGS

(INSTITUTION RULES)

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II. INSTITUTION RULES OF PROCEDURE FOR THE INSTITUTION OF ICSID CONVENTION CONCILIATION AND ARBITRATION PROCEEDINGS (INSTITUTION RULES)

Introductory Note

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

The Institution Rules apply from the filing of a Request for arbitration or conciliation under the ICSID Convention to the date of registration or refusal to register. If a Request is registered, the Arbitration or Conciliation Rules apply to the subsequent procedure. The Institution Rules do not apply to the initiation of post-Award remedy proceedings, or to proceedings under pursuant to the Additional Facility, the ICSID Fact-Finding Rules and the ICSID Mediation Rules.

Rule 1
The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) shall file a Request for arbitration or conciliation together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 2
Contents of the Request

(1) The Request shall:

(a) state whether it relates to an arbitration or conciliation proceeding;

(b) be in English, French or Spanish;
(c) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(d) be signed by each requesting party or its representative and be dated;

(e) attach proof of any representative’s authority to act; and

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) With regard to the jurisdiction of the Centre, the Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising directly out of the investment;

(b) with respect to each party’s consent to submit the dispute to arbitration or conciliation under the Convention:

(i) the instrument(s) in which each party’s consent is recorded;

(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;

(c) if a party is a natural person:

(i) information concerning that person’s nationality on both the date of consent and on the date of the Request, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the Request;

(d) if a party is a juridical person:
(i) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the Contracting State party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another Contracting State pursuant to Article 25(2)(b) of the Convention, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision or agency of a Contracting State:

(i) the State’s designation to the Centre pursuant to Article 25(1) of the Convention; and

(ii) supporting documents demonstrating the State’s approval of consent pursuant to Article 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.

17. IR 2(2)(a) adds a requirement that the Request include an estimate of any damages sought.

18. New IR 2(b)(iv) in WP # 3 requires that a requesting party indicate whether it has complied with any conditions in the applicable instrument of consent. This would address, for example, cooling-off periods, fork-in-the-road clauses and prescription and limitation periods.

19. Some States suggested that the rule require or recommend (see IR 3, below) disclosure of the financial status of a requesting party and the corporate structure of a requesting party that is a legal entity. To the extent that this information is relevant for the purposes of the Secretariat’s review of the Request, it would be addressed by the requestor in the information submitted under IR 2(2)(a).

---

**Rule 3**

**Recommended Additional Information**

It is recommended that the Request also contain any procedural proposals or agreements reached by the parties, including with respect to:

(a) an estimate of the amount of damages sought, if any;

(b)(a) a proposal concerning the number and method of appointment of arbitrators or conciliators; and

(e)(b) the proposed procedural language(s); and
20. The estimate of any damages sought is now required content (IR 2) and is thus deleted from IR 3.

**Rule 4**

**Filing of the Request and Supporting Documents**

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a supporting document may be filed as a supporting document if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

(4) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.

**Rule 5**

**Receipt of the Request and Routing of Written Communications**

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.
Rule 6  
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall review the Request pursuant to Article 28(3) or 36(3) of the Convention.

(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 7  
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators or conciliators, unless such information has already been provided, and to constitute a Tribunal or Commission without delay;

(d) invite the parties to constitute a Tribunal or Commission without delay

(e)(d) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal or Commission in regard to jurisdiction of the Centre, competence of the Tribunal or Commission, and the merits; and

(f)(e) remind the parties to make the disclosure required by Arbitration Rule 143 or and Conciliation Rule 120.

21. IR 7(d) has been merged with paragraph (c) in WP # 3 to further streamline the rule.

22. The “and” previously appearing in IR 7(e) is replaced with “or” as only one of the two provisions referenced will apply.

23. One State suggested that the Notice of Registration mention the availability of Expedited Arbitration pursuant to Chapter XII of the AR. Another State suggested that the Notice of Registration remind parties of the availability of mediation. The Notice of Registration is
accompanied by a letter to the parties with additional information concerning the proceeding. The availability of Expedited Arbitration, Mediation and Fact-Finding proceedings will be added in this letter.

**Rule 8**  
**Withdrawal of the Request**

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 5(b).

**Rule 9**  
**Final Provisions**

(1) The English, French and Spanish texts of these Rules are equally authentic.

(2) These Rules may be cited as the “Institution Rules” of the Centre.
III. ARBITRATION RULES FOR ICSID CONVENTION PROCEEDINGS
(ARBITRATION RULES)

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III. **Arbitration Rules of Procedure for Arbitration-ICSID Convention Proceedings**

(ARBITRATION RULES)

**Introductory Note**

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

The Arbitration Rules are supplemented by the Administrative and Financial Regulations of the Centre.

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

**Chapter I**

**General Provisions**

**Rule 1**

**Application of Rules**

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

(2) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it does not conflict with the Convention or the Administrative and Financial Regulations.

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

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

24. AR 26(4) from WP # 2 has been moved to AR 1(2) in view of the general application of the rule.
Rule 2
General Duties

(1) The Tribunal and the parties shall conduct the proceeding and implement the Tribunal’s orders and decisions in good faith and in an expeditious and cost-effective manner.

(2) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.

(3) The Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.

25. Some States inquired as to the application of the good faith obligation required by AR 2(1) and sought clarity as to whether it applied to matters such as jurisdiction. Other States commented that they understood that the good faith obligation related only to procedural matters.

26. States also commented that the good faith obligation should be related to the conduct of the proceeding but not to the implementation of the Tribunal’s orders. One State suggested the imposition of adequate and specific penalties for violation of the good faith obligation.

27. The proposed change to AR 2(1) in WP # 3 clarifies that the good faith obligation is related to the conduct of the proceeding. In addition, AR 2(3) in WP # 2 has been merged with paragraph (1) as it also concerns the conduct of the proceeding.

Rule 3
Meaning of Party and Party Representative

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

(a) all parties acting as claimant or as respondent;

(b) a representative of a party.

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

28. AR 3(1)(b) is deleted as “representative” is fully dealt with in AR 3(2).

29. One State commented that the definition of “Party” and “Party representative” was overly broad. The definition is intended to be broad enough to accommodate officials or other
advisors acting on behalf of the State, in response to comments received in WP # 2.

30. Another State asked that Rule 3 explicitly state that the other party and the Tribunal will be notified without delay when a new party representative is named. The Centre acknowledges receipt of all documents filed and transmits them to the other party immediately upon receipt, including any notifications of a new representative; no amendment to this rule is required.

31. AR 4 now addresses only the manner of filing documents, while AR 6 deals with the routing of the documents filed.

32. The order of AR 4(1) and (2) has been switched.

33. One State suggested that the term “supporting documents” in AR 5(1) should be expanded to capture all potential forms of evidence such as video or audio exhibits that may be filed...
in a proceeding. WP # 3 does not propose such a change because it is understood that “exhibits” cover all formats evidence, including mixed media files. However, a change has been made in paragraphs (2) and (3) to account for the fact that not all supporting documents are in written format.

34. One State commented that supporting documents are not always filed with the written submission to which they relate if they are filed following leave to file an unscheduled supporting document pursuant to AR 30(3). This is correct and is consistent with AR 5(1).

35. With regard to extracting documents, some States suggested that the default rule should be that a document be provided in full instead of an extract. Such a default rule may prove burdensome and is not necessary since AR 5(2) gives a party the ability to request the extract in full at any time and without the intervention of the Tribunal.

### Rule 6
**Routing of Documents**

The Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other;

(b) the Tribunal, unless the parties communicate directly with the Tribunal on request of the Tribunal or by agreement of the parties; and

(c) the Chairman of the Administrative Council (“Chair”) if applicable.

(1) The Secretary-General shall be the official channel for routing of documents among the parties, the Tribunal, and the Chairman of the Administrative Council (“Chair”), except that:

(a) the parties may communicate directly with each other, provided that they transmit all documents to be filed in the proceeding to the Secretary-General;

(b) the members of the Tribunal shall communicate directly with each other; and

(c) a party may communicate directly with the Tribunal on request of the Tribunal or by agreement of the parties, provided that the other party and the Secretary-General are copied.

(2) The Secretary-General shall:

(a) acknowledge receipt of all documents transmitted by a party; and distribute the documents to the other party and the Tribunal, unless they were transmitted pursuant to paragraph 1(a) or (c).
AR 6 streamlines provisions relating to the routing of documents but does not change the substance of the Rule.

Rule 7
Procedural Languages, Translation and Interpretation

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

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written submissions, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may order a party to file such documents in both procedural languages.

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

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

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may order interpretation into the other procedural language.

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

(8) The recordings and transcripts of a hearing shall be made in the procedural language(s) used at the hearing.

States offered differing views on the need to limit the number of procedural languages and on the rules regulating translations. Some States suggested that parties to a dispute should
use their best efforts to agree on only one procedural language in order to reduce costs. Other States were of the view that each party should have the right to select the procedural language that it prefers and that all documents be translated into both languages if there are two, to ensure public access to case documents in the relevant language and to comply with domestic legislation regarding public documents.

38. Given the time and cost of preparing translations in a bi-lingual proceeding, WP # 3 retains the default rule that the Tribunal has discretion to order translation of documents into the other procedural language when the parties do not agree on translations.

**Rule 8**

**Correction of Errors and Deficiencies**

(1) A party may correct an accidental error in a document promptly upon discovery and at any time before the Award is rendered, with agreement of the other party or with leave of the Tribunal. The parties may refer any dispute regarding a correction to the Tribunal for determination.

(2) The Secretary-General may request that a party correct any deficiency in a filing or make the required correction.

39. AR 8(1) has been revised in response to comments from States suggesting that a party should correct an error in a document as promptly as possible. The provision now specifies that the Tribunal will address any disputed corrections.

40. AR 8(2) has been deleted in response to State comments that the Secretary-General's power to request the correction of deficiencies in a filing ought to be circumscribed. As a practical matter, the Secretary of the Tribunal typically requests that the relevant party rectify a deficiency, for example to provide additional USB keys. This practice does not need to be addressed in the Rules.

**Rule 9**

**Calculation of Time Limits**

(1) References to time shall be determined based on the time at the seat of the Centre on the relevant date.

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

(a) the Tribunal, or the Secretary-General if applicable, announces the period; or

(b) the procedural step starting the period is taken.
(3) A time limit shall be satisfied if a procedural step is taken or a document is received by the Secretary-General on the relevant date, or, if the date falls on a Saturday or Sunday, or a holiday observed by the Secretariat, on the subsequent business day.

41. Some States suggested that AR 9(3) refer to a holiday observed by the party required to take a step instead of a “holiday observed by the Secretariat”. AR 9(3) deletes “holidays observed by the Secretariat” from the calculation of time limits on procedural steps to be taken by parties.

42. The parties and the Tribunal can take into account any specific holidays that may apply to them when establishing the procedural calendar.

Rule 10
Fixing Time Limits Applicable to Parties

(1) The Tribunal, or the Secretary-General if applicable, shall fix time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by the Convention or these Rules.

(2) The Parties may agree to extend any time limit other than those in Articles 49, 51 and 52 of the Convention.

(3) The Tribunal, or the Secretary-General if applicable, may extend any time limit that they fixed, upon a reasoned application by either party made prior to its expiry. The Tribunal may delegate this power to its president.

(4) An application or request filed after the expiry of the time limits in Articles 49, 41 and 52 of the Convention shall be disregarded. A procedural step taken or document received after the expiry of any other time limit shall be disregarded unless:

(a) the other party does not object to the late step or filing; or

(b) the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet a time limit that they fixed.

43. AR 10 has been divided into two rules for greater clarity. AR 10 in WP # 3 regulates the fixing of time limits and AR 11 addresses the extension of time limits and the consequences of a failure to meet a time limit when an extension was not sought or was not granted.
Rule 11

Extension of Time Limits Applicable to Parties

(1) The time limits in Articles 49, 51 and 52 of the Convention cannot be extended. An application or request filed after the expiry of such time limits shall be disregarded.

(2) A time limit prescribed by the Convention or these Rules, other than those referred to in paragraph (1), may only be extended by agreement of the parties. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise.

(3) A time limit fixed by the Tribunal or the Secretary-General may be extended by agreement of the parties or the Tribunal, or Secretary-General if applicable, upon reasoned application by either party made prior to its expiry. A procedural step taken or document received after the expiry of such time limit shall be disregarded unless the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet the time limit.

(4) The Tribunal may delegate to the President the power to extend time limits referred to in paragraph (3).

44. AR 11 (AR 10(2)-(4) of WP # 2) clarifies when time limits may be extended, by whom and the consequence of failure to meet time limits.

45. AR 11(1) lists the time limits that may not be extended and specifies that the relevant application or request will be disregarded if it is late.

46. AR 11(2) applies only to time limits prescribed by the Convention or the AR. The default rule is the same as in WP # 2: unless the parties agree to extend such time limits, they cannot be extended. Consequently, a procedural step taken or submission filed after the expiry of the time limit will be disregarded, unless the parties agree otherwise.

47. AR 11(3) applies to time limits fixed by the Tribunal or the Secretary-General. WP # 2, AR 10(4)—which is now AR 11(3)—stated that a late procedural step or filing would not be disregarded if the other party did not object (see WP # 2, Vol. 2, at page 102). AR 11(3) requires the party taking the late procedural step or filing the submission late to show that special circumstances exist justifying the late step or filing.
Rule 12.1
Time Limits Applicable to the Tribunal

(1) The Tribunal shall use best efforts to meet all applicable time limits to render orders, decisions and the Award.

(2) If special circumstances arise which prevent the Tribunal from complying with an applicable time limit, it shall advise the parties of the reason for the delay and the date when it anticipates rendering the order, decision or Award will be delivered.

AR 12 is revised for greater clarity. The Centre will track compliance with this rule on its website and payment of arbitrator invoices will be postponed if an order, decision or Award is not rendered in accordance with the relevant time lines.
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Chapter II
Constitution of the Tribunal

Rule 132
General Provisions Regarding the Constitution of the Tribunal

(1) The Tribunal shall be constituted without delay after registration of the Request for arbitration.

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

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

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

49. Further comments were received about the need for a code of conduct for arbitrators. The ICSID and UNCITRAL Secretariats continue joint work on a background paper to develop a Code of Conduct for arbitrators in the context of UNCITRAL Working Group III. Such a Code of Conduct could be incorporated in ICSID proceedings via the Arbitrator Declaration if States wish to do so (see WP # 2, Vol. 1, ¶ 121).

50. A Member State asked for further nationality restrictions in AR 13, aimed at preventing appointment of nationals of a State that does not maintain diplomatic relations with the State party to the dispute or with the State whose national is a party to the dispute. In this respect, see the discussion on this matter at WP # 2, Vol. 1, ¶ 122.

Rule 143
Notice of Third-Party Funding

(1) For purposes of completing the arbitrator declaration required by Rule 18(3)(b), a party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.
(3) A party shall file send the notice referred to in paragraph (1) with to the Secretary-General upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit the notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 19(3)(b).

51. States generally recognize that TPF is a widely available mechanism that provides important systemic benefits, for example, by enhancing access to arbitration for small and medium enterprises (“SMEs”). At the same time, some States remain concerned about the existence and potential impact of TPF.

52. WP # 3 refines AR 14(1) to reflect more closely the existing provisions that have been incorporated by a significant number of Member States in their treaties. The proposed definition of TPF is intended to provide certainty and ease of application.

53. WP # 3 further includes an editorial change to AR 14(3), reflecting a drafting suggestion made by Singapore.

54. New AR 14(4) states that the Secretary-General will provide the parties, any proposed arbitrator and any arbitrator already appointed with a copy of the third-party funding notice and any updated notices. This notice assists arbitrators in completing their declaration, which expressly requires disclosure of any relationship between the arbitrator and the third-party funder (see Schedule 3: Arbitrator Declaration; Schedule 5: Ad hoc Committee Member Declaration; Schedule 6: Conciliator Declaration).

55. Some States have suggested requiring the disclosure of information other than the existence of third-party funding and the name of the third-party funder. Most of these suggestions concerned the power of a Tribunal to order disclosure of the third-party funding agreement.

56. There is no right to further information or disclosure of the agreement under the proposed rule. To the extent that the agreement or information in the agreement is relevant to an issue in dispute, this is addressed by other rules. In particular, a Tribunal has power to order production of necessary documents or evidence at any stage of a proceeding. This is expressly stated in Art. 43 of the Convention and is further reflected in proposed AR 36(3). If third-party funding were relevant to an issue in the arbitration, the Tribunal already has the authority to make the appropriate order to disclose relevant documents or information.

57. AR 52 on Security for Costs has been revised in WP # 3 to state that a Tribunal may consider third-party funding as evidence relating to a circumstance required to obtain an
order for security listed in AR 52(3). AR 52(4) stipulates that the existence of third-party funding by itself is insufficient to justify ordering security for costs. This revision is consistent with case law on third-party funding and security for costs and with the comments of most States on AR 52.

58. Some States suggested a new rule stating that failure to comply with the duty of disclosure in AR 14 is to be considered by a Tribunal when allocating the costs of the proceeding. Proposed AR 52 requires a Tribunal to consider the conduct of the parties as a factor in allocating costs. Failure to comply with proposed AR 14 would, therefore, be covered by AR 52 and no additional specific costs provision is needed.

59. One State suggested there should be a carve-out for funding by a sub-national entity. For the reasons explained at WP # 2, ¶ 141, this has not been included in AR 14.

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### Rule 154

**Method of Constituting the Tribunal**

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

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, the Tribunal shall be constituted in accordance with Article 37(2)(b) of the Convention.

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60. A few Member States suggested that the deadline in proposed AR 15(2) revert to 60 days. The reduction to 45 days responds to concerns expressed about efficiency in the Tribunal constitution process, and it impacts only a discrete aspect: the method of constitution. Parties can modify the deadline by agreement.

61. A Member State suggested incorporating detailed requirements in this rule concerning arbitrator independence, impartiality, credibility, legitimacy, experience and availability. AR 15 is aimed at establishing the number of arbitrators and method for appointments only. Arts. 40(2) and 14(1) of the Convention regulate the qualities of arbitrators. Additionally, many of these concerns expressed are addressed in the proposed Arbitrator Declaration (Schedule 3).
Rule 165

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

If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention, each party shall appoint an arbitrator and the parties shall jointly appoint the President of the Tribunal.

Rule 176

Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.

Rule 187

Appointment of Arbitrators by the Chair in accordance with Article 38 of the Convention

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

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

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

62. One commentator suggested that Member States consider alternatives to party appointment. Proposed AR 16 reflects Art. 37(2)(b) of the Convention, which provides for party-appointed co-arbitrators as part of the default method of constitution. Absent a different agreement by the parties under Art. 37(2)(a) of the Convention, Art. 37(2)(b) governs and cannot be amended via the AR.

63. One Member State suggested that AR 18(3) require the Chair to take into account any requirements agreed by the parties when making appointments pursuant to Art. 38 of the Convention. The suggestion is not adopted as proposed AR 18 operates as the default mechanism for appointments required to complete a Tribunal, whether or not there is an
agreed method of constitution. When there is an agreed method, the appointment authority takes into account any agreement by the parties that is consistent with the Convention.

64. Two Member States and another commentator suggested that proposed AR 18(3) explicitly state that the Chair shall strive to achieve gender and geographical diversity in appointments. Geographical diversity is expressly mandated in appointments to the Panel by the Chair pursuant to Art. 14 of the Convention. Further, gender and geographical diversity are among the many factors routinely considered in appointments by the Chair under Art. 38 of the Convention, and they are embodied in the notion that such appointments are to be made from the Panel, a defined and necessarily diverse body of individuals designated by the Member States themselves.

65. A Member State suggested removal of the expression “as far as possible” from AR 18(3). The language has been maintained as it originates in Art. 38 of the Convention. In practice, the Chair consults the parties when making an appointment under Art. 38.

<table>
<thead>
<tr>
<th>Rule 198</th>
<th>Acceptance of Appointment</th>
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</thead>
<tbody>
<tr>
<td>(1) A party appointing an arbitrator shall notify the Secretary-General of the appointment and provide the appointee’s name, nationality(ies) and contact information.</td>
<td></td>
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<tr>
<td>(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).</td>
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<tr>
<td>(3) Within 20 days after receipt of the request for acceptance of an appointment, an appointee shall:</td>
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<tr>
<td>(a) accept the appointment; and</td>
<td></td>
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<tr>
<td>(b) provide a signed declaration in the form published by the Centre, addressing matters including the arbitrator’s independence, impartiality, availability and commitment to maintain the confidentiality of the proceedings.</td>
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<tr>
<td>(4) The Secretary-General shall notify the parties of the acceptance of appointment by each arbitrator and provide their signed declarations.</td>
<td></td>
</tr>
<tr>
<td>(5) The Secretary-General shall notify the parties if an arbitrator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as arbitrator in accordance with the method followed for the previous appointment.</td>
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</tbody>
</table>
(6) Each arbitrator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

66. While no further substantive amendments are proposed to AR 19, an adjustment is proposed to the Arbitrator Declaration referred to in AR 18(3)(b) (Schedule 3). Section 4(a)(ii) of the Declaration now refers to the “parties’ representatives” instead of “counsel for the parties,” to align with proposed AR 3(2) (“Party and Party Representative”). Other suggestions for additions to the Declaration were not adopted. Disclosure of significant relationships with counsel for the parties is covered under Section 4(a)(i) of the Declaration; and other situations that “might reasonably cause [an arbitrator’s] independence or impartiality to be questioned” are covered under the umbrella of Section 4(c) of the Declaration, and the “continuing obligation to disclose any change of circumstances which might cause my independence or impartiality to be questioned.”

67. Two States suggested that AR 19(3) require an arbitrator accepting an appointment to commit to complying with the requirements of a Code of Conduct; and another commentator suggested adding a general “commitment to comply with existing relevant ethical rules” as part of the arbitrator’s acceptance. Proposed AR 19(3) allows for incorporation by reference of a Code of Conduct in the Arbitrator Declaration, thereby eliminating the need to refer to undetermined parameters in the rule at this time.

68. One commentator reiterated prohibiting the practice of “double-hatting”. The Secretariat refers to the discussion on this matter at WP # 1, Vol. 3, ¶¶ 302 et seq.

69. A Member State inquired whether the deadline for acceptance of an appointment proposed in AR 19(3) could be extended by party agreement. That possibility exists under AR 1(2) which confirms the general principle that AR deadlines can be modified by agreement of the parties.

| Rule 2019 |
| Replacement of Arbitrators Prior to Constitution of the Tribunal |
| (1) At any time before the Tribunal is constituted: |
| (a) an arbitrator may withdraw an acceptance; |
| (b) a party may replace an arbitrator whom it appointed; or |
| (c) the parties may agree to replace any arbitrator. |
| (2) A replacement arbitrator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced arbitrator was appointed. |
70. A Member State suggested making a reference to Arts. 38 and 56 of the Convention in proposed AR 20. Overarching principles in the Convention have not been restated in the AR.

### Rule 210
**Constitution of the Tribunal**

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

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

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Rule 22 - Proposal for Disqualification of Arbitrators ................................................................. 302
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Chapter III
Disqualification of Arbitrators and Vacancies

Rule 221
Proposal for Disqualification of Arbitrators

(1) A party may file a proposal to disqualify one or more arbitrators ("proposal") in accordance with the following procedure:

(a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of:

(i) the constitution of the Tribunal; or

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

(b) the proposal shall include the grounds on which it is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (1)(c); and

(e) each party may file a final written submission on the proposal within seven days after expiry of the time limit referred to in paragraph (1)(d).

(2) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

71. Most comments on AR 22 concerned whether the automatic suspension of the proceeding upon the filing of a challenge should be maintained. WP # 1 had proposed to eliminate the automatic suspension, but this proposal was abandoned in WP # 2 following numerous comments suggesting potential complications or legitimacy concerns related to the challenged arbitrator participating in the proceeding pending a decision on the challenge. The same type of comments were received on WP # 2. Accordingly, no changes are proposed in WP # 3.

72. Greater efficiency is achieved through the specific timelines included in the rule, the ability of parties to agree to continue the proceeding or any part thereof, and the use of costs to
address strategic challenges.

73. One comment indicated that the 7-day deadline for simultaneous submissions following the statement of the challenged arbitrator is too short. WP # 2 already revised and extended various deadlines in this rule following comments on WP # 1. To maintain the expedited nature of this procedure, no further changes to the deadlines are proposed.

74. One commentator urged that filing a second proposal for disqualification by the same party against the same arbitrator should be deemed abusive. There have been few instances where the same arbitrator has been repeatedly challenged on similar grounds. The Tribunal has discretion to award costs if it finds any conduct abusive.

### Rule 232

**Decision on the Proposal for Disqualification**

1. The decision on a proposal shall be made by the arbitrators not subject to the proposal or by the Chair in accordance with Article 58 of the Convention.

2. For the purposes of Article 58 of the Convention:

   a. if the arbitrators not subject to a proposal are unable to decide the proposal for any reason, they shall notify the Secretary-General and they shall be considered equally divided;

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

3. The arbitrators not subject to the proposal and the Chair shall use best efforts to decide any proposal within 30 days after the later of the expiry of the time limit referred to in Rule 224(1)(e) or the notice in paragraph Rule 23(2)(a).

75. One commentator requested further specificity on the grounds for disqualification under the Convention. No changes are proposed in this regard. The grounds for disqualification are contained in Art. 14 of the Convention, and the circumstances that may justify disqualification are to be determined in every case by the non-challenged members of the Tribunal or Committee, or by the Chair, as applicable.

76. One State asked whether a proposal to disqualify the entire Tribunal qualified as a proposal to disqualify a majority for the purposes of Art. 58 of the Convention. Challenges filed against the entire Tribunal are treated as a proposal to disqualify a majority of the Tribunal. Accordingly, no changes are necessary.

77. One State asked whether it is possible to engage the responsibility of a disqualified
This matter is governed by Art. 21(a) of the Convention, pursuant to which arbitrators enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity. No changes to WP # 2 are proposed in this regard.

### Rule 243
**Incapacity or Failure to Perform Duties**

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 224 and 232 shall apply.

### Rule 254
**Resignation**

1. An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal and providing reasons for the resignation.

2. If the arbitrator was appointed by a party, the other members of the Tribunal shall promptly notify the Secretary-General whether they consent to the arbitrator’s resignation for the purposes of Rule 265(3)(a).

### Rule 265
**Vacancy on the Tribunal**

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

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

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

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

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

4. Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was
notified. Any portion of a hearing shall be recommenced if the newly appointed arbitrator considers it necessary to decide a pending matter.
III. ARBITRATION RULES

Chapter IV - Conduct of the Proceeding

Rule 27 - Orders and Decisions
Rule 28 - Waiver
Rule 29 - First Session
Rule 30 - Written Submissions
Rule 31 - Case Management Conference
Rule 32 - Hearings
Rule 33 - Quorum
Rule 34 - Deliberations
Rule 35 - Decisions Made by Majority Vote
Chapter IV
Conduct of the Proceeding

Rule 276
Orders, and Decisions and Agreements

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

(2) Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Tribunal.

(3) The Tribunal shall consult with the parties prior to making an order or decision it is authorized by these Rules to make by a Tribunal on its own initiative.

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

78. One State asked whether AR 27(2) could mean that the President of the Tribunal has the power to issue orders and decisions without deliberations of the Tribunal. To the contrary, when orders are signed by the President on behalf of the Tribunal pursuant to AR 27(2), the full Tribunal has already deliberated on the ruling contained. This ensures the prompt dispatch of orders and decisions.

79. AR 27(4) has been moved to AR 1 in Chapter I on General Provisions because of its general application in arbitration proceedings.

Rule 287
Waiver

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

80. One State proposed requiring an objection concerning non-compliance to be made within a “reasonable time” rather than “promptly.” The wording of AR 28 has been maintained due to the significance of a waiver.
### Rule 298
<br><br>**First Session**

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

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

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

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

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

   (a) the applicable arbitration rules;
   
   (b) the division of advances payable pursuant to Administrative and Financial Regulation 15;
   
   (c) the procedural language(s), translation and interpretation;
   
   (d) the method of filing and routing of documents;
   
   (e) the number, length, type and format of written submissions;
   
   (f) the place of hearings;
   
   (g) whether there will be requests for production of documents as between the parties and if so, the scope, timing and procedure for such requests for production of documents between the parties, if any;
   
   (h) the procedural calendar, including written submissions, hearings, case management conferences and the Tribunal’s orders and decisions;
(i) the manner of making recordings and transcripts of hearings;

(j) the publication of documents and recordings;

(k) the treatment protection of confidential or protected information; and

(l) any other procedural matter raised by either party or the Tribunal.

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

81. One State asked whether the first session could be held among Tribunal members only, without the parties. In practice this happens only if the parties are not available within the 60-day time frame and do not agree to an extension. In any event, during such a meeting the Tribunal would consider the parties’ written submissions on the matters listed in AR 29(4).

82. AR 29(4)(g) has been revised to address comments received with respect to document production. The proposed language makes it clear that the onus is on the parties to decide at the first session whether a document production process should take place and, if so, to determine the procedural aspects of such process, including the scope, timing and procedure applicable.

83. AR 29(4)(h) has been simplified to “the procedural calendar” because certain steps in the proceeding may not be known at the time of the first session or it may be premature to decide on the time limits for certain steps. These may be fixed later.

**Rule 3029**

**Written Submissions**

(1) The parties shall file the following written submissions:

(a) a memorial by the requesting party;

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

and, unless the parties agree otherwise:

(c) a reply by the requesting party; and

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

(3) A memorial on the merits or a memorial on preliminary objections may be filed at any time before the first session.

(4) No party may only file an unscheduled written submissions, observations or supporting documents only after obtaining without leave of the Tribunal, unless the filing of such documents is provided for by the Convention or these Rules. The Tribunal may grant such leave upon a timely and reasoned application if it finds such written submissions, observations or supporting documents are necessary in view of all relevant circumstances.

AR 30(2) has been modified to state that the reply and rejoinder shall “be limited to” responding to the previous written submission. This reverts to the language originally proposed in WP # 1 and emphasizes that parties should not raise new claims in the reply and rejoinder. This provision does not limit arguments based on new documents or newly discovered facts occurring after a party’s first written submission.

AR 30(3) ensures that unscheduled submissions cannot be filed without leave of the Tribunal. Hence, if a party wishes to file a memorial on the merits before the Tribunal fixes a procedural calendar, it would need to seek leave to do so pursuant to AR 30(3).

Rule 310
Case Management Conference

With a view to conducting an expeditious and cost-effective proceeding, the Tribunal shall convene one or more case management conferences with the parties at any time after the first session to:

(a) identify uncontested facts;

(b) clarify and narrow the issues in dispute; or

(c) address any other procedural or substantive issue related to the resolution of the dispute.
86. In response to a comment made by one State, language has been added to AR 31(6) to encourage tribunals to also clarify the issues in dispute.

87. One State suggested adding a reference to the management of document production requests. This is one of the roles that a case management conference may usefully play and is covered under paragraph (c). A reference concerning document production is also included in the matters to be discussed during the first session (AR 29(4)(g)).

### Rule 32
**Hearings**

1. The Tribunal shall hold one or more hearings, unless the parties agree otherwise.

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

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

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

### Rule 33
**Quorum**

The participation of a majority of the members of the Tribunal by any appropriate means of communication shall be required at the first session, case management conferences, hearings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.

### Rule 34
**Deliberations**

1. The deliberations of the Tribunal shall take place in private and remain confidential.

2. The Tribunal may deliberate at any place and by any means it considers appropriate.
(3) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.

88. One State suggested that the Tribunal notify the parties if anyone other than the Tribunal or the Secretary were admitted to deliberations. This is addressed in WP # 2, Vol. 1, ¶ 229.

**Rule 354**

**Decisions Made by Majority Vote**

The Tribunal shall make decisions by a majority of the votes of all its members. Abstention shall count as a negative vote.
Chapter V
Evidence

Rule 365
Evidence: General Principles

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

(2) Each party has the burden of proving the facts relied on to support its claim or defense.

(3) The Tribunal may, if it deems it necessary at any stage of the proceedings, call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.

Rule 376
Disputes Arising from Requests for Documents

The Tribunal shall decide any dispute arising out of a party’s objection to the other party’s request for production of documents. In deciding the dispute, the Tribunal shall consider all relevant circumstances, including:

(a) the scope and timeliness of the request;
(b) the relevance and materiality of the documents requested;
(c) the burden of production; and
(d) the basis of the objection; and
(e) all other relevant circumstances.

89. Many States suggested that the rules should state that document production need not occur in every case. This is clear from AR 29(4)(g) requiring the determination at the first session of “whether there will be requests for production of documents as between the parties and if so, the scope, timing and procedure for such requests.”

90. Other comments received from States reiterated the concern that document production is too lengthy, expensive and burdensome. This concern is addressed by AR 37 and other mechanisms such as case management conferences.
Finally, several States suggested that the ICSID Rules should include exemptions from document production, for example on the basis of confidentiality or commercial secrets.

The exemptions from production are not governed by the ICSID Rules. They depend on the applicable law, in particular the evidentiary rules which apply in each case. In fact, parties usually authorize the Tribunal to be guided by the IBA Rules on the Taking of Evidence in International Arbitration which include detailed provisions addressing the scope and timing of requests for documents production (IBA Article 3). The IBA Rules also list exemptions from production including commercial or technical confidentiality, privilege, and special political or institutional sensitivity (IBA Article 9).

AR 37 specifically reminds tribunals deciding on objections to production to consider the burden of production, the scope and timeliness of the request, the relevance and materiality of the documents requested, the burden of production and the basis of the objection. This reinforces the Tribunal’s role in managing the cost and time of document production.

**Rule 38.7**

**Witnesses and Experts**

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness, and be signed and dated.

(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.

(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Each witness shall make the following declaration before giving evidence:

“I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”

(7) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(8) Each expert shall make the following declaration before giving evidence:
“I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”

94. A few States suggested that witnesses and experts should be required to submit a written declaration of independence and impartiality and to disclose their relationships, if any, with the participants in the proceeding.

95. In practice, however, witnesses are not required to be independent from a party. For instance, States often present officials of their own government as witnesses, and a party who is a natural person may testify on his or her own behalf. At the same time, witnesses are required to tell the truth.

96. With respect to party-appointed experts, there is an expectation of independence and impartiality, but there is also an understanding that the expert is paid by a party and may work closely with that party in preparing the report. Therefore, it would be inappropriate to require experts to sign a declaration of independence and impartiality akin to the declaration provided by Tribunal Members.

97. Any concerns related to the independence and impartiality of witnesses and experts may be tested in cross-examination and go to the credibility of the witness or expert. It is for the Tribunal to assess the probative value of any witness and expert evidence, pursuant to proposed AR 36.

98. One State proposed that the word “expert” be included throughout the rule as it is intended to cover both witnesses and experts. This is adequately addressed by AR 38(7).

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**Rule 398**

**Tribunal-Appointed Experts**

(1) Unless the parties agree otherwise, the Tribunal may appoint one or more independent experts to report to it on specific matters within the scope of the dispute.

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert.

(2)(3) Upon accepting an appointment by the Tribunal, an expert shall provide a signed declaration in the form published by the Centre.

(3)(4) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.
99. Some States suggested that AR 39(2) should require the Tribunal to obtain both parties’ agreement on the appointment of a Tribunal-appointed expert and their terms of reference, while other States recognized that such a requirement would allow one party to block the process. The opening clause “unless the parties agree otherwise” has been added to underscore that the parties jointly can refuse to have a Tribunal-appointed expert.

100. In relation to AR 39(2), some States suggested additional criteria that the Tribunal must raise with the parties before appointing an expert, including for example the expert’s qualifications, scope of work, and any increase in time and costs. As noted in WP # 2, Vol. 1, ¶¶ 250-255, the concept of “terms of reference” is broad and covers all of the proposed additions.

101. A new paragraph (3) is added to AR 39 to implement the suggestion made by several States that the Tribunal-appointed expert be required to sign a declaration of independence and impartiality. The draft declaration form is contained in Schedule 4. It requires the expert to disclose any significant relationship with the main participants in the case.

102. A few States expressed concern about the impact of a Tribunal-appointed expert in relation to the burden of proof. The burden of proof is addressed by the general principle in proposed AR 36(2), which is not affected by the Tribunal’s appointment of an expert.
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Chapter VI
Special Procedures

Rule 410
Manifest Lack of Legal Merit

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

(2) The following procedure shall apply:

(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;

(b) the written submission shall specify the grounds on which the objection is based; and contain a statement of the relevant facts, law and arguments;

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

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

(e) the Tribunal shall render its decision or render its Award on the objection within 60 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the objection.

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

(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 432 or to argue subsequently in the proceeding that a claim is without legal merit.
The time period in AR 41(2)(a) to object that a claim manifestly lacks legal merit (“MLLM”) has been extended to 45 days after the tribunal constitution. In practice, because the average time to reach the stage of tribunal constitution is approximately 5-6 months, the party wishing to object to a claim on these grounds has sufficient time to prepare the submission.

Several States suggested that AR 41 include a presumption of costs in favor of the party successfully objecting on the basis of manifest lack of legal merit. This suggestion has not been adopted for several reasons.

First, a presumption is not compatible with the scheme of costs in ICSID proceedings. That scheme adopts the basic approach that costs are within the discretion of the Tribunal (Art. 61 of Convention) and the rules on costs provide specific factors to consider in exercising this discretion. Such factors include success, conduct of the parties, complexity of the matter, and reasonableness of cost claimed. In addition, the Tribunal is under an obligation to provide reasons for a given cost allocation.

Second, no provision in the proposed (or current) rules includes a presumption of costs, and it would be discordant to place such a provision in this rule, as opposed to any other.

Third, there can be a number of different outcomes on an application for MLLM that are not consistent with the presumption of costs but can be well addressed by the usual approach of discretion on matters of costs. For example, a number of MLLM applications have resulted in a partial dismissal based on the finding that only part of the claim manifestly lacks legal merit, and a presumption of costs in such a circumstance is not useful.

Fourth, States that wish to have such a presumption may place it in their treaties, as some have already done in recent years.

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**Rule 421**

**Bifurcation**

(1) A party may request that a question be addressed in a separate phase of the proceeding (“request for bifurcation”).

(2) If a request for bifurcation relates to a preliminary objection, Rule 442BIS shall apply.

(3) The following procedure shall apply to a request for bifurcation other than a request referred to in Rule 44 paragraph (2):
(a) the request for bifurcation shall be filed as soon as possible;

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

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

(d) the Tribunal shall issue its decision on the request for bifurcation within 320 days after the later of the last written or oral submission on the request; and

(e) the Tribunal shall decide whether to suspend any part of the proceeding if it decides to bifurcate; and

(f) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding, as required.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and

(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

(5) If the Tribunal orders bifurcation pursuant to this Rule, it shall suspend the proceeding with respect to any questions to be addressed at a later phase, unless the parties agree otherwise or the Tribunal decides there are special circumstances that do not justify suspension.

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

109. Several States proposed reinstating the 30-day deadline in WP # 1 for the Tribunal to decide on a request for bifurcation, instead of the 20 days proposed in WP # 2. This change has been made in AR 42(3)(d) and is consistent with the average number of days (approximately 28 days) to issue a reasoned decision on bifurcation in ICSID practice.

110. Several States also suggested including additional criteria that Tribunals should consider when deciding whether to bifurcate, based on case law. WP # 3 adds the most widely adopted circumstances in AR 42(4)(a)-(c). As suggested by the chapeau, these
Rule 432
Preliminary Objections

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

(2) A party shall notify the Tribunal and the other party of its intent to file a preliminary objection shall be raised as soon as possible.

(3) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits.

(4) If a party requests bifurcation of a preliminary objection, Rule 442BIS shall apply.

(5) If a party does not request bifurcation of a preliminary objection within the time limits referred to in Rule 442BIS(1)(a) or the parties confirm that they will not request bifurcation, the objection shall be joined to the merits and the following procedure shall apply:

(a) the Tribunal shall fix time limits for written and oral submissions on the preliminary objection, as required;

(b) the memorial on the preliminary objection shall be filed no later than:

(i) by the date to file the counter-memorial on the merits;

(ii) by the date to file the next written submission after an ancillary claim, if the objection relates to the ancillary claim; or

(iii) as soon as possible after the facts on which the objection is based become known to a party, if those facts were unknown to that the party on the relevant dates referred to in paragraph (5)(b)(i) and (ii);

(c) the party filing the memorial on preliminary objections shall also file its counter-memorial on the merits, or, if the objection relates to an ancillary claim, file its next written submission after the ancillary claim; and

(d) the Tribunal shall render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).
(6) The Tribunal may at any time on its own initiative consider whether a dispute or any ancillary claim is within the jurisdiction of the Centre or within its own competence.

111. One State commented that the language in AR 43(2) and 43(5)(b)(i) (AR 42 in WP # 2’) might suggest that the party filing a preliminary objection within the time limit in AR 43(5)(b)(i) loses its right to do so if it does not also raise the objection as soon as possible pursuant to AR 43(2). The revised language in paragraph (2) clarifies that the party wishing to file a preliminary objection must notify its intent to do so as soon as possible. This is for scheduling purposes and does not preclude a party from filing the preliminary objection pursuant to AR 43(5)(b)(i). If possible, intent to file preliminary objections should be notified at the first session as part of the discussions concerning the procedural calendar. The party notifying such intent need not specify its preliminary objections.

112. A further comment suggested a clarification to the effect that preliminary objections based on new facts can be made after the counter-memorial on the merits is filed. AR 43(5)(b)(iii) has been revised to clarify that this is the situation contemplated.

Rule 442BIS

Bifurcation of Preliminary Objections

(1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:

(a) unless the parties agree otherwise on a different time limit, the request for bifurcation shall be filed within:

(i) 30 days after the first session, if the memorial on the merits is filed before the first session;

(ii) within 45 days after filing the memorial on the merits, if it is filed after the first session;

(iii) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to the party on the relevant dates referred to in paragraph (1)(a)(i) and (ii);

(b) the request for bifurcation shall state the preliminary objection to which it relates;
(c) **unless the parties agree otherwise**, the proceeding on the merits shall be suspended **until the Tribunal decides whether to bifurcate** pending the Tribunal’s consideration of the request for bifurcation, unless the parties agree otherwise;

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

(e) the Tribunal shall issue its decision on a request for bifurcation within 320 days after the **later of the** last written or oral submission on the request.

(2) In determining whether to bifurcate, the Tribunal shall consider **whether bifurcation could materially reduce the time and cost of the proceeding and all other relevant circumstances**, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

(3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:

(a) **suspend the proceeding on the merits**, unless the parties agree otherwise, or the Tribunal decides there are special circumstances that do not justify suspension decide whether to suspend any part of the proceeding on the merits;

(b) fix time limits for written and oral submissions on the preliminary objection, as required;

(c) **render issue its decision or render its** Award on the preliminary objection within 180 days after the **later of the** last written or oral submission, in accordance with Rule 57(1)(b); and

(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

(4) If the Tribunal decides to join the preliminary objection to the merits, it shall:

(a) **lift any suspension of the proceeding on the merits in place pursuant to paragraph (1)(c);**

(b) **fix time limits for written and oral submissions on the preliminary objection, as required:**
(c)(b) modify any time limits for written and oral submissions on the merits, as required; and

(d)(c) render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 57(1)(c).

113. The deletion of AR 29(3) in WP # 2 (see AR 30 under Chapter IV) concerning the option to file a memorial on the merits before the first session is reflected in AR 44(1)(a) by the deletion of sub-paragraph (i).

114. WP # 3 proposes to extend the time limit in AR 44(1)(a) to 45 days to file a request for bifurcation relating to a preliminary objection. This should not materially impact on any other time limits.

115. Several States suggested that AR 44(2) add criteria developed in case law when deciding on a request for bifurcation of preliminary objections. As in AR 42(4), WP # 3 proposes to add the most widely-adopted criteria in AR 44(2), while maintaining tribunal discretion to consider the specific circumstances of the case.

116. Several States suggested that there should be a presumption to suspend the proceeding after a decision to bifurcate. This change has been adopted in AR 44(3)(a), which specifies that the parties may agree otherwise or the Tribunal may find there are special circumstances that do not justify suspension.

**Rule 453**

**Consolidation or Coordination of Arbitrations**

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

(2) **To be consolidated under this Rule, the arbitrations shall have been registered in accordance with the Convention and shall involve the same Contracting State (or any constituent subdivision or agency of the Contracting State).** Consolidation joins all aspects of the arbitrations sought to be consolidated and results in a single Award. **To be consolidated pursuant to this Rule, the arbitrations shall have been registered in accordance with the Convention and shall involve the same Contracting State (or constituent subdivision or agency of the Contracting State).**

(3) Coordination aligns specific procedural aspects of each pending arbitration, but the arbitrations remain separate proceedings and **each** results in **an** individual Awards.

(4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms of reference for **the conduct of the** consolidation or
coordinated proceeding(s) and consult with the Secretary-General to ensure that the proposed terms of reference are capable of being implemented.

(5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the proposed agreed terms of reference to the Tribunal(s) constituted in the arbitrations. Such Tribunal(s) shall make any order or decision required to implement these terms of reference.

117. A number of States supported adding an express provision on voluntary consolidation and coordination as outlined in AR 45.

118. The language and structure of AR 45 has been amended to streamline this provision. The order of the sentences in AR 45(2) has been inverted.

119. One State suggested that AR 45(4) should specify that States wishing to consolidate must provide the Secretary-General with a proposed procedural outline for the consolidation process, including rules for the appointment of a Tribunal in a consolidated case. AR 45(4) and (5) are clarified to address this suggestion.

Rule 464
Provisional Measures

(1) A party may at any time request that the Tribunal recommend provisional measures to preserve that party’s rights, including measures to:

(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;

(b) maintain or restore the status quo pending determination of the dispute; or

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

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

(c) if a party requests provisional measures before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and
(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the request.

(3) In deciding whether to recommend provisional measures, the Tribunal shall consider all relevant circumstances, including:

(a) whether the measures are urgent and necessary; and

(b) the effect that the measures may have on each party; and

(c) all other relevant circumstances.

(4) The Tribunal may recommend provisional measures on its own initiative. The Tribunal may also recommend provisional measures different from those requested by a party.

(5) A party shall promptly disclose any material change in the circumstances upon which the Tribunal recommended provisional measures.

(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party’s request.

(7) A party may request any judicial or other authority to order provisional measures if such recourse is permitted by the instrument recording the parties’ consent to arbitration.

120. One State reiterated the suggestion that the Tribunal should consider whether the requested provisional measures interfere with State sovereignty, a State’s domestic legal framework or the ability to implement the measure under the State’s domestic laws. These factors may be relevant to a decision on provisional measures and a State may raise these for consideration by a Tribunal.

121. One commentator suggested further elaboration on the circumstances to be considered in deciding whether to recommend provisional measures. WP # 3 does not list further circumstances, as AR 46(3) reflects circumstances considered in all cases (see WP # 2, Vol. 1, ¶¶311-315), while enabling tribunals to consider other relevant circumstances.

122. One comment suggested the addition of “unless the parties agree otherwise” in AR 46(3). This wording has not been added as the parties may always agree otherwise pursuant to
AR 1(2).

123. One State suggested modifying AR 46(7) to allow a party to request a domestic judicial authority to order provisional measures even where the parties have not consented to such recourse. Current AR 39(6) was added in 1984 to preserve the exclusivity of ICSID proceedings, except when the parties have agreed otherwise pursuant to Art. 26 of the Convention. This exclusive remedy rule has been repeatedly confirmed by domestic courts and ICSID tribunals. Therefore, no change is proposed in this respect.

124. By contrast, the AF Arbitration Rules do not contain such a limitation and (AF)AR 54(7) provides that a party may at any time request any judicial or other authority to order interim or conservatory measures.

### Rule 475
Ancillary Claims

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”) arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and the jurisdiction of the Centre.

(2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise.

(3) The Tribunal shall fix time limits for written and oral submissions on the ancillary claim, as required.

### Rule 486
Default

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.
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| 4      | If the request in paragraph (2) relates to a failure to appear at a hearing, the Tribunal may:  
   (a) reschedule the hearing to a date within 60 days after the original date;  
   (b) proceed with the hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the hearing; or  
   (c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the hearing. |
| 5      | If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3). |
| 6      | A party’s default shall not be deemed an admission of the assertions made by the other party. |
| 7      | The Tribunal may invite the party that is not in default to file observations, produce evidence or make oral submissions. |
| 8      | If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine the jurisdiction of the Centre and its own competence before deciding the questions submitted to it and rendering an Award. |
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Rule 49
Costs of the Proceeding

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

(a) the legal fees and expenses of the parties;
(b) the fees and expenses of the members of the Tribunal, Tribunal assistants approved by the parties and Tribunal-appointed experts and any Tribunal assistants approved by the parties; and
(c) the administrative charges and direct costs of the Centre.

125. One State requested clarification on whether the legal fees and expenses of the parties in (a) include the costs associated with party-appointed experts. Such costs are covered by AR 49(a).

Rule 48
Payment of Advances

The Tribunal shall determine the portion of the advances payable by each party in accordance with Administrative and Financial Regulation 15 to defray the costs referred to in Rule 47(b) and (c).

126. AR 48 in WP # 2 is deleted because the payment and division of advances is already addressed in AFR 15.

Rule 50
Statement of and Submission on Costs

The Tribunal shall request that each party file a statement of its costs and a written submission on the allocation of costs before allocating the costs of the proceeding between the parties.
### Rule 510

**Decisions on Costs**

1. In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:

   - (a) the outcome of the proceeding or any part of it;
   - (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; and
   - (e) all other relevant circumstances.

2. The Tribunal may make an interim decision on the costs of any part of a proceeding at any time.

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

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127. Two States suggested that AR 51(1)(a) be revised to more specifically indicate that a Tribunal could allocate costs based on the outcome of specific claims, defences and parts of a proceeding. AR 51(1)(a) allows a Tribunal to take into account the outcome with respect to any phase of the proceeding, including the success of any individual claim or defence or the overall outcome in allocating costs.

128. Among other changes to streamline AR 51, “any part of a proceeding” is deleted from paragraph (2). Such language is superfluous as an “interim” decision necessarily applies to “any part of a proceeding.”

129. Comments regarding the allocation of costs in the context of an objection that a claim is manifestly without legal merit are addressed under AR 41 (Chapter VI). Comments regarding the allocation of costs in the context of third-party funding are addressed under AR 14 (Chapter II). Comments regarding the allocation of costs in the context of discontinuance are addressed under AR 55 and 56 (Chapter VIII).
Rule 524
Security for Costs

(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.

(2) The following procedure shall apply:

(a) the request shall specify the circumstances that require security for costs;

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

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

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

(a) that party’s ability to comply with an adverse decision on costs;

(b) that party’s willingness to comply with an adverse decision on costs;

(c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and

(d) the conduct of the parties; and

(e) all other relevant circumstances.

(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.
(4)(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and shall fix a time limit for compliance with the order.

(5)(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(6)(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(7)(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party’s request.

130. WP # 3 maintains AR 52 as revised in WP # 2 with the addition of a new paragraph (4) that refers to the use of evidence of the existence of third-party funding.

131. On AR 52(1), a few States and one public commentator reiterated the suggestion that only claimants be required to provide security for costs. This suggestion has not been adopted. Consistent with the objective of rules balanced between investors and States, the rule is available to any party that incurs costs as a result of having to defend a claim or counterclaim.

132. Two States suggested that a Tribunal should be able to issue an order for security for costs on its own initiative. As explained in WP # 1, Vol. 3, ¶ 518, the requirement that a party initiate a request for security for costs is retained because only a party will be in a position to determine whether it wants security, and that party will need to establish the circumstances of the case that justify such an order.

133. One State reiterated its suggestion that an order of security for costs should be automatic upon a claimant’s disclosure of third-party funding. However, other States have recognized that the existence of third-party funding should not, on its own, justify an order for security for costs. In addition, an automatic order for security for costs could unreasonably impede access to ICSID dispute resolution mechanisms, particularly for SMEs.

134. Some States suggested that third-party funding be included among the factors that tribunals may consider in deciding whether to order security for costs. An express reference to third-party funding has now been included in a new paragraph (4), reflecting the fact that third-party funding is not by itself a separate factor but may be “considered as evidence of a circumstance listed in paragraph (3)”.

135. If the Tribunal determines that the terms of the third-party funding agreement would be relevant to its decision (for example whether the funder has undertaken to cover an adverse cost award), it may order disclosure of relevant information or terms (potentially redacted to protect confidential information).
136. Another suggestion received in relation to AR 52(3) was that sub-paragraphs (a) and (b) be replaced with the text: “reasonable doubt as to the party’s willingness or ability to comply with an adverse costs decision.” The current text provides tribunals with sufficient guidance in exercising their power to order security for costs.

137. With respect to AR 52(3)(b), one State proposed eliminating the factor related to “willingness to comply” and one commentator suggested changing this reference to “history of non-compliance with previous awards in relevant proceedings”. These suggestions are not incorporated because they would narrow the factors that the Tribunal should consider and would restrict the Tribunal’s discretion.

138. On AR 52(5) (proposed AR 51(4) in WP # 2), one State suggested adding that the Tribunal must specify “the amount required to be paid” and “shall decide disputes regarding compliance with the order”. These additions are not necessary because: (i) the amount is covered by the requirement for the Tribunal to specify “any relevant terms” and (ii) the Tribunal’s obligation to determine any disputes regarding compliance is addressed in proposed AR 27(1), which provides that the Tribunal “shall make the orders and decisions required for the conduct of the proceeding”.

139. In relation to AR 52(6) (proposed AR 51(5) in WP # 2), one State repeated its suggestion that discontinuance of the proceeding should be mandatory for non-compliance. The text as proposed in WP # 2 is maintained because it balances Tribunal discretion with due process and flexibility to account for the circumstances of the case.
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Chapter VIII
Suspension, Settlement and Discontinuance

Rule 532
Suspension of the Proceeding

(1) The Tribunal shall suspend the proceeding by agreement of the parties.

(2) The Tribunal may suspend the proceeding upon the request of either party or on its own initiative, except as otherwise provided in the Administrative and Financial Regulations or these Rules.

(3) The Tribunal shall give the parties the opportunity to make observations before ordering a suspension pursuant to paragraph (2).

(4) In its order suspending the proceeding, the Tribunal shall specify:

   (a) the period of the suspension;

   (b) any relevant terms or appropriate conditions; and

   (c) a modified procedural calendar to take effect on resumption of the proceeding, if necessary.

(5) The Tribunal shall extend the period of a suspension prior to its expiry by agreement of the parties.

(6) The Tribunal may extend the period of a suspension prior to its expiry, on its own initiative or upon a party’s request, after giving the parties an opportunity to make observations.

(7) The Secretary-General shall suspend the proceeding pursuant to paragraph (1) or extend the suspension pursuant to paragraph (5) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any terms or conditions agreed to by the parties.
**Rule 543**

Settlement and Discontinuance

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.

(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

   (a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or

   (b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

140. No change is proposed to the text of AR 54. One State asked whether AR 54(2)(a) ought to require the parties to request the issuance of a discontinuance order “jointly.” The provision gives the parties flexibility to approach the Tribunal either by a joint letter or to confirm the request by separate communications.

**Rule 554**

Discontinuance at Request of a Party

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

141. One State reiterated its earlier proposal that the grounds for discontinuance pursuant to AR 55 should be specified. Discontinuance is based on a request of a party which the other party does not oppose (see WP # 1, Vol. 3, ¶¶ 561-564 and WP # 2, Vol. 1, ¶¶ 377-378). The issuance of the discontinuance order depends solely on the other party’s non-objection.
to the discontinuance of the proceeding.

142. One State asked about the meaning of “any objection” in the last sentence of AR 54(1). “Objection” is any indication that the other party does not agree to the discontinuance. If the other party raises any objection, or seeks to impose a condition on the discontinuance, the proceeding will continue because there has been no acquiescence in the discontinuance of the proceeding.

| Rule 565  
Discontinuance for Failure of Parties to Act |
<table>
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<tr>
<td>(1) If the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.</td>
</tr>
<tr>
<td>(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal shall issue an order taking note of the discontinuance.</td>
</tr>
<tr>
<td>(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.</td>
</tr>
<tr>
<td>(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.</td>
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The word “consecutive” has been added to AR 56 to reflect a corresponding change in AFR 16(2)(c) and clarify the 150-day period is 150 consecutive days.

144. Some States inquired as to whether they could recover costs where the proceeding does not continue. If either party abandons the proceeding (i.e., fails to appear or present its case), the other can invoke the default provision of AR 48 to obtain an enforceable Award. Alternatively, if the parties agree on the terms of ending the proceeding, their agreement may be incorporated in an enforceable Award pursuant to AR 54. If either party fails to pay advances, the other can make the outstanding payment pursuant to AFR 16 to ensure that the proceeding continues and to obtain an enforceable Award. Moreover, the new rule on security for costs (proposed AR 52) is specifically designed to address such concerns. When the proceeding is discontinued by the Secretary-General for non-payment of advances before the constitution of the Tribunal, the recovery of costs is not possible. Costs at this early stage of the proceeding are usually limited.
Rule 56
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by Administrative and Financial Regulation 15, the proceeding may be discontinued pursuant to Administrative and Financial Regulation 16.

145. Proposed AR 56 has been deleted since it is not necessary considering AFR 16.
III. ARBITRATION RULES

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Rule 59 - Rendering of the Award .......................................................................................... 343
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Chapter IX  
The Award  

Rule 57  
Timing of the Award  

(1) The Tribunal shall render the Award as soon as possible, and in any event no later than:

(a) 60 days after the latest of the Tribunal constitution, the last written submission or the last oral submission, or the Tribunal constitution, whichever is later, if the Award is rendered pursuant to Rule 410(3);  

(b) 180 days after the later of the last written or oral submission if the Award is rendered pursuant to Rule 442BIS(3)(c); or 

(c) 240 days after the later of the last written or oral submission in all other cases.  

(2) A statement of costs and submissions on costs filed pursuant to in accordance with Rule 5049 shall not be considered a written submission for the purposes of paragraph (1).  

Rule 58  
Contents of the Award  

(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;  

(b) the names of the representatives of the parties;  

(c) a statement that the Tribunal was established in accordance with the Convention and a description of the method of its constitution;  

(d) the name of each member of the Tribunal and the appointing authority of each;  

(e) the dates and place(s) of the first session, case management conferences and the hearings;  

(f) a brief summary of the proceeding;  

(g) a statement of the relevant facts as found by the Tribunal;
(h) a brief summary of the submissions of the parties, including the relief sought;

(i) the decision of the Tribunal on every question submitted to it, and the reasons on which the Award is based; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision on the allocation of costs.

(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.

146. Some States requested that the list of items in AR 58(1) be expanded to include the reasoning of the Tribunal on specific questions, such as jurisdiction, applicable law and damages. Under Arts. 48(3) of the Convention and AR 58(1)(i), the Tribunal’s reasoning on such issues already must be included in the Award.

147. One State proposed that the parties and the Tribunal be required to agree on a list of “questions” to be decided by the Tribunal. This comment was addressed in WP # 2, Vol. 1, ¶ 393.

148. One State suggested that electronic signatures under AR 58(2) be the default option. This matter was addressed in WP # 1, Vol. 3, ¶ 598.

149. Finally, one State proposed that the rules clarify whether statements of dissent and individual opinions may be issued after the Award is rendered and whether they may be considered as part of the Award. This issue was addressed in WP # 1, Vol. 3, ¶ 599.

Rule 59
Rendering of the Award

(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.
(2) The Award shall be deemed to have been rendered on the date of dispatch of certified copies of the Award.

(3) The Secretary-General shall provide additional certified copies of the Award to a party upon request.

| Rule 60  
| Supplementary Decision and Rectification |

(1) A party requesting a supplementary decision on, or the rectification of, an Award pursuant to Article 49(2) of the Convention shall, within 45 days after the Award was rendered, file the request with the Secretary-General and pay the lodging fee published in the schedule of fees within 45 days after the Award was rendered.

(2) The request referred to in paragraph (1) shall:

   (a) identify the Award to which it relates;

   (b) be signed by each requesting party or its representative and be dated; and

   (c) specify:

       (i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award; and

       (ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award; and

   (d) attach proof of payment of the lodging fee.

(3) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

   (a) transmit the request to the other party;

   (b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (1); and

   (c) notify the parties of the registration or refusal to register.

(4) As soon as the request is registered, the Secretary-General shall transmit the request and the notice of registration to each member of the Tribunal.
(5) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(6) Rules 58-59 shall apply to any decision of the Tribunal pursuant to this Rule.

(7) The Tribunal shall issue a decision on the request for the supplementary decision or rectification within 60 days after the later of the last written or oral submission on the request.

(8) The date of dispatch of certified copies of the supplementary decision or rectification shall be the relevant date for the purposes of calculating the time limits specified in Articles 51(2) and 52(2) of the Convention.

(9) A supplementary decision or rectification under this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.
III. ARBITRATION RULES

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Rule 65 - Confidential or Protected Information..................................................................... 351
Rule 66 - Submission of Non-Disputing Parties................................................................. 352
Rule 67 - Participation of Non-Disputing Treaty Party......................................................... 353
Chapter X governs publication of case materials by the Centre, public access to ICSID proceedings, and submissions by non-parties. The rules governing these matters can be varied by specific provisions in the instrument of consent, agreement of the parties, or accession to the Mauritius Convention.

This Chapter should be considered with complementary provisions in AFR 23 (publication of information concerning Contracting States), AFR 24 (publication of information on the Panels of Arbitrators and of Conciliators), AFR 25(a) (publication of information concerning the operation of the Centre), and AFR 26 (publication of case registers with all significant data concerning the institution, conduct and disposition of the proceeding, including the economic sector involved, the names of the parties and their representatives, and the method of constitution and membership of each Commission, Tribunal and Committee). AFR 25(b) refers to the rules applicable in the individual proceeding for regulation of publication of documents generated in proceedings.

As is evident from the published compilations of comments to date, States and other commentators continue to have different positions on transparency in investment arbitration. The proposals below ensure that the most important documents and information are made available to the public and that documents and information which are properly confidential or otherwise protected are not disclosed to the public.

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

Rule 61
Publication of Awards and Decisions on Annulment

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

(2) The parties may consent to publication of the full text or to a jointly redacted text of the documents referred to in paragraph (1).

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

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

(a) the Secretary-General Centre shall propose excerpts to the parties within 30 days after the date upon which a party declines consent to publication of the document receiving notice that a party declines consent to publication of a
document referred to in paragraphs (1) and (2), or if the parties have not provided their consent to publication within 90 days after the dispatch of the document; (b) the parties may send comments on the proposed excerpts to the Centre Secretary-General within 60 days after their receipt; and (c) the Secretary-General Centre shall consider any the comments received on the proposed excerpts, if any, and publish excerpts within 30 days after receipt of such those comments.

153. As explained in WP # 1 and WP # 2, Art. 48(5) of the Convention requires consent to publication of an Award.

154. AR 61(2) reminds the parties that they may consent to publication of the full Award or a jointly redacted Award. The clarification that the redacted version be “jointly” submitted by the parties reflects the fact that consent is mandatory in this circumstance and there is no ability to refer disputed redactions of the Award to a Tribunal for a binding ruling.

155. AR 61(3) revives the notion of deemed consent which was advanced in WP # 1. Numerous States noted that deemed consent was useful in this context. A few States queried whether deemed consent might contradict Art. 48(5) of the Convention. Given that a bare objection is required to avoid deemed consent to publication of an Award, it seems clear that this does not contradict the Convention.

156. AR 61(4) contains the procedure for excerpting Awards where consent to publication has not been given. It is similar to proposed AR 61 in WP # 2, but gives the Centre 60 (rather than 30) days to compile proposed redactions for consideration by the parties and gives parties 60 (rather than 30) days to comment on proposed excerpts.

157. In addition, AR 61(4) proposes excerpts of the Award rather than excerpts of the legal reasoning in the Award. This reflects current practice whereby parties are provided a draft of a fully extracted Award for comment rather than merely the legal reasoning in the Award. Some States suggested that parties should also be required to provide compelling reasons why proposed excerpts might not be published. While parties are entitled to explain the reason for their position on extracts, this has not been required in AR 61(4) as it would increase the time and cost of the excerpting mechanism.
Rule 62
Publication of Orders and Decisions

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

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

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

AR 62 is similar to WP # 2 except that it clarifies that only disputed redactions will be referred to the Tribunal. This version of AR 62 was supported by many, although not all, States.

Some States disagreed with this approach and urged a rule that required consent to publication, similar to AR 61. Such an approach is not proposed because the Convention clearly requires consent to publication of Awards and does not extend this requirement to the discrete category of orders and decisions. This is consistent with the clear distinction in the Convention and rules between Awards, on the one hand, and orders and decisions, on the other.

The approach in AR 62 seeks to balance the interests of all parties by allowing publication of orders and decisions with redaction of confidential or otherwise protected information and the possibility of review of disputed redactions by the Tribunal.

Parties should note that in reviewing disputed redactions under this rule, the Tribunal shall not permit publication of confidential or protected information, now defined in new proposed AR 65.
Rule 63
Publication of Documents Filed by a Party in the Proceeding

(1) Upon request of either a party, the Centre shall publish any document which that party filed in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General, subject to paragraph (2).

(2) Either party may refer any dispute regarding the publication or redaction of a document in paragraph (1) to the Tribunal for determination. The Centre shall publish the document in accordance with the determination of the Tribunal.

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

AR 63 is similar to proposed AR 63 in WP # 2. AR 63 allows either party to request publication of any document filed in the proceeding, with redactions agreed to by the parties and jointly notified to the Centre. Like AR 62, it allows either party to refer disputed redactions to the Tribunal for review. In addition, it allows either party to object to publication of the document and to refer such objection to the Tribunal if disputed.

AR 63 does not provide a list of the documents filed in the proceeding as urged by some States, as there are numerous categories of documents filed in an ICSID proceeding and these are all subsumed in the category of “documents filed in the proceeding”.

Rule 64
Observation of Hearings

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

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

(3) The Centre shall publish video recordings or transcripts of those portions of hearings that were available for observation by the public in accordance with paragraphs (1) and (2), unless either party objects.

AR 64 is revised to reflect comments received on observation of hearings in WP # 2. It permits a Tribunal to address whether a hearing shall be open to the public. In addition,
AR 64(2) requires a Tribunal to ensure that confidential or protected information, defined in AR 65, is not disclosed to the public.

**Rule 65**

**Confidential or Protected Information**

For the purposes of Rules 61-64, confidential or protected information is information which:

(a) is protected from disclosure pursuant to the instrument of consent to arbitration;

(b) is protected from disclosure pursuant to the applicable law;

(c) is protected from disclosure in accordance with the orders and decisions of the Tribunal;

(d) is protected from disclosure by agreement of the parties;

(e) constitutes confidential business information;

(f) would impede law enforcement if disclosed to the public;

(g) would prejudice the essential security interests of the State if disclosed to the public;

(h) would aggravate the dispute between the parties if disclosed to the public; or

(i) would undermine the integrity of the arbitral process if disclosed to the public.

165. AR 65 is new. It provides general principles governing the application of Rules 61-64 and reflects the request of many stakeholders to provide guidance for parties and the Tribunal as to when information would be considered confidential or protected, and hence not subject to access by the public.
Rule 665
Submission of Non-disputing Parties

(1) Any person or entity that is not a disputing party to the dispute (“non-disputing party”) may apply for permission to file a written submission in the proceeding. The application shall be made in a procedural language used in the proceeding.

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

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

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

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

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

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

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

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length or scope of the written submission and the time limit to file the submission.

(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the later of the last written or oral submission on the application.

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

(7) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.
Comments received on AR 66 were generally positive, and few changes are proposed to this provision.

AR 66(1) is modified to refer to a person or entity that is not a party to the dispute. This is based on the definition of “party” in AR 3, which is a “claimant or respondent”. This change should clarify that an REIO or an NDTP may apply to make a submission pursuant to AR 66 if it is not a named party in the case.

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**Rule 676**  
**Participation of Non-Disputing Treaty Party**

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

(2) The Tribunal may impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or scope of the submission and the time limit to file the submission.

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

Comments on this rule were favorable overall, although some States did not support NDTP participation and were concerned that it might be tantamount to diplomatic protection. Others urged NDTP participation to be made available for a broader range of subjects than interpretation of the treaty. AR 67 retains its limited scope as “interpretation of the treaty at issue in the dispute and upon which consent to arbitrate is based”. Art. 27 of the Convention prevents a party from offering diplomatic protection and would apply if a proposed NDTP submission would be tantamount to diplomatic protection.
III. ARBITRATION RULES

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Arbitration Rules
Chapter XI
Interpretation, Revision and Annulment of the Award

Rule 687
The Application

(1) A party applying for interpretation, revision or annulment of an Award shall file the application with the Secretary-General, together with any supporting documents, and pay the lodging fee published in the schedule of fees.

(2) The application shall:

(a) identify the Award to which it relates;
(b) be in a language in which the Award was rendered of the Centre used in the original proceeding, or if the Award was not rendered in an official language of the Centre, be in no an official language used in the original proceeding;
(c) be signed by each applicant or its representative and be dated; and
(d) attach proof of any representative’s authority to act; and
(e) attach proof of payment of the lodging fee.

(3) An application for interpretation pursuant to Article 50(1) of the Convention may be filed at any time after the dispatch of the Award is rendered and shall specify the points in dispute concerning the meaning or scope of the Award.

(4) An application for revision pursuant to Article 51(1) of the Convention shall be filed within 90 days after the discovery of a fact of such a nature as decisively to affect the Award, and in any event within three years after the Award (or any supplementary decision on or rectification of the Award) was rendered. The application shall specify:

(a) the change sought in the Award;
(b) the newly discovered fact that decisively affects the Award; and
(c) that the fact was unknown to the Tribunal and to the applicant when the Award was rendered, and that the applicant’s ignorance of that fact was not due to negligence.

(5) An application for annulment pursuant to Article 52(1) of the Convention shall:
(a) be filed within 120 days after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered if the application is based on any of the grounds in Article 52(1)(a), (b), (d) or (e) of the Convention; or

(b) be filed within 120 days after the discovery of corruption on the part of a member of the Tribunal and in any event within three years after the date on which the Award (or any supplementary decision on or rectification of the Award) was rendered, if the application is based on Article 52(1)(c) of the Convention; and

(c) specify the grounds on which it is based, limited to the grounds in Article 52(1)(a)-(e) of the Convention, and the reasons in support of each ground.

(6) A complete application and evidence of payment of the lodging fee must be filed by the time limits referred to in paragraphs (4) or (5).

(7)(6) Upon receipt of an application and the lodging fee, the Secretary-General shall promptly:

(a) transmit the application and the supporting documents to the other party;

(b) register the application, or refuse registration if the application is not made within the time limits referred to in paragraphs (4) or (5); and

(c) notify the parties of the registration or refusal to register.

(8)(7) An applicant may withdraw from an application before it has been registered by filing a written notice of withdrawal with the Secretary-General. At any time before registration, an applicant may notify the Secretary-General in writing of the withdrawal of the application or, if there is more than one applicant, that it is withdrawing from the application. The Secretary-General shall promptly notify the parties of the withdrawal, unless the application has not yet been transmitted to the other party pursuant to paragraph (6)(a).

169. AR 68(2)(b) now refers to the language of the Award, rather than to the language of the proceeding, for purposes of determining the language of an application for annulment. This proposed change removes the risk of delay in case an application for annulment is filed after resubmission proceedings, or if the language changed in the course of the proceeding.

170. One State suggested that the Rule should require the applicant to detail the alleged errors of procedure or errors in the Award justifying each ground and the reasons why it considers that these errors constitute a basis to invoke such grounds. AR 68(5)(c) contains language to that effect.
171. AR 68(6) in WP # 2 has been deleted and a reference to proof of payment of the lodging fee is instead included in AR 68(2)(e), indicating that the lodging fee must be paid within the time limit to file an application.

172. AR 68(7) (AR 68(8) in WP # 2) has been revised to mirror the language in IR 8 concerning the withdrawal of a Request for arbitration.

**Rule 698**

**Interpretation or Revision: Reconstitution of the Tribunal**

(1) As soon as an application for the interpretation or revision of an Award is registered, the Secretary-General shall:

(a) transmit the notice of registration, the application and any supporting documents to each member of the original Tribunal; and

(b) request each member of the Tribunal to inform the Secretary-General within 10 days whether that member can take part in the consideration of the application.

(2) If all members of the Tribunal can take part in the consideration of the application, the Secretary-General shall notify the Tribunal and the parties of the reconstitution of the Tribunal.

(3) If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall invite the parties to constitute a new Tribunal without delay. The new Tribunal shall have the same number of arbitrators and be appointed by the same method as the original Tribunal.

173. One State suggested that the rules incorporate an appeals mechanism. As indicated in WP # 2, Vol. 1, ¶ 434, the Secretariat remains prepared to assist States if they wish to discuss the establishment of such a mechanism.

174. One State suggested that the parties be able to reappoint the arbitrators who participated in the original arbitration. AR 69 requires the new Tribunal to be appointed by the same method as the original Tribunal, but the parties are free to appoint the remaining individuals that acted as party-appointed arbitrators and/or as presiding arbitrator if they wish (see WP # 2, Vol. 1, ¶ 446).
Rule 7069
Annulment: Appointment of the *ad hoc* Committee

(1) As soon as an application for annulment of an Award is registered, the Chair shall appoint an *ad hoc* Committee in accordance with Article 52(3) of the Convention.

(2) Each member of the Committee shall provide a signed declaration in accordance with Rule 198.

(3) The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointments.

Rule 710
Procedure Applicable to Interpretation, Revision and Annulment

(1) Except as provided below, the *provisions* of these Rules shall apply, with necessary modifications, to any procedure relating to the interpretation, revision or annulment of an Award and to the decision of the Tribunal or Committee.

(2) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall continue to apply to an interpretation, revision or annulment proceeding, with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.

(3) In addition to the application, the written procedure shall consist of one round of written submissions in an interpretation or revision proceeding, and two rounds of written submissions in an annulment proceeding, unless the parties agree or the Tribunal or Committee orders otherwise.

(4) A hearing shall be held upon the request of either party, or if ordered by the Tribunal or Committee.

(5) The Tribunal or Committee shall issue its decision within 120 days after the *later of the* last written or oral submission on the application.

One State suggested that procedural agreements made by the original Tribunal should not apply to interpretation, revision or annulment proceedings if either party objects. AR 71(2) allows parties to object to the application of procedural agreements of the original Tribunal, and any such objection would be decided by the Tribunal or Committee. The proposed formulation avoids unnecessary delays in the proceeding while allowing the parties to propose procedural agreements different from those of the original Tribunal.
Rule 724
Stay of Enforcement of the Award

(1) A party to an interpretation, revision or annulment proceeding may request a stay of enforcement of all or part of the Award at any time before the final decision on the application.

(2) If the stay is requested in the application for revision or annulment of an Award, enforcement shall be stayed provisionally until the Tribunal or Committee decides on the request.

(3) The following procedure shall apply:

(a) the request shall specify the circumstances that require the stay;

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

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

(d) the Tribunal or Committee shall issue its decision on the request within 30 days after the latest of:

   (i) the constitution of the Tribunal or Committee;

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

   (iii) the last oral submission on the request.

(4) If a Tribunal or Committee decides to stay enforcement of the Award, it may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances.

(5) A party shall promptly disclose to the Tribunal or Committee any change in the circumstances upon which the enforcement was stayed.

(6) The Tribunal or Committee may at any time modify or terminate a stay of enforcement, on its own initiative or upon a party’s request.

(7) A stay of enforcement shall terminate on the date of dispatch of the decision on the application for interpretation, revision or annulment, or on the date of discontinuance of the proceeding.
Rule 732
Resubmission of Dispute after an Annulment

(1) If a Committee annuls all or part of an Award, either party may file with the Secretary-General a request to resubmit the dispute to a new Tribunal, together with any supporting documents, and pay the lodging fee published in the schedule of fees.

(2) The request shall:

(a) identify the Award to which it relates;

(b) be in an official language of the Centre;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) specify which aspect(s) of the dispute is resubmitted to the new Tribunal.

(3) Upon receipt of a request for resubmission and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request and the supporting documents to the other party;

(b) register the request;

(c) notify the parties of the registration; and

(d) invite the parties to constitute a new Tribunal without delay, which shall have the same number of arbitrators, and be appointed by the same method as the original Tribunal, unless the parties agree otherwise.

(4) If 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.

(5) Except as otherwise provided in paragraphs (1)-(4), these Rules shall apply to the resubmission proceeding.

(6) The procedural agreements and orders on matters addressed at the first session of the original Tribunal shall not apply to the resubmission proceeding, unless the parties agree otherwise.
176. One State inquired whether the indication in WP # 2, Vol. 1, ¶ 465 that the parties may agree to limit the time period for resubmission refers to the parties to the instrument invoked as basis of consent to ICSID jurisdiction or the parties to the dispute. If the consent to arbitration is expressed in a contract, parties to the instrument of consent and parties to the dispute are the same. If consent to ICSID jurisdiction stems from an investment treaty or from a national law, acceptance by the investor of the State’s offer of consent expressed in the treaty or the law would be interpreted as an agreement on any time limit for resubmission contained in the instrument of consent.

177. Two States proposed to include a time limit for the resubmission of disputes. The Convention does not provide for any time limit for the resubmission of the dispute, and it would be difficult to determine the appropriate length of such time limit (see WP # 1, Vol. 3, ¶ 652 and WP # 2, Vol. 1, ¶ 465). WP # 3 therefore does not propose to add a time limit. The parties to the instrument invoked as basis of consent to ICSID jurisdiction may include such a time limit in that instrument.
III. ARBITRATION RULES

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Chapter XII
Expeditied Arbitration

Rule 743
Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted under the Convention may consent at any time to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by jointly notifying the Secretary-General in writing of their consent.

(2) Chapters I-XI of the Arbitration Rules apply to an expedited arbitration except that:

(a) Rules 154, 165, 187, 29(3), 398, 4039, 410, 424, 442BIS, and 453 do not apply in an expedited arbitration; and

(b) Rules 198, 221, 298, 376, 432, 486, 57, 60 and 710, as modified by Rules 754-832, apply in an expedited arbitration.

(3) If the parties consent to expedited arbitration after the constitution of the Tribunal pursuant to Chapter II, Rules 754-776 shall not apply, and the expedited arbitration shall proceed subject to all members of the Tribunal confirming their availability pursuant to Rule 787(2). If any arbitrator fails to confirm availability before the expiry of the applicable time limit, the arbitration shall proceed in accordance with Chapters I-XI.

Rule 754
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 765 or a three-member Tribunal appointed pursuant to Rule 776.

(2) The parties shall jointly notify the Secretary-General in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of the notice of consent referred to in Rule 743(1).

(3) If the parties do not notify the Secretary-General of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed pursuant to in accordance with Rule 765.

(4) An appointment pursuant to under Rules 765 or 776 shall be deemed an appointment in accordance with a method agreed by the parties pursuant to Article 37(2)(a) of the Convention.
Rule 765
Appointment of Sole Arbitrator for Expedited Arbitration

(1) A Sole Arbitrator in an expedited arbitration shall be appointed in accordance with the following procedure:

(2) The parties shall jointly appoint the Secretary-General in writing of their agreement on a Sole Arbitrator and shall provide the appointee’s name, nationality(ies) and contact information within 20 days after the notice referred to in Rule 754(2); and

(a) The Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77(1).

(b) The parties do not appoint the Sole Arbitrator within the time limit referred to in paragraph (1)(a); or

(c) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator; or

(d) the appointee declines the appointment or does not comply with acceptance of the appointment within the time limit referred to in Rule 787(1); or

(e) the appointee declines the appointment.

(3) The following procedure shall apply to an appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and
(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77(1); and

(e)(d) if the selected candidate declines the appointment or does not comply with accept the appointment within the time limit referred to in Rule 77(1), the Secretary-General shall select the next highest-ranked candidate.

178. WP # 3 streamlines the procedure for appointing a Sole Arbitrator in an expedited arbitration. Proposed paragraphs (1)(b) and (3)(d) in WP # 2 are deleted as this process is already covered by AR 19(2) and (3), as modified by AR 78(1), with a shorter, 10-day, time limit for the appointee’s reply to the appointment request.

**Rule 776**

Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator (“co-arbitrator”) within 20 days after the notice referred to in Rule 754(2) and shall notify the Secretary-General of the appointee’s name, nationality(ies) and contact information within such time; and

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77(1);

(c)(b) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of the acceptances from of both co-arbitrators appointments made pursuant to paragraph (1)(a) and shall notify the Secretary-General of the appointee’s name, nationality(ies) and contact information within such time; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77(1).

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the applicable time limits referred to in paragraph (1)(a) or (c);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal; or
(c) an appointee \textit{declines the appointment or does not comply with accept the appointment within the time limit referred to in Rule 787(1)}; or

(d) an appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators \textit{not yet appointed} pursuant to paragraphs (1) and (2):

(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed, after consulting as far as possible with the parties. The Secretary-General shall consult with the parties as far as possible and use best efforts to appoint the co-arbitrator(s) appointment(s) within 15 days after the relevant event in paragraph (2);

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77(1);

(c) within 10 days after the later of the date on which both co-arbitrators have accepted their appointments, or within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(d) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(e) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and

(f) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 77(1); and

(g) if the selected candidate declines the appointment or does not comply with accept the appointment within the time limit referred to in Rule 787(1), the Secretary-General shall select the next highest-ranked candidate.

179. WP # 3 streamlines the procedure for appointing a three-member Tribunal in an expedited arbitration and reflects many of the same changes made in AR 76, but does not make any substantive changes.
Rule 787
Acceptance of Appointment in Expedited Arbitration

(1) An arbitrator appointed in an expedited arbitration pursuant to Rule 765 or 776 shall accept the appointment and provide a declaration pursuant to Rule 198(3) within 10 days after receipt of the request for acceptance.

(2) An arbitrator appointed to a Tribunal constituted pursuant to Chapter II shall confirm provide a supplementary declaration confirming their availability to conduct an expedited the arbitration in accordance with Chapter XII within 10 days after receipt of the parties’ notice of consent pursuant to Rule 743(3).

180. The wording of AR 78(2) simplifies the process to confirm availability by arbitrators who were appointed pursuant to Chapter II. Instead of having to submit a supplementary declaration, as proposed in WP # 2, the members of the already constituted Tribunal can confirm their availability by any appropriate means, such as an affirmative statement provided by email.

Rule 798
First Session in Expedited Arbitration

(1) The Tribunal shall hold a first session pursuant to Rule 298 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication, unless both parties and the Tribunal agree it shall be held in person.

Rule 8079
The Procedural Schedule in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply in an the expedited arbitration:

(a) the claimant requesting party shall file a memorial within 60 days after the first session;

(b) the respondent other party shall file a counter-memorial within 60 days after the date of filing the memorial;

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;
(d) the claimant requesting party shall file a reply within 40 days after the date of filing the counter-memorial;

(e) the respondent other party shall file a rejoinder within 40 days after the date of filing the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of their costs and written submissions on costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counterclaim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits referred to in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents or other evidence pursuant to Rule 37(6). The Tribunal shall decide such applications based on written submissions and without an in-person hearing.

(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule referred to in paragraph (1), unless the Tribunal determines that there are special circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.

181. The words “or other evidence” are removed from AR 80(3) to mirror the same change made to AR 37 on Disputes Arising from Requests for Documents. AR 37 and AR 80(3) have the same scope for the disputes arising out of document production requests that the Tribunal must determine.

182. AR 80(4) replaces the reference to “exceptional circumstances” with “special circumstances”, which is used throughout the rules.
Rule 810
Default during Expedited Arbitration

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 486.

Rule 821
The Procedural Schedule for Supplementary Decision and Rectification in Expedited Arbitration

The Tribunal shall issue a supplementary decision or rectification pursuant to Rule 60 within 30 days after the later of the last written or oral submission on the request.

Rule 832
The Procedural Schedule for an Application for Interpretation, Revision or Annulment of an Award Rendered in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply to the procedure relating to an interpretation, revision or annulment of an Award rendered in an expedited arbitration:

(a) the applicant shall file a memorial on interpretation, revision or annulment within 30 days after the first session;

(b) the other party shall file a counter-memorial on interpretation, revision or annulment within 30 days after the memorial;

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 100 pages in length;

(d) a hearing shall be held within 45 days after the date for filing the counter-memorial;

(e) the parties shall file statements of their costs and written submissions on costs within 5 days after the last day of the hearing referred to in paragraph (1)(d); and

(f) the Tribunal or Committee shall issue the decision on interpretation, revision or annulment as soon as possible, and in any event no later than 60 days after the hearing referred to in paragraph (1)(d).
(2) Any schedule for submissions other than those referred to in paragraph (1) shall run in parallel with the main schedule, unless the Tribunal or Committee determines that there are special exceptional circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal or Committee shall take into account the expedited nature of the process.

**Rule 843**

Resubmission of a Dispute after an Annulment in Expedited Arbitration

The consent of the parties to expedited arbitration given pursuant to Rule 74 shall not apply to resubmission of the dispute.

**Rule 854**

Opting Out of Expedited Arbitration

(1) The parties may agree to opt out of an expedited arbitration at any time by jointly notifying the Tribunal and Secretary-General in writing of their agreement. Upon such notification, only Chapters I-XI shall apply to the arbitration.

(2) Upon request of a party, the Tribunal may decide that an arbitration should no longer be expedited. In deciding the request, the Tribunal shall consider the complexity of the issues, the stage of the proceeding and all other relevant circumstances.

(2)(3) The Tribunal, or the Secretary-General if a Tribunal has not been constituted, shall determine the further procedure pursuant to Chapters I-XI and fix any time limit necessary for the conduct of the proceeding.

183. AR 85(1) clarifies that the parties may opt out of EA “at any time,” to mirror the wording of AR 74.

184. AR 85(1) also clarifies that a joint written notification is required to opt out of expedited arbitration. The consequence of opting out is moved to AR 85(3), dealing with the conduct of the further proceeding after Chapter XII no longer applies.

185. WP # 3 expands the mechanisms available to conclude the application of the EA and continue the arbitration under Chapters I-XI. A new mechanism is proposed in AR 85(2) and operates at the request of a party, decided by the Tribunal on the basis of non-exhaustive criteria, such as the complexity of the issues in dispute and the stage of the proceeding. This offers greater flexibility, and protection to the parties and addresses Member States’ comments that the possibility to opt out of EA should not depend solely on party agreement.
186. AR 85(3) allows the Secretary-General to determine further procedure, recognizing that the parties may opt out of the EA before a Tribunal has been constituted. It also specifies that the proceeding shall then be conducted pursuant to the provisions of Chapters I-XI once the arbitration is no longer expedited.
IV. CONCILIATION RULES FOR ICSID CONVENTION PROCEEDINGS
(CONCILIATION RULES)

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IV. **Conciliation Rules of Procedure for Conciliation ICSID Convention Proceedings**

(Conciliation Rules)

187. Revisions made to the CR in WP # 3 respond to comments from Member States and the public. Revisions to the corresponding provisions in the AR are also reflected in the CR, where suitable.

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**Introductory Note**

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

The Conciliation Rules are supplemented by the Administrative and Financial Regulations of the Centre.

The Conciliation Rules apply from the date of registration of a Request for conciliation until termination of the conciliation.

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**Chapter I**

**General Provisions**

**Rule 1**

**Application of Rules**

(1) These Rules shall apply to any conciliation proceeding conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) in accordance with Article 33 of the Convention.

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

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

**Rule 2**

**Meaning of Party and Party Representative**

(1) For the purposes of these Rules, “party” may include(s), where the context so admits, all parties acting as claimant or as respondent, and
(b) a representative of a party.

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

188. CR 2 has been revised, reflecting changes to the corresponding provision in AR 3.

Rule 3

Method of Filing and Supporting Documents

(1) A document to be filed in the proceeding shall only be filed with the Secretary-General, who shall acknowledge its receipt electronically, unless the Commission orders otherwise in special circumstances.

(2) A document shall only be filed electronically, unless the Commission orders otherwise in special circumstances, with the Secretary-General, who shall acknowledge receipt and distribute it in accordance with Rule 4.

(3) Supporting documents shall be filed together with the written statement, request, observation or communication to which they relate.

(4) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Commission or a party may require a fuller extract or a complete version of the document.

189. CR 3 has been divided into two rules. CR 3 now sets out the default rules for the method of filing, while CR 4 addresses supporting documents. Changes made to CR 3 reflect those made to the corresponding provision in AR 4.

Rule 43

Supporting Documents

(1) Supporting documents shall be filed together with the written statement, request, observation or communication to which they relate.

(2) An extract of a supporting document may be filed as a supporting document if the omission of the text does not render the extract misleading. The Commission or a party may require a fuller extract or a complete version of the document.
190. CR 4 reflects changes to the corresponding provision in AR 5(1) and (2).

**Rule 54**

Routing of Documents

The Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other;

(b) the Commission, unless the parties communicate directly with the Commission on request of the Commission or by agreement of the parties; and

(c) the Chairman of the Administrative Council (“Chair”) if applicable.

(1) The Secretary-General shall be the official channel for routing of documents among the parties, the Commission, and the Chairman of the Administrative Council (“Chair”), except that:

(2) The Secretary-General shall:

(a) acknowledge receipt of all documents transmitted by a party; and

(b) distribute the documents to the other party and the Commission, unless they were transmitted pursuant to paragraph 1(a) or (c).

(3) The parties may communicate directly with each other, provided that they transmit all documents to be filed in the conciliation to the Secretary-General;

(4) the members of the Commission shall communicate directly with each other; and

(5) a party may communicate directly with the Commission on request of the Commission, provided that the Secretary-General is copied.

191. CR 5 streamlines provisions relating to the routing of documents and aligns the text with revisions to AR 6. CR 5(b) includes direct communication between the Commission and one party only, consistent with CR 24(4)(b).

**Rule 65**

Procedural Languages, Translation and Interpretation

(1) The parties may agree to use one or two procedural languages in the conciliation. The parties shall consult with the Commission and the Secretary-
General regarding the use of a language that is not an official language of the Centre.

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written statements, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Commission may order a party to file such documents in both procedural languages.

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

(5) Any document from the Commission or the Secretary-General shall be in a procedural language. In a proceeding with two procedural languages, the Commission and, or where applicable the Secretary-General if applicable, shall issue orders, decisions, recommendations and the Report in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Commission may order interpretation into the other procedural language.

192. CR 6 reflects changes made to the corresponding provisions in AR 7(1)-(6).

Rule 7
Calculation of Time Limits

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

193. CR 7 has been added to provide a default provision for the calculation of time limits in conciliation proceedings. This provision reflects the corresponding provision in AR 9.
**Rule 86**

**Payment of Advances and Costs of the Proceeding**

(1) Each party shall pay one half of the advances payable in accordance with Administrative and Financial Regulation 15.

(2) The fees and expenses of the members of the Commission and the administrative charges and direct costs of the Centre incurred in connection with the proceeding shall be borne equally by the parties, in accordance with Article 61(1) of the Convention.

(3) Each party shall bear its own any other costs incurred in connection with the proceeding.

The reference to payment of advances has been removed from CR 8 as this is dealt with in AFR 15. The language in new CR 8(1) has been simplified. New CR 8(2) has been aligned with the corresponding provision in MR 8.

**Rule 97**

**Confidentiality of the Conciliation**

(1) All information relating to the conciliation, or and all documents generated in or obtained during the conciliation, shall be kept confidential, unless:

   (a) the parties agree otherwise;

   (b) the information is to be published by the Centre pursuant to Administrative and Financial Regulation 26;

   (c) the information or document is independently available; or

   (d) disclosure is required by law.

(2) Any settlement agreement concluded during of the conciliation shall be kept confidential, except to the extent that disclosure is required by law or for purposes of its implementation and enforcement.

(3) The parties to a conciliation may consent to:

   (a) disclosure to a non-party of any information relating to or document generated in or obtained during the conciliation, other than the information to be published by the Centre pursuant to Administrative and Financial Regulation 26; and
CR 9(2) in WP # 2 has been deleted because the disclosure of settlement agreements resulting from the conciliation is covered by CR 9(1). In addition, a reference to the disclosure of settlement agreements has been added to the list of items to be addressed at the first session between the Commission and the parties.

Likewise, the publication of information by ICSID contemplated in CR 9(3) in WP # 2 has been deleted given that publication on the basis of party consent is covered in CR 9(1).

**Rule 108**

**Use of Information in Other Proceedings**

Unless the parties to the dispute agree otherwise pursuant to Article 35 of the Convention, neither a party shall not rely on any of the following in other proceedings:

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

2. the Report, order, decision, or any recommendation made by the Commission in the conciliation.
IV. CONCILIATION RULES FOR ICSID CONVENTION PROCEEDINGS
(CONCILIATION RULES)

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Chapter II
Constitution of the Commission

Rule 119
General Provisions, Number of Conciliators and Method of Constitution

(1) The Commission shall be constituted without delay after registration of the Request for conciliation.

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

(3) The parties shall endeavor to agree on a Sole Conciliator; or any uneven number of conciliators, and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, either party may inform the Secretary-General that the Commission shall be constituted in accordance with Article 29(2)(b) of the Convention.

(4) References in these Rules to a Commission or a President of a Commission shall include a Sole Conciliator.

Rule 120
Notice of Third-Party Funding

(1) For purposes of completing the conciliator declaration required by Rule 164(3)(b), a party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall send the notice referred to in paragraph (1) to the Secretary-General upon registration of the Request for conciliation, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit a notice of third-party funding and any changes to such notice to the parties, and to any conciliator proposed for appointment or appointed in a proceeding for purposes of completing the conciliator declaration required by Rule 164(3)(b).
197. CR 12 reflects changes to the corresponding provision in AR 14.

**Rule 134**
Appointment of Conciliators to a Commission Constituted in Accordance with Article 29(2)(b) of the Convention

If the Commission is to be constituted in accordance with Article 29(2)(b) of the Convention, each party shall appoint a conciliator and the parties shall jointly appoint the President of the Commission.

**Rule 142**
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a Sole Conciliator, or any uneven number of conciliators.

**Rule 153**
Appointment of Conciliators by the Chair in Accordance with Article 30 of the Convention

(1) If a Commission has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Chair appoint the conciliator(s) who have not yet been appointed pursuant to Article 30 of the Convention.

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

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

**Rule 164**
Acceptance of Appointment

(1) A party appointing a conciliator shall notify the Secretary-General of the appointment and provide the appointee’s name, nationality(ies) and contact information.
(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

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

(a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each the conciliator(s) and provide the signed declaration.

(5) The Secretary-General shall notify the parties if a conciliator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as conciliator in accordance with the method followed for the previous appointment.

(6) Each conciliator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the conciliator agree otherwise, a conciliator may not act as arbitrator, counsel, expert, judge, mediator, witness or in any other capacity in any other proceeding relating to the dispute that is the subject of the conciliation.

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**Rule 175**

**Replacement of Conciliators Prior to Constitution of the Commission**

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

(a) a conciliator may withdraw an acceptance;

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

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

(2) A replacement conciliator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced conciliator was appointed.
Rule 186
Constitution of the Commission

(1) The Commission shall be deemed to be constituted on the date the Secretary-General notifies the parties that each conciliator has accepted the appointment.

(2) As soon as the Commission is constituted, the Secretary-General shall transmit the Request for conciliation, the supporting documents, the notice of registration and communications with the parties to the each conciliator(s).
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Chapter III
Disqualification of Conciliators and Vacancies

Rule 197
Proposal for Disqualification of Conciliators

(1) A party may file a proposal to disqualify one or more conciliators (“proposal”) in accordance with the following procedure:

(a) the proposal shall be filed after the constitution of the Commission and within 21 days after the later of:
   (i) the constitution of the Commission; or
   (ii) the date on which the party proposing the disqualification first knew or first should have known of the facts upon which the proposal is based;

(b) the proposal shall include the grounds on which the proposal is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;

(d) the conciliator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (1)(c); and

(e) each party may file a final written submission on the proposal within seven days after expiry of the time limit referred to in paragraph (1)(d).

(2) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.

Rule 2018
Decision on the Proposal for Disqualification

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

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

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

(3) The conciliators not subject to the proposal and the Chair shall use best efforts to decide any proposal within 30 days after the later of the expiry of the time limit referred to in Rule 197(1)(e) or the notice in paragraph Rule 20(2)(a).

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**Rule 2119**

**Incapacity or Failure to Perform Duties**

If a conciliator becomes incapacitated or fails to perform the duties required of a conciliator, the procedure in Rules 1917 and 2018 shall apply.

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**Rule 220**

**Resignation**

(1) A conciliator may resign by notifying the Secretary-General and the other members of the Commission and providing reasons for the resignation.

(2) If the conciliator was appointed by a party, the other members of the Commission shall promptly notify the Secretary-General whether they consent to the conciliator’s resignation for the purposes of Rule 234(3)(a).

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**Rule 234**

**Vacancy on the Commission**

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

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

(3) A vacancy on the Commission shall be filled by the method used to make the original appointment, except that the Chair shall fill the following from the Panel of Conciliators:
(a) a vacancy caused by the resignation of a party-appointed conciliator without the consent of the other members of the Commission; or

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

(4) Once a vacancy has been filled and the Commission has been reconstituted, the conciliation shall continue from the point it had reached at the time the vacancy was notified.
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Rule 242
Functions of the Commission

(1) The Commission shall clarify the issues in dispute and assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) In order to bring about agreement between the parties, the Commission may, at any stage of the proceeding, after consulting with the parties, recommend:

(a) specific terms of settlement to the parties; or

(b) that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.

(3) Recommendations may be made orally or in writing. Either party may request that the Commission provide reasons for any recommendation. The Commission may invite each party to provide observations concerning any recommendation made.

(4) At any stage of the proceeding, the Commission may:

(a) request explanations, documents or other information from either party or other persons;

(b) communicate with the parties jointly or separately; or

(c) visit any place connected with the dispute or conduct inquiries with the agreement and participation of the parties.

Rule 253
General Duties of the Commission

(1) The Commission shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.

(2) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.
The sequence of paragraph (1) and (2) has been inverted to mirror the corresponding changes to AR 2. Many States commented on the good faith provision in the context of AR 2(1). The good faith requirement was added in CR 25(1) to address these comments and to mirror the corresponding duty of the parties in Article 34 of the Convention.

Rule 264
Orders, Decisions and Procedural Agreements

(1) The Commission shall make the orders and decisions required for the conduct of the conciliation.

(2) The Commission shall make decisions by a majority of the votes of all its members. Abstentions shall count as a negative vote.

(3) Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Commission.

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

CR 26(4) has been revised to clarify that the Commission shall apply any agreement between the parties unless it conflicts with provisions in the Convention or the AFR.

Rule 275
Quorum

The participation of a majority of the members of the Commission by any appropriate means of communication shall be required at the first session, meetings and deliberations, unless the parties agree otherwise.

Rule 286
Deliberations

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

(2) The Commission may deliberate at any place and by any means it considers appropriate.
(3) Only members of the Commission shall take part in its deliberations. No other person shall be admitted unless the Commission decides otherwise.

**Rule 297**

Cooperation of the Parties

(1) The parties shall cooperate with the Commission and with one another, and shall conduct the conciliation in good faith, and in an expeditious and cost-effective manner.

(2) The parties shall provide all relevant explanations, documents or other information. The parties shall also facilitate visits to any place connected with the dispute and the participation of other persons as requested by the Commission.

(3) The parties shall comply with any time limit agreed upon or fixed by the Commission.

(4) The parties shall give their most serious consideration to the Commission’s recommendations pursuant to Article 34(1) of the Convention.

**Rule 3028**

Written Statements

(1) Each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views on these issues 30 days after the constitution of the Commission, or such longer time as the Commission may fix in consultation with the parties, but in any event before the first session.

(2) Either party may file further written statements at any stage of the conciliation within the time limits fixed by the Commission.

200. A consultation requirement has been added in CR 30(1) as in the corresponding provision in MR 18.

**Rule 3129**

First Session

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

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

(2)(3) The first session shall be held within 60 days of after the Commission’s constitution or such other period as the parties may agree.

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

(4) Before the first session, the Commission shall invite the parties’ views of the parties on procedural matters, including:

(a) the applicable conciliation rules;

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

(c) the method of filing and routing of documents;

(d) a schedule for further written statements and meetings;

(e) the place and format of meetings between the Commission and the parties;

(f) the manner of recording or keeping minutes of meetings, if any;

(g) the protection treatment of confidential or protected information;

(h) the publication of documents;

(i) any agreement between the parties:

   (i) concerning the treatment of information disclosed by one party to the Commission by way of separate communication pursuant to Rule 242 (4)(b);

   (ii) not to initiate or pursue during the conciliation any other proceeding in respect of the dispute;

   (iii) concerning the application of prescription or limitation periods;

   (iii)(iv) concerning the disclosure of any settlement agreement resulting from the conciliation; and

   (iv)(v) pursuant to Article 35 of the Convention; and
(j) any other procedural matter raised by either party or the Commission.

(5) At the first session or within any other period as determined by the Commission may determine, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

(6) The Commission shall issue summary minutes recording the parties’ agreements and the Commission’s decisions on the procedure within 15 days after the later of the first session or the last written statement on procedural matters addressed at the first session.

201. CR 31(1) reflects changes to the corresponding provision in the AR, reverses the sequence of paragraph (2) and (3) and modifies the language in CR 31(4)(g). CR 31(4)(i)(iv) has been added in light of the deletion of the reference to settlement agreements in CR 9.

**Rule 320**

Meetings

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

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

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

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

**Rule 334**

Preliminary Objections

(1) A party may file a preliminary objection that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission (“preliminary objection”).
Conciliation Rules

(2) A party shall notify the Commission and the other party of its intent to file a preliminary objection shall be made as soon as possible. The objection shall be made no later than the date of the initial written statement referred to in Rule 3028(1), unless the facts on which the objection is based are unknown to the party at the relevant time.

(3) The Commission may address a preliminary objection separately or with other issues in dispute. If the Commission decides to address the objection separately, it may suspend the conciliation on the other issues in dispute to the extent necessary to address the preliminary objection.

(4) The Commission may at any time on its own initiative consider whether the dispute is within the jurisdiction of the Centre or within its own competence.

(5) If the Commission decides that the dispute is not within the jurisdiction of the Centre or for other reasons is not within its competence, it shall close the proceeding and issue a Report to that effect, in which it shall state its reasons. Otherwise, the Commission shall issue a decision on the objection with brief reasons and fix any time limit necessary for the further conduct of the conciliation.

202. The notification requirement in CR 33 reflects the corresponding change to AR 43(2).
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Termination of the Conciliation

Rule 342
Discontinuance Prior to the Constitution of the Commission

(1) If the parties notify the Secretary-General prior to the constitution of the Commission that they have agreed to discontinue the proceeding, the Secretary-General shall issue an order taking note of the discontinuance.

(2) If a party requests the discontinuance of the proceeding prior to the constitution of the Commission, the Secretary-General shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(3) If, prior to the constitution of the Commission, the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Secretary-General shall notify them of the time elapsed since the last step taken in the proceeding. If the parties fail to take a step within 30 days after the notice, they shall be deemed to have discontinued the proceeding and the Secretary-General shall issue an order taking note of the discontinuance. If either party takes a step within 30 days after the Secretary-General’s notice, the proceeding shall continue.

Rule 33
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by Administrative and Financial Regulation 15, the proceeding may be discontinued pursuant to Administrative and Financial Regulation 16.

203. The provision relating to the discontinuance of the proceeding for failure to pay the required advances has been removed as this is covered by AFR 16.
Rule 354  
Report Noting the Parties’ Agreement  

(1) If the parties reach agreement on some or all of the issues in dispute, the Commission shall close the proceedings and issue its Report noting the issues in dispute and recording the issues upon which the parties have agreed.

(2) The parties may provide the Commission with the complete and signed text of their settlement agreement and may request that the Commission embody such settlement in the Report.

Rule 365  
Report Noting the Failure of the Parties to Reach Agreement  

At any stage of the proceeding, and after notice to the parties, the Commission shall close the proceedings and issue its Report noting the issues in dispute and recording that the parties have not reached agreement on the issues in dispute during the conciliation if:

(a) it appears to the Commission that there is no likelihood of agreement between the parties; or

(b) the parties advise the Commission that they have agreed to discontinue the conciliation.

Rule 376  
Report Recording the Failure of a Party to Appear or Participate  

If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceedings and issue its Report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

Rule 387  
The Report  

(1) The Report shall be in writing and shall contain, in addition to the information specified in Rules 354-376:
(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Commission was established under the Convention and a description of the method of its constitution;

(d) the name of each member of the Commission and of the appointing authority of each;

(e) the dates and place(s) of the first session and the meetings of the Commission with the parties;

(f) a brief summary of the proceeding;

(g) the complete and signed text of the parties’ settlement agreement if requested by the parties pursuant to Rule 354 (2);

(h) a statement of the costs of the proceeding, including the fees and expenses of each member of the Commission and the costs to be paid by each party pursuant to Rule 86; and

(i) any agreement of the parties pursuant to Article 35 of the Convention.

(2) The Report shall be signed by the members of the Commission. It may be signed by electronic means if the parties agree. If a member does not sign the Report, such fact shall be recorded therein.

Rule 398
Issuance of the Report

(1) Once the Report has been signed by the members of the Commission, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.
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V. THE ADDITIONAL FACILITY RULES

Introductory Note

Additional Facility proceedings are governed by the Additional Facility Rules, the Additional Facility Administrative and Financial Regulations (Annex A), and the relevant (Additional Facility) Arbitration (Annex B) or Conciliation (Annex C) Rules. They apply to investment proceedings that cannot be brought under the ICSID Convention due to lack of jurisdiction.

Article 1
Definitions

(1) “Secretariat” means the Secretariat of the Centre.

(2) “Centre” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.

(3) “Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 14, 1966.

(4) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.

(5) “National of another State” means, unless otherwise agreed:

(a) a natural or juridical person that, on the date of consent to the proceeding, is a national of a State other than the State party to the dispute, or of any constituent State of the REIO party to the dispute; or

(b) a juridical person that, on the date of consent to the proceeding, is a national of the State party to the dispute or of any constituent State of the REIO party to the dispute, and which the parties agree not to treat as a national of that State for the purpose of these Rules.

(6) “Request” means a request for arbitration or conciliation.

(7) “Contracting State” means a State for which the Convention is in force.
204. One State requested further discussion regarding the definition of an REIO in Art. 1(4), the concept of transfer of competence in respect of matters governed by the AF Rules and the consequences of REIO participation for States.

205. The proposed definition of an REIO in Art. 1(4) is commonly used in other international instruments, including the ECT (see WP # 1, Vol. 3, ¶¶ 934 et seq. and WP # 2, Vol. 1, ¶¶ 561 et seq. for further examples using this definition of REIO).

206. The proposed definition of REIO in Art. 1(4) has two main components. First, the REIO must be an organization composed by States. Second, the constituent States of the REIO must have transferred competence to the REIO in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of such matters. As explained in WP # 1, the requirement that the REIO has the power to bind its member States is typically implied by the competence transferred to the organization.

207. The foundational instrument of an REIO generally prescribes the competences transferred from its Member States, including ISDS. Whether an REIO qualifies under Art. 1(4) will be determined based on the text of such instruments.

208. Assuming that an REIO meets the definition in Art. 1(4), it would also have to consent to AF arbitration or conciliation to be a disputing party. This consent typically is included in the investment treaty or contract concluded by the REIO and its constituent States.

209. To give a concrete example, the EU meets the definition of an REIO in Art. 1(4) because it is an organization constituted by its 28 Member States (the first component), to which States have transferred competence in respect of matters governed by the AF Rules, including the authority to make decisions binding on them in respect of such matters (see Lisbon Treaty and TFEU), thus meeting the second component of the definition in Art. 1(4). IIAs signed by the EU offer ICSID AF arbitration for resolution of investment disputes. Thus, the AF (as proposed) would be available in ISDS disputes naming the EU.

210. In this fashion, the proposed addition of Art. 1(4) ensures that States that enter into IIAs with REIOs will have the option of ICSID dispute resolution for cases in which the REIO is a claimant or a respondent. Increasingly States are entering treaties in this manner, and so this amendment is important to modernize the AF Rules and to ensure dispute settlement at ICSID remains available to investors and host States party to such a treaty.

211. One State asked about the benefits of allowing dual nationals to be parties, as envisioned under Art. 1(5).

212. This proposal accommodates those IIAs in force that explicitly extend ISDS to dual nationals.

213. States can offer ISDS to dual nationals in the instrument of consent, but currently ICSID AF Arbitration and Conciliation is not available to such dual nationals. It therefore seems
appropriate to also make proceedings under the AF available to dual nationals, expanding the fora available to settle such disputes.

### Article 2
**Additional Facility Proceedings**

(1) The Secretariat is authorized to administer arbitration and conciliation proceedings for the settlement of legal disputes arising out of an investment between a State or an REIO on the one hand, and a national of another State on the other hand, which the parties consent in writing to submit to the Centre if:

(a) none of the parties to the dispute is a Contracting State or a national of a Contracting State;

(b) either the State party to the dispute, or the State whose national is a party to the dispute, but not both, is a Contracting State; or

(c) an REIO is a party to the dispute.

(2) Reference to a State or an REIO includes a constituent subdivision of the State, or an agency of the State or the REIO. The State or the REIO must approve the consent of the constituent subdivision or agency which is a party to the proceeding pursuant to paragraph (1), unless the State or the REIO concerned notifies the Centre that no such approval is required.

(3) Arbitration and conciliation proceedings under these Rules shall be conducted in accordance with the (Additional Facility) Arbitration Rules (Annex B) or the (Additional Facility) Conciliation Rules (Annex C) respectively. The (Additional Facility) Administrative and Financial Regulations (Annex A) shall apply to such proceedings.

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214. One State queried whether proposed Art. 2(1) might be perceived as adopting a subjective (as opposed to objective) notion of investment. This is addressed comprehensively in WP # 1, ¶¶ 953-960 and 966-967.

215. The proposed AF does not take any position as to whether investment is an objective or subjective concept and which of these approaches should apply.

216. Taking stock of the AF case law, the Centre noted in WP # 1 that the vast majority of tribunals in AF cases have not applied a definition of investment other than what is expressly stated in the instrument of consent. These tribunals examined whether there was an investment for the purposes of the IIA or contract invoked, without doing the “double-keyhole” test usually employed under the Convention. This has been the majority practice in NAFTA and CAFTA cases (see e.g., Apotex v. USA (ARB(AF)/12/1), Award (August
217. Conversely, there are cases under the UNCITRAL Rules that have applied a “double-keyhole” test to the definition of investment (see e.g., Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award (November 26, 2009)) even though that test is not expressed in the UNCITRAL Rules.

218. Referring to “legal disputes arising out of an investment” is especially apt for cases under the AF where one or both of the parties will not be signatory to the Convention.

219. The reference to investment in Art. 2 does not deviate from current practice and does not prohibit an objective interpretation of “investment” by tribunals.

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**Article 3**

**Convention Not Applicable**

The provisions of the Convention do not apply to the conduct of Additional Facility proceedings.

**Article 4**

**Final Provisions**

(1) The applicable Rules are those in force on the date of filing of the Request, unless the parties agree otherwise.

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

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

220. Changes in Art. 4(2) were made to reflect similar provisions in other Rules.
VI. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR ADDITIONAL FACILITY PROCEEDINGS (ANNEX A)
((ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS)

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(ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS

Introductory Note

The (Additional Facility) Administrative and Financial Regulations apply to Additional Facility Arbitration and Conciliation proceedings and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

Chapter I
General Provisions

Regulation 1
Application of these Regulations

(1) These Regulations apply to arbitration and conciliation proceedings which the Secretariat of the Centre is authorized to administer under Article 2 of the Additional Facility Rules.

(2) The applicable Regulations are those in force on the date of filing the Request for arbitration or conciliation under the Additional Facility Rules, unless the parties agree otherwise.

(3) These Regulations may be referred to as the “(Additional Facility) Administrative and Financial Regulations” of the Centre (“Annex A” to the Additional Facility Rules).
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General Functions of the Secretariat

Regulation 2
Secretary

The Secretary-General of the Centre shall appoint a Secretary for each Commission and Tribunal. The Secretary may be drawn from the Secretariat, and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the (Additional Facility) Arbitration and Conciliation Rules applicable to individual proceedings and delegated to the Secretary; and

(b) assist the parties and the Commission or Tribunal with all aspects of the proceedings, including the expeditious and cost-effective conduct of the proceeding.

221. This change reflects change in corresponding AFR 28(b).

Regulation 3
The Registers

The Secretary-General shall maintain and publish a Register for each case containing all significant data concerning the institution, conduct and disposition of the proceeding, including the economic sector involved, the names of the parties and their representatives, and the method of constitution and membership of each Commission or Tribunal.

Regulation 4
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for arbitration, conciliation, supplementary decisions, rectification or interpretation;

(b) all written submissions, written statements, observations, supporting documents and communications filed in a proceeding;
(c) the minutes, recordings and transcripts of hearings, meetings or sessions in a proceeding; and

(d) any order, decision, recommendation, Report or Award by a Commission or Tribunal.

(2) Subject to the applicable rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties. Certified copies of the documents referred to in paragraph (1)(d) shall reflect any supplementary decision, rectification or interpretation, rectification or supplementary decision.

222. The change to (AF)AFR 4 reflects change in corresponding AFR 29(1).

**Regulation 5**

**Certificates of Official Travel**

The Secretary-General may issue certificates of official travel to members of Commissions or Tribunals, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under pursuant to the ICSID Additional Facility Rules.

223. (AF)AFR 5 reflects change in corresponding AFR 30, and ensures consistency.
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Regulation 6
Fees, Allowances and Charges

(1) Each member of a Commission or Tribunal shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a hearing, meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a hearing, meeting or session held away from the member’s place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the hearing, meeting or session is held; and

(iii) a per diem allowance for each day the member spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Commission or Tribunal and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties for the services of the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) members of Commissions and Tribunals, and any assistants approved by the parties;

(b) witnesses and experts called by a Commission or Tribunal who have not been presented by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any hearing, meeting or session held outside an ICSID facility.
(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Commission or Tribunal, unless the parties have made sufficient payments to defray the costs of the proceeding.

224. This change reflects change in corresponding AFR 14.

**Regulation 7**  
**Payments to the Centre**

(1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for arbitration or conciliation, the Secretary-General shall request the claimant(s) to make a payment to defray the estimated costs of the proceeding through the first session of the Commission or Tribunal, which shall be considered partial payment by the claimant(s) of the payment referred to in paragraph (1)(b);

(b) upon constitution of a Commission or Tribunal, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding; and

(2) the Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(3) In conciliation proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division. In arbitration proceedings, each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless a different division is agreed to by the parties or ordered by the Tribunal. Payment of these sums is without prejudice to the Tribunal’s final decision on the payment of costs pursuant to Rule 69(1)(j) of the (Additional Facility) Arbitration Rules.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

(4) This Regulation shall apply to requests for a supplementary decision on or rectification of an Award, and to an application for interpretation of an Award.
225. Changes in (AF)AFR 7 reflect changes in corresponding AFR 15.

| Regulation 8  |
| Consequences of Default in Payment |

(1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

(a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Commission or Tribunal if constituted; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Commission or Tribunal if constituted.

The addition of “consecutive” reflects the change in corresponding AFR 16(2)(c).

226. The addition of “consecutive” reflects the change in corresponding AFR 16(2)(c).

| Regulation 9  |
| Special Services |

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

| Regulation 10  |
| Fee for Lodging Requests |

The party or parties (if a request is made jointly) wishing to institute an arbitration or conciliation proceeding, or requesting a supplementary decision, rectification or interpretation of an Award, shall pay the Centre a non-refundable
lodging fee determined by the Secretary-General and published in the schedule of fees.

**Regulation 11**

**Administration of Proceedings**

The ICSID Secretariat is the only entity authorized to administer proceedings conducted pursuant to the Additional Facility Rules.

227. This change reflects change in corresponding AFR 22.
VI. (ADDITIONAL FACILITY) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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Chapter IV
Official Languages and Limitation of Liability

Regulation 12
Languages of Regulations

(1) These Regulations are published in the official languages of the Centre, English, French and Spanish.

(2) The texts of these Regulations in each of these official languages are equally authentic.

(3) The singular form of words in these Regulations and in the (Additional Facility) Arbitration and Conciliation Rules include the plural form of that word, unless otherwise stated or required by the context of the provision.

Regulation 13
Prohibition Against Testimony and Limitation of Liability

(1) Unless required by applicable law or unless the parties and all the members of the Commission or Tribunal agree otherwise in writing, no member of the Commission or Tribunal shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the arbitration or conciliation proceeding.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no member of the Commission or Tribunal shall be liable for any act or omission in connection with the exercise of their functions in the arbitration or conciliation proceeding, unless there is fraudulent or willful misconduct.
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Introductory Note

The Additional Facility Rules of Procedure for Arbitration Rules for Additional Facility Proceedings (the (Additional Facility) Arbitration Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7(4).

The (Additional Facility) Arbitration Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations in Annex A.

The (Additional Facility) Arbitration Rules apply from the submission of a Request for arbitration until an Award is rendered and to any proceedings arising from a request for a supplementary decision on, rectification of, or interpretation of, an Award.

Chapter I
General Provisions
Scope

Rule 1
Application of Rules

(1) These Rules shall apply to any arbitration proceeding conducted under pursuant to the Additional Facility Rules, except to the extent that the parties agree otherwise and subject to paragraph (2).

(1)(2) The parties may agree to modify the application of any of these Rules other than Rules 1-9.

(2)(3) If any of these Rules, or any aspect of the parties’ agreement pursuant to paragraph (2), conflicts with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

(3) The Tribunal shall apply any agreement of the parties on procedural matters to the extent that it conforms with the (Additional Facility) Administrative and Financial Regulations, subject to paragraph (2).
(4) The applicable (Additional Facility) Arbitration Rules are those in force on the date of filing the Request for arbitration, unless the parties agree otherwise.

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

(6) These Rules may be cited as the “(Additional Facility) Arbitration Rules” of the Centre.

229. (AF)AR 1(2) allows the parties to modify the application of the Rules except for Chapters I and II that contain the institution and registration provisions.

230. (AF)AR 1(3) in WP # 2 has been removed and reinserted under (AF)AR 34.

231. (AF)AR 1(4) has been modified to allow parties to apply prior versions of the Rules should they wish to do so.

232. (AF)AR 2-11 in WP # 2 have been moved to new Chapter III on the Conduct of the Proceeding.
VII. THE ARBITRATION RULES FOR ADDITIONAL FACILITY PROCEEDINGS
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Chapter II
Institution of Proceedings

Rule 12
The Request

(1) Any party wishing to institute arbitration proceedings under pursuant to the Additional Facility Rules shall file a Request for arbitration together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 13
Contents of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising out of the investment;

(b) with respect to each party’s consent to submit the dispute to arbitration pursuant to under the Additional Facility Rules:

(i) the instrument(s) in which each party’s consent is recorded;
(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;

(c) if a party is a natural person:

(i) information concerning that person’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person did not have the nationality of is a national of a State other than the State party to the dispute or of any constituent State of an the REIO party to the dispute on the date of consent;

(d) if a party is a juridical person:

(i) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of consent, information identifying the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the State’s or REIO’s approval of consent of the State or the REIO, unless the State or the REIO has notified the Centre that no such approval is required.

233. Changes to (AF)AR 1(e) and 3(2)(a) reflect changes in proposed IR 2.

234. The change to (AF)AR 3(2)(c) accommodates dual nationals, as proposed under AF Art. 1(5).
Rule 14
Recommended Additional Information

It is recommended that the Request also contain any procedural proposals or agreements reached by the parties, including with respect to:

(a) an estimate of the amount of damages sought, if any;
(b) a proposal concerning the number and method of appointment of arbitrators;
(c) the agreed or proposed seat of arbitration;
(d) the agreed or proposed law applicable to the dispute; and
(e) the proposed procedural language(s); and
(f) any other procedural proposals or agreements reached by the parties.

235. Changes to (AF)AR 4 reflect changes in IR 3.

Rule 15
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a supporting document may be filed as a supporting document if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

(4) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.

236. Changes to (AF)AR 5 reflect changes in IR 4.
Rule 16
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;
(b) transmit the Request to the other party upon receipt of the lodging fee; and
(c) act as the official channel of written communications between the parties.

Rule 17
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 18
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;
(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;
(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators, unless such information has already been provided; and to constitute a Tribunal without delay;
(d) invite the parties to constitute a Tribunal without delay;
(e) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal in regard to jurisdiction, competence of the Tribunal, and the merits; and
(f)(e) remind the parties to make the disclosure required by Rule 232.

237. Changes to (AF)AR 8 reflect changes in IR 7.

Rule 49
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 46(b).
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Rule 102
General Duties

(1) The parties shall conduct the proceeding and implement the Tribunal’s orders and decisions in good faith.

(1) The Tribunal and the parties shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.

(2) The Tribunal shall treat the parties equally and provide each party with a reasonable opportunity to present its case.

(3) The Tribunal and the parties shall conduct the proceeding in an expeditious and cost-effective manner.

238. Changes to (AF)AR 10 reflect changes in AR 2.

Rule 113
Meaning of Party and Party Representative

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

(a) all parties acting as claimant or as respondent; and

(b) a representative of a party.

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

239. Changes to (AF)AR 11 reflect changes in AR 3.

Rule 124
Method of Filing

(1) A document to be filed in the proceeding shall be filed with the Secretary-General, who shall acknowledge its receipt. It shall only be filed electronically, unless the Tribunal orders otherwise in special circumstances.
240. Changes to (AF)AR 12 reflect changes in AR 4.

Rule 135
Supporting Documents

(1) Supporting documents, including witness statements, expert reports, exhibits and legal authorities, shall be filed together with the request, written submission, observations or communication to which they relate.

(2) An extract of a supporting document may be filed as a supporting document if the omission of the text does not render the extract not misleading. The Tribunal or a party may require a fuller extract or a complete version of the document.

(3) If the authenticity of a supporting document is disputed, the Tribunal may order a party to provide a certified copy or to make the original document available for examination.

241. Changes to (AF)AR 13 reflect changes in AR 5.

Rule 146
Routing of Documents

(1) Following the registration of the Request pursuant to Rule 17(2), the Secretary-General shall transmit a document filed in the proceeding to be the official channel for routing of documents among the parties and the Tribunal, except that:

(a) the other party, unless the parties may communicate directly with each other, provided that they transmit all documents to be filed in the proceeding to the Secretary-General; and

(b) the members of the Tribunal, unless the parties shall communicate directly with each other on request of the Tribunal or by agreement of the parties; and

(c) a party may communicate directly with the Tribunal on request of the Tribunal or by agreement of the parties, provided that the other party and the Secretary-General are copied.
(2) The Secretary-General shall:

(a) acknowledge receipt of all documents transmitted by a party; and

(b) distribute them to the other party and the Tribunal, unless they were transmitted pursuant to paragraph (1)(a) or (c).

242. Changes to (AF)AR 14 reflect changes in AR 6.

**Rule 157**

Procedural Languages, Translation and Interpretation

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

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written submissions, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Tribunal may order a party to file such documents in both procedural languages.

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

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

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Tribunal may order interpretation into the other procedural language.

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

243. Changes to (AF)AR 15 reflect changes in AR 7.

**Rule 168**

**Correction of Errors and Deficiencies**

(1) A party may correct an accidental error in a document promptly upon discovery and at any time, before the Award is rendered, with agreement of the other party or with leave of the Tribunal. The parties may refer any dispute regarding a correction to the Tribunal for determination.

(2) The Secretary-General may request that a party correct any deficiency in a filing or make the required correction.

244. Changes to (AF)AR 16 reflect changes in AR 8.

**Rule 179**

**Calculation of Time Limits**

(1) References to time shall be determined based on the time at the seat of the Centre on the relevant date.

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

   (a) the Tribunal, or the Secretary-General if applicable, announces the period; or

   (b) the procedural step starting the period is taken.

(3) A time limit shall be satisfied if a procedural step is taken or a document is received by the Secretary-General on the relevant date, or, if the date falls on a Saturday, or Sunday, or a holiday observed by the Secretariat, on the subsequent business day.

245. Changes to (AF)AR 17 reflect changes in AR 9.
Rule 180
Fixing Time Limits Applicable to Parties

(1) The Tribunal, or the Secretary-General if applicable, shall fix time limits for the completion of each procedural step in the proceeding, other than time limits prescribed by these Rules.

(2) The parties may agree to extend any time limit.

(3) The Tribunal, or the Secretary-General if applicable, may extend any time limit that they fixed, upon a reasoned application by either party made prior to its expiry. The Tribunal may delegate this power to its President.

(4) An application or request filed after the expiry of the time limits in Rule 71 shall be disregarded. A procedural step taken or document received after the expiry of any other time limit shall be disregarded unless:

   (a) the other party does not object to the late step or filing; or

   (b) the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet a time limit that they fixed.

Changes to (AF)AR 18 reflect changes in AR 10.

Rule 19
Extension of Time Limits Applicable to Parties

(1) A time limit prescribed by these Rules may only be extended by agreement of the parties. A procedural step taken or document received after the expiry of such time limit shall be disregarded, unless the parties agree otherwise.

(2) A time limit fixed by the Tribunal or the Secretary-General may be extended by agreement of the parties or by the Tribunal, or Secretary-General if applicable, upon reasoned application by either party made prior to its expiry. A procedural step taken or a document received after the expiry of such time limit shall be disregarded unless the Tribunal, or the Secretary-General if applicable, concludes that there are special circumstances justifying the failure to meet the time limit.

(3) The Tribunal may delegate to the President the power to extend time limits referred to in paragraph (2).

New (AF)AR 19 reflects new AR 11.
Rule 2011
Time Limits Applicable to the Tribunal

(1) The Tribunal shall use best efforts to meet all applicable time limits to render orders, decisions and the Award.

(2) If special circumstances arise which prevent the Tribunal from complying with an applicable time limit, it shall advise the parties of the special circumstances that justify the reason for delay and the date when it anticipates rendering the order, decision or Award will be delivered.

248. Changes to (AF)AR 20 reflect changes in AR 12.

Chapter II
Institution of Proceedings

Rule 12
The Request

(3) Any party wishing to institute arbitration proceedings under the Additional Facility Rules shall file a Request for arbitration together with the required supporting documents ("Request") with the Secretary-General and pay the lodging fee published in the schedule of fees.

(4) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

249. The institution of the proceedings has been moved to Chapter II.

Rule 13
Contents of the Request

(3) The Request shall:

(f) be in English, French or Spanish;

(g) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(h) be signed by each requesting party or its representative and be dated;
(i) attach proof of any representative’s authority to act; and

(j) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request and attach the authorizations.

(4) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

(f) a description of the investment, a summary of the relevant facts and claims, the request for relief, and an indication that there is a legal dispute between the parties arising out of the investment.

(g) with respect to each party’s consent to submit the dispute to arbitration under the Additional Facility Rules:

(v) the instrument(s) in which each party’s consent is recorded;

(vi) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(vii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre;

(h) if a party is a natural person:

(iii) information concerning that person’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(iv) a statement that the person did not have the nationality of the State party to the dispute or of any constituent State of an REIO party to the dispute on the date of consent;

(i) if a party is a juridical person:

(iii) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(iv) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of the consent, information identifying the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;
(j) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the State’s or REIO’s approval of consent, unless the State or the REIO has notified the Centre that no such approval is required.

Rule 14
Recommended Additional Information

It is recommended that the Request also contain:

(g) an estimate of the amount of damages sought, if any;

(h) a proposal concerning the number and method of appointment of arbitrators;

(i) the agreed or proposed seat of arbitration;

(j) the agreed or proposed law applicable to the dispute;

(k) the proposed procedural language(s); and

(l) any other procedural proposals or agreements reached by the parties.

Rule 15
Filing of the Request and Supporting Documents

(5) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(6) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(7) The Secretary-General may require a certified copy of a supporting document.

(8) Any document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.
Rule 16
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(d) promptly acknowledge receipt of the Request to the requesting party;
(e) transmit the Request to the other party upon receipt of the lodging fee; and
(f) act as the official channel of written communications between the parties.

Rule 17
Review and Registration of the Request

(3) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(4) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 18
Notice of Registration

The notice of registration of the Request shall:

(g) record that the Request is registered and indicate the date of registration;

(h) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(i) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of arbitrators, unless such information has already been provided;

(j) invite the parties to constitute a Tribunal without delay;

(k) remind the parties that registration of the Request is without prejudice to the powers and functions of the Tribunal in regard to jurisdiction, competence of the Tribunal, and the merits; and
(l) remind the parties to make the disclosure required by Rule 22.

Rule 19
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 16(b).
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Chapter IV
Constitution of the Tribunal

Rule 210
General Provisions Regarding the Constitution of the Tribunal

(1) The Tribunal shall be constituted without delay after registration of the Request.

(2) Unless otherwise agreed by the parties:

(a) the majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute, any constituent State of the REIO party to the dispute; and the State whose national is a party to the dispute;

(b) a party may not appoint an arbitrator who is a national of the State party to the dispute, any constituent State of the REIO party to the dispute or the State whose national is a party to the dispute;

(c) arbitrators appointed by the Secretary-General shall not be nationals of the State party to the dispute, a constituent State of the REIO party to the dispute or the State whose national is a party to the dispute; and

(d) no person previously involved in the resolution of the dispute as a conciliator, judge, mediator, or in a similar capacity may be appointed as an arbitrator.

(3) The composition of a Tribunal shall remain unchanged after it has been constituted, except as provided in Chapter IV.

Rule 224
Qualifications of Arbitrators

Arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who are impartial and independent.

Rule 232
Notice of Third-Party Funding

(1) For purposes of completing the arbitrator declaration required by Rule 26(3)(b), a party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support.
for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.

(3) A party shall file send the notice referred to in paragraph (1) with to the Secretary-General upon registration of the Request, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit a notice of third-party funding and any changes to such notice to the parties and to any arbitrator proposed for appointment or appointed in a proceeding for purposes of completing the arbitrator declaration required by Rule 27(3)(b).

250. Changes to (AF)AR 23 reflect changes in AR 14.

Rule 243
Method of Constituting the Tribunal

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

(2) The parties shall endeavor to agree on any uneven number of arbitrators and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties.

Rule 254
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a President of the Tribunal or a Sole Arbitrator.
Rule 265
Appointment of Arbitrators by the Secretary-General

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

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

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

Rule 276
Acceptance of Appointment

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

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

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

   (a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by each arbitrator and provide their signed declarations.

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

**Rule 287**
Replacement of Arbitrators Prior to Constitution of the Tribunal

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

(a) an arbitrator may withdraw an acceptance;

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

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

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

**Rule 298**
Constitution of the Tribunal

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

(2) As soon as the Tribunal is constituted, the Secretary-General shall transmit the Request, the supporting documents, the notice of registration and communications with the parties to each member.
VII. THE ARBITRATION RULES FOR ADDITIONAL FACILITY PROCEEDINGS
(ADDITIONAL FACILITY) ARBITRATION RULES

Chapter V - Disqualification of Arbitrators and Vacancies

Rule 30 - Proposal for Disqualification of Arbitrators
Rule 31 - Decision on the Proposal for Disqualification
Rule 32 - Incapacity or Failure to Perform Duties
Rule 33 - Resignation
Rule 34 - Vacancy on the Tribunal
Chapter IV
Disqualification of Arbitrators and Vacancies

Rule 3024
Proposal for Disqualification of Arbitrators

(1) A party may file a proposal to disqualify one or more arbitrators (“proposal”) on the following grounds:

(a) that the arbitrator was ineligible for appointment to the Tribunal under pursuant to Rule 210(2)(a)–(c); or

(b) that circumstances exist that give rise to justifiable doubts as to the arbitrator's qualities of the arbitrator required by Rule 224.

(2) The following procedure shall apply:

(a) the proposal shall be filed after the constitution of the Tribunal and within 21 days after the later of:

(i) the constitution of the Tribunal; or

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

(b) the proposal shall include the grounds on which it is based, a statement of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days after receipt of the proposal;

(d) the arbitrator to whom the proposal relates may file a statement limited to factual information relevant to the proposal. The statement shall be filed within five days after receipt of the response referred to in paragraph (2)(c); and

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

(3) If the other party agrees to the proposal prior to the dispatch of the decision referred to in Rule 310, the arbitrator shall resign in accordance with Rule 332.

(4) The proceeding shall be suspended until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding in whole or in part.
Rule 310
Decision on the Proposal for Disqualification

(1) The Secretary-General shall make the decision on the proposal.

(2) The Secretary-General shall use best efforts to decide any proposal within 30 days after the expiry of the time limit referred to in Rule 3029(2)(e).

Rule 324
Incapacity or Failure to Perform Duties

If an arbitrator becomes incapacitated or fails to perform the duties required of an arbitrator, the procedure in Rules 3029 and 310 shall apply.

Rule 332
Resignation

An arbitrator may resign by notifying the Secretary-General and the other members of the Tribunal.

Rule 343
Vacancy on the Tribunal

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

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

(3) A vacancy on the Tribunal shall be filled by the method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Tribunal has been reconstituted, the proceeding shall continue from the point it had reached at the time the vacancy was notified. Any portion of a hearing shall be recommenced if the newly appointed arbitrator considers it necessary to decide a pending matter.
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Chapter - VI Conduct of the Proceeding

Rule 35 - Orders, Decisions and Agreements
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Rule 41 - Seat of Arbitration
Rule 42 - Hearings
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Rule 44 - Deliberations
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Chapter VI
Conduct of the Proceeding

Rule 354
Orders, and Decisions and Agreements

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

(2) Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Tribunal.

(3) The Tribunal shall apply any agreement of the parties on procedural matters, subject to Rule 1(3), and to the extent that the agreement does not conflict with the (Additional Facility) Administrative and Financial Regulations.

(4) The Tribunal shall consult with the parties prior to making an order or decision it is authorized by these Rules to make on its own initiative.

251. (AF)AR 35(3) was (AF)AR 34 in WP # 2. It was reinserted into this Rule.

252. Changes to (AF)AR 35(4) reflect changes in AR 27.

Rule 365
Waiver

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

Rule 376
Filling of Gaps

If a question of procedure arises which is not covered by these Rules or by any agreement of the parties, the Tribunal shall decide the question.
Rule 387
First Session

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

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

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

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

(a) the applicable arbitration rules;

(b) the division of advances payable pursuant to (Additional Facility) Administrative and Financial Regulation 7;

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

(d) the method of filing and routing of documents;

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

(f) the seat of arbitration;

(g) the place of hearings;

(h) whether there will be requests for production of documents as between the parties and, if so, the scope, timing and procedure for such requests for production of documents between the parties, if any;
(i) the procedural calendar, including written submissions, hearings, case
management conferences and the Tribunal’s orders and decisions;

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

(k) the publication of documents and recordings;

(l) the treatment protection of confidential or protected information; and

(m) any other procedural matter raised by either party or the Tribunal.

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

253. Changes to (AF)AR 38 reflect changes in AR 29.

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**Rule 398**

**Written Submissions**

(1) The parties shall file the following written submissions:

(a) a memorial by the requesting party;

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

and, unless the parties agree otherwise:

(c) a reply by the requesting party; and

(d) a rejoinder by the other party.

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

(3) A memorial on the merits or a memorial on preliminary objections may be filed at any
time before the first session.

(4) No party may file unscheduled written submissions, observations, or
supporting documents without obtaining leave of the Tribunal, unless the
filing of such documents is provided for by these Rules. The Tribunal may grant such leave upon a timely and reasoned application if it finds such written submissions, observations or supporting documents are necessary in view of all relevant circumstances.

254. Changes to (AF)AR 39 reflect changes in AR 30.

**Rule 4039**  
**Case Management Conferences**

With a view to conducting an expeditious and cost-effective proceeding, the Tribunal shall convene one or more case management conferences with the parties at any time after the first session to:

(a) identify uncontested facts;

(b) clarify and narrow the issues in dispute; or

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

255. Changes to (AF)AR 40 reflect changes in AR 31.

**Rule 410**  
**Seat of Arbitration**

The seat of arbitration shall be agreed on by the parties or, absent agreement, shall be determined by the Tribunal having regard to the circumstances of the proceeding and after consulting with the parties.

**Rule 424**  
**Hearings**

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

(2) The President of the Tribunal shall determine the date, time and method of holding hearings, after consulting with the other members of the Tribunal and the parties.
(3) If a hearing is to be held in person, it may be held at any place agreed to by the parties after consulting with the Tribunal and the Secretary-General. If the parties do not agree on the place of a hearing, it shall be held at a place determined by the Tribunal.

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

256. Changes to (AF)AR 42 reflect changes in AR 32.

Rule 432
Quorum

The participation of a majority of the members of the Tribunal by any appropriate means of communication shall be required at the first session, case management conferences, hearings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.

Rule 443
Deliberations

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

(2) The Tribunal may deliberate at any place and by any means it considers appropriate.

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

(4) The Tribunal shall deliberate on any matter for decision immediately after the last written or oral submission on that matter.

Rule 454
Decisions Made by Majority Vote

The Tribunal shall make decisions by a majority of the votes of all its members. Abstention shall count as a negative vote.
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Chapter VII
Evidence

Rule 465
Evidence: General Principles

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

(2) Each party has the burden of proving the facts relied on to support its claim or defense.

(3) The Tribunal may, if it deems it necessary at any stage of the proceedings, call upon a party to produce documents or other evidence if it deems it necessary at any stage of the proceeding.

Rule 476
Disputes Arising from Requests for Documents

The Tribunal shall decide any dispute arising out of a party’s objection to the other party’s request for production of documents. In deciding the dispute, the Tribunal shall consider all relevant circumstances, including:

(a) the scope and timeliness of the request;

(b) the relevance and materiality of the documents requested;

(c) the burden of production; and

(d) the basis of the objection, and

(e) all other relevant circumstances.

257. Changes to (AF)AR 47 reflect changes in AR 37.

Rule 487
Witnesses and Experts

(1) A party intending to rely on evidence given by a witness shall file a written statement by that witness. The statement shall identify the witness, contain the evidence of the witness, and be signed and dated.
(2) A witness who has filed a written statement may be called for examination at a hearing.

(3) The Tribunal shall determine the manner in which the examination is conducted.

(4) A witness shall be examined before the Tribunal, by the parties, and under the control of the President. Any member of the Tribunal may put questions to the witness.

(5) A witness shall be examined in person unless the Tribunal determines that another means of examination is appropriate in the circumstances.

(6) Each witness shall make the following declaration before giving evidence:

   “I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.”

(7) Paragraphs (1)-(5) shall apply, with necessary modifications, to evidence given by an expert.

(8) Each expert shall make the following declaration before giving evidence:

   “I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.”

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**Rule 498**

**Tribunal-Appointed Experts**

(1) *Unless the parties agree otherwise, the Tribunal may appoint one or more independent experts to report to it on specific matters within the scope of the dispute.*

(2) The Tribunal shall consult with the parties on the appointment of an expert, including on the terms of reference and fees of the expert.

(3) *Upon accepting an appointment by the Tribunal, an expert shall provide a signed declaration in the form published by the Centre.*

(3)(4) The parties shall provide the Tribunal-appointed expert with any information, document or other evidence that the expert may require. The Tribunal shall decide any dispute regarding the evidence required by the Tribunal-appointed expert.
The parties shall have the right to make written and oral submissions, as required, on the report of the Tribunal-appointed expert, as required.

Rule 487(1)-(5) and (8) shall apply, with necessary modifications, to the Tribunal-appointed expert.

258. Changes to (AF)AR 49 reflect changes in AR 39.

Rule 5049
Visits and Inquiries

(1) The Tribunal may order a visit to any place connected with the dispute, on its own initiative or upon a party’s request, if it deems the visit necessary, and may conduct inquiries there as appropriate.

(2) The order shall define the scope of the visit and the subject of any inquiry, the procedure to be followed, the applicable time limits and other terms.

(3) The parties shall have the right to participate in any visit or inquiry.
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Chapter VIII
Special Procedures

Rule 510
Manifest Lack of Legal Merit

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

(2) The following procedure shall apply:

(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;

(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;

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

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

(e) the Tribunal shall render issue its decision or render its Award on the objection within 60 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the objection.

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

(4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 532 or to argue subsequently in the proceeding that a claim is without legal merit.

259. Changes to (AF)AR 51 reflect changes in AR 41.
Rule 524
Bifurcation

(1) A party may request that a question be addressed in a separate phase of the proceeding ("request for bifurcation").

(2) If a request for bifurcation relates to a preliminary objection, Rule 542 BIS shall apply.

(3) The following procedure shall apply to a requests for bifurcation other than a request referred to in paragraph Rule 54(2):

(a) the request for bifurcation shall be filed as soon as possible;

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

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

(d) the Tribunal shall issue its decision on the request for bifurcation within 320 days after the later of the last written or oral submission on the request; and

(e) the Tribunal shall decide whether to suspend any part of the proceeding if it decides to bifurcate; and

(f) the Tribunal shall fix any time limit necessary for the further conduct of the proceeding, as required.

(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and

(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.

(5) If the Tribunal orders bifurcation pursuant to this Rule, it shall suspend the proceeding with respect to any questions to be addressed at a later phase, unless the parties agree...
otherwise or the Tribunal decides there are special circumstances that do not justify
suspension.

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

260. Changes to (AF)AR 52 reflect changes in AR 42.

**Rule 532**
**Preliminary Objections**

(1) The Tribunal shall have the power to rule on its jurisdiction and competence. For the
purposes of this Rule, an agreement providing for arbitration pursuant to under the
Additional Facility Rules shall be severable from the other terms of the contract in
which it may have been included.

(2) A party may file a preliminary objection that the dispute or any ancillary claim is not
within the jurisdiction or competence of the Tribunal (“preliminary objection”).

(3) A party shall notify the Tribunal and the other party of its intent to file a preliminary
objection shall be raised as soon as possible.

(4) The Tribunal may address a preliminary objection in a separate phase of the
proceeding or join the objection to the merits.

(5) If a party requests bifurcation of a preliminary objection, Rule 542BIS shall apply.

(6) If a party does not request bifurcation of a preliminary objection within the time limits
referred to in Rule 542BIS(1)(a) or the parties confirm that they will not request
bifurcation, the objection shall be joined to the merits and the following procedure
shall apply:

(a) the Tribunal shall fix time limits for written and oral submissions on the
preliminary objection, as required;

(b) the memorial on the preliminary objection shall be filed no later than:

(i) by the date to file the counter-memorial on the merits;

(ii) by the date to file the next written submission after an ancillary claim, if the
objection relates to the ancillary claim; or
(iii) as soon as possible after the facts on which the objection is based become known to a party, if those facts were unknown to the party on the relevant dates referred to in paragraph (6)(b)(i) and (ii).

(c) the party filing the memorial on preliminary objections shall also file its counter-memorial on the merits, or, if the objection relates to an ancillary claim, file its next written submission after the ancillary claim; and

(d) the Tribunal shall render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 68(1)(c).

(7) The Tribunal may at any time on its own initiative consider whether a dispute or an ancillary claim is within its own jurisdiction and competence.

261. Changes to (AF)AR 53 reflect changes in AR 43.

**Rule 54BIS**

**Bifurcation of Preliminary Objections**

(1) The following procedure shall apply with respect to a request for bifurcation relating to a preliminary objection:

(a) unless the parties agree otherwise on a different time limit, the request for bifurcation shall be filed within:

(i) 30 days after the first session, if the memorial on the merits is filed before the first session;

(ii) within 45 days after filing the memorial on the merits, if it is filed after the first session;

(iii) within 45 days after filing the written submission containing the ancillary claim, if the objection relates to the ancillary claim; or

(iv) as soon as possible after the facts on which the preliminary objection is based become known to a party, if those facts were unknown to the party on the relevant dates referred to in paragraph (1)(a)(i) and (ii);

(b) the request for bifurcation shall state the preliminary objection to which it relates;

(c) unless the parties agree otherwise, the proceeding on the merits shall be suspended until the Tribunal decides whether to bifurcate pending the...
Tribunal’s consideration of the request for bifurcation, unless the parties agree otherwise;

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

(e) the Tribunal shall issue its decision on a request for bifurcation within 320 days after the later of the last written or oral submission on the request.

(2) In determining whether to bifurcate, the Tribunal shall consider whether bifurcation could materially reduce the time and cost of the proceeding and all other relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

(3) If the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall:

(a) suspend the proceeding on the merits, unless the parties agree otherwise, or the Tribunal decides there are special circumstances that do not justify suspension; decide whether to suspend any part of the proceeding on the merits;

(b) fix time limits for written and oral submissions on the preliminary objection, as required;

(c) issue render its decision or render its Award on the preliminary objection within 180 days after the later of the last written or oral submission, in accordance with Rule 68(1)(b); and

(d) fix any time limit necessary for the further conduct of the proceeding if the Tribunal does not render an Award.

(4) If the Tribunal decides to join the preliminary objection to the merits, it shall:

(a) lift any suspension of the proceeding on the merits in place pursuant to paragraph (1)(c);

(b) fix time limits for written and oral submissions on the preliminary objection, as required;
(e)(b) modify any time limits for written and oral submissions on the merits, as required; and

(d)(c) render its Award within 240 days after the later of the last written or oral submission in the proceeding, in accordance with Rule 68(1)(c).

262. Changes to (AF)AR 54 reflect changes in AR 44.

### Rule 553

Consolidation or Coordination of Arbitrations

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

(2) To be consolidated under this Rule, the arbitrations shall have been registered in accordance with these Rules and shall involve the same State or the same REIO (or any constituent subdivision of the State or agency of the State or the REIO). Coordination joins all aspects of the arbitrations sought to be consolidated and results in a single Award. To be consolidated pursuant to this Rule, the arbitrations shall have been registered in accordance with these Rules and shall involve the same State or the same REIO (or constituent subdivision of the State or agency of the State or the REIO).

(3) Coordination aligns specific procedural aspects of each pending arbitration, but the arbitrations remain separate proceedings and each results in an individual Award.

(4) The parties referred to in paragraph (1) shall jointly provide the Secretary-General with proposed terms of reference for the conduct of the consolidated proceeding(s) and consult with the Secretary-General to ensure that the proposed terms of reference are capable of being implemented.

(5) After the consultation referred to in paragraph (4), the Secretary-General shall communicate the agreed-proposed terms of reference to the Tribunal(s) constituted in the arbitrations. Such Tribunal(s) shall make any order or decision required to implement these terms of reference.

263. Changes to (AF)AR 55 reflect changes in AR 45.

### Rule 564

Provisional Measures

(1) A party may at any time request that the Tribunal order provisional measures
to preserve that party’s rights, including measures to:

(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process;

(b) maintain or restore the status quo pending determination of the dispute; or

(c) preserve evidence that may be relevant to the resolution of the dispute.

(2) The following procedure shall apply:

(a) the request shall specify the rights to be preserved, the measures requested, and the circumstances that require such measures;

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

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

(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

   (i) the constitution of the Tribunal;

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

   (iii) the last oral submission on the request.

(3) In deciding whether to order provisional measures, the Tribunal shall consider all relevant circumstances, including:

(a) whether the measures are urgent and necessary; and

(b) the effect that the measures may have on each party; and

(c) all other relevant circumstances.

(4) The Tribunal may order provisional measures on its own initiative. The Tribunal may also order provisional measures different from those requested by a party.

(5) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered provisional measures.
(6) The Tribunal may at any time modify or revoke the provisional measures, on its own initiative or upon a party’s request.

(7) A party may request any judicial or other authority to order interim or conservatory measures. Such a request shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

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**Rule 575**

Ancillary Claims

(1) Unless the parties agree otherwise, a party may file an incidental or additional claim or a counterclaim (“ancillary claim”), provided that such ancillary claim is within the scope of the agreement of the parties.

(2) An incidental or additional claim shall be presented no later than in the reply, and a counterclaim shall be presented no later than in the counter-memorial, unless the Tribunal decides otherwise.

(3) The Tribunal shall fix time limits for written and oral submissions on the ancillary claim, as required.

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**Rule 586**

Default

(1) A party is in default if it fails to appear or present its case, or indicates that it will not appear or present its case.

(2) If a party is in default at any stage of the proceeding, the other party may request that the Tribunal address the questions submitted to it and render an Award.

(3) Upon receipt of the request referred to in paragraph (2), the Tribunal shall notify the defaulting party of the request and grant a grace period to cure the default, unless it is satisfied that the defaulting party does not intend to appear or present its case. The grace period shall not exceed 60 days without the consent of the other party.

(4) If the request in paragraph (2) relates to a failure to appear at a hearing, the Tribunal may:

(a) reschedule the hearing to a date within 60 days after the original date;
(b) proceed with the hearing in the absence of the defaulting party and fix a time limit for the defaulting party to file a written submission within 60 days after the hearing; or

(c) cancel the hearing and fix a time limit for the parties to file written submissions within 60 days after the original date of the hearing.

(5) If the default relates to another scheduled procedural step, the Tribunal may set the grace period to cure the default by fixing a new time limit for the defaulting party to complete that step within 60 days after the date of the notice of default referred to in paragraph (3).

(6) A party’s default shall not be deemed an admission of the assertions made by the other party.

(7) The Tribunal may invite the party that is not in default to file observations, produce evidence or make oral submissions.

(8) If the defaulting party fails to act within the grace period or if no such period is granted, the Tribunal shall examine whether the dispute is within its own jurisdiction and competence before deciding the questions submitted to it and rendering an Award.
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Chapter IX

Costs

Rule 59

Costs of the Proceeding

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

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

(b) the fees and expenses of the members of the Tribunal, Tribunal assistants approved by the parties and Tribunal-appointed experts and any Tribunal assistants approved by the parties; and

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

264. Changes to (AF)AR 58 reflect changes in AR 48.

Rule 58

Payment of Advances

The Tribunal shall determine the portion of the advances payable by each party in accordance with (Additional Facility) Administrative and Financial Regulation 7 to defray the costs referred to in Rule 57(b) and (c).

265. Deletion of (AF)AR 58 in WP # 2 reflects deletion of AR 48 in WP # 2.

Rule 60

Statement of and Submission on Costs

The Tribunal shall request that each party file a statement of its costs and a written submission on the allocation of costs before allocating the costs of the proceeding between the parties.
Rule 610
Decisions on Costs

(1) In allocating the costs of the proceeding, the Tribunal shall consider all relevant circumstances, including:

(a) the outcome of the proceeding or any part of it;

(b) the parties’ conduct of the proceedings 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; and

(e) all other relevant circumstances.

(2) The Tribunal may make an interim decision on the costs of any part of a proceeding at any time.

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

266. Changes to (AF)AR 61 reflect changes in AR 51.

Rule 621
Security for Costs

(1) Upon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs.

(2) The following procedure shall apply:

(a) the request shall specify the circumstances that require security for costs;

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

(c) if a party requests security for costs before the constitution of the Tribunal, the Secretary-General shall fix time limits for written submissions on the request so that the Tribunal may consider the request promptly upon its constitution; and
(d) the Tribunal shall issue its decision on the request within 30 days after the latest of:

(i) the constitution of the Tribunal;

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

(iii) the last oral submission on the request.

(3) In determining whether to order a party to provide security for costs, the Tribunal shall consider all relevant circumstances, including:

(a) that party’s ability to comply with an adverse decision on costs;

(b) that party’s willingness to comply with an adverse decision on costs;

(c) the effect that providing security for costs may have on that party’s ability to pursue its claim or counterclaim; and

(d) the conduct of the parties; and

(e) all other relevant circumstances.

(4) The Tribunal may consider third-party funding as evidence relating to a circumstance in paragraph (3), but the existence of third-party funding by itself is not sufficient to justify an order for security for costs.

(4)(5) The Tribunal shall specify any relevant terms in an order to provide security for costs and fix a time limit for compliance with the order.

(5)(6) If a party fails to comply with an order to provide security for costs, the Tribunal may suspend the proceeding. If the proceeding is suspended for more than 90 days, the Tribunal may, after consulting with the parties, order the discontinuance of the proceeding.

(6)(7) A party shall promptly disclose any material change in the circumstances upon which the Tribunal ordered security for costs.

(7)(8) The Tribunal may at any time modify or revoke its order on security for costs, on its own initiative or upon a party’s request.

267. Changes to (AF)AR 62 reflect changes in AR 52.
VII. THE ARBITRATION RULES FOR ADDITIONAL FACILITY PROCEEDINGS
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Chapter IX
Suspension, Settlement and Discontinuance

Rule 632
Suspension of the Proceeding

(1) The Tribunal shall suspend the proceeding by agreement of the parties.

(2) The Tribunal may suspend the proceeding upon the request of either party or on its own initiative, except as otherwise provided in the (Additional Facility) Administrative and Financial Regulations or these Rules.

(3) The Tribunal shall give the parties the opportunity to make observations before ordering the suspension pursuant to paragraph (2).

(4) In its order suspending the proceeding, the Tribunal shall specify:
   
   (a) the period of the suspension;
   
   (b) any relevant terms appropriate conditions; and
   
   (c) a modified procedural calendar to take effect on resumption of the proceeding, if necessary.

(5) The Tribunal shall extend the period of suspension prior to its expiry by agreement of the parties.

(6) The Tribunal may extend the period of suspension prior to its expiry, on its own initiative or upon a party’s request, after giving the parties an opportunity to make observations.

(7) The Secretary-General shall suspend the proceeding pursuant to paragraph (1) or extend the suspension pursuant to paragraph (5) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any terms conditions agreed to by the parties.

Rule 643
Settlement and Discontinuance

(1) If the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.
(2) If the parties agree on a settlement of the dispute before the Award is rendered, the Tribunal:

(a) shall issue an order taking note of the discontinuance of the proceeding, if the parties so request; or

(b) may record the settlement in the form of an Award, if the parties file the complete and signed text of their settlement and request that the Tribunal embody such settlement in an Award.

(3) An Award rendered pursuant to paragraph (2)(b) does not need to include the reasons on which it is based.

(4) The Secretary-General shall issue the order referred to in paragraphs (1) and (2)(a) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

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**Rule 654**

**Discontinuance at Request of a Party**

(1) If a party requests the discontinuance of the proceeding, the Tribunal shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(2) The Secretary-General shall fix the time limit and issue the order referred to in paragraph (1) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

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**Rule 665**

**Discontinuance for Failure of Parties to Act**

(1) If the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding.

(2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal shall issue an order taking note of the discontinuance.
(3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue.

(4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.

268. Changes to (AF)AR 66 reflect changes in AR 56.

### Rule 66
**Discontinuance for Failure to Pay**

If the parties fail to make payments to defray the costs of the proceeding as required by (Additional Facility) Administrative and Financial Regulation 7, the proceeding may be discontinued pursuant to (Additional Facility) Administrative and Financial Regulation 8.

269. The deletion of (AF)AR 66 in WP #2 reflects the deletion of AR 56 in WP #2.
VII. THE ARBITRATION RULES FOR ADDITIONAL FACILITY PROCEEDINGS
(ADDITIONAL FACILITY) ARBITRATION RULES

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Chapter XI
The Award

Rule 67
Applicable Law

(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply:

(a) the law which it determines to be applicable; and

(b) the rules of international law as it considers applicable.

(2) The Tribunal may decide *ex aequo et bono* if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.

Rule 68
Timing of the Award

(1) The Tribunal shall render the Award as soon as possible, and in any event no later than:

(a) 60 days after the *latest of the Tribunal constitution, the* last written *submission* or the last oral submission, or the Tribunal constitution, whichever is later, if the Award is rendered pursuant to Rule 510(4);

(b) 180 days after the *later of the* last written or oral submission if the Award is rendered pursuant to Rule 542BIS(3)(c); or

(c) 240 days after the *later of the* last written or oral submission in all other cases.

(2) A statement of costs and submissions on costs filed pursuant to *in accordance* with Rule 6059 shall not be considered a written submission for the purposes of paragraph (1).

(3) The parties waive any time limits for rendering the Award which may be provided for by the law of the seat of arbitration.

270. Changes to (AF)AR 68 reflect changes in AR 57.
Rule 69
Contents of the Award

(1) The Award shall be in writing and shall contain:

(a) a precise designation of each party;

(b) the names of the representatives of the parties;

(c) a statement that the Tribunal was established pursuant to these Rules and a description of the method of its constitution;

(d) the name of each member of the Tribunal and the appointing authority of each;

(e) the seat of arbitration, the dates and place(s) of the first session, case management conferences and the hearings;

(f) a brief summary of the proceeding;

(g) a statement of the relevant facts as found by the Tribunal;

(h) a brief summary of the submissions of the parties, including the relief sought;

(i) the reasons on which the Award is based, unless the parties have agreed that no reasons are to be given; and

(j) a statement of the costs of the proceeding, including the fees and expenses of each member of the Tribunal, and a reasoned decision on the allocation of costs.

(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 and if allowed by the law of the seat of arbitration.

(3) Any member of the Tribunal may attach an individual opinion or a statement of dissent to the Award before the Award is rendered.

(4) The Award shall be final and binding on the parties.

With regard to (AF)AR 69(1)(i), one State suggested that the Tribunal should always give reasons in the Award. The possibility to forego reasons is subject to the agreement of the parties and may provide for a more expeditious and cost-effective process if agreed on. Given the requirement of consent, WP # 3 does not propose any change in this respect.
Rule 70
Rendering of the Award

(1) Once the Award has been signed by the members of the Tribunal who voted for it, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Award to each party, together with any individual opinion and statement of dissent, indicating the date of dispatch on the Award; and

(b) deposit the Award in the archives of the Centre, together with any individual opinion and statement of dissent.

(2) Upon request of the parties that the original text of the Award be filed or registered by the Tribunal pursuant to the law of the seat of arbitration, the Secretary-General shall do so on behalf of the Tribunal.

(3) The Award shall be deemed to have been made at the seat of arbitration and deemed to have been rendered on the date of dispatch of certified copies of the Award.

(4) The Secretary-General shall provide additional certified copies of the Award to a party upon request.

Rule 71
Supplementary Decision, Rectification and Interpretation of an Award

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 30 days after rendering the Award.

(2) A party may request a supplementary decision, rectification or interpretation of an Award by filing a request with the Secretary-General within 45 days after the Award was rendered and paying the lodging fee published in the schedule of fees within 45 days after the Award was rendered.

(3) The request referred to in paragraph (2) shall:

(a) identify the Award to which it relates;

(b) be in an official language of the Centre used in the proceeding;

(c) be signed by each requesting party or its representative and be dated; and

(d) specify:
(i) with respect to a request for a supplementary decision, any question which the Tribunal omitted to decide in the Award;

(ii) with respect to a request for rectification, any clerical, arithmetical or similar error in the Award; and

(iii) with respect to a request for interpretation, the points in dispute concerning the meaning or scope of the Award; and

(e) attach proof of payment of the lodging fee.

(4) A complete request and evidence of payment of the lodging fee must be filed by the time limit referred to in paragraph (2).

(5) Upon receipt of the request and the lodging fee, the Secretary-General shall promptly:

(a) transmit the request to the other party;

(b) register the request, or refuse registration if the request is not made within the time limit referred to in paragraph (2); and

(c) notify the parties of the registration or refusal to register.

(6) As soon as the request is registered, the Secretary-General shall transmit the request and the notice of registration to each member of the Tribunal.

(7) The President of the Tribunal shall determine the procedure to consider the request, after consulting with the other members of the Tribunal and the parties.

(8) Rules 69-70 shall apply to any decision of the Tribunal pursuant to this Rule.

(9) The Tribunal shall issue a decision on the request for the supplementary decision, rectification or interpretation within 60 days after the later of the last written or oral submission on the request.

(10) A supplementary decision, rectification or interpretation pursuant to this Rule shall become part of the Award and shall be reflected on all certified copies of the Award.

272. Changes to (AF)AR 71 reflect changes in AR 60.
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Chapter XII
Publication, Access to Proceedings and Non-Disputing Party Submissions

Rule 72
Publication of Awards, Orders, and Decisions and Awards

(1) The Centre shall publish Awards, orders, and decisions and Awards within 60 days after their issuance, with any redactions agreed to by the parties and jointly notified to the Centre Secretary-General within 60 days after of the order, decision or Award is rendered the 60-day period.

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

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

273. Changes to (AF)AR 72 reflect changes in AR 62.

Rule 73
Publication of Documents Filed in the Proceeding by a Party

(1) Upon request of either a party, the Centre shall publish any document which that party filed in the proceeding, with any redactions agreed to by the parties and jointly notified to the Secretary-General.

(2) Either party may refer any dispute regarding the publication or redaction of a document in paragraph (1) to the Tribunal for determination. The Centre shall publish the document in accordance with the determination of the Tribunal.

(3) In determining disputes pursuant to paragraph (2), the Tribunal shall ensure that publication does not disclose any confidential or protected information.

274. Changes to (AF)AR 73 reflect changes in AR 63.
Rule 74
Observation of Hearings

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

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

(3) The Centre shall publish video-recordings or transcripts of those portions of hearings that were available for observation by the public in accordance with paragraphs (1) and (2), unless either party objects.

275. Changes to (AF)AR 74 reflect changes in AR 64.

Rule 75
Confidential or Protected Information

For the purposes of Rules 72-74, confidential or protected information is information which:

(a) is protected from disclosure pursuant to the instrument of consent to arbitration;

(b) is protected from disclosure pursuant to the applicable law;

(c) is protected from disclosure in accordance with the orders and decisions of the Tribunal;

(d) is protected from disclosure by agreement of the parties;

(e) constitutes confidential business information;

(f) would impede law enforcement if disclosed to the public;

(g) would prejudice the essential security interests of the State or the REIO if disclosed to the public;

(h) would aggravate the dispute between the parties if disclosed to the public; or

(i) would undermine the integrity of the arbitral process if disclosed to the public.
276. (AF)AR 75 is a new rule and reflects new AR 65.

Rule 765
Submission of Non-Disputing Parties

(1) Any person or entity that is not a disputing party to the dispute ("non-disputing party") may apply for permission to file a written submission in the proceeding. The application shall be made in a procedural language used in the proceeding.

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

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

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

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

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

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

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

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length or scope of the written submission and the time limit to file the submission.

(5) The Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the later of the last written or oral submission on the application.

(6) The Tribunal may provide the non-disputing party with access to relevant documents filed in the proceeding, unless either party objects.
(7) If the Tribunal permits a non-disputing party to file a written submission, the parties shall have the right to make observations on the submission.

Rule 776
Participation of Non-disputing Treaty Party

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

(2) The Tribunal may impose conditions on the filing of a written submission by the non-disputing Treaty Party, including with respect to the format, length or scope of the submission and the time limit to file the submission.

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

277. Given the limited scope of NDTP in this rule, there is no need to address the concern that NDTP participation may amount to diplomatic protection.
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(ADDITIONAL FACILITY) ARBITRATION RULES

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Rule 80 - Appointment of Sole Arbitrator for Expedited Arbitration
Rule 81 - Appointment of Three-Member Tribunal for Expedited Arbitration
Rule 82 - Acceptance of Appointment in Expedited Arbitration
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Chapter XIII
Expedited Arbitration

Rule 787
Consent of Parties to Expedited Arbitration

(1) The parties to an arbitration conducted pursuant to under these Rules may consent at any time to expedite the arbitration in accordance with this Chapter (“expedited arbitration”) by jointly notifying the Secretary-General in writing of their consent.

(2) Chapters I-XII of the (Additional Facility) Arbitration Rules apply to an expedited arbitration except that:

(a) Rules 243, 265, 28(3), 498, 5049, 510, 524, 542BIS, and 553, do not apply in an expedited arbitration; and

(b) Rules 2716, 310, 387, 476, 532, 586, 68, and 71, as modified by Rules 787-876, apply in an expedited arbitration.

(3) If the parties consent to expedited arbitration after the constitution of the Tribunal pursuant to Chapter IVH, Rules 798-810 shall not apply, and the expedited arbitration shall proceed subject to all members of the Tribunal confirming their availability pursuant to Rule 824(2). If any arbitrator fails to confirm availability before the expiry of the applicable time limit, the arbitration shall proceed in accordance with Chapters I-XII.

Rule 798
Number of Arbitrators and Method of Constituting the Tribunal for Expedited Arbitration

(1) The Tribunal in an expedited arbitration shall consist of a Sole Arbitrator appointed pursuant to Rule 8079 or a three-member Tribunal appointed pursuant to Rule 810.

(2) The parties shall jointly notify the Secretary-General in writing of their election of a Sole Arbitrator or a three-member Tribunal within 30 days after the date of the notice of consent referred to in Rule 787(1).

(3) If the parties do not notify the Secretary-General of their election within the time limit referred to in paragraph (2), the Tribunal shall consist of a Sole Arbitrator to be appointed pursuant to in accordance with Rule 8079.

278. Changes to (AF)AR 78 reflect changes in AR 74.
(4) An appointment pursuant to under Rules 8079-810 shall be deemed an appointment in accordance with a method agreed by the parties.

Rule 8079
Appointment of Sole Arbitrator for Expedited Arbitration

(1) A Sole Arbitrator in an expedited arbitration shall be appointed in accordance with the following procedure:

(2)(1) The parties shall jointly advise the Secretary-General in writing of their agreement on appointing the Sole Arbitrator and shall provide the appointee’s name, nationality(ies) and contact information within 20 days after the notice referred to in Rule 798(2); and

(a) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 81.

(3)(2) The Secretary-General shall appoint the Sole Arbitrator if:

(a) the parties do not appoint agree on the Sole Arbitrator within the time limit referred to in paragraph (1)(a);

(b) the parties notify the Secretary-General that they are unable to agree on the Sole Arbitrator; or

(c) the appointee does not accept declines the appointment or does not comply with the appointment within the time limit referred to in Rule 821(1); or

(d) the appointee declines the appointment.

(4)(3) The following procedure shall apply to the appointment by the Secretary-General of the Sole Arbitrator pursuant to paragraph (2):

(a) the Secretary-General shall transmit a list of five candidates for appointment as Sole Arbitrator to the parties within 10 days after the relevant event referred to in paragraph (2);

(b) each party may strike one name from the list; and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(c) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate
with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 81(1); and

(e) if the selected candidate declines the appointment or does not accept the appointment within the time-limit referred to in comply with Rule 82(1), the Secretary-General shall select the next highest-ranked candidate.

279. Changes to (AF)AR 80 reflect changes in AR 76.

Rule 810
Appointment of Three-Member Tribunal for Expedited Arbitration

(1) A three-member Tribunal shall be appointed in accordance with the following procedure:

(a) each party shall appoint an arbitrator (“co-arbitrator”) within 20 days after the notice referred to in Rule 79(2) and shall notify the Secretary-General of the appointee’s name, nationality(ies) and contact information within such time; and

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 81(1);

(c) the parties shall jointly appoint the President of the Tribunal within 20 days after the receipt of the acceptances from both co-arbitrators appointments made pursuant to paragraph (1)(a) and shall notify the Secretary-General of the appointee’s name, nationality(ies) and contact information within such time; and

(d) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 81(1).

(2) The Secretary-General shall appoint the arbitrators not yet appointed if:

(a) an appointment is not made within the applicable time limits referred to in paragraph (1)(a) or (c);

(b) the parties notify the Secretary-General that they are unable to agree on the President of the Tribunal; or
(c) an appointee declines the appointment or does not accept the appointment within the time limit referred to in Rule 824(1); or

(d) an appointee declines the appointment.

(3) The following procedure shall apply to the appointment by the Secretary-General of any arbitrators not yet appointed pursuant to paragraphs (1) and (2):

(a) the Secretary-General shall first appoint the co-arbitrator(s) not yet appointed, after consulting as far as possible with the parties. The Secretary-General shall consult with the parties as far as possible and use best efforts to appoint the co-arbitrator(s) within 15 days after the relevant event in paragraph (2);

(b) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 81(1);

(c) as soon as within 10 days after the later of the date on which both co-arbitrators have accepted their appointments, or within 10 days after the relevant event referred to in paragraph (2), the Secretary-General shall transmit a list of five candidates for appointment as President of the Tribunal to the parties;

(d) each party may strike one name from the list, and shall rank the remaining candidates in order of preference and transmit such ranking to the Secretary-General within 10 days after receipt of the list;

(e) the Secretary-General shall inform the parties of the result of the rankings on the next business day after receipt of the rankings and shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Secretary-General shall select one of them; and

(f) the Secretary-General shall immediately send the request for acceptance of the appointment to the appointee and shall request a reply within 10 days of receipt in accordance with Rule 81(1); and

(g) if the selected candidate declines the appointment or does not accept the appointment within the time limit referred to in Rule 824(1), the Secretary-General shall select the next highest-ranked candidate.

280. Changes to (AF)AR 81 reflect changes in AR 77.
Rule 821
Acceptance of Appointment in Expedited Arbitration

(1) An arbitrator appointed pursuant to Rule 843 or 854 shall accept the appointment and provide a declaration pursuant to Rule 276(3) within 10 days after receipt of the request for acceptance.

(2) An arbitrator appointed to a Tribunal constituted pursuant to Chapter IV shall provide a supplementary declaration confirming their availability to conduct an expedited arbitration in accordance with Chapter XII within 10 days after receipt of the parties’ notice of consent pursuant to Rule 787(3).

Rule 832
First Session in Expedited Arbitration

(1) The Tribunal shall hold a first session pursuant to Rule 387 within 30 days after the constitution of the Tribunal.

(2) The first session shall be held by telephone or electronic means of communication, unless both parties and the Tribunal agree it shall be held in person.

Rule 843
The Procedural Schedule in Expedited Arbitration

(1) The following schedule for written submissions and the hearing shall apply:

(a) the claimant requesting party shall file a memorial within 60 days after the first session;

(b) the respondent other party shall file a counter-memorial within 60 days after the date of filing the memorial;

(c) the memorial and counter-memorial referred to in paragraph (1)(a) and (b) shall be no longer than 200 pages in length;

(d) the claimant requesting party shall file a reply within 40 days after the date of filing the counter-memorial;
(e) the respondent other party shall file a rejoinder within 40 days after the date of filing the reply;

(f) the reply and rejoinder referred to in paragraph (1)(d) and (e) shall be no longer than 100 pages in length;

(g) the hearing shall be held within 60 days after the last written submission is filed;

(h) the parties shall file statements of their costs and written submissions on costs within 10 days after the last day of the hearing referred to in paragraph (1)(g); and

(i) the Tribunal shall render the Award as soon as possible, and in any event no later than 120 days after the hearing referred to in paragraph (1)(g).

(2) Any preliminary objection, counterclaim, incidental or additional claim shall be joined to the main schedule referred to in paragraph (1). The Tribunal shall adjust the schedule if a party raises any such matter, taking into account the expedited nature of the process.

(3) The Tribunal may extend the time limits referred to in paragraph (1)(a) and (b) by up to 30 days if any party requests that the Tribunal determine a dispute arising from requests to produce documents or other evidence pursuant to Rule 476. The Tribunal shall decide such applications based on written submissions and without an in-person hearing.

(4) Any schedule for submissions other than those referred to in paragraphs (1)-(3) shall run in parallel with the main schedule referred to in paragraph (1), unless the Tribunal determines that there are exceptional special circumstances that justify the suspension of the main schedule. In fixing time limits for such submissions, the Tribunal shall take into account the expedited nature of the process.

Rule 854
Default in Expedited Arbitration

A Tribunal may grant a party in default a grace period not to exceed 30 days pursuant to Rule 586.
**Rule 865**

The Procedural Schedule for Supplementary Decision, Rectification and Interpretation in Expedited Arbitration

(1) A Tribunal may rectify any clerical, arithmetical or similar error in the Award on its own initiative within 15 days after rendering the Award.

(2) A request for a supplementary decision, rectification or interpretation of an Award made pursuant to Rule 71 shall be filed within 15 days after the Award was rendered.

(3) The Tribunal shall issue a supplementary decision, rectification or interpretation of an Award pursuant to Rule 71 within 30 days after the later of the last written or oral submission on the request.

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**Rule 876**

Opting Out of Expedited Arbitration

(1) The parties may agree to opt out of an expedited arbitration at any time by jointly notifying the Tribunal and Secretary-General in writing of their agreement. Upon such notification, only Chapters I-XI shall apply to the arbitration.

(2) Upon request of a party, the Tribunal may decide that an arbitration should no longer be expedited. In deciding the request, the Tribunal shall consider the complexity of the issues, the stage of the proceeding and all other relevant circumstances.

(3) The Tribunal, or the Secretary-General if a Tribunal has not been constituted, shall determine the further procedure pursuant to Chapters I-XII and fix any time limit necessary for the conduct of the proceeding.

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282. Changes to (AF)AR 87 reflect changes in AR 85.
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((ADDITIONAL FACILITY) CONCILIATION RULES) (ANNEX C)

283. The revisions in this document reflect changes to the corresponding provisions in the CR.

284. The general procedural provisions, which were included in Chapter I in WP # 2, have been re-located to Chapter III.

Introductory Note

The Conciliation Rules for Additional Facility Rules of Procedure for Conciliation Proceedings (the (Additional Facility) Conciliation Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7(1).

The (Additional Facility) Conciliation Rules are supplemented by the (Additional Facility) Administrative and Financial Regulations in Annex A.

The (Additional Facility) Conciliation Rules apply from the submission of a Request for conciliation until termination of the conciliation.

Chapter I

General Provisions

Scope

Rule 1
Application of Rules

(1) These Rules shall apply to any conciliation proceeding conducted under pursuant to the Additional Facility Rules.

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-9, except to the extent that the parties agree otherwise and subject to paragraph (2).

(3) If any of these Rules, or any aspect of the parties’ agreement pursuant to paragraph (2), to modify the application of these Rules, conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(3) The Commission shall apply any agreement between the parties on procedural matters to the extent it conforms with the (Additional Facility) Administrative and Financial Regulations.
(4) The applicable (Additional Facility) Conciliation Rules are those in force on the date of filing of the Request for conciliation, unless the parties agree otherwise.

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

(6) These Rules may be cited as the “(Additional Facility) Conciliation Rules” of the Centre.

285. (AF)CR 1(2) clarifies that the parties can modify the application of the Rules except for those in Chapters I and II. In light of this change, (AF)CR 1(4) allows the parties to agree on the applicable (AF)CR, so that they may agree to apply a prior version of the (AF)CR should they wish to do so. This may be of particular relevance to dispute settlement provisions in contracts.

286. (AF)CR 1(3) has been moved to (AF)CR 32 as the provision deals with the conduct of the proceeding.
VIII. (ADDITIONAL FACILITY) CONCILIATION RULES

Chapter II - Institution of the Proceedings

Rule 2 - The Request
Rule 3 - Contents of the Request
Rule 4 - Recommended Additional Information
Rule 5 - Filing of the Request and Supporting Documents
Rule 6 - Receipt of the Request and Routing of Written Communications
Rule 7 - Review and Registration of the Request
Rule 8 - Notice of Registration
Rule 9 - Withdrawal of the Request
Chapter III
Institution of the Proceedings

Rule 29
The Request

(1) Any party wishing to institute conciliation proceedings pursuant to the Additional Facility Rules shall file a Request for conciliation together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

Rule 310
Contents of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the dispute and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act; and

(e) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request and attach the authorizations.

(2) With regard to Article 2(1)(a) of the Additional Facility Rules, the Request shall include:

(a) a description of the investment, a summary of the relevant facts and claims, the request for relief, including an estimate of the amount of any damages sought, and an indication that there is a legal dispute between the parties arising out of the investment;

(b) with respect to each party’s consent to submit the dispute to conciliation under the Additional Facility Rules:

(i) the instrument(s) in which each party’s consent is recorded;
(ii) the date of entry into force of the instrument(s) on which consent is based, together with supporting documents demonstrating that date; and

(iii) the date of consent, which is the date on which the parties consented in writing to submit the dispute to the Centre, or, if the parties did not consent on the same date, the date on which the last party to consent gave its consent in writing to submit the dispute to the Centre; and

(iv) an indication that the requesting party has complied with any conditions in the instrument of consent for submission of the dispute;

(c) if a party is a natural person:

(i) information concerning that person’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) a statement that the person is a national of a State other than did not have the nationality of the State party to the dispute or of any constituent State of the an REIO party to the dispute on the date of consent;

(d) if a party is a juridical person:

(i) information concerning that party’s nationality on the date of consent, together with supporting documents demonstrating such nationality; and

(ii) if that party had the nationality of the State party to the dispute or of any constituent State of the REIO party to the dispute on the date of the consent, information identifying the agreement of the parties to treat the juridical person as a national of another State pursuant to Article 1(5)(b) of the Additional Facility Rules, together with supporting documents demonstrating such agreement;

(e) if a party is a constituent subdivision of a State or an agency of a State or of an REIO, supporting documents demonstrating the State’s or REIO’s approval of consent of the State or the REIO, unless the State or the REIO has notified the Centre that no such approval is required.

287. The changes to proposed (AF)CR 3(1)(e), (2)(a) and (2)(b)(iv) reflect the corresponding changes in proposed IR 2.

288. (AF)CR 3(2)(c) is updated to reflect the change in AF Rule 1(5), permitting dual nationals to be party to a proceeding under the (AF)CR.
Rule 411
Recommended Additional Information

It is recommended that the Request also contain any procedural proposals or agreements reached by the parties, including with respect to:

(a) an estimate of the amount of damages sought, if any;

(b) a proposal concerning the number and method of appointment of conciliators; and

(c) the proposed procedural language(s);

(d) any other procedural proposals or agreements reached by the parties.

289. Changes to proposed (AF)CR 4 reflect changes reflected in proposed IR 3.

Rule 512
Filing of the Request and Supporting Documents

(1) The Request shall be filed electronically. The Secretary-General may require the Request to be filed in an alternative format if necessary.

(2) An extract of a supporting document may be filed as a supporting document if the omission of the text does not render the extract misleading. The Secretary-General may require a fuller extract or a complete version of the document.

(3) The Secretary-General may require a certified copy of a supporting document.

(4) Any supporting document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or a complete translation of the document.

290. Changes to proposed (AF)CR 5 reflect changes in proposed IR 4.
Rule 613
Receipt of the Request and Routing of Written Communications

The Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) act as the official channel of written communications between the parties.

Rule 714
Review and Registration of the Request

(1) Upon receipt of the Request and lodging fee, the Secretary-General shall register the Request if it appears on the basis of the information provided that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(2) The Secretary-General shall promptly notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

Rule 815
Notice of Registration

The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre;

(c) invite the parties to inform the Secretary-General of their agreement regarding the number and method of appointment of conciliators, unless such information has already been provided, and to constitute a Commission without delay;

(d) invite the parties to constitute a Commission without delay;

(e) remind the parties that registration of the Request is without prejudice to the powers and functions of the Commission in regard to jurisdiction and competence of the Commission, and the issues in dispute; and
291. Changes to proposed (AF)CR 8 reflect changes in proposed IR 7.

**Rule 916**
Withdrawal of the Request

At any time before registration, a requesting party may notify the Secretary-General in writing of the withdrawal of the Request or, if there is more than one requesting party, that it is withdrawing from the Request. The Secretary-General shall promptly notify the parties of the withdrawal, unless the Request has not yet been transmitted pursuant to Rule 613(b).
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Chapter III
General Procedural Provisions

Rule 102
Meaning of Party and Party Representative

(1) For the purposes of these Rules, “party” may include:
(a) all parties acting as claimant or as respondent; and
(b) a representative of a party.

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

292. Changes to proposed (AF)CR 10 reflect changes in proposed CR 2.

Rule 113
Method of Filing and Supporting Documents

(1) A document to be filed in the proceeding shall be filed with the Secretary-General, who shall acknowledge its receipt, shall only be filed electronically, unless the Commission orders otherwise in special circumstances.

(2) Documents shall only be filed electronically, unless the Commission orders otherwise in special circumstances. A document shall be filed with the Secretary-General, who shall acknowledge receipt and distribute it in accordance with Rule 4.

(3) Supporting documents shall be filed together with the written statement, request, observation or communication to which they relate.

(4) An extract of a supporting document may be filed if the omission of the text does not render the extract misleading. The Commission or a party may require a fuller extract or a complete version of the document.

293. Proposed (AF)CR 11 and 12 have been divided into two Rules, reflecting the corresponding changes to CR 3 and 4.
(1) Supporting documents shall be filed together with the written statement, request, observations or communication to which they relate.

(2) An extract of a supporting document may be filed as a supporting document if the omission of the text does not render the extract misleading. The Commission or a party may require a fuller extract or a complete version of the document.

Following the registration of the Request pursuant to Rule 7, the Secretary-General shall transmit a document filed in the proceeding to:

(a) the other party, unless the parties communicate directly with each other; and

(b) the Commission, unless the parties communicate directly with the Commission on request of the Commission or by agreement of the parties.

(1) Following the registration of the Request pursuant to Rule 14(2), the Secretary-General shall be the official channel for routing of documents among the parties and the Commission, except that:

(a) the other party, unless the parties may communicate directly with each other, provided that they transmit all documents to be filed in the conciliation to the Secretary-General; and

(b) the members of the Commission shall communicate directly with each other; and

(c) a party may communicate directly with the Commission on request of the Commission, provided that the Secretary-General is copied.

(2) The Secretary-General shall:
(a) acknowledge receipt of all documents transmitted by a party; and

(b) distribute the documents to the other party and the Commission, unless they were transmitted pursuant to paragraph (1)(a) or (c).

Proposed (AF)CR 13 is modified to reflect changes made to proposed CR 5.

Rule 145
Procedural Languages, Translation and Interpretation

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

(2) If the parties do not agree on the procedural language(s), each party may select one of the official languages of the Centre.

(3) Requests, written statements, observations and communications shall be filed in a procedural language. In a proceeding with two procedural languages, the Commission may order a party to file such documents in both procedural languages.

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

(5) Any document from the Commission or the Secretary-General shall be in a procedural language. In a proceeding with two procedural languages, the Commission and, or where applicable the Secretary-General if applicable, shall issue orders, decisions, recommendations and the Report in both procedural languages, unless the parties agree otherwise.

(6) Any oral communication shall be in a procedural language. In a proceeding with two procedural languages, the Commission may order interpretation into the other procedural language.

Proposed (AF)CR 14 is modified to reflect changes made to proposed CR 6.
**Rule 15**
*Calculation of Time Limits*

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

296. Proposed (AF)CR 15 is new and replicates proposed CR 7.

**Rule 166**
*Payment of Advances and Costs of the Proceeding*

Unless the parties agree otherwise, each party shall:

(a) pay one half of the advances payable in accordance with (Additional Facility) Administrative and Financial Regulation 7(2);

(b) pay one half of the fees and expenses of the members of the Commission and the administrative charges and direct costs of the Centre; and

(c) bear any other its own costs incurred in connection with the proceeding.

297. Proposed (AF)CR 16 is modified to reflect changes made to proposed CR 8.

**Rule 177**
*Confidentiality of the Conciliation*

(1) All information relating to the conciliation, or and all documents generated in or obtained during the conciliation, shall be kept confidential, unless:

(a) the parties agree otherwise;

(b) the information is to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 3;

(c) the information or document is independently available; or

(d) disclosure is required by law.
(2) Any settlement agreement concluded during the conciliation shall be kept confidential, except to the extent that disclosure is required by law or for purposes of implementation and enforcement of the settlement agreement.

(3) The parties to a conciliation may consent to:

(a) disclosure to a non-party of any information relating to or document generated in or obtained during the conciliation, other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 3; and

(a) publication by the Centre of any document generated in the conciliation.

298. Proposed (AF)CR 17 is modified to reflect changes made to proposed CR 9.

Rule 188
Use of Information in Other Proceedings

Unless the parties to the dispute agree otherwise, neither a party shall not rely on any of the following in other proceedings:

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

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

299. Proposed (AF)CR 17 is modified to reflect changes made to proposed CR 10.
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Chapter IV
Constitution of the Commission

Rule 1719
General Provisions, Number of Conciliators and Method of Constitution

(1) The Commission shall be constituted without delay after registration of the Request.

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

(3) The parties shall endeavor to agree on a Sole Conciliator, or any uneven number of conciliators, and the method of their appointment. If the parties do not advise the Secretary-General of an agreement within 45 days after the date of registration, either party may inform the Secretary-General that the Commission shall consist of a Sole Conciliator, appointed by agreement of the parties.

(4) The composition of a Commission shall remain unchanged after it has been constituted, except as provided in Chapter IV.

(5) References in these Rules to a Commission or a President of a Commission shall include a Sole Conciliator.

Proposed (AF)CR 19 is modified to reflect changes made to proposed CR 11.

Rule 1820
Qualifications of Conciliators

Conciliators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who are impartial and independent.

Rule 1921
Notice of Third-Party Funding

(1) For purposes of completing the conciliator declaration required by Rule 224(3)(b), a party shall file a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds or equivalent support for the conciliation through a donation or grant, or in return for remuneration dependent on the outcome of the dispute (“third-party funding”).

(2) A non-party referred to in paragraph (1) does not include a representative of a party.
(3) A party shall **send**-**file** the notice referred to in paragraph (1) **to**-**with** the Secretary-General upon registration of the Request, or immediately upon concluding a third-party funding arrangement after registration. The party shall immediately notify the Secretary-General of any changes to the information in the notice.

(4) The Secretary-General shall transmit a notice of third-party funding and any changes to such notice to the parties, and to any conciliator proposed for appointment or appointed in a proceeding for purposes of completing the declaration required by Rule 24(3)(b).

301. Proposed (AF)CR 21 is modified to reflect changes made to proposed CR 12.

**Rule 220**  
Assistance of the Secretary-General with Appointment

The parties may jointly request that the Secretary-General assist with the appointment of a Sole Conciliator or any uneven number of conciliators.

**Rule 234**  
Appointment of Conciliators by the Secretary-General

(1) If a Commission has not been constituted within 90 days after the date of registration, or such other period as the parties may agree, either party may request that the Secretary-General appoint the conciliator(s) who have not yet been appointed.

(2) The Secretary-General shall appoint the President of the Commission after appointing any members who have not yet been appointed.

(3) The Secretary-General shall consult with the parties as far as possible before appointing a conciliator and shall use best efforts to appoint any conciliator(s) within 30 days after receipt of the request to appoint.

**Rule 242**  
Acceptance of Appointment

(1) A party appointing a conciliator shall notify the Secretary-General of the appointment and provide the appointee’s name, nationality(ies) and contact information.
(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected. The Secretary-General shall also transmit to each appointee the information received from the parties relevant to completion of the declaration referred to in paragraph (3)(b).

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

(a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by the each conciliator(s) and provide the signed declaration.

(5) The Secretary-General shall notify the parties if a conciliator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed as conciliator in accordance with the method followed for the previous appointment.

(6) Each conciliator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).

(7) Unless the parties and the conciliator agree otherwise, a conciliator may not act as arbitrator, counsel, expert, judge, mediator, witness or in any other capacity in any other proceeding relating to the dispute that is the subject of the conciliation.

302. Proposed (AF)CR 24 is modified to reflect changes made to proposed CR 16.

Rule 253
Replacement of Conciliators Prior to Constitution of the Commission

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

(a) a conciliator may withdraw an acceptance;

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

(c) the parties may agree to replace any conciliator.
(2) A replacement conciliator shall be appointed as soon as possible, in accordance with the method by which the withdrawing or replaced conciliator was appointed.

Rule 254
Constitution of the Commission

(1) The Commission shall be deemed to be constituted on the date the Secretary-General notifies the parties that each conciliator has accepted the appointment.

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

303. Proposed (AF)CR 25 is modified to reflect changes made to proposed CR 18.
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Chapter IV
Disqualification of Conciliators and Vacancies

Rule 275
Proposal for Disqualification of Conciliators

(1) A party may file a proposal to disqualify one or more conciliators (“proposal”) on the
ground that circumstances exist that give rise to justifiable doubts as to the
conciliator’s qualities of the conciliator required by Rule 2018.

(2) The following procedure shall apply:

(a) the proposal shall be filed after the constitution of the Commission and within 21
days after the later of:

   (i) the constitution of the Commission; or

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

(b) the proposal shall include the grounds on which the proposal is based, a statement
    of the relevant facts, law and arguments, and any supporting documents;

(c) the other party shall file its response and supporting documents within 21 days
    after receipt of the proposal;

(d) the conciliator to whom the proposal relates may file a statement limited to factual
    information relevant to the proposal. The statement shall be filed within five days
    after receipt of the response referred to in paragraph (2)(c); and

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

(3) If the other party agrees to the proposal prior to the dispatch of the decision referred
    to in Rule 286, the conciliator shall resign in accordance with Rule 3028.

(4) The proceeding shall be suspended until a decision on the proposal has been made,
    except to the extent that the parties agree to continue the proceeding in whole or in
    part.
Rule 286
Decision on the Proposal for Disqualification

(1) The Secretary-General shall make the decision on the proposal.

(2) The Secretary-General shall use best efforts to decide any proposal within 30 days after the expiry of the time limit referred to in Rule 275(2)(e).

Rule 297
Incapacity or Failure to Perform Duties

If a conciliator becomes incapacitated or fails to perform the duties required of a conciliator, the procedure in Rules 257 and 268 shall apply.

Rule 3028
Resignation

(1) A conciliator may resign by notifying the Secretary-General and the other members of the Commission.

(2) A conciliator shall resign upon the joint request of the parties.

Rule 3129
Vacancy on the Commission

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

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

(3) A vacancy on the Commission shall be filled by the method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of vacancy.

(4) Once a vacancy has been filled and the Commission has been reconstituted, the conciliation shall continue from the point it had reached at the time the vacancy was notified.
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Chapter VI
Conduct of the Conciliation

Rule 320
Functions of the Commission

(1) The Commission shall clarify the issues in dispute and assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.

(2) In order to bring about agreement between the parties, the Commission may, at any stage of the proceeding, after consulting with the parties, recommend:

(a) specific terms of settlement to the parties; or

(b) that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.

(3) Recommendations may be made orally or in writing. Either party may request that the Commission provide reasons for any recommendation. The Commission may invite each party to provide observations concerning any recommendation made.

(4) At any stage of the proceeding, the Commission may:

(a) request explanations, documents or other information from either party or other persons;

(b) communicate with the parties jointly or separately; or

(c) visit any place connected with the dispute or conduct inquiries with the consent of agreement and participation of the parties.

304. Proposed (AF)CR 32 is modified to reflect changes made to proposed CR 24.

Rule 334
General Duties of the Commission

(1) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.

(1) The Commission shall conduct the proceeding in good faith and in an expeditious and cost-effective manner.
305. Proposed (AF)CR 33 is modified to reflect changes made to proposed CR 25.

**(2) The Commission shall treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding.**

306. Proposed (AF)CR 34 is modified to incorporate the duty of the Commission to apply procedural agreements of the parties, previously set out in (AF)CR1 in WP # 2.

**Rule 342**  
**Orders, and Decisions and Agreements**

1. The Commission shall make the orders and decisions required for the conduct of the conciliation.

2. The Commission shall make decisions by a majority of the votes of all its members. Abstentions shall count as a negative vote.

3. Orders and decisions may be made by any appropriate means of communication and may be signed by the President on behalf of the Commission.

4. The Commission shall apply any agreement between of the parties on procedural matters, subject to Rule 1(3), and to the extent that the agreement does not conflict with the (Additional Facility) Administrative and Financial Regulations.

307. Proposed (AF)CR 35 is modified to reflect changes made to proposed CR 27.

**Rule 353**  
**Quorum**

The participation of a majority of the members of the Commission by any appropriate means of communication shall be required at the first session, meetings and deliberations, by any appropriate means of communication, unless the parties agree otherwise.

308. Proposed (AF)CR 36 is modified to reflect changes made to proposed CR 28.

**Rule 364**  
**Deliberations**

1. The deliberations of the Commission shall take place in private and remain confidential.
(2) The Commission may deliberate at any place and by any means it considers appropriate.

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

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Rule 375
Cooperation of the Parties

(1) The parties shall cooperate with the Commission and with one another, and shall conduct the conciliation in good faith, and in an expeditious and cost-effective manner.

(2) The parties shall provide all relevant explanations, documents or other information. They shall also facilitate visits to any place connected with the dispute and the participation of other persons as requested by the Commission.

(3) The parties shall comply with any time limit agreed upon or fixed by the Commission.

(4) The parties shall give their most serious consideration to the Commission’s recommendations.

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308. Proposed (AF)CR 37 is modified to reflect changes made to proposed CR 29.

Rule 386
Written Statements

(1) Each party shall simultaneously file a brief, initial written statement describing the issues in dispute and its views on these issues 30 days after the constitution of the Commission, or such longer time as the Commission may fix in consultation with the parties, but in any event before the first session.

(2) Either party may file further written statements at any stage of the conciliation within the time limits fixed by the Commission.
Rule 392
First Session

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

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

(2)(3) The first session shall be held within 60 days of the Commission’s constitution or such other period as the parties may agree.

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

(4) Before the first session, the Commission shall invite the parties’ views on procedural matters, including:

(a) the applicable conciliation rules;

(b) the division of advances payable pursuant to (Additional Facility) Administrative and Financial Regulation 7(2);

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

(d) the method of filing and routing of documents;

(e) a schedule for further written statements and meetings;

(f) the place and format of meetings between the Commission and the parties;

(g) the manner of recording or keeping minutes of meetings, if any;

(h) the treatment protection of confidential information;

(i) the publication of documents;

(j) any agreement between the parties:

(i) concerning the treatment of information disclosed by one party to the Commission by way of separate communication pursuant to Rule 329(4)(b);
(ii) not to initiate or pursue during the conciliation any other proceeding in 
respect of the dispute;

(iii) concerning the application of prescription or limitation periods; and

(iv) concerning the disclosure of any settlement agreement resulting from the 
conciliation; and

(iv)(v) pursuant to Rule §18; and

(k) any other procedural matter raised by either party or the Commission.

(5) At the first session or within any other period as determined by the Commission 
may determine, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

(6) The Commission shall issue summary minutes recording the parties’ agreements and 
the Commission’s decisions on the procedure within 15 days after the later of the 
first session or the last written statement on procedural matters addressed at the first 
session.

309. Proposed (AF)CR 39 is modified to reflect changes made to proposed CR 31.

Rule 4038
Meetings

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

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

(3) If a meeting is to be held in person, it may be held at any place agreed to by the 
parties after consulting with the Commission and the Secretary-General. -If the 
parties do not agree on the place of a meeting, it shall be held at a place determined 
by the Commission.

(4) Meetings shall remain confidential. The parties may consent agree to observation of 
meetings by persons in addition to the parties and the Commission.
(1) A party may file a preliminary objection that the dispute is not within the jurisdiction or competence of the Commission (“preliminary objection”).

(2) A party shall notify the Commission and the other party of its intent to file a preliminary objection as soon as possible. The objection shall be made no later than the date of the initial written statement referred to in Rule 3638(1), unless the facts on which the objection is based are unknown to the party at the relevant time.

(3) The Commission may address a preliminary objection separately or with other issues in dispute. If the Commission decides to address the objection separately, it may suspend the conciliation on the other issues in dispute to the extent necessary to address the preliminary objection.

(4) The Commission may at any time on its own initiative consider whether the dispute is within its own jurisdiction or competence.

(5) If the Commission decides that the dispute is not within its jurisdiction or competence, it shall issue a Report to that effect, in which it shall state its reasons. Otherwise, the Commission shall issue a decision on the objection with brief reasons and fix any time limit necessary for the further conduct of the conciliation.

310. Proposed (AF)CR 41 is modified to reflect changes made to proposed CR 33.
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Chapter VII
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Rule 420
Discontinuance Prior to the Constitution of the Commission

(1) If the parties notify the Secretary-General prior to the constitution of the Commission that they have agreed to discontinue the proceeding, the Secretary-General shall issue an order taking note of the discontinuance.

(2) If a party requests the discontinuance of the proceeding prior to the constitution of the Commission, the Secretary-General shall fix a time limit within which the other party may oppose the discontinuance. If no objection in writing is made within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Secretary-General shall issue an order taking note of the discontinuance of the proceeding. If any objection in writing is made within the time limit, the proceeding shall continue.

(3) If, prior to the constitution of the Commission, the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Secretary-General shall notify them of the time elapsed since the last step taken in the proceeding. If the parties fail to take a step within 30 days after the notice, they shall be deemed to have discontinued the proceeding and the Secretary-General shall issue an order taking note of the discontinuance. If either party takes a step within 30 days after the Secretary-General’s notice, the proceeding shall continue.

Rule 41
Discontinuance for Failure to Pay

If the parties fail to make payments to defray the costs of the proceeding as required by (Additional Facility) Administrative and Financial Regulation 7, the proceeding may be discontinued pursuant to (Additional Facility) Administrative and Financial Regulation 8.

311. Proposed (AF)CR 41 has been deleted, reflecting the corresponding deletion of CR 33 in WP # 2. The discontinuance for the failure to pay is regulated in (AF)AFR 8.
### Rule 432
**Report Noting the Parties’ Agreement**

(1) If the parties reach agreement on some or all of the issues in dispute, the Commission shall issue its Report noting the issues in dispute and recording the issues upon which the parties have agreed.

(2) The parties may provide the Commission with the complete and signed text of their settlement agreement and may request that the Commission embody such settlement in the Report.

### Rule 443
**Report Noting the Failure of the Parties to Reach Agreement**

At any stage of the proceeding, and after notice to the parties, the Commission shall issue its Report noting the issues in dispute and recording that the parties have not reached agreement on the issues in dispute during the conciliation if:

(a) it appears to the Commission that there is no likelihood of agreement between the parties; or

(b) the parties advise the Commission that they have agreed to discontinue the conciliation.

### Rule 454
**Report Recording the Failure of a Party to Appear or Participate**

If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, issue its Report noting the submission of the dispute to conciliation and recording the failure of that party to appear or participate.

### Rule 465
**The Report**

(1) The Report shall be in writing and shall contain, in addition to the information specified in Rules 432-454:

(a) a precise designation of each party;
(b) the names of the representatives of the parties;

(c) a statement that the Commission was established under pursuant to these Rules and a description of the method of its constitution;

(d) the name of each member of the Commission and of the appointing authority of each;

(e) the dates and place(s) of the first session and the meetings of the Commission with the parties;

(f) a brief summary of the proceeding;

(g) the complete and signed text of the parties’ settlement agreement if requested by the parties pursuant to Rule 432 (2);

(h) a statement of the costs of the proceeding, including the fees and expenses of each member of the Commission and the costs to be paid by each party pursuant to Rule 166; and

(i) any agreement of the parties pursuant to Rule 1846.

(2) The Report shall be signed by the members of the Commission. It may be signed by electronic means if the parties agree. If a member does not sign the Report, such fact shall be recorded.

Rule 476
Issuance of the Report

(1) Once the Report has been signed by the members of the Commission, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.
# IX. RULES FOR FACT-FINDING PROCEEDINGS
(ICSID FACT-FINDING RULES)

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IX. RULES OF PROCEDURE FOR FACT-FINDING PROCEEDINGS (ICSID FACT-FINDING RULES)

Introductory Note

The Rules of Procedure for Fact-Finding Proceedings (the ICSID Fact-Finding Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7(4).

The ICSID Fact-Finding Rules are supplemented by the (Fact-Finding) Administrative and Financial Regulations (Annex A).

The ICSID Fact-Finding Rules apply from the submission of a Request for fact-finding until the termination of the proceeding.

Chapter I
General Provisions

Rule 1
Definitions

(1) “Secretariat” means the Secretariat of the Centre.

(2) “Centre” or “ICSID” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

(3) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.

(4) “National of another State” means, unless otherwise agreed:

(a) a natural or juridical person that, on the date of consent to the fact-finding, is a national of a State other than the State party to the fact-finding, or of any constituent State of the REIO party to the fact-finding; or

(b) a juridical person that, on the date of consent to the fact-finding, is a national of the State party to the fact-finding or of any constituent State of the REIO party to the fact-finding, and which the parties agree not to treat as a national of that State for the purpose of these Rules.
“Request” means a request for fact-finding together with the required supporting documents.

“Secretary-General” means the Secretary-General of the Centre.

“Party” may include, where the context so admits, all parties to the fact-finding and a representative of a party. Each party may be represented or assisted by agents, counsel, advocates or other advisors whose names and proof of authority to act have been notified by that party to the Secretary-General (“representative(s)”).

“Schedule of fees” means the schedule of fees published by the Secretary-General.

The definition of the term “national of another State” has been removed from FFR 1 to reflect the modification of FFR 2(1).

**Rule 2**

**Fact-Finding Proceedings**

1. The Secretariat is authorized to administer fact-finding proceedings pertaining relating to an investment, between involving a State or an REIO, and a national of another State, which the parties consent in writing to submit to the Centre.

2. Reference to a State or an REIO includes a constituent subdivision of the State, or an agency of the State or the REIO. The State or the REIO must approve the consent of the constituent subdivision or agency which is a party to the fact-finding pursuant to paragraph (1), unless the State or the REIO concerned notifies the Centre that no such approval is required.

3. The (Fact-Finding) Administrative and Financial Regulations, attached as Annex A, shall apply to any such proceedings pursuant to these Rules.

The reference in FFR 2(1) of WP # 2 to “a national from another State” (i.e., a State other than the State party to the mediation) has been removed to authorize the Secretariat to administer any FFR proceeding that relates to an investment “involving a State or an REIO” (irrespective of who is the other party or parties to the FFR would be). This proposed change would provide States broader access to investment Fact-Finding facilities without the limitations applicable to Additional Facility arbitration and conciliation proceedings. As in all cases, the consent of all parties would be required before a proceeding could be initiated.
314. The word “pertaining” has been replaced with “relating” in FFR 2(1). This is to be given its ordinary meaning, and is not intended as a legal term of art. This terminology in FFR 2(1) is purposefully broader than notions such as “arising directly out of” or “arising out of” used in the Convention and Additional Facility Rules. It is consistent with the overall approach of the FFR to provide parties with a flexible framework in relation to disputed investment matters for which the States wish to engage the Centre’s fact-finding services.

315. The FFR are proposed as stand-alone rules and not as part of the Additional Facility framework. This reflects the fact that some of the limiting jurisdictional requirements applicable to Additional Facility arbitration and conciliation do not apply to proceedings under the FFR. Having the FFR as a stand-alone set of rules avoids confusion between the FFR and other ICSID rules and provides a short, simple, user-friendly framework based on party consent to participate in a fact-finding proceeding.

Rule 3
Application of Rules

(1) These Rules shall apply to any fact-finding proceeding conducted pursuant to Rule 2, except to the extent the parties agree to modify or exclude their application.

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-6.

(2)(3) The applicable ICSID Fact-Finding Rules are those in force on the date of filing the Request, unless the parties agree otherwise.

(3)(4) The texts of these Rules are equally authentic in English, French and Spanish.

(4)(5) These Rules may be cited as the “ICSID Fact-Finding Rules.”

316. FFR 3(2) clarifies that the Rules allowing the Secretariat to administer FFR proceedings and the provisions relating to the institution of proceedings (FFR 1-6) may not be modified by party agreement. Parties may consensually modify any of the rules following FFR 6.
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Rule 4
The Request

Parties wishing to institute a fact-finding proceeding under these Rules shall file a joint Request with the Secretary-General and pay the lodging fee published in the schedule of fees.

Rule 5
Contents and Filing of the Request

(1) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the proceeding and its nationality and provide their contact information (including electronic mail address, street address and telephone number);

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request, and attach the authorizations;

(g) indicate that the fact-finding is between a State or an REIO on the one hand and a national of another State on the other hand, describe the investment to which the fact-finding pertains, and indicate the facts to be examined and the relevant circumstances;

(h) attach a copy of the agreement of the parties providing for recourse to fact-finding under these Rules; and

(i) contain any proposals or agreements reached by the parties concerning the constitution of a Fact-Finding Committee (“Committee”), the qualifications of its member(s), its mandate and the procedure to be followed during the fact-finding.
(2) Any supporting document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or complete translation of the document.

**Rule 6**

**Receipt and Registration of the Request**

(1) The Secretary-General shall promptly acknowledge receipt of the Request, and act as the official channel of written communications between the parties.

(2) Upon receipt of the Request and the lodging fee, the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is within not manifestly outside the scope of Rule 2(1).

(3) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(4) The notice of registration of the Request shall:

   (a) record that the Request is registered and indicate the date of registration;

   (b) confirm that all correspondence to the parties in connection with the fact-finding proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Secretary-General; and

   (c) invite the parties to constitute a Committee without delay.

317. FFR 6(1) has been modified as it is implicit that any correspondence related to the initiation of Fact-Finding should be addressed to the Secretary-General.

318. FFR 6(2) has been modified to underline that the screening process is intended to be light, consistent with the consensual nature of the FFR process.
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Rule 8 - Number of Members and Method of Constituting the Committee
Rule 9 - Acceptance of Appointment
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Chapter III
The Fact-Finding Committee

Rule 7
Qualifications of Members of the Committee

(1) Each member of a fact-finding Committee shall be impartial and independent of the parties.

(2) The parties may agree that a member of a Committee shall have particular qualifications or expertise relevant to the subject-matter of the Request.

319. The change in FFR 7(2) underlines the principle of party autonomy, including the parties’ ability to agree on the qualifications of fact-finding committee members. Such qualifications might relate to the subject-matter of the Request, but also to other matters that could be important to the parties, for example expertise in fact-finding, nationality or linguistic ability.

Rule 8
Number of Members and Method of Constituting the Committee

(1) The parties shall endeavor to agree on a sole or any uneven number of Committee members, and the method of their appointment. If the parties do not advise the Secretary-General of an agreement on the number of members and method of appointment within 30 days after the date of registration, the Committee shall consist of a sole member, appointed by agreement of the parties.

(2) The parties may jointly request that the Secretary-General assist with the appointment of any sole member or any other members at any time.

(3) If the parties are unable to appoint a sole member or any member of a Committee within 60 days after the date of registration, either party may request that the Secretary-General appoint the member(s) not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the member(s) and shall use best efforts to appoint any Committee member(s) within 30 days after receipt of the request to appoint.

(4) If no step has been taken by the parties to appoint the members of a Committee within 120 consecutive days after the date of registration, or such other period as the parties may agree, the Secretary-General shall notify the parties that the fact-finding is terminated, the appointees have not accepted their appointments within 120 days after the date of registration, or such other period as the parties may agree, the Secretary-General shall inform the parties that the fact-finding cannot proceed.
320. FFR 8(4) clarifies that the inactivity of the parties vis-à-vis the appointment of the member of a fact-finding committee triggers the termination of the proceeding.

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Acceptance of Appointment |
<table>
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<tbody>
<tr>
<td>(1) The parties shall notify the Secretary-General of the appointment of the members of the Committee and provide the names, and contact information of the appointees.</td>
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<td>(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected.</td>
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<td>(3) Within 20 days after receipt of the request for acceptance of an appointment, an appointee shall:</td>
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<tr>
<td>(a) accept the appointment; and</td>
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<tr>
<td>(b) provide a signed declaration in the form published by the Centre, addressing matters including the appointee’s independence, impartiality, availability and commitment to maintain the confidentiality of the proceeding.</td>
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<td>(4) The Secretary-General shall notify the parties of the acceptance of appointment by each member and provide their signed declaration(s).</td>
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<tr>
<td>(5) The Secretary-General shall notify the parties if an appointee fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed in accordance with the method followed for the previous appointment.</td>
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<td>(6) Each member shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3)(b).</td>
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<tr>
<td>(7) Unless the parties and the Committee agree otherwise, a member may not act as arbitrator, conciliator, counsel, expert, judge, mediator, witness or in any other capacity in any other proceeding relating to circumstances examined during the fact-finding.</td>
</tr>
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Rule 10
Constitution of the Committee

The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that each member has accepted their appointment. As soon as the Committee is constituted, the Secretary-General shall transmit the Request, any supporting documents; and the notice of registration to each member.
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Rule 11
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(1) Each party shall file a written preliminary written statement of not more than 50 pages with the Secretary-General within 15 days after the date of constitution of the Committee, unless the parties agree otherwise. The preliminary statement shall address the party’s view on the mandate of the Committee, the scope of the inquiry, relevant documents, persons to be interviewed, site visits and any other relevant matters. The Secretary-General shall transmit the written preliminary written statements to the Committee and the other party.

(2) The Committee shall hold a first session with the parties within 30 days after its constitution or such other period as the parties may agree.

(3) At the first session, the Committee shall determine the protocol for the fact-finding (“Protocol”) after consulting with the parties on procedural matters, including:

(a) the Committee’s mandate;

(b) the procedure for the conduct of the proceeding, such as the procedural languages, method of communication, place of sessions, the next steps in the proceeding, the treatment protection of confidential or protected information, documents to be provided, persons to be interviewed, site visits and any other procedural and administrative matters;

(c) whether the Report to be issued will be binding on the parties; and

(d) whether the Committee should make any recommendations in its Report; and

(e) any other relevant matters.

(4) The Committee shall conduct the proceeding fact-finding in accordance with the Protocol and take all steps necessary to discharge its mandate. To that end, it shall make all decisions required for the conduct of the proceeding.

(5) Any matters not provided for in these Rules or not previously agreed to by the parties shall be determined by agreement of the parties or, failing such agreement, by the Committee.
Rule 12
General Duties

(1) The Committee shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding. It shall conduct the proceeding fact-finding in an expeditious and cost-effective manner and shall consult regularly with the parties on the conduct of the proceeding.

(2) The parties shall cooperate with the Committee and with one another and shall conduct the proceeding in good faith in an expeditious and cost-effective manner. The parties shall endeavor to provide all relevant explanations, documents or other information requested by the Committee and participate in the sessions of the Committee. The parties shall use all available means to facilitate the Committee’s inquiry.

Rule 13
Calculation of Time Limits

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

321. FFR 13 has been added as a default provision for the calculation of time limits applicable in FFR proceedings.

Rule 143
Payment of Advances and Costs of the Proceeding Fact-Finding

Unless the parties agree otherwise, each party shall:

(a) pay one half of the advances payable in accordance with (Fact-Finding) Administrative and Financial Regulation 7;

(b) pay one half of the fees and expenses of the Committee, as well as the administrative fee for use of the facilities of the Centre, in accordance with (Fact-Finding) Administrative and Financial Regulation 7 and the administrative charges and direct costs of the Centre; and

(c) bear any other costs it incurs in connection with the proceeding fact-finding.
322. The reference to payment of advances has been removed in FFR 14 as this is dealt with in (FFR)AFR 7.

**Rule 15**

**Confidentiality of the Fact-Finding and Use of Information in Other Proceedings**

(1) All information relating to the fact-finding proceeding, or and all documents generated in or obtained during the fact-finding shall be kept confidential, unless:

(a) the parties agree otherwise;

(b) the information or document is independently available; or

(c) disclosure is required by law.

(2) Unless the parties to the fact-finding agree otherwise, the fact that the parties are seeking or have sought fact-finding, shall not be confidential.

(3) The parties to a fact-finding may consent to:

(a) disclosure to a non-party of any information relating to, or document generated in or obtained during the fact-finding; and

(b) publication by the Centre of information relating to the fact-finding, or any document generated in connection with the fact-finding.

(4) Unless the parties to the fact-finding agree otherwise, the parties shall not rely, in other proceedings, on any positions taken, admissions made, or views expressed by the other party or the members of the Committee during the fact-finding.

323. FFR 3 addressing the publication of information has been deleted given that such publication may be consented to by the parties pursuant to 15(1).

**Rule 16**

**Use of Information in Other Proceedings**

A party shall not rely in other proceedings on any positions taken, admissions made, or views expressed by the other party or the members of the Committee during the fact-finding proceeding, unless the parties agree otherwise.

324. Proposed FFR 16 is former FFR 15(4).
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Rule 175
Manner of Terminating the Fact-Finding Proceeding

The fact-finding proceeding shall terminate upon:

(a) the issuance of a notice by the Secretary-General pursuant to Rule 8(4);

(b) the issuance of a Report by the Committee; or

(c) an agreement of the parties a notice from the parties that they have agreed to conclude the proceeding.

325. Changes to proposed FFR17 are made to clarify that the notice of termination might be issued by the Secretary-General if no member has been appointed.

326. FFR 17(c) has been updated to clarify that the proceeding does not automatically concludes upon the signing of an agreement to terminate but that notification by the parties either to the Committee or to the Secretary-General is required.

Rule 186
Failure of a Party to Participate or Cooperate

If a party fails to participate in the proceeding or cooperate with the Committee, and the Committee determines that it is no longer able to discharge its mandate, the Committee shall, after notice to the parties, record the failure of that party to participate or cooperate in its Report.

Rule 197
Report of the Committee

(1) The Report shall be in writing and shall contain:

(a) the mandate of the Committee;

(b) the Protocol followed;

(c) a brief summary of the proceeding;
(d) a recommendation if requested by the parties; and

(e) the facts established by the Committee and the reasons why certain facts may not be considered as having been established; or

(f) an indication of the failure of a party to participate or cooperate pursuant to Rule 186.

(2) The Report shall be adopted by a majority of the members and signed by them. If a member does not sign the Report, such fact shall be recorded.

(3) Any member may attach a statement to the Report if the member disagrees on any of the facts found and explain the reasons for any such disagreement.

(4) Unless the parties agree otherwise, the Report of the Committee shall not be binding upon the parties, and the parties shall be free to give any effect to it.

327. Changes to proposed FFR 19 are made to streamline the provision. FFR 19(3) clarifies that the member attaching a statement to the Report may, but need not, explain the reasons for disagreeing with the Report.

Rule 2018

Issuance of the Report

(1) Once the Report has been signed by the members of the Committee, the Secretary-General shall promptly:

(a) dispatch a certified copy of the Report to each party, indicating the date of dispatch on the Report; and

(b) deposit the Report in the archives of the Centre.

(2) The Secretary-General shall provide additional certified copies of the Report to a party upon request.
X. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR FACT-FINDING PROCEEDINGS (ANNEX A)

(FACT-FINDING) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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Introductory Note

The (Fact-Finding) Administrative and Financial Regulations apply to fact-finding proceedings and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Regulation 7.

Chapter I
General Provisions

Regulation 1
Application of these Regulations

(1) These Regulations apply to fact-finding proceedings which the Secretariat of the Centre is authorized to administer pursuant to Rule 23 of the ICSID Fact-Finding Rules.

(2) The applicable Regulations are those in force on the date of filing the Request for fact-finding pursuant to the ICSID Fact-Finding Rules.

(3) These Regulations may be referred to as the “(Fact-Finding) Administrative and Financial Regulations” of the Centre or “Annex A” to the ICSID Fact-Finding Rules.
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Chapter II
General Functions of the Secretariat

Regulation 2
Secretary

The Secretary-General of the Centre shall appoint a Secretary for each Fact-Finding Committee (“Committee”). The Secretary may be drawn from the Secretariat, and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the ICSID Fact-Finding Rules applicable to individual proceedings and delegated to the Secretary; and

(b) assist the parties and the Committee with all aspects of the proceedings, including the expeditious and cost-effective conduct of the proceeding.

328. This change reflects a change in corresponding AFR 28(b).

Regulation 3
The Registers

The Secretary-General shall maintain a Register for each proceeding containing all significant data concerning the institution, conduct and disposition of the proceeding. The information in the Register shall not be published, except as provided for in ICSID Fact-Finding Rule 14 unless the parties agree otherwise.

329. (FF)AFR 3 reflects changes to FFR 15 (FFR 14 in WP #2).

Regulation 4
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:

(a) all requests for fact-finding;

(b) all documents and communications filed in a proceeding;

(c) any recordings and transcripts of meetings or sessions in a proceeding; and
(d) any Report of the Committee.

(2) Subject to the ICSID Fact-Finding Rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties.

**Regulation 5**

**Certificates of Official Travel**

The Secretary-General may issue certificates of official travel to members of Committees, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding pursuant to under the ICSID Fact-Finding Rules.

330. These changes reflect proposed amendments to corresponding AFR 30.
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Chapter III
Financial Provisions

Regulation 6
Fees, Allowances and Charges

(1) Each member of a Committee shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a meeting or session held away from the member’s place of residence:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the meeting or session is held; and

(iii) a per diem allowance for each day the member spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a member for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the constitution of the Committee and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties for the services of the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) Members of Committees and any assistants approved by the parties;

(b) witnesses and experts called by the Committee who have not been presented by a party;

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any meeting or session held outside an ICSID facility.
(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the members of any Committee, unless the parties have made sufficient payments to defray the costs of the proceeding.

**Regulation 7**

**Payments to the Centre**

(1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for fact-finding, the Secretary-General shall request the requesting parties to make a payment to defray the estimated costs of the proceeding through the first session of the Committee, which shall be considered partial payment by the requesting parties of the payment referred to in paragraph (1)(b);

(b) upon constitution of a Committee, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding; and

(d) the Centre shall provide a statement of account to the parties with each request for payment and at any other time upon request of a party.

(2) Each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

331. (FF)AFR 7 incorporates changes in corresponding AFR 15, and is clarified to reflect the joint nature of any request to institute fact-finding proceedings.

**Regulation 8**

**Consequences of Default in Payment**

(1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.
(2) The following procedure shall apply in the event of non-payment:

   (a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

   (b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Committee if constituted; and

   (c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Committee if constituted.

332. The addition of “consecutive” reflects change in corresponding AFR 16(2)(c).

**Regulation 9**

**Special Services**

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

**Regulation 10**

**Fee for Lodging Requests**

The parties wishing to institute a fact-finding proceeding shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.
Regulation 11  
Administration of Proceedings

The ICSID Secretariat is the only entity body authorized to administer fact-finding proceedings conducted pursuant to under the ICSID Fact-Finding Rules.

333. (FF) AFR 11 reflects change in corresponding AFR 22.
Chapter IV
Official Languages and Limitation of Liability

Regulation 12
Languages of Regulations

(1) These Regulations are published in the official languages of the Centre, English, French and Spanish.

(2) The texts of these Regulations in each of these official languages are equally authentic.

(3) The singular form of words in these Regulations and in the ICSID Fact-Finding Rules include the plural form of that word, unless otherwise stated or required by the context of the provision.

Regulation 13
Prohibition Against Testimony and Limitation of Liability

(1) Unless required by applicable law or unless the parties and all the members of the Committee agree otherwise in writing, no member of the Committee shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the fact-finding proceeding.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no member of the Committee shall be liable for any act or omission in connection with the exercise of their functions in the fact-finding proceeding, unless there is fraudulent or willful misconduct.
# XI. RULES FOR MEDIATION PROCEEDINGS

(ICSID MEDIATION RULES)

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XI. RULES OF PROCEDURE FOR MEDIATION PROCEEDINGS
(ICSID MEDIATION RULES)

Introductory Note

The Rules of Procedure for Mediation Proceedings (the ICSID Mediation Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7(4).

The ICSID Mediation Rules are supplemented by the (Mediation) Administrative and Financial Regulations (Annex A).

The ICSID Mediation Rules apply from the submission of a Request for mediation until termination of the mediation.

334. The Introductory Note has been updated to stipulate the basis for adoption of the MR by the Administrative Council, which is also the basis for adoption of the Additional Facility and Fact-Finding Rules. The final paragraph has been removed in light of the stand-alone nature of the MR, including rules authorizing the Secretariat to administer mediations.

Chapter I
General Provisions

Rule 1
Definitions

(1) “Secretariat” means the Secretariat of the Centre.

(2) “Centre” or “ICSID” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

(3) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.

(4) “National of another State” means, unless otherwise agreed:

(a) a natural or juridical person that, on the date of consent to the mediation, is a national of a State other than the State party to the dispute or of any constituent State of the REIO party to the dispute; or
(b) a juridical person that, on the date of consent to the mediation, is a national of
the State party to the dispute or of any constituent State of the REIO party to the
dispute, and which the parties agree not to treat as a national of that State for the
purpose of these Rules.

(5)(4) “Request” means a request for mediation together with the required supporting
documents.

(6)(5) “Secretary-General” means the Secretary-General of the Centre.

(7)(6) “Party” may include(s), where the context so admits, all parties to the mediation
and any representative of a party. Each party may be represented or assisted by
agents, counsel, advocates or other advisors whose names and proof of authority to
act shall be notified by that party to the Secretary-General (“representative(s)”).

(8)(7) “Schedule of fees” means the schedule of fees as published by the Secretary-
General.

335. The definition of the term “national of another State” has been removed from MR 1 to
reflect the modification of MR 2(1).

**Rule 2
Mediation Proceedings**

(1) The Secretariat is authorized to administer mediations relating to an investment
between a State or an REIO on the one hand, and a national of another State on the other hand,
which the parties consent in writing to submit to the Centre.

(2) Reference to a State or an REIO includes a constituent subdivision of the State, or an
agency of the State or the REIO. The State or the REIO must approve the consent of
the constituent subdivision or agency which is a party to the mediation pursuant to
paragraph (1), unless the State or the REIO concerned notifies the Centre that no such
approval is required.

(3) The (Mediation) Administrative and Financial Regulations, attached as Annex A, shall
apply to such proceedings mediations pursuant to these Rules.

336. The reference in MR 2(1) of WP # 2 to “a national from another State” (i.e., a State other
than the State party to the mediation) has been removed to authorize the Secretariat to
administer any mediation proceeding that relates to an investment “involving a State or an
REIO” (irrespective of who the other party to the mediation is). This proposed change
would provide States broader access to investment mediation facilities without the
limitations applicable to Additional Facility arbitration and conciliation proceedings. As in all cases, the consent of all parties would be required before a mediation could commence.

337. The word “pertaining” has been replaced with “relating” in MR 2(1). This new term is to be given its ordinary meaning, and is not intended as a legal term of art. This terminology in MR 2(1) is purposefully broader than the notions “arising directly out of” or “arising out of” used in the Convention and Additional Facility Rules. It is consistent with the overall approach of the MR to provide parties with a flexible framework in relation to disputed investment matters for which the States wish to engage the Centre’s mediation services.

338. One State inquired about the consistency of the MR with ICSID’s functions. The mandate of the Centre is to offer facilities to assist States with the settlement of investment disputes, and the MR provide a further tool to achieve this goal. The proposed MR complement the Centre’s services, and in particular conciliation.

339. One State requested clarification as to why the MR are proposed as stand-alone rules and delinked from the Additional Facility framework. The stand-alone nature of the MR reflects the fact that some of the limiting jurisdictional requirements applicable to Additional Facility arbitration and conciliation do not apply to proceedings under the MR. In particular, (i) the MR do not require the involvement of a national of a State other than the State party to the mediation; and (ii) there is no requirement for the dispute to be of a legal nature or for the dispute to have formally crystalized. Having the MR as a stand-alone set of rules avoids confusion between the MR and other ICSID rules and provides a short, simple, user-friendly framework for these rules.

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**Rule 3**

**Application of Rules**

(1) These Rules shall apply to any mediation proceeding conducted pursuant to Rule 2, except to the extent the parties agree otherwise and subject to paragraph (2).

(2) The parties may agree to modify the application of any of these Rules other than Rules 1-6.

(2)(3) If any of these Rules, or any aspect of the parties’ agreement to modify the application of these Rules pursuant to paragraph (2), conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(3)(4) The applicable ICSID Mediation Rules are those in force on the date of filing the Request, unless the parties agree otherwise.

(4)(5) The texts of these Rules are equally authentic in English, French and Spanish.
These Rules may be cited as the “ICSID Mediation Rules”.

340. MR 3(2) clarifies that the Rules allowing the Secretariat to administer mediations and the provisions relating to the institution of proceedings (MR 1-6) may not be modified by party agreement. Parties may consensually modify any of the rules following MR 6, subject to the limitation in MR 3(3).
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Chapter II
Institution of the Mediation

Rule 4
Institution of Mediation Based on Prior Party Agreement

(1) If the parties have agreed in writing to refer the dispute to mediation pursuant to these Rules, any party wishing to institute a mediation shall file a Request with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

(3) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the mediation and its nationality and provide their contact information, including electronic mail address, street address and telephone number;

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of any representative’s authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;

(f) if the requesting party is a juridical person, state that it has obtained all necessary internal authorizations to file the Request, and attach the authorizations;

(g) indicate that the mediation involves a State or an REIO on the one hand and a national of another State on the other hand, describe the investment to which the mediation relates, and include a brief statement of the issues in dispute;

(h) attach a copy of the agreement of the parties to refer the dispute to mediation under these Rules; and

(h) contain any proposals or agreements reached by the parties concerning the appointment and qualifications of the mediator and the procedure to be followed during the mediation;

(i) attach a copy of the agreement of the parties to mediate pursuant to these Rules.
(4) Any supporting document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or complete translation of the document.

(5) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party; and

(b) transmit the Request to the other party upon receipt of the lodging fee.

(6) The Secretary-General shall act as the official channel of written communications between the parties.

341. MR 4(6) in WP # 2 has been removed, as it is implicit that any correspondence related to the mediation should be addressed to the Secretary-General.

**Rule 5**

**Institution of Mediation Absent a Prior Party Agreement**

(1) If the parties have no prior written agreement to refer the dispute to mediation under these Rules, any party wishing to institute a mediation shall file a Request with the Secretary-General, and pay the lodging fee published in the schedule of fees, and make an offer to mediate to the other party in accordance with paragraphs (2)-(5).

(2) The Request shall:

(a) comply with the requirements in Rule 4(3)(a)-(h);

(b) include an offer to the other party to refer the dispute to mediation under these Rules; and

(c) request that the Secretary-General invite the other party to accept the offer to mediate referred to in paragraph (2)(b).

(3) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and
(c) invite the other party to inform the Secretary-General within 60 days after transmittal of the Request pursuant to paragraph (3)(b) whether it accepts the offer to mediate referred to in paragraph (2)(b).

(4) If the other party informs the Secretary-General that it accepts the offer to mediate referred to in paragraph (2)(b), the Secretary-General shall acknowledge receipt and transmit the acceptance of the offer to mediate to the requesting party.

(5) If the other party rejects the offer to mediate, or fails to accept the offer to mediate referred to in paragraph (2)(b) within the 60-day period referred to in paragraph (3)(c), or within such other period as the parties may agree, the Secretary-General shall acknowledge receipt and transmit any communication received to the requesting party and inform the parties that no further action will be taken on the Request.

342. MR 5(1) clarifies that a written agreement to mediate is required to institute mediations pursuant to the MR. MR 5(5) specifically allows the parties to agree to extend (or shorten) the period within which the other party must accept or reject an offer to mediate.

343. One State suggested that the institution of mediation should be limited to instances in which a written agreement to mediate was in force prior to the submission of the Request (i.e., under MR 4 only). MR 5 has been retained as it responds to requests from States for ICSID to introduce this option.

344. MR 5 complements systemic investment dispute response mechanisms adopted by many States and assists Member States to effectively manage investment disputes even where there is no formal instrument offering mediation.
(2) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(3) The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;

(b) confirm that all correspondence to the parties in connection with the mediation will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Secretary-General; and

(c) invite the parties to appoint the mediator without delay.

345. MR 6 has been modified to underline that the screening process is intended to be light (see WP # 1, AF Rules), consistent with the consensual nature of the mediation process.

346. MR 6(1)(b) and (c) have been merged to clarify that MR 4 and 5 set out alternatives, only one of which needs to be satisfied.
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Chapter III
General Procedural Provisions

Rule 7
Calculation of Time Limits

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or, if the date falls on a Saturday or Sunday, on the subsequent business day.

347. MR 7 has been added as a default provision for the calculation of time limits applicable in mediation proceedings.

Rule 87
Payment of Advances and Costs of the Mediation

Unless the parties agree otherwise, each party shall:

(a) pay one half of the advances payable in accordance with (Mediation) Administrative and Financial Regulation 7;

(b) pay one half of the fees and expenses of the mediator and the administrative charges and direct costs of the Centre, as well as the administrative fee for use of the facilities of the Centre, in accordance with (Mediation) Administrative and Financial Regulation 7; and

(c) bear any other costs it incurs in connection with the mediation.

348. The reference to payment of advances has been removed in MR 8 as this is dealt with in (M)AFR 7.

Rule 98
Confidentiality of the Mediation

(1) All information relating to the mediation, or and all documents generated in or obtained during the mediation, shall be kept confidential, unless:

(a) the parties agree otherwise;

(b) the information or document is independently available; or
(c) disclosure is required by law.

(2) Any settlement agreement concluded during the mediation shall be kept confidential, to the extent that disclosure is required by law or for purposes of implementation and enforcement of the settlement agreement.

(3)(2) Unless the parties to the dispute agree otherwise, the fact that the parties are mediating, or have mediated, shall not be confidential.

(4) The parties to a mediation may consent to:

   (a) disclosure to a non-party of any information relating to, or document generated in or obtained during the mediation; and

   (b) publication by the Centre of information relating to the mediation, or any document generated in the mediation.

349. MR 9(2) in WP # 2 has been deleted given that the disclosure of settlement agreements resulting from the mediation is covered by MR 9(1). In addition, a reference to the disclosure of settlement agreements has been added to the list of items to be addressed by the parties with the mediator at the first session pursuant to MR 19.

350. Likewise, MR 9(4) in WP # 2 addressing the publication of information has been deleted given that such publication may be consented to by the parties pursuant to MR 9(1).

351. Finally, the first clause in MR 9(3) in WP # 2 has been deleted. It is unnecessary given MR 3(2).

Rule 109
Use of Information in Other Proceedings

Unless the parties agree otherwise, A party shall not rely, in other proceedings, on any positions taken, admissions or offers of settlement made, or views expressed by the other party or the mediator during the mediation, unless the parties agree otherwise.
XI. RULES FOR MEDIATION PROCEEDINGS
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Chapter IV
The Mediator

Rule 110
Qualifications of the Mediator

(1) The mediator shall be impartial and independent of the parties.

(2) The parties may agree that the mediator shall have particular qualifications or expertise relevant to the subject-matter of the Request.

352. MR 11(2) has been updated in response to a comment from the public. The change underlines the principle of party autonomy, including the parties’ ability to agree on mediator qualifications. Such qualification might relate to the subject-matter of the Request, but also to other matters that could be important to the parties, for example expertise in mediation, nationality or linguistic ability.

Rule 121
Number of Mediators and Method of Appointment

(1) There shall be one mediator or two co-mediators. Each mediator shall be appointed by agreement of the parties. All references to “mediator” in these Rules shall include co-mediators, as applicable, where the context so admits.

(2) If the parties do not advise the Secretary-General of an agreement on the number of mediators within 30 days after the date of registration, there shall be one mediator appointed by agreement of the parties.

(3) The parties may jointly request that the Secretary-General assist with the appointment of a mediator at any time.

(4) If the parties are unable to appoint the mediator within 60 days after the date of registration, either party may request that the Secretary-General appoint the mediator not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the mediator and shall use best efforts to appoint any mediator within 30 days after receipt of the request to appoint.

(5) If no step has been taken by the parties to appoint the mediator within 120 consecutive days after the date of registration, or such other period as the parties may agree, the Secretary-General shall notify the parties that the mediation is terminated, the mediator has not accepted the appointment within 120 days after the
date of registration, or such other period as the parties may agree, the Secretary-Generals shall inform the parties that the mediation cannot proceed.

(6) If the parties notify the Secretary-General prior to the appointment of a mediator that they have agreed to terminate the mediation, the Secretary-General shall notify the parties that the mediation cannot proceed.

353. MR 12(5) clarifies that the inactivity of the parties vis-à-vis the appointment of the mediator triggers the termination of the mediation.

354. One State requested further information regarding the appointment and selection of mediators and suggested an ICSID panel of mediators. Criteria for parties to consider in selecting mediators are addressed in WP # 1 (Vol. 3, ¶ 1352) and WP # 2 (Vol. 1, ¶ 784). The type of Secretariat assistance available in the appointment process is set out in WP # 2 (Vol. 1, ¶ 785). The Secretariat will assess the possibility of establishing a mediator panel after the MR enter into force.

### Rule 132

**Acceptance of Appointment**

(1) The parties shall notify the Secretary-General of the appointment of the mediator and provide the name and contact information of the appointee.

(2) The Secretary-General shall request an acceptance from each appointee as soon as the appointee is selected.

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

   (a) accept the appointment; and

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

(4) The Secretary-General shall notify the parties of the acceptance of appointment by the mediator and provide the signed declaration.

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

(7) Unless the parties and the mediator agree otherwise, a mediator may not act as arbitrator, conciliator, counsel, expert, judge, witness or in any other capacity in any other proceeding relating to the dispute that is the subject of the issues in dispute in the mediation.

355. MR 13(7) has been aligned with MR 2(1) and MR 4(3)(g). Corresponding revisions for consistency have also been made to MR 16(1), 19(3)(g)(ii) and (4)(a) and MR 20(1) and (6).

356. One State suggested adding a requirement to disclose third-party funding in the MR (as is required in proposed AR 14). A provision regarding third-party funding has never been suggested in the context of the MR, as the role of a mediator differs significantly from that of a Tribunal. While third-party funding arrangements are less likely to be in place in the context of mediations, the parties are of course free to agree on disclosures of third-party funding. In cases where the mediation is happening in parallel with an ongoing ICSID arbitration (as is likely to happen), the parties will already know of any third-party funding as a consequence of the reporting obligations contained in the relevant arbitration rules.

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**Rule 143**

**Notice of Acceptance Transmittal of the Request**

As soon as the mediator has, or both co-mediators have, accepted the appointment(s), the Secretary-General shall notify the parties of such acceptance (“notice of acceptance”) and transmit the Request, any supporting documents, and the notice of registration to each mediator and notify the parties of this transmittal.

357. MR 14 has been clarified to avoid confusion with the notification of the acceptance of appointment by a mediator in MR 13(4). It now makes the transmittal of the Request for mediation to the mediator the triggering event for the timelines in MR 17 and 18.

---

**Rule 154**

**Resignation and Replacement of Mediator**

(1) A mediator may resign by notifying the Secretary-General and the parties.

(2) A mediator shall resign:

   (a) on the joint request of the parties; or
(b) if the mediator becomes incapacitated or fails to perform the duties required of a mediator.

(3) Following the resignation of a mediator, the Secretary-General shall notify the parties of the vacancy, and a new mediator shall be appointed by the same method used to make the original appointment, except that:

(a) the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of the vacancy, or such other period as agreed by the parties; or

(b) if a co-mediator resigns and the parties notify the Secretary-General within 45 days after the notice of the vacancy that they have agreed to continue the mediation with the remaining co-mediator acting as sole mediator, no new mediator shall be appointed.

(3) Following the resignation of a co-mediator, the parties may agree to continue the mediation with the remaining co-mediator acting as a sole mediator. The parties shall notify the Secretary-General of such agreement within 45 days after the notice of the vacancy or such other period as agreed by the parties pursuant to paragraph (2).

358. MR 15(2)(b) has been updated to align the wording with the corresponding provisions in the CR and (AF)CR.

359. The structure of MR 15(3) has been updated for clarification without changing the substance of the provision. As MR 3(1) provides that the parties may agree to modify the application of the provisions in this Chapter, the reference to the parties’ ability to modify the 45-day period has been removed in MR 15(3)(a) and (b).
XI. ICSID MEDIATION RULES

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Chapter V  
Conduct of the Mediation  

Rule 165  
Role and Duties of the Mediator

(1) The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the dispute issues in dispute. The mediator does not have the authority to impose a settlement on the parties.

(2) The mediator shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding.

(3) The mediator shall conduct the proceeding in an expeditious and cost-effective manner.

360. MR16(1) has been modified to clarify that the mediator cannot decide the manner in which the parties shall settle disputed matters. MR 16(3) has been deleted as this is covered in MR 20(2).

Rule 176  
Duties of the Parties

(4) The parties shall cooperate with the mediator and with one another and shall conduct the mediation in good faith; and in an expeditious and cost-effective manner.

(2) The parties shall endeavor to provide all relevant explanations, documents or other information requested by the mediator.

361. MR 17(2) in WP # 2 has been removed as it is covered by the more general provision in MR 17.

Rule 187  
Initial Written Statements

(1) Each party shall file a brief, initial written statement with the Secretary-General describing the issues in dispute and its views on these issues and on the procedure to be followed during the mediation. These statements shall be filed within 15 days after the date of the notice of acceptance of the transmittal of the Request pursuant to Rule 14, or such other period as the mediator may determine in consultation with the parties, but and in any event before the first session.
(2) The Secretary-General shall transmit the initial written statements to the mediator and the other party.

362. MR 18(1) has been updated to simplify the language and reflect the modification in MR 14.

363. MR 18(1) contemplates that the mediator may determine the filing deadlines for the parties’ initial written statements. One State suggested including an option for the parties to agree on the applicable timelines. A consultation requirement has been added to address this concern; however, MR 18(1) is otherwise retained to ensure that the mediator has sufficient time to prepare and engage with the parties prior to the first session, which is regular practice in mediation proceedings (see also the proposed revision in MR 19(2)).

**Rule 198**

**First Session**

(1) The mediator shall hold a first session with the parties within 30 days after the date of the notice of acceptance transmittal of the Request pursuant to Rule 14 or such other period as the parties may agree.

(2) The first session may be held in person or remotely, by any means that the mediator deems appropriate. The agenda, method and date of the first session shall be determined by the mediator after consulting with the parties. In preparation for the first session, the mediator may meet and communicate with the parties jointly or separately.

(3) At the first session, the mediator shall determine the protocol for the conduct of the mediation (“Protocol”) after consulting with the parties on procedural matters, including:

(a) the procedural language(s);

(b) the method of communication;

(c) the place of meetings;

(d) the next steps in the proceeding;

(e) the treatment protection of confidential or protected information;

(f) the participation of other persons in the mediation;

(g) any agreement between the parties:
(i) concerning the treatment of information disclosed by one party to the mediator by separate communication pursuant to Rule 2019(3);

(ii) not to initiate or pursue other proceedings in respect of the issues in dispute during the mediation;

(iii) concerning the application of prescription or limitation periods;

(iii)(iv) concerning the disclosure of any settlement agreement resulting from the mediation; and

(h) the division of advances payable pursuant to (Mediation) Administrative and Financial Regulation 7; and

(i) any other relevant procedural and administrative matters.

(4) At the first session or within any other period as the mediator may determine, each party shall:

(a) identify a representative who is authorized to settle the issues in dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

364. MR 19(1) has been updated to reflect the revision in MR 14. In response to inquiries regarding the mediation procedure prior to the first session, MR 19(2) clarifies that the mediator may meet or communicate with the parties jointly or separately prior to the first session to effectively prepare the discussions. This reflects common practice in mediation proceedings. The general confidentiality provision in MR 19(4) applies to such interactions.

365. MR 19(3)(e) has been aligned with the corresponding provisions in other ICSID rules. This provision also covers discussions by the parties regarding the adoption of a customized protocol for disclosure of information to a wider audience, including through the making of joint press releases or other agreed-upon disclosures to a specified audience or the general public.

366. MR 19(3)(g)(iv) has been added given the deletion of the reference to settlement agreements in MR 9.

367. With regard to MR 19(4)(i), one commentator proposed requiring proof of settlement authority. The requirement of such proof is best left to the parties to address at the first session if desired.
583

Rule 2019

Conduct of the Mediation

(1) The mediator shall conduct the mediation in accordance with the Protocol and shall take into account the views of the parties and the circumstances of the issues in dispute.

(2) The mediator shall conduct the mediation in good faith and in an expeditious and cost-effective manner.

(3) The mediator may meet and communicate with the parties jointly or separately. Such communications may be in person or in writing, and by any appropriate means of communication.

(4) Information received by the mediator from one party shall not be disclosed to the other party without authorization from the disclosing party.

(5) The mediator may request that the parties provide additional information or written statements.

(6) If requested by the parties, the mediator may make oral or written recommendations for the resolution of all or part of the issues in dispute.

(7) The mediator may obtain expert advice with the agreement of the parties.

368. Mirroring the parties’ obligation to cooperate with the mediator and with one another in good faith, MR 20(2) now includes a duty for the mediator to conduct the mediation in good faith.

369. MR 20(4) underlines the importance of confidentiality within the mediation process and specifies that information shared with the mediator by one party – by way of separate meetings or otherwise – shall not be disclosed to the other party absent express authorization. The matter is also to be addressed by the parties at the first session, as contemplated by MR 19(3)(g)(i).

370. One commentator inquired about the parties’ ability to amend the Protocol for the conduct of the mediation following the first session. In light of the consensual nature of the mediation process, this is envisioned on the basis of an agreement between all parties and the mediator. Adding a rule expressly providing for this appears unnecessary given the nature of mediation.

371. Reflecting the facilitative nature of mediation under these Rules, MR 20(6) has been updated to clarify that a request for the mediator to make any recommendations for the
resolution of all or part of the issues in dispute must be made by all the parties to the mediation.

Chapter V
Termination of the Mediation

Rule 210
Notice of Termination of the Mediation

(1) The mediator, or the Secretary-General if no mediator has been appointed, shall issue a notice of termination of the mediation. The mediation shall be terminated upon:

(a) a notice from the parties that they have signed the signing of a settlement agreement by the parties;

(b) a notice by from the parties that they have agreed to discontinue terminate the mediation;

(c) a notice of withdrawal by any party, unless the remaining parties agree to continue the mediation;

(d) a determination by the mediator that there is no likelihood of resolution through this the mediation; or

(e) a determination by the mediator that a party failed to participate in the mediation or cooperate with the mediator.

(f) satisfaction of the requirements of Rule 12(5).

(2) The mediator shall take note of the termination in writing. The notice of termination shall contain a brief summary of the procedural steps and the basis for termination of the mediation pursuant to paragraph (1). The notice shall be dated and signed by the mediator or the Secretary-General, as applicable.

(3) The Secretary-General shall promptly dispatch a certified copy of the notice of termination to each party, indicating the date of dispatch, and deposit the notice in the archives of the Centre. The Secretary-General shall provide additional certified copies of the notice to a party upon request.

372. The first sentence in MR 21(2) has been merged into MR 21(1) to simplify the provision.

373. MR 21(1) has further been updated to clarify that the notice of termination might be issued by the Secretary-General if no mediator has been appointed, or if a mediator has resigned and a replacement mediator has not yet been appointed. The language in MR 21(2)(a) has
been updated to clarify that the mediation does not automatically terminate upon the
signing of a settlement agreement but that notification by the parties either to the mediator
or to the Secretary-General is required.

374. MR 21(2)(e) refers to termination if no steps are taken by the parties to appoint a mediator
pursuant to MR 12(5).
XII. ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR MEDIATION
(ANNEX A)
(MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS

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XII. **ANNEX A: (MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS FOR MEDIATION (ANNEX A)**

*(((MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS)*

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**Introductory Note**

The (Mediation) Administrative and Financial Regulations apply to mediation proceedings and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.

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**Chapter I**

**General Provisions**

**Regulation 1**

**Application of these Regulations**

1. These Regulations apply to mediation proceedings which the Secretariat of the Centre is authorized to administer under Rule 2 of the ICSID Mediation Rules.

2. The applicable Regulations are those in force on the date of filing the Request for mediation under the ICSID Mediation Rules.

3. These Regulations may be referred to as the “(Mediation) Administrative and Financial Regulations” of the Centre or “Annex A” to the ICSID Mediation Rules.
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Chapter II
General Functions of the Secretariat

Regulation 2
Secretary

The Secretary-General of the Centre shall appoint a Secretary for each mediation. The Secretary may be drawn from the Secretariat, and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

(a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the ICSID Mediation Rules applicable to individual proceedings and delegated to the Secretary; and

(b) assist the parties and the Mediator with all aspects of the proceedings, including the expeditious and cost-effective conduct of the proceeding.

375. These changes reflect change in corresponding AFR 28(b) and ensure consistency with the MR.

Regulation 3
The Registers

The Secretary-General shall maintain a Register for each mediation containing all significant data concerning the institution, conduct and disposition of the proceeding. The information in the Register shall not be published, unless the parties agree otherwise except as provided for in ICSID Mediation Rule 7.

376. The changes to (MR)AFR 3 complement MR 7.

377. One State commented that Registers for mediations should be published as a default. Given the nature of mediation, no change has been made to this rule. Parties may consent to publication, and States may incorporate a requirement for publication into their treaties, contracts and mediation agreements, should they consider that desirable.

Regulation 4
Depositary Functions

(1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:
(a) all requests for mediation;
(b) all documents and communications filed in a proceeding mediation;
(c) any records of meetings or sessions in a proceeding mediation; and
(d) any notice of termination of a mediation pursuant to ICSID Mediation Rule 210.

(2) Subject to the ICSID Mediation Rules and the agreement of the parties to the proceedings, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties.

Regulation 5
Certificates of Official Travel

The Secretary-General may issue certificates of official travel to mediators, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in proceedings, indicating that they are traveling in connection with a proceeding under pursuant to the ICSID Mediation Rules.

378. These changes reflect change in corresponding AFR 30.
Chapter III  
Financial Provisions  

Regulation 6  
Fees, Allowances and Charges

(1) Each mediator shall receive:

(a) a fee for each hour of work performed in connection with the proceeding;

(b) when not travelling to attend a meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the proceeding; and

(c) when required to travel to attend a meeting or session held away from the place of residence of the mediator:

(i) reimbursement of the cost of ground transportation between the points of departure and arrival;

(ii) reimbursement of the cost of air and ground transportation to and from the city in which the meeting or session is held; and

(iii) a per diem allowance for each day the mediator spends away from their place of residence.

(2) The Secretary-General shall determine and publish the amount of the fee and the per diem allowance referred to in paragraph (1)(a) and (c). Any request by a mediator for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the transmittal of the Request for mediation to notice of acceptance by the mediator pursuant to ICSID Mediation Rule 143 and shall justify the increase requested.

(3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties for the services of the Centre.

(4) All payments, including reimbursement of expenses, shall be made by the Centre to:

(a) mediators and any assistants approved by the parties;

(b) any experts appointed by a mediator pursuant to ICSID Mediation Rule 20(7); and

(c) service providers that the Centre engages for a proceeding; and

(d) the host of any meeting or session held outside an ICSID facility.
(5) The Centre shall not be required to provide any service in connection with a proceeding or to pay the fees, allowances or reimbursements of the Mediator, unless the parties have made sufficient payments to defray the costs of the proceeding.

379. These changes reflect corresponding changes in AFR 14 and update the rule to address changes of terminology in MR 13.

**Regulation 7**

**Payments to the Centre**

(1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:

(a) upon registration of a Request for mediation, the Secretary-General shall request the party(ies) instituting the mediation requesting party(ies) to make a payment to defray the estimated costs of the proceeding through the first session of the Mediator, which shall be considered partial payment by the requesting instituting party(ies) of the payment referred to in paragraph (1)(b);

(b) upon the notice of acceptance of appointment by the Mediator transmittal of the Request for mediation pursuant to ICSID Mediation Rule 13, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the proceeding; and

(c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the proceeding; and

(d) the Centre shall provide a statement of account to the parties with each request for payment and at any other time upon request of a party.

(2) Each party shall pay one half of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division.

(3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

380. The changes in (MR)AFR 7 address corresponding changes in AFR 15.
Regulation 8
Consequences of Default in Payment

(1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.

(2) The following procedure shall apply in the event of non-payment:

(a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;

(b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the proceeding until payment is made, after giving notice to the parties and to the Mediator if appointed; and

(c) if any proceeding is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the proceeding, after giving notice to the parties and to the Mediator if appointed.

381. The addition of “consecutive” reflects change in corresponding AFR 16(2)(c).

Regulation 9
Special Services

(1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.

(2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

Regulation 10
Fee for Lodging Requests

The party or parties (if a request is made jointly) wishing to institute a mediation shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.
The ICSID Secretariat is the only entity body authorized to administer mediation proceedings conducted under pursuant to the ICSID Mediation Rules.

382. This change reflects change in corresponding AFR 22.
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Chapter IV
Official Languages and Limitation of Liability

Regulation 12
Languages of Regulations

(1) These Regulations are published in the official languages of the Centre, English, French and Spanish.

(2) The texts of these Regulations in each of these official languages are equally authentic.

(3) The singular form of words in these Regulations and in the ICSID Mediation Rules include the plural form of that word, unless otherwise stated or required by the context of the provision.

Regulation 13
Prohibition Against Testimony and Limitation of Liability

(1) Unless required by applicable law or unless the parties and the Mediator agree otherwise in writing, no Mediator shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the mediation.

(2) Except to the extent such limitation of liability is prohibited by applicable law, no Mediator shall be liable for any act or omission in connection with the exercise of their functions in the mediation, unless there is fraudulent or willful misconduct.
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*In accordance with Article 5 of the current AF Rules, “Regulations 14 through 16, 22 through 30 and 34(1) of the Administrative and Financial Regulations of the Centre shall apply, *mutatis mutandis*, in respect of fact-finding, conciliation and arbitration proceedings under the Additional Facility.”

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Amending the ICSID Rules: Process, Objectives and Outcomes

Meg Kinnear, Secretary-General, ICSID

The International Centre for Settlement of Investment Disputes (ICSID) initiated the latest update to its procedural rules in late 2016. The rules were previously amended in 2006, which ushered in a number of innovations. These included strengthened disclosure requirements for arbitrators; the possibility of holding open hearings; increased publication of awards; the opportunity for non-disputing parties to file submissions (amicus curiae briefs); and the possibility for a respondent to obtain an early dismissal of a case due to its manifest lack of legal merit. The 2006 version of the rules have had an impact well beyond ICSID procedure—they went on to influence various investment treaties and the arbitration rules of other institutions.

Ten years later, the time felt right to take another fresh look at the rules. ICSID’s caseload has continued to grow, providing valuable insight into how the rules perform in practice. More broadly, the expanded use of investor-State dispute settlement (ISDS) has raised a range of questions on how the system can best serve States and investors. Not all ISDS reforms can be achieved through procedural rules—many relate to the substantive provisions of treaties, contracts, investment laws and the practices of States. But some procedural improvements are possible, and the proposed amendments have focused on these.

Process

The current amendment process has entailed by far the most extensive consultation with States and the public in ICSID’s history. It began with an invitation to States and other stakeholders to suggest topics to be addressed in the amended rules. In 2017, ICSID also published a survey of States on recovery of costs. The initial round of input culminated in the first working paper on the proposed rule amendment in September 2018. This working paper—as with subsequent editions—featured the proposed text of the new rules in English, French and Spanish, and an explanation of why each change was proposed. It was subject to extensive review and comment, including a three-day consultation with Member States and over 75 briefings with State officials.

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1 Ms. Kinnear was appointed Secretary-General of ICSID in June 2009. She previously worked as Senior General Counsel (2006-2009) and Director General of the Trade Law Bureau of Canada (1999-2006). Prior to this, Ms. Kinnear also worked as the Executive Assistant to the Deputy Minister of Justice of Canada (1996 -1999) and Counsel at the Civil Litigation Section of the Canadian Department of Justice (1984-1996).

2 Arbitration Rule 6(2), and Article 13(2) of the Arbitration (Additional Facility) Rules

3 Arbitration Rule 32(2), and Article 39(2) of the Arbitration (Additional Facility) Rules

4 Arbitration Rule 48(4), and Article 53(3) of the Arbitration (Additional Facility) Rules

5 Arbitration Rule 37(2), and Article 41(3) of the Arbitration (Additional Facility) Rules

6 Arbitration Rule 41(5), and Article 45(6) of the Arbitration (Additional Facility) Rules


legal professionals and civil society representatives. Written comments received from States and 
the public were posted to the ICSID website as they were received, and subsequently 
consolidated into a compendium that links comments to the specific proposals that they 
addressed.

The same process was followed with the next two working papers, published in March 2019 and 
August 2019 respectively. The proposals have undoubtedly benefitted from the scrutiny. 
Promisingly, we have seen increasing consensus with each new iteration of the revised rules.

Considerations

While ICSID has received numerous recommendations on changes to the rules, there has also 
beneffice generally amongst ICSID stakeholders that the rules are performing well. 
Preserving what works in the rules is therefore also important. At a high-level, this has meant 
maintaining how the rules strike a balance amongst the interest of States and investors. This 
balance was ingrained in the original rules, and has been essential to their success.

There are also two formal requirements that must be met for the new rules. First, they require the 
approval of ICSID Member States. The rules for arbitration and conciliation under the ICSID 
Convention need two-thirds approval, and the rules of the Additional Facility, and the Mediation 
and Fact-Finding Rules, need a simple majority. However, the aim has been to build broad 
support for the amendments amongst the ICSID membership that exceeds the minimum 
requirements.

The second requirement is that the rules for arbitration and conciliation under the ICSID 
Convention conform with the Convention itself. Here it is important to recall that the ICSID 
Convention not only establishes ICSID’s jurisdiction, but it also provides the procedural 
framework for arbitration and conciliation governed by the Convention. This framework is 
supplemented by more detailed rules of procedure that are the focus of the current amendment 
process. A good example are rules that govern public access to awards in ICSID Convention 
arbitration. Under the ICSID Convention, parties must consent to the publication of ICSID 
awards. If they do not, ICSID will publish excerpts of the awards. Therefore, while the proposed 
new rules would enhance transparency in a number of respects, they cannot override the 
Convention’s requirements with respect to consent to publication of awards in Convention cases.

Objectives and Proposals

The overriding objective of this amendment process is to modernize ICSID procedure based on 
experience, best practices and feedback received from users. This is reflected, for instance, in 
the numerous measures that have been introduced to enhance the efficiency of the dispute 
settlement process, and thus reduce the length and cost of cases. Towards this end, tribunals are 
encouraged to be active case managers; for example, by deciding when best to convene a case 
management conference to narrow the issues in dispute or address a procedural or substantive

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9 State input on the amendment proposals is available at https://icsid.worldbank.org/en/amendments/state-input
10 Public input is available at https://icsid.worldbank.org/en/amendments/Pages/Public%20Inputs/input.aspx
11 Article 6 of the ICSID Convention and Article (7(2) of the ICSID Convention, respectively
matter. We have also proposed new or shorter timelines for a range of procedural steps, and even shorter timelines in a new set of optional expedited arbitration rules. The expedited rules would conclude a case in about 1.5 years, less than half of the current average.\footnote{See Arbitration Rules 74 – 85 (Working Paper #3)}

Innovations to the arbitration rules also include new provisions on third-party funding and security for costs, revisions to the rules on transparency, and to the allocation of arbitration costs amongst the parties. ICSID has also proposed expanding the scope of the Additional Facility Rules for arbitration and conciliation in order to increase their availability to States and investors, and to make them accessible to regional economic integration organizations (REIOs). Finally, the proposed amendments expand the dispute settlement options available to parties. The major development in this respect is an entirely new set of rules for investor-State mediation. ICSID’s existing rules on fact-finding have also been significantly revamped. Each of these proposals is discussed in more detail below.

*Third-Party Funding*

Third-party funding of legal claims has grown in recent years and is often debated by practitioners and States. This was reflected in the varied input ICSID received on the topic. At one end of the spectrum were those who would ban third-party funding in ISDS entirely, seeing it as inappropriate for cases involving sovereign States. Others support third-party funding as a means to facilitate access to justice, especially for small-and-medium-sized enterprises. The proposed amendments do not take a position on this policy debate. Rather, the starting point has been that third-party funding is used in ISDS and that conflicts of interest might arise between arbitrators and third-party funders. The proposed amendments therefore address the potential of conflict through mandatory disclosure of the existence of funding arrangements by claimants and respondents.\footnote{See Arbitration Rule 14 (Working Paper #3)} This is buttressed by an enhanced declaration of impartiality of arbitrators and conciliators, which specifically addresses their relationship to a third-party funder.

*Security for Costs*

While orders for security for costs are rare in investment arbitration, they are increasingly requested and occasionally ordered. For this reason it is proposed that security for costs be addressed specifically in the updated rules.\footnote{See Arbitration Rule 52 (Working Paper #3)} The proposed rule states that in exercising its discretion to order security for costs, the tribunal must consider all relevant circumstances, including the party’s ability and willingness to comply with an adverse decision on costs, the effect of providing security for costs on the party’s ability to pursue a claim, and each party’s conduct. The rule also stipulates that while third-party funding may be raised as evidence of these criteria, the existence of third-party funding is not sufficient in-and-of-itself to warrant an order for security for costs.

*Costs of Proceedings*

\footnotesize{\textsuperscript{12} See Arbitration Rules 74 – 85 (Working Paper #3)}
\footnotesize{\textsuperscript{13} See Arbitration Rule 14 (Working Paper #3)}
\footnotesize{\textsuperscript{14} See Arbitration Rule 52 (Working Paper #3)}
The ICSID Convention gives tribunals discretion on whether and how to allocate the costs.\footnote{15 \textit{Article 61 of the ICSID Convention}} However, the proposed rules provide guidance on the circumstances to be considered in marking a decision on allocation of costs, specifically: the outcome of the proceeding or any part of it; the parties’ conduct; the complexity of the issues involved in the case; and the reasonableness of the costs claimed.\footnote{16 See Arbitration Rule 51 (\textit{Working Paper #3})} The proposed rules also state that the tribunal may make interim decisions on costs at any point, and that all costs decisions must be reasoned and form part of the award.

\textit{Transparency}

The proposed rules would enhance transparency, particularly with respect to the publication of awards, decisions and order. All orders and decisions in ICSID Convention cases and all orders, decisions and awards under the Additional Facility Rules would be published, with redactions agreed to by the parties. This respects the Convention’s requirements that awards are published only with the consent of both parties. It would nonetheless provide substantially greater access to procedural and substantive decisions, which in turn contributes to the development of a more cohesive and stable jurisprudence. In cases where parties have treaty-specific provisions on transparency, or if the Mauritius Convention applies, these will set the standards of transparency. In other words, the ICSID rules set the floor—not the ceiling—when it comes to transparency.

\textit{Broader Scope of the Additional Facility Rules}

The scope of the Additional Facility rules has been broadened so that they would be available in cases where neither party is a Contracting State to the ICSID Convention or only one party is a national of a Contracting State. This means that ICSID’s ISDS rules and services would be accessible for a greater range of disputes. The proposed Additional Facility Rules also provide access to regional economic integration organizations (REIOs), such as the European Union, reflecting the fact that increasingly States are negotiating investment agreements as regional entities.

\textit{Alternative Dispute Resolution Options}

The amendment process has been an opportunity to both improve and expand the Alternative Dispute Resolution (ADR) options available to States and investors. Notably, this includes an entirely new set of rules for investor-State mediation. The mediation rules complement the Singapore Mediation Convention, which opened for signature in August 2019 and is designed to facilitate the enforcement of international settlement agreements arising from mediation. The ICSID mediation rules are drafted so that a settlement agreement reached through the mediation process meets the Singapore Convention's requirements for enforceability. Extensive revisions have also been made to the rules for conciliation and fact-finding, aiming to make these more flexible and efficient.

Finally, both the mediation and fact-finding rules are stand-alone—meaning they are independent of the jurisdictional requirements of the ICSID Convention and Additional Facility—and have their own sets of administrative and financial regulations. The rationale is to
ensure their wide availability to parties based fully on their express consent to either fact-finding or mediation proceedings.

**Next Steps**

ICSID continues to consult on the proposals with its Member States and other stakeholders, with the goal of submitting a package of proposals to ICSID’s Administrative Council in 2020. Towards this end, a week-long consultation amongst Member States is scheduled for November 2019. This will be an important opportunity to fine-tune the amended rules before they are tabled for a vote. Once adopted, the amended rules apply to cases based on consent given after the new rules are brought into force. They hold the promise, therefore, of making very concrete improvements to ISDS procedure in the near future.
Guidelines for Witness Conferencing in International Arbitration

with Explanatory Notes
The Chartered Institute of Arbitrators Guidelines on Witness Conferencing in International Arbitration have been prepared by the Chartered Institute of Arbitrators (Singapore Branch) Sub-Committee on Witness Conferencing in International Arbitration. The Sub-Committee is grateful to the Practice and Standards Committee for its support in the preparation of the Guidelines.

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Guidelines for Witness Conferencing in International Arbitration

with Explanatory Notes
April 2019
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Foreword

The Chartered Institute of Arbitrators Guidelines on Witness Conferencing in International Arbitration are offered as a practical document for use by parties, arbitrators and experts in the preparation for and presentation of evidence by witnesses in conference. The Guidelines provide a non-exhaustive checklist of factors to consider in determining a procedure that will further the efficient and effective taking of evidence and procedural orders that may be used as a basis for crafting appropriate directions for witness conferencing.

It is hoped that the checklist and the procedural orders provide arbitrators, parties and their professional advisers with the means to devise and execute effective witness conferences tailored to the needs of the particular case in question.

The Sub-Committee on Witness Conferencing in International Arbitration would like to thank Accuracy for their support in the publication of these Guidelines.
1. These Guidelines aim to assist tribunals, parties and experts to achieve an effective and efficient witness conference and to minimise the risks of the process going awry. They recognise that different factors will come to bear on the decision whether or not to hold a witness conference, and on the format of such a conference. Experienced arbitrators and advisers may find some aspects of these Guidelines to be self-evident; nevertheless, it is hoped that they will prove a useful aide-memoire; for others, particularly those with limited experience of witness conferencing, the Guidelines will help the tribunal, parties and experts to navigate the process with confidence. We have referred in the Guidelines to “witnesses” rather than “experts”. In the majority of cases witnesses giving concurrent evidence will be experts giving opinion evidence, although there will be cases where it will be appropriate to take concurrent evidence from witnesses of fact, as discussed in the explanatory notes.

2. The Guidelines comprise the Checklist, the Standard Directions, and the Specific Directions. These are presented in the order in which they are likely be used. Parties and tribunals can consult the Checklist when considering whether and how to hold a witness conference. The Standard Directions can be considered where parties and tribunals wish to reserve in an early procedural order the possibility of witness conferencing. The Specific Directions can be used when parties and tribunals discuss the organisation of the hearing.

3. The Checklist sets out a convenient list of matters to consider when determining the possibility of holding a witness conference. The Checklist covers two broad lines of enquiry. The first is whether witness conferencing would be an appropriate meaning of taking evidence. Some of the factors set out in the

How to Use these Guidelines
Checklist will militate in favour of a conference, whereas others may detract. Other items on the Checklist assume that a conference will take place, and are to be considered in determining what form the conference should take. Not all of the items in the Checklist will be relevant in all cases.

4. The **Standard Directions** provide a general framework for witness conferencing to be incorporated as part of an initial procedural order issued by a tribunal for the conduct of the arbitration. These directions provide a set of applicable principles in the event that the tribunal subsequently orders some of the witness evidence to be taken concurrently. By including the Standard Directions into a procedural order, the parties are not taken to have dispensed with the taking of consecutive evidence.

5. The **Specific Directions** are to be issued once the tribunal and the parties have decided to hold a witness conference. The Specific Directions provide three possible procedural frameworks for a conference, depending on whether it is to be conducted by the tribunal, the witnesses (who in the majority of cases will be expert witnesses), or counsel for the parties. The tribunal may use a combination of the three approaches reflected in the procedural options, or may draw on different directions from among the three frameworks, or may incorporate other directions to arrive at an appropriate procedural order. Which of the Specific Directions will be most suitable as a starting point for crafting an appropriate order will depend on the needs of the case at hand.

6. The **Explanatory Notes** provide detailed discussion of the items in the Checklist and the Directions.
1. Witness conferencing can be described as any evidence-taking process whereby two or more witnesses give evidence concurrently before a tribunal. A more precise definition of the phrase might mistakenly convey the impression that it describes a single established process. However, witness conferences may take many forms. They may concern the evidence of factual or expert witnesses, or both. They can be conducted by the tribunal, the witnesses or parties’ counsel, or any combination of them. These guidelines recognise the diversity of approaches that can be adopted without seeking to restrict the ability and imagination of tribunals and parties to shape a conference most suited to any given dispute.

2. Witness conferencing has in recent years become a popular means of taking evidence particularly — but not exclusively — from expert witnesses in international arbitration. The process is not, however, encountered only in arbitration. For example, the courts of Australia, England and Wales and Singapore have also explored or adopted the process to a greater or lesser degree. This popularity stems from a number of perceived advantages. First, a conference can be a more effective means of receiving evidence than consecutive examination of witnesses by parties’ counsel. The side-by-side presentation of evidence can make it easier to compare witnesses’ different views on an issue, and for the witnesses to challenge each other’s views with direct responses or rebuttals. Second, the quality of evidence may be improved. For example, expert witnesses may be less willing to make technically incorrect assertions in front of
a peer who can supply an immediate rebuttal. Third, the process can promote efficiency at an evidentiary hearing, as the tribunal can hear evidence from all the witnesses on the issues at once, rather than at different stages of a hearing as the parties present their cases.

3. At the same time, witness conferencing gives rise to other considerations. For example, whilst taking evidence in conference may lead to shorter hearings than where evidence is taken consecutively, the time and costs for preparing a witness conference beforehand may be higher. The quality of evidence may also be affected, and proceedings disrupted, where witnesses in conference prove to be unfriendly, hostile or even rude to each other, or where one witness is more reticent giving evidence in the presence of another, for example due to differing levels of experience in giving evidence, cultural factors or some pre-existing professional or personal relationship between them.

4. The matters set out in the Checklist, and the Standard and Specific Directions will help the tribunal and the parties to determine whether witness conferencing is appropriate for their particular dispute and, if so, what procedures will best suit the circumstances of their case.
The Guidelines
The Checklist

A practical checklist of matters for tribunals and parties to consider in determining whether to conduct a witness conference (*) and, if so, what form that conference may take (†)

Matters in issue

1*† There is conflicting opinion evidence on a specialist topic that requires testing

2*† There is conflicting factual evidence of two or more witnesses that requires testing

3*† The credibility of a witness is in issue

Witnesses

4*† The relationship between witnesses is one of:
   1) contrasting experience giving evidence before tribunals
   2) contrasting cultural background
   3) present or former colleagues
   4) close personal friendship or enmity

5† The composition of the conference by reference to:
   1) the issues to be addressed
   2) the number of witnesses
Pre-Hearing

6† Reports of expert witnesses
7† A chronology of facts
8† Allocation of time among the witnesses
9† Presentations and demonstrables

Logistics

10*† One or more witnesses is to give evidence by video conference
11† Simultaneous or sequential interpretation is required for one or more witnesses
12† Sufficient physical space is required at the venue of the hearing for multiple witnesses to give concurrent evidence
13† Seating arrangement of witnesses
14† Stenographic, recording and/or audio amplification is required for multiple witnesses to give concurrent evidence
15† Audio-visual equipment is required for giving evidence
The Standard Directions

The *Standard Directions* may be adopted as part of an early procedural order

1 The tribunal in consultation with the parties shall determine which witnesses will give concurrent oral evidence and on what issues. The witnesses shall give evidence on such issues in such conference or conferences at such date and time as the tribunal directs.

2 Witnesses giving concurrent evidence on the same issue or issues shall jointly prepare a schedule containing a list of areas on which the witnesses agree and disagree and a summary of the witnesses’ views on those areas of disagreement (“*Schedule*”).

3 The tribunal may direct that the parties shall agree a chronology of agreed facts (“*Chronology*”) relating to evidence to be given concurrently by witnesses.

4 For the purpose of preparing a Schedule or Chronology:

1) The witnesses may hold discussions with each other by such means and for such period as the tribunal shall direct.

2) either [Counsel shall not be involved in discussions between the witnesses]

   or   [Counsel’s involvement in discussions between the witnesses shall be limited to [to be agreed between parties]].

3) The parties agree that nothing discussed between the witnesses shall be referred to or given in evidence in the proceedings.

4) The witnesses may at any time jointly seek directions from the [parties / tribunal].
5 Any presentation materials and demonstrables used in conjunction with a presentation by a witness shall be provided to the tribunal and the other parties prior to the presentation.

6 At any witness conference, the tribunal may at any time at its own discretion:

1) ask questions of any witness.

2) order that a witness be recalled for further questioning.

3) vary the procedures for taking concurrent evidence as it considers necessary for the efficient and effective conduct of the proceedings.
The Specific Directions

*Three procedural frameworks for witness conferences led by (a) the tribunal; (b) the witnesses; and (c) counsel*

**Option A: Tribunal-led Conference**

A1 Witnesses shall [not] be sequestered prior to giving evidence.

A2 At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.

A3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.

A4 Each witness shall give an oral presentation of their position. The tribunal shall, in consultation with the parties, determine the length of the presentations and the order in which the witnesses shall make them.

A5 The tribunal will question the witnesses in relation to the areas of disagreement set out in the Schedule and on any other matter it considers appropriate. The tribunal will ask each witness to express their views on each of the areas and why they disagree with the views of the other witness(es). The tribunal shall give each witness the opportunity to respond to the evidence of another.

A6 After the tribunal has completed its questioning, each party’s counsel may question the witness(es) of the other party/parties and may invite their own party’s witness to respond to the opposing witness’s answers.

A7 The tribunal may at any time permit or invite discussion between the witnesses, or any of them, of any area of disagreement set out in the Schedule and on any other matter it considers appropriate.
Option B: Witness-led Conference

B1 Witnesses shall [not] be sequestered prior to giving evidence.

B2 At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.

B3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.

B4 Each witness shall give an introductory oral presentation of their position. The witnesses (or in the absence of agreement between them, the tribunal) shall determine the length of the presentations and the order in which the witnesses make them.

B5 The witnesses shall address in turn each area of disagreement in the Schedule as follows.

1) The witnesses shall set out their respective positions in relation to the area of disagreement using such presentation materials and demonstrables as they deem appropriate.

2) The witnesses shall ask each other questions in order to clarify their respective views on that area, to determine the bases on which they disagree with each other’s views and to test the relative strengths and weaknesses of those views.

3) The tribunal may intervene in the discussion between the witnesses at any time in order give each witness the opportunity to present their views and to respond to the views of the other witness(es), and to ensure the orderly and efficient conduct of the conference.

4) After the witnesses have concluded their discussions, the tribunal may ask further questions of any of the witnesses on the area of disagreement.
5) After the tribunal has completed its questioning, each party’s counsel may question the witness(es) of the other party/parties and invite his own party’s witness to respond to the opposing witness’s answers.
Option C: Counsel-led Conference

C1 Witnesses shall [not] be sequestered prior to giving evidence.

C2 At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.

C3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.

C4 The tribunal shall, in consultation with the parties, determine the order in which witnesses will be questioned.

C5 Each party’s counsel may question the witness(es) of the other party/parties and may invite his own party’s witness to respond to the opposing witness’s answers. After being questioned by counsel for the opposing party, counsel may ask a witness of his own party to clarify any matter that arose out of that questioning.
Explanatory Notes

General Note
Throughout the Explanatory Notes, reference is made to matters that the tribunal will need to consider, or decisions that the tribunal may need to make. Such formulations are not intended to convey that the parties are not to be involved in decisions concerning witness conferencing. In many cases, the parties will agree on many or even all aspects of witness conferencing. The formulation aims to reflect that matters of procedure are ultimately for the tribunal to determine, subject to any agreement between the parties and any provisions of applicable mandatory law.
The Checklist

Introduction

a) The Checklist provides arbitrators and parties with a practical list of matters to consider in determining whether to take concurrent evidence from witnesses and, if so, what form the witness conference should take. Matters that should be considered in determining the suitability of taking evidence concurrently concern the witnesses themselves and their evidence, and are marked in the Checklist with an asterisk (*). Matters that can determine or influence the form of a witness conference are marked with an obelisk (†). Not all of the items in the Checklist will be relevant in all cases.

b) The Checklist is divided into four sections. The first section concerns the matters in issue between the parties that may impact the decision whether or not to hold a witness conference. Arbitrators and parties should consider what evidence has been filed, or the areas on which evidence is to be filed and assess whether that evidence could usefully be tested concurrently. The second section of the Checklist considers the relationship between concurrent witnesses, which will be important in determining whether to take evidence in conference. It also considers other factors affecting the dynamics that arise when witnesses give evidence together. The third and fourth sections concern case management matters to consider in preparing for and holding a conference.

Matters in issue

1*† There is conflicting opinion evidence on a specialist topic that requires testing

a) Conferencing is well suited to many, if not most, types of expert evidence. The tribunal and the parties will however need to consider the circumstances of the particular case at hand to determine whether or not to hold a conference.
b) Although opinion evidence is often given by independent expert witnesses, witnesses of fact may sometimes give opinion evidence which can be considered in lieu of independent expert testimony. Such evidence can also be taken in conference, although in such cases the parties and the tribunal will need to consider whether it would be preferable for the conference to be led by the tribunal or counsel rather than the witnesses.

c) The nature of the issues may influence the form of a conference. Where the tribunal has particular experience or expertise of an issue, a tribunal-led conference of the witnesses may prove to be the most efficient and effective means of testing the expert witnesses’ evidence. For example, where the tribunal or one of its members is an engineer, or qualified in a particular law whose application is in issue, the engineering or legal experts could give concurrent evidence led by the tribunal. Where a party-appointed arbitrator is to participate in the questioning, care must be taken to ensure that that arbitrator does not conduct or contribute to the process in such a way as to question their impartiality or give rise to complaints about due process. Even where a tribunal does not have particular expertise of an issue, it may nevertheless consider a conference to be the better way to proceed and either direct the questioning itself in order to gain the understanding and receive the evidence it needs to make its determination, or it could propose that the experts or counsel should lead the conference.

2 There is conflicting factual evidence of two or more witnesses that requires testing

a) In some circumstances, a conference may be held to take evidence from witnesses of fact. In practice, this is less common than taking concurrent evidence from expert witnesses. Where expert witnesses hold different opinions, those experts can seek to justify their opinions by reference to their professional
judgment and experience. Disagreements between witnesses of fact may not be susceptible to the same interrogation. A tribunal should therefore consider the factual issues in dispute, whether there is other corroborating evidence to support one or more of the witnesses' evidence, whether the facts are likely disputed owing to differing but honest recollections, or whether one or more witnesses are advancing a knowingly untruthful account. In addition, a tribunal should consider whether the likely antipathy felt between witnesses whose evidence is contradictory could adversely affect the quality of evidence if given concurrently.

b) A tribunal may hold a conference with witnesses of fact as the primary means of taking all their evidence (in other words, not just those areas where the witnesses give conflicting accounts). Alternatively, a tribunal may wish to hold a conference after witnesses have already been questioned consecutively and it transpires that the witnesses have not resiled from those parts of their evidence that conflict with each other. The subsequent conference would focus on those areas of contradictory evidence. Standard Direction 6 preserves procedural flexibility to account for such possibilities.

c) In most cases, an experienced tribunal should lead a conference with witnesses of fact, in order to ensure that the witnesses can be effectively guided to give evidence relevant to the issues in dispute.

d) Where witnesses of fact give evidence in conference, the tribunal needs to be vigilant to ensure that each witness is given an opportunity to give their evidence and respond to the other evidence that is given. It will need to take special care where witnesses become defensive or hostile, particularly in situations where they are directly challenged by another witness. The tribunal may consider adjourning or dispensing with a conference where it forms the view that the witnesses have become uncooperative or unable to provide probative evidence.
The credibility of a witness is in issue

a) Credibility of expert witnesses may be challenged on the basis of a lack of independence or bias, or on the basis that the witness lacks relevant qualifications, expertise or experience. The nature of the challenge to a witness's credibility may be a factor that militates against holding a witness conference since the evidence of one expert witness may not be helpful in testing another's lack of independence or lack of qualifications, experience or expertise.

b) Issues of credibility may impact the whole of the expert’s evidence, or to part of it (for example where the expert has opined on matters spanning more than one discipline). Where part of the evidence is unaffected by the allegation of credibility, the tribunal may consider taking that part of the evidence concurrently. Where all of an expert’s evidence is potentially affected, the tribunal will need to consider whether to hold a witness conference at all. If a conference is to be held, issues of credibility could be dealt with by the tribunal in the conference itself, or through separate questioning. The tribunal could hold a conference and direct that the experts do not address the issue of credibility, which would be explored among the witnesses by the tribunal or counsel (or a combination of both). Another possibility is for the tribunal to address the issue through questioning of the impugned expert only (by the tribunal, counsel or both) prior to holding a conference on the matters of substance. In such situations, the tribunal and parties will need to consider whether the other experts giving evidence on the subject matter to be sequestered while the impugned expert is questioned. After the issue of credibility has been tested, the tribunal may convene a conference on the substantive areas of evidence, or it may direct that the expert witnesses be questioned consecutively by counsel. The tribunal may wish to decide on the preferred approach only after hearing evidence on credibility.
c) Where an issue of credibility arises in the course of an expert witness conference, the tribunal may dispense with the conference, or may proceed and direct that the issue be explored among the witnesses through questions from the tribunal or counsel only, or direct that the issue of credibility be tested separately.

Witnesses

4† The relationship between witnesses

a) The inevitable interactions between witnesses in a conference produce interpersonal dynamics that do not arise when witnesses give evidence alone. These dynamics can have a subtle or sometimes overt effect on the evidence given by one or more of the witnesses. The tribunal and the parties should consider the witnesses’ respective backgrounds, and whether the witnesses have a pre-existing relationship. Both can affect how the witnesses give evidence together and, in some circumstances, may cause a tribunal to conclude that a conference would not be suitable. Some common situations are set out below. They are not intended to be exhaustive of all circumstances.

b) Many factors may determine how individual witnesses give testimony. Some witnesses will be more forthcoming than others. Some witnesses express their views more effectively in a lecture style or a question and answer format, whereas others prefer to engage in direct dialogue or debate. A tribunal will need to monitor these dynamics to determine whether a particular witness is dominating the discussion, or is remaining taciturn. A tribunal may wish to intervene in a discussion to ensure that all witnesses are given the opportunity to present evidence. In some cases it may be helpful for the tribunal to impose time limits or a chess-clock procedure to regulate the amount of time given to the witnesses.

Explanatory Notes: The Checklist
(1) Contrasting experience giving evidence before tribunals

c) The tribunal should be aware of the witnesses’ prior experience giving evidence before courts and tribunals. Professional expert witnesses are more likely to be comfortable in conferences and may appear to present more persuasive evidence when contrasted with witnesses with no or comparatively less experience. The difference in experience may be a function of seniority among professional expert witnesses (and therefore a difference in testifying experience) or because one witness is a professional expert witness with some testifying experience, whereas another witness does not habitually present expert testimony.

d) In these sorts of circumstances, the demeanour of a witness who appears less confident could be explained by a relative lack of experience in giving evidence as opposed to the quality of evidence that is given; similarly, an apparent reluctance to engage may not be reflective of the quality of evidence that a witness gives.

e) A tribunal ought to consider modifying the mode of witness conferencing where it appears that an interpersonal dynamic may be affecting the quality of evidence. Where, for example, a conference is to be led by expert witnesses and the quality of evidence is affected by the sort of factors mentioned here, the tribunal may need to intervene and propose instead that the tribunal itself or counsel lead the conference.

(2) Contrasting cultural background

f) The tribunal and the parties must be sensitive to contrasting cultural backgrounds of the witnesses in a conference. At the other extreme, care needs to be taken not to apply cultural stereotypes. When witnesses from contrasting cultural backgrounds
appear together; those backgrounds may influence how they give evidence. Contrasting cultural factors may impact conferences of experts and witnesses of fact. A witness conference may not always be preferable where such cultural differences exist.

g) For example, in some cultures the seniority (in terms of office, age or both) of a person will affect how another more junior person will interact with them. It may be considered inappropriate for a junior to contradict his or her senior; deference may be the cultural norm. Conversely, a more senior person may consider it unnecessary to justify their views to someone more junior; he or she may even take offence if asked to do so. In some cultures, open confrontation is not normal nor is it expected when expressing differences of opinions. In other cultures, open disagreement on issues is not considered to be unusual. Tribunals need to take particular care where one or more witnesses from different backgrounds act in accordance with their own cultural norms so that the evidence taken is not materially affected.

h) Sometimes it may not be possible to anticipate how a witness presents evidence until the conference itself. A tribunal may need to adapt to circumstances and modify the form of the conference or, in an appropriate case, dispense with it and direct that evidence be taken consecutively.

(3) Present or former colleagues

i) Various factors will determine whether and how concurrent evidence can be taken from witnesses who are colleagues. Decisions regarding witness conferencing are unlikely to be affected where professional expert witnesses are former colleagues. Where the witnesses giving expert evidence are present or former colleagues but do not work or have not worked for professional services firms as expert witnesses, a tribunal will need to consider the witnesses’
respective positions, for example whether one of them is or has been superior to the other, and whether their working relationship may affect the evidence that the witnesses may give. The same considerations will apply for witnesses of fact who were formerly colleagues (or, less commonly, remain colleagues).

(4) Close personal friendship or enmity

j) A witness conference might not be suitable where the witnesses are in a close personal friendship or where enmity exists between them. A tribunal will need to consider whether the witnesses are likely to be able to give evidence unaffected by their relationship.

k) A tribunal may wish to explore the issue of friendship or enmity at the outset of a conference, or possibly separately with each witness in the absence of the other, and then direct either that the conference may proceed, or that evidence be taken consecutively.

l) Where the tribunal directs evidence to be given in conference, it must remain vigilant to the possibility that the conference has ceased to be a useful means of taking evidence and either vary the form of the conference in some way, or adjourn or conclude the conference. This may become necessary where, for example, one or both witnesses are reluctant to challenge the other’s evidence, or where the witnesses become uncooperative, hostile or rude.

5. The composition of the conference(s)

(1) The issues to be addressed

a) Although the Guidelines refer to a witness conference in the singular, it may often be desirable to have more than one conference, bearing in mind the nature of the issues and the number of witnesses to give evidence.
Depending on the circumstances of the case, a tribunal may want to have one conference to address certain issues with witnesses of fact, and another conference for expert witness testimony. Where expert evidence encompasses multiple areas of expertise, a tribunal may direct separate conferences.

b) Where multiple conferences are to be held, the sequence of the conferences should be determined by taking into account the most efficient and effective means of taking evidence. In some cases, it may be preferable for evidence on factual issues to be heard first, followed by expert evidence.

c) Another approach is for a tribunal to hold successive witness conferences by reference to the parties’ claims. This approach may be attractive in matters with large amounts of discrete factual and expert evidence. For example, in building and construction cases, it may be most effective and efficient for all relevant witnesses (possibly including fact and expert witnesses, and experts across different disciplines) to give evidence on a claim-by-claim basis with respect to each defect (or class of defect) or each extension of time.

d) A tribunal may wish to consider the composition of witness conferences involving expert witnesses at the time it makes directions in relation to a schedule of matters that are agreed and not agreed, for which see the Explanatory Notes to Direction 4.

(2) The number of witnesses

e) The simplest form of a witness conference will be between two witnesses whose evidence covers the same areas. Where there are multiple areas of evidence to be covered, possibly by witnesses across different disciplines, the tribunal and parties will need to consider whether one or more conferences would be most appropriate.
f) Where one party presents a single expert to give evidence on multiple disciplines, whereas another party presents different witnesses to cover the different disciplines, the tribunal will need to consider whether to hold a single conference with all the experts together, or multiple conferences composed of one party’s sole expert giving evidence in each conference with the other party’s respective witnesses. In such a situation, where the evidence for each discipline may be lengthy, and is minimally impacted (or not impacted at all) by the evidence of other disciplines, separate conferences may be preferable.

g) A witness conference in principle can be held with any number of witnesses. In most cases, the nature of the evidence and the issues in dispute will guide the tribunal on how many witnesses should give evidence. Conferences with conceivably any number of witnesses can be held with the right degree of planning by the tribunal and the parties.

Pre-Hearing

6 Reports of expert witnesses

a) Expert witness reports, including any joint reports, must be made available to the tribunal prior to the conference as they are likely to be referred to in the conference.

b) A tribunal will often find it beneficial for expert witnesses to prepare a joint report. It may contain, among other things, a list of areas where the experts agree or disagree. The tribunal should direct a deadline by which the experts are to produce a joint report. Where a joint report is to be produced, the parties and tribunal should consider agreeing the following:
i) Mode of communications between witnesses (for example by e-mail, telephone, video conference or face-to-face meetings)

ii) Use of interpreters if one or more witnesses do not speak the language(s) of the arbitration

iii) The extent to which members of a professional expert’s team may be involved in discussions and the drafting of the joint report

iv) Whether witnesses might jointly seek directions (from counsel or from the tribunal) prior to or during discussions

v) Whether the contents of discussions should be treated as “without prejudice” and not subject to any adverse inference by the tribunal

vi) Whether counsel can be involved in the discussions. The level of involvement may vary. Counsel might not be involved at all; they might be updated on the contents of the discussions periodically, or after their conclusion; they might provide limited assistance with, for example, drafting. Where counsel is to communicate with witnesses, the parties should consider and agree on whether these communications should be subject to privilege, and not subject to any adverse inference by the tribunal.

c) The parties should brief witnesses on how discussions should be conducted and how the information they have obtained from these discussions might or might not be used.

d) Where experts do not prepare a joint report, a tribunal may direct that the experts agree a schedule setting out areas of their evidence where they agree and disagree (“Schedule”). The tribunal, parties or experts may use such a Schedule as an agenda for a witness conference. Factual witnesses might be called upon to create such a list where there are involved
factual issues, or where the evidence of fact witnesses differs on technical factual issues, although in practice this is uncommon.

e) Where witnesses are to draw up a list of agreed and unagreed issues, the tribunal should direct how and by when the witnesses must do so. The parties should also consider the list of practical matters set out above with respect to joint reports. A possible format for a joint report is illustrated in the Figure below. It is generally helpful for the witnesses to set out whether the unagreed issues relate to differing factual assumptions, legal arguments or opinions.
Figure: Illustrative Joint Report Format

Title Page [including case name, experts’ names and signatures]

1. Introduction [including date(s) and duration(s) of expert meeting(s)]

2. Agreed Issues

<table>
<thead>
<tr>
<th>No.</th>
<th>Issue</th>
<th>Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>[e.g. Should interest be calculated using a simple or compound method]</td>
<td>[e.g. The experts are agreed that, given the facts of the case, interest should be calculated using a compound method]</td>
</tr>
<tr>
<td>2</td>
<td>[Second Issue]</td>
<td>[State agreement reached]</td>
</tr>
</tbody>
</table>

3. Unagreed Issues [with reasons]

<table>
<thead>
<tr>
<th>No.</th>
<th>Issue</th>
<th>Expert 1 (Claimant) position</th>
<th>Expert 2 (Respondent) position</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>[e.g. What is the appropriate applicable interest rate to apply]</td>
<td>[e.g. The appropriate interest rate is 3% because…]</td>
<td>[e.g. The appropriate interest rate is 8% because…]</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[I disagree with Expert 2’s position because…]</td>
<td>[I disagree with Expert 1’s position because…]</td>
</tr>
<tr>
<td>4</td>
<td>[Fourth Issue]</td>
<td>[State position]</td>
<td>[State position]</td>
</tr>
</tbody>
</table>

4. Annexures [if required, e.g. calculations, charts, diagrams or scholarly extracts]
A chronology of facts

a) Tribunals commonly direct parties to prepare a chronology (in agreed form if possible) of the dispute. Where witnesses of fact give concurrent evidence, a chronology of the issues on which they are to give evidence may be of additional assistance to the tribunal, particularly in cases of considerable factual complexity. A chronology of facts in agreed form is a useful framework document for the tribunal, the parties and the witnesses when taking concurrent evidence, particularly from witnesses of fact. It may also be helpful for expert witnesses where a sequence of events relates to their evidence. Where a chronology cannot be agreed, one that highlights disputed facts may nevertheless be of assistance where the disputed fact impacts the evidence given.

b) The tribunal will need to determine whether the parties should compile such a chronology, or whether the witnesses themselves should do so. Where witnesses are to draw up a chronology, the tribunal should direct how and by when this must be done. The parties should also consider the list of practical matters set out with respect to joint reports in the Explanatory Notes to Checklist Item 6 above (save for that relating to professional experts’ teams).

Allocation of time among the witnesses

a) The tribunal and parties should determine how much time should be allocated to the examination of factual and expert witnesses. The allocation of time should be monitored by the tribunal to ensure that each party has sufficient time to advance its case. The time required to take evidence will be influenced by a number of factors, such as the number of witnesses to be
examined, the extent of agreement and disagreement between the witnesses and the manner in which the witness conference will be conducted (i.e. whether it will be led by the tribunal, counsel, the witnesses, or some combination of the three). The tribunal will also need to make allowance, depending on who leads the conference, for questions from the tribunal and counsel.

b) The tribunal should consider whether each witness will be allocated a specific amount of time to speak, and whether specific time may be allocated for questions from the tribunal and counsel. The fluid nature of a witness conference, particularly where witnesses engage in lengthy discussions, can make a strict allocation of time impractical. Although the tribunal should ensure that all witnesses are given a fair opportunity to give evidence, it does not follow that each witness must be accorded the same amount of time in the conference. The tribunal must be guided by the circumstances of the case on what is the proper time to be given to the witnesses.

c) The tribunal may track time according to a chess-clock procedure or in some other way. The tribunal may itself keep time, or require this to be done by the parties or a tribunal secretary.

9† Presentations and demonstrables

a) The parties may agree or the tribunal may direct that the witnesses make presentations or use demonstrables during a witness conference. Such aids when giving evidence can be particularly helpful where the issues in dispute are technical or complex, or there are aspects of the evidence that are easier to visualise with diagrams, animations or models.
b) The tribunal may direct that the witnesses prepare their own presentations or, less commonly, a joint presentation setting out their areas of agreement and disagreement. Presentations and descriptions of demonstrables may be exchanged by the parties before the witness conference; otherwise, copies of presentations should be made available for parties and the tribunal at or immediately after the conference.

c) The tribunal may determine that presentations and demonstrables should refer only to evidence on record or such other additional evidence that the parties agree to produce for the purpose of the presentation or demonstrable. This can avoid complaints that a party has sought to introduce fresh evidence at or on the eve of an evidentiary hearing.

Logistics

10*† One or more witnesses is to give evidence by video conference

a) There may be circumstances when a witness is unable to attend at the hearing venue for a conference but may be able to give evidence by video. The dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated. A witness conference in such circumstances may be undesirable save where the tribunal considers that time or other constraints or considerations prevail over the limitations of evidence being given by video.

b) A tribunal should consider whether a witness conference can be held where all the witnesses are to give evidence from a location other than hearing venue. In such circumstances, the witnesses will not be physically dislocated from each other, but from the tribunal, counsel and others present at the hearing venue.
c) Where a witness is to give evidence by video conference, the tribunal should consider issuing directions addressing the following matters:

i) provision by the party presenting such witness of details of the video conferencing service to the tribunal and all parties in advance of the hearing to allow the other parties to observe tests of the service provider’s video conferencing capabilities between the venue of video conference and the venue of the hearing

ii) details of the time and venue of the video conference

iii) the presence of a duly empowered legal representative of the party presenting such witness at the venue of the video conference. The party presenting such witness shall inform the tribunal of the identity of such representative and provide his/her curriculum vitae prior to the hearing

iv) the presence of a duly empowered legal or other representative of the other parties should they wish at the venue of the video conference. Where another party chooses to have such a representative present, it shall inform the tribunal and all other parties of the identity of such representative and provide his/her curriculum vitae prior to the hearing

v) where such witness is to give evidence in a language other than the language of the arbitration, the party presenting the witness shall engage a qualified and experienced interpreter, who shall be present in person with the witness at the venue of the video conference

vi) provision and access at the venue of the video conference to all documentation produced in the proceedings relevant to such witness’s evidence
**11† Simultaneous or sequential interpretation is required for one or more witnesses**

a) There may be instances where a witness is unable to speak the language in which the arbitration is conducted or is not confident doing so. The tribunal should give interpretation of questions to and answers from the witness. Directions for a qualified and experienced interpreter to provide simultaneous or consecutive interpretation of questions to and answers from the witness.

b) The tribunal should consider what impact interpretation may have on the timing of a conference, including how it may allocate time among the witnesses.

**12† Sufficient physical space is required at the venue of the hearing for multiple witnesses to give concurrent evidence**

The parties should ensure that there is sufficient space at the venue for the witness conference. The hearing venue will need to be able to accommodate the witnesses sitting comfortably together (including any translators) to be able to interact with the tribunal, counsel and each other. They will each need sufficient space to access and review documentation, including any reports and other relevant evidence.

**13† Seating arrangement of witnesses**

a) The parties should consider the proposed seating arrangements for witnesses in advance of the hearing. For larger conferences, witnesses who will naturally be responding to each other’s evidence ought to be grouped together. The witnesses ought not to be too distant from either the tribunal or counsel.
b) Where witnesses may give more discursive evidence, for example in an expert-led conference, less room may be needed to accommodate documentation. Witnesses may require more space in conferences with more inquisitive questioning among themselves, counsel and the tribunal to allow access to their documents in the course of giving evidence.

14† **Stenographic, recording and/or audio amplification is required for multiple witnesses to give concurrent evidence**

The parties should ensure that the venue for the conference contains the necessary layout and equipment to ensure witnesses can give evidence concurrently and be heard by the tribunal and counsel. In most cases, the tribunal and the parties will want real time transcription services to record the evidence of all the witnesses. Parties should consult with professional stenography service providers to ensure that they can accommodate transcription of concurrent evidence, particularly where there may be a large number of witnesses giving evidence.

15† **Audio-visual equipment is required for giving evidence**

Audio-visual equipment may be required for a witness conference. A witness may wish to give a presentation using a slideshow, animations or other digital means. Parties should ensure that the hearing venue can accommodate such requirements.
The Standard Directions

Introduction

a) The Standard Directions provide tribunals and parties with a procedural framework for witness conferencing. They are intended to be included in a tribunal’s initial procedural order in arbitration proceedings that establishes the procedure for the arbitration as a whole. Once the issues to be determined and the identities of the witnesses (and possibly their evidence) have crystallised, the tribunal can decide whether to hold a witness conference. If so, it can issue further Specific Directions, as set out in these Guidelines, and a procedural timetable for the various steps required to prepare the conference. Where a tribunal has not issued the Standard Directions in an initial procedural order, they should be incorporated into a subsequent order together with the appropriate Specific Directions.

b) The Standard Directions establish the ground rules for witness conferencing. They provide that the tribunal may take concurrent evidence from witnesses as it considers appropriate in due course, and stipulate what steps the parties and witnesses must take to prepare for the conference.

1 The tribunal in consultation with the parties shall determine which witnesses will give concurrent oral evidence and on what issues. The witnesses shall give evidence on such issues in such conference or conferences at such date and time as the tribunal directs.

a) This Direction confirms that the tribunal may take concurrent witness evidence in relation to such issues as it considers appropriate. It does not preclude the taking of consecutive evidence from the same or other witnesses on other issues. The Direction anticipates that at a future point in the proceedings the tribunal shall direct who will give evidence in conference and on what issues.
b) In some cases, that future direction will simply confirm that a witness for each party will give (for example) expert witness evidence together. In other cases, the tribunal may issue (or may ask the parties to agree) a schedule that sets out which witnesses will give concurrent evidence and on which issues in which conference. This will be necessary where, for example, witnesses have given written evidence relevant to a number of issues and those issues might be addressed in more than one witness conference with different permutations of witnesses. A tribunal may also need to articulate the issues to be tested in conference where some parts of a witness’s evidence will be tested through concurrent evidence, and other aspects through consecutive evidence.

2 Witnesses giving concurrent evidence on the same issue or issues shall jointly prepare a schedule containing a list of areas on which the witnesses agree and disagree and a summary of the witnesses’ views on those areas of disagreement (“Schedule”).

a) This Direction provides that the witnesses to give evidence in conference prepare a Schedule setting out the areas where they agree and disagree. Where the witnesses are to give expert evidence, the contents of the Schedule could be drawn from a joint report, if the witnesses are going to produce one. The tribunal and the parties ought therefore to consider this Direction in the context of any directions given in the same procedural order for the preparation of reports by expert witnesses. This Direction anticipates that the tribunal will subsequently direct the date by which a Schedule must be prepared.
b) This Direction may not be necessary or suitable if the conference is to be with witnesses of fact. In such cases where a Schedule is to be prepared, it will usually be preferable for the parties, rather than the witnesses themselves, to prepare the Schedule. The Direction should be modified accordingly.

c) A Schedule prepared pursuant to this Direction can serve as an agenda for the witness conference.

3 The tribunal may direct that the parties shall agree a chronology of agreed facts ("Chronology") relating to evidence to be given concurrently by witnesses.

As set out in the explanatory notes to Checklist Item 7, a tribunal may wish for parties to prepare a chronology of agreed facts. This Direction provides that the tribunal may order the parties to arrange for such a chronology to be prepared. It anticipates that the tribunal will subsequently direct the date by which such a Chronology must be prepared.

4 For the purpose of preparing a Schedule or Chronology:

(1) The witnesses may hold discussions with each other by such means and for such period as the tribunal shall direct.

a) This Direction provides for the witnesses to hold discussion in order to agree a Schedule (or, less commonly, a Chronology). In some cases, the tribunal will specifically direct the mode of discussions, such as by email, telephone or in-person meetings. It may also provide a timeframe in which those discussions are to take place, although in practice this is likely to appear in a subsequent procedural order:
b) The parties should consider whether and to what extent counsel should be involved in discussions to agree a Schedule or Chronology. It might be agreed that counsel is not to be involved at all. Alternatively, counsel could be involved to a limited extent, and assist (for example) in only the drafting of the Schedule or Chronology. Parties could agree that counsel may receive an update from the witnesses at an agreed point in the discussions, or after they have concluded. The parties may agree on other conditions of counsel’s involvement.

c) This Direction records the parties’ agreement not to rely on matters discussed between witnesses in the preparation of a Schedule or Chronology. The tribunal and the parties must ensure that the witnesses understand the implications of this Direction and how the contents of the witnesses’ discussions may or may not be used in the course of a witness conference session, or more generally at the hearing. A tribunal may wish to require the witnesses to record their agreement not to do so as part of their written evidence.

d) This Direction is also intended to ensure that where counsel is involved in discussions, the contents of those discussions are also not to be referred to or given in evidence in the proceedings.
(4) The witnesses may at any time jointly seek directions from the [parties /tribunal].

e) This Direction provides that witnesses may jointly seek directions from the parties or the tribunal. This may be necessary where the witnesses have encountered difficulties in the course of preparing a Schedule or Chronology. They may seek clarification as to whether they are permitted to take certain further steps, or they may require the tribunal to give further directions.

5 Any presentation materials and demonstrables used in conjunction with a presentation by a witness shall be provided to the tribunal and the other parties prior to the presentation.

This Direction anticipates that the tribunal will make a direction for the production of presentation materials and demonstrables prior to the presentation to which it relates. In many cases it will be sufficient for the materials to be provided immediately before the presentation, but depending on the nature of the materials or demonstrable, the tribunal may wish to direct that they be provided at an earlier date. See also the explanatory notes to Checklist Item 9.

6 At any witness conference, the tribunal may at any time at its own discretion:

(1) ask questions of any witness.

a) This Direction ensures that the tribunal may ask questions of any witness at any time, regardless of who leads the witness conference so that it can inquire further into any area of evidence.
(2) **order that a witness be recalled for further questioning.**

b) Sometimes a witness who has completed giving evidence may need to be recalled as a result of some other evidence or issue that arises later in the proceedings. This Direction clarifies that the tribunal may order recall of a witness despite the fact that he or she has given evidence concurrently with another witness who has given evidence on a common issue. The tribunal may order that all witnesses who have given concurrent evidence previously are to be recalled to give further evidence, either concurrently or consecutively.

c) Practical difficulties may arise when one or more witnesses are recalled. In most instances, recall as soon as possible will be desirable, especially where witnesses may have travelled any distance to give evidence, and in any event may have other commitments. The tribunal and the parties should consider whether it would be appropriate for a recalled witness to give evidence by video conference; see also the explanatory notes to Checklist Item 14.

(3) **vary the procedures for taking concurrent evidence as it considers necessary for the efficient and effective conduct of the proceedings.**

d) The Standard Directions seek to address the most common situations relating to witness conferencing but they cannot and do not purport to account for every eventuality. The Standard Directions will likely be issued early in the proceedings where the form or even desirability of holding a witness conference may be unclear. Circumstances may change after the issue of the Standard Directions, and indeed the Specific Directions, which require the tribunal to reassess and vary the procedures it had previously ordered for witness conferencing. For example, it may only transpire during the witness conference itself that the form of the conference needs to be adapted, or that
the conference may need to be concluded. It might also transpire following the discussions to prepare a Schedule or Chronology that it would not be necessary to hold the witness conference.

e) How the tribunal may vary the conferencing procedure will depend on the circumstances as they arise, although the tribunal must take the parties’ views into account in determining how best to proceed.
The Specific Directions

Introduction

a) The Specific Directions provide three frameworks for taking concurrent evidence at the evidentiary hearing. The frameworks approach witness conferencing from the perspectives of those leading the conference: the tribunal, the witnesses or the parties’ counsel. The Specific Directions may be used to create a standalone procedural order concerning witness conferencing or be included in a wider order. In practice, the tribunal and the parties will not be in a position to agree what Specific Directions will be best suited to the case until the issues for determination have been crystallised, the parties have exchanged evidence and the identities of the witnesses have been confirmed.

b) The three frameworks set out in the Specific Directions will be suitable for many cases with little or no alteration. Alternatively, the tribunal and the parties may wish to combine the approaches of some or all of the different frameworks to create a bespoke process that suits the case at hand.

Option A: Tribunal-led Conference

A witness conference under this framework will be conducted by the tribunal. This style of conference bears some similarity to inquisitorial processes found in civil law systems, and parties’ counsel have a more limited role than is typically experienced in common law adversarial proceedings.

A1 Witnesses shall [not] be sequestered prior to giving evidence.
a) The question of sequestering witnesses typically arises when those witnesses give consecutive evidence. The concern that sequestering seeks to address is that a witness may be consciously or subconsciously influenced after hearing another witness's evidence. This issue will not arise as between witnesses giving evidence concurrently. However, it may be desirable for those witnesses nevertheless to be sequestered as regards the evidence of other witnesses.

b) Where witnesses are to give evidence in multiple conferences, or both in conference for some issues and alone for others, a tribunal will need to consider whether some or all of the witnesses should be sequestered. The direction for sequestration may need to account for the fact that a witness may give evidence in one conference (or alone) and then wait until a later part of the hearing before giving evidence again.

c) Although this Direction is framed broadly to relate to all witnesses, a tribunal may need to make directions for sequestration in relation to specific witnesses or groups of witnesses.

d) If there is to be some form of witness sequestration, the tribunal should consider whether to make a supplementary direction that sequestered witnesses shall not be provided with a transcript or summary of the evidence of other witnesses.

A2 At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.

This Direction is optional. Different jurisdictions have varying practices on whether arbitrators may or are required to administer oaths and affirmations.
A3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.

In common law systems, witnesses in civil proceedings typically provide evidence by way of written statements (in place of oral testimony) and a witness is typically asked by the presenting party to confirm the correctness of their written statement before being cross examined. This Direction is included to ensure that witnesses confirm that the written evidence they offer is their own evidence, and to give them the opportunity of correcting it as necessary.

A4 Each witness shall give an oral presentation of their position. The tribunal shall, in consultation with the parties, determine the length of the presentations and the order in which the witnesses shall make them.

a) This Direction is optional. The tribunal may find an oral presentation from expert witnesses helpful in understanding their respective positions. Presentations from witnesses of fact may be less useful. A tribunal will need to consider the particular circumstances of the case when considering whether to make this Direction.

b) Where the witnesses are to provide presentations, the tribunal should consider whether each witness should present separately, or whether they should jointly present a summary of the areas on which they agree, followed by separate presentations from each witness on the areas of disagreement. The tribunal should also direct how long the presentations should be. The length and order of presentations may be indicated by amending the second sentence of this Direction, or by a subsequent procedural order.
A5 The tribunal will question the witnesses in relation to the areas of disagreement set out in the Schedule and on any other matter it considers appropriate. The tribunal will ask each witness to express their views on each of the areas and why they disagree with the views of the other witness(es). The tribunal shall give each witness the opportunity to respond to the evidence of another.

a) This Direction lies at the heart of the tribunal-led conference. The tribunal will ask the witnesses questions usually by reference to the Schedule (see Standard Direction 2). The tribunal may also seek the witnesses’ views on other matters that it feels would assist in resolving issues in dispute. The tribunal may ask the witnesses questions on an issue-by-issue basis. Alternatively, the tribunal may adopt some other structured approach to taking the evidence.

b) One of the advantages of taking concurrent evidence is to hear immediate responses and rebuttals to competing evidence. The witnesses may engage in dialogue as they explain their positions and justify why they do not agree with other evidence. After being questioned by counsel for the opposing party, counsel may ask a witness of his own party to clarify any matter that arose out of that questioning.

c) The tribunal should monitor the conference to ensure that all the witnesses are given the opportunity to present their positions and explain why the other witnesses’ evidence is not to be preferred. Equally, the tribunal will need to exercise control over the dialogue that may develop between the witnesses so that sufficient time is devoted to each area of disagreement.

Explanatory Notes: The Specific Directions
After the tribunal has completed its questioning, each party’s counsel may question the witness(es) of the other party/parties and may invite their own party’s witness to respond to the opposing witness’s answers.

a) This Direction allows parties to question witnesses on matters that may not have been addressed during the conference, or where a party wishes a witness to clarify their evidence. It ensures that parties have the opportunity to present their own witnesses’ evidence and to test the evidence of other parties’ witnesses, to the extent that this has not already taken place during the tribunal’s conduct of the conference.

b) Before counsel questions the witnesses, the tribunal may wish to summarise its understanding of the witnesses’ evidence, either on an issue-by-issue basis as the conference unfolds, or at the conclusion of the tribunal’s questioning. This may not be practicable where the evidence is detailed.

c) This Direction provides that counsel may “question” another party’s witnesses. This questioning could take various forms. For example, the tribunal should consider whether it is necessary or appropriate to clarify whether such questioning is to be in the form of closed questions, akin to cross examination as encountered in common law jurisdictions. If so, it may be appropriate to direct that opposing counsel may thereafter ask supplemental open questions, akin to common law re-examination.

d) Another means by which counsel may ask supplemental questions of the witnesses is for counsel to ask all of the witnesses a common question, and allow each of them to answer. If desirable, the witnesses may discuss and debate the question posed.

e) When all the witnesses have had an opportunity to speak, the tribunal may ask counsel to move onto the next question. Once one party’s counsel has asked all
the questions they wish to ask, opposing counsel would be given the same opportunity to ask questions. This approach to questioning could be modified such that after the witnesses have given evidence in response to a question, the tribunal invites other parties’ counsel to ask questions that arise from the evidence just given, following which, questions on another topic are asked.

f) Whichever way counsel asks supplemental questions, the tribunal must ensure that the parties have an opportunity to present their case. It should be alert to the need for the witnesses to present their positions but at the same time ensure that witnesses do not unnecessarily repeat their evidence and compromise the efficiency of the process.

A7 The tribunal may at any time permit or invite discussion between the witnesses, or any of them, of any area of disagreement set out in the Schedule and on any other matter it considers appropriate.

This Direction clarifies that the tribunal may allow or ask the witnesses to discuss a particular area in dispute, in addition to asking questions directly of the witnesses. Such free form discussions can be of considerable assistance in understanding why the witnesses hold different views on an issue, or can even lead to a consensus once the witnesses have been able to discuss and debate their respective positions.

Option B: Witness-led Conference

a) A witness conference conducted under this framework is led by the witnesses. The interaction between the witnesses is free-flowing with less input from the tribunal or counsel. This approach is suitable for expert witnesses providing opinion evidence. It is unlikely to be appropriate where witnesses of fact give concurrent evidence. The process bears some resemblance to meetings that take place between expert witnesses to discuss their evidence in advance of preparing a joint report to a court or tribunal.
b) Conferences led by witnesses are particularly suitable where the witnesses give expert evidence in the same discipline. Where the witnesses are experienced in giving expert evidence, they are likely to be able to prepare joint and individual presentations, and to discuss the differences in their evidence, in a manner that is efficient and effective. There will also be instances where experts of different disciplines can usefully lead a single conference, particularly where their evidence is complementary or where their collective evidence is relevant to a particular issue. A witness-led conference may also be appropriate where a tribunal has appointed an expert witness in addition to those expert witnesses appointed by the parties. In such circumstances, it may be helpful for the tribunal-appointed expert to lead the conference.

c) Although the witnesses will determine the agenda (often by reference to the Schedule) and presentation of evidence at the conference, the tribunal will need to monitor the progress of such a conference closely and intervene in appropriate circumstances to ensure that the experts have had an opportunity to present their respective positions in relation to each issue, and to explain why they disagree with each other. A tribunal may also need to assume control of a witness-led conference where the process proves to be ineffective, for example where the discussions prove to be unstructured, where witnesses do not engage meaningfully or where the dynamic between the witnesses proves to be unproductive.

B1 Witnesses shall [not] be sequestered prior to giving evidence.

See the Explanatory Notes to Specific Direction A1 above.

B2 At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.

See the Explanatory Notes to Specific Direction A2 above.
B3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.

See the Explanatory Notes to Specific Direction A3 above.

B4 Each witness shall give an introductory oral presentation of their position. The witnesses (or in the absence of agreement between them, the tribunal) shall determine the length of the presentations and the order in which the witnesses make them.

A presentation is a useful means of introducing each witness's evidence to the tribunal. The presentation can provide an overview of areas of agreement and disagreement between the witnesses and identify any important differences in approach, methodology or interpretation of relevant facts. The presentations may include the use of demonstrables or other aids, such as presentation software, flip charts, product samples, prototypes, scale models and so on. See also Checklist Item 9 in relation to presentations and demonstrables. The tribunal will usually allot equal time to the witnesses to deliver their presentations, although it should be guided by the circumstances of the case.

B5 The witnesses shall address in turn each area of disagreement in the Schedule as follows.

a) This Direction proceeds on the basis that the witnesses will use the Schedule as the basis for an agenda for the conference. The witnesses give evidence, exploring each area of disagreement in turn. The tribunal or the witnesses themselves may wish to determine in advance how much time should be allotted to the various areas of disagreement.
(1) The witnesses shall set out their respective positions in relation to the area of disagreement using such presentation materials and demonstrables as they deem appropriate.

b) For each area, the witnesses explain their respective positions to the tribunal, using presentation aids and demonstrables as appropriate. They may expand on the points that have already been set out in written evidence.

(2) The witnesses shall ask each other questions in order to clarify their respective views on that area, to determine the bases on which they disagree with each other’s views and to test the relative strengths and weaknesses of those views.

c) After the presentations, the witnesses ask questions about each other’s evidence. Where there are more than two witnesses giving concurrent evidence, the witness asking a question should indicate whether the question is being asked of a particular witness, or all the witnesses. The witnesses should consider who will ask questions first and, if required, seek directions from the tribunal. The witnesses should avoid becoming advocates for their instructing parties’ positions; a witness-led conference should not become a cross examination of one witness by another.

d) The tribunal should monitor the progress of the conference to ensure that all the witnesses are given the opportunity to present their positions and explain why the other witnesses’ evidence is not to be preferred. Equally, the tribunal will need to exercise control over the dialogue that may develop between the witnesses so that sufficient time is devoted to each area of disagreement. The tribunal should have regard to the dynamics between the witnesses, and consider the matters set out in Checklist Items 4 and 5.
(3) The tribunal may intervene in the discussion between the witnesses at any time in order to give each witness the opportunity to present their views and to respond to the views of the other witness(es), and to ensure the orderly and efficient conduct of the conference.

e) This Direction provides that the tribunal can intervene in the conference in appropriate circumstances. Examples where the tribunal may intervene include: ensuring that all witnesses are given the opportunity to present their evidence; seeking a response from a witness who avoids answering a question or who refuses to engage in a meaningful manner with their counterpart; informing the witnesses where the discussion has strayed away from the area of disagreement or does not otherwise assist the tribunal; adjourning the conference for a short break (or if necessary concluding it) where one or more witnesses becomes hostile, aggressive or uncommunicative.

(4) After the witnesses have concluded their discussions, the tribunal may ask further questions of any of the witnesses on the area of disagreement.

f) The tribunal may wish to ask questions as the witnesses discuss their views. It can also ask questions once the witnesses have finished discussing an area of disagreement. Questions can be posed to one or more witnesses. In appropriate circumstances, where the tribunal has asked one witness a question, it may wish to seek the views of the other witnesses on that question to ensure that all viewpoints have been taken into account.
(5) After the tribunal has completed its questioning, each party’s counsel may question the witness(es) of the other party/parties and invite his own party’s witness to respond to the opposing witness’s answers.

g) See the Explanatory Notes to Specific Direction A6 above.

Option C: Counsel-led Conference

a) A witness conference led by counsel is similar to the procedure of cross examination typical in common law systems, the key difference being that one or more other witnesses may respond to evidence given by the witness being questioned.

b) Using this conference framework allows each party through their counsel to retain a high degree of control over the taking of evidence. A conference led by counsel can take two broad forms. The first is where counsel for a party chooses who amongst the witnesses sitting in conference together will answer a question and who will subsequently respond. The second is an enhanced form of cross examination where counsel questions a particular witness and in the course of questioning may (but need not) invite their own and/or other witnesses to reply to the answers given.

c) The tribunal and the parties should consider whether the witnesses should give a presentation of the areas of difference between them at the outset of the conference, and whether counsel should adopt a Schedule prepared by the witnesses as an agenda for the conference.

C1 Witnesses shall [not] be sequestered prior to giving evidence.

See the Explanatory Notes to Specific Direction A1 above.
C2 At the beginning of any conference, the tribunal shall administer an oath or take an affirmation from each witness.

See the Explanatory Notes to Specific Direction A2 above.

C3 Each witness shall confirm that the written evidence submitted by them is their own and shall identify any corrections that they wish to make.

See the Explanatory Notes to Specific Direction A3 above.

C4 The tribunal shall, in consultation with the parties, determine the order in which witnesses will be questioned.

a) The tribunal will need to consider the circumstances of the case at hand to determine the order of witnesses. In adversarial proceedings, the usual approach is for the claimant to present its witnesses to give evidence first, followed by the presentation of the respondent’s witness. Sometimes, a different approach can be adopted, for example where an issue turns on the defence raised and evidence filed by the respondent or where a jurisdictional objection is raised by the respondent (where it may be preferable for the respondent’s witnesses to be questioned first), or in the case of multiple claimants and respondents.

b) The tribunal should consider whether consecutive evidence from all the parties should be heard before concurrent evidence. This is often the preferable course to adopt where factual witnesses are to give evidence consecutively and expert witnesses concurrently. Where some factual witnesses are to give evidence consecutively and others concurrently, it may also be preferable to hear the consecutive evidence first. The tribunal will take into account the parties’ preferred
order of witnesses, bearing in mind that when witnesses give evidence concurrently, this may affect the sequence of evidence typically seen in adversarial proceedings. For example, where a respondent’s counsel has questioned a claimant’s witness in the presence of the respondent’s witness, it will generally be more efficient for the claimant’s counsel to question the respondent’s witness immediately thereafter.

C5 Each party’s counsel may question the witness(es) of the other party/parties and may invite his own party’s witness to respond to the opposing witness’s answers. After being questioned by counsel for the opposing party, counsel may ask a witness of his own party to clarify any matter that arose out of that questioning.

a) This Direction envisages that counsel for one party will question witnesses for the other parties to test the evidence they have given in their written statements. As set out in the preamble above, counsel may use the conference to take evidence by posing questions to the witnesses and inviting others to respond. Alternatively, counsel may approach the conference like a cross examination in the common law style, drawing on other witnesses on the conference to provide rebuttal evidence as appropriate in the course of the questioning. It will generally be a matter for counsel to decide whether or not to call on their own witness to respond to evidence. This is always subject to the tribunal’s ability to intervene at any time to ask questions of any witness, as set out in Standard Direction 6.

b) The typical common law format of evidence-in-chief (sometimes referred to as direct evidence and during which witnesses are asked to confirm their written evidence), cross examination (by opposing counsel), and re-examination (or re-direct examination) needs to be modified in a witness conference led by counsel because the other party’s witnesses will be giving evidence concurrently.
c) The tribunal should consider whether, prior to questioning under this Direction, a witness should be permitted to provide supplemental evidence upon questioning by counsel for the party presenting that witness, in the same way that a witness may provide additional 'direct' evidence through examination-in-chief in common law jurisdictions. This is useful when a development has occurred since the witnesses prepared their written evidence, and they have not had a chance to explain how that development may affect their views. When the tribunal decides to receive such supplemental evidence, it should consider whether it should receive evidence from all the witnesses in the conference at once by asking all of the witnesses about the development, before questioning from an opposing party's counsel begins. The advantage of doing so is to receive all new evidence from all the witnesses before one witness is questioned by counsel.

d) The second sentence of this Direction provides that counsel can ask clarifying questions of his or her own witness following their questioning by opposing counsel, akin to re-examination of witnesses in common law jurisdictions. The need for such clarifying questions may be limited, given that the witness may have discussed the issue in question with other witnesses in the conference and therefore already explained his view. However, there may be (for example) situations where the witnesses engaged in limited discussion with each other, or where counsel otherwise considers that the witness was not given an opportunity to express a view, in which case counsel can ask the witness to clarify the position.
NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

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For more details about the Chartered Institute of Arbitrators, visit our website: www.ciarb.org
Neutral Citation Number: [2018] EWCA Civ 817
Case No: A3/2017/0623

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HON. MR JUSTICE POPPLEWELL
[2017] EWHC 137 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2018

Before :

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT

LORD JUSTICE SIMON
and
LORD JUSTICE HAMBLEN

Between :

Halliburton Company
- and -

(1) Chubb Bermuda Insurance Ltd
(2) [M]
(3) [N]
(4) [P]

Appellant

Respondents

Lord Grabiner QC, Neil Kitchener QC and Owain Draper (instructed by K & L Gates LLP) for the Appellant
Michael Crane QC, David Scorey QC and David Peters (instructed by Clyde & Co LLP) for the First Respondent

Judgment Approved
LORD JUSTICE HAMBLEN:

Introduction

1. This is the judgment of the Court.

2. This appeal raises issues of importance in relation to commercial arbitration law and practice. The specific issues upon which the judge gave permission to appeal may be summarised as follows:

   (1) Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.

   (2) Whether and to what extent he may do so without disclosure.

3. The second of those issues gives rise to the consideration of two further general issues, namely:

   (1) When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his impartiality?

   (2) What are the consequences of failing to make disclosure of circumstances which should have been disclosed?

The factual background

4. On 20 April 2010 there was an explosion and fire on the Deepwater Horizon oil rig in the Gulf of Mexico, when a well which was in the process of being plugged and temporarily abandoned suffered a blow out (“the incident”).

5. BP Exploration and Production Inc (“BP”) was the lessee of the rig. Transocean Holdings LLC (“Transocean”) was the owner of the rig and had been engaged by BP to provide crew and drilling teams. The Appellant (“Halliburton”) provided cementing and well-monitoring services to BP in relation to the temporary abandonment of the well.

6. Both Transocean and Halliburton purchased liability insurance on the Bermuda form from the First Respondent (“Chubb”). It appears that the material policy terms were the same. Halliburton’s insurance policy provided coverage of US$100 million excess US$500 million. It was governed by New York law but provided for arbitration in London by a tribunal consisting of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen; in the event of disagreement between the arbitrators as to the choice of the third, the appointment was to be made by the High Court.

7. Following the incident, numerous claims were made against BP, Halliburton and Transocean by the US Government and corporate and individual claimants. The US Government claims were for civil penalties under various federal statutes. The private claims for damages were pursued through a Plaintiffs’ Steering Committee (“PSC”). Many of the claims were consolidated into a single ‘Multi District Litigation’.
8. Following a liability trial in the Federal Court for the Eastern District of Louisiana, judgment was given on 4 September 2014 holding the apportionment of blame to be BP 67%; Transocean 30% and Halliburton 3%. Shortly before judgment, Halliburton concluded a settlement of the PSC claims against it in the sum of approximately US$1.1 billion. Following the judgment, Transocean settled the PSC claims for some US$212 million and paid civil penalties of about US$1 billion to the US Government.

9. Halliburton made a claim on its liability insurance against Chubb. However, Chubb refused to pay Halliburton’s claim, contending amongst other things that Halliburton’s settlement of the claims was not a reasonable settlement, and/or that Chubb had reasonably not consented to the settlement.

10. Halliburton commenced arbitration by appointing N, the third respondent, as its arbitrator on 27 January 2015 (“reference 1”). The fourth respondent, P, was appointed on behalf of Chubb. The identity of the third arbitrator could not be agreed and so an application was made to the High Court for appointment of a third arbitrator. Following a contested hearing, in which a number of candidates were put forward on both sides, Flaux J appointed M, the second respondent, as the third arbitrator by an order of 12 June 2015. M was Chubb's preferred candidate. Halliburton’s main objection to Chubb’s candidates, including M, was that they were English lawyers and this was a policy governed by New York law. Halliburton did not seek to appeal against that order.

11. Prior to expressing his willingness to be appointed, M disclosed that he had previously acted as arbitrator in a number of arbitrations in which Chubb was a party, including appointments on behalf of Chubb, and that he was currently appointed as arbitrator in two pending references in which Chubb was involved.


13. In December 2015 M accepted appointment by Chubb through Clyde & Co, who were also Chubb's solicitors in reference 1, in relation to an excess liability claim arising out of the incident made by Transocean under its liability insurance policy with Chubb (“reference 2”). The same manager, Mr Trimarchi, was responsible for monitoring the claims made by both Transocean and Halliburton on behalf of Chubb and took the decision to refuse the claim in each case.

14. Prior to his acceptance of this appointment, M disclosed to Transocean his appointment in reference 1 and in the other Chubb arbitrations which had been disclosed to Halliburton. Transocean raised no objection. M did not, however, disclose to Halliburton his proposed appointment by Transocean.

15. In August 2016 M accepted appointment as a substitute arbitrator in another claim made by Transocean against a different insurer on the same layer of insurance (“reference 3”). This proposed appointment was also not disclosed to Halliburton.

16. In references 2 and 3 there was an order for a trial of a preliminary issue which was potentially dispositive of the claims, if decided in favour of the insurers. It involved construction of the policy terms on undisputed facts relating to the exhaustion of
underlying layers by reference to the fines and penalties paid by Transocean. The preliminary issue was heard in November 2016.


18. M replied by email on 5 December 2016, explaining in outline how he came to be appointed in references 2 and 3. He stated that he had not made disclosure to Halliburton at the time of those appointments because it did not occur to him at the time that he was under any obligation under the IBA Guidelines to do so, an explanation which is accepted as truthful by both parties. He further stated as follows:

“I do not think and did not think that the above circumstances put any obligation upon me to make any disclosure to you or your clients under the IBA Guidelines. However, I appreciate, with the benefit of hindsight, that it would have been prudent for me to have informed your clients through your firm, and I apologise for not having done so.

It is correct that all three References arise from the Deepwater Horizon incident, but it is not the case, as you suggest, that they raise the same or even similar issues. The two claimants, Halliburton and Transocean, as I understand it, performed very different roles and the issues were totally different and, so far, beyond matters which are public knowledge, my only involvement in the Transocean cases, has concerned the issue of construction argued by Counsel in two 2-day Hearings, without any evidence save as to the circumstances of the making of the relevant insurance contract. I have received no information which would not be shared by my co-arbitrators in the Halliburton case.

Both you and your clients have my assurance that during the period of about 20 years during which I have practised as a full-time international commercial arbitrator, I have at all times remained independent and impartial and will continue to do so.

That said, I readily acknowledge that it is important that both parties in arbitration should share confidence that the dispute will be determined fairly on the evidence and the law without bias.

I do not believe that any damage has been done but, if your clients remain concerned, I would be prepared to consider tendering my resignation from my appointment in the two Transocean cases if the results of the determination of the preliminary issues of construction, which are likely to be issued shortly, does not effectively bring them to an end.”

19. Halliburton responded repeating its concerns about M’s impartiality and suggesting that he resign, to which Chubb was not prepared to agree. M responded further by email of 15 December 2016 in which he stated:
“It is in accordance with my duty to both parties that my response seeks to take into account what I believe to be the best interests of both.

I do not think that it would be helpful to either party for me to continue the debate as to whether or not, by accepting appointment in the two Transocean arbitrations, I was in breach of any duty to Mr Birsic's clients by failing to disclose the fact, and presumably, giving them an opportunity to object. I would merely add that, even if the IBA Guidelines did apply (and I think Mr Payton is probably right in his view that they did not) I remain unpersuaded that I was in breach of them. However, I have accepted in my earlier letter that, with the benefit of hindsight, it would have been prudent for me to have made disclosure to avoid any sense of a lack of transparency on my part.

In relation to the other points raised in Mr Birsic's letter I can only repeat that neither him nor his clients need have any fear that I will have learned anything in the course of the Transocean arbitrations which could be of any relevance in the Halliburton case. The points so far considered relate only to preliminary issues of construction as to the attachment point, and I learned nothing about the facts of the incident and its consequences which is not public knowledge and which would not be well known to my co-arbitrators …

Putting the above to one side, the current potion [sic] is clearly unsatisfactory, to say the least. I repeat that I believe it is of fundamental importance that both parties should have confidence in the impartiality of the members of the Tribunal, and in particular the chairman, and, if my first letter together with what I have added above does not both put Mr Birsic's and his clients’ minds at rest, there is what seems to be a total impasse between the parties, to both of whom I owe an obligation.

Mr Payton wishes me to remain as chairman and for the hearing to go ahead. But if I were to decline Mr Birsic's invitation to resign, I have little doubt that an application would be made to the court to remove me which may well take some time to resolve…..

… were the decision left to me to be determined in accordance with my own self-interests, I would resign. I have no wish to continue to serve as chairman in a tribunal in a case in which one of the parties, through its legal team, has expressed serious doubts as to my impartiality. Furthermore, as you may know, I plan to retire later this year and would not wish that my long career as an international commercial arbitrator which has spanned over three decades should end with my being the subject of a debate in the Commercial Court as to whether I have behaved improperly.

However, as I have already indicated, I have duties to both parties: by accepting the Court's appointment as chairman, I undertook to continue to serve in that capacity until I had completed the task, unless prevented by circumstances beyond my control and I would, I think, be in breach of those duties were I simply to resign in the face of strong opposition from one party.

In these circumstances, might I venture to propose to the parties that, even now, they put aside their differences to the extent of concentrating their attention on
trying to agree upon a mutually acceptable replacement chairman who would be available for the hearing, without spending further time on argument, and applications to the Court.

Were they to do so, I would gladly resign. If that does not occur, I fear that I would have no alternative but to leave my fate in the hands of the Court.”

20. On 21 December 2016 Halliburton issued a Claim Form seeking an order pursuant to section 24(1)(a) of the Arbitration Act 1996 (“the Act”) that M be removed as an arbitrator.

21. On 4 January 2017, M responded by email to further questions in relation to the overlap between the references, stating that he was “unaware that there were any common issues”. By an email of 5 January 2017, K & L Gates requested that M clarify whether he had seen any document in which Chubb or any other respondent in references 2 or 3 set out similar defences to those pleaded in reference 1. M did not respond to that email. On 10 January 2017 Halliburton obtained from Chubb the release of the pleadings in reference 2. These revealed that the pleadings relied on by Chubb in the two references were substantially similar, specifically that the settlement was not reasonable and Chubb had reasonably withheld its consent. There was an additional defence in reference 2, which was the subject of the preliminary issue determination.

22. Halliburton’s arbitration application was heard by the High Court on 12 January 2017, and on 3 February 2017 Mr Justice Popplewell delivered his judgment dismissing the application.

23. On 1 March 2017 the tribunals in references 2 and 3 issued awards deciding them in Chubb’s favour on the preliminary issues of policy construction. The effect of this was that the references were brought to an end, and the tribunal was not required to consider any issues relating to the reasonableness of the settlement.

24. On 5 December 2017, the tribunal in reference 1 issued its Final Partial Award on the merits (“the Award”), deciding in Chubb’s favour. One of the arbitrators, the third respondent N, issued “Separate Observations” in which he wrote that he was unable to join in the award as a result of his “profound disquiet about the arbitration’s fairness”, explaining that:

“…arbitrators who decide cases cannot ignore the basic fairness of proceedings in which they participate. One side secured appointment of its chosen candidate to chair this case, over protest from the other side. Without any disclosure, the side that secured the appointment then named the same individual as its party-selected arbitrator in another dispute arising from the same events. The lack of disclosure, which causes special concern in the present fact pattern, cannot be squared with the parties’ shared ex ante expectations about impartiality and even-handedness.”

The judgment

25. The judge considered and addressed the three elements of M's conduct which were relied upon as giving rise to an appearance of bias: (1) his acceptance of the
appointments in the Transocean arbitrations; (2) his failure to disclose those appointments to Halliburton; and (3) his response to the challenge to his impartiality.

26. In relation to element (1), the judge rejected the suggestion made that M’s appointment in references 2 and 3 involved him being given a secret benefit by Chubb in the form of the remuneration he would earn from the arbitration. He pointed out that “the duty to act independently and impartially involves arbitrators owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially”. He also found that the appointment conferred no immediate benefit in terms of his fees, observing that the appointing party does not undertake to bear those fees and that the tribunal as a whole would decide who ultimately is to bear them, in the light of the course of the arbitration and the result.

27. The judge also rejected the contention that the overlap between the references was a matter of concern since it meant that M would learn information during the course of the Transocean references which was relevant to the issues in the Halliburton arbitration, and available to Chubb but not to Halliburton. He observed that it is “a regular feature of international arbitration in London that the same underlying subject matter gives rise to more than one claim and more than one arbitration without identity of parties”. He considered that this was desirable because (1) “parties should be free to appoint their chosen arbitrator in accordance with the procedure agreed in the arbitration clause in fulfilment of the contractual bargain”; (2) arbitrators are often chosen for their particular knowledge and expertise, but frequently comprise a limited pool of talent, and it is “undesirable that parties should be unnecessarily constrained in their ability to draw on this pool if there are multiple arbitrations arising out of a single event or overlapping circumstances”; and (3) the principle of finality is served “if the tribunal is already familiar with the background to and uncontroversial aspects of the subject matter of the dispute.”

28. The judge observed that: “generally, the fact that an arbitrator may be involved in an arbitration between party A and party B, whose subject matter is identical to that in an arbitration between party B and party C does not preclude him or her from sitting on both tribunals.” He considered that this was borne out by the duty enshrined in section 33 of the Act which requires an arbitrator to decide the case by reference to material available to the parties to the particular reference and by authority, citing the Court of Appeal decision in AMEC Capital Projects Ltd v Whitefriars City Estates Ltd. [2005] 1 WLR 723. He accordingly concluded that:

“29. The informed and fair-minded observer would not therefore regard M as unable to act impartially in the reference between Halliburton and Chubb merely by virtue of the fact that he might be an arbitrator in other references arising out of the incident, and might hear different evidence or argument advanced in another such reference. The objective and fair-minded assessment would be that his experience and reputation for integrity would fully enable him to act in accordance with the usual practice of London arbitrators in fulfilling his duties under section 33 by approaching the evidence and argument in the Halliburton reference with an open mind; and in deciding the case, in conjunction with the other members of the tribunal, in accordance with such material, with which Halliburton will have a full and fair opportunity to engage.”
29. In these circumstances, his conclusion was that there was nothing in the acceptance of
the Transocean appointments by M which gave rise to an appearance of bias against
Halliburton, even if the issues which had to be decided in the references were
identical or substantially overlapping, which he found they were not.

30. In relation to element (2), the judge held that his conclusion on element (1) meant that
there was nothing to disclose: “If a particular circumstance does not give rise to any
justifiable concerns as to an arbitrator's impartiality, then his failure to disclose that
circumstance cannot, without more, give rise to any equivalent concern.”

31. He further held that even if disclosure ought to have been made, the failure to do so
did not give rise to a real possibility of apparent bias against Halliburton. M’s
unchallenged explanation in correspondence was that he did not do so because it did
not occur to him that there was any obligation to do so. The judge held that: “even if
such honest belief were mistaken (which it is not), the fair-minded observer would not
think that it would raise a real possibility of apparent bias”.

32. In relation to element (3), the judge went through each of the complaints made about
M’s response to the challenge to his impartiality and rejected them. He concluded
that M “dealt with the challenge in a courteous, temperate and fair way,
demonstrating commendable even-handedness. His response would only serve to
reinforce the confidence any fair-minded observer would have in his ability and
intention to continue to conduct the reference fairly and impartially.”

The grounds of appeal

33. The grounds of appeal are:

   (1) The judge erred in concluding that M’s acceptance of the Transocean
       appointments was unobjectionable.

   (2) The judge erred in giving no or insufficient weight to the failure to disclose.

   (3) The judge should have found that the appearance of bias was reinforced by
       M’s failure to deal appropriately with Halliburton’s concerns.

   (4) The judge failed to address properly or at all Halliburton’s submissions in
       support of the application.

The law

The duty of impartiality

34. Under English law an arbitrator’s duties are governed by the Act. The Act imposes a
duty of impartiality.

35. The general principles set out in section 1 of the Act include that the object of
arbitration is to obtain the fair resolution of disputes “by an impartial tribunal”.

36. The duty of impartiality is reflected in section 24 of the Act which provides that the
court has power to remove an arbitrator on the grounds:
“(1)(a) that circumstances exist that give rise to justifiable doubts as to his impartiality …”

37. It is also reflected in section 33 of the Act which imposes a duty on arbitrators to “act fairly and impartially as between the parties”.

38. Although lack of independence may give rise to justifiable doubts of impartiality, the Act deliberately did not include this as a separate ground for removal, as explained in the DAC Report on the Arbitration Bill in the commentary on Clause 24. In particular, it was there pointed out that there would be no point in including lack of independence as an independent ground if it covered cases which did not give rise to justifiable doubts as to impartiality and that there was “no good reason for including “non-partiality” independence as a ground for removal”. It was also noted that “there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent”.

39. Section 24 has been held to reflect the common law test for apparent bias, namely whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

40. This is an objective test and is not to be confused with the approach of the person who has brought the complaint. It involves taking a balanced and detached approach, having taken the trouble to be informed of all matters that are relevant – see, for example, Helow v Secretary of State for the Home Department [2008] 1 WLR 2416 at [2]-[3] per Lord Hope.

41. With one caveat, both parties accepted that the judge had directed himself correctly as to the law at [16] of his judgment. That caveat was Halliburton’s contention that the judge failed to have sufficient regard to the risk of unconscious bias. That risk, which the judge recognised (see, for example, at [62]) does not affect the relevant legal test for apparent bias, which he correctly set out. It provides an example of how bias may act, or appear to act, on the mind, but it is not part of the test for whether there is bias. We accept, however, that it is a relevant risk for the fair-minded and informed observer to take into account.

42. At the heart of Halliburton’s appeal is its contention that the judge failed to have proper regard to the unfairness which may arise where an arbitrator accepts appointments in overlapping references with only one common party. Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias

43. The essence of that potential unfairness is said to be information and knowledge which the common party acquires, unknown to the other party. The common party may obtain the advantage of, for example, making submissions and adducing evidence that influence the common arbitrator without the participation or knowledge of the other party; sharing with the common arbitrator relevant information that is not shared with the other party; and the opportunity to assess the views of the common arbitrator in one arbitration and to tailor its submissions and evidence accordingly in
the other. Given the privacy and confidentiality of arbitration, the possibility of such advantage is likely to be unknown to the other party.

44. There have been recent judicial observations recognising this as a legitimate concern. In Guidant LLC v Swiss Re International SE [2016] EWHC 1201 Leggatt J was concerned with an application to appoint a third arbitrator in two arbitrations brought by Guidant against Swiss Re companies. Guidant sought the appointment of the same third arbitrator as in its arbitration against Markel, which raised closely overlapping issues. Guidant contended that having a common third arbitrator would reduce costs and delay and minimise the risk of inconsistent decisions. Leggatt J observed as follows at [9]:

“9. In circumstances where the arbitrations will therefore be taking place separately, it seems to me that Swiss Re has a legitimate basis for objecting to the appointment as the third member of the tribunals in its arbitrations of the same person who is the third arbitrator and chair of the tribunal in the Markel arbitration. If the same person were to be appointed, there would be a legitimate concern that that person would be influenced in deciding the Swiss Re arbitrations by arguments and evidence in the Markel arbitration. Indeed, the likelihood that that would occur is implicit in the very argument which Guidant makes that appointment of the same person would minimise the risk of inconsistent decisions. Swiss Re is not a party to the Markel arbitration and will have no opportunity to be heard in that arbitration or to influence its outcome. Indeed, without a waiver of confidentiality, they will not be privy to the evidence adduced or the submissions made in the Markel arbitration. If the Markel arbitration were to be heard first, the members of the tribunal in that arbitration would form views, without any input or opportunity for input from Swiss Re, from which they may afterwards be slow to resile.”

45. In the light of these considerations Leggatt J did not appoint Guidant’s requested arbitrator as the third arbitrator in the exercise of his discretionary powers under s.18 of the Act. At the same time, he recognised, however, that the appointment of a common arbitrator did not justify an inference of apparent bias. Thus, he noted that the fact that Guidant had appointed the same arbitrator in all three arbitrations was not a ground upon which disqualification could be sought. As he stated at [10]:

“10. I accept the submission made by Mr. Tse on behalf of Guidant that the appointment of a common arbitrator does not justify an inference of apparent bias. The fact that the same person has been appointed by Guidant as its arbitrator in the Markel arbitration is not, therefore, a ground on which an application could be made to seek to disqualify him from acting in the Swiss Re arbitrations. Guidant is entitled to choose the same individual as their arbitrator in all three arbitrations, as they have. But conversely Swiss Re, for their part, are in my view reasonably entitled to object to having forced upon them an arbitrator who has already been appointed in the Markel arbitration and about whose involvement in that arbitration they are entitled to feel the concern which I have indicated.”

46. Leggatt J therefore drew a distinction between the concern which Swiss Re “were entitled to feel” and a concern which would justify an inference of apparent bias.
47. A similar recognition of legitimate concern was expressed by Fraser J in *Beumer Group UK Ltd v Vinci Construction UK Ltd* [2016] EWHC 2283. In that case two construction adjudications were heard by the same adjudicator arising from the same underlying dispute, with one party appearing in both. That party advanced mutually inconsistent cases in the two adjudications. All of this was unknown to the other party. Fraser J held that the appointment of the common adjudicator and the conduct of that adjudication with all that involved, in terms of contact and the running of inconsistent cases, without notifying the other party, meant that this was a case of apparent bias. In relation to the contact between the adjudicator and the common party, he observed as follows at [31]:

> “31. If unilateral telephone calls are strongly discouraged (if not verging on prohibited) due to the appearance of potential unfairness, it is very difficult, if not in my judgment impossible, for an adjudicator to be permitted to conduct another adjudication involving one of the same parties at the same time without disclosing that to the other party. Conducting that other adjudication may not only involve telephone conversations, but will undoubtedly involve the receipt of communications including submissions, and may involve a hearing. If all that takes place secretly, in the sense that the other party does not know it is even taking place, then that runs an obvious risk in my judgment of leading the fair minded and informed observer to conclude that there was a real possibility of bias. All of this can be avoided by disclosing the existence of the appointment at the earliest opportunity.”

48. The legitimate concern identified by Leggatt J and Fraser J was addressed in a recent talk given by Jeffrey Gruder QC to the BILA on 21 July 2017 in which he described the problem as being one of “inside information” or “inside knowledge”. It is to be noted, however, that he said that his resulting “sense of unease” did not relate to justifiable doubts as to the arbitrators’ impartiality.

49. We accept that inside information and knowledge may be a legitimate concern for the parties to have in overlapping arbitrations involving a common arbitrator but only one common party. We agree, however, with Leggatt J and Jeffrey Gruder QC that, in itself, it does not justify an inference of apparent bias.

50. As the judge held, the starting point is that an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question. In this context the judge referred to the *AMEC* case at [20]-[21] where Dyson LJ stated as follows:

> “20. In my judgment, the mere fact that the tribunal has previously decided the issue is not of itself sufficient to justify a conclusion of apparent bias. Something more is required. Judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. The same applies to adjudicators, who are almost always professional persons. That is not to say that, if it is asked to redetermine an issue and the evidence and arguments are merely a repeat of what went before, the tribunal will not be likely to reach the same conclusion as before. It would be unrealistic, indeed absurd, to expect the tribunal in such circumstances to ignore its earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. The vice which the law must guard against is that the tribunal
may approach the rehearing with a closed mind. If a judge has considered an issue carefully before reaching a decision on the first occasion, it cannot sensibly be said that he has a closed mind if, the evidence and arguments being the same as before, he does not give as careful a consideration on the second occasion as on the first. He will, however, be expected to give such reconsideration of the matter as is reasonably necessary for him to be satisfied that his first decision was correct. As I have said, it will be a most unusual case where the second hearing is for practical purposes an exact rerun of the first.

21. The mere fact that the tribunal has decided the issue before is therefore not enough for apparent bias. There needs to be something of substance to lead the fair-minded and informed observer to conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear.”

51. As the judge observed, these comments are equally applicable to arbitrators and to references involving a common party. Arbitrators are assumed to be trustworthy and to understand that they should approach every case with an open mind. The mere fact of appointment and decision making in overlapping references does not give rise to justifiable doubts as to the arbitrator’s impartiality. Objectively this is not affected by the fact that there is a common party. An arbitrator may be trusted to decide a case solely on the evidence or other material before him in the reference in question and that is equally so where there is a common party.

52. In the context of Bermuda form arbitrations, the position has been summarised as follows in Liability Insurance in International Arbitration, 2nd ed (2011), at para 14.32:

“The decision in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, and the foregoing discussion, is also relevant in the fairly common situation where a loss, whether from boom or batch, gives rise to a number of arbitrations against different insurers who have subscribed to the same programme. A number of arbitrations may be commenced at around the same time, and the same arbitrator may be appointed at the outset in respect of all these arbitrations. Another possibility is that there are successive arbitrations, for example because the policyholder wishes to see the outcome of an arbitration on the first layer before embarking on further proceedings. A policyholder, who has been successful before one tribunal, may then be tempted to appoint one of its members (not necessarily its original appointee, but possibly the chairman or even the insurer's original appointee) as arbitrator in a subsequent arbitration. Similarly, if insurer A has been successful in the first arbitration, insurer B may in practice learn of this success and the identity of the arbitrators who have upheld insurer A’s arguments. It follows from Locabail and AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 All ER 723 that an objection to the appointment of a member of a previous panel would not be sustained simply on the basis that the arbitrator had previously decided a particular issue in favour of one or other party. It equally follows that an arbitrator can properly be appointed at the outset in respect of a number of layers of coverage, even though he may then decide the dispute under one layer before hearing the case on another layer.”

53. We accordingly agree with the judge that the mere fact that an arbitrator accepts appointments in multiple references concerning the same or overlapping subject
matter with only one common party does not of itself give rise to an appearance of bias. As Dyson LJ said, “[s]omething more is required” and that must be “something of substance”.

54. Whether and to what extent an arbitrator may accept such appointments without disclosure will be addressed below. For reasons there set out, we do not consider that the fact that such appointments may be accepted is determinative of whether disclosure should be given before accepting such appointments.

When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his or her impartiality?

55. The Act sets out no requirements in relation to disclosure, but many institutional rules governing arbitration include provisions requiring disclosure to be made of facts or circumstances which may give rise to justifiable doubts as to an arbitrator’s impartiality.

56. Under the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.

57. In *Davidson v Scottish Ministers (No 2)* [2005] 1 SC 7 the House of Lords held that there was a risk of apparent bias where a judge was called upon to rule judicially on the effect of legislation which he or she had drafted or promoted. In addressing the issue of disclosure Lord Bingham described the position at common law in the following terms at [19]:

> “Where a judge is subject to a disqualifying interest of any kind (‘actual bias’), this is almost always recognised when the judge first appreciates the substance of the case which has been assigned. The procedure is then quite clear: the judge should, without more, stand down from the case. It is rare in practice for difficulties to arise. Apparent bias may raise more difficult problems. It is not unusual for a judge, at the outset of a hearing, to mention a previous activity or association which could not, properly understood, form the basis of any reasonable apprehension of lack of impartiality. Provided it is not carried to excess, this practice is not to be discouraged, since it may obviate the risk of misunderstanding, misrepresentation or misreporting after the hearing. It is also routine for judges, before or at the outset of a hearing, to disclose a previous activity or association which would or might provide the basis for a reasonable apprehension of lack of impartiality. It is very important that proper disclosure should be made in such cases, first, because it gives the parties an opportunity to object and, secondly, because the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment. When such disclosure is made, it is unusual for an objection to be taken ...

There are of course a number of entirely honourable reasons why a judge may not make disclosure in a case which appears to call for it, among them forgetfulness, failure to recognise the relevance of the previous involvement to the current issue or failure to appreciate how the matter might appear to a fair-minded and informed observer who has considered the facts but lacks the detailed knowledge and self-knowledge of the judge. However understandable the reasons for it, the
fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer.”

58. The judgments of the Court of Appeal in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 and Taylor v Lawrence [2003] QB 528 are to similar effect.

59. In Locabail in the judgment of the court (Lord Bingham CJ, Lord Woolf MR, and Sir Richard Scott V-C) it was stated as follows at [21]:

“... If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.” (emphasis added)

60. In Taylor Lord Woolf stated as follows in giving the judgment of the court at [64]:

“A further general comment which we would make, is that judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. If such a relationship is disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair-minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant's confidence in the judge.” (emphasis added)

61. A recent example of a case in which it was held that disclosure should have been given in circumstances falling short of apparent bias is provided by the decision of the Cayman Islands’ Court of Appeal in Wael Almazeedi v Michael Penner and Stuart Sybermsa. That case concerned institutional links between a Qatari party involving Qatari government interests and the judge by reason of his appointment as a judge of the Qatar International Court and Dispute Resolution Centre (QICDRC). In giving the judgment of the Court on this issue Sir Bernard Rix stated at [50] as follows:

“50. On the matter of disclosure, we consider that the judge ought to have disclosed his appointment to the QICDRC in a case which involved Qatari government interests in the form of the petitioning preference shareholders. That is independent of our decision on this appeal. The purpose of such disclosures, which often go beyond legitimate concerns as to independence and impartiality which would, subject to waiver, require a judge to recuse himself, is to enable the parties to consider the disclosures made and either to assure themselves in advance that there is no legitimate problem or to make submissions to the judge, or to finesse any potential problem by means of waiver. Such matters can only be efficiently and safely handled in advance. Once judgment has been entered, and a
winner and a loser emerge, the matter becomes much more difficult. Losers feel aggrieved whatever the rights and wrongs of the situation are, specious claims to bias may be raised, and all the difficulties of retrospective consideration fall for debate and decision.”

62. At the time of the hearing of the present appeal the Privy Council decision on the appeal in the Almazeedi case was pending and it was agreed that this should be awaited and the parties should have the opportunity to make further submissions in the light of the Privy Council’s judgment. Judgment was handed down on 26 February 2018 – [2018] UKPC 3. Both parties have provided further written submissions in the light of that judgment, which we have taken into account. We also received written submissions in relation to the recent Court of Appeal decision concerning apparent bias in Bubbles & Wine Limited v Reshat Lusha [2018] EWCA Civ 468. That was a case on its own and different facts and we did not find it to be of any real assistance.

63. In Almazeedi the Privy Council agreed with what the Cayman Islands’ Court of Appeal had said about disclosure, observing at [60] that:

“21. Against this background, the Court of Appeal repeated an observation made earlier in its judgment, namely that, although this was not the test of apparent bias, the judge ought to have disclosed his appointment in Qatar to enable the position to be clarified and considered and avoid possible later challenges such as the present. Mr Francis Tregear QC, representing the JOLs, realistically, did not take issue with this, and the Board need say no more than that it also agrees with it.”

64. By its decision the Privy Council (Lord Sumption dissenting) agreed with the Cayman Islands’ Court of Appeal that it had been inappropriate for the judge to sit without disclosure of his position in Qatar, but from an earlier date than that found by the Court of Appeal. The decision reached is encapsulated in [34] of the judgment:

“34. In the result, the Board, with some reluctance, has come to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but has also come to the conclusion that that the Court of Appeal was wrong to treat the prior period differently. The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised. An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would, so far as appears, have been no obstacle.”

65. The decision in Almazeedi supports the importance of disclosure, as borne out by the other authorities referred to. These authorities explain the important practical advantages of giving disclosure and addressing any issues which may arise at the outset. They also show that in borderline cases disclosure should be given -
disclosure should be given of circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the tribunal was biased. An important practical reason for this approach is that it may be difficult at the time of considering whether to make disclosure to draw any firm conclusion as to whether or not the fair-minded and informed observer would so conclude. As the authorities make clear, the test is an objective one, to be judged by reference to what the fair-minded and informed observer would or might conclude.

66. We consider that the same approach applies to arbitral tribunals for the same reasons as have been given in the authorities we have mentioned. The test for apparent bias is the same and the practical advantages of early disclosure are just as important.

67. Many arbitration institutional rules impose a stricter test of disclosure, importing a subjective test. The IBA Guidelines, for example, require disclosure of facts or circumstances “that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence” (emphasis added) (General Principle (3)). The ICC Rules require disclosure of facts or circumstances which “might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality” (emphasis added) (Article 11). The LCIA Rules require disclosure of “circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence” (emphasis added) (Article 5.4).

68. Whilst this may reflect good practice in international commercial arbitration, the authorities make it clear that the more certain standards of an objective observer apply to the issue of disclosure under English law.

69. We note that the LCIA Rules make it clear that disclosure is only required of facts or circumstances known to the arbitrator (as do the IBA Guidelines in the Explanation to General Standard (3) at (d)). We agree with that approach. You can only disclose what you know and there is no duty of inquiry.

70. The disclosure required depends on what the arbitrator knows. The fact that disclosure is required of circumstances that might lead to a conclusion of apparent bias, emphasises that the question of what is to be disclosed is to be considered prospectively. The question of whether or not disclosure should be made, or should have been made, depends on the prevailing circumstances at that time. A decision as to disclosure based on a conclusion which might be drawn can only be made on the basis of the circumstances as they were then known to be and, in principle, a determination of whether or not such disclosure should have been made should similarly be so judged. In this regard, we disagree with the approach of the judge who considered that the issue of whether disclosure ought to have been made was to be determined retrospectively by reference to whether, having regard to all matters known at the later stage to the fair-minded and informed observer, the circumstance would lead to the conclusion that there was a real possibility of bias.

71. In summary, we consider the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to
his impartiality. Under English law this means facts or circumstances which would or
might lead the fair-minded and informed observer, having considered the facts, to
conclude that there was a real possibility that the arbitrator was biased.

72. The implications of this conclusion in relation to disclosure of appointments
concerning overlapping subject matter but only one common party will be considered
when addressing the facts of the present case.

What are the consequences of failing to make disclosure of circumstances which should
have been disclosed?

73. There are, as it seems to us, two distinct questions for the court considering an
allegation of non-disclosure after the event. First, the court needs to consider whether
disclosure ought to have been made in accordance with the principles we have just
enunciated. Secondly, the court needs to consider the significance of that non-
disclosure in the context of the application with which the court is dealing. In the
case of an application for removal of the arbitrator in question, the court will consider
on the basis of all the factual information available when that application is heard
(including the fact that there has been non-disclosure), whether the fair-minded and
informed observer would conclude that there was a real possibility that the arbitrator
was biased.

74. If a disclosure that ought to have been made has not been made, that will mean that
the arbitrator will not have displayed the “badge of impartiality” which he should
have done. As Lord Bingham observed in the Davidson case: the fact of non-
disclosure “must inevitably colour the thinking of the observer”.

75. Non-disclosure is therefore a factor to be taken into account in considering the issue
of apparent bias. An inappropriate response to the suggestion that there should be or
should have been disclosure may further colour the thinking of the observer and may
fortify or even lead to an overall conclusion of apparent bias – see, for example, Paice
EWHC 240.

76. Non-disclosure of a fact or circumstance which should have been disclosed, but does
not in fact, on examination, give rise to justifiable doubts as to the arbitrator’s
impartiality, cannot, however, in and of itself justify an inference of apparent bias.
Something more is required – see, for example, the comments of Lord Mance in
Helow v Home Secretary at [58].

Application to the facts

Acceptance of the appointment

77. For reasons already given, viewed objectively, we do not consider that the mere fact
of an appointment in a related reference with only one common party would in and of
itself justify an inference of apparent bias. We accept that M’s acceptance of a
closely related appointment also involving Chubb may give rise to legitimate
concerns in the eyes of Halliburton, and that these might have been alleviated by
disclosure. However, as has already been explained, in order to lead to the objective
78. In this case, Halliburton relies on a number of aspects of M’s behaviour above and beyond the mere fact of his acceptance of a related appointment to which Chubb was the only common party. The main points are as follows:

(1) The fact that M had been appointed against the wishes of Halliburton and was the preferred candidate of Chubb;

(2) The degree of overlap between those arbitrations;

(3) The fact that M accepted the benefit of paid employment at the nomination of Chubb at a time when he was sitting in judgment on Chubb’s dispute with Halliburton;

(4) M’s failure to disclose the Transocean appointments;

(5) The fact that the need to make disclosure should have been obvious and the only explanation offered was one of oversight;

(6) M’s failure to deal with Halliburton’s concerns appropriately, after it had discovered the further appointments.

79. More generally, Halliburton relied on the views expressed by the third arbitrator, N, “an international arbitrator of great experience and eminence”, as a proxy for the views of the fair-minded and informed observer.

Circumstances of M’s appointment

80. M was appointed by the High Court in accordance with the agreed contractual procedure set out in the arbitration agreement. Having been so appointed, the appropriateness of his appointment is not open to question. Moreover, Halliburton’s main objection to Chubb’s candidates, namely that they were English lawyers, was generic and did not relate to M personally or to issues of a possible lack of impartiality.

Degree of overlap

81. For reasons already given, the mere fact of overlap does not give rise to justifiable doubts as to impartiality. In any event, the degree of overlap in this case was in fact very limited. References 2 and 3 were decided on the basis of a preliminary issue of law that did not arise in reference 1. The facts never had to be investigated. Further, although there was a similarity in the further issues which would otherwise have arisen (reasonableness of settlement and withholding of consent), they would have fallen for consideration in a very different factual context. In particular, in Halliburton’s case the context was before and in anticipation of the court judgment by the federal court of the Eastern District of Louisiana, whilst in Transocean’s case it was after and in knowledge of the judgment.

Financial benefit from the further Chubb appointment
82. We do not consider this to be a matter of significance, essentially for the reasons given by the judge at [20]-[21] of his judgment. In essence, the argument goes too far and would mean that a remuneration benefit which an arbitrator receives from his appointing party (even indirectly) is a disqualifying benefit. If that were so it would equally apply to party-appointed arbitrators in a single arbitration and would be wholly inconsistent with the manner in which commercial arbitration is routinely conducted. The alleged “secrecy” of the benefit adds nothing. Either the benefit is disqualifying or it is not. If it is, then objection could be made to every party-appointed arbitrator, which would be absurd.

Non-disclosure

83. The judge approached the issue of disclosure with the benefit of hindsight. Having decided that the appointment of M did not give rise to justifiable doubts as to his impartiality, he considered that it followed that there were no circumstances to disclose. For reasons already given, we agree with Halliburton that the issue of whether disclosure ought to have been made has to be addressed at the time that disclosure potentially falls to be made and not with the benefit of hindsight. In this case, it should be considered at the point M took the decision to accept the Transocean appointment.

84. The question to be asked is whether there were facts or circumstances known to M which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that M was biased. If so, M was under an obligation to disclose them.

85. The relevant facts and circumstances are M’s proposed appointment in related arbitrations and in particular reference 2, which involved Chubb alone as a common party. Halliburton submits that this should have been disclosed because of the legitimate concerns to which such appointments give rise, as addressed above.

86. As explained above, the starting point is as stated by the judge, namely that an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question. For reasons already given, viewed objectively, we do not consider that the fact of such an appointment would or might, in and of itself, justify an inference of apparent bias such as to give rise to an obligation to make disclosure.

87. We recognise, however, as Leggatt J did in the Guidant case, that in the eyes of the parties there might be cause for legitimate concern, at least in a case of substantial material overlap. From Halliburton’s perspective, such disclosure would enable it to identify potential problems and inform the arbitrator of the significance of those problems, to play a role in policing the arbitrator’s duty of impartiality, and to propose practical measures so as to prevent any potential disadvantage arising.

88. In the context of an international commercial arbitration, we accept that it is good practice for disclosure to be given in the light of party concerns such as this. Indeed, M himself recognised that disclosure would have been “prudent”. He also stressed the fact that, as matters had turned out, he had learned no factual information that would be unknown to his co-arbitrators in the Halliburton reference, thereby implicitly recognising the relevance of unknown information. Further, in so far as the IBA
Guidelines reflect international commercial arbitration practice, it is to be noted that the present case may be said to fall within the IBA Guideline Orange List 3.1.5., which calls for disclosure where an arbitrator serves in an arbitration on a related issue involving one of the parties.

89. We would therefore approach the issue of whether disclosure ought to have been made on the basis that in the context of international commercial arbitration, as a matter of good practice, such disclosure should have been made. It is then necessary to consider whether, considered at the time of the appointment, disclosure ought, as a matter of law to have been made. We bear in mind that we consider this question from an objective standpoint, even though the objective observer would realise that a party to whom disclosure was not made might reasonably have the concerns we have alluded to.

90. It was telling that counsel for Chubb accepted that 10 appointments for one party might objectively give rise to justifiable doubts as to the impartiality of the arbitrator. This was not such a case, but it was a case where M had accepted a number of appointments by Chubb or in cases involving Chubb. Chubb stressed that this had not been the basis of Halliburton’s objection to M, but the test to be applied is an objective one. Moreover, given that M had at the outset disclosed his appointments in other Chubb arbitrations, the natural expectation of the fair-minded and informed observer would be that he would do likewise in relation to any further proposed Chubb appointment. Since the question at the time that disclosure ought to have been contemplated is not whether the fact would have provided the basis for a reasonable apprehension of lack of impartiality, but whether it might have provided such a basis, this concession is, we think, important.

91. In our judgment, the fact that best practice in international commercial arbitration would have required disclosure of the other appointments, taken together with the clear possibility that other factors, such as the actual degree of overlap about which M knew little at the time and the nature of other connections, might have been argued to combine together to give the fair-minded and informed observer a basis for a reasonable apprehension of lack of impartiality. In these factual circumstances, we consider that disclosure ought, as a matter of law, to have been made. In so far as that impacts on the arbitrator’s duty of confidentiality in relation to the other arbitration, it must be regarded as being an exception to that duty, a duty which is recognised not to be absolute. The enquiry is obviously fact-intensive, but we take the view that M’s own instincts were the right ones. He recognised that it would have been “prudent” to make disclosure. His innocent oversight in failing to do so is not something for which he can be blamed, but it cannot also excuse non-disclosure of a fact that ought properly to have been disclosed on the basis of the principles we have explained.

M’s response to Halliburton’s concerns

92. M dealt with Halliburton’s concerns appropriately for all the detailed reasons given by the judge. In particular, there is no justification for criticising M for making his offer to resign conditional on the consent of Chubb. Having reached the conclusion in good faith that Halliburton’s complaints did not require him to resign, in circumstances where Chubb wished him to remain in office, it was appropriate for him to conclude that he should continue to discharge his responsibilities until the parties agreed or the court ordered otherwise. In doing so, he did not align his
interests with Chubb; even if he had, this would have been limited to the preliminary issue in references 2 and 3 and would have had no impact on reference 1.

The views of N

93. The court has to form its own judgment on the conclusion which the fair minded and informed observer would draw, on the basis of the evidence and argument presented to it, applying English law. Moreover, it is to be noted that although N has throughout been a party to these proceedings, he never expressed any concerns about the procedural fairness of the arbitration until the Award was issued, and did not dissent from the substantive decision in the Award.

Conclusions

94. We conclude that M ought as a matter of good practice and, in the circumstances of this case, as a matter of law to have made disclosure to Halliburton at the time of his appointments in references 2 and 3.

95. The question then becomes whether, at the time of the hearing to remove, the non-disclosure taken together with any other relevant factors would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that M was biased.

96. In answering this question we would in particular take the following factors into account from the perspective of the fair-minded and informed observer: (1) the non-disclosed circumstance does not in itself justify an inference of apparent bias; (2) disclosure ought to have been made, but the omission was accidental rather than deliberate; (3) the very limited degree of overlap means that this is not a case where overlapping issues should give rise to any significant concerns; (4) the fair-minded and informed observer would not consider that mere oversight in such circumstances would give rise to justifiable doubts as to impartiality; and (5) there is no substance in Halliburton’s criticisms of M’s conduct after the non-disclosure was challenged or in the other heads of complaint raised by them.


"As to a possible predisposition of the judge in His Majesty's favour, we think the observer would take the view earlier expressed by this court that 'judicial experience, by its nature, conditions the mind to independence of thought and impartiality of decision'. He would know that any judge appointed to the High Court would not be lacking in experience. We see no room for unconscious predisposition."

98. Although the Privy Council stated that they did not “take this passage to mean that the fair-minded and informed observer would discount the risk of unconscious bias in all situations”, the Prince Jefri case does illustrate that relevant experience is material to the risk of such bias. In this case, as the judge observed, M is a “well known and
highly respected international arbitrator” with very extensive experience as an arbitrator.

99. In addition, the fact that Halliburton’s concerns had been fully explained and expressed before any substantive consideration of the case by M makes such bias unlikely. M would thereby have been made conscious of the matters of which it is suggested he might otherwise have been unconscious. In the light of the objections raised, M would be likely to have done all he could to ensure that nothing that transpired in references 2 and 3 influenced in any way his approach in reference 1. In any event, due to the determination of the preliminary issue in references 2 and 3 in favour of Chubb, there was in fact no substantive overlap between these references and reference 1.

100. For all these reasons, having carefully considered both individually and collectively all the arguments advanced by Halliburton (orally and in writing), we agree with the judge’s overall conclusion that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that M was biased.

101. For the reasons outlined above, we dismiss the appeal.
MONSTER ENERGY COMPANY, FKA Hansen Beverage Company,  
Petitioner-Appellee,  

v.  

CITY BEVERAGES, LLC, DBA Olympic Eagle Distributing,  
Respondent-Appellant.  

Appeal from the United States District Court  
for the Central District of California  
R. Gary Klausner, District Judge, Presiding  

Argued and Submitted July 12, 2019  
Pasadena, California  

Filed October 22, 2019  


Opinion by Judge Milan D. Smith, Jr.;  
Dissent by Judge Friedland  

* The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.
Arbitration

The panel reversed the district court, vacated a final arbitration award between Monster Energy Co. and City Beverages LLC, doing business as Olympic Eagle Distributing, and vacated the district court’s award of post-arbitration fees to Monster Energy Co. for its petition to confirm the award.

After Monster exercised its contractual right to terminate a distribution agreement, the parties proceeded to arbitration to determine whether Olympic Eagle was entitled to protection under Washington law, and thus whether Monster had improperly terminated the agreement without good cause. The parties chose an arbitrator from a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement. At the outset of arbitration, the arbitrator provided a series of disclosure statements and in the final arbitration award, determined that Olympic Eagle did not qualify for protection under Washington law. Olympic Eagle sought to vacate the award based on later-discovered information that the arbitrator was a co-owner of JAMS—a fact that he did not disclose prior to arbitration.

The panel first rejected the claim that Olympic Eagle waived its evident partiality claim because it failed to timely object when it first learned of potential bias on the part of the arbitrator. The panel held that because Olympic Eagle did
not have constructive notice of the arbitrator’s potential non-neutrality, it did not waive its evident partiality claim.

The panel held that before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties’ acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations’ nontrivial business dealings with the parties to the arbitration. In this case, the arbitrator’s failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, created a reasonable impression of bias and supported vacatur of the arbitration award. Because the panel vacated the arbitration award, the panel also vacated the district court’s award of post-arbitration fees to Monster.

Dissenting, Judge Friedland disagreed that, in an evaluation of whether the arbitrator might favor Monster, the additional information the majority believed should have been disclosed would have made any material difference. She would therefore reject Olympic Eagle’s effort to vacate the arbitration award in Monster’s favor.

COUNSEL

City Beverages, LLC, doing business as Olympic Eagle Distributing (Olympic Eagle), and Monster Energy Co. (Monster) signed an agreement providing exclusive distribution rights for Monster’s products to Olympic Eagle for a fixed term in a specified territory. After Monster exercised its contractual right to terminate the agreement, the parties proceeded to arbitration to determine whether Olympic Eagle was entitled to protection under Washington law, and thus whether Monster had improperly terminated the agreement without good cause. From a list of several neutrals provided by JAMS, the arbitration organization specified in the agreement, the parties chose the Honorable John W. Kennedy, Jr. (Ret.) (the Arbitrator). At the outset of arbitration, the Arbitrator provided a series of disclosure statements. In the final arbitration award (the Award), the Arbitrator determined that Olympic Eagle did not qualify for protection under Washington law.

The parties filed cross-petitions in the district court, with Monster seeking to confirm the Award and Olympic Eagle moving to vacate it. The district court ultimately confirmed the Award.
We conclude, given the Arbitrator’s failure to disclose his ownership interest in JAMS, coupled with the fact that JAMS has administered 97 arbitrations for Monster over the past five years, that vacatur of the Award is necessary on the ground of evident partiality. We therefore reverse the district court and vacate the Award. We also vacate the district court’s award of post-arbitration fees to Monster for its petition to confirm the Award.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

In 2006, Olympic Eagle, an Anheuser-Busch (AB) distributor, agreed to promote and sell Monster energy drinks for twenty years in an exclusive territory. The contract permitted Monster to terminate the agreement without cause upon payment of a severance fee. Eight years later, Monster exercised its termination right and offered to pay Olympic Eagle the contractual severance of $2.5 million.

In response, Olympic Eagle invoked Washington’s Franchise Investment Protection Act (FIPA), which prohibits termination of a franchise contract absent good cause. See Wash. Rev. Code § 19.100.180(2)(j). Monster served an arbitration demand on Olympic Eagle and filed an action in the district court seeking to compel arbitration. The district court ruled in favor of Monster and compelled arbitration before JAMS Orange County, as specified by Monster in its form agreement with the AB distributors.

JAMS provided a list of seven neutrals to conduct the arbitration, and the parties chose the Arbitrator. The Arbitrator’s multi-page disclosure statement, provided to the
parties at the commencement of arbitration, contained the following provision:

I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

II. Procedural Background

Following two weeks of hearings, the Arbitrator issued an interim award, finding that Olympic Eagle was not entitled to protection under FIPA. Two months later, the Arbitrator awarded Monster attorneys’ fees (together with the interim award, the Award).

Thereafter, Monster filed a petition in the district court to confirm the Award, and Olympic Eagle cross-petitioned for its vacatur. Olympic Eagle sought to vacate the Award based on later-discovered information that the Arbitrator was a co-owner of JAMS—a fact that he did not disclose prior to arbitration. Olympic Eagle also requested information from JAMS regarding the Arbitrator’s financial interest in JAMS, and Monster’s relationship with JAMS. When JAMS refused to divulge this information, Olympic Eagle served JAMS with a subpoena. In the face of further resistance, Olympic Eagle later moved to compel JAMS’s response to the subpoena.
Ultimately, the district court confirmed the Award, denying Olympic Eagle’s cross-petition and finding its motion to compel moot. The district court then awarded Monster attorneys’ fees from both the arbitration and the post-arbitration proceedings. Judgment was entered, and Olympic Eagle timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 9 U.S.C. § 16 and 28 U.S.C. § 1291, and we review de novo the district court’s confirmation of an arbitration award. New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1105 (9th Cir. 2007).

ANALYSIS

The Federal Arbitration Act permits a court to vacate an arbitration award “where there was evident partiality . . . in the arbitrators.” 9 U.S.C. § 10(a)(2).1 Olympic Eagle seeks vacatur of the Award based on the Arbitrator’s failure to fully disclose his ownership interest in JAMS. Monster contends that the district court correctly found Olympic Eagle’s argument waived, and, alternatively, that the Arbitrator’s disclosures were sufficient. We first consider

1 Our dissenting colleague makes much of the fact that persons who litigate their claims in arbitration have voluntarily given up the extensive protections afforded to parties by the conflict of interest statutes and rules governing federal judges. However, she fails to similarly credit the fact that federal law also provides some comparable protections to parties in arbitration by also permitting courts to vacate arbitration awards when there is “evident partiality . . . in the arbitrators.” 9 U.S.C. § 10(a)(2); see infra Section II.
whether Olympic Eagle waived its evident partiality claim, and, finding that it did not, then turn to the merits.

I. Waiver

The district court held, and Monster continues to argue, that Olympic Eagle waived its evident partiality claim because it failed to timely object when it first learned of potential “repeat player” bias and the Arbitrator disclosed his economic interest in JAMS.

In *Fidelity Federal Bank, FSB v. Durga Ma Corp.* (*Fidelity*), we joined several of our sister circuits that utilize a constructive knowledge standard when considering whether a party has waived an evident partiality claim. 386 F.3d 1306, 1313 (9th Cir. 2004). There, we held that the disgruntled party was on notice that the challenged arbitrator may have been non-neutral given the process the parties employed to pick their arbitration panel: each party picked one arbitrator and the arbitrators picked the third. *Id.* Moreover, the party had failed to request disclosures from the arbitrator or object to the lack of disclosures. *Id.* Given these facts, we concluded that the party had waived its partiality objection. *Id.*

Our post-*Fidelity* waiver cases involved less complicated factual scenarios than the case before us. See *Johnson v. Gruma Corp.*, 614 F.3d 1062, 1069 (9th Cir. 2010) (finding waiver where the party knew for at least “a year or two” of the prior professional relationship between the arbitrator and opposing counsel’s spouse before the arbitrator ruled); *Metalmark Nw., LLC v. Stewart*, No. 06-35321, 2008 WL 11442024, at *1 (9th Cir. May 6, 2008) (finding no waiver because the arbitrator failed to disclose conflicts and neither party had selected the arbitrator). Unlike these prior cases, the situation here is more akin to a
partial disclosure—the Arbitrator disclosed his “economic interest” in JAMS prior to arbitration, but Olympic Eagle did not know it was an ownership interest. Although the district court correctly noted that an ownership interest is “merely a type of economic interest,” the key issue is whether Olympic Eagle had constructive notice of the Arbitrator’s potential non-neutrality.

We find that Olympic Eagle lacked the requisite constructive notice for waiver. To be sure, it knew that the Arbitrator had some sort of “economic interest” in JAMS. But the Arbitrator expressly likened his interest in JAMS to that of “each JAMS neutral,” who has an interest in the “overall financial success of JAMS.” The Arbitrator also disclosed his previous arbitration activities that directly involved Monster, in which he ruled against the company. In context, these disclosures implied only that the Arbitrator, like any other JAMS arbitrator or employee, had a general interest in JAMS’s reputation and economic wellbeing, and that his sole financial interest was in the arbitrations that he himself conducted. Thus, even if the number of disputes that Monster sent to JAMS was publicly available, that information alone would not have revealed that this specific Arbitrator was potentially non-neutral based on the totality of JAMS’s Monster-related business.

The crucial fact—the Arbitrator’s ownership interest—was not unearthed through public sources, and it is not evident that Olympic Eagle could have discovered this information prior to arbitration. In fact, JAMS repeatedly stymied Olympic Eagle’s efforts to obtain details about JAMS’ ownership structure and the Arbitrator’s interest post-arbitration. Accordingly, Olympic Eagle did not have constructive notice of the Arbitrator’s ownership interest in JAMS—the key fact that triggered the specter of partiality.
Furthermore, we have repeatedly emphasized an arbitrator’s duty to investigate and disclose potential conflicts. See, e.g., New Regency, 501 F.3d at 1110–11 (holding that the arbitrator’s new employment triggered duty to investigate possible conflicts). The Arbitrator undoubtedly knew of his ownership interest in JAMS prior to arbitration yet failed to disclose it. To find waiver in this circumstance would “‘put a premium on concealment’ in a context where the Supreme Court has long required full disclosure.” Tenaska Energy, Inc. v. Ponderosa Pina Energy, LLC, 437 S.W. 3d 518, 528 (Tex. 2014) (quoting Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982)). Thus, we hold that Olympic Eagle did not have constructive notice of the Arbitrator’s potential non-neutrality, and therefore did not waive its evident partiality claim.

II. Evident Partiality

The Supreme Court has held that vacatur of an arbitration award is supported where the arbitrator fails to “disclose to the parties any dealings that might create an impression of possible bias.” Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 149 (1968). In a concurrence, Justice White noted that when an arbitrator has a “substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed,” id. at 151–52 (White, J., concurring)—a formulation of the rule that we have adopted. See, e.g., New Regency, 501 F.3d at 1107. By contrast, we have observed that “long past, attenuated, or insubstantial connections between a party and an arbitrator” do not support vacatur based on evident partiality. Id. at 1110; see also Lagstein v. Certain Underwriters at Lloyd’s, London, 607 F.3d 634, 646 (9th Cir. 2010) (finding no evident partiality where the
the arbitrator’s alleged ethical misconduct “occurred more than a decade before th[e] arbitration and concerned neither of the parties to the case”).

In *New Regency*, we considered an arbitrator’s failure to disclose his new employment as an executive at a film group that was negotiating with one of the party’s executives for the development of a movie. 501 F.3d at 1107, 1111. Prior to the arbitration, the arbitrator disclosed only that he had “negotiated deals” with that same party’s leadership, but failed to update his disclosures once the new employment began. *Id.* at 1106. Because the film deal was “real and nontrivial,” we found a “reasonable impression of partiality [] sufficient to support vacatur.” *Id.* at 1110–11. Similarly, in *Schmitz v. Zilveti*, we vacated an arbitration award for evident partiality where the arbitrator’s law firm had represented the parent company of one party in “at least nineteen cases during a period of 35 years.” 20 F.3d 1043, 1044 (9th Cir. 1994). Thus, under our case law, to support vacatur of an arbitration award, the arbitrator’s undisclosed interest in an entity must be substantial, and that entity’s business dealings with a party to the arbitration must be nontrivial.

Here, the Arbitrator submitted a disclosure statement in accordance with JAMS’s rules. He disclosed that within the past five years he had served as a neutral arbitrator for one of the parties, firms, or lawyers in the present arbitration; that within the past two years he or JAMS had been contacted by a party or an attorney regarding prospective employment; and that he “practice[s] in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS.” The Arbitrator also disclosed that he arbitrated a separate dispute between Monster and a distributor, resulting in an award against
Monster of almost $400,000. He did not, however, disclose his ownership interest in JAMS and JAMS’s substantial business relationship with Monster.

Our inquiry is thus two-fold: we must determine (1) whether the Arbitrator’s ownership interest in JAMS was sufficiently substantial, and (2) whether JAMS and Monster were engaged in nontrivial business dealings. If the answer to both questions is affirmative, then the relationship required disclosure, and supports vacatur.

First, as a co-owner of JAMS, the Arbitrator has a right to a portion of profits from all of its arbitrations, not just those that he personally conducts. This ownership interest—which greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization—is therefore substantial. Second, Monster’s form contracts contain an arbitration provision that designates JAMS Orange County as its arbitrator. As a result, over the past five years, JAMS has administered 97 arbitrations for Monster: an average rate of more than one arbitration per month. Such a rate of business dealing is hardly trivial, regardless of the exact profit-share that the Arbitrator obtained. In sum, these facts demonstrate that the

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2 Indeed, only about one-third of JAMS neutrals are owner-shareholders.

3 Although the record does not reveal the Arbitrator’s specific monetary interest in Monster-related arbitrations, we do not require such empirical evidence to conduct the triviality inquiry. See New Regency, 501 F.3d at 1111 (finding that a “high-profile” project was not unimportant, even though “the record [did] not allow us to place a dollar value” on it); Schmitz, 20 F.3d at 1044, 1048 (finding generally that an arbitrator’s firm’s representation on nineteen cases in 35 years resulted in impression of impartiality).
Arbitrator had a “substantial interest in [JAMS,] which has done more than trivial business with [Monster]”—facts that create an impression of bias, should have been disclosed, and therefore support vacatur. Commonwealth Coatings, 393 U.S. at 151–52 (White, J., concurring).

We acknowledge that previous cases did not address an arbitrator’s interest in his own arbitration service. Nonetheless, the Court did not distinguish between an arbitrator’s organization and other entities, nor do we see any reason to insulate arbitration services from the principles that the Court articulated Commonwealth Coatings.

Some states within our circuit have already legislated extensive requirements for neutral arbitrators to ensure full disclosure. In California, for example, arbitrators are required to disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be impartial,” including the “existence of any ground specified in [Cal. Civ. Proc. Code § 170.1] for disqualification of a judge.” Cal. Civ. Proc. Code § 1281.9(a). Similarly, Montana requires arbitrators to disclose “all matters that could cause a person aware of the facts underlying a potential conflict of interest to have a reasonable doubt that the person would be able to act as a neutral or impartial arbitrator,” including any ground for the disqualification of a judge. Mont. Code Ann. §§ 27-5-116(3)–(4).

In addition, under the Revised Uniform Arbitration Act (the RUAA), which has been adopted by several states in our circuit, an arbitrator must disclose “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator,” including a financial interest in the outcome of the proceeding. See, e.g., Or. Rev. Stat. Ann. § 36.650(1)(1). The RUAA also establishes a
presumption of evident partiality when the arbitrator does not disclose a “known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party . . . .” See, e.g., Ariz. Rev. Stat. Ann. § 12-3012(E).

In the states that have enacted the referenced measures, arbitrators currently operate under disclosure rules akin to, or more burdensome than, the easily satisfied obligations we set forth here. Fundamentally, these disclosure requirements safeguard the parties’ right to be aware of the relevant information to assess the arbitrator’s neutrality.

We note that although judges are bound by somewhat different rules than arbitrators, judges are clearly not immune from recusal requirements when our neutrality might be reasonably questioned. See, e.g., Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009) (“The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that the Due Process Clause requires recusal when a judge has a “direct, personal, substantial pecuniary interest” in a case). Unlike the standards governing judges, however, our ruling in this case does not require automatic disqualification or recusal—only disclosure prior to conducting an arbitration concerning (1) the arbitrator’s ownership interest, if any, in the entity under whose auspices the arbitration is conducted, and (2) whether the entity under whose auspices the arbitration is conducted and one or more of the parties were previously engaged in nontrivial business dealings. Once armed with that information, and the answers to any other inquiries the parties may wish to pose as a result of knowing that information, the parties can make their own
informed decisions about whether a particular arbitrator is likely to be neutral. It is simplicity itself, and no real burden, for an arbitrator to disclose his or her ownership interest in an arbitration company for which he or she works, as well as the organization’s prior dealings with the parties to the arbitration.

Although this litigation involved two sophisticated companies, the proliferation of arbitration clauses in everyday life—including in employment-related disputes, consumer transactions, housing issues, and beyond—means that arbitration will often take place between unequal parties. See Katherine Van Wezel Stone, _Rustic Justice: Community and Coercion Under the Federal Arbitration Act_, 77 N.C. L. Rev. 931, 934 (1999); see also _Aspic Eng’g & Constr. Co. v. ECC Centcom Constructors, LLC_, 913 F.3d 1162, 1169 (9th Cir. 2019) (noting, “We have become an arbitration nation.”). Clear disclosures by arbitrators aid parties in making informed decisions among potential neutrals. These disclosures are particularly important for one-off parties facing “repeat players.” See Lisa B. Bingham, _Employment Arbitration: The Repeat Player Effect_, 1 Emp. Rts. & Emp. Pol’y J. 189, 209–17 (1997) (finding that employees disproportionately failed to recover damages against repeat-player employers compared to non-repeat-player employers).

Ultimately, we agree with Justice White:

The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the
The arbitrator of any financial transactions which he has had or is negotiating with either of the parties... The judiciary should minimize its role in arbitration as judge of the arbitrator’s impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

*Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring).

In accordance with the interest of finality, judicial review of arbitration awards is often unexacting. However, the Supreme Court has nonetheless clearly endorsed the judicial enforcement of an arbitrators’ duty to disclose. Placing the onus on arbitrators to disclose their ownership interests in their arbitration organizations, and their organizations’ nontrivial business dealings with the parties to the arbitration, is consistent with both the principles of *Commonwealth Coatings* and our court’s precedents.

Although our dissenting colleague raises concerns about the finality of recent arbitral judgments in light of our ruling in this case, she correctly notes that the applicable statute of limitations to vacate an arbitration award, *which is only three months*, will limit the impact of our ruling on recently decided arbitrations. 9 U.S.C. § 12; *Stevens v. Jiffy Lube Int’l, Inc.*, 911 F.3d 1249, 1251–52 (9th Cir. 2018). Prospectively, arbitration organizations like JAMS, which are already well-accustomed to extensive conflicts checks and disclosures, will have no difficulty fulfilling, and even exceeding, the requirements described here.
CONCLUSION

As the Commonwealth Coatings Court stated, “We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.” 393 U.S. at 149. We thus hold that before an arbitrator is officially engaged to perform an arbitration, to ensure that the parties’ acceptance of the arbitrator is informed, arbitrators must disclose their ownership interests, if any, in the arbitration organizations with whom they are affiliated in connection with the proposed arbitration, and those organizations’ nontrivial business dealings with the parties to the arbitration.

Here, the Arbitrator’s failure to disclose his ownership interest in JAMS—given its nontrivial business relations with Monster—creates a reasonable impression of bias and supports vacatur of the arbitration award. Because we vacate the arbitration award, we also vacate the district court’s award of post-arbitration fees to Monster.4

REVERSED and VACATED.

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4 We further deny Olympic Eagle’s request to take judicial notice and grant Monster’s request to take judicial notice. We deny the amicus motions filed by the Legal Academics and Eric Kripke. We find moot the amicus motion filed by Warner Bros. We grant the amicus motion filed by the National Beer Wholesalers Association, finding it relevant and useful. See Fed. R. App. P. 29(a)(3)(B).
FRIEDLAND, Circuit Judge, dissenting:

The majority vacates the arbitration award for “evident partiality” because the Arbitrator failed to disclose that he had an ownership interest in JAMS. In the majority’s view, this undisclosed fact was necessary for the parties’ informed selection of this Arbitrator because it creates an impression that differs meaningfully from that created by the facts the Arbitrator did disclose: (1) that he had a financial interest in JAMS’s success generally, and (2) that Monster was a repeat customer of JAMS. I disagree that, in an evaluation of whether the Arbitrator might favor Monster, the additional information the majority believes should have been disclosed would have made any material difference. I would therefore reject Olympic Eagle’s effort to vacate the arbitration award in Monster’s favor.

I.

The Framers of our Constitution built protections against judicial partiality into Article III. Federal judges have life tenure and may not have their salaries diminished while in office. U.S. Const. art. III, § 1. As federal employees, federal judges receive their salaries from the government, not from the parties who appear before them. These structural protections are designed to help ensure that federal judges will decide cases based on the law and the facts, not out of concern about remaining popular enough to be selected to decide the next case or to receive the next paycheck. See The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that Article III’s provision of life tenure is meant “to secure a steady, upright, and impartial administration of the laws”).

When parties like those here, who could have their disputes resolved in federal court, instead have entered into
a contract that requires resolving any disputes in private arbitration (whether the arbitration term was desired by both parties or not), they have given up those Article III protections. See Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) (explaining that parties to a commercial arbitration have “cho[sen] their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen”). By nature of the fact that arbitrators are hired and paid by the parties for whom they conduct private arbitrations, arbitrators have an economic stake in cultivating repeat customers for their services. In addition, arbitrators affiliated with an arbitration firm have an interest in not causing the firm to lose its top clients. At least to some extent, this means arbitrators have incentives to make decisions that are viewed favorably by parties who frequently engage in arbitrations. This feature of private arbitration, even if distressing, is an inevitable result of the structure of the industry.

In this case, the Arbitrator disclosed that he had a financial interest in JAMS’s success. He further disclosed that he had personally conducted one arbitration in which Monster was a party and had been selected to decide another case involving Monster and a different distributor. And he made clear that “the parties should assume that one or more of the other neutrals who practice with JAMS has participated in [a] . . . dispute resolution proceeding with the parties . . . in this case and may do so in the future.” Olympic Eagle also knew that Monster used a form contract with its hundreds of distributors requiring that disputes be resolved

1 Individual arbitrators may be able to put these incentives out of their minds and make impartial decisions, but the incentives exist nonetheless.
through arbitration before JAMS—and therefore had even more reason to know that Monster had likely hired other JAMS arbitrators or at least had the potential to do so in the future. Indeed, the parties had litigated about the form contract, and the district court had held that Olympic Eagle had validly agreed to its terms, a ruling Olympic Eagle has not appealed. And before the arbitration began, Olympic Eagle could easily have accessed an online record showing that JAMS had conducted dozens of arbitrations between Monster and its consumers.3 See Consumer Case Information, JAMS, https://www.jamsadr.com/consumercases/ (last visited Oct. 11, 2019); see also Cal. Code Civ. Proc. § 1281.96 (requiring arbitration companies to disclose information about their consumer arbitrations).

This was more than enough information to allow Olympic Eagle to consider whether the Arbitrator might

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2 It is unclear the extent to which a JAMS arbitrator would have had a similarly strong incentive to please Olympic Eagle, itself a large beverage distribution company. There appears to be nothing in the record that indicates whether Olympic Eagle was a repeat customer of JAMS or how frequently it engages in arbitrations. But it is possible that a JAMS arbitrator would have had an incentive to please the lawyers representing Olympic Eagle, given that lawyers often help their clients choose arbitrators. According to a court filing submitted by Monster, an international law firm that helped represent Olympic Eagle in this dispute with Monster had represented parties in at least twenty-three other cases involving arbitration with JAMS.

have had an incentive to try to please Monster and thereby keep its repeat arbitration business. The majority reasons, however, that the Arbitrator’s interest as a JAMS owner should have been specifically disclosed because it “greatly exceeds the general economic interest that all JAMS neutrals naturally have in the organization.” Maj. Op. at 12. I do not see how this information would have made a material difference in Olympic Eagle’s evaluation of the Arbitrator. Owners of JAMS have an interest in maximizing JAMS’s amount of business, because they share in JAMS’s profits. Likewise, non-owner arbitrators have an interest in advancing their professional careers and maintaining their status with JAMS, which creates similar incentives to decide cases in a way that is acceptable to repeat player customers—otherwise, JAMS might terminate the non-owner’s JAMS affiliation.

Notably, by the time the Arbitrator was being selected, Olympic Eagle had committed to resolving any dispute with Monster through arbitration at JAMS. This necessarily meant that Olympic Eagle agreed the arbitration would be conducted by a JAMS arbitrator, whether that arbitrator was an owner of JAMS or a non-owner of JAMS. Because both types of arbitrators would have at least some incentive to keep repeat customers of JAMS such as Monster happy, it is unclear why knowing the details of the financial relationship between any specific potential arbitrator and JAMS would make a material difference to whether that arbitrator was accepted by Olympic Eagle.4 That an arbitrator has an

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4 The majority also highlights that the Arbitrator failed to disclose more concrete information about Monster’s past use of JAMS. Maj. Op. at 12. To the extent the majority believes this nondisclosure further supports vacating the arbitration award, compare Maj. Op. at 12 (noting the Arbitrator did not disclose “JAMS’s substantial business relationship
ownership interest in the arbitration firm, not just a financial interest in that firm more generally, is hardly the sort of “real” and “not trivial” undisclosed conflict that our court has held requires vacatur. See New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1110 (9th Cir. 2007) (quotation marks omitted).

The majority also leaves unclear how detailed an arbitrator’s disclosures must be. Is it enough to reveal the fact that the arbitrator is an owner, or must the arbitrator disclose information such as how large the ownership interest is? Is it necessary to disclose the arbitration firm’s total profits from the prior year—or maybe each year in the prior decade—so parties may assess, for example, whether the business of the party in question is significant overall? And how many prior arbitrations must a corporation have engaged in with an arbitration firm for there to be “nontrivial business dealings,” Maj. Op. at 14, that require disclosure?5

with M onster”), with Maj. Op. at 17 (emphasizing “the Arbitrator’s failure to disclose his ownership interest in JAMS,” and the existence of JAMS’s “nontrivial business relations with Monster,” but not mentioning the Arbitrator’s nondisclosure of those “business relations”), I disagree. Given that owners and non-owners have similar incentives to favor repeat players, the extent of a repeat player’s relationship with the firm as a whole—which would not vary from arbitrator to arbitrator—would be of little help in deciding whether to choose any particular arbitrator. And even if the Arbitrator did not disclose precise details, he did disclose that Monster was a repeat customer.

5 The majority indicates that generally, if an arbitrator has an ownership interest in his firm, and his firm has significant prior dealings with a party, both pieces of information must be disclosed. It is unclear, however, whether the majority’s approach requires an arbitrator to disclose significant prior dealings even if he has no ownership interest, and vice-versa. Compare Maj. Op. at 17 (stating that “arbitrators must disclose their ownership interests, if any” and their firm’s “nontrivial
Does the fee paid for each of these prior arbitrations need to exceed any threshold to trigger disclosure? And, because lawyers often choose or help choose arbitrators, giving arbitrators an incentive to please lawyers who bring clients to arbitrations, must prior arbitrations with the lawyers or law firms representing the parties also be disclosed?

As these lingering questions demonstrate, ruling for Olympic Eagle is likely to generate endless litigation over arbitrations that were intended to finally resolve disputes outside the court system. Nothing in existing caselaw forces this error. Olympic Eagle has not pointed us to a single reported federal decision holding that an undisclosed potential source of bias stemming from the structure of the private arbitration industry itself warrants vacating an arbitration award. The majority acknowledges as much by conceding that there are no prior cases directly on point. Rather, the precedent binding us that vacated arbitration awards because of a failure to disclose information involved an arbitrator who had a relationship with one of the arbitrating parties that was totally unrelated to prior arbitrations. See Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 146, 149–50 (1968) (arbitrator failed to disclose that he had occasionally served as an engineering consultant for one of the parties over several years); New Regency Prods., 501 F.3d at 1107–11 (arbitrator failed to disclose his employment with a company negotiating a film deal with one of the parties to the arbitration); Schmitz v. Zilveti, 20 F.3d 1043, 1044, 1048–50 (9th Cir. 1994) (arbitrator failed to disclose that his law firm represented in at least nineteen matters a parent company of one of the arbitrators).

business dealings with the parties to the arbitration” (emphasis added)), with Maj. Op. at 12 (suggesting that disclosure is only required if there is both an ownership interest and substantial business dealings).
parties to the arbitration). There is no reason the parties would know about the potential partiality arising from such a relationship unless the arbitrator disclosed the relationship. By contrast, the potential partiality that stems from the very structure of private arbitration is obvious to anyone who understands arbitrators’ general economic interest in repeat business for themselves or their firm.

In the short run, adopting Olympic Eagle’s position will require vacating awards in numerous cases decided by JAMS owners (who make up about a third of JAMS arbitrators) who did not disclose their ownership interest. 6 If there are other firms where arbitrators similarly hold ownership interests, the majority’s approach will likewise require vacatur in those arbitrators’ cases with repeat players unless there was a disclosure of the ownership interest.

In the long run, adopting Olympic Eagle’s position could spur years of quibbling over the extent of disclosures required by arbitrators. And this slippery slope may have no bottom. If the losing party to an arbitration is less of a repeat player than its opponent, it will likely be able to think up after the fact some argument that an arbitrator’s disclosure did not fully convey the arbitrator’s financial interest in the potential future arbitration business of the winning party or its lawyers. The result will be to prolong disputes that both parties have already spent tremendous amounts of time and money to resolve. Olympic Eagle, for example, only

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6 Of course, the statute of limitations for filing a motion to vacate an arbitration award may place a limit on how much litigation there will be. See 9 U.S.C. § 12; Stevens v. Jiffy Lube Int’l, Inc., 911 F.3d 1249, 1251–52 (9th Cir. 2018) (discussing statute of limitations for petitions to vacate arbitration awards).
objected to the Arbitrator’s lack of disclosure after it lost the arbitration. By that point, more than a year had passed since the district court compelled arbitration, and the agreed-upon Arbitrator had conducted a hearing lasting nine days. The arbitration fee alone was $160,000, and Monster was awarded $3 million in attorney’s fees and costs. 7 To avoid the uncertainty created by the majority’s opinion, which would inevitably exist even after further disclosures are attempted, parties may shift to using arbitrators who are unaffiliated with any arbitration firm. These arbitrators may be less likely to have expertise—but be at least equally likely to want to retain the business of potential repeat customers. Cf. ANR Coal Co., Inc. v. Cogentrix of N.C., Inc., 173 F.3d 493, 498–99 (4th Cir. 1999) (“[S]ubjecting arbitrators to extremely rigorous disclosure obligations would diminish one of the key benefits of arbitration: an arbitrator’s familiarity with the parties’ business.” (citing Commonwealth Coatings, 393 U.S. at 150 (White, J., concurring))).

Although I would affirm the Arbitrator’s award in favor of Monster, I note that lack of disclosure about a party’s prior arbitrations might require vacatur in some instances. For

7 Ruling for Olympic Eagle could also lay the groundwork for further disputes over whether arbitrators with ownership interests have a conflict that disqualifies them under state law from arbitrating cases involving a repeat player. See Cal. Code Civ. Proc. § 1281.91(d) (allowing for disqualification under certain circumstances, including those described in Cal. Code Civ. Proc. § 170.1(a)(6)(A)(iii)—when “[a] person aware of the facts might reasonably entertain a doubt that the [decision-maker] would be able to be impartial”); see also Alaska Stat. § 09.43.380(b) (“An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding . . . may not serve as an arbitrator required by an agreement to be neutral.”); Ariz. Rev. Stat. Ann. § 12-3011(B) (same); Haw. Rev. Stat. § 658A-11(b) (same); Nev. Rev. Stat. § 38.226(2) (same).
example, if one of the parties had used the exact same arbitrator to resolve numerous disputes, and the arbitrator always ruled in its favor, vacatur might be appropriate based on the arbitrator’s failure to disclose that arbitration history. But the facts of this case are nowhere near so extreme. The Arbitrator had previously decided one dispute between Monster and a distributor, and that proceeding resulted in an award of almost $400,000 against Monster. The Arbitrator had also been selected to decide a dispute between Monster and another distributor, which was still pending at the time of the arbitration involving Monster and Olympic Eagle. The disclosure the Arbitrator made to the parties provided accurate information about both arbitrations.

II.

To the extent that the private arbitration system favors repeat players, I think it is unfortunate that so many parties forgo the protections of Article III and turn to arbitration instead. It is especially unfortunate when arbitrations involve a non-repeat player party that had no choice but to agree to arbitration in order to acquire employment, purchase a product, or obtain a necessary service. The majority laudably seeks to mitigate disparities between repeat players and one-shot players in the arbitration system. But I disagree that requiring disclosures about the elephant that everyone knows is in the room will address those disparities. It will only cause many arbitrations to be re-done, and endless litigation over how many repeated arbitrations there will be.

I therefore respectfully dissent.
COURT OF APPEAL FOR ONTARIO

CITATION: Heller v. Uber Technologies Inc., 2019 ONCA 1

DATE: 20190102

DOCKET: C65073

Feldman, Pardu and Nordheimer JJ.A.

BETWEEN

David Heller

Plaintiff (Appellant)

and


Defendants (Respondents)

Michael Wright, Danielle Stampley, Lior Samfiru, Stephen Gillman and James Omran, for the appellant

Lisa Talbot and Sarah Whitmore, for the respondents

Heard: November 27, 2018

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated January 30, 2018, with reasons reported at 2018 ONSC 718.

Nordheimer J.A.:

[1] The plaintiff appeals from the order of the motion judge that stayed the plaintiff’s action in favour of arbitration.

I: Background

[2] The appellant resides in Ontario. He has been licenced to use the Uber Driver App since February 2016.[1] The appellant has used the Driver App to provide food delivery services to people in Toronto. He has never used the Driver App to provide personal transportation services. The appellant is 35 years old and has a high school education. He earns approximately $400 to $600 per week based on 40 to 50 hours of work delivering food for UberEATS driving his own vehicle.

[3] The appellant commenced this proposed class action on behalf of “[a]ny person, since 2012, who worked or continues to work for Uber in Ontario as a Partner and/or independent contractor, providing any of the services outlined in Paragraph 4 of the Statement of Claim
pursuant to a Partner and/or independent contractor agreement” (the “Class” or “Class Members”). The Class Members provide food delivery services and/or personal transportation services using various Uber Apps. For convenience, I will refer to them collectively as “drivers” below.

[4] In his proposed class action, the appellant seeks a declaration that drivers in Ontario, who have used the Driver App to provide food delivery and/or personal transportation services to customers, are employees of Uber and governed by the provisions of the Employment Standards Act, 2000, S.O. 2000, c. 41 (the “ESA”). The claim seeks declarations that Uber has violated the provisions of the ESA and that the arbitration provisions of the services agreements entered into between the parties are void and unenforceable. The action also claims damages of $400 million.

[5] Uber App users (drivers and customers) download the Uber Apps to their smartphones. Uber uses GPS to connect customers seeking personal transportation using an App for riders (the “Rider App”) with drivers using an App developed for drivers (the “Driver App”). The Rider App allows riders to request rides at their location, track the driver on the way to the location and then rate the driver after the ride is completed.

[6] The UberEATS App allows customers seeking food delivery to order food from restaurants and have it delivered by a nearby driver. The App displays each restaurant’s menu, collects each customer’s order and transmits the orders to the restaurants. The restaurant updates the App as the food is prepared. Then the App signals to a nearby driver that a delivery is available. Drivers willing to deliver the order accept through the App, which provides his or her identifying information to the restaurant and the customer. After delivering the food, the driver confirms the delivery in the App, which collects the customer’s payment and remits payment to the restaurant.

[7] Uber requires drivers to create an account online to access the Apps. After downloading the Driver App, Uber requires drivers in Ontario (performing services by car) to provide copies of the following documents: (i) a valid driver’s license; (ii) a valid vehicle registration; (iii) proof of eligibility to work in Canada; and (iv) valid insurance. After reviewing and verifying the drivers’ documentation and screening results, Uber activates their account.

[8] The first time a driver logs into the Uber App, he or she must accept a services agreement, which appears on the smartphone screen. Drivers accept by clicking “YES, I AGREE”, and confirming acceptance by again clicking “YES, I AGREE” after reading the following: “PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS.” Uber’s January 4, 2016 Driver service agreement with the appellant is 14 pages. The November 29, 2016 UberEATS service agreement with the appellant is 15 pages.

[9] Uber determines the maximum fares drivers receive for their work according to a base fare amount plus distance (based on GPS data obtained through the App), plus applicable time amounts. Uber collects the fares from customers, provides customers with a receipt, and remits payment periodically to drivers, less Uber’s fees.
[10] Drivers can report complaints to Uber through the Apps. Customer Service Representatives (“CSRs”) in the Philippines first receive the complaints. If unresolved, they escalate the complaints to CSRs in Chicago, then to Uber’s legal team. Drivers may also attend in Ontario at an Uber “Greenlight Hub”, which is a support centre staffed with Uber employees, to ask for assistance, although the appellant says that the staff there will likely only refer the driver back to the App for assistance.

[11] The appellant entered into a Driver services agreement with Rasier Operations B.V. on June 7, 2016, and an UberEATS services agreement on December 15, 2016. Each agreement contains the following arbitration clause (the “Arbitration Clause”):

Governing Law; Arbitration. Except as otherwise set forth in this Agreement, this Agreement shall be exclusively governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws. . . . Any dispute, conflict or controversy howsoever arising out of or broadly in connection with or relating to this Agreement, including those relating to its validity, its construction or its enforceability, shall be first mandatorily submitted to mediation proceedings under the International Chamber of Commerce Mediation Rules (“ICC Mediation Rules”). If such dispute has not been settled within sixty (60) days after a request for mediation has been submitted under such ICC Mediation Rules, such dispute can be referred to and shall be exclusively and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC Arbitration Rules”). . . . The dispute shall be resolved by one (1) arbitrator appointed in accordance with ICC Rules. The place of arbitration shall be Amsterdam, The Netherlands. . . .

[12] Under the ICC Mediation Rules, drivers must pay a US$2,000 non-refundable filing fee to initiate mediation proceedings against Uber. For disputes valued under US$200,000, drivers must pay an additional administrative fee, which may be as much as US$5,000. These fees do not cover the mediator’s fees or legal fees.

[13] If the parties are unable to resolve their dispute through mediation within 60 days, they must proceed to arbitration under the ICC Arbitration Rules. A driver, and any party wishing to join the arbitration, must each pay a US$5,000 filing fee.

[14] Article 37 of the ICC Arbitration Rules requires the parties to pay an advance on costs “in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties”. The payment must be in cash, unless a party’s share of the fees and expenses is greater than US$500,000, in which case the party may post a bank guarantee. The initial US$5,000 filing fee is credited against the claimant’s portion of this advance but is non-refundable. The administrative fee component of this advance is at least US$2,500 per party for disputes valued at under US$200,000. These fees do not cover counsel fees, travel or other expenses related to participating in the arbitration.

[15] Accordingly, the up-front administrative/filing-related costs for a driver to participate in the mediation-arbitration process in the Netherlands prescribed in the Arbitration Clause is
US$14,500. As an UberEATS driver, the appellant earns about $20,800-$31,200 per year, before taxes and expenses.

II: The decision below

[16] The motion judge granted Uber's motion to stay the action in favour of arbitration. In so doing, the motion judge determined that the dispute is both international and commercial, such that the International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5 (the “ICAA”) and not the Arbitration Act, 1991, S.O. 1991, c. 17 (the “Arbitration Act, 1991”) applied. However, the motion judge noted, at para. 35, that "ultimately not much turns on this point," because the appellant was unable to demonstrate that the exceptions under either Act warranted a denial of Uber's stay motion.

[17] Applying the Supreme Court of Canada's decision in Seidel v. TELUS Communications Inc., 2011 SCC 15, [2011] 1 S.C.R. 531 and this court's decision in Wellman v. TELUS Communications Company, 2017 ONCA 433, 138 O.R. (3d) 413, the motion judge held that courts must enforce arbitration agreements freely entered into, even in contracts of adhesion. Any restriction on the parties' freedom to arbitrate must be found in the legislation.

[18] The motion judge then concluded that the plain language of the ESA does not restrict the parties from arbitrating. He also concluded that the arbitrability of employment agreements was not a question of pure statutory interpretation but instead raised a "complex issue of mixed fact and law," one for the arbitrator to decide at first instance under the competence-competence principle. Finally, the motion judge rejected the unconscionability exception that the appellant advanced under both the Arbitration Act, 1991 and the ICAA.

III: Analysis

[19] I begin with a brief analysis of the standard of review applicable to the motion judge’s decision. In my view, the standard of correctness applies to his decision for two reasons. One is that the central questions raised, including the proper application of the provisions of either the Arbitration Act, 1991 or the ICAA are questions of law: Trade Finance Solutions Inc. v. Equinox Global Limited, 2018 ONCA 12, 420 D.L.R. (4th) 273, at para. 31. The other is that the court is being called upon to interpret a standard form contract, notably a contract of adhesion, that has ramifications beyond just the case at hand and thus the correctness standard also applies: Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 46.

[20] For the reasons that follow, I have concluded that the motion judge erred in granting a stay of this action in favour of arbitration. In particular, the motion judge erred in principle in his analysis of the existing authorities on the issue of when it is appropriate to grant a stay in favour of an arbitration provision contained in a contract of adhesion.

[21] While I have serious reservations about the motion judge’s conclusion that the relationship between the parties here is a commercial one, since I agree with the motion judge that nothing much turns on whether the ICAA or the Arbitration Act, 1991 applies to the Arbitration Clause in issue, I do not intend to deal with that issue. I will deal with the other issues in these reasons using the Arbitration Act, 1991 since it is the more commonly referred
to statute on these matters. I note that neither party suggested that the result would differ depending on which statute applies. I add that I would reach the same conclusions if I applied the ICAA.

[22] As a result, there are two issues that fall to be determined: (i) whether the Arbitration Clause amounts to an illegal contracting out of the ESA and is thus invalid and (ii) whether the Arbitration Clause is unconscionable and thus invalid on that separate basis.

(i) Contracting out

[23] Section 7(1) of the Arbitration Act, 1991, provides that, if a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court shall stay the proceeding. However, there are a number of exceptions to that mandatory requirement that are found in s. 7(2). One of those exceptions is where the arbitration agreement is invalid.[2] Here the appellant says that the Arbitration Clause is invalid because it amounts to a contracting out of the ESA that is, itself, prohibited by the ESA.

[24] It is not necessary, in deciding the issues raised, to determine whether the appellant (and others like him) are employees rather than independent contractors. That is the core issue that is to be decided in the action, if it proceeds. Rather, what must be decided is whether the Arbitration Clause is invalid such that the mandatory stay under s. 7(1) of the Arbitration Act, 1991 does not apply.

[25] In determining that issue, I begin with the structure of the Arbitration Act, 1991 to which I just referred. The structure of the statute, on the issue of a stay of proceedings in favour of arbitration, is that a court must grant a stay unless one of the five exceptions in s. 7(2) applies. If one of those exceptions applies, then the court has a discretion whether or not to grant a stay.

[26] What is clear from the structure of the Arbitration Act, 1991 is that it is the court that is charged with making the determination whether one of the exceptions in s. 7(2) applies so that the issue of whether to grant a stay becomes a discretionary decision, not a mandatory one.[3] It is not the arbitrator who makes that call, it is the court – a point that I will discuss in more detail below.

[27] Turning to the exceptions then, it seems to me that one must start with the presumption that the appellant can prove that which he pleads, that is, that he is an employee of Uber. This is a preliminary motion in a proceeding and, like many other preliminary challenges to the court’s jurisdiction to entertain a claim, the court normally proceeds on the basis that the plaintiff’s allegations are true or, at least, capable of being proven. I note that this is the approach that was taken in Seidel where Binnie J. said, at para. 8:

I should flag at the outset two issues that this appeal does not decide. Firstly, of course, Ms. Seidel’s complaints against TELUS are taken to be capable of proof only for the purposes of this application. We are not assuming the allegations will be proven, let alone deciding that TELUS did in fact engage in the conduct complained of.
[28] The question then becomes, if the appellant (and those like him) is an employee of Uber, does the Arbitration Clause constitute a prohibited contracting out of the ESA? If it does, then the Arbitration Clause is invalid, the mandatory stay under s. 7(1) does not apply, and the court may then deny a stay under s. 7(2).

[29] In determining that question, heed must be taken of s. 5 of the ESA:

(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[30] Under s. 1(1) of the ESA, an employment standard is defined as follows:

“employment standard” means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee.

[31] As earlier noted, in his proposed class action, the appellant contends that he and his fellow drivers are employees of Uber. If they are employees, then they are covered by the ESA and are entitled to the benefits provided by the ESA. Most importantly, for the purposes of this matter, if they are employees, then they are not bound by any contractual term that purports to oust those benefits.

[32] Included in the benefits provided by the ESA is the right of an employee to make a complaint to the Ministry of Labour that his/her employer has contravened the ESA, pursuant to s. 96(1) of the ESA:

A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

[33] Only two restrictions on that right appear in the ESA. One is in s. 98, which provides that an employee who commences a civil proceeding may not concurrently make a complaint that raises the same issue as the civil proceeding. The other is in s. 99(2), which precludes an employee who is a member of a trade union from making a complaint. The latter, of course, does not apply to the appellant. With respect to the former, I do not accept the submission of Uber that a civil proceeding includes an arbitration. There is no reason to interpret the term “civil proceeding” in that fashion. Indeed, the Courts of Justice Act, R.S.O. 1990, c. C.43, which applies to all civil proceedings in Ontario, defines both actions and applications as civil proceedings. Notably it does not mention arbitrations. The definitions of actions and applications in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 take the same approach.

[34] Further, there is nothing in the ESA that suggests that there was any intention to include arbitrations within the usual meaning of the term “civil proceeding”. Indeed, certain provisions suggest a contrary conclusion. One is s. 8(2) that requires an employee who commences a
civil proceeding to give notice of that fact to the Director of Employment Standards. It would seem odd that notice of an arbitration (which is normally private) would have to be given to the Director but that would be the result if arbitrations are included in civil proceedings. In fact, s. 8(2), which requires that notice be given to the Director “before the date the civil proceeding is set down for trial”, also seemingly equates civil proceedings with actions. Another is s. 101(1) which refers specifically to “a proceeding before an arbitrator” and thus appears to draw a distinction between that form of proceeding and what the ESA otherwise refers to as a “civil proceeding”. In any event, what is clear is that the restriction in s. 98 does not apply to the circumstances of this case.

[35] If an employee makes a s. 96 complaint, then an Employment Standards Officer (“ESO”) must investigate the complaint. The ESO has certain rights and authorities when doing so. By way of example, under s. 102(1) of the ESA, the ESO may require the employee and the employer to attend a meeting with the ESO. The ESO may also require persons to produce documents under s. 102(4). And, in the end result, the ESO may, pursuant to s. 103, issue an order to pay wages against the employer if a contravention of the ESA has occurred.

[36] In my view, this investigative process constitutes an employment standard as that term is defined in the ESA. The investigative process, once triggered, is mandated by the ESA and both the employee and, more importantly the employer, are required to participate in that process. The process is thus a “requirement” that “applies to an employer for the benefit of an employee” and, accordingly, meets the definition of an employment standard. In reaching this conclusion, I read the words, used in the definition of employment standard, in their grammatical and ordinary sense: Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21.

[37] Uber argued, at the hearing, that s. 96 is not an “employment standard” because, in allowing employees to make a complaint to the Ministry of Labour, it does not establish a “requirement or prohibition...that applies to an employer”. There are two problems with this submission. First, it extracts s. 96 from the relevant statutory context and treats it as a stand-alone provision, contrary to the modern approach to statutory interpretation adopted by the Supreme Court of Canada in Rizzo. Second, it invites an unduly narrow interpretation of s. 96 which would, if accepted, authorize employers to contract their employees out of s. 96, and thus out of the entire investigative process, without offending s. 5(1). That outcome would undermine the protective purpose of the ESA. It would also run afoul of the Supreme Court of Canada’s directive regarding the interpretative approach to be taken to the ESA. As Iacobucci J. said in Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986 at p. 1003:

The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards...Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.

[38] I return then to the point that it is for the court to decide whether the exceptions in s. 7(2) of the Arbitration Act, 1991 apply when an order for a stay of a proceeding is sought. Uber argues that this is an issue for the arbitrator to determine because it is an issue going to the
jurisdiction of the arbitrator. Uber invokes the “competence-competence” principle in support of its position.

[39] I do not agree with Uber’s position because, in my view, this issue is not about jurisdiction. I am aware of the general approach that any dispute over an arbitrator’s jurisdiction should first be determined by the arbitrator but that addresses situations where the scope of the arbitration is at issue. That is not this case. There does not appear to be any dispute that, if the Arbitration Clause is valid, the appellant’s claim would fall within it. Rather, the issue here is the validity of the Arbitration Clause. The answer to that question is one for the court to determine as s. 7(2) of the Arbitration Act, 1991 makes clear.

[40] In light of that conclusion, the competence-competence principle has no application to this case and, consequently, I do not need to address the arguments made with respect to it.

[41] Given my conclusion regarding the meaning of “employment standard”, it follows that the Arbitration Clause constitutes a contracting out of the ESA. It eliminates the right of the appellant (or any other driver) to make a complaint to the Ministry of Labour regarding the actions of Uber and their possible violation of the requirements of the ESA. In doing so, it deprives the appellant of the right to have an ESO investigate his complaint. This is of some importance for, among other reasons, if a complaint is made then the Ministry of Labour bears the burden of investigating the complaint. That burden does not fall on the appellant. Under the Arbitration Clause, of course, the appellant would bear the entire burden of proving his claim.

[42] I am aware that the appellant has not, in fact, chosen to make a complaint under the ESA but rather has commenced this proposed class action. That fact does not alter the analysis, however, for a few reasons. The first reason is that, if the Arbitration Clause offends s. 5(1) because it contracts out of the investigative process, the provision is invalid, irrespective of what the appellant does or does not do.

[43] A second reason is that it is the appellant’s right, under the ESA, to avail himself of the “civil proceeding” exception to the complaint process. It is his choice whether to take that route, and he is only barred from making a complaint if he chooses to take it. The Arbitration Clause essentially transfers that choice to Uber who then forces the appellant (and all other drivers) out of the complaints process. I reiterate that, in addressing this issue, we are dealing not just with the appellant but with all persons who might be in the same position as the appellant. The interpretative process must take that into account.

[44] A third reason is that this is a proposed class action. That fact provides the obvious reason why the appellant is availing himself of a civil proceeding over the complaint process. If the class proceeding is certified, then the central issues will be determined, not just for the appellant, but for all persons who find themselves in the same position as the appellant. It is well recognized that this is one of the central benefits of, and reasons for, the Class Proceedings Act, 1992, S.O. 1992, c. 6.

[45] A fourth reason flows from the previous two and that is that under the complaints process, and also under the proposed class proceeding, the central issues will be determined
for everyone who finds themselves in the same position as the appellant. If the Ministry of Labour were to make a finding regarding the appellant, it would be a public finding upon which others could rely. The same is true through the class proceeding, if certified, since any decision in that proceeding would be binding on the members of the class (except for those who opted out). It is clear that there is no ability for a class determination under the Arbitration Clause nor is any determination through the arbitration a matter of public record upon which others can rely.

A fifth reason is that there is no evidence in this record as to what remedy the appellant could expect to obtain if he is successful in the arbitration process. The Arbitration Clause requires that the laws of the Netherlands are to apply to the arbitration. We do not know how the laws of the Netherlands deal with the issues that the appellant has raised. We do not know if the laws of the Netherlands would provide greater, lesser, or equal benefits to the appellant, if it is determined that he is an employee. If he is an employee, then the appellant is entitled to the benefits that are provided by the ESA. In other words, as an Ontario resident he is statutorily entitled to the minimum benefits and protections of Ontario’s laws. He should not be left in a situation where those benefits and protections are set by the laws of another country.

On that latter point, I should address the position taken by Uber that it was the appellant who should have, but did not, provide any expert evidence as to the laws of the Netherlands and whether an arbitrator there would apply Ontario law to the issues raised. I would first point out that Uber also did not provide any such expert evidence. It would appear self-evident that it would have been a great deal easier for Uber to provide that evidence, if they considered it to be important, than it would be for the appellant to do so.

In any event, expert evidence on this point was not required. As the majority in Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751 pointed out in the context of forum selection clauses, there is no requirement for a party trying to avoid a forum selection clause to prove that his/her claim would fail in that forum: at para 67. Similarly, I find that in this context, there was no requirement for the appellant to prove that his claim would fail, if it was arbitrated in the Netherlands, in order to avoid the application of the Arbitration Clause.

I conclude, therefore, that the Arbitration Clause is invalid because, based on the presumption that drivers are employees of Uber, as pleaded, it constitutes a contracting out of the provisions of the ESA, a result that is prohibited by that statute. I am reinforced in that conclusion when public policy considerations are taken into account.

The issue of whether persons, in the position of the appellant, are properly considered independent contractors or employees is an important issue for all persons in Ontario. The issue of whether such persons are entitled to the protections of the ESA is equally important. Like the privacy issue raised in Douez, the characterization of these persons as independent contractors or employees for the purposes of Ontario law is an issue that ought to be determined by a court in Ontario. As the majority in Douez said, at para. 37:

After all, the strong cause test must ensure that a court’s plenary jurisdiction only yields to private contracts where appropriate.
[51] It follows from my conclusion on this issue that the mandatory stay provided for in s. 7(1) does not apply. Once the Arbitration Clause is found to be invalid under s. 7(2), the remedy of a mandatory stay no longer has any application.

(ii) Unconscionability

[52] Independent of that first conclusion, I would, in any event, find the Arbitration Clause to be invalid on the basis of unconscionability. This conclusion would also bring the Arbitration Clause within the invalidity exception in s. 7(2).

[53] The motion judge dismissed the unconscionability argument on the basis that there was no evidence that Uber “preyed or took advantage of Mr. Heller or the other Drivers or extracted an improvident agreement by inserting an arbitration provision” (para. 70). The motion judge’s conclusion on this issue is flawed because, in reaching it, he made palpable and overriding errors of fact.

[54] Chief among those errors is the motion judge’s finding that “most grievances or disputes between Drivers and Uber can be dealt with by the dispute resolution mechanisms readily available from Ontario and that it will be a substantial dispute that entails arbitration in the Netherlands” (para. 70).

[55] What the factual record actually shows is that there is no dispute resolution mechanism either in Ontario, or elsewhere, short of the Arbitration Clause. The other avenues available to a driver, who has a complaint, are located in the Philippines or in Chicago. Though accessible from Ontario, they are procedures run by Uber personnel and are completely controlled by Uber. They are not, in any way, independent grievance or adjudication procedures.

[56] It is also not correct that only a “substantial” dispute requires arbitration in the Netherlands. To the contrary, all disputes require arbitration in the Netherlands unless the driver resolves his/her complaint voluntarily with Uber. The reason that only a substantial dispute would go to arbitration is a direct result of the financial barriers that the arbitration process erects which would dissuade drivers with lesser disputes from pursuing that process.

[57] It was also an error for the motion judge to evaluate the impact of the Arbitration Clause, in this context, by looking at the collective claim in the proposed class action, as opposed to the individual claim of the appellant. The motion judge held that there is a “significant” claim for $400 million, which does not make the agreement improvident, in a comparative sense, with the costs of an arbitration in the Netherlands.

[58] However, the proposed class action is just that, a proposed class action. It has not yet been certified. Until it is certified, it remains, in essence, a single claim by the appellant. What makes the Arbitration Clause clearly improvident is the fact that any driver with a claim, that might ordinarily amount to nothing more than a few hundred dollars, must undertake an arbitration in the Netherlands in order to have their rights determined independently. That arbitration must be held in Amsterdam, under the law of the Netherlands, and must be conducted in accordance with the ICC Rules.
[59] It must be remembered, in this regard, that the evidence shows that the cost of initiating the arbitration process alone is US$14,500. This does not include the costs of travel, accommodation and, most importantly, counsel to participate in the arbitration. These costs are to be contrasted with the appellant’s claim for minimum wage, overtime, vacation pay and the like brought by a person earning $400-$600 per week.

[60] I pause at this juncture to address the proper test to be applied in determining whether a contractual provision is unconscionable. In Ontario, the existing case law establishes that there are four elements to the test. Those elements are set out in Titus v. William F. Cooke Enterprises Inc., 2007 ONCA 573, 284 D.L.R. (4th) 734, at para. 38, recently affirmed in Phoenix Interactive Design Inc. v. Alterinvest II Fund L.P., 2018 ONCA 98, 420 D.L.R. (4th) 335. They are:

1. a grossly unfair and improvident transaction;

2. a victim's lack of independent legal advice or other suitable advice;

3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

4. the other party's knowingly taking advantage of this vulnerability.

[61] In contrast to the Ontario approach, there is some suggestion that the test for unconscionability requires only two elements: inequality of bargaining power and unfairness. This is the test applied by the British Columbia Court of Appeal in Morrison v. Coast Finance Ltd. (1965), 55 D.L.R. (2d) 710 (B.C. C.A). It is also the test applied by Abella J. in her concurring reasons in Douez, at para. 115, and appears to be the test applied by the dissenting judges in Douez, at para. 145. The majority in Douez did not address the issue of unconscionability and, consequently, did not address the elements of the test.

[62] I do not consider it necessary to resolve the question of whether the decision in Douez has changed the proper elements to be applied in determining unconscionability in Ontario because, under either test, I find that the Arbitration Clause is unconscionable.

[63] In approaching that issue, I start with the approach taken by the majority in Douez. While I recognize that the clause in question in Douez was a forum selection clause, I see no reason in principle why the same approach ought not to be taken to the Arbitration Clause in this case. I say that because the Arbitration Clause here is not, strictly speaking, simply an arbitration provision. It is also a forum selection provision and it is a choice of laws provision. It covers much more than just the method through which disputes will be resolved. It establishes both a foreign forum for the adjudication and a foreign law that will be applied in that adjudication. Consequently, the Arbitration Clause should be subject to a broader analysis when it comes to the issue of validity, especially in a situation where it is part of a contract of adhesion.

[64] The majority in Douez set out the approach to determining whether to enforce such a clause. The majority applied a two-step approach. At the first step, the party relying on the
clause must establish that the clause is valid, clear, and enforceable, and that it applies to the cause of action before the court (para. 28). In this step, the court applies the principles of contract law to determine the validity of the clause, including issues such as unconscionability, undue influence, and fraud.

[65] If the clause is found to be valid, then, at the second step, the onus shifts to the opposing party who must demonstrate strong reasons why the court should not enforce the forum selection clause and stay the action. At this stage, the court must consider all the circumstances including the "convenience of the parties, fairness between the parties and the interests of justice" (para. 29).

[66] Although, in my view, the two step approach taken in Douez has application to this case, that approach has to be adjusted to take into account the statutory requirements that flow from the Arbitration Act, 1991. One of those requirements is found in s. 7(2) which clearly places the onus on the person, who seeks to avoid the mandatory stay, to establish that the arbitration provision in issue is invalid. So in this case, the onus falls on the appellant to establish unconscionability and thus invalidity. It is not Uber’s onus to establish validity.

[67] Another requirement is that, because the exception in s. 7(2) requires a finding of invalidity, there does not appear to be any room for the second step of the analysis in Douez to apply. That is, if the appellant cannot establish that the Arbitration Clause is invalid, the Arbitration Act, 1991 would not allow for a separate finding that the Arbitration Clause is unenforceable for other reasons. Indeed, the majority in Douez appears to proceed on the basis that the forum selection clause was valid but, nonetheless, the majority would not enforce it for the reasons they gave. That latter remedy is not provided for under the Arbitration Act, 1991 as a mechanism to avoid the mandatory stay.

[68] In any event, in my view, the Arbitration Clause here fails at the first step of this analysis. Contrary to the conclusion reached by the motion judge, I find that the Arbitration Clause is unconscionable when it is viewed properly and in the context in which it is intended to apply. Applying the four elements from Titus, I conclude as follows:

1. The Arbitration Clause represents a substantially improvident or unfair bargain. It requires an individual with a small claim to incur the significant costs of arbitrating that claim under the provisions of the ICC Rules, the fees for which are out of all proportion to the amount that may be involved. And the individual has to incur those costs up-front. Uber’s submission that the individual might recover those costs, if successful, does not change the impact that flows from the fact that these costs must be paid up-front. Further, it should be self-evident that Uber is much better positioned to incur the costs associated with the arbitration procedure that it has chosen and imposed on its drivers. Additionally, the Arbitration Clause requires each claimant to individually arbitrate his/her claim and to do so in Uber’s home jurisdiction, which is otherwise completely unconnected to where the drivers live, and to where they perform their duties. Still further, it requires the rights of the drivers to be determined in accordance with the laws of the Netherlands, not the laws of Ontario, and the drivers are given no information as to what the laws of the Netherlands are.
2. There is no evidence that the appellant had any legal or other advice prior to entering into the services agreement nor is it realistic to expect that he would have. In addition, there is the reality that the appellant has no reasonable prospect of being able to negotiate any of the terms of the services agreement.

3. There is a significant inequality of bargaining power between the appellant and Uber – a fact that Uber acknowledges.

4. Given the answers to the first three elements, I believe that it can be safely concluded that Uber chose this Arbitration Clause in order to favour itself and thus take advantage of its drivers, who are clearly vulnerable to the market strength of Uber. It is a reasonable inference that Uber did so knowingly and intentionally. Indeed, Uber appears to admit as much, at least on the point of favouring itself when drafting the Arbitration Clause. Its rationale in support of that favouring, i.e. that it chose this particular arbitration process in order to provide consistency of results, is an unpersuasive one.

[69] Consequently, all four elements of the Titus test for unconscionability are present in this case. It follows that, if the two-step test found in Douez were to apply, it would also be met.

[70] It seems to me that the fundamental flaw in the approach adopted by the motion judge to this issue is to proceed on the basis that the Arbitration Clause is of the type involved in normal commercial contracts where the parties are of relatively equal sophistication and strength. That is not this case. As the majority in Douez noted, “forum selection clauses often operate to defeat consumer claims” (para. 62). The same can be said of the Arbitration Clause here – it operates to defeat the very claims it purports to resolve. And I reiterate that this Arbitration Clause is much more than just a simple arbitration provision.

[71] I would add that, for the purposes of this analysis, I do not see any reasonable distinction to be drawn between consumers, on the one hand, and individuals such as the appellant, on the other. Indeed, I would note that, if Uber is correct and their drivers are not employees, then they are very much akin to consumers in terms of their relative bargaining position. Alternatively, if Uber is wrong, and their drivers are employees, we are not speaking of employees who are members of a large union with similar bargaining power and resources available to protect its members. Rather, the drivers are individuals who are at the mercy of the terms, conditions and rates of service set by Uber, just as are consumers. If they wish to avail themselves of Uber’s services, they have only one choice and that is to click “I agree” with the terms of the contractual relationship that are presented to them.

[72] Finally on this point, I should mention that the motion judge, in coming to his conclusion, relied in part on my decision in Kanitz v. Rogers Cable Inc. (2002), 58 O.R. (3d) 299 (S.C.). Kanitz is entirely distinguishable from the situation here. First, in Kanitz, there was no evidence as to what the costs of initiating the arbitration process would be, nor evidence that any particular customer had been dissuaded from arbitrating because of the expense. The arbitration provision in Kanitz required the arbitration to proceed where the consumer resided and on mutually agreeable terms. Consequently, there was no evidence of any significant financial or geographic barriers to initiate the arbitration process, as there are in this case. I
would also note that, subsequent to the decision in Kanitz, consumer protection legislation in Ontario was amended to preclude arbitration in such situations.

[73] In the end result, for the reasons I have given, I conclude that the Arbitration Clause is unconscionable and therefore invalid. The invalidity exception in s. 7(2) of the Arbitration Act, 1991 again applies to the Arbitration Clause.

IV: Conclusion

[74] I conclude that the Arbitration Clause amounts to an illegal contracting out of an employment standard, contrary to s. 5(1) of the ESA, if the drivers are found to be employees as alleged by the appellant. I reach the separate and independent conclusion that the Arbitration Clause is unconscionable at common law. On the basis of each finding, the Arbitration Clause is invalid under s. 7(2) of the Arbitration Act, 1991. The remedy of a mandatory stay has no application.

[75] The appeal is therefore allowed and the stay is set aside. The respondent will pay to the appellant his costs of the appeal in the agreed amount of $20,000 inclusive of disbursements and HST.

[76] The parties did not make submissions on what should happen to the costs of the motion should the appeal be successful. If the parties cannot resolve that issue, they may make brief written submissions. The appellant shall file his submissions within 15 days of the date of these reasons and the respondent shall file its submissions within 10 days thereafter. No reply submissions are to be filed and each party’s submissions shall not exceed five pages.

Released: January 2, 2019 “K.F.”

“I.V.B. Nordheimer J.A.”

“I agree. K. Feldman J.A.”

“I agree. G. Pardu J.A.”

[1] Since it does not appear necessary, for the purposes of these reasons, to differentiate between the various respondents, I will refer to them collectively as “Uber”.

[2] Similar provisions are found in the ICAA.

[3] The structure of the ICAA is essentially the same with the result that the approach to the two statutes should be the same: Ontario Medical Association v. Willis Canada Inc., 2013 ONCA 745, 118 O.R. (3d) 241, at para. 26.
A Framework for Interest Awards in International Arbitration

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ARTICLE

A FRAMEWORK FOR INTEREST AWARDS IN INTERNATIONAL ARBITRATION

M. Alexis Maniatis,* Florin Dorobantu** and Fabricio Nunez***

ABSTRACT

Issues of pre-award and post-award interest are an important component of quantum awards that typically receive little attention. While there is a set of alternatives that are commonly advocated, there is not an agreement on a systematic approach for determining the correct interest rate. In this Article, we argue that economic principles can be used to develop a framework for guiding tribunals. This framework proposes economically appropriate alternatives based on the tribunal’s interpretation of the contract, treaty, or law at issue.

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I. INTRODUCTION

Questions surrounding interest rates arise in most cases where damages are awarded. International arbitration tribunals typically calculate damages based on when the incident occurred, and then add “pre-award” and “post-award” interest. The interest rate applied can have a significant impact on damages, especially for pre-award interest, given the potential length of the arbitration process.1 For example, if it takes five years for a claimant to secure an award, a 10% pre-award interest rate would raise a US$100 million claim by 60% to US$160 million,2 and the interest would represent 37.5% of the total damages awarded.

This example is not just a hypothetical. In a recent case involving Tenaris S.A., a company incorporated in Luxembourg, and the country of Venezuela, principal damages amounted to US$87.3 million, and pre-award interest totaled US$85.5 million, or close to 50% of the total damages awarded.3 Similarly, in another case involving the export of tobacco products and the country of Mexico, principal damages totaled Mex$9.5 million, and pre-award interest was Mex$7.5 million, or 44% per cent of the total award.4 Finally, in

2. This figure assumes that interest is compounded annually. More frequent compounding would increase the interest amount even further.
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cases ARB/05/18 and ARB/07/15 pre-award interest actually exceeded the principal amount of damages to which it was applied.5

Despite their practical importance, interest rates are rarely a major focus of parties and tribunals when pleading and granting awards. While interest is important from an economic perspective, many tribunals give little consideration to this issue.6 As a result, pre-award interest is an under-pleaded area, and there are significant differences in the approaches used by parties and tribunals.7

Recent research confirms these findings. A study by Professor James Dow from the London Business School8 demonstrates that tribunals select a variety of interest rates for awards. This includes US Treasury bills and London Interbank Offered Rate (LIBOR), with and without a premium (also known as “spread”).9

The Dow study also shows that tribunals give diverse justifications for the choice of rates.10 In some cases, it appears that respondents simply failed to challenge the specific claim for pre-award interest, so the tribunals adopted the claimants’ requests.11 Some tribunals have justified the use of risk-free and interbank rates as appropriate to compensate claimants; in other cases, the awards refer to specific rates contained in the relevant treaties.12

7. Id.
9. See An Unexpected Interest in Interest, supra note 6. The study shows that in 23 of the 60 cases analyzed, pre-award interest was calculated on the market benchmark plus a premium such as, for example LIBOR plus 1% or US Treasury bills (T-bills) plus 2%. In 14 cases, Professor Dow found that the tribunal simply stated a rate (such as 4.5% or 9%). In the remaining 23 cases, pre-award interest was a base rate, but without any spread. The study also showed that the adders or spreads vary significantly across awards. For example, no spread was added in 5 of the 21 cases based on LIBOR, 2% was added in 9 cases, 4% in 4 cases and 1% in 2 cases. In one case the spread was based on “political risk.” Id.
10. Id.
11. Id.
12. Id.
PricewaterhouseCoopers (PwC) reached similar conclusions in a 2016 study. In 60% of the awards analyzed, the tribunal did not explicitly address the reasons behind interest awarded, while the explanations for the other 40% were diverse. They include the application of a contractual and/or statutory rate, or a desire to compensate the claimant by offering a rate commensurate with its borrowing costs, or by offering a reasonable return on investment. The PwC study also notes that tribunals generally do not distinguish between pre- and post-award interest rates. When the distinction is addressed explicitly, tribunals have expressed very different views. In some cases, tribunals have taken the view that pre- and post-award interest should be calculated using the same methodology – while in other cases, tribunals have stated that pre- and post-award interest should be treated differently.

Like Professor Dow, the authors of the PwC study found that tribunals appear to be aware of issues related to the money currency of the award. This does not mean, however, that tribunals follow a unified approach. The PwC study notes that some tribunals explicitly recognized that the interest rate should match the currency of the award, while others felt that this was not necessary.

The two aforementioned studies suggest that the economics behind the choice of interest rate in awards are not well understood. In the next section of this Article, we will propose a principles-based, economic framework for choosing the appropriate pre- and post-award interest rates. This framework can be implemented by tribunals, parties, and experts.

14. See id.
15. See id.
16. See id.
17. See id.
18. See id.
19. See id.
20. See id.
21. See id.
II. A FRAMEWORK FOR DETERMINING INTEREST RATES

The framework we develop to select pre- and post-award interest rates reflects economic principles and provides fair compensation. By “fair compensation,” we refer to an interest rate that is market-based, that compensates for the risks that the tribunal chooses to recognize, and that preserves the Fair Market Value (FMV) of the award. Our proposed framework encompasses two fundamental concepts. First, the relevant valuation standard is FMV – the rate consistent with well-functioning markets for arm’s-length transactions between well-informed parties. Second, the interest awarded should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue.22 Our approach is consistent with and accomplishes other policy objectives at times cited in the relevant literature, including: 1) signaling the social obligation to honor contracts, 2) preventing unjust enrichment, and 3) avoiding incentives by either side to benefit by delaying payment.23

To motivate a company to extend a loan, the loan must generate a return at least as high as that available on a riskless asset – say a guaranteed bank deposit or a US Treasury bill. Such a rate compensates for the time value of money during the delay in receipt of payment – here, the delay from the date of valuation to the date of award. Interest rates must also provide compensation for bearing the risk of default by the debtor, and for the risk that interest rates will rise during the lending period above the level expected when the debt is issued.24 Lenders would not willingly extend credit without such compensation, since short-term and risk-free alternatives would be superior. All of these factors should be considered in determining the appropriate pre- and post-award interest rate.


23. See, e.g., Michael S. Knoll, A Primer on Prejudgment Interest, 75 TEX. L. REV. 293, 295-98 (1996). Punishing the wrongdoer is also sometimes listed as a policy objective. Our approach does not include a punitive element, but it does establish a market benchmark, in the sense that imposing a higher rate can be seen as including a punitive element.

24. This latter component, called interest rate risk, arises from variation in the two components of nominal interest rates: inflation and the real interest rate. Over the course of a long-term loan, both can be higher or lower than expectations held by market participants at loan inception. See also BREALEY ET AL., supra note 22, at 53-64 (10th ed. 2011) (providing an economic discussion of interest rates).
A. Prevailing Theories of Pre-Award Interest

Scholars and practitioners have proposed three main approaches to pre-award interest. Each approach implies a different rate. As we discuss below, the “forced loan theory” proposes the respondent’s cost of borrowing. A second theory advocates for a risk-free rate (the “risk-free rate theory”). A third strand of theories proposes some measure of the claimant’s cost of financing.25

The “forced” or “coerced” loan theory argues that the correct rate is the respondent’s borrowing rate, in effect treating the claimant as a “forced creditor” of the respondent.26 The key argument under this theory is that compensation was due at the date of the breach. Since compensation was due, but not paid, at that date, the claimant bore the risk of the respondent’s default, just like other creditors who may have extended loans on a voluntary commercial basis at the date of the breach.27 Under this approach, the respondent effectively owes a fixed amount as of the date of the breach, and the failure to pay immediate compensation is the equivalent of borrowing money from the claimant. The argument is that claimants deserve compensation commensurate with other unsecured lenders to the respondent, at the respondent’s unsecured borrowing rate.28

An alternative theory argues that courts and arbitration tribunals should apply the risk-free rate (the “risk-free rate” theory) since there is no risk of default at the time the award is issued.29 The key contrast with the forced loan theory is that here proponents view the liability

25. See INGMAR MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW § 6.B.1, Appendix 1, Appendix 2, Appendix 3, & Appendix 4 (2d ed. 2017) (listing interest rates for ICSID cases, NAFTA cases, Energy Charter cases, and ad hoc deliberations, respectively).


as arising at the moment of the award, at which time the respondent presumably is not in default on its general commercial obligations.\textsuperscript{30} To the extent that claimant has been exposed to risks between the breach and award dates, the risk-free rate theory categorizes them as general litigation risks, rather than financial risks that arose at the date of breach.\textsuperscript{31} Proponents of the theory have appealed to two aspects of the US legal system: the presumption of innocence prior to verdict, and the general rule that each side bears its own legal costs.\textsuperscript{32} Under this theory, then, the risk that a respondent fails financially prior to an award is viewed as a litigation risk rather than a financial risk. For example:

> The risk of the defendant’s bankruptcy is not the only risk the plaintiff bears. It also bears the risk of losing the case . . . . \[T\]he risk that the defendant will go bankrupt during trial is properly associated with the risks of litigation, not with the violation itself. It is hard to see why that risk should be singled out as one for which the plaintiff is to be compensated. Accordingly, we retain the position that prejudgment interest should be awarded at the risk-free rate.\textsuperscript{33}

Under this view, awarding any higher rate would constitute an abuse of hindsight, in effect compensating the claimant for an investment that was never undertaken. That is, given that the respondent is solvent at the time of the award and that it did not owe a debt to the claimant before then, the claimant should not be entitled to a premium for past default risk that it did not bear.\textsuperscript{34} The theory is economically coherent, but if the tribunal viewed the debt as arising at the time of the breach itself, as opposed to the date of the award, the conclusions would be reversed.

Moreover, a tribunal could still endorse the forced loan theory while accepting the view of pre-award interest as part of the category of general legal expenses. Some jurisdictions differ markedly from the US system, and award litigation expenses to claimants who prevail. Claimants could argue that the forced loan theory accurately

\textsuperscript{30} See, e.g., \textit{id.}
\textsuperscript{31} See \textit{id.} at 147-148.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 147-48 (discussing the issue within the context of the US legal system).
\textsuperscript{34} See \textit{id.} at 146.
reflects a cost that they bore in connection with the protracted nature of the dispute.

It is worth emphasizing that, while the forced loan theory uses the word “forced,” it does not include a punitive element in the pre-award interest rate. The forced loan theory implies a fair market rate, reflecting the FMV principle, i.e., the rate at which lenders would agree to lend to the respondent in arm’s-length commercial transactions. We are aware of one case in which the tribunal rejected the forced loan theory because it associated the word “forced” with a desire to punish the respondent, even though the tribunal viewed prejudgment interest as an instrument to compensate the claimant for the postponement of compensation that had become due many years in the past. The tribunal was also willing to compensate the claimant for litigation expenses, so there was no appeal to the notion that litigants should bear their own costs. The relevant legal framework called for a commercial rate, and the tribunal thought that responding to an image of a loan as “forced” would stray from the requirement to rely on normal commercial terms. However, the word “forced” was, in that case, just an unfortunate term for a principle that directly appealed to rates set in the market by willing lenders and the respondent.

We conclude that the same basic principle applies to both the forced loan and the risk-free rate theories. That is, that pre-award interest should reflect risk at the market rate. The difference between them lies in the tribunal’s approach to the prior risk of financial insolvency or default of the respondent.35

A separate strand of theories views pre-award interest as an issue related to the claimant’s cost of funds.36 The argument is frequently made along the lines best illustrated with a simple hypothetical example: the claimant borrowed from a bank to finance the purchase price of an asset that was expropriated shortly afterwards. In the absence of the expropriation, the loan would have carried an interest rate commensurate with the risk of the underlying asset. If the

35. We note that there is no tension between the requirement in some treaties or contracts for the use of a “commercial” rate of interest and the use of a risk-free rate. The risk-free rate is itself a commercial rate for securities without default risk. It is set in free markets by commercial parties and investors transacting freely. In other words, it defines the commercial rate for lending and borrowing risk-free amounts.

claimant did not repay the bank immediately upon expropriation, the loan would have continued to accrue interest until the receipt of compensation from the respondent. If the respondent’s borrowing rate is lower than the interest rate on the underlying asset loan, then the argument is that either a risk-free rate or the forced loan theory would impose a loss upon the claimant, failing to cover the loan costs prior to the award.

A different, but related, argument is that claimants had to borrow to replace the lost funds in order to make profitable investments. Claimants, at times, argue that pre-award interest should cover the interest paid on incremental sums that they borrowed in the absence of prompt compensation from the respondent. The argument here is that the claimants would have borrowed less in the absence of the disputed conduct. A generalized form of the argument considers not just the loans undertaken by the claimant, but also the cost of raising equity funds, which together combine to form the claimant’s overall cost of capital (or weighted average cost of capital—WACC). The argument is then that the principle of full compensation or full reparation requires the calculation of pre-award interest based on the claimant’s cost of capital,37 to put the claimant in the position it would have achieved absent the breach.38

We explain below why a uniform appeal to the claimant’s cost of borrowing or its cost of capital is not consistent with economic principles. We also explain why the arguments advanced by proponents of this approach may reflect case-specific circumstances rather than general principles. Our view is that a tribunal could address such circumstances directly as a distinct element of damages, as opposed to indirectly through the pre-award interest rate.

B. Implementation of the Framework for Pre-Award Interest

Our framework consists of four steps, guided by the principle that matching risk to return should inform the specific choice of rate.


Our approach follows the FMV standard in that the selected rate would be consistent with well-functioning markets for arm’s-length transactions between well informed parties, subject to the risks that are deemed legally compensable.

Figure 1 summarizes the steps:

**Figure 1: Steps to Determine Pre-Award Interest Rate**

1. **Step # 1: Allocate Default Risk**

First, the tribunal decides if the risk of the respondent’s default prior to an award is relevant and compensable to the claimant. If it is not, then the pre-award interest should be calculated at the risk-free rate. This would be consistent with the risk-free rate theory that there was no debt until the award was issued, at which point there is no chance of past default if the respondent is present and solvent. Here, then, the only compensation needed for the claimant is the time value of money between the date of valuation and the date of the award.

If the tribunal decides that the claimant deserves compensation for the risk of the respondent’s default prior to an award, then pre-award interest should reflect the respondent’s borrowing rate for liabilities of the same risk. Using the respondent’s borrowing rate is consistent with the forced loan theory discussed above. Proponents of this theory argue that while we cannot possibly know how the proceeds would have been invested if the plaintiff had received them earlier, we do not know how they were actually invested, because

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39. It may seem counterintuitive that the claimant should be compensated for having borne the default risk - even though at the award date, it is known that the respondent is not insolvent. It is, however, no different from any lending arrangement in which the loan rate reflects borrower’s default risk and the borrower pays that rate, even though it never defaults. The risk premium is the compensation necessary to induce the lender to loan in the first place. Without it, a willing transaction would not occur.
they were advanced to the defendant in the form of a forced loan. Thus, to award less than the respondent’s borrowing rate would fail to compensate the claimant for risks it was indeed forced to bear. Conversely, to award more would compensate a claimant for greater risks than it was forced to bear.

Awarding pre-award interest at the respondent’s borrowing rate does not imply straying from a focus on the claimant and how it was affected by the delay. If payment became due on the date of the breach, then the payment delay caused the claimant to bear the respondent’s risk of default. Awarding interest at a rate commensurate with the risk provides fair market compensation for the effect on claimant’s financial position. It also prevents unjust enrichment of the respondent, as commentators have noted, but that is not its only economic result.

Using either the risk-free rate or the respondent’s borrowing rate would be consistent with the principles of market-based rates of addressing the risks deemed legally compensable and preserving FMV across time. To illustrate, consider the following hypothetical. Suppose that a tribunal has ruled in favor of the claimant on the breach/valuation date, and granted it an award worth US$100 on that date (i.e., assuming an instantaneous ruling from the tribunal). Suppose that the tribunal orders the respondent to offer two alternatives for payment: (1) immediately hand over a two-year US Treasury security with a face value (or principal amount) of US$100 that pays a risk-free market rate of 3% per year or (2) a promissory note issued by the respondent for the same US$100 in principal amount with an interest rate of 5%, maturing in two years’ time. Assume further that the higher rate of 5% is the market interest rate applicable on the respondent’s other debt, and compensates for the chance that the respondent might default before maturity of the debt.

The FMV of either alternative on the valuation date is US$100, and would represent full compensation if given at the date of breach,

40. See Knoll, supra note 24, at 310-11.
41. See MARBOE, supra note 26, ¶¶ 6.110-111.
42. Id., ¶ 6.111; see also Knoll, supra note 24, at 310-11 (explaining that in the generic commercial litigation context, the defendant’s borrowing rate both compensates the plaintiff and prevents the unjust enrichment of the defendant).
43. For simplicity, we assume that this US Treasury security is trading at par (i.e., at its face value of US$100), on the valuation date.
just as payment of US$100 in cash would. To see this, consider that in principle, the claimant could sell the two-year US Treasury security to a third party for the US$100 amount of the award. It could also sell the respondent’s two-year promissory note for the same amount. Potential purchasers would value the note just like any other future payments owed by the respondent.

Of course, in practice tribunals do not rule instantaneously; it takes time to secure an award. Thus, in reality, the tribunal has to decide whether to compensate the claimant for the risk of default between the date of breach and the date of the award. If the tribunal decides that it should not, then the tribunal should award interest based on a risk-free rate, otherwise it is appropriate to apply the respondent’s borrowing rate. In either case the selected rate compensates the claimant for the risks that the tribunal chooses to recognize. In this illustration, the 3% in the US Treasury compensates solely for the time value of money, while the 5% in the promissory note compensates as well for the risk of the respondent’s default.

2. Step # 2: Ensure that Interest Rate Matches Currency of the Award

Tribunals should ensure that the interest rate matches the currency of the award. Interest rates reflect inflation and exchange rate expectations that are currency-specific. Therefore, the rate used should be based on market rates in the currency in which the award is denominated, as it is not economically meaningful to apply rates quoted in one currency to amounts denominated in a different currency.

44. Again, assuming the US government’s risk of default is zero, the 3% compensates the claimant for the time value of money.

45. We abstracted in this example from issues related to interest rate risk, which are addressed in § II.B.2 of the framework.

46. Note that the award thus calculated can then be paid in any freely traded currency using the market exchange rate at the time of payment.

47. See Colón & Knoll, Prejudgment Interest, supra note 30, at 18-21 (providing a detailed discussion of currency conversion in the context of pre-award interest, as well as the need for matching the interest rate to the award currency). See also Dow, supra note 4 (noting that arbitration tribunals are generally aware of the issue and choose the currency of interest rates appropriately). See generally Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence § 9.2 (2008).
However, matching the interest rate currency with the award currency does not make the choice of the award currency itself irrelevant. An award calculated in US dollars that carries a US dollar interest would not, in general, result in the same amount at the time of payment as if it were calculated in, say, euros (carrying a euro interest rate) and then converted to US dollars. The choice of the award currency is important, but it is a separate question from pre-award interest.  

3. Step # 3: Select Rate Based on Maturity Consistent with Relevant Risks

The next step is for the tribunal to select the benchmark rate consistent with its allocation of risk, while taking into account maturity and length of compensation. Markets generally require higher rates for lending or borrowing over a longer period of time. Again, reflecting a core principle of finance, higher rates for longer maturities compensate lenders or investors for bearing risks arising from the irreversible commitment of funds. For fixed-rate debt, lenders bear risks that include unexpected changes in inflation, real interest rates, and borrower’s default risk.

It may seem natural to set pre-award interest using long-term rates, reflecting the time elapsed between breach and award dates, in order to provide compensation for these risks. If the selected long-term rate is commensurate with market rates, such selection would compensate the claimant for these risks, but it would also force the claimant to bear them. Perhaps we could all agree that a five-year fixed interest rate at the time of the breach would prove too low and “out-of-market” by the end of the fifth year (assuming that it takes five years to receive an award) if either inflation or real interest rates increased shortly after the breach, or the respondent’s solvency deteriorates. In other words, a fixed long-term rate is not consistent


49. That is, the risk-free rate or respondent’s borrowing rate.

50. Long-term rates can be higher than short-term rates also because investors expect short-term interest rates to rise over time. However, that alone cannot explain why long-term rates are much more frequently above short-term rates than below. See BREALEY ET AL., supra note 25, at 58.
with the risk-free rate approach, because long-term rates, even on instruments with no default risk, are not truly risk-free, due to interest rate risk exposure. Simply using the rate for a security at the time of the breach whose maturity matches the award date compensates the claimant based on market expectations and risk preferences at the time of the breach, but leaves that claimant exposed to potential gains or losses from changing circumstances.

An alternative view is that the tribunal should apply a series of rolling short-term rates to protect the claimant from the risks of fluctuations in inflation, real interest rates, and of changes in respondent’s default risk that may have occurred after the date of breach,\(^{51}\) if default risk is deemed compensable in Step 1. Exposure to interest rate risk is not inherently part of the forced nature of the loan. This is because if the claimant and the respondent negotiated an arm’s-length loan at the date of the breach, claimant could avoid interest rate risk exposure by structuring the loan with a floating rate that tracks changes in short-term interest rates.\(^{52}\)

The potential disadvantage of using rolling short-term rates is that it does not address the long-term commitment of funds. A claimant could in principle still claim that it deserves a premium to address the commitment of funds over an extended period of years. Rolling short-term rates forward over time offers certain types of protection, but it does not address illiquidity risk, which cannot be avoided if the claimant is unable to sell or borrow against an eventual award when it faces an unexpected need for cash. Such a premium, however, would be small because commercial entities not in financial distress, which are often the claimants in international arbitration cases, have access to financial markets that allow them to meet unexpected liquidity needs. As we discuss in Step 4 below, if special circumstances cause a claimant to suffer harm from being unable to access funds, such harm can be calculated and awarded separately as damages. A related, but distinct liquidity premium for long-term commitments can arise if short-term rates do not fully reflect the risk

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\(^{51}\) Note that to eliminate exposure to changes in respondent’s default risk, the premium for default risk should be time-varying. In practice, the credit default spread (CDS) market can provide timely information about changes in default risk. See Knoll, supra note 24, at 324-26 (proposing the alternative of a floating base rate plus a fixed default risk premium, which locks in the expected risk of respondent’s default at the time of the breach).

\(^{52}\) See id.
of default on a long-term loan because of lack of liquidity as a borrower approaches insolvency and default.53

Applying a rolling short-term rate can result in either a higher or a lower cumulative interest amount, as opposed to applying the long-term rate over the same period.54 Both approaches appeal to underlying principles and match risk and return, but it is clear that the claimant or respondent may prefer one or the other knowing in hindsight which approach is most advantageous. The appropriate answer depends on the risks that claimant is forced to bear and that the tribunal believes it should recognize. Rolling short-term rates can insulate the claimants from the risk of subsequent spikes in rates, but does not provide compensation for forgoing access to the funds for a long period. A tribunal can compensate the claimant for this lack of liquidity by adopting a fixed, long-term interest rate at the date of breach, but such an approach exposes the claimant to the risk of subsequent movements in interest rates, including changes in respondent’s default risk under the forced loan theory.

If default risk is deemed compensable, a practical solution may involve using a rolling short-term risk-free rate, such as the Treasury bill rate for US dollars amounts and add a credit risk premium measured based on market instruments. These could include credit default swaps or bonds, with a longer maturity. This would, in effect, provide a premium that can compensate for illiquidity effects arising from the long-term nature of the commitment, while still protecting the claimant from risk of changes in interest rates and likelihood of default.

If the tribunal has determined that interest should be based on the respondent’s borrowing rate, it should also consider whether

53. That is, in theory, as a borrower’s solvency deteriorates, the rate at which it can borrow would increase, but in practice, lenders may simply be unwilling to lend at some point. A lender who lends on a rolling short-term basis is less exposed to this risk because it can simply not roll over the debt as the borrower’s solvency deteriorates.

54. The long-term rate at the start of the loan reflects market expectation of the evolution of short-term interest rates over the course of the loan. This happens because for market participants to lend freely at the long-term rate, they should be indifferent between extending a loan at a fixed, long-term rate and extending a series of short-term loans. Therefore, if short-term rates rise above the levels expected at inception, a floating-rate loan would accumulate more interest than the fixed-rate loan, and vice versa if short-term rates rise fall below expected levels. However, because long-term rates incorporate a premium for bearing interest rate risk (as discussed above), on average awarding interest at long-term rates results in higher pre-award interest than applying short-term rates.
awards have favorable or unfavorable credit characteristics relative to the benchmark chosen. These differences are likely to be relatively small. Examples include differences in priority or costs of enforcement or collection.

4. Step # 4: Address Claims of Additional Harm Caused by Delay in Payment

As a final step, tribunals should address any claims for additional damages suffered based on the claimant’s cost of financing, be it the cost of debt, the cost of equity, or the cost of capital. The claimant may argue that the inability to access the award amount at the date of the breach: 1) has caused the claimant to raise financing at some cost that would not have been incurred if the funds had been made immediately available, or 2), has prevented the claimant from pursuing profitable investment opportunities, or 3) has prevented the claimant from repaying outstanding loans taken to finance the asset that was expropriated or impaired by respondent’s breach. As general theories of pre-award interest, such arguments are inconsistent with economic principles of compensation. In specific circumstances, the arguments may be economically sensible and the tribunal can address the specific facts separately and make a decision based on evidence that links those facts to specific harm to the claimant.

The claim that the respondent’s actions left the claimant without the cash necessary to fund attractive investments, so instead the claimant borrowed and paid a relatively high interest rate on loans, does not satisfy the basic principle of aligning risk and return. If the claimant had a higher borrowing cost than the respondent, and borrowed at that higher cost to finance its operations/investments, then the operations/investments must have had a higher risk than the amounts owed by the respondent. It does not mean that the claimant has paid too much in interest.

In other words, funds always have a cost. It is mistaken to argue that the prompt payment of compensation from the respondent would have deprived the claimant of the need to incur a cost of funds. If the respondent had harmed the claimant by US$100, and had immediately reimbursed the claimant with a payment of US$100 on the date of breach, then the US$100 would still have had its own implicit cost of funds before the claimant redirected it to the alleged attractive investment. The cost of funds associated with the hypothetical
US$100 cash compensation should have been the same as on any external loan that the claimant actually undertook.

A similar, related argument made by the claimants is that the respondent’s actions prevented the claimant from obtaining a return on the investment, so that pre-award interest should be calculated at the project’s cost of capital for the award to put the claimant in the position they would have achieved absent the breach. The problem with this logic is readily apparent when considering the principle of aligning risk and return. The cost of capital represents the expected rate an investor earns in exchange for bearing the risk of earning more or less than a particular target, including the possibility of actually experiencing a loss. The cost of capital is by no means a certain return. Awarding such a return is inappropriate if the alleged violation has itself deprived the claimant of the risk associated with an asset or business.

Suppose that the respondent has expropriated an asset worth US$100 on the valuation date, and that the cost of capital for that asset would have been 15%. Suppose that the pre-award interest covers one year so that a claim for the cost of capital would bring the value of the award to US$115 in one year. If the expropriation has deprived the claimant of the risk associated with the asset, then it would be inappropriate to award the claimant the 15% return, which includes compensation for risk not borne. If we know with certainty that the respondent would never default, then an investor would use a risk-free rate to estimate the fair market value of an award of US$115 in one year. If the risk-free rate is only 4%, then the FMV of the award would be US$110.60 as of the date of valuation. Losing US$100 in FMV, the claimant would in effect receive an award with an FMV that is US$10.60 higher. One can conclude that awarding the cost of capital does not respect the principle of FMV in this case.

55. See, e.g., Abdala et al., supra note 40.
56. To illustrate this point, suppose that an investor makes such a risky investment multiple times. On average, the return would be the cost of capital, but in each individual case, the return could be higher than the average, sometimes it would be below the average, and in some instances the investor would actually experience a loss.
58. $100 \times 1.15 = $115.
59. $115/1.04 = $110.60.
Commentators have noted a pernicious element to applying the cost of capital, in that high-risk assets would receive larger amounts of pre-award interest even if the breach prevented the claimant from incurring any further business risk in connection with the asset. The same principle implies that it is inappropriate to award pre-award interest based on the expected return on other investments that the claimant has not made, such as the overall stock market: it would provide compensation for a risk that claimant has not borne. An interpolated compensation standard explicitly rewards the claimant for the resolution of risk that the claimant did not actually bear after the date of breach, yet tribunals often hesitate to impose such a standard unless they make specific findings of a willful or flagrant violation.

Moreover, if the claimant had a lucrative investment opportunity, it should have been able to finance it at whatever market rate was appropriate for the risk of that investment. As long as the claimant had access to funding sources, which is the typical case for a commercial entity, the delay in receiving compensation should not have prevented it from undertaking attractive investments, and therefore should not have caused any harm. In special cases when the claimant could not access external financing, the claimant could bring evidence of specific investment opportunities that it would have pursued but for the lack of financing. If the tribunal found the evidence sufficient to support a claim for damages under the relevant legal standards, the tribunal could grant an award for the proven loss of opportunity.

The third argument for using the claimant’s cost of funds – that the expropriation denied the claimant the funds to repay an outstanding loan taken to finance the asset that was expropriated or impaired by the respondent’s breach – has its own problems. First, it assumes that the claimant cannot have repaid or refinanced the loan

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60. See Dolgoff & Duarte-Silva, supra note 62, at 443.
once the asset was lost. But if that is the case, then the claimant should be able to identify and measure the additional cost, demonstrate that it could not have been avoided through mitigation, and claim it directly as an additional element of damages. The associated costs would form part of the damages to which a tribunal should apply pre-award interest. Second, it assumes that the respondent’s borrowing rate is lower than the interest rate on the underlying loan on the asset so that the respondent’s borrowing rate would fail to cover the loan costs prior to the award.

In summary, arguments based on the claimant’s cost of financing generally do not hold because the typical claimant has access to well-functioning financial markets. It can therefore fund investment opportunities on FMV terms, neither foregoing potentially profitable investments nor paying above-market financing costs to fund them. However, some claimants may lack access to markets, or market frictions may make external funding more expensive than their own funds. Resulting losses may be compensable under such specific circumstances and the tribunal can evaluate the factual evidence and determine whether it meets the legal standard necessary to award damages. Such an inquiry is similar to that conducted to award other types of damages.

C. Post-Award Interest

Post-award interest does not confront the question of the allocation of litigation risk. Once the award is established, the claimant is formally a creditor to the respondent and should receive a rate of interest commensurate with the post-award risks. The starting point should be the respondent’s borrowing rate. The tribunal, however, should consider making the adjustments we outlined earlier to reflect substantive differences, if any, in the risk of default or the cost of enforcement of an award compared to those reflected in the respondent’s benchmark borrowing rate. In doing so, the post-award interest preserves the FMV of the award over time and captures the risks of collection. It would also remove incentives for the respondent to delay payment and use the award debt as a source of cheap financing.

63. See Colón & Knoll, Prejudgment Interest, supra note 30, at 4-6 (providing a summary of economic arguments against rates based on claimant’s cost of funds).
III. CONCLUSION

We propose a framework based on economic principles that tribunals and experts can apply to determine the correct rates for pre- and post-award interest. We propose that a generally applicable pre-award interest rate is either the risk-free rate or a rate that reflects the respondent’s risk of default, with the choice depending on whether the tribunal establishes that liability begins at the date of the award or at the date of the breach respectively. In either alternative, the appropriate economic standard is fair market value and the appropriate rate should reflect the time value of money and the risks that the tribunal deems compensable. Post-award interest accrues after liability is established, and therefore only a rate that reflects respondent’s risk of default is relevant. Where specific circumstances affect the claimant’s financial position or the markets in which it can obtain financing, our framework suggests that the claimant should provide evidence of such additional harm. The tribunal can then evaluate that evidence as a separate head of damages. Our framework identifies economically principled choices and provides economic guidance for tribunals’ interpretation of the economic aspects of the contract, treaty, or law at issue.
This release of the approved ASA Business Valuation Standards of the American Society of Appraisers contains all standards approved through November 2009, and is to be used in conjunction with the Uniform Standards of Professional Appraisal Practice (USPAP) of The Appraisal Foundation and the Principles of Appraisal Practice and Code of Ethics of the American Society of Appraisers. Periodic updates to these Standards are posted to the Business Valuation Committee’s website www.bvappraisers.org.

The ASA Business Valuation Standards, including Statements on Business Valuation Standards, Advisory Opinions and Procedural Guidelines have been published and/or revised as indicated in the following Table of Contents.

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(Statements clarify, interpret, explain, or elaborate on Standards and have the full weight of Standards)

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Published by:
Business Valuation Committee
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555 Herndon Parkway, Suite 125
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I. The American Society of Appraisers, through its Business Valuation Committee, has adopted these "ASA Business Valuation Standards and Definitions" ("the Standards") in order to maintain and enhance the quality of business valuations for the benefit of the business valuation profession and users of business valuations.

II. The American Society of Appraisers, in its Principles of Appraisal Practice and Code of Ethics, and The Appraisal Foundation, in its Uniform Standards of Professional Appraisal Practice ("USPAP"), have established authoritative principles and a code of professional ethics. These Standards incorporate the Principles of Appraisal Practice and Code of Ethics and the relevant portions of USPAP, either explicitly or by reference, and are designed to clarify them and provide additional requirements specifically applicable to the valuation of businesses, business ownership interests, securities and intangible assets.

III. These Standards incorporate all relevant business valuation standards adopted by the American Society of Appraisers through its Business Valuation Committee.

IV. These Standards provide minimum criteria to be followed by business appraisers in developing and reporting the valuation of businesses, business ownership interests, securities and intangible assets.

V. If, in the opinion of the appraiser, the circumstances of a specific business valuation assignment dictate a departure from any provision of any Standard, such departure must be disclosed and will apply only to the specific provision.

VI. These Standards are designed to provide guidance to ASA members and to provide a structure for regulating the development and reporting of business valuations through uniform practices and procedures. Deviations from the Standards are not intended to form the basis of any civil liability and should not create any presumption or evidence that a legal duty has been breached. Moreover, compliance with these Standards does not create any special relationship between the appraiser and any other person.
I. Preamble

A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. The purpose of this Standard is to define and describe the general requirements for developing the valuation of businesses, business ownership interests, securities and intangible assets.

C. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. Appropriate definition of the assignment

A. Business valuation is the act or process of determining the value of a business enterprise or ownership interest therein.

B. In developing a valuation of a business, business ownership interest, security, or intangible asset, an appraiser must identify and define, as appropriate:

1. The client and other intended users
2. The purpose or intended use of the appraisal
3. The type of engagement as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C
4. The business enterprise to which the valuation relates
5. The type of entity (e.g., corporation, limited liability company, partnership or other)
6. The state or jurisdiction of incorporation, if applicable
7. The principal business location (or headquarters)
8. The business interest under consideration
9. The standard of value applicable to the valuation (e.g., fair market value, fair value, investment value, or other)
10. The premise of value (e.g., going concern, liquidation, or other)
11. The level of value (e.g., strategic control, financial control, marketable minority, or nonmarketable minority) in the context of the standard of value, the premise of value, and the relevant characteristics of the interest
12. The effective (or “as of”) date of the appraisal
13. Any extraordinary assumptions used in the assignment
14. Any hypothetical conditions used in the assignment
C. The nature and type of the engagement must be defined. An acceptable type of engagement will generally be one of the three types detailed below. Other types of engagements should be explained and described.

1. Appraisal
   a. An Appraisal is the act or process of determining the value of a business, business ownership interest, security, or intangible asset.
   b. The objective of an appraisal is to express an unambiguous opinion as to the value of a business, business ownership interest, security or intangible asset which opinion is supported by all procedures that the appraiser deems to be relevant to the valuation.
   c. An appraisal has the following qualities:
      (1) Its conclusion of value is expressed as either a single dollar amount or a range
      (2) It considers all relevant information as of the appraisal date available to the appraiser at the time of performance of the valuation
      (3) The appraiser conducts appropriate procedures to collect and analyze all information expected to be relevant to the valuation
      (4) The valuation considers all conceptual approaches deemed to be relevant by the appraiser

2. Limited appraisal
   a. The objective of a limited appraisal is to express an estimate as to the value of a business, business ownership interest, security or intangible asset. The development of this estimate excludes some additional procedures that are required in an appraisal.
   b. A limited appraisal has the following qualities:
      (1) Its conclusion of value is expressed as either a single dollar amount or a range
      (2) It is based upon consideration of limited relevant information
      (3) The appraiser conducts only limited procedures to collect and analyze the information that such appraiser considers necessary to support the conclusion presented
      (4) The valuation is based upon the conceptual approach(es) deemed by the appraiser to be most appropriate

3. Calculation
   a. The objective of a calculation is to provide an approximate indication of value of a business, business ownership interest, security or intangible asset based on the performance of limited procedures agreed upon by the appraiser and the client.
   b. A calculation has the following qualities:
      (1) It’s result may be expressed as either a single dollar amount or a range
      (2) It may be based upon consideration of only limited relevant information
      (3) The appraiser collects limited information and performs limited analysis
      (4) The calculation may be based upon conceptual approaches agreed upon with the client
III. Information collection and analysis

The appraiser shall gather, analyze and adjust the relevant information necessary to perform a valuation appropriate to the nature or type of the engagement. Such information shall include:

A. Characteristics of the business, business ownership interest, security or intangible asset to be valued, including rights, privileges, conditions, quantity, factors affecting control and agreements restricting sale or transfer

B. The nature, history and outlook of the business

C. Historical financial information for the business

D. Assets and liabilities of the business

E. The nature and conditions of relevant industries that have an impact on the business

F. Economic factors affecting the business

G. Capital markets providing relevant information; e.g., available rates of return on alternative investments, relevant public stock market information and relevant merger and acquisition information

H. Prior transactions involving the subject business, or involving interests in, the securities of, or intangible assets in the subject business

I. Other information deemed by the appraiser to be relevant

IV. Approaches, methods and procedures

A. The appraiser shall select and apply appropriate valuation approaches, methods and procedures.

B. The appraiser shall develop a conclusion of value pursuant to the valuation assignment as defined, considering the relevant valuation approaches, methods and procedures, the information available and appropriate premiums and discounts, if any.

V. Documentation and retention

The appraiser shall appropriately document and retain all information relied on and the work product used in reaching a conclusion.

VI. Reporting

The appraiser shall report the appraisal conclusions to the client in an appropriate written or oral format. Other than preliminary communications of results to a client, reporting on valuation calculations, or reporting on engagements that do not result in conclusions of value, the report must meet the requirements of Standard 10 of the Uniform Standards of Professional Appraisal Practice. In the event the assignment results in a Comprehensive Written Business Valuation Report, the report shall meet the requirements of BVS-VIII Comprehensive Written Business Valuation Report.
I. Preamble
   A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).
   B. The purpose of this Standard is to define and describe the requirements for making financial statement adjustments in the valuation of businesses, business ownership interests, securities and intangible assets.
   C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.
   D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. Conceptual framework
   A. As a procedure in the valuation process, financial statements should be analyzed and, if appropriate, adjusted. Financial statements to be analyzed include those of the subject entity and any entities used as guideline companies.
   B. Financial statement adjustments are modifications to reported financial information that are relevant and significant to the appraisal process. Adjustments may be appropriate for the following reasons, among others:
      1. To present financial data of the subject and guideline companies on a consistent basis
      2. To adjust from reported values to current values
      3. To adjust revenues and expenses to levels that are reasonably representative of continuing results
      4. To adjust for non-operating assets and liabilities, and any revenues and expenses related to the non-operating items
   C. Financial statement adjustments are made for the sole purpose of assisting the appraiser in reaching a conclusion of value.

III. Documentation of adjustments
   All adjustments made should be fully described and supported.
I. Preamble

A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. The purpose of this Standard is to define and describe the requirements for the use of the asset-based approach (and the circumstances in which it is appropriate) in the valuation of businesses, business ownership interests, securities and intangible assets, but not the reporting thereof.

C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.

D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. The asset-based approach

A. The asset-based approach is a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods based on the value of the assets net of liabilities.

B. In business valuation, the asset-based approach may be analogous to the cost approach of other appraisal disciplines.

C. Assets, liabilities and equity relate to a business that is an operating company, a holding company, or a combination thereof (a mixed business).
   1. An operating company is a business that conducts an economic activity by generating and selling, or trading in a product or service.
   2. A holding company is a business that derives its revenues from a return on its assets, which may include operating companies and/or other businesses.
   3. The asset-based approach should be considered in valuations conducted at the enterprise level and involving:
      a. An investment or real estate holding company
      b. A business appraised on a basis other than as a going concern

Valuations of particular ownership interests in an enterprise may or may not require the use of the asset based approach.

D. The asset-based approach should not be the sole appraisal approach used in assignments relating to operating companies appraised as going concerns unless this approach is customarily used by sellers and buyers. In such cases, the appraiser must support the selection of this approach.
BVS-IV Income Approach to Business Valuation

I. Preamble

A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. The purpose of this Standard is to define and describe the requirements for the use of the income approach in the valuation of businesses, business ownership interests, securities and intangible assets, but not the reporting thereof.

C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.

D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. The Income Approach

A. The income approach is a general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods through which anticipated benefits are converted into value.

B. Both capitalization of benefits methods and discounted future benefits methods are acceptable. In capitalization of benefits methods, a representative benefit level is divided or multiplied by an appropriate capitalization factor to convert the benefit to value. In discounted future benefits methods, benefits are estimated for each of several future periods. These benefits are converted to value by applying an appropriate discount rate and using present value procedures.

III. Anticipated Benefits

A. Anticipated benefits, as used in the income approach, are expressed in monetary terms. Anticipated benefits may be reasonably represented by such items as dividends or distributions, or various forms of earnings or cash flow.

B. Anticipated benefits should be estimated by considering such items as the nature, capital structure and historical performance of the related business entity, the expected future outlook for the business entity and relevant industries, and relevant economic factors.

IV. Conversion of Anticipated Benefits

A. Anticipated benefits are converted to value by using procedures that consider the expected growth and timing of the benefits, the risk profile of the benefits stream and the time value of money.

B. The conversion of anticipated benefits to value normally requires the determination of a capitalization factor or discount rate. In that determination, the appraiser should consider such factors as the level of interest rates, the rates of return expected by investors on alternative investments and the specific risk characteristics of the anticipated benefits.
C. In discounted future benefits methods, expected growth is considered in estimating the future stream of benefits. In capitalization of benefits methods, expected growth is incorporated in the capitalization factor.

D. The capitalization factors or discount rates should be consistent with the types of anticipated benefits used. For example, pre-tax factors or discount rates should be used with pre-tax benefits, common equity factors or discount rates should be used with common equity benefits and net cash flow factors or discount rates should be used with net cash flow benefits.
BVS-V Market Approach to Business Valuation

I. Preamble

A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. The purpose of this Standard is to define and describe the requirements for the use of the market approach in the valuation of businesses, business ownership interests, securities and intangible assets, but not the reporting thereof.

C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.

D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. The market approach

A. The market approach is a general way of determining a value indication of a business, business ownership interest, security or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities or intangible assets that have been sold.

B. Examples of market approach methods include the Guideline Public Company Method (see SBVS-1) and the Guideline Transactions Method (see SBVS-2).

III. Reasonable basis for comparison

A. The business, business ownership interest, security or intangible asset used for comparison must serve as a reasonable basis for comparison to the subject.

B. Factors to be considered in judging whether a reasonable basis for comparison exists include:
   1. A sufficient similarity of qualitative and quantitative investment characteristics
   2. The amount and verifiability of data known about the similar investment
   3. Whether or not the price of the similar investment was observed in an arm’s-length transaction, or in a forced or distressed sale

IV. Selection of valuation ratios

A. Comparisons are normally made through the use of valuation ratios. The computation and use of such ratios should provide meaningful insight about the value of the subject, considering all relevant factors. Accordingly, care should be exercised with respect to issues such as:
   1. The selection of the underlying data used to compute the valuation ratios
   2. The selection of the time periods and/or the averaging methods used for the underlying data
3. The computation of the valuation ratios
4. The timing of the price data used in the valuation ratios (in relationship to the effective date of the appraisal)
5. How the valuation ratios were selected and applied to the subject's underlying data

B. In general, comparisons should be made by using comparable definitions of the components of the valuation ratios. However, where appropriate, valuation ratios based on components that are reasonably representative of ongoing results may be used.

V. Rules of thumb

Rules of thumb may provide insight into the value of a business, business ownership interest, security or intangible asset. However, value indications derived from the use of rules of thumb should not be given substantial weight unless they are supported by other valuation methods and it can be established that knowledgeable buyers and sellers place substantial reliance on them.
I. Preamble

A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. The purpose of this Standard is to define and describe the requirements for reaching a final conclusion of value in the valuation of businesses, business ownership interests, securities and intangible assets.

C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.

D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. General

A. The conclusion of value reached by the appraiser shall be based upon the applicable standard of value, the purpose and intended use of the valuation, and all relevant information available as of the valuation date in carrying out the type of engagement for the assignment.

B. The conclusion of value reached by the appraiser will be based on value indications resulting from one or more methods performed under one or more appraisal approaches.

III. Selection and weighting of methods

A. The selection of and reliance on appropriate methods and procedures depends on the judgment of the appraiser and not on any prescribed formula. One or more approaches may not be relevant to a particular situation, and more than one method under an approach may be relevant.

B. The appraiser must use informed judgment when determining the relative weight to be accorded to indications of value reached on the basis of various methods, or whether an indication of value from a single method should be conclusive. The appraiser's judgment may be presented either in general terms or in terms of mathematical weighting of the indicated values reflected in the conclusion. In any case, the appraiser should provide the rationale for the selection or weighting of the method or methods relied on in reaching the conclusion.

C. In assessing the relative importance of indications of value determined under each method, or whether an indication of value from a single method should dominate, the appraiser should consider factors such as:

1. The applicable standard of value

2. The purpose and intended use of the valuation

3. Whether the subject is an operating company, a real estate or investment holding company, or a company with substantial non-operating or excess assets
4. The quality and reliability of data underlying the indication of value
5. Such other factors that, in the opinion of the appraiser, are appropriate for consideration

IV. Additional factors to consider

As appropriate for the valuation assignment as defined, and if not considered in the process of determining and weighting the indications of value provided by various procedures, the appraiser should separately consider the following factors in reaching a final conclusion of value:

A. Marketability or lack thereof, considering the nature of the business, the business ownership interest, security or intangible asset
B. The effect of relevant contractual and/or other legal restrictions
C. The condition of the market(s) in which the appraised interest might trade
D. The ability of an owner of the appraised interest to control the operation, sale, or liquidation of the relevant business
E. Such other factors that, in the opinion of the appraiser, are appropriate for consideration
I. Preamble

A. This Standard must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. The purpose of this Standard is to define and describe the requirements for the use of discounts and premiums whenever they are applied in the valuation of businesses, business ownership interests, securities and intangible assets.

C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.

D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

E. This Standard applies at any time in the valuation process, whether within a method, to the value indicated by a valuation method, or to the result of weighting or correlating methods.

II. The concepts of discounts and premiums

A. A discount has no meaning until the conceptual basis underlying the base value to which it is applied is defined.

B. A premium has no meaning until the conceptual basis underlying the base value to which it is applied is defined.

C. A discount or premium is warranted when characteristics affecting the value of the subject interest differ sufficiently from those inherent in the base value to which the discount or premium is applied.

D. A discount or premium quantifies an adjustment to account for differences in characteristics affecting the value of the subject interest relative to the base value to which it is compared.

III. The application of discounts and premiums

A. The purpose, applicable standard of value, or other circumstances of an appraisal may indicate the need to account for differences between the base value and the value of the subject interest. If so, appropriate discounts or premiums should be applied.

B. The base value to which the discount or premium is applied must be specified and defined.

C. Each discount or premium to be applied to the base value must be defined.

D. The primary reasons why each selected discount or premium applies to the appraised interest must be stated.

E. The evidence considered in deriving the discount or premium must be specified.

F. The appraiser's reasoning in arriving at a conclusion regarding the size of any discount or premium applied must be explained.
I. Preamble

A. This Standard must be followed only in the preparation of comprehensive written business valuation reports developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

B. A business valuation report may be less comprehensive in content provided that the report complies with the minimum content required by Standard 10.2 of USPAP.

C. The purpose of this Standard is to define and describe the requirements for the written communication of the results of a business valuation, analysis, or opinion, but not the conduct thereof, which may reflect the three types of engagements defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.

D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. Signature and certification

A. An appraiser assumes responsibility for the statements made in a comprehensive written report and accepts that responsibility by signing the report. To comply with this Standard, a comprehensive written report must be signed by the appraiser. For the purpose of this Standard, the appraiser is the individual or entity undertaking the appraisal assignment under a contract with the client.

B. Clearly, at least one individual is responsible for the valuation conclusion(s) expressed in a report. A report must contain a certification, as required by Standard 10 of USPAP, in which the individual(s) responsible for the valuation conclusion(s) must be identified.

III. Assumptions and limiting conditions

The following assumptions and/or limiting conditions must be stated:

A. Pertaining to bias. A report must contain a statement that the appraiser has no interest in the asset appraised, or other conflict that could cause a question as to the appraiser’s independence or objectivity; or, if such an interest or conflict exists, it must be disclosed.

B. Pertaining to data used. Where appropriate, a report must indicate that an appraiser relied on data supplied by others, without further verification by the appraiser, as well as the sources that were relied on.

C. Pertaining to validity of the valuation. A report must contain a statement that a valuation is valid only for the valuation date indicated and for the purpose stated.
IV. Definition of the valuation assignment

The precise definition of the valuation assignment is a key aspect of the report. The following are components of such a definition and must be included in the report:

A. The business interest being valued must be clearly defined, such as “100 shares of the Class A common stock of the XYZ Corporation” or “a 20 percent limited partnership interest in the ABC Limited Partnership.” The existence, rights, and/or restrictions of other classes of ownership in the subject business must also be adequately described if they are relevant to the conclusion of value.

B. The purpose and use of the valuation must be clearly stated, such as “a determination of fair market value for ESOP purposes” or “a determination of fair value for dissenters' rights purposes.” If a valuation is being performed pursuant to a particular statute, the statute must be referenced.

C. The standard of value used in the valuation must be stated and defined.

D. The premise or basis of value, such as valuation on a going concern or liquidation basis, must be defined.

E. The level of value, such as marketable minority or nonmarketable minority, must be defined.

F. The effective date and the report date must be stated.

G. Other elements as outlined in BVS-I General Requirements for Developing a Business Valuation, Section II.B, as appropriate.

V. Business description

A comprehensive written business valuation report must include a business description that covers relevant factual matters related to the business, such as:

A. Form of organization (e.g., corporation, partnership, or other)

B. History

C. Products and/or services

D. Markets and customers

E. Management

F. Major assets, both tangible and intangible, and major liabilities

G. Outlook for the economy, industry, and business

H. Past transactional evidence of value

I. Sensitivity to seasonal or cyclical factors

J. Competition

K. Sources of information used

L. Such other factual information as may be required to present a clear description of the business and the general context within which it operates
VI. Financial analysis

A. An analysis and discussion of a firm’s financial statements is an integral part of a business valuation and must be included in a comprehensive written business valuation report. Exhibits summarizing balance sheets and income statements for a period of years sufficient to the purpose of the valuation and the nature of the subject company must be included in the valuation report.

B. Any adjustments made to the reported financial data must be fully explained.

C. If projections of balance sheets or income statements are used in the valuation, key assumptions underlying those projections must be included and discussed.

D. If appropriate, the company’s financial results in comparison to those of the industry in which it operates must be discussed.

VII. Valuation methodology

A. The valuation method or methods selected, and the reasons for their selection, must be discussed. The steps followed in the application of the method(s) selected must be described. The description of the methodology and the procedures followed must contain sufficient detail to allow the intended user of the report to understand how the appraiser reached the valuation conclusion.

B. The report must include explanations of how factors such as discount rates, capitalization rates, or valuation multiples were determined and used. The rationale and/or supporting data for any premiums or discounts must be clearly presented.

VIII. Comprehensive written business valuation report format

The comprehensive written business valuation report must clearly communicate pertinent information, valuation methods and conclusions in a logical progression, and must incorporate the other specific requirements of this Standard, including the signature and certification provisions.

IX. Confidentiality of the report

No copies of the report may be furnished to persons other than the client without the client’s specific permission or direction unless ordered by a court of competent jurisdiction.
I. Preamble
   A. This Standard must be followed in all valuations of intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA) or Fellows (FASA).
   B. The purpose of this Standard is to define and describe the requirements for the valuation of intangible assets.
   C. This Standard applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS-I General Requirements for Developing a Business Valuation, Section II.C.
   D. This Standard incorporates the General Preamble to the ASA Business Valuation Standards.

II. Principles

   In developing an intangible asset valuation, an appraiser must:
   A. Identify the intangible asset to which the valuation relates.
   B. Identify and define the applicable items of BVS-I General Requirements for Developing a Business Valuation, Section II.B.

III. Valuation methodology

   In valuing an intangible asset, the appraiser should consider appropriate approaches and methods. Approaches that should be considered in valuing intangible assets are as follows:
   A. Income Approach.
      1. The appraiser should identify the economic benefits that are reasonably attributable to the subject intangible asset, and the risks associated with realizing those benefits.
      2. The appraiser should consider the economic benefit provided by the amortization of the asset’s value for income tax purposes, where applicable.
      3. The appraiser should consider whether the economic life of the intangible asset is different from its legal or regulatory life.
   B. Market Approach. The appraiser should consider relevant differences between the subject and guideline assets as well as respective market conditions.
   C. Cost Approach. The appraiser should consider direct and indirect costs associated with reproduction or replacement, as the case may be, as well as any loss of value due to functional or economic obsolescence, or reduced life expectancy.
IV. Factors

In valuing an intangible asset, the appraiser should consider:

A. The bundle of legal rights, protections and limitations pertaining to the intangible asset to be valued.

B. The history of the intangible asset.

C. The intangible asset’s expected remaining economic (useful) and legal life.

D. The economic benefits, direct or indirect, that the intangible asset is expected to provide to its owner during the asset’s life.

E. Previous or existing litigation involving the intangible asset.

F. The distinction between an undivided interest and a fractional interest in the intangible asset resulting from, e.g., shared ownership or a licensing agreement.

G. The feasibility and character of potential commercial exploitation of the intangible asset.

H. Additional factors relating to the specific type of intangible asset to be valued, as appropriate.

See Appendix A below for illustrations of several intellectual property intangible assets.
APPENDIX A to BVS-IX: INTELLECTUAL PROPERTY EXAMPLES

The purpose of this Appendix is to illustrate asset type valuation factors in the context of intellectual property, and to provide guidance to be considered in the valuation of the indicated assets.

I. **Patents.** A patent is a published, public document that grants an inventor or assignee specific rights such as excluding others from making, using, or selling an invention, design or discovery within a specific jurisdiction for a term of years. For an intangible asset such as a patent, the appraiser should consider the following factors, as applicable (in addition to meeting all the other requirements of ASA Business Valuation Standard BVS IX: Intangible Asset Valuation):
   
   A. Scope of protection, such as jurisdictional coverage, status of registrations and maintenance fee payments, breadth of patent claims and alternatives to the patented invention.
   
   B. Risks of patent exploitation, such as infringement, invalidity, existence of technological or economic barriers to successful commercialization, or alternative innovations that could reduce the patent’s economic benefit.
   
   C. Public and private information that may be available regarding the subject patent and comparable or competing technologies, such as data from the United States Patent & Trademark Office [USPTO], public disclosure filed with the Securities and Exchange Commission ("SEC") and market research.
   
   D. In valuing a portfolio of patents, the appraiser should consider the relevant synergies enabled by the aggregation of rights, such as:
      1. Elimination of blocking patent rights
      2. Obtaining design freedom, reducing the likelihood of infringement
      3. Attainment of a broader, or more versatile or desirable mix of commercialization possibilities

II. **Trade Secrets.** A trade secret is information that a business keeps secret in order to gain an advantage over competitors. For an intangible asset in the nature of a trade secret, the appraiser should consider the following factors, as applicable (in addition to meeting all the other requirements of ASA Business Valuation Standard BVS IX: Intangible Asset Valuation):
   
   A. The reasonableness and effectiveness of measures taken to ensure secrecy.
   
   B. The possibility that the secret could be legitimately discovered and/or developed by competitors, such as through independent research, development or engineering.
   
   C. If potentially patentable, the potential benefits, costs and risks of patenting versus holding the trade secret as a trade secret.
III. Trademarks. A trademark is a word, symbol or device that is used to denote a source of goods or services. For an intangible asset in the nature of a trademark, the appraiser should consider the following factors, as applicable (in addition to meeting all the other requirements of ASA Business Valuation Standard BVS IX: Intangible Asset Valuation):

A. The ability to extend the trademark to related products or services, i.e., without infringing on the trademarks of others.

B. The nature and extent of protections afforded by any registrations, including whether applicable renewals are in effect.

C. Possibility of abandonment due to non-use.

D. Possibility of the mark becoming generic.

E. Public and private information that may be available regarding the subject trademark and comparable or competing marks, such as USPTO data, public disclosure filed with the SEC, market analysis and research and surveys.

IV. Copyrighted Works. A copyright is a creative expression, such as a writing, recording, play, or work of art, which is protected by law against unpermitted copying. For an intangible asset in the nature of a copyrighted work, the appraiser should consider the following factors, as applicable (in addition to meeting all the other requirements of ASA Business Valuation Standard BVS IX: Intangible Asset Valuation):

A. Scope of protection, such as jurisdictional coverage, status of registrations and renewals, and whether the copyright relates to the original work or a particular derivative thereof.

B. Public and private information that may be available regarding the copyrighted work, and comparable or competing works.
Preamble

The American Society of Appraisers, through its Business Valuation Committee, has adopted these Definitions (“Definitions”) to ensure the quality of valuations by defining terms whose meanings are clear and consistently applied for the benefit of appraisers, their clientele and other intended users.

A. These Definitions include the International Glossary of Business Valuation Terms as adopted by the following professional societies and organizations:

- American Institute of Certified Public Accountants
- American Society of Appraisers
- National Association of Certified Valuation Analysts
- The Canadian Institute of Chartered Business Valuators
- The Institute of Business Appraisers

The International Glossary of Business Valuation Terms are marked with an asterisk (*)

B. In the event that the assignment requires use of definitions that materially depart from those contained herein, the appraiser should fully explain the reason for departure and the implications it may have on the valuation assignment.

C. These Definitions provide guidance to ASA members by offering uniformity and consistency in the course of applying valuation terms used in developing and reporting the valuation of businesses, business ownership interests, securities and intangible assets.

D. Departure from these Definitions is not intended to form the basis of any civil liability and should not create any presumption or evidence that a legal duty has been breached. Moreover, compliance with these Definitions does not create any special relationship between the appraiser and any other person.
Definitions

**Adjusted Book Value.** The book value that results after asset or liability amounts are added, deleted, or changed from their respective book amounts.

**Adjusted Book Value Method.** A method within the asset approach whereby all assets and liabilities (including off-balance sheet, intangible, and contingent) are adjusted to their fair market values (Note: In Canada on a going concern basis).

**Adjusted Net Asset Method.** See Adjusted Book Value Method.

**Appraisal.** See Valuation.

**Appraisal Approach.** See Valuation Approach.

**Appraisal Date.** See Valuation Date.

**Appraisal Method.** See Valuation Method.

**Appraisal Procedure.** See Valuation Procedure.

**Appraised Value.** The appraiser's opinion or conclusion of value.

**Arbitrage Pricing Theory.** A multivariate model for estimating the cost of equity capital, which incorporates several systematic risk factors.

**Asset (Asset-Based) Approach.** A general way of determining a value indication of a business, business ownership interest, security or intangible asset using one or more methods based on the value of the assets net of liabilities.

**Beta.** A measure of systematic risk of a stock; the tendency of a stock's price to correlate with changes in a specific index.

**Blockage Discount.** An amount or percentage deducted from the current market price of a publicly traded stock to reflect the decrease in the per share value of a block of stock that is of a size that could not be sold in a reasonable period of time given normal trading volume.

**Book Value.** See Net Book Value.

**Business.** See Business Enterprise.

**Business Appraiser.** A person who, by education, training and experience, is qualified to develop an appraisal of a business, business ownership interest, security or intangible assets.

**Business Enterprise.** A commercial, industrial, service, or investment entity (or a combination thereof) pursuing an economic activity.

**Business Risk.** The degree of uncertainty of realizing expected future returns of the business resulting from factors other than financial leverage. See Financial Risk.

**Business Valuation.** The act or process of determining the value of a business enterprise or ownership interest therein.
Capital Asset Pricing Model (CAPM).* A model in which the cost of capital for any stock or portfolio of stocks equals a risk-free rate plus a risk premium that is proportionate to the systematic risk of the stock or portfolio.

Capitalization.* A conversion of a single period of economic benefits into value.

Capitalization Factor.* Any multiple or divisor used to convert anticipated economic benefits of a single period into value.

Capitalization of Earnings Method.* A method within the income approach whereby economic benefits for a representative single period are converted to value through division by a capitalization rate.

Capitalization Rate.* Any divisor (usually expressed as a percentage) used to convert anticipated economic benefits of a single period into value.

Capital Structure.* The composition of the invested capital of a business enterprise, the mix of debt and equity financing.

Cash Flow.* Cash that is generated over a period of time by an asset, group of assets, or business enterprise. It may be used in a general sense to encompass various levels of specifically defined cash flows. When the term is used, it should be supplemented by a qualifier (e.g., "discretionary" or "operating") and a specific definition in the given valuation context.

Common Size Statements.* Financial statements in which each line is expressed as a percentage of the total. On the balance sheet, each line item is shown as a percentage of total assets, and on the income statement, each item is expressed as a percentage of sales.

Control.* The power to direct the management and policies of a business enterprise.

Control Premium.* An amount or a percentage by which the pro rata value of a controlling interest exceeds the pro rata value of a non-controlling interest in a business enterprise, to reflect the power of control.

Cost Approach.* A general way of determining a value indication of an individual asset by quantifying the amount of money required to replace the future service capability of that asset.

Cost of Capital.* The expected rate of return that the market requires in order to attract funds to a particular investment.

Debt-Free.* Use of this term is discouraged. See Invested Capital.

Discount for Lack of Control.* An amount or percentage deducted from the pro rata share of value of 100 percent of an equity interest in a business to reflect the absence of some or all of the powers of control.

Discount for Lack of Liquidity. An amount or percentage deducted from the value of an ownership interest to reflect the relative inability to quickly convert property to cash.

Discount for Lack of Marketability.* An amount or percentage deducted from the value of an ownership interest to reflect the relative absence of marketability.

Discount for Lack of Voting Rights.* An amount or percentage deducted from the per share value of a minority interest voting share to reflect the absence of voting rights.

Discount Rate.* A rate of return used to convert a future monetary sum into present value.
**Discounted Cash Flow Method.** A method within the income approach whereby the present value of future expected net cash flows is calculated using a discount rate.

**Discounted Future Earnings Method.** A method within the income approach whereby the present value of future expected economic benefits is calculated using a discount rate.

**Discretionary Earnings.** Earnings that may be defined, in certain applications, to reflect earnings of a business enterprise prior to the following items:

- Income taxes
- Nonoperating income and expenses
- Nonrecurring income and expenses
- Depreciation and amortization
- Interest expense or interest income
- Owner’s total compensation for those services, which could be provided by a sole owner/manager.

**Economic Benefits.** Inflows such as revenues, net income, net cash flows, etc.

**Economic Life.** The period of time over which property may generate economic benefits.

**Effective Date.** See Valuation Date.

**Enterprise.** See Business Enterprise.

**Equity.** The owner's interest in property after deduction of all liabilities.

**Equity Net Cash Flows.** Those cash flows available to pay out to equity holders (in the form of dividends) after funding operations of the business enterprise, making necessary capital investments, and increasing or decreasing debt financing.

**Equity Risk Premium.** A rate of return added to a risk-free rate to reflect the additional risk of equity instruments over risk free instruments (a component of the cost of equity capital or equity discount rate).

**Excess Earnings.** That amount of anticipated economic benefits that exceeds an appropriate rate of return on the value of a selected asset base (often net tangible assets) used to generate those anticipated economic benefits.

**Excess Earnings Method.** A specific way of determining a value indication of a business, business ownership interest, security or intangible asset determined as the sum of a) the value of the assets derived by capitalizing excess earnings and b) the value of the selected asset base. Also frequently used to value intangible assets. See Excess Earnings.

**Fair Market Value.** The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. (Note: In Canada, the term "price" should be replaced with the term "highest price").

**Fairness Opinion.** An opinion as to whether or not the consideration in a transaction is fair from a financial point of view.

Forced Liquidation Value.* Liquidation value, at which the asset or assets are sold as quickly as possible, such as at an auction.

Free Cash Flow.* Use of this term is discouraged. See Net Cash Flow.

Going Concern.* An ongoing operating business enterprise.

Going Concern Value.* The value of a business enterprise that is expected to continue to operate into the future. The intangible elements of Going Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place.

Going Concern Value. Refers to the intangible elements that result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems and procedures in place. Also refers to the premise of value based on the concept that a business enterprise is expected to continue operations into the future.

Goodwill.* That intangible asset arising as a result of name, reputation, customer loyalty, location, products, and similar factors not separately identified.

Goodwill. That intangible asset arising as a result of elements such as name, reputation, customer loyalty, location, products and related factors not separately identified and quantified.

Goodwill Value.* The value attributable to goodwill.

Goodwill Value. The value attributable to the elements of intangible assets above the identifiable tangible and intangible assets employed in a business.

Guideline Public Company Method.* A method within the market approach whereby market multiples are derived from market prices of stocks of companies that are engaged in the same or similar lines of business, and that are actively traded on a free and open market.

Guideline Transactions Method. See Merger and Acquisition Method.

Holding Company. An entity that derives its returns from investments rather than from the sale of products or services.

Hypothetical Condition. That which is contrary to what exists but is supposed for the purpose of analysis.

Income (Income-Based) Approach.* A general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more methods that convert anticipated economic benefits into a present single amount.

Intangible Assets.* Non-physical assets such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities and contracts (as distinguished from physical assets) that grant rights and privileges, and have value for the owner.

Internal Rate of Return.* A discount rate at which the present value of the future cash flows of the investment equals the cost of the investment.
Intrinsic Value.* The value that an investor considers, on the basis of an evaluation or available facts, to be the "true" or "real" value that will become the market value when other investors reach the same conclusion. When the term applies to options, it is the difference between the exercise price or strike price of an option and the market value of the underlying security.

Invested Capital.* The sum of equity and debt in a business enterprise. Debt is typically a) all interest bearing debt or b) long-term interest-bearing debt. When the term is used, it should be supplemented by a specific definition in the given valuation context.

Invested Capital Net Cash Flows.* Those cash flows available to pay out to equity holders (in the form of dividends) and debt investors (in the form of principal and interest) after funding operations of the business enterprise and making necessary capital investments.

Investment Risk.* The degree of uncertainty as to the realization of expected returns.

Investment Value.* The value to a particular investor based on individual investment requirements and expectations. (Note: in Canada, the term used is "Value to the Owner").

Key Person Discount.* An amount or percentage deducted from the value of an ownership interest to reflect the reduction in value resulting from the actual or potential loss of a key person in a business enterprise.

Levered Beta.* The beta reflecting a capital structure that includes debt.

Limited Appraisal. The act or process of determining the value of a business, business ownership interest, security, or intangible asset with limitations in analyses, procedures, or scope.

Liquidation Value.* The net amount that would be realized if the business is terminated and the assets are sold piecemeal. Liquidation can be either "orderly" or "forced."

Liquidity.* The ability to quickly convert property to cash or pay a liability.

Liquidity. The ability to readily convert an asset, business, business ownership interest, security or intangible asset into cash without significant loss of principal.

Majority Control.* The degree of control provided by a majority position.

Majority Interest.* An ownership interest greater than 50 percent of the voting interest in a business enterprise.

Market (Market-Based) Approach.* A general way of determining a value indication of a business, business ownership interest, security, or intangible asset by using one or more methods that compare the subject to similar businesses, business ownership interests, securities or intangible assets that have been sold.

Market Capitalization of Equity.* The share price of a publicly traded stock multiplied by the number of shares outstanding.

Market Capitalization of Invested Capital.* The market capitalization of equity plus the market value of the debt component of invested capital.

Market Multiple.* The market value of a company's stock or invested capital divided by a company measure (such as economic benefits, number of customers).
Marketability.* The ability to quickly convert property to cash at minimal cost.

Marketability. The capability and ease of transfer or salability of an asset, business, business ownership interest, security or intangible asset.

Marketability Discount.* See Discount for Lack of Marketability.

Merger and Acquisition Method.* A method within the market approach whereby pricing multiples are derived from transactions of significant interests in companies engaged in the same or similar lines of business.

Mid-Year Discounting.* A convention used in the Discounted Future Earnings Method that reflects economic benefits being generated at midyear, approximating the effect of economic benefits being generated evenly throughout the year.

Minority Discount.* A discount for lack of control applicable to a minority interest.

Minority Interest.* An ownership interest less than 50 percent of the voting interest in a business enterprise.

Multiple.* The inverse of the capitalization rate.

Net Assets. Total assets less total liabilities.

Net Book Value.* With respect to a business enterprise, the difference between total assets (net of accumulated depreciation, depletion, and amortization) and total liabilities as they appear on the balance sheet (synonymous with shareholders’ equity). With respect to a specific asset, the capitalized cost less accumulated amortization or depreciation as it appears on the books of account of the business enterprise.

Net Cash Flows.* A form of cash flow. When the term is used, it should be supplemented by a qualifier (e.g., "equity" or "Invested Capital") and a specific definition in the given valuation context.

Net Income. Revenue less expenses and taxes.

Net Present Value.* The value, as of a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

Net Tangible Asset Value.* The value of the business enterprise's tangible assets (excluding excess assets and non-operating assets) minus the value of its liabilities. (Note: in Canada, tangible assets also include identifiable intangible assets).

Non-Operating Assets.* Assets not necessary to ongoing operations of the business enterprise. (Note: in Canada, the term used is "Redundant Assets").

Normalized Earnings*. Economic benefits adjusted for nonrecurring, non-economic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Normalized Financial Statements.* Financial statements adjusted for non-operating assets and liabilities and/or for nonrecurring, non-economic, or other unusual items to eliminate anomalies and/or facilitate comparisons.

Operating Company. A business that conducts an economic activity by generating and selling, or trading in a product or service.
Orderly Liquidation Value.* Liquidation value at which the asset or assets are sold over a reasonable period of time to maximize proceeds received.

Portfolio Discount.* An amount or percentage deducted from the value of a business enterprise to reflect the fact that it owns dissimilar operations or assets that do not fit well together.

Premise of Value.* An assumption regarding the most likely set of transactional circumstances that may be applicable to the subject valuation; e.g., going concern, liquidation.

Present Value.* The value, as of a specified date, of future economic benefits and/or proceeds from sale, calculated using an appropriate discount rate.

Price/Earnings Multiple.* The price of a share of stock divided by its earnings per share.

Rate of Return.* An amount of income (loss) and/or change in value realized or anticipated on an investment, expressed as a percentage of that investment.

Redundant Assets.* See Non-Operating Assets.

Replacement Cost New.* The current cost of a similar new property having the nearest equivalent utility to the property being valued.

Report Date.* The date conclusions are transmitted to the client.

Reproduction Cost New.* The current cost of an identical new property.

Required Rate of Return.* The minimum rate of return acceptable by investors before they will commit money to an investment at a given level of risk.

Residual Value.* The value as of the end of the discrete projection period in a discounted future earnings model.

Return on Equity.* The amount, expressed as a percentage, earned on a company’s common equity for a given period.

Return on Investment.* See Return on Invested Capital and Return on Equity.

Return on Invested Capital.* The amount, expressed as a percentage, earned on a company’s total capital for a given period.

Risk-Free Rate.* The rate of return available in the market on an investment free of default risk.

Risk Premium.* A rate of return added to a risk-free rate to reflect risk.

Rule of Thumb.* A mathematical formula developed from the relationship between price and certain variables based on experience, observation, hearsay, or a combination of these; usually industry specific.

Special Interest Purchasers.* Acquirers who believe they can enjoy post-acquisition economies of scale, synergies, or strategic advantages by combining the acquired business interest with their own.

Standard of Value.* The identification of the type of value being used in a specific engagement; e.g. fair market value, fair value, investment value.
Sustaining Capital Reinvestment.* The periodic capital outlay required to maintain operations at existing levels, net of the tax shield available from such outlays.

Systematic Risk.* The risk that is common to all risky securities and cannot be eliminated through diversification. The measure of systematic risk in stocks is the beta coefficient.

Tangible Assets.* Physical assets (such as cash, accounts receivable, inventory, property, plant and equipment, etc.)

Terminal Value.* See Residual Value

Transaction Method.* See Merger and Acquisition Method and Guideline Transactions Method.

Unlevered Beta.* The beta reflecting a capital structure without debt.

Unsystematic Risk.* The risk specific to an individual security that can be avoided through diversification.

Valuation.* The act or process of determining the value of a business, business ownership interest, security, or intangible asset.

Valuation Approach.* A general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one or more valuation methods.

Valuation Date.* The specific point in time as of which the valuator's opinion of value applies (also referred to as "Effective Date" or "Appraisal Date" or "as of" date).

Valuation Method.* Within approaches, a specific way to determine value.

Valuation Procedure.* The act, manner, and technique of performing the steps of an appraisal method.

Valuation Ratio.* A fraction in which a value or price serves as the numerator and financial, operating, or physical data serves as the denominator.

Value to the Owner.* See Investment Value.

Voting Control.* de jure control of a business enterprise.

Weighted Average Cost of Capital (WACC). The cost of capital (discount rate) determined by the weighted average, at market values, of the cost of all financing sources in the business enterprise’s capital structure.

Working Capital. The amount by which current assets exceed current liabilities.
I. Preamble

A. Statements clarify, interpret, explain, or elaborate on Standards. Statements have the full weight of Standards.

B. This Statement must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).

C. The purpose of this Statement is to define and describe the requirements for the use of guideline public companies in the valuation of businesses, business ownership interests, securities and intangible assets, when applicable, under BVS–V Market Approach to Business Valuation.

D. This Statement applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS–I General Requirements for Developing a Business Valuation, Section II.C.

E. This Statement incorporates the General Preamble to the ASA Business Valuation Standards.

II. Conceptual framework

A. Market transactions in the securities of publicly traded companies can provide objective, empirical data for developing valuation ratios for use in business valuation.

B. The development of valuation ratios from guideline public companies should be considered in the valuation of businesses, business ownership interests, securities and intangible assets to the extent that adequate and relevant information is available.

C. Guideline public companies are companies with shares traded in the public securities markets that provide a reasonable basis for comparison to the investment characteristics of the company (or other interest) being valued. Ideal guideline companies are in the same industry as the subject company; however, if there is insufficient market evidence available in that industry, it may be necessary to select other companies having an underlying similarity to the subject company in terms of relevant investment characteristics such as markets, products, growth, cyclical variability, and other relevant factors.

III. Search for and selection of guideline companies

A. When using the Guideline Public Company Method, a thorough, objective search for guideline public companies is required to establish the credibility of the valuation analysis.

B. The search procedure must include criteria for screening and selecting guideline public companies.

C. Empirical data can be found in market-based valuation ratios of guideline public companies that are engaged in the same business, in similar lines of business, or in businesses that share other relevant investment characteristics with the subject company.
IV. Financial data of guideline public companies

A. It is necessary to obtain and analyze financial and operating data on selected guideline public companies, as available.

B. Adjustments to the financial data of the subject company and guideline public companies should be considered to minimize differences in accounting treatments when such differences are significant.

C. Unusual or nonrecurring items should be analyzed and adjusted as appropriate.

V. Valuation ratios derived from guideline public companies

A. Comparisons are made through the use of valuation ratios. The computation and use of such ratios should provide meaningful insight about the value of the subject company, considering all relevant factors. Accordingly, care should be exercised with respect to issues such as:

1. The selection of the underlying data used to compute the valuation ratios

2. The selection of the time periods and/or the averaging methods used for the underlying data

3. The computation of the valuation ratios, which may be derived by relating prices of the guideline public companies to the appropriate underlying financial, operating, or physical data of the respective guideline companies

4. The timing of the price data used in the valuation ratios (in relationship to the effective date of the appraisal)

5. How the valuation ratios were selected and applied to the subject’s underlying data

B. In general, comparisons should be made using comparable definitions of the components of the valuation ratios. However, where appropriate, valuation ratios based on components that are reasonably representative of ongoing results may be used.

C. Several valuation ratios may be selected for application to the subject company. These ratios may require adjustment for differences in qualitative and quantitative factors between the guideline public companies and the subject.

D. One or more indications of value may result from the use of the Guideline Public Company Method. The appraiser must consider the relative importance or weight accorded to each of the indications of value used in arriving at the opinion or conclusion of value.

VI. Other factors and considerations

Adjustment may be necessary to the ratios or values for factors relating to the subject interest that may not have been considered earlier in the appraisal, such as:

A. Degree of control

B. Degree of marketability and liquidity

C. Strategic or investment value issues

D. Size, depth of management, diversification of markets, products and services, and relative growth and risk
I. Preamble
   A. Statements clarify, interpret, explain, or elaborate on Standards. Statements have the full weight of Standards.
   B. This Statement must be followed in all valuations of businesses, business ownership interests, securities and intangible assets developed by all members of the American Society of Appraisers, be they Candidates, Accredited Members (AM), Accredited Senior Appraisers (ASA), or Fellows (FASA).
   C. The purpose of this Statement is to define and describe the requirements for the use of guideline transactions in the valuation of businesses, business ownership interests, securities and intangible assets, when applicable, under BVS–V Market Approach to Business Valuation.
   D. This Statement applies to appraisals and may not necessarily apply to limited appraisals and calculations as defined in BVS–I General Requirements for Developing a Business Valuation, Section II.C.
   E. This Statement incorporates the General Preamble to the ASA Business Valuation Standards.

II. Conceptual framework
   A. Transactions involving the sale, merger or acquisition of businesses, business ownership interests, securities and intangible assets can provide objective, empirical data for developing valuation ratios for use in business valuation.
   B. The development of valuation ratios from guideline transactions of significant interests in companies (or intangible assets, if applicable) should be considered in the valuation of businesses, business ownership interests, securities and intangible assets to the extent that sufficient and relevant information is available.
   C. Guideline transactions are transactions involving companies (or interests) that provide a reasonable basis for comparison to the investment characteristics of the company (or interest) being valued. Ideal guideline transactions are in the same industry as the subject company. However, if there is insufficient transactional information available in that industry, it may be necessary to select transactions involving other companies having an underlying similarity to the subject company in terms of relevant investment characteristics such as markets, products, growth, cyclical variability and other relevant factors. Prior transactions in the company being valued may also be considered to be guideline transactions.

III. Search for and selection of transactions in guideline companies
   A. When using the Guideline Transactions Method, a thorough, objective search for transactions of interests in companies similar to the company being valued is required to establish the credibility of the valuation analysis.
   B. The search procedure must include criteria for screening and selecting guideline transactions.
   C. Empirical data can be developed from guideline transactions involving controlling or minority interests in publicly traded or closely held companies or intangible assets.
   D. Empirical data can be developed from valuation ratios of guideline transactions involving companies (or interests) in the same business, in similar lines of business, or in businesses that share other relevant investment characteristics with the subject company (or interest) when sufficient information is available regarding the transactions.
IV. Financial data of guideline companies
   A. It is necessary to obtain and analyze relevant financial and operating data of the companies involved in guideline transactions, as available.
   B. Adjustments to the financial data of the subject company and the companies in the guideline transactions should be considered to minimize differences in accounting treatments when such differences are significant.
   C. Unusual or nonrecurring items should be analyzed and adjusted, as appropriate.

V. Valuation ratios derived from guideline transactions
   A. Comparisons are made through the use of valuation ratios. The computation and use of such ratios can provide meaningful insight about the value of the subject, considering all relevant factors. Accordingly, care should be exercised with respect to issues such as:
      1. The selection of the underlying data used to compute the valuation ratios
      2. The selection of the time periods and/or the averaging methods used for the underlying data
      3. The computation of the valuation ratios, which may be derived by relating prices in guideline transactions to the appropriate underlying financial, operating, or physical data of the respective companies (or interests) involved in the transactions
      4. The timing of the price data used in the valuation ratios (in relationship to the effective date of the appraisal)
      5. How the valuation ratios were selected and applied to the subject’s underlying data
   B. Several valuation ratios may be selected for application to the subject company. These ratios may require adjustment for differences in qualitative and quantitative factors between the companies (or interests) involved in the guideline transactions and the subject.
   C. Guideline transactions typically involve a specific buyer and a specific seller. Information regarding both the buyer and seller in a guideline transaction may be necessary in order to draw valuation inferences from the transaction.
   D. One or more indications of value may result from the use of the Guideline Transactions Method. The appraiser must consider the relative importance or weight accorded to each of the indications of value used in arriving at the opinion or conclusion of value.

VI. Other factors and considerations
   Adjustments may be necessary to the ratios or values for factors that have not been considered earlier in the appraisal, such as:
   A. Degree of control
   B. Degree of marketability and/or liquidity
   C. Timing differences between market transactions and the valuation date
   D. Strategic or investment value issues
   E. Size, depth of management, diversification of markets, products and services, and relative growth and risk
It is the opinion of the Business Valuation Committee that the ASA Business Valuation Standards and the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation, as they apply to business valuation issues, are intended to apply to appraisals that are formally developed and presented opinions of value performed as the primary or ultimate objective of an appraisal engagement. These standards are not intended to apply to financial consultation or advisory services where there is no expression of an opinion value, or the primary or ultimate objective is not to express an opinion of value, including but not limited to, fairness opinions, solvency opinions, pricing of securities for public offerings, feasibility studies, transfer pricing studies, lifing studies of intangibles, estate planning or estate tax services, economic damage analysis and quantification, litigation consulting, royalty rate studies for intangibles and similar engagements.
I. Preamble

A. Business valuation professionals are frequently engaged as independent financial experts for purposes of assisting in dispute resolution, litigation, or potential litigation. To preserve and enhance the quality of the services of such experts, the American Society of Appraisers, through its Business Valuation Committee, has adopted this Procedural Guideline.

B. This Procedural Guideline incorporates, where appropriate, all relevant Business Valuation Standards and Statements on Standards adopted by the American Society of Appraisers through its Business Valuation Committee.

C. This Procedural Guideline suggests specific procedures that may be used by experts. It is not binding.

D. This Procedural Guideline is designed to offer guidance to ASA members providing litigation-support services. Deviations from this Procedural Guideline are not designed to be or intended to be the basis of any civil liability, and should not create any presumption or evidence that a legal duty has been breached, or create any special relationship between the expert and any other person.

II. Performance of litigation support services

A. Litigation support services include any professional assistance provided to a client in a matter involving pending or potential litigation or dispute resolution proceedings before a trier of fact.

B. In rendering litigation support services, the expert may be retained to provide an expert opinion on the financial effects of facts and assumptions. In addition to forming an expert opinion, the expert may value a business, project future financial results, analyze the performance of a business operation, interpret financial data, opine on an impaired stream of earnings, or render other similar types of professional services.

C. In providing litigation-support services, an independent financial expert may play a role as:

1. **Expert.** One who is qualified by knowledge, skill, experience, training, or education in performing business valuation services and/or related financial analyses.

2. **Expert Witness.** An expert who is engaged to explain technical, scientific, or specialized knowledge in order to assist the trier of fact in understanding evidence.

3. **Arbitrator.** An expert who serves as a trier of fact in an alternative dispute resolution context.

4. **Court-Appointed Expert.** An expert who is engaged by a court to assist the trier of fact.

5. **Consulting or Advisory Expert.** An expert who is engaged to review another expert’s work product or who is engaged to advise the client, lawyer or another expert witness about technical matters relating to the subject litigation, but who will not be called to testify at trial, and may or may not be independent. Accordingly, this Procedural Guideline may not apply to such an expert.
D. The expert should obtain a clear understanding of the type of the assignment.

E. When planning the scope of work for a particular engagement, the expert should obtain an understanding of the nature of the dispute, the events giving rise to the claim, as well as the economic context and industry outlook impacting the business and/or individual central to the assignment.

F. The expert should obtain sufficient relevant data to afford a reasonable basis for the conclusions reached and/or recommendations made.

G. Sufficient information and documentation should be gathered by such means as inspection, inquiry, computation and analysis to ensure that the expert's analysis and conclusion(s) are properly supported. The expert should exercise professional judgment in determining the extent of the information and documentation necessary to support the conclusion.

H. The expert witness, arbitrator or court-appointed expert should maintain integrity, objectivity and independence.

I. The following examples represent some of the many types of cases in which an expert may provide litigation-support services in the area of business valuation and related financial analysis:

1. **Business valuation**
   a. Determination of “fair value” of minority shares in dissenting stockholder and oppression suits
   b. Income, property, gift tax, and estate tax issues, including the determination of fair market value in non-arm’s length transactions, allocation of purchase price among different categories of assets, corporate reorganizations, rollovers, stockholder benefits, deemed dispositions, gifts and bequests, capital gains, etc.
   c. Valuation of shares held by an Employee Stock Ownership Plan
   d. Separation and divorce
   e. Partner/shareholder disputes
   f. Business valuations
   g. Buy-sell agreements

2. **Quantification of financial loss or damages**
   a. Breach of contract and tort, including:
      (1) measuring damages for lost profits and loss of goodwill
      (2) defining relevant markets and calculating market share
      (3) restating or reconstructing financial records
      (4) developing profit and cost relationships
      (5) creating pro-forma financial statements
   b. Personal injury and fatality claims, including the quantification of impaired earnings
   c. Insurance claims, including business interruption and disturbance losses
   d. Condemnation/expropriation of business or property
   e. Trespass and conversion
   f. Professional malpractice
   g. Anti-trust/unfair competition
   h. Intellectual property-infringement damages
   i. Bankruptcy and reorganization
III. Conducting the assignment

A. In performing the engagement, the expert should consider the appropriate method(s) to be adopted and procedures to be applied.

B. The expert should consider key assumptions and hypothetical conditions, determining the reasonableness and appropriateness thereof. The use of unwarranted assumptions may impair the objectivity — actual or perceived — of the expert.

C. The expert should consider the necessity of relying on the work of a specialist. When there is such reliance, the expert may wish to consider the specialist’s independence and competency. If the expert relies upon a specialist, the conclusions drawn should be documented. Any written opinion or report from a specialist should be retained on file.

D. Work performed in the course of an engagement should be documented and files should be maintained in an organized manner. The form and extent of work papers should suit the circumstances and needs of the engagement for which they are prepared.

E. The expert should evaluate the necessity of obtaining a client representation letter and, if possible and applicable, a representation letter from management or other representatives of the underlying business.

F. The expert should either retain on file, or have access to, all information relied upon.

G. When the expert has determined that an engagement letter is required, the engagement letter should be retained on file. When no engagement letter has been received, the expert’s file should include a summary of the nature and function of the assignment.

H. When the expert has determined that a client representation letter and/or a management representation letter is necessary, this (these) letter(s) should be retained on file.

I. The method(s) selected by the expert should be documented along with the reasons for selection. In addition, the specific procedures should be documented along with the reasons for selection. The expert should document key areas considered and significant assumptions made. A copy of calculations, explanations and documentation supporting the final conclusion should be retained in the file.

J. The expert should follow the rules of the applicable jurisdiction.

IV. Preparation of an expert report

A. An expert report is often considered to constitute any communication, written or oral (and not in draft or preliminary form) that is prepared by an expert and that contains a conclusion pertaining to a review, analysis, or quantification of business value, damages, or economic loss and that is to be used in litigation or arbitration proceedings.

B. It is recommended that the individual(s) responsible for the preparation of the expert report be identified.

C. To the extent that it is both possible and appropriate, an expert report should contain, as a minimum, the following information:
   1. **Identity of client.** The expert’s client(s) should be clearly identified.
   2. **Description of assignment.** The expert report should contain a clear description as to the specific nature of the expert’s assignment.
3. **Effective date(s) or effective time period(s).** Value(s) or damages should be expressed as of a specific date or time period. In damage claims, the damages may relate to past, present and/or future economic losses.

4. **Intended use.** If not already included in the description of the nature of the assignment, the intended use of the expert report should be clearly stated, and use for other purposes should be precluded.

5. **Definitions.** The expert report should contain the expert’s definition of key terms not commonly defined. The expert should define or explain terms such as (but not limited to) “damages,” “economic loss,” “loss of profits,” “lost contribution margin.”

6. **Documents and information.** The expert report should identify significant documents and information relied upon and, if applicable, those reviewed but not relied upon.

7. **Limitations.** If the expert was unable to obtain, or was otherwise denied access to, documents, information, and/or interviews, or where the information provided was incomplete, this limitation should be clearly disclosed in the expert report. It may also be appropriate to disclose the reasons for this limitation. To the extent that such limitation would restrict the ability of the expert to form an opinion, it may be necessary to express a qualified opinion, a disclaimer, or a denial of an opinion, depending on the specific circumstances.

8. **Relevant chronology.** When relevant, the expert report should summarize the chronology of events giving rise to the claim(s) in the litigation. The chronology of events, as set out in the expert report, should be consistent with the effective date or time period.

9. **Relevant context and financial analysis.** When relevant, the expert report should include an appropriate description of factors such as those listed in BVS VIII Comprehensive Written Business Valuation Report, Section V, and a financial analysis such as the one described in BVS VIII, Section VI.

10. **Methodology.** The expert report should contain a description of the method(s) adopted and the reason(s) for their use.

11. **Analysis.** The expert report should provide adequate description in clear terms of how the expert determined value, quantified economic losses, damages, etc.

12. **Assumptions.** The expert report should clearly state and identify the basis of all assumptions, hypothetical conditions and limiting conditions that affected the analyses, opinions and conclusions (see USPAP 10-2(a)(x)).

13. **Conclusion.** The expert report should clearly state the conclusions of the expert.

14. **Report date.** The expert report should be dated as of the day on which it is completed or issued.

15. **Exhibits, appendices, graphs, charts, schedules and tables.** The use of visual aids in the body of, or appending, the expert report should be made in an objective, unbiased and professional manner, so that they can be properly interpreted by the trier of fact and others connected with the litigation or arbitration.
V. Retention of work papers and report

A. The expert should retain fully-documented work papers for each engagement, whether in hard copy or electronic copy. The expert should also retain summaries of oral reports or testimony (or a transcript of testimony) and all other data, information and documentation necessary to support the expert’s opinions and conclusions. Summaries of key meetings, discussions and correspondence should be retained on file.

B. The expert should maintain custody of the work papers, or make appropriate retention, access, and retrieval arrangements with the party having custody of those work papers. The expert should retain the work papers for a period of at least five (5) years after preparation, or at least two (2) years after final disposition of any judicial proceeding (including arbitration) in which testimony was given, whichever period expires last.

C. A copy of the final issued expert report should be retained on file for a period of at least five (5) years after preparation, or at least two (2) years after final disposition of any judicial proceeding (including arbitration) in which testimony was given, whichever period expires last.
I. Preamble

A. Business valuation professionals are frequently engaged as independent financial appraisers for purposes of valuing fractional or partial ownership interests. To preserve and enhance the quality of the services of such appraisers, the American Society of Appraisers, through its Business Valuation Committee, has adopted this Procedural Guideline.

B. This Procedural Guideline incorporates, where appropriate, all relevant Business Valuation Standards and Statements on Standards adopted by the American Society of Appraisers through its Business Valuation Committee.

C. The purpose of this Procedural Guideline is to define and describe the considerations and procedures that may be used in valuing partial ownership interests in businesses, securities or other fractional interests in tangible or intangible property. It is not binding.

D. Deviations from this Procedural Guideline are not designed to be or intended to be the basis of any civil liability, and should not create any presumption or evidence that a legal duty has been breached, or create any special relationship between the appraiser and any other person.

II. General principles

A. Partial ownership interests are interests of an enterprise or an asset of less than 100 percent. Partial ownership interests may exist in various business entities and assets such as corporations, limited liability companies, partnerships, and as direct fractional ownership of certain tangible and intangible assets.

B. Partial ownership interests comprise a spectrum of positions, from nearly total control (e.g., a 95 percent stock ownership position in a corporation, or the sole general partner of a limited partnership) to almost complete lack of control (e.g., a small block of non-voting corporate stock).

C. It is not possible to categorize partial interests in simple terms.

1. Generally, a partial ownership position in an entity or asset that is less than 50 percent may be classified as a noncontrolling or minority interest. Similarly, an interest of greater than 50 percent often confers control. An exact 50 percent interest may have both control characteristics (such as blocking power) and lack of control characteristics (such as inability to proactively cause an action to be taken).

2. The degree of ownership does not always indicate the degree of control.

   a. Governance documents, loan covenants, securities attributes (e.g., preferences, voting versus non-voting, etc.) and other factors may confer control of an entity even if the interest at issue is less than 50 percent.
b. A 60 percent limited partner may have no control over a partnership if removal of the general partner requires a two-thirds majority vote of the limited partnership interests.

c. A 2 percent ownership position might be in a position of limited control if there are two other owners of 49 percent each who are at odds with one another. The same 2 percent owner would be in a completely different position if there was only one other owner of 98 percent, or 49 other owners each owning 2 percent.

d. Three interests of one-third (33 1/3 percent) each provides yet another set of potential valuation dynamics.

3. A complete listing of all the different potential combinations and permutations of ownership structure and characteristics is beyond the scope of this Procedural Guideline.

D. Development of value for a partial interest can be a very different process from valuing the underlying entity or asset as a whole. In addition, valuation of partial interests may or may not be a direct function of the value of the underlying entity or asset as a whole.

1. It is the responsibility of the appraiser to determine if valuation of the underlying asset(s) or entity as a whole is required in order to develop credible appraisal results for the partial interest.

2. If ownership of a partial interest does not provide the ability to liquidate an entity, cause its sale or gain access to any of the assets, valuation of the whole may not be relevant to the analysis. However, if investors or market participants would nonetheless consider the value of the whole irrespective of their inability to cause liquidation or sale of the entity or assets, then valuation of the whole, either on a going concern or liquidation premise, may be appropriate to consider in the analysis.

3. If ownership of a partial interest does provide the ability to cause liquidation of the underlying entity or sale of the underlying asset, and value of the entity or asset depends primarily on the asset-based approach, it may be appropriate to obtain qualified appraisals of any real estate or personal property.

E. Valuation of partial ownership interests is often dependent on contractual provisions. Consequently, rights and restrictions contained in documents such as articles of incorporation, bylaws, partnership agreements, tenant-in-common agreements, option agreements, buy-sell agreements or shareholder agreements may be relevant to the analysis. Similarly, value may be a direct or indirect function of applicable laws and regulations.

F. Appraisers should be aware that the standard (type) and premise of value can have a material effect on the value of a partial ownership interest. For example, valuation of a minority shareholding under the “fair value” standard of value may be very different from its value under the “fair market value” standard of value.

III. Factors to consider

A number of factors may be appropriate to consider in valuing partial ownership interests. The following list is not intended to be all-inclusive. Items on the list may or may not be applicable in specific valuation situations.
A. The purpose and definition of the valuation engagement in accordance with BVS–I General Requirements for Developing a Business Valuation, including the applicable standard (type) and premise of value.

B. Factors related to the underlying enterprise or asset, including:

1. The value of the underlying enterprise or asset, if applicable.

2. Enterprise-level or asset-level tax effects, if relevant.

C. Factors related to the subject partial interest, including:

1. Provisions in the organizational and governance documents that affect the rights, restrictions, marketability and liquidity of the subject interest. Documents to consider may include partnership agreements, articles of incorporation, bylaws, operating agreements, buy-sell agreements, investment letter stock restrictions, option agreements, lock-up requirements or others that may be relevant.

2. Applicable laws and regulations. Business examples include statutory rights to demand dissolution of a corporation under state law, restrictions on transfer pursuant to SEC Rule 144, and many others. An asset example is included the right to partition.

3. The existing ownership structure and configuration.

4. Access to, availability of, and reliability of information regarding the underlying asset or entity.

5. The relevant pool of potential buyers, if any.

6. Market data on transactions in similar markets, if any. Potentially similar markets might include private placements in publicly or privately syndicated entities (including restricted stock transactions, pre-IPO transactions, and transactions in publicly traded limited partnerships) or tenants-in-common arrangements, etc.

7. Expected holding period for an investment in the subject interest, including consideration of such factors as:

   a. The extent to which the expected holding period may be uncertain.

   b. Defined expiration or termination dates contained in the governing documents, or other external factors, that may precipitate a foreseeable liquidation or sale of the underlying entity.

   c. Analysis of the age, health and other characteristics of the other owners and/or key managers, which could provide information about the possible timing of a sale or liquidation by the controlling owner(s).

   d. The history of transactions (if any) involving partial (or possibly controlling) interests of the subject enterprise or asset, including recapitalizations or stock repurchases that have provided liquidity to shareholders.

   e. The potential market for similar enterprises or assets (e.g., is the industry consolidating?).
f. The emerging attractiveness of the entity for equity offering, sale, merger or acquisition.

g. Provisions in the governing documents or buy-sell agreements, or under law or regulation either prohibiting, restricting or allowing transfer of the subject interest.

h. Rights and powers attributable to the subject interest that may enable a sale of the subject entity, asset or the interest itself, against the will of the other owners.

i. Historical actions of management and/or the directorate, which may provide information about their policy and intentions regarding eventual sale of the entity or asset, or receptivity to a potential sale or repurchase of partial interests.

j. The existence, depth and functioning of markets that might be available for interests similar to the subject interest.

k. The appropriateness of considering a range of expected holding periods and exit possibilities.

8. Expected economic benefits associated with the subject interest, which come in the form of interim benefits (dividends or distributions) and a terminal cash flow when the investment is sold or liquidated.

a. Expected interim dividends or distributions to the interest, which may differ from the expected benefits (cash flows) generated by the entity or asset as a whole. Interest-level benefits may be affected by such factors as:

   (1) The history of dividends or distributions, including both timing and amounts.

   (2) Current or expected future distribution policy.

   (3) Preferential dividend claims.

   (4) Enterprise-level and/or interest-level tax characteristics.

   (5) The outlook for one-time and/or irregular dividends or distributions.

   (6) Circumstances with controlling owners that may increase (or decrease) the likelihood of future interim benefits.

b. The expected terminal cash flow at the end of the expected holding period(s), which may be a function of such factors as:

   (1) Possible future transactions involving the enterprise or asset as a whole, or transactions in the subject interest itself.

   (2) Current (valuation date) value and expected growth in value of the enterprise or asset to the end of the expected holding period(s).

   (3) Growth in value may be a function of expected earnings retention (distribution policy) and the amount of and effectiveness of expected reinvestment in the entity or asset.
9. Required return for investing in the subject interest. The required return may consider risks other than risks related to the enterprise or asset as a whole, including for example:
   a. The expected length and uncertainty of the holding period.
   b. The likelihood of dividends or distributions (i.e., expected distribution policy).
   c. The costs of due diligence efforts required to acquire the subject partial interest.
   d. The costs of monitoring the investment over the expected holding period, including issues related to the expected receipt of timely and reliable information concerning the investment.
   e. Required returns on similar investments or investments with similar investment-specific liquidity and holding period characteristics.
   f. The risk of tax liabilities from pass-through profits without guaranteed tax distributions in entities such as limited liability companies, Subchapter S corporations or partnerships.
   g. The difficulty and cost of marketing the subject interest.
   h. The risk of involuntary dilution when no preemptive rights are provided in the articles of incorporation or bylaws of a corporation.
   i. The degree of control conveyed by the subject interest.

10. Ownership-level tax effects, if relevant.

11. Prior transactions in the subject interest, entity or asset, and their relevance to a given assignment.

D. Interaction of the factors listed above, and their cumulative impact on the degree of control, marketability and liquidity of the subject interest.

IV. Approaches, methods and procedures
   A. Appraisers should consider all three approaches to value (asset-based, income and market) when valuing partial interests. If an approach is excluded in an assignment the appraiser should explain the reason for such exclusion in the appraisal report.

   B. It may be appropriate for the appraiser to obtain the assistance of legal counsel in order to gain a reasonable familiarity and understanding of the legal and regulatory environment that may influence or affect value. Similarly, it may be appropriate for the appraiser to obtain input from counsel regarding governing documents and agreements.

   C. If discounts or premiums are applied at the partial ownership level the appraiser should explain how the discounts or premiums were developed, as required by BVS–VII Valuation Discounts and Premiums.

   D. If the income approach is used at the partial ownership level the appraiser should develop and support any assumptions concerning the expected benefits to be received, the expected or required holding period(s) and the appropriate required rate of return on the investment given
the risks associated with the subject ownership position. To the extent applicable the provisions of BVS-IV Income Approach to Business Valuation should be followed.

E. If the market approach is used at the partial ownership interest level, several other sections of the Standards may be applicable.

1. Discounts for lack of marketability (or discount rates) are sometimes developed, for example, by reference to or analysis of restricted stocks of public companies, options on public securities (such as long-term equity anticipation securities), pre-IPO transactions in private companies that later went public, or other public securities. When using such methods, the appraiser should follow the guidance of SBVS-I Guideline Public Company Method as well as BVS-V Market Approach to Business Valuation and BVS-VII Valuation Discounts and Premiums.

2. Similarly, appraisers using studies of transactions in the secondary market for private partnership interests to develop discounts for lack of marketability (or discount rates) should follow the guidance of SBVS-II Guideline Transactions Method, as well as BVS-V and BVS-VII.

3. If transactional premium studies involving public companies (e.g., control premium studies) are utilized by the appraiser to support discounts for lack of control (minority discounts), the provisions of SBVS-I and BVS-VII should also be applied.

F. When reconciling the final value conclusion for a partial interest, regardless of the method(s) employed, the appraiser may wish to consider one or more tests of reasonableness for the concluded value of the partial interest, such as:

1. Calculating the implied internal rate of return for the subject interest at the concluded price over the relevant range of expected holding periods, and comparing the implied internal rate of return to expected returns of similar investments, if available.

2. Calculating the implied dividend or distribution yield for the investment based on the expected dividend or distribution policy of the enterprise, and comparing the implied dividend or distribution yield with expected yields on similar investments, if available.
NOTE

Country Risk and Damages in Investment Arbitration

Florin A. Dorobantu,¹ Natasha Dupont² and M. Alexis Maniatis³

I. INTRODUCTION

In investor–State international arbitrations, the claimant investor and respondent State often diverge on quantum. Disagreement over the appropriate discount for country risk is frequently an important cause of this divergence. In particular, investor-State tribunals have been split on whether the risk that the State may violate its foreign investment treaty obligations should lower damages awards.

Country risk refers to the valuation discount caused by factors specific to the country in which the project is located. Such factors may include the relative stability of economic conditions (such as exchange rates) and social conditions (such as civil unrest). Country risk may also include the risk of unlawful State conduct, such as expropriation without full compensation and conduct that violates a State's international legal obligations.

A foreign investor that can invoke treaty protections may have a right of recovery for unlawful State conduct through international arbitration. But should a damages award set quantum assuming that the sovereign will in the future meet all of its legal obligations, or should it assume only that the specific violation being arbitrated did not occur? In other words, should the risk of future illegal State conduct lower the investor's recovery? This issue matters because the observed or estimated market value of assets facing the possibility of future breaches can reflect a discount for the risk of illegal State conduct, especially if markets anticipate that the investor will not be fully compensated.

The debate surrounding this question can be seen in three recent decisions involving claims against Venezuela. First, the Tribunal in Gold Reserve v Venezuela

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stated plainly that expropriation risk must be excluded in assessing the value of an asset subject to a claim of expropriation:

The Tribunal agrees ... that it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations. As such, the Tribunal finds the range of country risk premiums offered by [the Respondent's expert] to be too high, as all of these include some element reflective of the State policy to nationalise investments which has been discussed in earlier sections of this Award.\(^4\)

Shortly thereafter, however, the Tribunal in *Venezuela Holdings and others v Venezuela* took the opposite view:

Article 6(c) of the BIT requires that the compensation due in case of expropriation represent 'the market value of the investments affected before the measures are taken or the impending measures became public knowledge, whichever is earlier'. This means that the compensation must correspond to the amount that a willing buyer would have been ready to pay to a willing seller in order to acquire his interests but for the expropriation, that is, at a time before the expropriation had occurred or before it had become public that it would occur. The Tribunal finds that, it is precisely at the time before an expropriation (or the public knowledge of an impending expropriation) that the risk of a potential expropriation would exist, and this hypothetical buyer would take it into account when determining the amount he would be willing to pay in that moment. The Tribunal considers that the confiscation risk remains part of the country risk and must be taken into account in the determination of the discount rate.\(^5\)

Finally, the Tribunal in *Flughafen and others v Venezuela* adopted an intermediate position, calculating damages that were reduced by the risk in place when the investment was made but stating that any subsequent increase in country risk due to wrongful acts by the State should not affect the quantum of damages:

[The Claimant's expert] argues that legal, regulatory and political risks should not be incorporated into the model, because a Government cannot create risks under its control before an expropriation, thus significantly reducing compensation.

The Tribunal agrees with this assessment by [Claimant's expert]. *A Government that through the adoption of new political attitudes, adopted after the investment was materialized, which increases the country risk, cannot benefit from a wrongful act attributable to it, that reduces the compensation payable*.\(^6\)

The difference in approach between these tribunals can translate into large impacts on the quantum of compensation. For example, a country risk premium of 5 percent added to a 10 percent discount rate on an investment returning a level amount for 30 years would reduce an investor's recovery by 30 percent.

The decisions highlight two important issues. First, before any overt action is taken by the State, an asset's market value may be lowered by the risk of unlawful State acts. Even if a market transaction were observed before knowledge of the

\(^4\) *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) para 841 (emphasis added).

\(^5\) *Venezuela Holdings BV and others (formerly Mobil Corporation and others) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Award (9 October 2014) (Venezuela Holdings) para 365 (emphasis added).

\(^6\) *Flughafen Zürich AG and Gestion e Ingenieria IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Award (18 November 2014) paras 904–7 (emphasis added; unofficial English translation from the Columbia Center for Sustainable Investment) <http://ccsi.columbia.edu/files/2013/12/1.-Flughafen_v_Venezuela_.-_Laudo-Translated-partially.pdf> accessed 24 April 2015 (emphasis added).
impending expropriation became public, that transaction value could already reflect, through this risk, the impact of State behaviour that violates its investment treaty obligations. Should a tribunal award the observed transaction value or a higher amount, equal to the market value that would have prevailed absent the risk of illegal State actions?

Second, when market transactions for the asset at issue are not observed, the methods that experts use to estimate market values often incorporate a country risk discount. Depending on the method used, the country risk discount may reflect the risk of State behaviour that violates its investment treaty obligations. Clarity on the estimation method is necessary for tribunals to make an informed decision about the inclusion or exclusion of this component of country risk from the compensation amount.

II. THE INDIRECT EFFECT OF ACTIONABLE STATE CONDUCT

All foreign investments are subject to risk. Risk arises from uncertainty about the future. Higher risk lowers value because people are risk averse—between two payoffs that are equal on average, most people prefer the payoff that is more certain and are willing to pay more to obtain it. Some risks arise due to the country in which the investment is located. The risk generated by country-specific factors is referred to as ‘country risk.’ Country risks include business risks (arising, for example, from macroeconomic factors, financial market factors or local demand/supply factors) and political risks (arising, for example, from the prospect of State actions such as expropriation, tax and policy changes, including currency convertibility, and the risk of political violence such as civil war, mass strikes and civil strife).

International investment agreements (IIA) aim to reduce country risk and, in particular, political risk, to foster foreign direct investment. Under IIAs, States commit not to engage in certain conduct and investors are provided a right to reparation for such conduct and access to international arbitration for dispute resolution. We refer to acts that violate the State’s obligations to foreign investors under its international agreements as ‘actionable State conduct’. Actionable State conduct includes unlawful expropriation, lawful but undercompensated expropriation, creeping or indirect expropriation, discriminatory regulations that violate fair and equitable treatment clauses and failure to fulfil specific obligations entered into by the State.

It is clear that actionable conduct, once undertaken or announced, often reduces the investment’s value to the investor. This is evident in the sudden and sizable drop in the stock price of companies with substantial exposure to assets

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7 Which opportunity would you prefer? Pay $100 today for a certain $200 in 10 years? Or pay $100 today for an equal chance of getting $500 or owing another $100 in 10 years? All else equal the two opportunities will be worth the same on average in 10 years, but to the risk adverse the first, with a certain payoff, is favoured.

8 An investment’s risk is not only specific to the country in which the investment is located but also specific to the investment. Eg, a project drilling oil destined for export markets and a real estate project located in the same country will face different risks and different impacts from the same risks.

9 See Sergey Ripinsky and Kevin Williams, Damages in International Investment Law (British Institute of International and Comparative Law 2008) 326.

that have been expropriated. It follows necessarily that as long as expropriation or other actionable conduct is possible, this potential indirectly introduces risk that reduces the value of an investment. The value of the investment can therefore be reduced even though no overt act has been undertaken. The indirect effect of actionable State conduct is the reduction in value from this potential for actionable State conduct.

III. FAIR MARKET VALUE COMPENSATION AND THE INDIRECT EFFECT OF ACTIONABLE STATE CONDUCT

For lawful expropriations, the fair market value standard has become commonplace in investor–State arbitrations and is codified in many bilateral and multilateral investment treaties. Whether specified in the treaty or not, it seems accepted that compensation at the fair market value of an expropriated asset should exclude the reduction in market value caused by the complained of expropriation. However, the awards in *Venezuela Holdings*, *Gold Reserve* and *Flughafen* reveal an open question about the treatment of the indirect effect of actionable State conduct in a fair market value compensation award.

It is important to draw a distinction between the observed market value of an asset, which will include any indirect effect of actionable State conduct, and the asset's fair market value, which need not reflect the indirect discount.

If the asset is bought and sold, the price of such a transaction is the observed market value. The observed market value depends on the market’s expectations of the future cash flows that the asset will generate. It can therefore reflect a discount.

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12 Note that States can take many actions that are not actionable by a foreign investor but that impact directly and indirectly the value of an investment. Such legitimate State actions therefore give rise to country risk that is not intended to be reduced by investment treaties. Foreign investors bear this risk.

13 See eg Ioannis Kardassopoulos and Ron Fuchs v Georgia, *ICSID Case Nos. ARB/05/18, ARB/07/15, Award* (3 March 2010); ADC Affiliate Ltd. and ADC & ADMC Management Limited v Republic of Hungary, *ICSID Case No ARB/03/16, Award* (2 October 2006).


15 Treaties typically specify that the valuation must be made before the expropriation took place. Eg, the Jordan–Algeria bilateral investment treaty provides for ‘the payment of appropriate and actual compensation, whose amount is based on the value of the relevant investments estimated according to the value of investments prevailing in the market on the eve of the day on which the measures were taken or were declared.’ Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the People’s Democratic Republic of Algeria on the Reciprocal Encouragement and Protection of Investments (signed 1 August 1995, entered into force 5 June 1997) art 5. See also North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) art 1110(2) (NAFTA). Some treaties further specify that the valuation should not reflect knowledge of the complained-of expropriation (see eg art 1110(2).

16 While we focus on compensation for expropriation, it applies equally to compensation for other violations. The *Chorzów Factory* decision is often quoted and cited for the required compensation to remedy violations of international law: ‘The essential principle contained in the actual notion of an illegal act...is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear’. *Case Concerning the Factory at Chorzów (Germany v Poland) (Merits)* [1928] (13 September 1928) PCIJ Rep Ser A No 17, 47. Arguably, this standard would exclude incorporating into ‘the value which restitution in kind would bear’ the indirect effect of actionable State conduct.
arising from the risk of actionable State conduct. Because of the uncertainty about ultimate recovery, this discount can exist even though the investor has a right to pursue arbitration against the State.

To illustrate the economic forces at play, we set up a simple model of an asset’s market price in the presence of expropriation risk. In the model, there are three dates, as depicted in Figure 1. At the first date, the asset trades freely at the observed market value $P$. At the second date, the State may expropriate the investor’s asset. This action is not certain, it happens with probability $p$. This probability measures the expropriation risk—that is, the risk of actionable State conduct. Finally, at the third date, the investor receives cash. If the asset was not expropriated, the investor receives the payoff from the investment, equal to $V$. If the investment was expropriated, we assume the investor pursues recovery from the State and either receives nothing (with probability $q$) or receives some compensation $C$ (with probability $1 - q$).

As is common in such economic models, one can work backward from the end period to determine the price at which the asset would trade at the beginning. First, the expected compensation at the time of expropriation (Time 1) can be calculated as the average of the two possible outcomes, weighted by their probabilities: $EC = q \times 0 + (1 - q) \times C = (1 - q) \times C$. If compensation is certain, then the probability $q$ of receiving nothing is zero and the expected compensation equals $C$. The same probability weighted average formula can be used to determine the asset’s market price at Time 0. If the asset is expropriated, the investor gets the expected compensation calculated above, $EC$. If not, the investor receives the asset’s value $V$. Therefore, the expected value from owning the asset, and therefore its market price, is $P = p \times EC + (1 - p) \times V$.$^{17}$

This setup helps explain why the observed market price can reflect a discount for the indirect risk of expropriation—that is, why $P$ may not be equal to $V$. Notice first that if the risk of receiving no compensation is zero (that is, there is no litigation risk), the risk of the State defaulting on an award is also zero (no non-payment risk), and there are no litigation costs, then a policy of awarding compensation equal to the asset’s market price before expropriation eliminates any market discount for the risk of expropriation. Here is why: if the compensation amount is set to $P$ and the probability of not receiving that amount is zero, then

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$^{17}$ We assume no discounting for time or systematic risk in this example for simplicity and clarity. Adding discounting would incorporate more realistic features of asset pricing but would not change the intuition we develop with the simple example.
the expected compensation EC is also equal to P. Thus, the formula for the market price calculated above becomes \( P = p \times P + (1 - p) \times V \). There is only one solution to that equation, \( P = V \), which does not depend on the risk of expropriation (p).

If there is litigation risk, non-payment risk or uncompensated costs, the observed market price will reflect a discount for expropriation risk. Suppose, as before, that the award is set equal to the asset’s observed market price before expropriation, \( P \). Since expected compensation factoring in litigation and default risk will be less than \( P \), namely \( EC = (1 - q) \times P \), the resulting market price is \( P = \frac{1 - p}{1 - p(1 - q)} V \). This is less than \( V \). A wedge is therefore created between the asset’s value absent the risk of State actionable conduct and its market price:

\[
W = \left[1 - \frac{1 - p}{1 - p(1 - q)}\right]V = \frac{pq}{1 - p(1 - q)} V.
\]

The mathematical framework shows that the observed market price can reflect a discount even if compensation is awarded equal to the observed market price before expropriation. In this simple model, the discount is created by the risk of expropriation (measured by \( p \)), through the uncertainty about whether the investor will prevail in the arbitration, whether on jurisdiction or the merits, and whether the State will pay the award (together reflected in \( q \), the probability of receiving zero compensation). In addition, there is uncertainty as to whether the investor will be awarded its costs of the arbitration if it prevails. The investor also may face arbitration costs not factored into awards for costs (for example, management time).

Thus, there can be important distinctions between an observed market value and fair market value. Fair market value is an economic concept, not just an empirical observation. It refers to values that would arise under free market conditions in a transaction between well-informed parties and without coercion. But fair market value also depends on the specifics of the assumed market environment and features of the asset being valued. For example, one could estimate fair market value under conditions that either incorporate or exclude expropriation risk—the standard itself is agnostic to the choice. Thus, the tribunals in Flughafen, Gold Reserve and Venezuela Holdings awarded damages on the basis of the investment’s fair market value, but they differed on the assumptions about the risks relevant to determining that fair market value.

An asset may be bought and sold at a price that reflects a discount for the indirect effect of actionable State conduct. The asset’s observed market value might therefore be different from the appropriate fair market value compensation to be awarded in the event of an expropriation. Simply put, the use of a fair market value standard does not by itself answer the legal or policy question of whether the indirect effect of actionable State conduct—for example, the potential for expropriation—should reduce the compensation for treaty breaches.

18 In this example, costs are assumed to be zero for simplicity, so the calculated discount does not depend on costs. Including costs is straightforward and would increase the discount further.
IV. COMPENSATING FOR THE INDIRECT EFFECT OF ACTIONABLE STATE CONDUCT

Factual, legal and policy contexts may lead to different responses about whether damages awards should compensate for the indirect impact of actionable State conduct. We highlight relevant economic, legal and practical questions that might be considered in determining how indirect actionable State conduct might be incorporated in investor–State damages awards.

A. If the Risk of Actionable Conduct Diminishes Indirectly the Value of an Investment, Where Does the Full Asset Value Go?

When the risk of actionable State conduct diminishes the value of the investment and, therefore, the price an investor is willing to pay, is the reduction in value lost or is it transferred to another party? If it is transferred, who is the beneficiary? Do these issues matter to the quantum of damages to a successful claimant? If the State pays the observed (discounted) market value, does it obtain a benefit? Since the State obtains an asset worth $V$, but only pays compensation worth $P$, there is a benefit equal to the difference. One could argue that reducing the award for the risk of expropriation creates a windfall for the State, particularly because the size of the benefit increases with the risk of expropriation (a higher probability of expropriation $p$ corresponds to a higher difference between $P$ and $V$) and is at least partially under the control of the State. The Gold Reserve decision appears consistent with an intent to eliminate such a windfall, stating that ‘it is not appropriate to increase the country risk premium [that is, to reduce the estimated fair market value] to reflect the market’s perception that a State might have a propensity to expropriate investments in breach of BIT obligations.’

The benefit received by the State can be eliminated if the award is set equal to the asset’s value absent the expropriation risk, which we denoted by $V$. In this case, the State obtains an asset worth $V$ and pays compensation worth $V$. Under this market expectation, the market price would be higher, and the difference between $P$ and $V$ caused by the indirect effect of the risk of actionable State conduct smaller. The existence of a discount in the observed market value even when the award equals the asset’s full value means that an investor who purchased the asset at its market price of $P$ receives compensation $V$, which exceeds that price. One could view this difference as a windfall to the investor, since the award would exceed the price at which the asset could have been sold. The investor’s payoff, however, does not exceed the value it would have realized over the life of the investment if it had not been expropriated. Since the difference arises primarily from the risk and costs of litigation, the difference can be viewed as compensation.

19 Gold Reserve (n 4) para 841.
20 To be clear, this does not mean the compensation would reflect no discounting. In our simple model, this is an artefact of assuming there is no discounting. More realistically, introducing discounting for time and risks unrelated to unlawful conduct (including country risks) would translate into an award that reflects the present value of $V$, discounted for time and risk unrelated to unlawful conduct.
21 In this case, the difference is $W = pqV$. The market price must equal the expected value in the next period, so $P = p \times (q \times 0 + (1 - q) \times V) + (1 - p) \times V = (1 - pq) \times V$. 
for bearing litigation risk. This risk is present *ex ante* but has presumably been resolved favourably if an award is granted.

**B. What Incentives Are Created By Awarding Compensation That Excludes or Incorporates the Risk of Actionable State Conduct?**

Our discussion has focused on a scenario in which no changes in the risk of actionable conduct occur between the time of investment and the time of expropriation. However, how does the treatment of indirect effect of actionable State conduct in setting compensation affect each party’s incentive to take actions that affect the chances of such actionable conduct in fact materializing?

Damages awards that reflect a discount for the risk of actionable State conduct are lower than those that do not. Such awards may engender a pattern of negative reinforcement detrimental to lowering political risks and increasing investment. As a State engages in actions perceived to be contrary to its IIA obligations and the level of political risk increases, investment values decline. This in turn lowers the expected compensation owed by the State and reduces the deterrent effect of damages.

Arguably, by engaging in a pattern of actionable conduct that increases its political risk, the State could directly lower the expected damages and benefit from engaging in actionable conduct. From this standpoint, a standard of damages that does not discount for such risk is preferable because it provides a constant deterrent effect, unaffected by the State’s conduct. Concern for this incentive effect is reflected in the *Flughafen* Award. Although the Tribunal declined to exclude from the calculation of the discount rate the risk of actionable State conduct that existed when the investment was made, it stated also that ‘[a] Government that through the adoption of new political attitudes, adopted after the investment was materialized, which increases the country risk, cannot benefit from a wrongful act attributable to it that reduces the compensation payable.’

A damages standard that incorporates a discount for actionable State conduct also may penalize states at the outset, when the investment is made. Reduced compensation *ex post* for the risk of actionable State conduct may require the State to provide *ex ante* compensation to induce investment, by offering foreign investors better financial terms (for example, lower taxes and exemptions from duties and tariffs), thereby reducing the State’s extent of participation in a successful investment. One may argue that this results in inefficient incidence of compensation, as it requires the State to compensate investors for the risk of actionable conduct even if it ultimately does not engage in any actionable conduct. From this standpoint, a standard of damages that does not discount for such risk is preferable because it reduces the penalty paid at the outset of the investment for the risk that ultimately was reduced.

Incentives, of course, matter for investors too. The investor may be able to influence the level of political risk to which it is subject. Damages that are

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22 The difference is also affected by non-payment risk. If post-award interest is set to market values—ie, the respondent’s cost of borrowing, then it will provide, on average, compensation for non-payment risk and reduce the discount we discuss here.

23 *Flughafen* (n 6) para 905.

24 The penalty may not be completely eliminated because, as discussed above, a wedge remains to the extent that uncompensated uncertainty about enforcement remains.
insensitive to the risk of such conduct can create a form of moral hazard by reducing the investor's incentive to exert this influence. When a sovereign takes actions that affect foreign investments negatively, it can be the result of political pressure from its constituents, such as local communities, environmental groups or domestic firms. The extent to which these domestic political constituencies pressure the State into action can be directly influenced by their perception of the foreign investor. Most of today's large corporations practice stakeholder engagement strategies intended to improve the company's image and relationships. From this perspective, a damages standard that compensates the investor for the risk of actionable conduct may lower the investor's incentive to engage in this type of risk-reducing activity that may have public benefits.  

C. Can Compensating for the Risk of Actionable Conduct Comport with Legal Requirements for Awarding Damages?

As economists, we do not speak authoritatively regarding legal requirements. However, in our work on quantum in investor–State arbitrations, we are attuned to at least a few of the legal issues and arguments that arise. The legal issues of causation and certainty may, as they are currently conceived, limit the ability to award compensation for risk.

An award of damages requires a finding that the injury was caused by the wrongful conduct.  

As typically framed, causation looks at the consequences flowing from the subject conduct. The risk from actionable State conduct, on the other hand, does not follow the act but derives instead from the anticipation of conduct that has not yet materialized. The risk of actionable State conduct exists regardless of whether the conduct occurs. Does the fact that the risk exists before any overt act occurs prevent an appropriate causal connection and an award for damages flowing from the risk?

Causation also implicates the question of whether the injury claimed is too 'remote' or 'consequential.' Typically, this issue arises in connection with indirect injury from a State’s conduct, such as a missed opportunity that followed from the immediate injury. It also can arise in determining if intervening events break some or all of the causal connection between the conduct and the claimed injury. Limiting compensation to direct injury may create a hurdle in terms of

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25 We note however that at best the threat of expropriation is an inefficient way of providing such benefits because of its overall deterrent effect on investment. An efficient mechanism would incentivize these beneficial activities without the costly side effects associated with expropriation risk.

26 As summarized in Ripinsky and Williams (n 9), '[a] State responsible for an internationally wrongful act is under an obligation to make reparation only for the injury caused by that act. In other words, reparation (including compensation) is conditioned upon the existence of a causal link between the wrongful act and the damage suffered.' Causation requires a finding of factual and legal causation: 'Under the factual test of causation, the issue is whether the wrongful conduct played some part in bringing about the harm or injury or was relevant in its occurrence.... i.e. would the harm have occurred but for the unlawful conduct? On the other hand, under the legal test of causation, the key issue is whether the wrongful conduct was a sufficient, proximate, adequate, foreseeable or direct cause of the harm or injury' (135; emphasis in original, citations omitted).

disentangling the injury caused by different risks, some actionable and some not, that may impact the value of the investment.  

In general, the prices set by the market will not reveal specifically what events are predicted and how much of an impact these have on the value of the investment. Depending on the circumstances and the availability of data, however, careful economic analysis can yield reasonable estimates of the portions of discount attributable to specific risk factors. This approach was taken by the Gold Reserve Tribunal, which awarded damages on the basis of a discount rate that was intended to reflect country risk other than the risk of expropriation:  

However, the Tribunal also considers that the country risk premium adopted by [the Claimant’s expert] is too low, as it takes into account only labor risks and not other genuine risks that should be accounted for — including political risk, other than expropriation. ... the Tribunal decides to adopt a country risk premium of 4% .... The Tribunal accepts [the Respondent’s expert’s] explanation that this premium appropriately considers political risk, together with other risks, but has not been over-inflated on account of expropriation risks.  

Another concern is the possibility of double recovery. Where State conduct does not involve a complete taking of the investment, one must be cognizant that the investor can bring future claims for subsequent events. We believe this issue can be resolved with careful quantification of the injury, ensuring that any impact from indirect actionable conduct incorporated into the analysis only applies to the loss and not to the remaining asset value. These issues may raise difficult questions for tribunals and quantum experts in determining damages. However, damages estimates can be improved if tribunals are clear about whether it is appropriate for the claimant to recover based on the assumption that the sovereign will in the future meet all of its legal obligations or, alternatively, that only the violation being arbitrated did not occur. With such clarity, economic evidence can be more fully presented and evaluated.  

V. COUNTRY RISK AND METHODS USED TO ESTIMATE FAIR MARKET VALUES  

Estimating the fair market value of expropriated assets indirectly is frequently a necessity because the market price of the asset is not observable. The need for estimation also arises if the asset’s market price is observed, but it reflects a discount for the risk of actionable State conduct that the tribunal decides should be excluded. Therefore, tribunals must contend both with the decision as to which risks ought to affect the damages amount and with assessing whether the valuation methods used by the experts reflect that decision. Quantum experts should be explicit in their reports about the inclusion or exclusion of the indirect effect of the risk of actionable conduct on their damages estimates. In the following sections,  

28 Note also that in an expropriation involving a taking of title or physical taking, the investor foregoes the right to recover damages from future actionable conduct, which is precluded by the expropriatory act.  

29 We understand that the lack of certainty in measurement need not bar recovery because certainty applies to the fact of damage, not the amount of loss. The balance of probabilities determines whether there has in fact been damage, even if measurement of the amount of damage may be uncertain. Ripinsky and Williams (n 9) 164–5.  

30 Gold Reserve (n 4) paras 841–2 (citations omitted).
we discuss how this indirect effect is reflected in two common valuation approaches: the discounted cash flow (DCF) method and the market comparable method.

A. DCF

A DCF model forecasts the future expected cash flows from the investment and reduces these to a present value using a discount rate. Experts who rely on the DCF method sometimes increase the discount rate to reflect country risk.\(^{31}\) By using a discount rate that is higher than what would be employed in valuing a similar asset in the US or other developed economy,\(^{32}\) the present value of cash flows is lower, creating a valuation discount.\(^{33}\) The increase in discount rate intended to reflect country risk is referred to as ‘country risk premium.’ This approach has important methodological weaknesses.\(^{34}\) It suffers also from being a one-size-fits-all adjustment that can make it impossible to ascertain the impact of specific sources of country risk on damages.

To illustrate, consider the ‘country spread’ method, which is used commonly to estimate the country risk premium. The discount rate is increased by the host State's sovereign spread—the difference between the yield on the country’s sovereign bonds (denominated in US dollars) and the US dollar risk-free rate.\(^{35}\) The sovereign spread reflects the country’s risk of default on its sovereign debt. While sovereign default risk is not the same risk that affects investments in private sector projects located in the country, proponents of the method argue that it is a practicable proxy.\(^{36}\)

Another commonly used approach is the ‘country risk ratings’ approach.\(^{37}\) This approach estimates the relationship between realized market returns and country risk ratings. The approach rests on the assumption that realized market returns reflect, on average, expected market returns.\(^{38}\) The estimated relationship between realized returns and the risk rating is then applied to the host country’s risk rating to determine the host’s country risk premium.\(^{39}\) Various country risk ratings are

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\(^{31}\) Financial economics principles require that only certain risks (known as systematic or non-diversifiable) be reflected in discount rates, while other risks, specific to the investment, should only be reflected in reduced cash flow estimates. Some analysts, while acknowledging the distinction, nonetheless rely only on discount rate adjustments to reflect all country risk. This issue is outside the scope of our discussion here, but as a matter of principle such applications are unreliable for any valuation, not just in the context of damages estimation.

\(^{32}\) In the discussion that follows, we use the USA as a benchmark, but the same applies if the benchmark discount rate is that of another country perceived to have low country risk.

\(^{33}\) For an overview of commonly used methods to estimate country risk premiums, see Morningstar, *International Cost of Capital Report* (2012).

\(^{34}\) We note with emphasis that employing a discount rate adjustment for country risk is not likely to result in an accurate valuation. There are many reasons for this, and we do not intend to present a thorough evaluation of this approach in this note. Eg, a discount rate adjustment for country risk assumes the risk compounds over time. It will cause the country risk discount to be small in the first year and growing over time. Country risks applicable to a given investment may not behave this way.

\(^{35}\) Variations of this approach may multiply the sovereign spread by another factor, eg, the ratio of the country’s stock market volatility to the US stock market volatility. See Aswath Damodaran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset* (3rd ed, Wiley 2002) 167–72 for an overview of such models.

\(^{36}\) ibid 167.


\(^{38}\) This, in turn, assumes that the market return process is identical over time and repeated observations of realized returns provide a reliable statistical estimate of expected returns.

\(^{39}\) The relationship is estimated based on a sample of countries for which both market returns and risk ratings can be measured. It allows for a country risk premium estimation for countries where only the risk ratings are measurable. The method assumes that country risk remains constant over the period during which the relationship between returns and ratings is estimated and that same relationship will continue to hold in the future.
available. Whether the risk of actionable State conduct is reflected in discount rates estimated in this way depends on how the specific country ratings used are developed. For example, some measure the probability of sovereign default. Other country risk ratings explicitly consider political risk factors, including expropriation, in determining the ratings.40

All of these approaches suffer from the one-size-fits-all assumption that is not appropriate for investment valuation. The risk of actionable State conduct is often asset specific—some investments face higher risks than others. Methods that use the sovereign spread or default risk ratings assume that the subject investment bears the same risks as the country’s sovereign debt. For many investments this would not be a valid assumption. Moreover, attempting to identify what fraction of the sovereign default risk should be attributed to the risk of unlawful State conduct towards investors in specific private sector projects is not possible.

Introducing a country risk premium into the discount rate employed in a DCF model poses challenges for tribunals to identify the source and size of specific risks impacting the investment. In contrast, by adjusting the DCF model’s forecasted cash flows for individual risks that affect the asset, it is possible both to identify the risks caused by actionable State conduct and to ensure that only risks relevant to the investment at issue affect its estimated value.

B. Market Comparables

The comparables (or market) approach hinges on identifying a sample of transactions or publicly traded investments that are sufficiently similar to the investment being valued and for which the remaining differences can be accounted. The choice of a sample will determine whether the resulting estimate reflects the risk of actionable conduct. A sample of transactions or companies from the same country is arguably closer to the investment at issue but precludes an estimation of the valuation discount due to the risk of actionable State conduct. Investments in the same country are subject to the risk of expropriation and other actionable conduct by the State and would therefore reflect a discount for the risk of such actionable conduct. Unless a sample of assets that are otherwise comparable but are not subject to this risk can be identified, an in-country set of comparables is not sufficient to measure the impact of specific country risks.

A sample of transactions or companies from outside the country may be used as an alternative. This comes at the potential cost of reducing the degree of comparability, although efforts can be made analytically to adjust the outside-country sample to try to reflect a same-country sample. If the sample includes assets from countries in which a risk of unlawful State conduct exists, then the resulting valuation will reflect political risk that is arguably not relevant to the asset being valued. A tribunal deciding on the issue of the indirect effect of actionable conduct must therefore be wary no matter whether the sample is drawn from within the same country as the investment or outside of the country.

40 Eg, Standard and Poor’s or Moody’s publish country credit ratings. The International Country Risk Guide ratings are a composite of political, economic and financial risk ratings, with 50% of the weight given to political risk and 25% to each of the other two ratings. See PRS Group, ICRG Methodology <http://www.prsgroup.com/about-us/our-two-methodologies/icrg> accessed 24 April 2015.
VI. CONCLUSION

The discount for country risk is frequently important in determining the quantum of damages in investor–State arbitrations. Country risk takes many forms—which risks have an impact on value, and what that impact is, depends on the investment. Importantly, country risk may reflect a discount for the anticipated, but as yet unconsummated, State conduct from which an investor has protection along with recourse to compensation through international arbitration. Incorporating some or all of the risk of actionable State conduct will reduce the quantum relative to a recovery that assumes the State abides by all of its legal obligations.

When a State has violated its obligations and an investor seeks appropriate recovery, the question arises about what the damages award should assume about the sovereign’s compliance with its legal obligations to the investor in the future. Underscoring the importance of this question are the different conclusions reached by tribunals in three recent awards. The *Gold Reserve* damages Award set quantum assuming that the sovereign will meet all of its legal obligations in the future. The *Venezuela Holdings* damages Award assumed that only the violation being arbitrated did not occur and incorporated the possibility for other actionable State conduct. The *Flughafen* damages Award took a middle path. It assumed the violation being arbitrated did not occur but only incorporated the risk of State conduct that existed at the time the investment was made but not the changes to the country risk thereafter.

In our experience, methods frequently applied to estimate country risk do not distinguish between actionable country risk, from which the investor is protected, and non-actionable country risk, which the foreign investor bears. We suggest that explicit consideration by both quantum experts and tribunals of their reasoning on the issue of country risk for actionable State conduct and its impact on quantum will serve the interests of all in the investment arbitration arena.
HOW TO VALUE A LOST OPPORTUNITY:
DEFINING AND MEASURING DAMAGES FROM MARKET FORECLOSURE

William B. Tye, Stephen H. Kalos, and A. Lawrence Kolbe

ABSTRACT

Despite a long history and the large financial stakes involved, the economic and legal principles governing the determination of damages in lawsuits involving market foreclosure are not well established. Consensual disagreements typically arise as to: (1) the appropriate recognition of future uncertainty in estimating damages; (2) whether damages should be calculated on the basis of knowledge as of the time of infliction or as of the time of trial (the appropriate role of hindsight); and (3) the appropriate interest or discount rates to be used to value cash flows at different times.

All other things being equal, damage awards based on an accurate application of the ex post approach (making the victim whole as of the date of award of
damages are, on average, systematically more than those that would be obtained
under an accurate application of the ex ante approach (making the victim whole
as of the date of the omission). Paradoxically, a substantial number of victims of
market foreclosure would nevertheless receive no damages under an accurately
applied ex post approach in a highly risky industry. If practical considerations
nonetheless justify the ex post methodology, it is possible in principle to develop
an adjustment to ex post awards that makes the expected adjusted ex post award
equal to the ex ante value. However, there are severe practical difficulties in
finding the right adjustment.

The appropriate rate for prejudgment interest, if awarded, is not determined
by the risk of the foreclosed economic activity. It may depend on whether the
ex ante or ex post damage methodology is employed. Consideration of risk in
prejudgment interest may also depend on whether any risk actually exists, and
if so, whether it may already have been taken into account in the damage estimate
itself through the treble damages in an antitrust lawsuit, or disallowed as a
matter of public policy.

The dramatic increase in commercial litigation in recent years has focused
attention on the measurement of damages, if any, to be awarded to plaintiffs.
A review of judgments awarded by the courts reveals a hodgepodge of
approaches and theories on which awards have been rendered. A striking
aspect of the judgments is their lack of consistency in applying basic principles
of economics and finance.

—Lanzillotti and Esquibel 1990, p. 125 (footnotes omitted)

Discounting and similar mathematical exercises may be the only mechanisms
for risk adjustments known in finance theory, but trials are not exercises in
applied finance. Only a wholesale revolution in how cases are tried and
decided would close the gap between the realities of litigation and strict
adherence to finance theory. It is doubtful that the gap is worth closing.
Despite its acknowledged force in the valuation of business opportunities,
finance theory has only a meager claim as the model for resolving disputes
about what might have been.

—Tausman and Bodington 1992

I. INTRODUCTION

Economic and legal analysis of alternative approaches to damages from market
foreclosure has a long history. However, it is not fully satisfactory from an
economic viewpoint, and in some areas the literature is surprisingly sparse. For
example, dozens of articles appear on antitrust liability issues in areas such as
resale price maintenance. Yet the literature on the law and economics of antitrust
claims can almost be counted on a pair of hands. Here we focus primarily on
general issues but discuss the special features of antitrust damages, as well.
It would also appear that this neglect of the subject reflects the relative allocation of efforts devoted to damages during the litigation process. Most cases of alleged market foreclosure are settled, dismissed, or abandoned. Litigation strategy thus may defer a sophisticated study of damages until after all the motions, discovery, settlement conferences, and even liability phase of a bifurcated trial are complete. Even without bifurcation, defense strategy until recently has been to ignore damages during the liability phase, on the grounds that any other approach was tantamount to an admission of guilt.

In our view, this emphasis on liability issues to the exclusion of damage issues is misplaced. The appropriate amount of resources to devote to pretrial motions and discovery cannot be determined without an assessment of the economic stakes in the case, and no meaningful settlement can be discussed without some idea of damage exposure. Many of the standing issues that arise in pretrial motions in an antitrust case, for example, may turn on whether or not the plaintiff has suffered "antitrust injury."

At even a bifurcated antitrust trial, beliefs about whether there has been "injury to competition" may be difficult to separate from a determination of whether the plaintiff, in particular, has suffered damages. And since Pennvol v. Texaco, many defense attorneys seem to have concluded that to ignore damages in a single liability and damages trial is folly. Even without this notable example, sophisticated defendants' attorneys are likely to become aware that many plaintiffs' damage studies are sufficiently weak that they can be attacked successfully with less of credibility chiefly to the plaintiff. Plaintiffs' attorneys who have recently won on liability, but received nothing or only a pitance in damages, are similarly likely to devote far more attention next time to their case on damages. Lastly, it is becoming obvious that defense experts, armed with computer models and conflicting theories, can produce damage results that differ by hundreds of millions of dollars in a large civil litigation proceeding.

All things considered, then, we are now entering an era of big stakes litigation where alternative damage theories and studies should be given increased attention. After all, as the bank robber Willie Sutton reminded us in another context, "That's where the money is."

A. Objectives of this Paper

This paper seeks to clarify some of the major debates over damages in cases of market foreclosure. We pose the following objectives for the pages that follow:

1. Evaluate two general approaches, the ex ante and ex post methods, for assessment of damages due to an illegally foreclosed business opportunity, of which an antitrust offense is a special case;
2. Identify the economic properties of the contending methodologies, including why they produce different answers on average;
3. Identify what steps would be required to make them give the same answer; and
4. Address implementation issues for the two alternatives, including calculation of discount and prejudgment interest rates.

As with most such matters, where you end up depends in part on where you start. Therefore, it is important that we state clearly our starting assumptions.

B. Preliminary Ground Rules

The sensible place to start is to ask what the damage award in a civil litigation proceeding is designed to accomplish. Alternative objectives of the award of damages that have been proposed are to:

1. Punish the violator;
2. Deter the potential violator;
3. Compensate the victim
   a. By "making the victim whole" as of the time of the violation; or
   b. By "making the victim whole" as of the time of trial; and
4. Motivate optimal decisions for private litigants to sue and/or settle.

This paper focuses on the third objective, and in particular, on timing issues associated with how to "make the victim whole." Even with this narrowed focus, a number of disputes over appropriate methodology arises because of (1) time gaps between the violation itself and the compensation for the damages arising from the violation, and (2) uncertainty at any point in time as to future costs to the victim of the violation. These methodological issues translate into disputes over (1) the size of the prejudgment interest rate (if any) to be applied to damages between the date of offense and the date of trial, and (2) the appropriate discount rate for future lost profits, and the appropriate role of hindsight in accounting for damages during the period between violation and trial.

In this paper, we limit ourselves to damages arising from market foreclosure. This still leaves us with a major question: At what point in time should the victim be made whole, at the time of infraction or at the time of trial? Such a distinction can make a large difference in the amount of damages. To clarify the methodological disputes, we assume initially that a one-time violation occurs and that detection, judgment, and compensation are immediate. We then employ more realistic examples to examine the effect of delays in justice on the appropriate award. Throughout we assume that the victim's recovery of attorney's fees and litigation expenses are not an element of damage, either
as a matter of public policy or because they may be recovered through other means in certain circumstances.

We also assume for the purpose of argument that compensation for bearing the risks associated with the uncertainty inherent in the legal system itself (e.g., the outcome of the liability phase of the trial) is not to be recovered through the damage award. This assumption is tantamount to the assumption that (1) plaintiffs bear no risk that justice will not be served, (2) justice is accomplished on average (no systematic bias toward plaintiffs or defendants), or alternatively that (3) the risks of failing to litigate a meritorious claim successfully are either not to be compensated as a matter of public policy or are recovered in other ways (e.g., the trebling factor in the case of antitrust).

Other related risks, such as those inherent in the damage methodology itself and the possible default by a losing defendant, are treated as fair game for argument. Illiquidity resulting from difficulties of assignment of a damage claim by the victim is likewise not excluded automatically.

For the purpose of argument we also assume that damages are paid at the conclusion of the damages phase of the trial. When complaint and trial come well after the alleged offense, we assume that a statute of limitations is not a constraint on the damage period. Difficulties raised by the appeal process and collecting damage awards are then considered. We address only the issue of a legally enforced damage award and do not address settlement possibilities, while recognizing that the former will affect the latter.

For most of the paper we also assume that the contending methods for computing damages are accurately applied and that there is no disagreement as to what result a particular methodology will produce. This encompasses the assumption that adequate data are available to implement all methodologies without undue speculation. Where a methodology produces an inherently uncertain result, we assume initially that there is consensus as to the expected (i.e., average) value of the alternative possible results. Evaluation of the alternative methods is assumed to take place at the time of the offense and without knowing ahead of time the outcome of future uncertain events that will affect the results of the alternative methodologies. These assumptions, too, are then relaxed to consider the likelihood of systematic biases in applying the methodologies, data requirements, and opportunities to “game the system” by use of hindsight to choose the preferred methodology.

Finally, we assume that the analysis is unconstrained by rulings from the bench or controlling precedents (except as identified in the previously-mentioned ground rules).²

C. Summary of Conclusions

Based on these assumptions, our analysis demonstrates that the following principles govern the procedures for estimating damages.
1. Future expected after-tax cash flows ("lost profits") should be discounted at the appropriate risk-adjusted after-tax opportunity cost of capital to get the value as of a given date.

2. On average, the ex post method (calculating damages as of the date of the trial) will give a higher value for the damage estimate than the ex ante method (calculating damages as of the date of the offense), for two reasons:
   a. The absence of negative damages means only "winners" will see under the ex post method; and
   b. Even if negative-value outcomes do not exist, the plaintiff bears the risk of the actual outcome under the ex post method, and therefore can expect on average a higher rate of increase in value of the damage award between the date of the offense and the date of the trial as a result.

3. In principle, the ex post method could be justified as the first of these sources of difference, although in practice it would be very difficult; the second source of difference is economically appropriate and requires no remedy, providing the risk to the actual outcome under the ex post method is not made opportunistically. That is, only after it is known that this approach gives higher results (in that case, an additional adjustment would be needed to purge that source of bias on average).

4. Whether to include a default premium may depend on the damage methodology chosen (i.e., ex ante or ex post) and other issues.

II. A FRAMEWORK FOR ESTIMATING THE VALUE OF LOST OPPORTUNITIES

This paper focuses on the use of hindsight as damage calculations. A common starting point requires that we first identify what we believe to be widely accepted principles of damage calculation in a case where the use of hindsight does not arise.

A. Damages when Hindsight is Irrelevant

Consider the simplest case of damages from a market foreclosure. Assume that a one-time offense results in denial of market access (e.g., an illegal market foreclosure) and that a verdict for the plaintiff and compensation immediately follow the offense. Assume also that there are no opportunities for the
foreclosed firm to pass on the costs of the foreclosure to its customers, thereby eliminating any Illinois Brick issues. Figure 1 illustrates that the damage estimation issues in that case are similar to a bench of contract. The offense occurs at Time 0 (T0), immediately followed by a finding for plaintiff and payment of damages, also at T0. Expected net revenues to the enterprise are reduced from the "but for" levels as shown, but recover fully at T1, producing expected net revenue losses (damages) in the shaded area. The victim's business is subject to risk, that is, actual net revenues after the offense are uncertain and may turn out to be greater than, equal to, or less than expected actual net revenues in every future period. "But for" net revenues are subject to similar uncertainty or risk. Actual revenues in the "but for" world will never be known, but we assume that expected values of future actual and "but for" net revenues can be estimated. The expected values and relevant risk characteristics of future actual and "but for" net revenues are assumed to be known for every period. Figure 1 illustrates that the expected future cash flows, say at T1, are normally the means (i.e., averages) of an uncertain process; these means are only one outcome of a distribution of possible values.

A basic valuation approach where markets for the opportunity in question do not exist is "net present value" (NPV), based on "discounted cash flow" (DCF) analysis. The DCF method calculates the value of a project as the sum of the expected future cash flows it will generate, discounted for the time until each cash flow is to be received and for the risk of each cash flow. Net present value is the present value of future investor receipts minus investor outlays. Here we assume that the DCF estimate of NPV is the economically appropriate approach to valuing the lost opportunity. The discount rate in an NPV calculation equals the after-tax "opportunity cost of capital" (hereafter simply "cost of capital"). We assume there is no special, nonmarket value of the lost opportunity to the victim (e.g., sentimental value). Any lost transaction costs, except for those associated with the litigation process itself, are assumed to be included separately as the damage calculation. The foreclosed business opportunity thus is simply to be valued in the same manner as any business opportunity, and it would not matter whether the opportunity were degraded in value (as shown in Figure 1) or destroyed outright.

In this paper we focus on timing issues; and even in this simple case, a timing issue arises in the choice of a discount rate. The discount rate issue arises in other forms in more realistic cases, as well, so a brief review of the relevant principles is required.

To understand the debate over appropriate discount rates, it is important to understand the rationale for the net present value criteria in the theory of financial and consumer economics. The appropriate discount rate to translate future uncertain cash flows to obtain known current asset values is that rate that makes the asset holder indifferent between a sum (S) paid today for sure in cash (the asset value) and an uncertain payment at time (t) in the
Time 0: Beginning of damage period immediately followed by verdict for plaintiff and payment of damages.
Time 1: Cessation of damages.
Time 2: Alternative case (to be considered below) where trial and payment of damages follow offense at Time 2.
Time 3: Example of Post-trial Lost Profits
Time 4: Example of Pretrial Lost Profits

Figure 1. Effect of Market Foreclosure on Expected Net Revenues
future. The expected value of the uncertain future payment is $ \times (1 + r^t)$, where $r$ is the opportunity cost of capital for assets of that risk class. The cost of capital is ordinarily assumed to be a fixed number, albeit one that has to be estimated using various methods.\textsuperscript{21}

As noted earlier, we assume that the objective of estimating damages is to make the victim indifferent. The cost of capital is determined in capital markets where competition drives expected rates of return to the lowest value compatible with a given level of risk. It represents the market trade-off between present and future cash at that risk level. Thus the NPV is the best estimate of the market value that a non-traded asset would have if it were publicly traded. It is in this sense that damage award equal to the opportunity's NPV makes the victim indifferent.

An immediate consequence is that the appropriate discount rate is based on the risk class of the asset and not the "source of capital," for example, whether it was financed via debt or equity, or which company is making the investment.\textsuperscript{22} Equally irrelevant is the expected rate of return in the particular company's next best investment opportunity. This principle has important implications for issues such as prejudgment interest, as discussed subsequently.

A corollary of these principles occurs when the future cash flow to be discounted is not an uncertain one with $r$ range of possible outcomes, but rather a certain one with only one possible outcome. Here, the appropriate discount rate is the "risk-free" rate, generally equated to the yield on short-term U.S. Treasury securities.

The distinction between risk-free future cash values being discounted at the risk-free rate and expected values of uncertain future cash values being discounted at the appropriate risk-adjusted rate is critical to the discussion that follows. The risks that are to be taken into account in such discount rates are generally regarded to be risks that cannot be eliminated via portfolio diversification.\textsuperscript{23} As usual, accrual of finance charges at the appropriate interest rates as we move forward in time (the expected rate of asset growth over time) is the reverse of the discounting procedure, once adjusted for the risk embodied in each calculation.

B. Damages when Hindsight is Relevant

Even where the appropriate methodology is widely agreed upon,\textsuperscript{24} there is considerable room for dispute when applying it in actual cases.\textsuperscript{25} There is clearly great room for honest differences of expert opinion over how to measure costs, expected revenues, and the appropriate discount rate. Such differences exist even in competitive capital markets and may sometimes be exaggerated in the context of litigation, particularly where there are opportunities for the use of hindsight.
Moreover, differences in damage estimates can also arise from clear misapplication of the correct methodology. Two of us discuss these issues in a separate paper. For most of this paper we ignore such sources of error and assume that the alternative proposed standards are applied accurately. The issue instead is what the goal of the analysis should be in principle. We relax this assumption after evaluating the conceptual properties of the alternatives.

We assumed initially that compensation to the plaintiff for injury is instantaneous. In practice, damages will be awarded at some subsequent point (say $T_1$ in Figure 1). A new series of issues now arises that contrasts sharply with the consensus so far as to appropriate theory (even if practice stays lag behind).

Recognizing that damages are ordinarily paid well after the offense raises four questions, the answers to which are in serious dispute among the experts:

1. Assuming that the actual cash flows that would have occurred become known at $T_1$ (information that was not available at $T_0$), should hindsight be used to employ data based on historical evidence rather than expected values at the date of offense?
2. Assuming that one has a valid estimate of damages at $T_0$ and that is the appropriate point in time for making the victim indifferent, how should the fact that payment of damages occurs at a later date be taken into account?
3. If hindsight is used, does this affect the method by which prejudgment interest should be determined?
4. Should we attempt to make the victim whole as of $T_1$ instead of $T_0$?

III. CONSIDERATION OF THE LAG BETWEEN THE OFFENSE AND DAMAGES: THE ROLE OF HINDSIGHT

The award of damages as $T_1$ introduces a difficult problem: the possible availability of far more information on subsequent developments at $T_1$ than was available at $T_0$. Indeed, at $T_1$ it may even become apparent that the offender performed the foreclosed victim's favor by preventing that firm from investing in a money-losing venture, that is, damages as measured at $T_1$ may well be negative. What should be done with the information that damages may be perceived differently in light of hindsight?

Different uses of hindsight can produce huge differences in damage awards. Pennzoll v. Texaco provides an extreme but realistic example. Plaintiff's damage estimates at trial were based on certain expectations of the state of oil markets at the time of the offense. By the time of trial, oil prices were
declining. What did Pennzoil lose: (1) the opportunity it thought it had at the time of the agreement; or (2) the one it actually lost in retrospect?

A contested bidding process for the Chicago Bulls basketball team provides another excellent illustration of the issues arising when the date for calculating damages is disputed. The court in the case ruled that the plaintiffs had suffered antitrust injury because the defendants' refusal to lease the Chicago Stadium effectively cut off all competition for the acquisition of the Bulls franchise and injured plaintiffs as a result. However, the defendants argued, and Judge Easterbrook's dissenting opinion agreed, that plaintiffs only "lost an opportunity to buy an asset. That imposes loss only if the price of the asset was a bargain." The defendant argued that because the bidding would have been competitive absent the offense, plaintiffs' lost opportunity was worth very little, if anything, and in any event plaintiffs could have mitigated damages by buying another team.

The majority opinion, however, concluded that "we know of no requirement that damages must always be computed as of the time of the injury..." The court concluded that calculation of ex post damages was simply an exercise using the accepted "yardstick" method, where the economic success of the defendants themselves provided the most appropriate measure of a yardstick of plaintiffs' "but for" world.

This case illustrates that under conditions of economic uncertainty, even an accurate and fair estimate of the sum required to compensate the victim as of the time of trial is likely to differ materially from an accurate and fair estimate of the sum necessary to compensate the victim as of the date of the offense. Not surprisingly, contending theories have emerged for and against the use of hindsight. The two chief approaches go by many names, as shown in Table 1. Table 2 summarizes the chief features of the two methods.

To help illustrate the difference between the two theories, consider the case where there are no sunk costs, that is, the plaintiff had not yet invested when the opportunity was foreclosed, but there is an expectation of returns to the foreclosed activity in excess of opportunity costs. To simplify, assume that all damages consist of post-trial lost profits (area 2 in Figure 1) and there are no pretrial lost profits (thus ridding us for the moment of arguments about the prejudgment interest rate on the damages in area 1 in Figure 1). Assume further

### Table 1. Nomenclature of Alternative Estimation Approaches

<table>
<thead>
<tr>
<th>No Hindsight</th>
<th>Use of Hindsight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex Ante</td>
<td>Ex Post</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Time of offense</th>
<th>Time of trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lost going concern value</td>
<td>Lost future profits</td>
</tr>
<tr>
<td>Lost expectancy</td>
<td>Lost outcome</td>
</tr>
<tr>
<td>Table 2. Conceptual Features of the Alternative Approaches</td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Ex Ante</strong></td>
<td><strong>Ex Post</strong></td>
</tr>
<tr>
<td>Uses information available at the time of the violation.</td>
<td>Makes full use of information available at time of trial (hindight).</td>
</tr>
<tr>
<td>Takes account of full range of possible outcomes.</td>
<td>Takes account of subsequent actual events in evaluation of but-for outcome.</td>
</tr>
<tr>
<td>Discounts all future damages to time of violation.</td>
<td>Discounts only to time of trial.</td>
</tr>
<tr>
<td>Relates the plaintiff of the risks of the lost opportunity.</td>
<td>Exposes the plaintiff to risks of the lost opportunity at time of trial.</td>
</tr>
<tr>
<td>Intended to make victim whole at time of violation.</td>
<td>Intended to make victim whole at time of trial.</td>
</tr>
</tbody>
</table>

that there is a great deal of uncertainty about the levels of future profits and these expectations will differ by the time of trial from those at the date of the offense. Suppose the distribution as of the date of the offense of possible damage values at the time of trial is as shown in Figure 2. This distribution of future asset values is a source of uncertainty at T<sub>0</sub> but when trial arrives we know the actual value among the many possible values in the Figure 2 distribution, under our initial assumptions.

Figure 2 illustrates the differences between the two methodologies. Under the ex ante method, damages would be estimated by (1) taking the expected cash flow losses in future years, in this example captured by the mean of the distribution, point <i>m</i>, in Figure 2, (2) discounting them back to <i>T<sub>0</sub></i> at the risk-adjusted rate, and (3) compounding forward at the rate deemed appropriate for prejudgment interest. The ex post method would simply use whatever random drawing was observed from the distribution in Figure 2 at <i>T<sub>0</sub></i> except that a negative drawing is deemed to constitute zero damages (no negative damages awards). In Figure 2, the ex ante number will always be positive, but the ex post number could easily be negative. (The final damage results could also differ because of differences in assumptions regarding prejudgment discount and interest rates, but more on that later.)

Unlike the previously mentioned discussion over valuation methodology, the choice of the appropriate date for establishing the plaintiff's indifference does not immediately resolve itself either by appeals to legal authority or consensus over economic principles and authority. In the present state of affairs, plaintiffs and defendants may simply perform the calculations and espouse the most attractive result.

Much of the argument over the ex post vs. ex ante method seems to have focused on the variance of the ex post method relative to the ex ante method in individual applications, ignoring entirely the difference in expected values of the two approaches. Figure 2 shows the source of these differences: a fraction of the foreclosed activities in a risky industry will prove to be losers.
$m_1$: Mean of the Untruncated Distribution (plus and minus)
$m_2$: Mean of the Truncated Distribution (plus only)
$m_3$: Mean of the Distribution where the Plaintiff Chooses the Approach with Greatest Damages at Time of Trial

Figure 2. Distribution of Asset Values at Some Future Point in the Absence of Market Foreclosure
by the time of trial. An accurate estimate of damages will thus produce negative damages under the ex post standard for these cases. However, offenders will be unable to collect such negative damages from the beneficiaries of their market foreclosure.

The ex post method thus incorporates a basic asymmetry relative to both the ex ante method and the foreclosure opportunity. An investor in the foreclosed opportunity will face a distribution of possible outcomes that includes both winners and losers (i.e., both for unshaded and shaded areas in Figure 2). A victim of an act that wrongly precedes the opportunity to make the same investment will face the same distribution of possible outcomes under the ex ante method and should be awarded the expected value or weighted average of all possible outcomes, positive and negative. A victim of this injury under the ex post method, however, will face only the positive outcomes because the negative outcomes are truncated by the absence of negative damage awards. The implication is that the victim is, in some sense, made immediately better off by the violation under an ex post method, but not under the ex ante method, because the ex post approach eliminates the risk of negative outcomes.13

Figure 2 also shows the same results in another way: the mean of the truncated distribution (\(\bar{m}_t\)) is less than the mean of the truncated distribution (\(\bar{m}_c\)), where the latter does not average in the losers. An accurately applied ex ante methodology would produce an average award of \(\bar{m}_c\), while an accurately applied ex post methodology produces an average award of \(\bar{m}_t\).14 Not only do the two methodologies produce different results in a single application: they also produce systematically different results even when averaged over large numbers of cases.15

A very important result emerges. The ex post methodology will produce negative damage estimates and zero damage awards in large numbers of cases in risky industries. Paradoxically, this result obtains despite the fact that the average award is higher under the ex post methodology.

Choosing to make the victim indifferent as of the date of trial (the ex post result) can affect the risk of the award as well as the expected value of the award. Assuming a consensus that Figure 2 represents the distribution of asset values at trial, all such victims will receive \(m_t\) under an ex ante approach, while individual victims would receive a random drawing from the distribution under the ex post award. Importantly, the risks borne by the victim under the ex post approach more nearly approximate those of the foreclosed opportunity, except for the truncation of adverse outcomes arising from the asymmetry of the litigation process.16

This ranking of expected values for the two methods holds for \(T_0\) as well as at \(T_0\). The present value of ex post damages must exceed the value of the foregone opportunity at the time of the infraction because the present value of the shaded area in Figure 2 at \(T_0\) must be negative.17 This, if risk-neutral
plaintiffs were forced to choose between the ex ante and ex post methods at
the time of the violation, as a means of estimating damages at the time of trial,
risk-neutral plaintiffs would always select the ex post method. Because
plaintiffs usually do not have to select a method until well after the violation,
they sometimes choose to use an ex ante method, as Pennzoil did.

The matter gets worse if plaintiffs and defendants are able to pick and choose
expeditiously at the time of trial. Plaintiffs will be arguing for the ex post standard
for all cases where it exceeds m, while defendants will support ex post results
less than m. If victims were allowed to choose methodologies, the average
award gets even larger (m) as the victim gets the better of the two worlds in
each individual case.62

Figure 2 thus reveals that assessing damages under the ex post methodology
will have three main consequences as compared with the ex ante approach:

1. In industries with substantial risk, the average damage award under an
accurately applied ex post methodology will exceed the value of the
foreclosed opportunity;
2. Paradoxically, under the ex post methodology a large number of
offenders will pay no damages in a risky industry; and
3. Unless otherwise corrected for bias, an accurately applied ex post
methodology will systematically overcompensate victims, on average,
relative to an accurately applied ex ante methodology, measured either
at time of trial or at time of offense, especially if plaintiffs are allowed
to choose which method to employ.

If this were all there was to it, the indemnification principle might clearly
support use of the ex ante approach. However, a number of theoretical and
conceptual issues must first be considered. The first is the choice of prejudgment
interest under the two methods.

IV. PREJUDGMENT INTEREST ON POST-TRIAL
LOST PROFITS IN THE EX ANTE APPROACH

To clarify the prejudgment interest question, we first consider a pure shift
forward in time of the damage award given that a decision is made to use the
ex ante approach. Such interest accruals occur under the ex ante approach when
the value of the award as determined at T0 is moved forward to date of trial.

Assume for a moment that a verdict for plaintiff is rendered at T0, and a
valid measure of damages at that point is determined, but the offender does
not pay immediately. Rather, cash passes to the victim only at T3. This could
arise in a variety of ways, such as the creation of an escrow account or bonding
or simply from a delay between the date of judgment and the date of award.44
Proposed rates for accrual of prejudgment interest penalties have ranged across the board, as have their rationale, as shown in Table 3. In practice, the choice between the available alternatives can have major consequences for the amount of total damages. A lively dispute has evolved, with the participants taking positions supporting one or other approach while sometimes ignoring some of the basic principles of financial analysis discussed earlier.

This debate arises frequently in cases of commercial damage (e.g., trademark infringement), where the prejudgment rate is not fixed by statute. Such arguments over treatment of interest in prejudgment interest with the ex ante method arise for two reasons: first, the appropriate principles of financial economics are not always followed; and second, there is no clear guidance regarding where (1) the costs of being deprived of an asset (costs presumably related to the offense) end and (2) the costs and risks of recovering its value in court (and thus not part of damages per se) begin. We take these in turn.

### A. Considerations Based on Principles of Finance

Turning to Table 3, critics of the first approach rightly note that the victim is by definition no longer exposed to the risks inherent in the foreclosed enterprise. In their view, this clearly eliminates the first alternative because it may overcompensate or undercompensate the victim.

To illustrate, suppose a victim were foreclosed from a highly risky opportunity (say, trading in a very volatile stock with a correspondingly high expected rate of return). A rational investor would prefer recovery of damages equal to the amount of the investment plus certain prejudgment interest at a rate of return equal to the high expected returns from the foreclosed activity.
(but without the risk of losing everything on Black Monday), to having the actual stock with the same expected return and all of the risk still attached.

Modern finance theory shows that the appropriate expected rate of return at which to discount future cash flows or to accrue interest on past cash flows is the cost of capital. The cost of capital equals the risk-free rate plus a premium for the (undiscountable) risk investors bear for the investment in question.49

If (i) the purpose of the damage award is to make the victim indifferent; and (2) the risk of the victim in recovering damages between offense and trial is likely to be very different from the risk of the foreclosed activity, it becomes clear that (3) the cost of capital for the foreclosed activity cannot automatically be the right answer.44

If we have a known magnitude of damages at the time of the offense and propose to accrue interest on that fixed amount, it is inappropriate to reward the victim for risks of investing in the foreclosed enterprise during the time period between offense and trial. Whatever the risks borne by the victim during the time between infliction and payment as a result of the offense, there is no reason to believe that they necessarily coincide with those of the foreclosed activity.

The same argument rules out use of the defendant's overall cost of capital, which depends on the general business risks of the defendant's enterprises. Perhaps less obviously, the same argument also rules out the fourth option in Table 3, use of the plaintiff's borrowing rate. The plaintiff's borrowing rate depends on the risks lenders face when supplying money to the plaintiff. These risks bear no necessary relation to the risks associated with calculation of prejudgment interest in a trial.

This leaves two candidates in Table 3, the defendant's borrowing rate and the risk-free rate. To understand this choice, it is necessary to explore the kinds of risk that prejudgment interest might be intended to address.

B. Considerations Based on Nature of Risk

There are at least three risks or costs that might be candidates for recognition in the prejudgment interest rate with an ex aequo damage award:

1. the risk of losing the case;
2. the costs and risks of any illiquidity that the plaintiff might experience as a result of the offense; and
3. the risk that the defendant might go bankrupt before the plaintiff can win the trial.

As noted at the outset, the risk of losing the case ordinarily is ignored as part of the damage calculation. This could be justified by the assumption that the justice system is infallible, so that plaintiffs with meritorious claims never
lose and plaintiffs with unground claims never win. Alternatively, it may be thought that the system picks the "right" winners only on average. Plaintiffs and defendants are then both at risk of "wrongly" losing a lawsuit. Compensation to winning plaintiffs for this risk without equal compensation to winning defendants would create an asymmetry that would encourage additional lawsuits.68

The risk of losing a lawsuit obviously exists in virtually all cases that actually go to trial. The existence of the second potential factor, costs and risks from illiquidity, will vary from case to case. In an ex ante calculation, the issue is the expected costs of illiquidity. An investment that is important enough to the company to create illiquidity problems if the company is foreclosed from making it is also likely to be important enough to create a risk of illiquidity costs even if it goes ahead. That is, stand-alone investment projects typically take more cash than they generate at the outset, and if they turn out badly the result may be much like being deprived of the opportunity at the outset. Nonetheless, it may typically be easier to raise capital against the value of an ongoing project than an ongoing lawsuit. If a plaintiff may run into additional financial distress while awaiting the outcome of the lawsuit and the defendant's actions are judged responsible, the damages associated with the expected cost of that incremental distress are candidates for inclusion in an ex ante award.69

For both the first and second factors, then, the issue is whether the victim should be compensated for the risks of holding the right to recover damages at some future point, rather than holding the original opportunity.70 Even if this question is answered affirmatively for either factor, however, such compensation should not necessarily come in the form of an adjustment to the prejudgment interest rate.

Clearly, if compensation for these risks is warranted in the prejudgment interest rate, the lawsuit as an asset has risk characteristics different from those underlying all four suggested prejudgment interest rates in Table 3. For example, the expected costs of illiquidity need bear no necessary relation to the size of the investment itself, since the costs of illiquidity may be collateral costs that affect other operations of the firm. Thus the "right" increment to the interest rate to compensate for illiquidity would be idiosyncratic to the case at hand. Moreover, and not coincidentally, there are no readily observable interest rates in the economy that could serve as benchmarks to assess just how high a prejudgment interest rate would be compensatory.71 If these factors are to be considered, it seems more straightforward to estimate the expected consequences directly than to add some "judge factor" to the prejudgment interest rate.72

The third factor, default risk, is one that does naturally fall within the scope of the prejudgment interest rate, but there is again an issue of whether it should be recognized.
The case for use of the defendant's borrowing rate is as follows. If the plaintiff
knows it has been harmed and brings suit, but does not know when the case
will come to trial and the award paid, the plaintiff has effectively lent money
to the defendant (in the amount of the upcoming damage award) and deserves
the same interest rate the defendant pays to other creditors.2425

Alternatively, some would argue that successful plaintiffs should not be
compensated for any risk in the rate of prejudgment interest on the grounds
that such risks are, in reality, litigation risks that should be borne by the parties,
just like the risk of losing the lawsuit.26

Another variant of this argument is that the calculation of prejudgment
interest is intrinsically an ex post activity, unlike the valuation of investment
opportunities ex ante. The problem is that it may be impossible to fully purge
the damage calculation process of the knowledge the default did or did not
occur. For example, cases that go to trial (rather than settle) will ordinarily
have a material dispute either as to the fact of liability or the amount of damage,
or both. Ex post, default risk has already been resolved by the date of judgment.
The actual calculation of prejudgment interest occurs only after the fact of
default or its absence is already known. A principle of finance says that the
cost of capital depends upon the risk of the investment in question (here, the
prejudgment interest on the damage determined to exist as of the date of the
computation). Applied here, this implies that the risk-free rate is correct.27 To
give a default premium only to plaintiffs who can collect it compensates them
for a risk they did not bear ex post (and is without benefit to plaintiffs who
have suffered an actual default by losing defendants).28

Whether to include a default premium is the type of issue on which
reasonable people can disagree. An interesting point is raised by Stewart C.
Myers.29 Inclusion of a default premium means that on average defendants will
expect to pay the same rate when "borrowing" by committing intentional
wrongful acts as when going to capital markets for cash, which avoids any
possibility that such acts could be seen as a source of capital at below-market
rates.30 This raises the issue of willfulness.

The incentive to consider the absence of a default premium to make an illegal
act (e.g., a patent infringement) a cheap source of capital would obviously
increase as the fair default premium did. Thus, the need for a default premium
will tend to be highest in cases where the wrongful act is intentional (although
this is also the case when many winning plaintiffs are unlikely to collect it in
the event, because of actual default). Moreover, a finding that the act was
known to be wrongful in some sense implies that the defendant is knowingly
creating a liability at the time of the act, which may persuade even those who
feel prejudgment interest is an intrinsically ex post calculation that a default
premium is warranted in this type of ex ante damage calculation.

On the other hand, where the act is not willful (i.e., where there is a serious
question as to the existence and/or materiality of the liability until the trial
is over), retroactive imposition of a default premium after the default risk no longer exists may trouble those who would be inclined to include one for intentionally wrongful acts. This could point the way to a rule of reason on default premiums in ex ante damage calculations, because the issue of intentionality or willfulness sometimes is adjudicated as part of the trial. It seems to us that the case for a default premium in the prejudgment interest rate in an ex ante damage calculation is strongest where a finding of intentional violation is present.

Thus, we cannot rely on economic theory alone to reach a single answer to the correct prejudgment interest rate for an ex ante damage award. The issues of whether the act was willfully wrong or believed to be lawful bear on whether a default premium should be included in the prejudgment interest rate. Even more generally, the issue ultimately cannot be decided without consideration of the four major objectives of damage awards with which we began our paper. These general public policy questions go beyond the calculation of damages in individual cases.

Since we are left with two possibilities, we identify them and move on: we henceforth define a "pure" ex ante methodology as one that uses (1) an ex ante estimate of damages (including, if warranted, any expected illiquidity costs) and (2) a prejudgment interest rate equal to the risk-free rate plus a default premium. We define use of the same damage estimate with a prejudgment interest rate equal to the risk-free rate as a "mixed" ex ante approach. We shall hereafter refer to the rate that emerges from this process as the (pure or mixed) "ex ante prejudgment interest rate."

V. PREJUDGMENT INTEREST ON POST-TRIAL LOST PROFITS IN THE EX POST METHOD

Many of the same considerations for prejudgment interest arise under the ex post method as under the ex ante method. However, before addressing these issues directly, it is useful to explore an apparent puzzle about the results obtained with the two approaches.

The hypothetical example in Figure 2 showed that, other things being equal, a victim on average expects to be better off under the ex post method than under the ex ante method because of the asymmetry of the litigation process (no negative damages). This finding holds whether we are comparing the results of the two methods at the time of infraction or the time of trial.

The processes of discounting and calculating prejudgment interest create another potential source of difference between the two. In particular, the method used for computing prejudgment interest under the ex ante method will generally produce a measurement of damages at Tt different from that under the ex post methodology even if there is no difference between the
expected and actual lost cash flows. Perhaps even more curiously, this difference in expected damage values at T\textsubscript{1} will persist even if the asymmetry problem could be solved to make the ex post and ex ante methods of equivalent expected value at T\textsubscript{0}. This might seem to be a sign that one or the other of the methods is being applied incorrectly or must have an inherent flaw; in fact, once the plaintiff's risks under the two methods are properly considered, this difference becomes the two approaches' results is clearly appropriate.

To explore this issue, and thereby to address the general issue of prejudgment interest in an ex post damage calculation, it is useful to consider discount rate and interest rate issues for post-trial and prejudgment lost profits separately.

The source of the difference between the two methodologies is most clearly seen if we return to the example where there are only post-trial lost profits, that is, all damages consist of the area 2 in Figure 1, with trial and judgment at Time 2 (T\textsubscript{2}). Assume further that the foreclosed activity had only positive outcomes, so that the possibility of negative damages does not arise (imagine that the negative outcomes in Figure 2 arise only from hurricanes, and this risk is always insured fully in the foreclosed activity). Again, we continue to assume that the choice of method occurs at the time of the offense and not after the cards are face up at the date of the trial.

Figure 3 shows the effect of the difference between awarding the victim prejudgment interest on post-trial profits under the ex ante approach and awarding the victim the expected rate of return in the foreclosed alternative under the ex post method.

First, suppose the entire damage amount consists of a single, uncertain cash flow to be received at a particular future time, say T\textsubscript{1}. Suppose also that there happens to have been no change in expectations between times T\textsubscript{0} and T\textsubscript{1}. Under the ex ante approach, experts agree that these future damages will be discounted back to T\textsubscript{0} at the risk-adjusted rate and compounded forward to T\textsubscript{1} at the rate explicitly determined for prejudgment interest, a rate likely to be lower than the discount rate used to compute the value of damages as of T\textsubscript{0}. The result (Point A in Figure 3) will be a value under the ex ante method at T\textsubscript{0} that lies below the direct calculation of the present discounted value of the T\textsubscript{1} cash flow (Point B in Figure 3) at T\textsubscript{0}.

Now Point B is just the value of the T\textsubscript{1} cash flow under the ex post method, as long as expectations have not changed. Thus even if the expected future cash flows are exactly the same under the ex ante and ex post methods, the ex post value at the time of trial will exceed the ex ante value at the time of trial. We will now argue that this result is entirely appropriate, given the assumptions of the example.

Consider the expected value of the ex post award versus the value of the ex ante award at T\textsubscript{0}. They must be the same in this particular example at point C, because they both are the present value of the same expected cash flow discounted at the same rate over the same period of time.
After $T_o$, however, the expected value of the ex post award grows more rapidly than the ex ante award, providing the expected cash flow at $T_i$ stays the same. That is, the ex post award as of $T_o$ is expected to grow at the high, risk-adjusted rate used to discount the cash flows in the first place. The ex ante award, in contrast, grows at the (presumably) much lower pre-judgment interest rate. Under these assumptions, the ex post approach will be expected to produce a damage award at $T_i$ significantly above the ex ante damages plus pre-judgment interest (pure or mixed).

The reason this outcome is appropriate is that the plaintiff bears the risk under the ex post method that the expected cash flow at $T_i$ may change dramatically in value by the time of trial. Under the ex ante method, the plaintiff gets whatever the discounted expected value was at $T_0$, plus an appropriate interest rate on that fixed quantity.

Since the plaintiff continues to bear risk under the ex post method, it is appropriate that the expected award grow at a risk-adjusted rate. However, the actual award ex post may turn out to be very different from the level at Point B, the amount that would be expected at $T_0$. The reason is that some of the uncertainty about the cash flows at $T_i$ will have been resolved by $T_0$.

The higher expected value of the ex post award at $T_i$ is offset by the greater uncertainty of the award between $T_0$ and $T_i$.

We are now in a position to address the question of the implicit pre-judgment interest rate on post-trial lost profits. As of the date of trial, the post-judgment damages under the ex post method have a known value, such as Point B in Figure 3. Since this value is known as of $T_0$, if one wanted to know its present value as of $T_0$, one would discount it at the risk-free interest rate. The intuition behind this result is simple: as of $T_0$, investors would prefer a known value equal to Point B at $T_i$ to a risky expected value equal to Point B at $T_0$. Therefore, the known value must be more valuable to investors as of $T_0$. The value of the ex post damage shown in Figure 3 as of $T_0$ is at Point D, which just discounts the Point B amount back at the risk-free rate.

Figure 3 shows that the ex post award will typically have a higher expected value at both $T_0$ and $T_i$, when viewed from $T_0$. This is appropriate because the ex post award methodology incorporates higher risk (i.e., the risk of the foreclosed opportunity) for post-injunction lost profits.

A related issue that sometimes arises is whether the difference at $T_i$ implies a different implicit rate of pre-judgment interest between the ex ante and ex post methods. That is, the different growth rates for the expected payoffs to the two methods (i.e., in terms of Figure 3, from point C to point A for the ex ante approach and from point C to point B for the ex post approach) may seem to correspond to different rates of pre-judgment interest. That is incorrect, however, because only the ex ante method has actually calculated pre-judgment interest in the example to this point, at least in the ordinary sense of
Table 4: Appropriate Procedures for Discounts and Interest Rate Calculations for Post-Trial Lost Profits

<table>
<thead>
<tr>
<th>Approach</th>
<th>Here Done</th>
<th>Rate of Prejudgment Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex Ante (pure)</td>
<td>Discount to ( T_0 ) at risk-adjusted rate and compound forward to ( T_1 ) at ex ante prejudgment interest rate.</td>
<td>Risk-free rate plus a default premium.</td>
</tr>
<tr>
<td>Ex Ante (mixed)</td>
<td>Same as Ex Ante (pure).</td>
<td>Risk-free rate.</td>
</tr>
<tr>
<td>Ex Post</td>
<td>Discount to ( T_0 ) at risk-adjusted rate and compound forward to ( T_1 ) at risk-free rate.</td>
<td>Risk-free rate (implicit).</td>
</tr>
</tbody>
</table>

making an annualized cash addition (interest) to the award based on a specified amount of principal and prior interest.

Table 4 can now sum up the prejudgment discount and interest rates for post-trial damages under the two methodologies.

VI. PREJUDGMENT INTEREST FOR PRETRIAL LOST PROFITS

We now turn to the treatment of prejudgment interest for pretrial lost profits (Area I in Figure 1) under the two methodologies. The lost net revenues at Time 4 \( (T_4) \) in Figure 1 constitute an example of such damages. Possible procedures for prejudgment interest for these damages can readily be derived from the principles already stated, and are shown in Table 5.

The ex ante method deals with expected cash flows as of \( T_0 \) (see Figure 1) by discounting them back to \( T_0 \) at the risk-adjusted rate and forward to trial (\( T_3 \)) at the rate for prejudgment interest on ex ante damages. Table 5 shows an intermediate stopping point at \( T_3 \) (for the purpose of comparing the methods).

Table 5 defines the "pure" ex post approach compounding the "actual" cash flow forward to the time of trial at the risk-free rate. This is the pure ex post method in the sense that it uses the absence of actual default to exclude a default premium from the prejudgment interest rate.

Application of the pure ex post method is the clearest case where a risk-free rate is justified for prejudgment interest. Table 5 shows, however, that victims will often pursue a mixed approach, arguing for the use of hindsight in establishing the level of pretrial damages, but employing an ex ante approach to prejudgment interest. Note that the use of a prejudgment interest rate with a default premium involves the selective use of hindsight. The analyst is willing to use hindsight in determining the amount of the damage and the fact that the defendant was actually liable as of \( T_0 \), yet unwilling to use hindsight to disallow compensation for a nonexistent defendant by the defendant.
### Table 5. Potentially Appropriate Procedures for Prejudgment Interest for Pretrial Lost Profits

<table>
<thead>
<tr>
<th>Approach</th>
<th>Cash Flow Model</th>
<th>Discounted or Compounded</th>
<th>How Done</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex Ante (pure)</td>
<td>Expected Cash Flow at $T_1$</td>
<td>Discounted or Compounded</td>
<td>1. Discount back to $T_1$ at risk-free rate. 2a. Compound forward to $T_1$ at risk-free rate plus default premium.</td>
</tr>
<tr>
<td>Ex Ante (mixed)</td>
<td>Expected Cash Flow at $T_1$</td>
<td>Discounted or Compounded</td>
<td>1. Discount back to $T_1$ at risk-free rate. 2a. Compound forward to $T_1$ at risk-free rate.</td>
</tr>
<tr>
<td>Ex Post (pure)</td>
<td>&quot;Actual&quot; Cash Flow at $T_1$</td>
<td>Discounted or Compounded</td>
<td>1. Compound forward from $T_1$ to $T_2$ at risk-free rate.</td>
</tr>
<tr>
<td>Ex Post (mixed)</td>
<td>&quot;Actual&quot; Cash Flow at $T_1$</td>
<td>Discounted or Compounded</td>
<td>1. Compound forward from $T_1$ to $T_2$ at risk-free rate.</td>
</tr>
<tr>
<td>Legend to Chronology:</td>
<td>$T_1$  Date of offense $T_1$</td>
<td>End of damage period $T_2$ Date of Trial</td>
<td></td>
</tr>
</tbody>
</table>

The only principled argument in favor of such a practice that we have been able to conceive would be in the case of a willfully unlawful act, on the grounds that inclusion of a default premium avoids the incentive to treat the act as a source of cheap capital. However, such an incentive-based argument would have to deal explicitly with the bias in the ex post method caused by the truncation of the negative possible outcomes, by reducing the amount of the award before prejudgment interest in the fashion described subsequently. Otherwise, it would be selective use of an incentive argument, which has no more principled justification than selective use of hindsight. Table 5 also shows that the level of damages (i.e., the principal) to be compounded forward will typically differ between the two methodologies. It may seem that the ex post method will be compounding forward a riskier cash flow than the ex ante method. Some experts call for use of the risk-adjusted rate in the foreclosed opportunity under the ex post approach, to account for the greater risk of the ex post cash flows.

However, this logic is incorrect for the reasons already given. It is true that if the ex post method were applied consistently and accurately, the victim would be exposed to exactly the same risks as the foreclosed opportunity in recovery of pretrial lost profits (except for cases where negative damages would arise, which are excluded by assumption from this part of the paper). Once any particular cash flow is realized, however—for example, by being identified as occurring at $T_1$—that cash flow is no longer subject to the risk of the lost opportunity. That cash flow becomes a fixed or certain number, just like the
value of the lost opportunity at $T_2$ under the ex ante method. The appropriate interest rate for fixed quantities is the risk-free rate, perhaps plus a default premium in some views of the ex ante damage calculation. These conclusions follow immediately from the definition of the cost of capital as reflecting the risk of the cash flow in question.

VII. AN INTEGRATED APPROACH TO PREJUDGMENT INTEREST AND DAMAGE METHODOLOGY

The difference in treatment of prejudgment interest as shown in Figure 3 is often cited as evidence condemning either the ex post or ex ante methodology. These arguments are misplaced, assuming that the discount rates have been chosen appropriately under the two methodologies. Possible differences in prejudgment interest in Figure 3 will create a difference in the expected damage award at the date of trial even if the value of the damage award at all times between the violation and trial under the ex post award is exactly the same expected value under the ex ante award. For example, the difference can be perceived as arising from the differences in the rates for compounding interest from $T_0$ to $T_1$ under the four methods as shown in Table 5.

The difference can also be perceived as arising from the "round-trip" from $T_1$ to $T_2$ under the ex ante methodology, which need not occur under the ex post methodology. Note that Table 4 also assumes there will be a "round-trip" from $T_1$ to $T_2$ and back to $T_0$. This round-trip is mandatory in the ex ante method, but is optional for the ex post method, since the ex post answer at $T_1$ will be the same either way. (That is, one can simply compound the "actual" $T_1$ cash flow forward to $T_2$ at the risk-free rate under the ex post methodology.) Table 5 shows that the ex ante damages are discounted back to $T_0$ at the risk adjusted rate, but compounded forward to $T_1$ at the (presumably lower) ex ante rate for prejudgment interest. The extra "round-trip" under the ex ante methodology will generally cause ex ante damages at $T_2$ to be lower than the average under the ex post approach. This loss of expected value will, of course, also be present after compounding forward to $T_1$.

This source of systematic difference between the two methods initially may seem arbitrary and provide an offsetting argument in favor of the ex post method. However, if done correctly, it alone is not a defect in either the ex ante or the ex post method. The reason is that the difference in discount rates (third column of Table 5) is exactly offset by the difference in risk (second column of Table 5). The effect of the "round-trip" in the ex ante methodology is to purge the damage award of the expected return to risk-taking for the foreclosed opportunity between $T_1$ and $T_2$. But this is appropriate, because
the victim did not bear this risk under the ex ante method. By definition, the victim always gets the expected value at Tt as of Tt under the ex ante method, which does not change as the risks of the foreclosed opportunity evolve.

We have come to a conclusion that appears to differ from the literature and practice of awarding pre judgment interest. Much of the current argument over pre judgment interest and the choice of measurement methodology for damages proceeds in a vacuum without accounting for the interdependence between them. In choosing the correct rates for discounting and accruing pre judgment interest, one needs to distinguish carefully among:

1. The risks of the foreclosed activity;
2. The risks of the damage award under the ex ante approach; and
3. The risks of the damage award under the ex post approach.

There is no reason per se for the risks of the three alternatives to be the same, so the appropriate discount/interest rates may vary. If such rates are chosen correctly, the fact that they differ should not by itself be interpreted as grounds for choosing among damage approaches. Nor is one approach to be preferred over the other simply on the grounds of relative risk, assuming that the discount rates have been chosen correctly.

VIII. SHOULD DAMAGES SEEK TO MAKE THE VICTIM "WHOLE" AS OF THE OFFENSE OR AS OF THE TRIAL?

A. Purging the Ex Post Method of Bias

The rub to this conclusion, of course, is that the ex post method in practice does not truly replicate the risks of the foreclosed opportunity. As shown in Figure 2, the expected damage award under the ex post method will exceed that under ex ante applied to the same facts. If this were all there was to it, the ex post method would be difficult to justify. In risky industries, large numbers of offenders would go scot free even after a long inquiry, yet victims on average would be receiving in excess of their expected damages, even before trebling in the antitrust context. Large uncertainties over eventual awards under the ex post method would greatly complicate the settlement process once differences in expectations and attitudes toward risk were incorporated into the model.

This raises the question of whether it is possible to correct the ex post method by purging it of the bias. Patell, Weil, and Wolfsinn (1982) propose that this be done by treating the asymmetry from negative damages as a valuable option to the victim to sue whenever ex post results justify. To correct for the bias,
they would subtract the value of the option from ex post damages. We are not aware of any cases where this has actually been done, but we endorse the principle (subject to the caveats here).

Unfortunately, the calculation of the appropriate option value turns out to be difficult, and not merely because options can be difficult to value. Consider what the fair value of the option would be if the option were exercised. This is equivalent to a standard call option, where the buyer has the right but not the obligation to buy a stock at a future date for a specified price. The option is "exercised" only if it is "in the money": the value of the stock on that future day (read "ex post damage amount at time of trial") exceeds the exercise price specified in the option.

However, unlike the case of a standard call option, the option to sue under the ex post approach is not collected in advance from all foreclosed victims, but rather only from plaintiffs whose ex post damages are sufficiently large to provide something left over after having the value of the option deducted from their damage award. This is, of course, a variation of the leverage market, both winners and losers would have to pay the option's price in advance to insure against downside losses. Under what we shall call the ex post law option price methodology, the option fee would be paid only by the really big winners who exercise the option to pay the option fee and sue only after the cards are face up.

The kind of difficulty this presents is most clearly illustrated by the limiting case of a zero ex ante damage award (i.e., a case where the present value of the expected cash flows equaled the amount of the initial investment, so the net present value of the investment opportunity was zero). Suppose the option price is zero and the legal precedent implied that the option value in the case of a zero ex ante damage award would be 100 times the amount of the initial investment, so that very few plaintiffs would find it worthwhile suing ex post (a desirable outcome if indemnification were the only objective, given that there was zero damage ex ante). Still, there could be a few plaintiffs whose actual ex post outcomes justified a suit (say, because the actual outcomes turned out to be 101 times the amount of the initial investment). Those few winning plaintiffs would obtain damages even though they were not actually damaged at the time. In the case of a zero net present value investment ex ante, the only ex ante option value big enough to deter all lawsuits by plaintiffs who would have won ex post is one equal to the maximum possible size of the ex post damage amount.

In cases where there is positive damage ex ante, it will be possible in principle to calculate the appropriate ex ante option value to purge the ex post method of bias. However, even if this were done successfully, another perhaps more profound problem remains. Purging the ex post award of bias does not really reestablish the goal of "making the plaintiff whole" as of the date of trial. In fact, no individual victim will be "made whole" by collecting such premiums, even if victims on average can expect to recover their damages.
The problem arises because the major beneficiaries ignored by the ex post approach are the victims who were fortuitously foreclosed from making an investment mistake. There is no way these individuals can be "made whole" except by payment of negative damages to offenders. When the average benefit of these foreclosures is netted from the value of the winners' awards, the "average victim" is made whole, but all winners are made worse off than they would have been with no foreclosure. Thus, no individual victim can be "made whole" while purging the ex post method of its biases.1

Even more troubling, whatever advantages the ex post method has with regard to simplicity and economy of data might be lost through the need to conduct an ex ante valuation of the correct premium for the option. Purging the ex post award of the truncation bias that might require the damage study to implement both methodologies.

B. Difficulties in Accurately Applying the Ex Ante and Ex Post Methods

Until this point in the discussion, we have made a very important assumption. It was assumed that the methods were applied "accurately." This means that the distribution of ex post outcomes that plaintiffs and defendants will observe at trial (Figure 2) will not differ systematically from the ex ante expectations at the date of offense (Figure 1). That is, the distribution of possible future outcome is correctly perceived at the time of the violation.

It is not difficult to imagine ways in which this assumption will be violated. We have already seen one, the effects of truncation arising from the asymmetry of the litigation process, which biases upward the expected values under the ex post methodology. Sources of bias in the ex ante method are not so obvious, but may well be significant.

Suppose, for example, that the industry from which the victim was foreclosed was a highly risky one, where most entrants fail. Nevertheless, entrants are constantly entering because they misperceive their chances of success (note the existence of a market imperfection because each believes success is likely despite the failure of most). Entrants' expectations, if used to estimate future expected values, could be seriously upward-biased as compared with the actual distribution of successes observed at trial.

The procedure for estimating ex ante damages could also incorporate upward biases in expected damages as compared with an objective distribution of outcomes in the foreclosed opportunity. If a businessperson foreclosed from an opportunity were actually to forecast ex ante "but for" cash flows, such forecasts could be of the "everything goes right" variety. The reason, of course, is that it is often impossible to project the "unknown unknowns" that could go wrong—strikes, lawsuits, environmental disasters, uninsured hurricane
damage, and so forth. The difficulty of accounting for such risks in any future projection could be a source of upward bias in the ex ante approach.

C. Opportunities in the Choice of Methodology

Plaintiffs face not only the risks of achieving successful litigation and recovery of damages, illiquidity, and so forth. They (as well as defendants) also face the considerable risk of not knowing what damage methodology will ultimately be applied. And even if the methodology were specified from the bench, there is considerable uncertainty over what results a particular methodology will produce, given the sensitivity of all of the methods to the assumptions employed in the presence of data gaps.

D. A Summing Up

Tables 6 and 7 summarize the problems in implementing the two methodologies. In practical situations, these advantages and disadvantages would have to be weighed.

At the outset, we noted that the purpose of compensatory damages was to compensate the victim, not to punish the offender (which is accomplished by trebling in the antitrust context, and punitive damages in other contexts). Thus, we have expressed concern over methodologies that would consistently make it more profitable to invite foreclosures and become a victim and sue, rather than to pursue risky ventures.

Table 6. Problems with the Ex Post Approach

- An accurate application of the ex post approach on average will yield systematically larger damages than an inaccurate application of the ex ante approach.
- The expected value of damages under the ex post method will be greater than the expected value of the opportunity that was taken away.
- Congressing on an ex post approach to its biases may require a fullblown ex ante analysis.
- Periodically, a substantial number of victims would nevertheless receive no damages under an accurately applied ex post approach in a risky industry.
- The option to select between approaches after the card is face up makes the problem even worse.

Table 7. Problems with the Ex Ante Approach

- Judges and juries cannot always perceive hindsight.
- Discovery may not reveal objective data on expectations.
- Historical evidence on expectations may be difficult to interpret.
- It may be burdensome to estimate the true expected value of possible future outcomes.
- Continuing offenses may be difficult to analyze.
While the ex ante approach clearly has some attractive theoretical properties, the chief complaint about the ex ante approach is its susceptibility to overly optimistic projections, which are likely to be exposed in the sober light of actual experience. The victim may paint a glowing picture of the "but for" world, and the ex post methodology may provide the basis for a reality check on these projections.

The ex post methodology, however, has an intrinsic bias in its expected outcome due to the truncation problem—no negative damages. While it is possible in principle to correct for this problem, it is likely to be extraordinarily hard to do so in practice.

Our actual choices (and those of the decision makers) are not pure ones to be made before the cards are face up. In actual cases, judges and juries may find it hard to let the offender get off entirely just because the offender happened to be lucky that time. Members of juries who serve maybe once in a lifetime may find the notion of "doing justice on average" unattractive.

If judges and juries are going to be fashioning a hybrid of the methods anyway, there may be an argument for the experts' doing so explicitly. Indeed, some experts are already arguing for "mixed" approaches to prejudgment interest. One method would be to use hindsight to purge the ex ante method of excessive optimism and speculation, while still seeking to estimate expected values as of the date of violation. Table 8 illustrates a template for balancing such issues in actual cases.

**IX. SPECIAL CONSIDERATION OF ANTITRUST DAMAGES**

The chief unique factor that must be taken into account in antitrust proceedings is the disallowance of prejudgment interest. This procedure provides another opportunity for a possible discrepancy between the expected value of the ex post and ex ante methods. If trebling is to offset prejudgment interest, it is not exactly clear what is meant by prejudgment interest.

**Table 8. Issues in Evaluating Alternative Methodologies for Estimating Damages**

<table>
<thead>
<tr>
<th>Issue</th>
<th>Ex Ante</th>
<th>Ex Post</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allocation of risk between offender and victims</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equity (harms)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deterrence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Date requirements</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Causation/Expienscy</td>
<td></td>
<td></td>
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<tr>
<td>Punish violators</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Compensate the victim</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Optimal litigation choices</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Deleting prejudgment interest from the ex ante award would appear relatively simple. Since the procedure produces an estimate of damages at T0 as an intermediate product, the estimation procedure could stop at this point.

Under the ex post methodology the approach is not so clear. The usual approach is to calculate the net present value of future damages at time of trial (Area 2 in Figure 1) and simply sum up pretrial damages (Area 1 in Figure 1) with no compounding of interest.

An apparent prejudgment interest problem is that under the typical ex post approach, post-trial lost profits are increasing in expected value to the end of the damage period at the risk-adjusted rate in the foreclosed opportunity. The difference could be considerable, as shown in Figure 3. However, we have shown that this is not actually a matter of prejudgment interest. Rather, it simply reflects the fact that if cash flows happen to equal their initial expected values, the ex post value of that outcome will exceed the ex ante value. It does, however, matter how compensation for certain risks, if properly awarded, is to be done. If risks of illiquidity or nonrecovery because of the offender's default are assumed to be either ignored as a matter of law or economized, recovered though trebling, or appropriately made part of prejudgment interest, such risks will be excluded from the damage award. But if a decision is made to include these costs in damages (according to a desire to "make the victim whole"), they will not only be included but will be trebled.

X. CONCLUSIONS

Appropriate methods for calculation of damages from market foreclosure are subject to considerable argument at the present time. This article has attempted to clarify some of the still-controversial issues. The analysis showed that consistent employment of the ex post methodology will bias upward the average damage award because of the asymmetry in the litigation process, that is, no negative damages. The average ex post award will also be higher because the risky expected cash flows will on average equal their expected value, not their lower, risk-adjusted present value as of the date of the trial. However, this is not a bias in the ex post methodology, because it appropriately reflects the risks plaintiffs actually bear under that method (assuming it is not selected opportunistically). Other problems may arise in the ex ante methodology, however, and practical considerations will govern the choice of approaches in practice. If awarded, the appropriate rate for prejudgment interest may depend upon the damages methodology, especially for the ex post method. In the ex ante method, it may also be influenced by whether the liability could reasonably have been identified at the time of the act, that is, on whether the wrong was "willful." Broader public policy questions than those analyzed explicitly in this article (e.g., the implications of the incentives plaintiffs face when deciding
whether to use, and the implications of a presumption of innocence) may also come into play.

ACKNOWLEDGMENTS

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NOTES

1. As economists and financial analysts, and not attorneys, the authors are not writing on the legal issue in damage awards.

2. This is confirmed by the authors' literature search in preparing this paper. Of the literature in the area of antitrust that turned up, most of it addresses standing issues (e.g., Illinois Brick and the definition of "antitrust damages") or divvies over legislative changes to resolve damages penalties and optimal enforcement and deterrence. A survey examination of the American Bar Association syllabus as the subject would also indicate less attention to various theories of damage in the case law. See Nachwalter, Rechtman, and Perwin (1991). However, see also Project Committee on Antitrust Damage (1993).

3. See Moonkin and Wilten (1989). The case illustrates that attorneys should not rely on a belief that adverse decisions on damages can be easily overturned, given the discretion granted in damage awards. See Laycock (1990, p. 474).

The legal and financial communities agreed on one point: no measure of damages that produced such a large verdict could possibly be correct...the compensatory part of the verdict might indeed have been correct. The rule by which damages were measured was entirely conventional, and the calculation of damages under this rule was a question for the jury. Astonishing as the jury's award may seem, there was no basis on which a reviewing court could set it aside. Any serious argument for remittitur would have required evidence that Texaco had not presumed, and it would have required an argument fundamentally inconsistent with the argument Texaco actually made.

4. For a spirited implicit defense of Texaco's strategy not to sponsor a damage study as a good decision had outcomes, see Miller (1991).

5. Throughout this paper, we define "verdict" as a party who has been found at trial to have been wronged by another party. Thus the use of the terms "verdict" and "verdict" flow from the presumption that liability has already been established at trial. Trial on both liability and fact of damage is assumed to have resulted in a verdict in plaintiff's favor, leaving only the issue of the amount of damages.

6. Thus, we assume that defending in antitrust or patent cases, or punitive damages in other cases take care of the first two goals, and perhaps the third as well. Here our starting point is consistent with almost every other approach to the subject. See Note (1967), pp. 1556-1567.

The private antitrust suit attempts both to compensate victims of illegal conduct and to deter such conduct. Difficulties arise because determination of what should be done to
compensate injured parties is essentially unrelated to, and may conflict with, the consideration of what penalty should attach to violations. Thus, the measure of antitrust damages... cannot properly be analyzed in terms, because the private litigant's public function of enforcing the antitrust laws... requires that the damages be measured in terms of the economic injury to the public which a particular antitrust violation might have caused. Thus, the measure of antitrust damages... cannot properly be analyzed in terms, because the private litigant's public function of enforcing the antitrust laws... requires that the damages be measured in terms of the economic injury to the public which a particular antitrust violation might have caused.

In private antitrust suits, damages are measured to achieve the ordinary compensatory results of putting the plaintiff in as good a position as he would have occupied in the absence of the violation. The court then automatically assesses the award, giving the plaintiff a reasonable windfall, to advance more general public purposes.

It is agreed that Congress provided the prospect of awards of treble damages and attorney’s fees to induce private parties to bring costly and uncertain antitrust litigation, thus stimulating the business public as a supplementary enforcement body, dealing with violations against which the Government, with its limited enforcement resources, fails to proceed. In addition, the heavy reversion was meant to deter violations by suggesting the relatively light equitable and criminal penalties available to the Government (footnotes omitted).

Any other assumption makes either the trebling factor or the guilty verdict a generalized "judicial factor" capable of creating any fault in the damage calculation by citing to afflicting correction.

7. In this regard, a special problem arose in the antitrust context. The notion of indemnification of the victim of an antitrust offense is not necessarily achieved under the current rules, even in theory. Traditionally, a judgment interest is excluded from antitrust damages on the grounds that trebling makes such an award unnecessary. Without trebling, such interest would otherwise be included within such damage award if the victim is to be made whole. (See dissent by Judge Easterbrook in Federal v. Estate of Wyne, 807 F.2d 520, 582-584 (7th Cir., 1986), for the argument for not excluding prejudgment interest from antitrust damage estimates on the grounds that the victim should be fully indemnified before trebling.) The antitrust victim necessarily will not be made whole if the economic consequences of the offense by the award of antitrust damages prior to trebling, if trebling is assumed to include any measure of indemnification to the victim.

8. We focus on the consequences and related effects because they seem to raise the most difficult disputes. In the antitrust area, criminalization, prison-filing, and so on, raise other issues and are addressed by others such as Howard and Kaysen (1989), and Helfand and Streifer (1991).

9. This assumption means that, although the methodologies are applied under uncertainty, the value of the damage award is set so that it is equal to the true amount necessary to make the victim whole. Errors of application are thus assumed away initially. It is sometimes said that one should resolve unascertained in favor of the plaintiff. It is not clear how to do so without creating an upward bias in the process, thereby understating the objective of making damages compensatory. Resolving every uncertainty in favor of the victim would clearly make the damage award preferable to the functioned opportunity.

10. In actual practice, the appropriate procedures for calculating damages may be affected by such factors. Preclusion or offering corroborative might present the appropriate object of the damage estimates, the appropriate methodologies to achieve a given objective, or appropriate assumptions for a given methodology. For example, the issue for prejudgment interest as already have been established via legal procedures. (These procedures or otherwise should be unreasonably resolved by counsel prior to embarking upon any damage study.) In many cases, however, such preclusion may not be helpful, and in any case vary considerably across legal jurisdictions. Preclusions often arise to offer great latitude for a case-by-case approach, with no argument firmly rejected if sufficient legal research is done. And most fundamentally for our present purpose, these preclusions cannot be said always to be based on sound principles of economics and finance.
11. We believe the principles discussed in the next section to be widely accepted in the United States. We understand that this has traditionally been less true in international legal matters. We also understand, however, that some recent cases suggest these principles may be growing more accepted in international law, as well (see, for example, Leblanc, 1990, 1991).

12. Hypothesis about future ownership of the asset can also arise. We note, in effect, assuming that the victim would not pass on any of the benefits or costs to others via side.


14. These net revenues are cash flows, net of all costs including taxes, not accounting profit, as nearly all experts would agree. See, for example, Brealey and Myers (1991, pp. 95-96).

15. For the purpose of illustration, we are assuming that damages are equal to future lost cash flows. This does not mean other possible measures of damage. See Hodgson (1990).

16. Where market does exist (i.e., if traded stocks are to be valued), the actual market prices are used.

17. Such cash flows are sometimes referred to as "lost profits," although in reality they are net cash inflows, measured apart from any reporting of profit to shareholders or tax authorities. As long as the horizon is indefinite, most experts would use this approach. If the horizon is truncated for some reason, some experts might argue for a profit measure to account for accruals that show up in cash flows in later periods. See Wagner (1990).

18. The DCF formula for present value is:

$$\text{NPV} = \frac{CF_i + CF_{i+1} + CF_{i+2} + \ldots + CF_n}{(1+r)^t}$$

where:
- $CF_i$ = the expected cash flow to be realized at time $i$;
- $r$ = the discount rate, which reflects the cost of time and risk;
- $N$ = the last period in which a cash flow is expected.

The initial cash flow, $CF_0$, is usually negative, representing the initial cost of the investment, and other early cash flows may be negative, also.

19. This step is not always true. For example, the DCF approach is not used to value options. See Brealey and Myers (1991, chapters 20 and 21). More generally, in practice a wide variety of approaches could be used to estimate the victim's loss of asset value resulting from the offense and many of these can be interpreted as functional equivalents of the net present value approach.

We concentrate on the explicit NPV calculation because it provides valuable insights into the different approaches to use of hindsight, pre-emptive interest, and so forth.

20. The correct definition of the opportunity cost of capital should not be in dispute, as virtually all authorities define it in two parallel ways:

1. The expected rate of return on investments in capital markets on alternative investments of equivalent risk; and
2. The discount rate for determining the present value of future uncertain cash flows by discounting their expected values.

These definitions of the cost of capital do not require endorsement of any particular theory of what determines the cost of capital. For a discussion of the defaults, see, for example, Brealey and Myers (1987, chapter 7), or Kolbe, Read, and Hall (1984, chapter 3). This is sometimes referred to as the "risk-adjusted cost of capital."

21. See, for example, Kolbe, Read, and Hall (1984, chapter 3 and 4), for an evaluation of various techniques used to estimate the cost of capital.
22. In addition to reducing the expected value of future cash flows, a market downturn may also alter the degree of uncertainty regarding the future cash flows (Bodily and 1990). If so, the appropriate discount rate for the "true" rate and actual world's expected future cash flows will differ accordingly. Bodily also suggests that the risk premium on costs (as opposed to revenues or net cash flows) is negative. "While the present value of a projected revenue declines with risk, the present value or certainty equivalent of a projected cost rise with risk" (Bodily 1992, p. 217). This is incorrect. The risk that matters in determining the appropriate discount rate is the "market risk" of an investment, that is, the risk that cannot be diversified away in large portfolios (see note 23). This market risk is determined by the relationship between net cash flows in the project in question and returns to the market as a whole. In order for risk premiums on costs to be negative, it must be true that the cost of a project fall as returns to the market as a whole rise. This clearly cannot be true as a general principle. Costs generally decline as economic activity declines and as market returns fall. The intuitive explanation is that "only" costs are variable costs, while "project" costs are fixed costs, when unobservable risk is the measure. Variable costs are less burdensome and so should have a smaller net present value. 23. Thus, the appropriate discount rate may be the risk-free rate even for uncertain cash flows, in cases where the uncertainty is unrelated to other economic events and so can be diversified away in large portfolios. For example, consider an investment where in one year a coin is tossed, and heads pays you $1,000 and tails pays you nothing. The outcome is uncertain, yet an institutional investor who bought a portfolio of a million such coin tosses could predict the expected value of the portfolio in one year ($500 million) with a very high degree of certainty. Such an investment itself is a candidate for a discount rate equal to the risk-free rate, despite the uncertainty if you/one coin toss is bought. See, for example, Brealey and Myers (1986, chapters 7 and 8). 24. This agreement on methodology is found only among financial analysts, not necessarily in legal practice. See Schauer (1977-1978). 25. For example, the assumption that we know the distribution of net revenues is the actual and "true" future world assumes away issues of measurement methodology. Note (1967, pp. 1374-1375) identifies three of these: (1) "before and after," (2) the "separability" test, (3) the discount rate, and (4) expert testimony. See also Parker (1972). See Gulliford (1967) for a survey of various methods approved by the courts. 26. Tyi and Kalo (1996). 27. For further discussion of the issues raised by the alternatives together with some hypothetical and actual examples, see Taussig and Bodily (1992) and Bronner (1990). 28. For a thorough discussion of the arguments for the two approaches, see the majority opinion in Holman v. Line of Writs, 807 F.2d 520. See also, the dissent of Judge Easterbrook's dissent 807 F.2d 520, 579-580, endorsing the ex ante approach. 29. 807 F.2d 520, 533. 30. 807 F.2d 520, 578. 31. 807 F.2d 578-582. 32. 807 F.2d 552. 33. Note that the data normally used to prepare damage estimates under either method do not ordinarily include sufficient information to plot the entire distributions, as we have done in Figure 2. The example assumes that some such distribution exists for actual ventures and could be plotted in principle. The example also assumes that the distribution is symmetric, but this assumption could be relaxed with no loss of generality. 34. The other mean values in the figure, mv, and m2, are discussed in the following text. 35. The actual ex post value in Figure 2 represents the net present value of the future cash flows as of the date of trial, after substantially more information has become available. 36. Paid, Weil, and Weil (1982) appear to be the exception, as they provide examples that show the difference in expected value under the two methods.
37. We are indebted to Victor P. Goldberg for noting that the ex post method's superiority to the actual investment is true only when the plaintiff's loss due to litigation costs is expected to be less than the gain due to the avoidance of the investment's negative outcomes. However, as noted at the outset, our chief focus is on the alternative ways of measuring damages, and we see no reason to believe litigation costs will vary systematically between the ex ante and ex post damage methods. In any case, the optimal way to make a damage award cover litigation costs is to award litigation costs directly, not to make an arbitrarily high award for compensatory damages.

38. The source of the systematic difference is that under the ex post award system, the expected costs of the "losses" are never recovered by offenders, while they are netted out of the awards to victims under the ex ante system.

39. Tausman and Rodenbeck (1992, p. 79), pose the problem of negative damages under the ex post methodology as follows:

While the failure to award negative damages obviously disadvantages defendants, this result hardly seems unfair. Defendants are given the benefit of gains conferred on a plaintiff by wrongful conduct as a vehicle for reducing the plaintiff's recovery, only when the gains produced exceed the losses caused and defendants deprived of any further benefit. At bottom, the question is how much it matters if wrongful conduct that benefits others goes unrewarded. The answer should be that it matters very little (footnotes omitted).

If the authors are addressing issues of fairness, we have no economic basis to agree or disagree. However, they may be defining the issue as one of whether negative damages should be instituted to motivate welfare-enhancing restrictions on competition. If so, we must note that no one is proposing to do this, at least in the field of antitrust. Anti-competitive behavior is to be deterred because ex ante it imposes expected costs on society. In the cases where it does not, the benefits to intended victims cannot be identified in advance. Where they can, the solution is likely to be antitrust immunity, not award of negative damages. The real issue with negative damages is that they may result in an asymmetry in the litigation process. Tausman and Rodenbeck were clearly aware of the negative damages problem, but apparently were not aware of the bias it creates even if ex post methods are otherwise accurately implemented. Unless accounted for or otherwise offset, this asymmetry inherently biases the ex post result and violates the indifference principle that was the starting point of the analysis.

40. Fisher and Romer (1990, p. 145), reject ex post methods on the following grounds:

The violation did not merely deprive the plaintiff of the stream of returns that would have accompanied the asset. It also relieved the plaintiff of the uncertainty surrounding that stream. To use hindsight is to ignore the latter effect. As already explained, the way in which both effects can be taken into account is to value the asset net of the time of violation, taking account of uncertainty, and then award the time value of money making no allowance for uncertainty.

[In this case,] hindsight does not change the value that the asset had when it was destroyed. Making the plaintiff whole today means making it whole as of the date of violation plus compensation for the pure time value of money. Giving the plaintiff the lost profits that hindsight suggests does not place it in the position it would have occupied without the violation; it replaces an uncertain world with a particular outcome.

It seems to us that this "equivalent does not address the threat of the opposing argument for the ex post approach. As done right, the ex post method seeks to put back into the damage award the risk taking that the violation had taken away from the plaintiff. Of course, Figure 2 shows that "done right" means that the ex post method must be chosen before the realized outcome...
is known. We have assumed at the outset that evaluation of the competing methods occurs at the time of the offense and not after the events are set up at the date of the trial. We assume that the method must be selected prior to any chance of opportunity in light of hindsight. But even if opportunity is avoided, the real problem is that the ex post method cannot restore the plaintiff to its no-violation status as long as reintegration is at work to impose asymmetry in the damage award, which was not present in the foreclosed opportunity.

41. Note that under the assumptions employed in this hypothetical, the present value of the foreclosed opportunity is simply the sum of the present value of the expected ex post damage award minus the present value of the expected loss if a loss occurs.

42. If the realized outcome is less than m, plaintiffs will always choose the ex ante method and receive m. If the realized outcome is greater than m, they choose the ex post method and receive the realized outcome. This distribution of outcomes is truncated at m and hence is m. Similarly, if defendants were allowed to choose methodologies, the average award would be less than m, the average value of the lost opportunity.

43. Thus, in some ways this initial assumption is closer to post-judgment interest, yet it provides a useful starting point for the discussion.

44. See Ploom v. Estate of Wise, 807 F.2d 530, 581, where the difference between such va's 1 and 4 in Table 2, remanded the estimate of lost profits before interest; Fisher and Ramsey (1999, p. 145), cite another where, in their view, incorrect treatment of interest amounted to damages being overestimated by 100 percent.

45. One might argue that these arguments are irrelevant in the antitrust context, because prejudgment interest is routinely denied to antitrust victims. However, one cannot be oblivious to the issue even in the antitrust context. It matters how compensation for certain risk-related costs in the damage award is to be treated in an antitrust case: if included as part of prejudgment interest, these costs are ignored entirely, but if treated as part of the damage award itself, they are trebled. Moreover, since it will be seen that prejudgment interest is not necessarily treated identically in the ex ante and ex post methods, the impact of this effect can vary with the damage method used.

46. See, for example, Lanzillotti and Esquivel (1999, p. 130): "By making a damage award today for profits that have not yet been lost, a court gives a plaintiff lost profits without requiring that he bear the risk associated with the investment project... However, because the plaintiff no longer has to bear the investor's risk, the plaintiff is not entitled to be compensated for risk factors. In short, the plaintiff's damage award should not include the amount of the risk premium (the excess of the present value of the profits discounting at the risk-free rate over discounting at the cost of capital adjusted to the risk of the project). (footnote omitted.)" Fisher and McManus (1996) make the same argument.

47. Deterrence eliminates some risks, and competition in capital markets therefore purges compensation for diversifiable risks from the cost of capital. See notes 22 and 23.

48. The example of trading a risky stock illustrates why the discount rate appropriate to the risks of the foreclosed activity cannot be justified as the appropriate rate for prejudgment interest via a generalized "opportunity cost" rationale. Proponents of using the cost of capital for the foreclosed investment would argue that the foreclosed trader was prevented from earning, say, an expected 30 percent annually, and would have reinvested all potential lost profits at this high expected rate. Proponents of high interest rates for prejudgment interest would argue that the victim has shown a willingness to bear these risks and can be made whole only by earning the same high rate on the damage award. But in the foreclosed activity, the trader could have earned such a high rate of return only by accepting exposure to the possibility of being wiped out on Black Monday. Unless the damage methodology exposed the victim to precisely the same risks,
the damage award accruing interest at 30 percent would always be preferred to the foreclosed
activity, contrary to the indifferent principle (indeedification) in the damage award process. This
does not mean, of course, that the victim was not harmed by being precluded from taking the
risks of trading and possibly being forced to tie up assets in litigation with different risks. Arguments
about how a defendant would have reoriented personal lost profits are generally regarded as
speculative, self-serving, and as we shall show, are ultimately irrelevant. See Fisher and Romaine
49. Such a policy is not necessarily undesirable, but it should be a matter of conscious choice
rather than being hidden in some ad hoc prejudgment interest rate approach. Trebling, for example,
already encourages additional lawsuits in the antitrust context. Also, contingency fees give plaintiffs
without adequate access to capital the ability to sue anyway. As explained in Judge Williams’s
concurring opinion in King v. Palmer, 906 F.2d 762 (D.C. Cir., 1990), the formula for the
contingency markup is a tool of social policy that will determine how risky a lawsuit plaintiffs’
attorneys are willing to bring, and hence the amount of such litigation.
50. The issue of multiple sources of responsibility for the financial distress would clearly have
to be considered, too. For a discussion of the costs of financial distress, see Brandi and Myers
51. Pantell, Weil, and Wolfshein (1982) consider this question, for example, and divide the answer
turns on whether the plaintiff’s consumption pattern has been changed.
52. Readily observable interest rates are by definition based on liquid, traded securities.
53. Thus, the issue would be whether illiquidity caused by deprivation of the foreclosed activity
would be expected to do incremental, identifiable harm to the plaintiff in an ex ante calculation,
or actually did incremental harm in an ex post calculation. For example, illiquidity due to a
foreclosed opportunity may delay an unrelated project due to funding constraints. The cost of
the delay can be measured as part of the damages estimate.
54. The source of this view is Pantell, Weil, and Wolfshein (1982). Strictly speaking, however,
it goes too far even when a verdict for the plaintiff is established at the time of the offense. The
defendant’s borrowing rate includes compensation for (1) the pure time value of money (i.e., the
risk-free interest rate), (2) the nonforeseeable risk of the defendant’s default, if any; (3) the risk
defendant will default; and (4) the legal and related expenses creditors would expect to pay if
the defendant did default. The fourth item, however, does not belong in prejudgment interest,
since recovery of attorneys’ fees and court costs may be the topic of separate consideration in
trial. To include this element of compensation in both the prejudgment interest rate and an award
of legal costs would be double-counting, and to include it when legal costs have been denied plaintiff
is to grant the compensation by the back door when it has been denied at the front door.
Compensation for nonforeseeable risk, item (2) in the list, generally attaches to longer-term
debt. Thus, as long as a short-term rate is used to compute prejudgment interest, the issue comes
down to whether or not a default premium should be added to the risk-free rate.
55. This is the rationale that underlies the ruling in Oil Spill by the Amoco Cadiz off the Coast

By committing a tort, the wrongdoer creates an involuntary creditor. It may take time
for the victim to obtain an enforceable judgment, but once there is a judgment the obligation
is deemed as of the time of the injury.

It should be noted that the prejudgment interest rate was set at the prime rate in Amoco Cadiz
because of the absence of evidence on Amoco’s borrowing rate. This is almost certainly too high
a rate for a company like Amoco, suggesting the need for defendants to introduce evidence on
the appropriate default premium. In this regard, see also note 54.
57. Thus, this view would argue that the Court in Amoco Cadiz (see note 55) was incorrect to reason this because the Court believed that "since there is a judgment the obligation is fixed as of the time of the injury" then the plaintiff is entitled to a default risk premium in addition to the risk-free rate. The backdating of the liability, in this view, is a fiction that ignores the fact that the bankruptcy risk during the trial has already been resolved before the liability for prejudgment interest is ever established.

58. We are indebted to Carlos Laporta for noting that this view may relate to the legal debate about whether judges make or discover law. In a case where a judge "makes" law, it seems natural to view a finding that liability exists as unknowable until after the trial ends. If judges "discover" law, however, it is less clear to us as non-attorneys whether that fact alone would imply that a finding that liability exists is something that should have been known all along, or whether the particular facts in a given case still might imply that liability was unknowable until the court ruled.

59. Private communication.

60. It also means that the plaintiff will expect, at time of imprisonment, to be made whole.

61. For example, Section 4 of the Clayton Act was amended to permit recovery of prejudgment interest in antitrust cases where the defendant intentionally sought to delay the litigation or otherwise acted in bad faith. We understand that trebling of potential imprisonment damages may be imposed where the infringement is found to be intentional. Similarly, we understand that the Clean Air Act and Clean Water Act have provisions for additional penalties for intentional or egregious noncompliance. Also, the willfulness of the violation may sometimes be indicated by whether the defendant is required to pay the plaintiff's legal fees.

62. However, we are indebted to Carlos Laporta for noting that if the legal standards for a finding of willfulness reach such a conclusion only in the clearest possible cases, the expected default premium on intentionally unlawful act commands may be less than the full default premium, possibly not preventing some defendants with the full expected cost of their acts.

63. We are indebted to Carlos Laporta for noting that these issues also are related to a legal debate as to whether the law is determinate (which we understand is the traditional legal ideal) or indeterminate (which may be more realistic in practice). If the law is determinate, legality can be known in advance and willfulness judged accordingly. If there is only a probability that any given act is illegal, the concept of "willfulness" is blurred. If there were no concern over plaintiffs' incentives, the latter view might argue for a default premium in all but the clearest cases of legal "surprise," so that the expected cost of a potentially illegal act would be properly considered by defendants before undertaking a legally uncertain action. However, plaintiffs' incentives in deciding whether to bring questionable lawsuits would also have to be considered before reaching such a conclusion.

64. See Tausman and Bodding (1992) who provide hypothetical examples.

65. By the results of the last section, the ex ante prejudgment interest rate should equal either the risk-free rate or the risk-free rate plus a default premium.

66. One potential definition of the implicit rate of prejudgment interest for the ex post method is the internal rate of return which equates the value of the damage award expected at Tn with the value at Tn, that is, the expected rate of return in the foreclosed opportunity. However, that definition looks forward from Tn rather than backward from Tn, as we must under the ex post methodology. The value of any outcome known or certain at Tn must be discounted back to the risk-free rate to determine its value at Tn. In effect, use of a single interest rate of return would ignore the risk difference between the known value of the expected Tn cash flow as of Tn (which is the ex post award ordered by the court) and the uncertain present value of the cash flow itself at Tn, which is still in the future at the date of the trial. Since the risk changes at Tn, use of a single rate of return is inappropriate.

67. That is, the difference between the estimated cash flow the plaintiff would have received in the "but for" world using ex post information versus the actual cash flow the plaintiff received.
06. Plaintiffs may also argue for use of the defendant’s cost of capital or the plaintiff’s borrowing rate, possibilities raised in the ex ante damage context (Table 1). However, the reasons those rates are always economically inappropriate hold true for the ex post approach as well, and so are not repeated here.

09. That is, the bias in the ex post method creates economically perverse incentives for plaintiffs, for example, it is better to be wronged than to make the investment.

10. Indeed, one would have to show that the downward bias in ignoring the default premium would more than offset the upward bias in truncating the distribution.

71. See Tannenbaum and Bodgington (1992, pp. 35-36), who provide examples where the damage values at trial differ considerably even when the insured cash flows are the same under the two methodologies.

72. Fisher and Romaine (1990) recognize the dependency, and define the ex ante method as a logical method consistent with their argument for the appropriate discount rate. However, this alone does not explain why it would not be equally consistent to use the ex post methodology to replicate the risks under the foreclosed opportunity and accept the correspondingly higher expected rate of appreciation in the value of the ex post award. As Bonnoch (1990) puts it:

F&R’s [Fisher and Romaine’s] own methodology, rather than the defendant’s violation, is what ultimately reduces the plaintiff to the risks associated with the destroyed asset. F&R would have the court award only the asset’s value of exchange as of the time of the violation, i.e., the risk-adjusted expected future benefit discounted to the present value as of the time of the violation. Such an award makes whole the plaintiff’s reasonable expectations at the time of violation, but it does not maximize the likelihood that we plaintiff will be made whole for all time. The use of hindsight is what enables the court to return the asset’s riskiness to the plaintiff (pp. 29-31).

Bonnoch, however, does not propose to eliminate the asymmetry that frustrates the ability of the ex post damage award to “return the asset’s riskiness to the plaintiff.”

73. Assuming away the truncation problem for the moment (which we consider explicitly subsequently), it is clear that the ex post method imposes more risk on the victim at time of trial under our assumptions. If applied accurately and consistently, the risks borne under the ex post method during the time between offense and trial could be exactly the same as in the foreclosed opportunity. Truncation aside, that approach in principle is just as “fair” as the ex ante approach.

74. See, for example, Brasley and Myers (1991, chapters 20 and 21).

75. Logically, an alternative in such a case is to adopt an ex post option value as well, which would equal the amount of the ex post damage award. However, this is equivalent to focusing use of the ex ante method, and hence not in the spirit of purging the ex post method of bias.

76. Fisher and Romaine (1990) find the ex post method to be inherently biased. This can be overcome in principle, at least. A companion paper (Kolbe, n.d.) illustrates the conditions under which the ex ante and ex post methods of damage calculation can be made to have the same expected value at the time the damaging act occurs. It demonstrates that in principle, courts could choose to employ either the ex ante or ex post methods consistently, providing the value of the appropriately calculated option is subtracted in the ex post method. However, this approach is unlikely to be practical. Calculation of the value of the option requires a good deal more information about the project than direct calculation of the ex ante value: information that permits calculation of the distribution of possible ex post project values as of the trial date must be known, not just the expected project value ex ante.

77. This feature, in fact, characteristic of the trial process in general is at least one respect. Specifically, consider that some offenders will become bankrupt and default on their damage claims by time of trial. The average plaintiff will expect lower damage awards in the presence of such default risk, and some offenders will pay no damages (or reduced damages). Even if a decision
is made to include default risk in damages, through use of the "pure" ex ante method, for example. defaulted offenses will not pay the premium and their victims will still be shortchanged (the
wronged will be the victims lucky enough to be harmed by solvent offenders).
78. Note that this dissonance addresses the effect of net biases in a particular methodology
as a whole as perceived at the time of a potential offense and cannot be used solely as a basis
for deciding on the appropriate choice of subcomponent of the methodology. As discussed above,
such choice often appeal to the need to offset some bias elsewhere in the methodology.
79. This may be particularly true in bifurcated trials. The damages jury, having few of the
facts available to the liability jury, may be less able to find no or low damages, having been told
that their job is to punish an offender.
80. We assume for the purpose of argument that prejudgment interest is disallowed as a
component of actual damages, but this is not always the case. For discussion of some legal
precedents, see Tasman and Bedington (1992).

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Event Studies in Economics and Finance

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1. Introduction

Economists are frequently asked to measure the effects of an economic event on the value of firms. On the surface this seems like a difficult task, but a measure can be constructed easily using an event study. Using financial market data, an event study measures the impact of a specific event on the value of a firm. The usefulness of such a study comes from the fact that, given rationality in the marketplace, the effects of an event will be reflected immediately in security prices. Thus a measure of the event’s economic impact can be constructed using security prices observed over a relatively short time period. In contrast, direct productivity related measures may require many months or even years of observation.

The event study has many applications. In accounting and finance research, event studies have been applied to a variety of firm specific and economy wide events. Some examples include mergers and acquisitions, earnings announcements, issues of new debt or equity, and announcements of macroeconomic variables such as the trade deficit. However, applications in other fields are also abundant. For example, event studies are used in the field of law and economics to measure the impact on the value of a firm of a change in the regulatory environment (see G. William Schwert 1981) and in legal liability cases event studies are used to assess damages (see Mark Mitchell and Jeffry Netter 1994). In the majority of applications, the focus is the effect of an event on the price of a particular class of securities of the firm, most often common equity. In this paper the methodology is discussed in terms of applications that use common equity. However, event studies can be applied using debt securities with little modification.

Event studies have a long history. Perhaps the first published study is James Dolley (1933). In this work, he examines the price effects of stock splits, studying nominal price changes at the time of the split. Using a sample of 95 splits from 1921 to 1931, he finds that the price in-

1 The first three examples will be discussed later in the paper. Grant McQueen and Vance Roley (1993) provide an illustration of the fourth using macroeconomic news announcements.
creased in 57 of the cases and the price declined in only 26 instances. Over the decades from the early 1930s until the late 1960s the level of sophistication of event studies increased. John H. Myers and Archie Bakay (1948), C. Austin Barker (1956, 1957, 1958), and John Ashley (1962) are examples of studies during this time period. The improvements included removing general stock market price movements and separating out confounding events. In the late 1960s seminal studies by Ray Ball and Philip Brown (1968) and Eugene Fama et al. (1969) introduced the methodology that is essentially the same as that which is in use today. Ball and Brown considered the information content of earnings, and Fama et al. studied the effects of stock splits after removing the effects of simultaneous dividend increases.

In the years since these pioneering studies, a number of modifications have been developed. These modifications relate to complications arising from violations of the statistical assumptions used in the early work and relate to adjustments in the design to accommodate more specific hypotheses. Useful papers which deal with the practical importance of many of the complications and adjustments are the work by Stephen Brown and Jerold Warner published in 1980 and 1985. The 1980 paper considers implementation issues for data sampled at a monthly interval and the 1985 paper deals with issues for daily data.

In this paper, event study methods are reviewed and summarized. The paper begins with discussion of one possible procedure for conducting an event study in Section 2. Section 3 sets up a sample event study which will be used to illustrate the methodology. Central to an event study is the measurement of an abnormal stock return. Section 4 details the first step—measuring the normal performance—and Section 5 follows with the necessary tools for calculating an abnormal return, making statistical inferences about these returns, and aggregating over many event observations. The null hypothesis that the event has no impact on the distribution of returns is maintained in Sections 4 and 5. Section 6 discusses modifying this null hypothesis to focus only on the mean of the return distribution. Section 7 presents analysis of the power of an event study. Section 8 presents nonparametric approaches to event studies which eliminate the need for parametric structure. In some cases theory provides hypotheses concerning the relation between the magnitude of the event abnormal return and firm characteristics. Section 9 presents a cross-sectional regression approach that is useful to investigate such hypotheses. Section 10 considers some further issues relating event study design and the paper closes with the concluding discussion in Section 11.

2. Procedure for an Event Study

At the outset it is useful to briefly discuss the structure of an event study. This will provide a basis for the discussion of details later. While there is no unique structure, there is a general flow of analysis. This flow is discussed in this section.

The initial task of conducting an event study is to define the event of interest and identify the period over which the security prices of the firms involved in this event will be examined—the event window. For example, if one is looking at the information content of an earnings announcement with daily data, the event will be the earnings announcement and the event window will include the one day of the announcement. It is customary to define the event window to be larger than the specific period of interest. This permits examination of periods surrounding the
event. In practice, the period of interest is often expanded to multiple days, including at least the day of the announcement and the day after the announcement. This captures the price effects of announcements which occur after the stock market closes on the announcement day. The periods prior to and after the event may also be of interest. For example, in the earnings announcement case, the market may acquire information about the earnings prior to the actual announcement and one can investigate this possibility by examining pre-event returns.

After identifying the event, it is necessary to determine the selection criteria for the inclusion of a given firm in the study. The criteria may involve restrictions imposed by data availability such as listing on the New York Stock Exchange or the American Stock Exchange or may involve restrictions such as membership in a specific industry. At this stage it is useful to summarize some sample characteristics (e.g., firm market capitalization, industry representation, distribution of events through time) and note any potential biases which may have been introduced through the sample selection.

Appraisal of the event’s impact requires a measure of the abnormal return. The abnormal return is the actual ex post return of the security over the event window minus the normal return of the firm over the event window. The normal return is defined as the expected return without conditioning on the event taking place. For firm $i$ and event date $\tau$ the abnormal return is

$$ AR_{i\tau} = R_{i\tau} - E(R_{i\tau}|X_{\tau}) $$  \hspace{1cm} (1) 

where $AR_{i\tau}$, $R_{i\tau}$, and $E(R_{i\tau}|X_{\tau})$ are the abnormal, actual, and normal returns respectively for time period $\tau$. $X_{\tau}$ is the conditioning information for the normal return model. There are two common choices for modeling the normal return—the constant mean return model where $X_{\tau}$ is a constant, and the market model where $X_{\tau}$ is the market return. The constant mean return model, as the name implies, assumes that the mean return of a given security is constant through time. The market model assumes a stable linear relation between the market return and the security return.

Given the selection of a normal performance model, the estimation window needs to be defined. The most common choice, when feasible, is using the period prior to the event window for the estimation window. For example, in an event study using daily data and the market model, the market model parameters could be estimated over the 120 days prior to the event. Generally the event period itself is not included in the estimation period to prevent the event from influencing the normal performance model parameter estimates.

With the parameter estimates for the normal performance model, the abnormal returns can be calculated. Next comes the design of the testing framework for the abnormal returns. Important considerations are defining the null hypothesis and determining the techniques for aggregating the individual firm abnormal returns.

The presentation of the empirical results follows the formulation of the econometric design. In addition to presenting the basic empirical results, the presentation of diagnostics can be fruitful. Occasionally, especially in studies with a limited number of event observations, the empirical results can be heavily influenced by one or two firms. Knowledge of this is important for gauging the importance of the results.

Ideally the empirical results will lead to insights relating to understanding the sources and causes of the effects (or lack
of effects) of the event under study. Additional analysis may be included to distinguish between competing explanations. Concluding comments complete the study.

3. An Example of an Event Study

The Financial Accounting Standards Board (FASB) and the Securities Exchange Commission strive to set reporting regulations so that financial statements and related information releases are informative about the value of the firm. In setting standards, the information content of the financial disclosures is of interest. Event studies provide an ideal tool for examining the information content of the disclosures.

In this section the description of an example selected to illustrate event study methodology is presented. One particular type of disclosure—quarterly earnings announcements—is considered. The objective is to investigate the information content of these announcements. In other words, the goal is to see if the release of accounting information provides information to the marketplace. If so there should be a correlation between the observed change of the market value of the company and the information.

The example will focus on the quarterly earnings announcements for the 30 firms in the Dow Jones Industrial Index over the five-year period from January 1989 to December 1993. These announcements correspond to the quarterly earnings for the last quarter of 1988 through the third quarter of 1993. The five years of data for 30 firms provide a total sample of 600 announcements. For each firm and quarter, three pieces of information are compiled: the date of the announcement, the actual earnings, and a measure of the expected earnings. The source of the date of the announcement is Datastream, and the source of the actual earnings is Compustat.

If earnings announcements convey information to investors, one would expect the announcement impact on the market’s valuation of the firm’s equity to depend on the magnitude of the unexpected component of the announcement. Thus a measure of the deviation of the actual announced earnings from the market’s prior expectation is required. For constructing such a measure, the mean quarterly earnings forecast reported by the Institutional Brokers Estimate System (I/B/E/S) is used to proxy for the market’s expectation of earnings. I/B/E/S compiles forecasts from analysts for a large number of companies and reports summary statistics each month. The mean forecast is taken from the last month of the quarter. For example, the mean third quarter forecast from September 1990 is used as the measure of expected earnings for the third quarter of 1990.

To facilitate the examination of the impact of the earnings announcement on the value of the firm’s equity, it is essential to posit the relation between the information release and the change in value of the equity. In this example the task is straightforward. If the earnings disclosures have information content, higher than expected earnings should be associated with increases in value of the equity and lower than expected earnings with decreases. To capture this association, each announcement is assigned to one of three categories: good news, no news, or bad news. Each announcement is categorized using the deviation of the actual earnings from the expected earnings. If the actual exceeds expected by more than 2.5 percent the announcement is designated as good news, and if the actual is more than 2.5 percent less than expected the announcement is designated as bad news. Those announce-
ments where the actual earnings is in the 5 percent range centered about the expected earnings are designated as no news. Of the 600 announcements, 189 are good news, 173 are no news, and the remaining 238 are bad news.

With the announcements categorized, the next step is to specify the parameters of the empirical design to analyze the equity return, i.e., the percent change in value of the equity. It is necessary to specify a length of observation interval, an event window, and an estimation window. For this example the interval is set to one day, thus daily stock returns are used. A 41-day event window is employed, comprised of 20 pre-event days, the event day, and 20 post-event days. For each announcement the 250 trading day period prior to the event window is used as the estimation window. After presenting the methodology of an event study, this example will be drawn upon to illustrate the execution of a study.

4. Models for Measuring Normal Performance

A number of approaches are available to calculate the normal return of a given security. The approaches can be loosely grouped into two categories—statistical and economic. Models in the first category follow from statistical assumptions concerning the behavior of asset returns and do not depend on any economic arguments. In contrast, models in the second category rely on assumptions concerning investors' behavior and are not based solely on statistical assumptions. It should, however, be noted that to use economic models in practice it is necessary to add statistical assumptions. Thus the potential advantage of economic models is not the absence of statistical assumptions, but the opportunity to calculate more precise measures of the normal return using economic restrictions.

For the statistical models, the assumption that asset returns are jointly multivariate normal and independently and identically distributed through time is imposed. This distributional assumption is sufficient for the constant mean return model and the market model to be correctly specified. While this assumption is strong, in practice it generally does not lead to problems because the assumption is empirically reasonable and inferences using the normal return models tend to be robust to deviations from the assumption. Also one can easily modify the statistical framework so that the analysis of the abnormal returns is autocorrelation and heteroskedasticity consistent by using a generalized method-of-moments approach.

A. Constant Mean Return Model

Let \( \mu_i \) be the mean return for asset \( i \). Then the constant mean return model is

\[
R_{it} = \mu_i + \zeta_{it} \tag{2}
\]

where \( R_{it} \) is the period-\( t \) return on security \( i \) and \( \zeta_{it} \) is the time period \( t \) disturbance term for security \( i \) with an expectation of zero and variance \( \sigma_{\zeta_i}^2 \).

Although the constant mean return model is perhaps the simplest model, Brown and Warner (1980, 1985) find it often yields results similar to those of more sophisticated models. This lack of sensitivity to the model can be attributed to the fact that the variance of the abnormal return is frequently not reduced much by choosing a more sophisticated model. When using daily data the model is typically applied to nominal returns. With monthly data the model can be applied to real returns or excess returns (the return in excess of the nominal risk free return generally measured using the U.S. Treasury Bill with one month to maturity) as well as nominal returns.
B. Market Model

The market model is a statistical model which relates the return of any given security to the return of the market portfolio. The model’s linear specification follows from the assumed joint normality of asset returns. For any security $i$ the market model is

$$R_{it} = \alpha_i + \beta_i R_{mt} + \epsilon_{it}$$

where $R_{it}$ and $R_{mt}$ are the period-$t$ returns on security $i$ and the market portfolio, respectively, and $\epsilon_{it}$ is the zero mean disturbance term. $\alpha_i$, $\beta_i$, and $\sigma^2_{\epsilon_i}$ are the parameters of the market model. In applications a broad based stock index is used for the market portfolio, with the S&P 500 Index, the CRSP Value Weighted Index, and the CRSP Equal Weighted Index being popular choices.

The market model represents a potential improvement over the constant mean return model. By removing the portion of the return that is related to variation in the market’s return, the variance of the abnormal return is reduced. This in turn can lead to increased ability to detect event effects. The benefit from using the market model will depend upon the $R^2$ of the market model regression. The higher the $R^2$ the greater is the variance reduction of the abnormal return, and the larger is the gain.

C. Other Statistical Models

A number of other statistical models have been proposed for modeling the normal return. A general type of statistical model is the factor model. Factor models are motivated by the benefits of reducing the variance of the abnormal return by explaining more of the variation in the normal return. Typically the factors are portfolios of traded securities. The market model is an example of a one factor model. Other multifactor models include industry indexes in addition to the market. William Sharpe (1970) and Sharpe, Gordon Alexander, and Jeffery Bailey (1995, p. 303) provide discussion of index models with factors based on industry classification. Another variant of a factor model is a procedure which calculates the abnormal return by taking the difference between the actual return and a portfolio of firms of similar size, where size is measured by market value of equity. In this approach typically ten size groups are considered and the loading on the size portfolios is restricted to unity. This procedure implicitly assumes that expected return is directly related to market value of equity.

Generally, the gains from employing multifactor models for event studies are limited. The reason for the limited gains is the empirical fact that the marginal explanatory power of additional factors the market factor is small, and hence, there is little reduction in the variance of the abnormal return. The variance reduction will typically be greatest in cases where the sample firms have a common characteristic, for example they are all members of one industry or they are all firms concentrated in one market capitalization group. In these cases the use of a multifactor model warrants consideration.

The use of other models is dictated by data availability. An example of a normal performance return model implemented in situations with limited data is the market-adjusted return model. For some events it is not feasible to have a pre-event estimation period for the normal model parameters, and a market-adjusted abnormal return is used. The market-adjusted return model can be viewed as a restricted market model with $\alpha_i$ constrained to be zero and $\beta_i$ constrained to be one. Because the model coefficients
are prespecified, an estimation period is not required to obtain parameter estimates. An example of when such a model is used is in studies of the under pricing of initial public offerings. Jay Ritter (1991) presents such an example. A general recommendation is to only use such restricted models if necessary, and if necessary, consider the possibility of biases arising from the imposition of the restrictions.

D. Economic Models

Economic models can be cast as restrictions on the statistical models to provide more constrained normal return models. Two common economic models which provide restrictions are the Capital Asset Pricing Model (CAPM) and the Arbitrage Pricing Theory (APT). The CAPM due to Sharpe (1964) and John Lintner (1965) is an equilibrium theory where the expected return of a given asset is determined by its covariance with the market portfolio. The APT due to Stephen Ross (1976) is an asset pricing theory where the expected return of a given asset is a linear combination of multiple risk factors.

The use of the Capital Asset Pricing Model is common in event studies of the 1970s. However, deviations from the CAPM have been discovered, implying that the validity of the restrictions imposed by the CAPM on the market model is questionable.2 This has introduced the possibility that the results of the studies may be sensitive to the specific CAPM restrictions. Because this potential for sensitivity can be avoided at little cost by using the market model, the use of the CAPM has almost ceased.

Similarly, other studies have employed multifactor normal performance models motivated by the Arbitrage Pricing Theory. A general finding is that with the APT the most important factor behaves like a market factor and additional factors add relatively little explanatory power. Thus the gains from using an APT motivated model versus the market model are small. See Stephen Brown and Mark Weinstein (1985) for further discussion. The main potential gain from using a model based on the arbitrage pricing theory is to eliminate the biases introduced by using the CAPM. However, because the statistically motivated models also eliminate these biases, for event studies such models dominate.

5. Measuring and Analyzing Abnormal Returns

In this section the problem of measuring and analyzing abnormal returns is considered. The framework is developed using the market model as the normal performance return model. The analysis is virtually identical for the constant mean return model.

Some notation is first defined to facilitate the measurement and analysis of abnormal returns. Returns will be indexed in event time using $\tau$. Defining $\tau = 0$ as the event date, $\tau = T_1 + 1$ to $\tau = T_2$ represents the event window, and $\tau = T_0 + 1$ to $\tau = T_1$ constitutes the estimation window. Let $L_1 = T_1 - T_0$ and $L_2 = T_2 - T_1$ be the length of the estimation window and the event window respectively. Even if the event being considered is an announcement on given date it is typical to set the event window length to be larger than one. This facilitates the use of abnormal returns around the event day in the analysis. When applicable, the post-event window will be from $\tau = T_2 + 1$ to $\tau = T_3$ and of length $L_3 = T_3 - T_2$. The timing sequence is illustrated with a time line in Figure 1.

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2 Eugene Fama and Kenneth French (1996) provide discussion of these anomalies.
It is typical for the estimation window and the event window not to overlap. This design provides estimators for the parameters of the normal return model which are not influenced by the returns around the event. Including the event window in the estimation of the normal model parameters could lead to the event returns having a large influence on the normal return measure. In this situation both the normal returns and the abnormal returns would capture the event impact. This would be problematic because the methodology is built around the assumption that the event impact is captured by the abnormal returns. On occasion, the post-event window data is included with the estimation window data to estimate the normal return model. The goal of this approach is to increase the robustness of the normal market return measure to gradual changes in its parameters. In Section 6 expanding the null hypothesis to accommodate changes in the risk of a firm around the event is considered. In this case an estimation framework which uses the event window returns will be required.

A. Estimation of the Market Model

Under general conditions ordinary least squares (OLS) is a consistent estimation procedure for the market model parameters. Further, given the assumptions of Section 4, OLS is efficient. For the $i$th firm in event time, the OLS estimators of the market model parameters for an estimation window of observations are

\[
\hat{\beta}_i = \frac{\sum_{\tau = T_0 + 1}^{T_1} (R_{it} - \hat{\mu}_i)(R_{mt} - \hat{\mu}_m)}{\sum_{\tau = T_0 + 1}^{T_1} (R_{mt} - \hat{\mu}_m)^2}
\]

(4)

\[
\hat{\alpha}_i = \hat{\mu}_i - \hat{\beta}_i \hat{\mu}_m
\]

(5)

\[
\hat{\sigma}_i^2 = \frac{1}{L_1 - 2} \sum_{\tau = T_0 + 1}^{T_1} (R_{it} - \hat{\alpha}_i - \hat{\beta}_i R_{mt})^2
\]

(6)

where

\[
\hat{\mu}_i = \frac{1}{L_1} \sum_{\tau = T_0 + 1}^{T_1} R_{it}
\]

and

\[
\hat{\mu}_m = \frac{1}{L_1} \sum_{\tau = T_0 + 1}^{T_1} R_{mt}.
\]

$R_{it}$ and $R_{mt}$ are the return in event period $\tau$ for security $i$ and the market respectively. The use of the OLS estimators to measure abnormal returns and to develop their statistical properties is addressed next. First, the properties of a given security are presented followed by consideration of the properties of abnormal returns aggregated across securities.

B. Statistical Properties of Abnormal Returns

Given the market model parameter estimates, one can measure and analyze the abnormal returns. Let $\hat{AR}_{it}$, $\tau = T_1 + 1, \ldots, T_2$, be the sample of $L_2$ abnormal returns for firm $i$ in the event window. Using the market model to measure the normal return, the sample abnormal return is

\[
\hat{AR}_{it} = R_{it} - \hat{\alpha}_i - \hat{\beta}_i R_{mt}.
\]

(7)

The abnormal return is the disturbance term of the market model calculated on an out of sample basis. Under the null hypothesis, conditional on the event win-
dow market returns, the abnormal returns will be jointly normally distributed with a zero conditional mean and conditional variance \( \sigma^2(\bar{A}R_{it}) \) where

\[
\sigma^2(\bar{A}R_{it}) = \sigma^2_i + \frac{1}{L_1} \left[ 1 + \frac{(R_{it} - \hat{\mu}_i)^2}{\sigma_m^2} \right].
\]  

(8)

From (8), the conditional variance has two components. One component is the disturbance variance \( \sigma^2_i \) from (3) and a second component is additional variance due to the sampling error in \( \alpha_i \) and \( \beta_i \). This sampling error, which is common for all the event window observations, also leads to serial correlation of the abnormal returns despite the fact that the true disturbances are independent through time. As the length of the estimation window \( L_1 \) becomes large, the second term approaches zero as the sampling error of the parameters vanishes. The variance of the abnormal return will be \( \sigma_i^2 \) and the abnormal return observations will become independent through time. In practice, the estimation window can usually be chosen to be large enough to make it reasonable to assume that the contribution of the second component to the variance of the abnormal return is zero.

Under the null hypothesis, \( H_0 \), that the event has no impact on the behavior of returns (mean or variance) the distributional properties of the abnormal returns can be used to draw inferences over any period within the event window. Under \( H_0 \) the distribution of the sample abnormal return of a given observation in the event window is

\[
\bar{A}R_{it} \sim N(0, \sigma^2(\bar{A}R_{it})).
\]  

(9)

Next (9) is built upon to consider the aggregation of the abnormal returns.

C. Aggregation of Abnormal Returns

The abnormal return observations must be aggregated in order to draw overall inferences for the event of interest. The aggregation is along two dimensions—through time and across securities. We will first consider aggregation through time for an individual security and then will consider aggregation both across securities and through time. The concept of a cumulative abnormal return is necessary to accommodate a multiple period event window. Define \( C\bar{A}R_t(\tau_1, \tau_2) \) as the sample cumulative abnormal return (CAR) from \( \tau_1 \) to \( \tau_2 \) where \( T_1 < \tau_1 \leq \tau_2 \leq T_2 \). The CAR from \( \tau_1 \) to \( \tau_2 \) is the sum of the included abnormal returns,

\[
C\bar{A}R_t(\tau_1, \tau_2) = \sum_{\tau = \tau_1}^{\tau_2} \bar{A}R_{it}.
\]  

(10)

Asymptotically (as \( L_1 \) increases) the variance of \( C\bar{A}R_t \) is

\[
\sigma^2_t(\tau_1, \tau_2) = (\tau_2 - \tau_1 + 1) \sigma^2_i.
\]  

(11)

This large sample estimator of the variance can be used for reasonable values of \( L_1 \). However, for small values of \( L_1 \) the variance of the cumulative abnormal return should be adjusted for the effects of the estimation error in the normal model parameters. This adjustment involves the second term of (8) and a further related adjustment for the serial covariance of the abnormal return.

The distribution of the cumulative abnormal return under \( H_0 \) is

\[
C\bar{A}R_t(\tau_1, \tau_2) \sim N(0, \sigma^2(\tau_1, \tau_2)).
\]  

(12)

Given the null distributions of the abnormal return and the cumulative abnormal return, tests of the null hypothesis can be conducted.

However, tests with one event observation are not likely to be useful so it is necessary to aggregate. The abnormal return observations must be aggregated for the event window and across observations of the event. For this aggregation,
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Abnormal returns for an event study of the information content of earnings announcements. The sample consists of a total of 600 quarterly announcements for the 30 companies in the Dow Jones Industrial Index for the five year period January 1989 to December 1993. Two models are considered for the normal returns, the market model using the CRSP value-weighted index and the constant return model. The announcements are categorized into three groups, good news, no news, and bad news. AR is the sample average abnormal return for the specified day in event time and CAR is the sample average cumulative abnormal return for day –20 to the specified day. Event time is days relative to the announcement date.
it is assumed that there is not any clustering. That is, there is not any overlap in the event windows of the included securities. The absence of any overlap and the maintained distributional assumptions imply that the abnormal returns and the cumulative abnormal returns will be independent across securities. Later inferences with clustering will be discussed.

The individual securities’ abnormal returns can be aggregated using \( AR_i(t) \) from (7) for each event period, \( t = T_1 + 1, \ldots, T_2 \). Given \( N \) events, the sample aggregated abnormal returns for period \( t \) is

\[
AR_t = \frac{1}{N} \sum_{i=1}^{N} AR_i(t) \tag{13}
\]

and for large \( L_1 \), its variance is

\[
\text{var}(AR_t) = \frac{1}{N^2} \sum_{i=1}^{N} \sigma^2_{\varepsilon_i} \tag{14}
\]

Using these estimates, the abnormal returns for any event period can be analyzed.

The average abnormal returns can then be aggregated over the event window using the same approach as that used to calculate the cumulative abnormal return for each security \( i \). For any interval in the event window

\[
\overline{CAR}(t_1, t_2) = \sum_{t = t_1}^{t_2} AR_t, \tag{15}
\]

\[
\text{var}(\overline{CAR}(t_1, t_2)) = \sum_{t = t_1}^{t_2} \text{var}(AR_t). \tag{16}
\]

Observe that equivalently one can form the CAR’s security by security and then aggregate through time,

\[
\overline{CAR}(t_1, t_2) = \frac{1}{N} \sum_{i=1}^{N} \overline{CAR}_i(t_1, t_2) \tag{17}
\]

For the variance estimators the assumption that the event windows of the \( N \) securities do not overlap is used to set the covariance terms to zero. Inferences about the cumulative abnormal returns can be drawn using

\[
\overline{CAR}(t_1, t_2) \sim N[0, \text{var}(\overline{CAR}(t_1, t_2))] \tag{19}
\]

to test the null hypothesis that the abnormal returns are zero. In practice, because \( \sigma^2_{\varepsilon_i} \) is unknown, an estimator must be used to calculate the variance of the abnormal returns as in (14). The usual sample variance measure of \( \sigma^2_{\varepsilon_i} \) from the market model regression in the estimation window is an appropriate choice. Using this to calculate \( \text{var}(AR_t) \) in (14), \( H_0 \) can be tested using

\[
\theta = \frac{\overline{CAR}(t_1, t_2)}{\sqrt{\text{var}(\overline{CAR}(t_1, t_2))}} \sim N(0,1). \tag{20}
\]

This distributional result is asymptotic with respect to the number of securities \( N \) and the length of estimation window \( L_1 \).

Modifications to the basic approach presented above are possible. One common modification is to standardize each abnormal return using an estimator of its standard deviation. For certain alternatives, such standardization can lead to more powerful tests. James Patell (1976) presents tests based on standardization and Brown and Warner (1980, 1985) provide comparisons with the basic approach.

D. CAR’s for the Earnings Announcement Example

The information content of earnings example previously described illustrates the use of sample abnormal residuals and sample cumulative abnormal returns. Table 1 presents the abnormal returns av-
averaged across the 600 event observations (30 firms, 20 announcements per firm) as well as the aggregated cumulative abnormal return for each of the three earnings news categories. Two normal return models are considered; the market model and for comparison, the constant mean return model. Plots of the cumulative abnormal returns are also included, with the CAR’s from the market model in Figure 2a and the CAR’s from the constant mean return model in Figure 2b.

The results of this example are largely consistent with the existing literature on the information content of earnings. The evidence strongly supports the hypothesis that earnings announcements do indeed convey information useful for the valuation of firms. Focusing on the announcement day (day 0) the sample average abnormal return for the good news firm using the market model is 0.965 percent. Given the standard error of the one day good news average abnormal return is 0.104 percent, the value of $\theta_1$ is 9.28 and the null hypothesis that the event has no impact is strongly rejected. The story is the same for the bad news firms. The event day sample abnormal return is $-0.679$ percent, with a standard error of 0.098 percent, leading to $\theta_1$ equal to $-6.93$ and again strong evidence against the null hypothesis. As would be expected, the abnormal return of the no news firms is small at $-0.091$ percent and
with a standard error of 0.098 percent is less than one standard error from zero. There is some evidence of the announcement effect on day one. The average abnormal return is 0.251 percent and −0.204 percent for the good news and the bad news firms respectively. Both these values are more than two standard errors from zero. The source of these day one effects is likely to be that some of the earnings announcements are made on event day zero after the close of the stock market. In these cases, the effects will be captured in the return on day one.

The conclusions using the abnormal returns from the constant return model are consistent with those from the market model. However, there is some loss of precision using the constant return model, as the variance of the average abnormal return increases for all three categories. When measuring abnormal returns with the constant mean return model the standard errors increase from 0.104 percent to 0.130 percent for good news firms, from 0.098 percent to 0.124 percent for no news firms, and from 0.098 percent to 0.131 percent for bad news firms. These increases are to be expected when considering a sample of large firms such as those in the Dow Index because these stocks tend to have an important market component whose variability is eliminated using the market model.

The CAR plots show that to some extent the market gradually learns about the forthcoming announcement. The average CAR of the good news firms gradually drifts up in days −20 to −1 and the average CAR of the bad news firms gradually drifts down over this period. In the days after the an-
nouncement the CAR is relatively stable
as would be expected, although there
does tend to be a slight (but statisti-
cally insignificant) increase with the
bad news firms in days two through
eight.

E. Inferences with Clustering

The analysis aggregating abnormal re-
turns has assumed that the event win-
dows of the included securities do not
overlap in calendar time. This assump-
tion allows us to calculate the variance of
the aggregated sample cumulative abnor-
mal returns without concern about the
covariances across securities because
they are zero. However, when the event
windows do overlap and the covariances
between the abnormal returns will not
be zero, the distributional results pre-
sented for the aggregated abnormal re-
turns are no longer applicable. Victor
Bernard (1987) discusses some of the
problems related to clustering.

Clustering can be accommodated in
two ways. The abnormal returns can be
aggregated into a portfolio dated using
event time and the security level analysis
of Section 5 can applied to the portfolio.
This approach will allow for cross corre-
lation of the abnormal returns.

A second method to handle clustering
is to analyze the abnormal returns with-
out aggregation. One can consider test-
ing the null hypothesis of the event hav-
ing no impact using unaggregated
security by security data. This approach
is applied most commonly when there is
total clustering, that is, there is an event
on the same day for a number of firms.
The basic approach is an application of
a multivariate regression model with
dummy variables for the event date. This
approach is developed in the papers of
Katherine Schipper and Rex Thompson
(1983, 1985) and Daniel Collins and
Warren Dent (1984). The advantage of
the approach is that, unlike the portfolio
approach, an alternative hypothesis
where some of the firms have positive
abnormal returns and some of the firms
have negative abnormal returns can be
accommodated. However, in general
the approach has two drawbacks—fre-
quently the test statistic will have
poor finite sample properties except in
special cases and often the test will
have little power against economically
reasonable alternatives. The multivariate
framework and its analysis is similar
to the analysis of multivariate tests
of asset pricing models. MacKinlay
(1987) provides analysis in that con-
text.

6. Modifying the Null Hypothesis

Thus far the focus has been on a single
null hypothesis—that the given event has
no impact on the behavior of the returns.
With this null hypothesis either a mean
effect or a variance effect will represent
a violation. However, in some applica-
tions one may be interested in testing for
a mean effect. In these cases, it is neces-
sary to expand the null hypothesis to al-
low for changing (usually increasing)
variances. To allow for changing variance
as part of the null hypothesis, it is neces-
sary to eliminate the reliance on the
past returns to estimate the variance of
the aggregated cumulative abnormal re-
turns. This is accomplished by using the
cross section of cumulative abnormal re-
turns to form an estimator of the vari-
ance for testing the null hypothesis.
Ekkehart Boehmer, Jim Musumeci, and
Annette Poulsen (1991) discuss method-
ology to accommodate changing vari-
ance.

The cross sectional approach to esti-
mating the variance can be applied to
the average cumulative abnormal return
$\overline{\text{CAR}}(\tau_1,\tau_2)$. Using the cross-section to
form an estimator of the variance gives
\[ \text{var}(\text{CAR}(\tau_1, \tau_2)) = \frac{1}{N^2} \sum_{i=1}^{N} (\text{CAR}_i(\tau_1, \tau_2) - \overline{\text{CAR}}(\tau_1, \tau_2))^2. \] (21)

For this estimator of the variance to be consistent, the abnormal returns need to be uncorrelated in the cross-section. An absence of clustering is sufficient for this requirement. Note that cross-sectional homoskedasticity is not required. Given this variance estimator, the null hypothesis that the cumulative abnormal returns are zero can then be tested using the usual theory.

One may also be interested in the question of the impact of an event on the risk of a firm. The relevant measure of risk must be defined before this question can be addressed. One choice as a risk measure is the market model beta which is consistent with the Capital Asset Pricing Model being appropriate. Given this choice, the market model can be formulated to allow the beta to change over the event window and the stability of the risk can be examined. Edward Kane and Haluk Unal (1988) present an application of this idea.

7. Analysis of Power

An important consideration when setting up an event study is the ability to detect the presence of a non-zero abnormal return. The inability to distinguish between the null hypothesis and economically interesting alternatives would suggest the need for modification of the design. In this section the question of the likelihood of rejecting the null hypothesis for a specified level of abnormal return associated with an event is addressed. Formally, the power of the test is evaluated.

Consider a two-sided test of the null hypothesis using the cumulative abnormal return based statistic \( \theta_1 \) from (20). It is assumed that the abnormal returns are uncorrelated across securities; thus the variance of \( \text{CAR} \) is \( \frac{1}{N^2} \sum_{i=1}^{N} \sigma_i^2(\tau_1, \tau_2) \) and \( N \) is the sample size. Because the null distribution of \( \theta_1 \) is standard normal, for a two sided test of size \( \alpha \), the null hypothesis will be rejected if \( \theta_1 \) is in the critical region, that is,

\[ \theta_1 < c \left( \frac{\alpha}{2} \right) \quad \text{or} \quad \theta_1 > c \left( 1 - \frac{\alpha}{2} \right) \]

where \( c(x) = \phi^{-1}(x) \). \( \phi(\cdot) \) is the standard normal cumulative distribution function (CDF).

Given the specification of the alternative hypothesis \( H_A \) and the distribution of \( \theta_1 \) for this alternative, the power of a test of size \( \alpha \) can be tabulated using the power function,

\[ P(\alpha, H_A) = \text{pr}(\theta_1 < c \left( \frac{\alpha}{2} \right) | H_A) + \text{pr}(\theta_1 > c \left( 1 - \frac{\alpha}{2} \right) | H_A). \] (22)

The distribution of \( \theta_1 \) under the alternative hypothesis considered below will be normal. The mean will be equal to the true cumulative abnormal return divided by the standard deviation of \( \text{CAR} \) and the variance will be equal to one.

To tabulate the power one must posit economically plausible scenarios. The alternative hypotheses considered are four levels of abnormal returns, 0.5 percent, 1.0 percent, 1.5 percent, and 2.0 percent and two levels of the average variance for the cumulative abnormal return of a given security over the event period, 0.0004 and 0.0016. The
sample size, that is the number of securities for which the event occurs, is varied from one to 200. The power for a test with a size of 5 percent is documented. With $\alpha = 0.05$, the critical values calculated using $c(\alpha/2)$ and $c(1 - \alpha/2)$ are -1.96 and 1.96 respectively. Of course, in applications, the power of the test should be considered when selecting the size.
The power results are presented in Table 2, and are plotted in Figures 3a and 3b. The results in the left panel of Table 2 and Figure 3a are for the case where the average variance is 0.0004. This corresponds to a cumulative abnormal return standard deviation of 2 percent and is an appropriate value for an event which does not lead to increased variance and can be examined using a one-day event window. In terms of having high power this is the best case scenario. The results illustrate that when the abnormal return is only 0.5 percent the power can be low. For example, with a sample size of 20 the power of a 5 percent test is only 0.20. One needs a sample of over 60 firms before the power reaches 0.50. However, for a given sample size, increases in power are substantial when the abnormal return is larger. For example, when the abnormal return is 2.0 percent the power of a 5 percent test with 20 firms is almost 1.00 with a value of 0.99. The general results for a variance of 0.0004 is that when the abnormal return is larger than 1 percent the power is quite high even for small sample sizes. When the abnormal return is small a larger sample size is necessary to achieve high power.

In the right panel of Table 2 and in Figure 3b the power results are presented for the case where the average variance of the cumulative abnormal return is 0.0016. This case corresponds roughly to either a multi-day event window or to a one-day event window with the event leading to increased variance.
which is accommodated as part of the null hypothesis. When the average variance of the CAR is increased from 0.0004 to 0.0016 there is a dramatic power decline for a 5 percent test. When the CAR is 0.5 percent the power is only 0.09 with 20 firms and is only 0.42 with a sample of 200 firms. This magnitude of abnormal return is difficult to detect with the larger variance. In contrast, when the CAR is as large as 1.5 percent or 2.0 percent the 5 percent test is still has reasonable power. For example, when the abnormal return is 1.5 percent and there is a sample size of 30 the power is 0.54. Generally if the abnormal return is large one will have little difficulty rejecting the null hypothesis of no abnormal return.

In the preceding analysis the power is considered analytically for the given distributional assumptions. If the distributional assumptions are inappropriate then the results may differ. However, Brown and Warner (1985) consider this possible difference and find that the analytical computations and the empirical power are very close.

It is difficult to make general conclusions concerning the adequacy of the ability of event study methodology to detect non-zero abnormal returns. When conducting an event study it is best to evaluate the power given the parameters and objectives of the study. If the power seems sufficient then one can proceed, otherwise one should search for ways of increasing the power. This can be done by increasing the sample size, shortening the event window, or by

![Figure 3b. Power of event study test statistic $\theta_1$ to reject the null hypothesis that the abnormal return is zero, when the square root of the average variance of the abnormal return across firms is 4 percent.](image-url)
8. Nonparametric Tests

The methods discussed to this point are parametric in nature, in that specific assumptions have been made about the distribution of abnormal returns. Alternative approaches are available which are nonparametric in nature. These approaches are free of specific assumptions concerning the distribution of returns. Common nonparametric tests for event studies are the sign test and the rank test. These tests are discussed next.

The sign test, which is based on the sign of the abnormal return, requires that the abnormal returns (or more generally cumulative abnormal returns) are independent across securities and that the expected proportion of positive abnormal returns under the null hypothesis is 0.5. The basis of the test is that, under the null hypothesis, it is equally probable that the CAR will be positive or negative. If, for example, the null hypothesis is that there is a positive abnormal return associated with a given event, the null hypothesis is

$$H_0: \pi \leq 0.5$$

and the alternative is

$$H_A: \pi > 0.5$$

where

$$\pi = Pr[CAR_i \geq 0.0]$$.

To calculate the test statistic we need the number of cases where the abnormal return is positive, $N^+$, and the total number of cases, $N$. Letting $\theta_2$ be the test statistic,

$$\theta_2 = \left[ \frac{N^+}{N} - 0.5 \right] \sqrt{\frac{N}{0.5}} \sim N(0,1).$$

(23)

This distributional result is asymptotic. For a test of size $(1 - \alpha)$, $H_0$ is rejected if $\theta_2 > \Phi^{-1}(\alpha)$.

A weakness of the sign test is that it may not be well specified if the distribution of abnormal returns is skewed as can be the case with daily data. In response to this possible shortcoming, Charles Corrado (1989) proposes a nonparametric rank test for abnormal performance in event studies. A brief description of his test of no abnormal return for event day zero follows. The framework can be easily altered for more general tests.

Drawing on notation previously introduced, consider a sample of $L_2$ abnormal returns for each of $N$ securities. To implement the rank test, for each security it is necessary to rank the abnormal returns from one to $L_2$. Define $K_{i\tau}$ as the rank of the abnormal return of security $i$ for event time period $\tau$. Recall, $\tau$ ranges from $T_1 + 1$ to $T_2$ and $\tau = 0$ is the event day. The rank test uses the fact that the expected rank of the event day is $(L_2 + 1)/2$ under the null hypothesis. The test statistic for the null hypothesis of no abnormal return on event day zero is

$$\theta_3 = \frac{1}{N} \sum_{i=1}^{N} \left( K_{i0} - \frac{L_2 + 1}{2} \right) / s(K)$$

(24)

where

$$s(K) = \sqrt{\frac{1}{L_2} \sum_{\tau=T_1+1}^{T_2} \left( \frac{1}{N} \sum_{i=1}^{N} \left( K_{i\tau} - \frac{L_2 + 1}{2} \right) \right)^2}$$. (25)

Tests of the null hypothesis can be implemented using the result that the asymptotic null distribution of $\theta_3$ is standard normal. Corrado (1989) includes further discussion of details of this test.

Typically, these nonparametric tests are not used in isolation but in conjunction with the parametric counterparts. Inclusion of the nonparametric tests provides a check of the robustness of conclusions based on parametric tests. Such a check can be worthwhile as illustrated by the work of Cynthia Campbell and Charles Wasley (1993). They find that for NASDAQ stocks daily returns the nonparametric rank test provides more reliable inferences than do the standard parametric tests.
9. Cross-Sectional Models

Theoretical insights can result from examining the association between the magnitude of the abnormal return and characteristics specific to the event observation. Often such an exercise can be helpful when multiple hypotheses exist for the source of the abnormal return. A cross-sectional regression model is an appropriate tool to investigate this association. The basic approach is to run a cross-sectional regression of the abnormal returns on the characteristics of interest.

Given a sample of \( N \) abnormal return observations and \( M \) characteristics, the regression model is:

\[
AR_j = \delta_0 + \delta_1 x_{1j} + \cdots + \delta_M x_{Mj} + \eta_j 
\]

\( E(\eta_j) = 0 \)

(26)

(27)

where \( AR_j \) is the \( j \)th abnormal return observation, \( x_{mj}, m = 1, \ldots, M \), are \( M \) characteristics for the \( j \)th observation and \( \eta_j \) is the zero mean disturbance term that is uncorrelated with the \( x \)'s. \( \delta_m, m = 0, \ldots, M \) are the regression coefficients. The regression model can be estimated using OLS. Assuming the \( \eta_j \)'s are cross-sectionally uncorrelated and homoskedastic, inferences can be conducted using the usual OLS standard errors. Alternatively, without assuming homoskedasticity, heteroskedasticity-consistent \( t \)-statistics using standard errors can be derived using the approach of Halbert White (1980). The use of heteroskedasticity-consistent standard errors is advisable because there is no reason to expect the residuals of (26) to be homoskedastic.

Paul Asquith and David Mullins (1986) provide an example of this cross-sectional approach. The two day cumulative abnormal return for the announcement of an equity offering is regressed on the size of the offering as a percentage of the value of the total equity of the firm and on the cumulative abnormal return in the eleven months prior to the announcement month. They find that the magnitude of the (negative) abnormal return associated with the announcement of equity offerings is related to both these variables. Larger pre-event cumulative abnormal returns are associated with less negative abnormal returns and larger offerings are associated with more negative abnormal returns. These findings are consistent with theoretical predictions which they discuss.

Issues concerning the interpretation of the results can arise with the cross-sectional regression approach. In many situations, the event window abnormal return will be related to firm characteristics not only through the valuation effects of the event but also through a relation between the firm characteristics and the extent to which the event is anticipated. This can happen when investors rationally use the firm characteristics to forecast the likelihood of the event occurring. In these cases, a linear relation between the valuation effect of the event and the firm characteristic can be hidden. Paul Malatesta and Thompson (1985) and William Lanen and Thompson (1988) provide examples of this situation.

Technically, with the relation between the firm characteristics and the degree of anticipation of the event introduces a selection bias. The assumption that the regression residual is uncorrelated with the regressors breaks down and the OLS estimators are inconsistent. Consistent estimators can be derived by explicitly incorporating the selection bias. Sankarshan Acharya (1988) and B. Espen Eckbo, Vojislav Maksimovic, and Joseph Williams (1990) provide examples of this approach. N. R. Prabhala (1995) provides a good discussion of this problem and the possible solutions. He argues that, despite an incorrect specification, under weak conditions, the OLS ap-
Approach can be used for inferences and that the t-statistics can be interpreted as lower bounds on the true significance level of the estimates.

10. Other Issues

A number of further issues often arise when conducting an event study. These issues include the role of the sampling interval, event date uncertainty, robustness, and some additional biases.

A. Role of Sampling Interval

Stock return data is available at different sampling intervals, with daily and monthly intervals being the most common. Given the availability of various intervals, the question of the gains of using more frequent sampling arises. To address this question one needs to consider the power gains from shorter intervals. A comparison of daily versus monthly data is provided in Figure 4. The power of the test of no event effect is plotted against the alternative of an abnormal return of one percent for 1 to 200 securities. As one would expect given the analysis of Section 7, the decrease in power going from a daily interval to a monthly interval is severe. For example, with 50 securities the power for a 5 percent test using daily data is 0.94, whereas the power using weekly and monthly data is only 0.35 and 0.12 respectively. The clear message is that there is a substantial payoff in terms of increased power from reducing the sampling inter-

Figure 4. Power of event study test statistic \( \theta \), to reject the null hypothesis that the abnormal return is zero, for different sampling intervals, when the square root of the average variance of the abnormal return across firms is 4 percent for the daily interval. Size of test is 5 percent.
val. Dale Morse (1984) presents detailed analysis of the choice of daily versus monthly data and draws the same conclusion.

A sampling interval of one day is not the shortest interval possible. With the increased availability of transaction data, recent studies have used observation intervals of duration shorter than one day. However, the net benefit of intervals less than one day is unclear as some complications are introduced. Discussion of using transaction data for event studies is included in the work of Michael Barclay and Robert Litzenberger (1988).

B. Inferences with Event-Date Uncertainty

Thus far it is assumed that the event date can be identified with certainty. However, in some studies it may be difficult to identify the exact date. A common example is when collecting event dates from financial publications such as the Wall Street Journal. When the event announcement appears in the paper one can not be certain if the market was informed prior to the close of the market the prior trading day. If this is the case then the prior day is the event day, if not then the current day is the event day. The usual method of handling this problem is to expand the event window to two days—day 0 and day +1. While there is a cost to expanding the event window, the results in Section 6 indicated that the power properties of two day event windows are still good suggesting that the costs are worth bearing rather than to take the risk of missing the event.

Clifford Ball and Walter Torous (1988) have investigated the issue. They develop a maximum likelihood estimation procedure which accommodates event date uncertainty and examine results of their explicit procedure versus the informal procedure of expanding the event window. The results indicates that the informal procedure works well and there is little to gain from the more elaborate estimation framework.

C. Robustness

The statistical analysis of Sections 4, 5, and 6 is based on assumption that returns are jointly normal and temporally independently and identically distributed. In this section, discussion of the robustness of the results to departures from this assumption is presented. The normality assumption is important for the exact finite sample results to hold. Without assuming normality, all results would be asymptotic. However, this is generally not a problem for event studies because for the test statistics, convergence to the asymptotic distributions is rather quick. Brown and Warner (1985) provide discussion of this issue.

D. Other Possible Biases

A number of possible biases can arise in the context of conducting an event study. Nonsynchronous trading can introduce a bias. The nontrading or nonsynchronous trading effect arises when prices, are taken to be recorded at time intervals of one length when in fact they are recorded at time intervals of other possibly irregular lengths. For example, the daily prices of securities usually employed in event studies are generally "closing" prices, prices at which the last transaction in each of those securities occurred during the trading day. These closing prices generally do not occur at the same time each day, but by calling them "daily" prices, one is implicitly and incorrectly assuming that they are equally spaced at 24-hour intervals. This nontrading effect induces biases in the moments and co-moments of returns.

The influence of the nontrading effect on the variances and covariances of individual stocks and portfolios naturally feeds into a bias for the market model
beta. Myron Scholes and Williams (1977) present a consistent estimator of beta in the presence of nontrading based on the assumption that the true return process is uncorrelated through time. They also present some empirical evidence which shows the nontrading-adjusted beta estimates of thinly traded securities to be approximately 10 to 20 percent larger than the unadjusted estimates. However, for actively traded securities, the adjustments are generally small and unimportant.

Prem Jain (1986) considers the influence of thin trading on the distribution of the abnormal returns from the market model with the beta estimated using the Scholes-Williams approach. When comparing the distribution of these abnormal returns to the distribution of the abnormal returns using the usual OLS betas finds that the differences are minimal. This suggests that in general the adjustments for thin trading are not important.

The methodology used to compute the cumulative abnormal returns can induce an upward bias. The bias arises from the observation by observation rebalancing to equal weights implicit in the calculation of the aggregate cumulative abnormal return combined with the use of transaction prices which can represent both the bid and the offer side of the market. Marshall Blume and Robert Stambaugh (1983) analyze this bias and show that it can be important for studies using low market capitalization firms which have, in percentage terms, wide bid offer spreads. In these cases the bias can be eliminated by considering cumulative abnormal returns which represent buy and hold strategies.

11. Concluding Discussion

In closing, examples of event study successes and limitations are presented. Perhaps the most successful applications have been in the area of corporate finance. Event studies dominate the empirical research in this area. Important examples include the wealth effects of mergers and acquisitions and the price effects of financing decisions by firms. Studies of these events typically focus on the abnormal return around the date of first announcement.

In the 1960s there was a paucity of empirical evidence on the wealth effects of mergers and acquisitions. For example, Henry Manne (1965) discusses the various arguments for and against mergers. At that time the debate centered on the extent to which mergers should be regulated in order to foster competition in the product markets. Manne argued that mergers represent a natural outcome in an efficiently operating market for corporate control and consequently provide protection for shareholders. He downplayed the importance of the argument that mergers reduce competition. At the conclusion of his article Manne suggested that the two competing hypotheses for mergers could be separated by studying the price effects of the involved corporations. He hypothesized that, if mergers created market power, one would observe price increases for both the target and acquirer. In contrast, if the merger represented the acquiring corporation paying for control of the target, one would observe a price increase for the target only and not for the acquirer. However, Manne concludes, in reference to the price effects of mergers, that “no data are presently available on this subject.”

Since that time an enormous body of empirical evidence on mergers and acquisitions has developed which is dominated by the use of event studies. The general result is that, given a successful takeover, the abnormal returns of the targets are large and positive and the abnormal returns of the acquirer are close
to zero. Gregg Jarrell and Poulsen (1989) document that the average abnormal return for target shareholders exceeds 20 percent for a sample of 663 successful takeovers from 1960 to 1985. In contrast the abnormal returns for acquirers is close to zero. For the same sample, Jarrell and Poulsen find an average abnormal return of 1.14 percent for acquirers. In the 1980s they find the average abnormal return is negative at -1.10 percent. Eckbo (1983) explicitly addresses the role of increased market power in explaining merger related abnormal returns. He separates mergers of competing firms from other mergers and finds no evidence that the wealth effects for competing firms are different. Further, he finds no evidence that rivals of firms merging horizontally experience negative abnormal returns. From this he concludes that reduced competition in the product market is not an important explanation for merger gains. This leaves competition for corporate control a more likely explanation. Much additional empirical work in the area of mergers and acquisitions has been conducted. Michael Jensen and Richard Ruback (1983) and Jarrell, James Brickley, and Netter (1988) provide detailed surveys of this work.

A number of robust results have been developed from event studies of financing decisions by corporations. When a corporation announces that it will raise capital in external markets there is, on average, a negative abnormal return. The magnitude of the abnormal return depends on the source of external financing. Asquith and Mullins (1986) find for a sample of 266 firms announcing an equity issue in the period 1963 to 1981 the two day average abnormal return is -2.7 percent and on a sample of 80 firms for the period 1972 to 1982 Wayne Mikkelson and Megan Partch (1986) find the two day average abnormal return is -3.56 percent. In contrast, when firms decide to use straight debt financing, the average abnormal return is closer to zero. Mikkelson and Partch (1986) find the average abnormal return for debt issues to be -0.23 percent for a sample of 171 issues. Findings such as these provide the fuel for the development of new theories. For example, in this case, the findings motivate the pecking order theory of capital structure developed by Stewart Myers and Nicholas Majluf (1984).

A major success related to those in the corporate finance area is the implicit acceptance of event study methodology by the U.S. Supreme Court for determining materiality in insider trading cases and for determining appropriate disgorgement amounts in cases of fraud. This implicit acceptance in the 1988 Basic, Incorporated v. Levinson case and its importance for securities law is discussed in Mitchell and Netter (1994).

There have also been less successful applications. An important characteristic of a successful event study is the ability to identify precisely the date of the event. In cases where the event date is difficult to identify or the event date is partially anticipated, studies have been less useful. For example, the wealth effects of regulatory changes for affected entities can be difficult to detect using event study methodology. The problem is that regulatory changes are often debated in the political arena over time and any accompanying wealth effects generally will gradually be incorporated into the value of a corporation as the probability of the change being adopted increases.

Larry Dann and Christopher James (1982) discuss this issue in the context of the impact of deposit interest rate ceilings for thrift institutions. In their study of changes in rate ceilings, they decide not to consider a change in 1973 because it was due to legislative action. Schipper
and Thompson (1983, 1985) also encounter this problem in a study of merger related regulations. They attempt to circumvent the problem of regulatory changes being anticipated by identifying dates when the probability of a regulatory change being passed changes. However, they find largely insignificant results leaving open the possibility the of absence of distinct event dates as the explanation of the lack of wealth effects.

Much has been learned from the body of research based on the use of event study methodology. In a general context, event studies have shown that, as would be expected in a rational marketplace, prices do respond to new information. As one moves forward, it is expected that event studies will continue to be a valuable and widely used tool in economics and finance.

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