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**Proposals for Amendment of
the ICSID Rules — Working Paper**

**Propositions d'amendement des
règlements du CIRDI — Document de travail**

**Propuesta de Enmiendas a las
Reglas del CIADI — Documento de Trabajo**



ICSID

**International Centre for
Settlement of Investment Disputes**
WORLD BANK GROUP

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ABBREVIATIONS

| | |
|--------------------------------|--|
| (AF)AFR | (Additional Facility) Administrative and Financial Regulations |
| (AF)AR currently A(AF)R | (Additional Facility) Arbitration Rules |
| (AF)CR currently C(AF)R | (Additional Facility) Conciliation Rules |
| (AF)FFR currently FF(AF)R | (Additional Facility) Fact-Finding Rules |
| (AF)MR | (Additional Facility) Mediation Rules |
| AF Rules | Additional Facility Rules |
| AFR | Administrative and Financial Regulations |
| AR | Arbitration Rules – ICSID Convention |
| BIT | Bilateral Investment Treaty |
| CAFTA-DR | Central America-Dominican Republic-United States Free Trade Agreement |
| CETA | Canada-EU Comprehensive Economic and Trade Agreement (not yet in force) |
| CPTPP | Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (not yet in force) |
| CR | Conciliation Rules – ICSID Convention |
| EU | European Union |
| FTA | Free Trade Agreement |
| IBRD (Bank) | International Bank for Reconstruction and Development (World Bank) |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States |
| IR | Institution Rules – ICSID Convention |
| ISDS | Investor-State Dispute Settlement |
| Mauritius Convention | United Nations Convention on Transparency in Treaty-based Investor-State Arbitration |
| Member States | Contracting States of ICSID Convention (ICSID 3) |
| MIT | Multilateral Investment Treaty |
| NAFTA | North American Free Trade Agreement |
| NDP | Non-disputing Party |
| NDTP | Non-disputing Treaty Party |
| REIO | Regional Economic Integration Organization |
| UNCITRAL Arbitration Rules | UNCITRAL Arbitration Rules (2010) |
| UNCITRAL Rules on Transparency | UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration |
| USD | US dollars |
| VCLT | Vienna Convention on the Law of Treaties |
| WP | ICSID Working Paper on Amendment (2018) |

INTRODUCTION

1. 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. Amendments to rules under the Convention must be adopted by two-thirds of the Member States of the Administrative Council. ICSID currently has 153 Contracting States, hence rule amendments must be approved by 102 or more members. Amendments to the Additional Facility rules require majority approval (77/153 votes) pursuant to Art. 6(1) of the Convention and AFR Reg. 7(1).
2. The [ICSID Convention Rules and Regulations](#) were adopted in 1967, and the [Additional Facility Rules](#) were adopted in 1978. The rules were amended in 1984, 2003 and 2006. The first two amendment processes resulted in modest changes. The third, in 2006, introduced important innovations on transparency, arbitrator declarations and early dismissal of claims. Further background on rule amendments can be found on the [ICSID webpage on amendment](#).
3. Amendments to the ICSID Convention arbitration and conciliation rules will apply to all cases based on consent given after the amendments are brought into force, except as the parties otherwise agree (Art. 33 and 44 Convention). The rules applicable to Additional Facility arbitration, conciliation, fact-finding and mediation cases are those in force on the date of initiation of the proceeding, unless the parties otherwise agree.

BACKGROUND

4. ICSID launched the current amendment process in [October 2016](#) and invited Member States to suggest topics that merited consideration. In [January 2017](#), ICSID invited the public to suggest topics for rule amendments. Submissions received from the public have been posted on the [ICSID webpage on amendment](#). The Secretariat reviewed all comments received and prepared this Working Paper (WP) to inform further discussions on amendment. In addition, ICSID conducted a survey on recovery of costs and damages awards at the request of the Republic of Panama. The results of that [survey](#) were released in November 2017.

OBJECTIVES

5. The philosophy motivating these amendments is that States and investors should have a range of modern dispute settlement options available to resolve their disputes. These may be used individually, or at times in parallel. For example, parties may suspend an on-going arbitration to mediate their dispute or may obtain a binding determination in a fact-finding proceeding that will be used in an on-going arbitration. As a result, the proposals update the existing rules for arbitration, conciliation and fact-finding, and expand the scope of the Additional Facility to encompass a new set of mediation rules. The proposals also reflect four core objectives:

- Continued modernization of ICSID procedure – the accretion of case experience and current discussion on ISDS reform have suggested ways to further improve the investor-State dispute resolution process. For example, there have been suggestions for consolidation of cases, increased transparency, criteria to apply in awarding costs and more flexible alternate dispute resolution mechanisms. Such suggestions are reflected in the proposals for discussion.
- Simplification of the rules – the rules have been comprehensively reviewed. Numerous drafting changes are proposed to streamline language, re-order provisions, and adopt gender-neutral language. The proposals also correct discrepancies between the English, French and Spanish versions of the rules, which are equally authentic as the official languages of the Centre.
- Reducing time and cost – a prominent concern is the cost of arbitration, which is directly affected by the length of proceedings. The WP proposes a general duty to act expeditiously, numerous specific rule changes to reduce the duration of cases and an optional expedited arbitration procedure.
- Go green – reducing the paper burden of proceedings will further reduce time and cost and respect environmental concerns. Proposals for use of electronic transmission and fewer copies promote these goals.

At the same time, all amendments must maintain the procedural equilibrium between disputing parties so that proceedings are fair and equally effective for all participants.

ORGANIZATION OF THE WORKING PAPER

6. The WP reviews the ICSID rules roughly in the sequence of the current rules. Each section explains the concerns identified, current practice, potential amendments, and the reasoning behind the proposals. In most instances, revised draft language in English (green), French (pink) and Spanish (blue) is provided with each provision to clarify the scope of the change suggested. The WP is accompanied by a volume that compiles all of the proposed provisions in the official languages with a table of concordance showing the number of the current relevant provision and the proposed amended provision.
7. In some instances, the WP proposes changes other than rule amendment, including practice changes and practice guidance notes.
8. The WP also notes where a change might be useful but would require amendment to the ICSID Convention. Art. 65 and 66 of the Convention require a two-step process, and ultimately 100% approval of Member States, to amend the Convention. Convention amendment is not under consideration in this process. However, Member States may ultimately prefer to address some changes by Convention amendment and therefore these possibilities are flagged in the WP for future work.

9. Member States may also decide that some procedural changes are best addressed in their individual investment treaties, contracts or laws, especially if such changes are beyond the scope of procedural rules or where there is no consensus on an amendment.
10. The proposals in the WP are intended to encourage discussion and are not prescriptive. ICSID offers these for consideration by Member States and the public, and looks forward to a constructive dialogue that will result in consensus on proposals that could realistically be advanced to the Administrative Council for adoption.

NEXT STEPS

11. ICSID distributed the WP to Member States on August 2, 2018 and published the WP on its website on August 3, 2018. It will overview these proposals at a meeting of State experts in Washington, D.C. in September 2018 and in public consultation meetings and webinars in various regions in the autumn of 2018. The ICSID website will list public consultation events and provide further background documents and videos.
12. ICSID invites written comments from the public and Member States by December 28, 2018. Feedback from the public should be submitted to icsidideas@worldbank.org and will be posted on the website.
13. Feedback from Member States should be sent to icsidruleamendments@worldbank.org and will be posted on the ICSID website with consent of the Member State.
14. The feedback will be collated in early 2019. Depending on the extent and nature of the feedback received, ICSID will propose a package of amendments for further consideration and potential adoption in 2019 or 2020.

RULE 36 – PRELIMINARY OBJECTIONS

CURRENT RELATED PROVISIONS: Convention Art. 41; AR 41

Rule 36 Preliminary Objections

- (1) A party may file a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal.
- (2) The following procedure shall apply:
 - (a) a preliminary objection shall be made as soon as possible. Unless the facts on which the objection is based are unknown to the party at the relevant time, the objection shall be made no later than:
 - () the date to file the counter-memorial if the objection relates to the main claim;
or
 - () the date to file the next written submission after an ancillary claim is raised, if the objection relates to the ancillary claim;
 - () the party shall file a written submission, specifying the grounds on which the preliminary objection is based and including a statement of relevant facts, law and arguments, with any supporting documents; and
 - () the Tribunal shall fix time limits for written or oral submissions, as required, on the preliminary objection.
- (3) The Tribunal may address a preliminary objection in a separate phase of the proceeding pursuant to Rule 37 or join the objection to the merits. If the Tribunal decides to address the preliminary objection in a separate phase, it may suspend the proceeding on the merits.
 - () If a party files a preliminary objection it shall also file its counter-memorial on the merits, or file its next written submission after an ancillary claim is raised if the objection relates to the ancillary claim, unless the Tribunal has ordered otherwise.
 - () The Tribunal may at any time on its own initiative consider whether a claim is within the jurisdiction of the Centre or within its own competence.

- (6) The Tribunal shall issue its decision on the preliminary objection within 180 days after the last written or oral submission on the objection.
- (7) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre, or for other reasons is not within its competence, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceeding.

Article 36 **Objections préliminaires**

- (1) Une partie peut soulever une objection préliminaire fondée sur le motif que le différend ou toute demande accessoire ne ressortit pas à la compétence du Centre ou, pour toute autre raison, à celle du Tribunal.
- (2) La procédure suivante s'applique :
- (a) une objection préliminaire est soulevée aussitôt que possible. Sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré, l'objection est soulevée au plus tard :
 - () à la date fixée pour le dépôt du contre-mémoire si l'objection se rapporte à la demande principale ; ou
 - () à la date fixée pour le dépôt des écritures suivantes après qu'une demande accessoire soit soulevée, si l'objection se rapporte à la demande accessoire ;
 - () la partie dépose des écritures indiquant précisément les motifs sur lesquels l'objection est fondée et incluant un exposé des faits pertinents, du droit et des arguments, accompagnées de tous documents justificatifs ; et
 - () le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant l'objection préliminaire.
- (3) Le Tribunal peut traiter une objection préliminaire au cours d'une phase distincte de l'instance conformément à l'article 37 ou l'examiner avec les questions de fond. Si le Tribunal décide de traiter l'objection préliminaire au cours d'une phase distincte, il peut suspendre la procédure sur le fond.
- () Si une partie soulève une objection préliminaire, elle dépose également son contre-mémoire sur le fond, ou ses écritures suivantes après qu'une demande accessoire soit soulevée, si l'objection se rapporte à la demande accessoire, sauf instructions contraires du Tribunal.

- (5) Le Tribunal peut, à tout moment et de sa propre initiative, examiner si une demande ressortit à la compétence du Centre ou à sa propre compétence.
- (6) Le Tribunal rend sa décision concernant l'objection préliminaire dans un délai de 180 jours à compter des dernières écritures ou plaidoiries relatives à l'objection.
- (7) Si le Tribunal décide qu'un différend ne ressortit pas à la compétence du Centre ni, pour toutes autres raisons, à sa propre compétence, il rend une sentence dans ce sens. Dans le cas contraire, le Tribunal rend une décision sur l'objection et fixe tout délai nécessaire à la poursuite de l'instance.

Regla 36 **Excepciones Preliminares**

- (1) Una parte podrá oponer una excepción preliminar según la cual la diferencia, o una demanda subordinada, no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de la competencia del Tribunal.
- (2) Se aplicará el siguiente procedimiento:
 - (a) una excepción preliminar deberá oponerse lo antes posible. A menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción, la excepción deberá oponerse a más tardar:
 - () en la fecha de presentación del memorial de contestación si la excepción se refiere a la reclamación principal; o
 - () en la fecha de presentación del escrito inmediatamente posterior a la presentación de una demanda subordinada, si la excepción se refiere a la demanda subordinada;
 - () la parte deberá presentar un escrito, especificando las causales en las cuales se funda la excepción preliminar e incluir una relación de los hechos pertinentes, el derecho y los argumentos junto con cualquier documento de respaldo; y
 - () el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la excepción preliminar.
- (3) El Tribunal podrá pronunciarse sobre una excepción preliminar en una fase separada del procedimiento de conformidad con lo dispuesto en la Regla 37 o conjuntamente con las cuestiones de fondo. Si el Tribunal decide pronunciarse sobre la excepción preliminar en una fase separada, podrá suspender el procedimiento sobre las cuestiones de fondo.

- (4) Si una parte opone una excepción preliminar, también deberá presentar su memorial de contestación sobre el fondo, o presentar el escrito inmediatamente posterior a la presentación de una demanda subordinada si la excepción se refiere a la demanda subordinada, salvo resolución en contrario del Tribunal.
- (5) El Tribunal podrá en cualquier momento considerar de oficio si una reclamación se encuentra dentro de la jurisdicción del Centro o es de su propia competencia.
- (6) El Tribunal emitirá su decisión relativa a la excepción preliminar dentro de los 180 días siguientes a lo que suceda de último, sea la presentación de un escrito, o bien, una presentación oral sobre la excepción.
- (7) Si el Tribunal decide que la diferencia no se encuentra dentro de la jurisdicción del Centro o por otras razones no es de su propia competencia, dictará un laudo a tal efecto. De lo contrario, el Tribunal emitirá una decisión relativa a la excepción y fijará cualquier plazo necesario para la continuación del procedimiento.

382. Preliminary objections are common in ICSID cases and are typically raised by the respondent early in the process. They mostly concern the Tribunal's jurisdiction and the admissibility of the claim. The claimant may also raise preliminary objections to ancillary claims made by the respondent, for example, a counter-claim.
383. When a preliminary objection is raised, the Tribunal may: (i) deal with the objection as a preliminary question, with or without suspending consideration of the merits; or (ii) join the objection to the merits of the dispute. How to deal with the objection is typically discussed at the first session. The timing implications are discussed in Schedule 9 on Time and Cost.
384. Proposed AR 36 updates current AR 41 language and revises the procedure to reflect current practice.
385. **First**, in line with current practice, the parties and the Tribunal may agree on the time limit for filing the preliminary objection, which is to be filed as early as possible under current AR 41(1). If the parties are unable to agree on the time for filing the preliminary objection, the respondent must file the objection at the latest by the date fixed by the Tribunal to file the counter-memorial on the merits. Some comments suggested moving up the deadline for filing jurisdictional objections or giving the Tribunal discretion to fix this deadline. The WP proposes to keep the existing time limit (proposed AR 36(2)(a)(i)), but requires that a party file a request for bifurcation within 30 days after the memorial on the merits (*see* proposed AR 37(2)(a)).
386. **Second**, proposed AR 36(3) confirms that the Tribunal may deal with the objection as a preliminary question in a bifurcated proceeding or join it to the merits. The rule also proposes to delete the reference to a suspension of the proceeding on the merits upon the formal raising of the objection. In practice, the Tribunal addresses the question of

bifurcation before deciding whether to suspend the merits. The WP proposes to allow Tribunal discretion to consult with the parties and to decide when suspension of the proceeding is appropriate. If all jurisdictional objections are to be addressed in a separate phase of the proceeding before the merits, the proceeding on the merits will likely be suspended unless the parties agree otherwise.

387. **Third**, proposed AR 36(4) provides that a party filing a preliminary objection must also file its counter-memorial on the merits, unless the Tribunal has ordered bifurcation under proposed AR 37. This is a new provision that is intended to promote efficiency and fairness, avoiding delay due to late requests for bifurcation. In view of proposed AR 37(2)(d) requiring a party to file a request for bifurcation within 30 days after the memorial on the merits (most likely before the counter-memorial), it is expected that jurisdictional objections will be filed together with the counter-memorial only when the moving party does not wish to bifurcate jurisdiction from the merits. The moving party may thus not avoid filing the counter-memorial if the jurisdictional objections are filed at a late stage.
388. **Fourth**, proposed AR 36(5) mirrors current AR 41(2). In accordance with proposed AR 11(2), the Tribunal must consult with the parties before deciding on its own initiative that a claim is not within the jurisdiction of the Centre or within its own competence.
389. **Fifth**, some comments suggested a time limit for the Tribunal’s decision on the preliminary objection. The issues before the Tribunal vary in scope, complexity, and the number of pleadings and supporting documents. A review of the cases where a decision on jurisdiction was rendered between January 1, 2016 and June 30, 2017 shows that decisions on jurisdiction have taken on average 185 days from the last submission. In line with this data and comments received, the WP proposes in AR 36(6) and AR 59(1)(b) that the Tribunal issue a decision or Award on the objection within 180 days after the last written or oral submission. As noted above, this is a “best efforts” obligation pursuant to proposed AR 8(3).

RULE 37 – BIFURCATION

CURRENT RELATED PROVISIONS: AR 41

Rule 37 Bifurcation

- (1) A party may request that a question be addressed in a separate phase of the proceeding (“request for bifurcation”).
- (2) The following procedure shall apply:
 - (a) if the request for bifurcation relates to a preliminary objection, a party shall file the request within 30 days after the filing of the memorial on the merits or, if the

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

- (b) the request for bifurcation shall specify the questions to be bifurcated;
 - (c) the Tribunal shall fix time limits for written or oral submissions, as required, on the request for bifurcation; and
 - (d) the Tribunal shall issue its decision on a request for bifurcation within 30 days after the last written or oral submission on the request.
- (3) The Tribunal may at any time on its own initiative decide whether a question is to be addressed in a separate phase of the proceeding.
- (4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether bifurcation would materially reduce the time and cost of the proceeding.

Article 37 Bifurcation

- (1) Une partie peut demander qu'une question soit traitée au cours d'une phase distincte de l'instance (« demande de bifurcation »).
- (2) La procédure suivante s'applique :
- (a) si la demande de bifurcation se rapporte à une objection préliminaire, une partie présente la demande dans un délai de 30 jours suivant le dépôt du mémoire sur le fond ou, si l'objection se rapporte à une demande accessoire dans un délai de 30 jours suivant le dépôt des écritures contenant la demande accessoire, sauf si les faits sur lesquels l'objection est fondée sont inconnus de la partie au moment considéré ;
 - (b) la demande de bifurcation précise les questions devant faire l'objet de la bifurcation ;
 - (c) le Tribunal fixe les délais relatifs aux écritures ou aux plaidoiries, le cas échéant, concernant la demande de bifurcation ; et
 - (d) le Tribunal rend sa décision concernant une demande de bifurcation dans un délai de 30 jours à compter des dernières écritures ou plaidoiries relatives à la demande.

- (3) Le Tribunal peut, à tout moment et de sa propre initiative, décider si une question doit être traitée au cours d'une phase distincte de l'instance.
- (4) Pour déterminer s'il se prononce en faveur de la bifurcation, le Tribunal tient compte de l'ensemble des circonstances pertinentes, notamment il examine si la bifurcation réduirait de manière significative la durée et le coût de l'instance.

Regla 37 Bifurcación

- (1) Una parte podrá solicitar que una cuestión sea abordada en una fase separada del procedimiento ("solicitud de bifurcación").
- (2) Se aplicará el siguiente procedimiento:
 - (a) si la solicitud de bifurcación se refiere a una excepción preliminar, una parte presentará la solicitud dentro de los 30 días siguientes a la presentación del memorial sobre el fondo o, si la excepción se refiere a una demanda subordinada, dentro de los 30 días siguientes a la presentación del escrito que contenga la demanda subordinada, a menos que la parte no haya tenido conocimiento en el momento pertinente de los hechos en los que se funda la excepción;
 - (b) la solicitud de bifurcación deberá especificar las cuestiones que deben bifurcarse;
 - (c) el Tribunal deberá fijar plazos para los escritos o presentaciones orales, según sea necesario, sobre la solicitud de bifurcación; y
 - (d) el Tribunal emitirá su decisión sobre una solicitud de bifurcación dentro de los 30 días siguientes al último escrito o presentación oral sobre la solicitud.
- (3) El Tribunal podrá en cualquier momento decidir de oficio si una cuestión debe abordarse en una fase separada del procedimiento.
- (4) Al momento de determinar si corresponde bifurcar, el Tribunal considerará todas las circunstancias pertinentes, lo cual incluye si la bifurcación reduciría sustancialmente el tiempo y costo del procedimiento.

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

phases, for example, bifurcating consideration of the merits into liability and quantum phases.

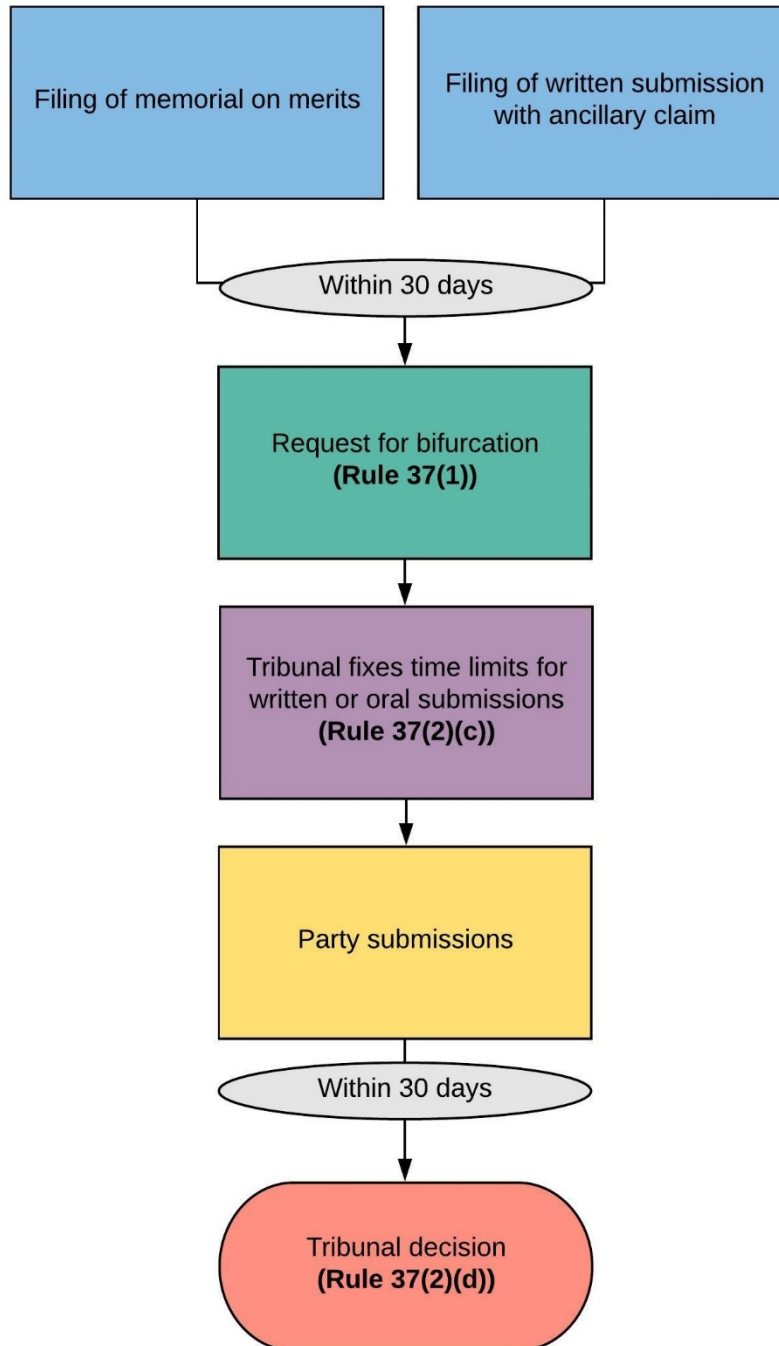
391. The possibility of bifurcation is foreseen in current AR 41(4), but the rule does not provide any further detail. Proposed AR 37 follows suggestions to include a stand-alone provision on bifurcation and to provide more guidance on the timing, procedure and factors to be considered.
392. Several Member States commented that bifurcation should be allowed more often, or automatically, when jurisdictional objections are raised. The WP does not propose automatic bifurcation because the facts of each case are relevant to determining whether bifurcation is appropriate.
393. ICSID case law has uniformly held that there is no presumption in favour of bifurcation, and has identified certain factors to be considered. For jurisdictional objections these factors include: (i) whether the objection is closely intertwined with the merits of the claim; (ii) whether the objection is capable of disposing of the entire case; (iii) whether the objection has merit and is not frivolous; and (iv) whether procedural economy would be served by dealing with the objection prior to the merits (*see e.g., Tulip v. Turkey* (ARB/11/28), [Decision on Bifurcated Jurisdictional Issue](#) (March 5, 2013), and *Emmis et al. v. Hungary* (ARB/12/2), [Decision on Respondent's Application for Bifurcation](#) (July 13, 2013)). The last factor addresses whether bifurcation would materially reduce time and cost, and applies to all bifurcation scenarios. This test is incorporated into the proposed rule. Time and cost savings are likely if the proceeding on jurisdiction leads to an Award on jurisdiction disposing of the case. However, if jurisdiction is upheld and the case continues on the merits, the proceeding could be longer and more expensive (*see* Schedule 9 on Time and Cost). Therefore, the WP proposes to maintain the current discretion of Tribunals to decide whether to bifurcate depending on the circumstances of each case.
394. The Request for Bifurcation. Proposed AR 37(1) allows the parties to request bifurcation of preliminary objections and other matters, *e.g.*, dealing with liability before quantifying damages. Proposed AR 37 is intended to cover all types of requests for bifurcation.
395. Tribunal Ordered Bifurcation. The Tribunal may sometimes conclude on its own initiative that bifurcation of a particular issue is appropriate or that a particular issue should be joined to the merits after bifurcation. Proposed AR 37(3) reflects the discretion of the Tribunal to order bifurcation in such circumstances or to join the bifurcated issue to the merits, after hearing the parties' views (*see* proposed AR 11(2)). The provision anticipates that the Tribunal will apply the standard for bifurcation indicated in proposed AR 37(4).
396. Timing of Requests for Bifurcation. Typically, requests concerning bifurcation of jurisdictional objections are made earlier than other requests for bifurcation, but there is no time limit for the request in the current AR. In practice, the deadline for a request for bifurcation often corresponds to the deadline for raising an objection to jurisdiction, although requests for bifurcation are increasingly filed before the objections. Several comments suggested that a time limit be introduced for requests to bifurcate to address delay.

397. Proposed AR 37(2)(a) requires the parties to file a request for bifurcation within 30 days after the memorial on the merits or on the ancillary claim. A review of the 60 cases which led to decisions on bifurcation issued between May 30, 2014 and December 14, 2017 showed that requests for bifurcation concerning jurisdictional objections are made before filing the counter-memorial on the merits in approximately 73% of the cases and are filed on average 37 days after the memorial on the merits.
398. As indicated in proposed AR 37(2)(b), the request for bifurcation should specify the issues that the party wishes the Tribunal to hear in a separate phase to allow the Tribunal to determine whether bifurcation is appropriate in the circumstances.
399. The Procedure. The Tribunal will establish a procedural calendar to deal with the request for bifurcation (*see* proposed AR 37(2)(c)). Typically, Tribunals have allowed one round of submissions on bifurcation, with short time limits. Proposed AR 37(2)(d) addresses delay in the issuance of a decision on bifurcation. Based on a review of the 60 cases referred to above, decisions on bifurcation have taken on average 28 days from the last submission, with a range of 2 to 159 days depending on the circumstances of the case. Typically, where concurrent applications were pending before the Tribunal, the decision took longer (*e.g.*, proposals for disqualification or requests for provisional measures). In the vast majority of cases (46 cases), however, the decision on bifurcation was rendered less than 40 days after the last submission.
400. In line with the average length and with comments received concerning timeliness of rulings, the WP proposes a deadline of 30 days from the last submission for the Tribunal to issue its decision. The Tribunal and the parties are encouraged to discuss the timing of potential requests for bifurcation, observations on the requests, and the Tribunal's decision at the first session.
401. Factors to Be Considered by Tribunal. Several comments suggested that the AR provide guidance regarding the factors to be considered by Tribunals when considering a request for bifurcation. These may vary depending on the nature of the issues to be heard in a separate phase. As mentioned above, a common factor is whether the bifurcation would reduce time and cost. Because other factors are specific to bifurcation of preliminary objections, proposed AR 37(4) only includes that factor.
402. Suspension of the proceeding. One Member State commented that suspension of the proceeding on the merits should be automatic if the Tribunal decides to bifurcate jurisdictional objections. The 2006 Rules made suspension of the merits discretionary. This was an amendment to previous versions of the AR under which suspension was mandatory, and addressed the possibility of an objection that a claim manifestly lacks legal merit, which is automatically bifurcated under current AR 41(5) (meaning there can be no suspension if the objection concerns the merits).
403. In practice, most Tribunals do suspend the proceeding on the merits when they grant bifurcation of an objection to jurisdiction. However, the practical implication is minimal and only serves to confirm that certain time limits for pleadings dealing with other matters

are suspended. In some cases, the parties agree to proceed with the merits of the case on a slower track.

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

Bifurcation – Rule 37



SCHEDULE 9: ADDRESSING TIME AND COST IN ICSID ARBITRATION

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I. INTRODUCTION

1. There is growing concern about the length and cost of the investment arbitration process. Recent studies have shown that the average duration of investment disputes is close to four years and the average cost per party is between USD 4-6 million (Jeffery P. Commission, [How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years](#), Kluwer Arbitration Blog, February 29 2016; Allen & Overy, [Investment Treaty Arbitration: Cost, duration and size of claims all show steady increase](#) (May 31, 2017). The users of ISDS recognize that the complexity of investor-State disputes may require a longer process at higher cost than commercial arbitration cases, and some are reluctant to impose hard time limits or other provisions that make the process less flexible and constrain party autonomy.
2. At the same time, comments received from Member States and the public show that most users consider efficiency vital to the success of the system. Many of the comments received focused on arbitrator delay in issuing decisions and rendering the Award (*see* Chapter X – The Award); others suggested more pro-active case management by Tribunals; or focused on time limits for pleadings and reducing the number and type of pleadings (*see* Chapter II – Conduct of the Proceeding, and Chapter V – Initial Procedures). In view of these comments, one of the main goals in this rule amendment process has been to reduce the time and cost of proceedings through a variety of approaches.
3. The Centre has sought to identify the areas where time and cost can be reduced by examining trends and practices and the duration and costs of recently concluded cases. To identify the main issues affecting case duration, the Secretariat reviewed 63 cases which concluded with an Award in the period January 1, 2015 to June 30, 2017 (*see* below Section II). The average length of these cases was 1,336 days (3 years and 7 months) from the Tribunal constitution to an Award.
4. In addition to showing large discrepancies in duration between different type of proceedings (bifurcated and non-bifurcated), the study identified three main areas of concern: (i) the length of time to appoint arbitrators and constitute the Tribunal; (ii) the length of time for the written process; and (iii) the length of time to render the Tribunal’s Award. The study shows that improving efficiency will require coordinated effort from parties, counsel, arbitrators and the Centre alike throughout the various stages of an arbitration.
5. The Centre has endeavored to maintain flexibility of the process while proposing appropriate rule amendments addressing efficiency in the AR and (AF)AR (*see* Section III below). In doing so, it has taken into account the special characteristics of investment disputes, and the desirability of tailoring the process to the particular needs of each case. The AR and (AF)AR are therefore complemented by a set of rules for an expedited arbitration (Chapter XII - Expedited Arbitration) (*see* Section IV below), which the parties can agree to apply if they want a fully expedited process from registration to post-Award remedies. Parties may agree to apply Expedited Arbitration (“EA”) in advance in treaties or investment contracts or they may agree to apply them after a dispute has arisen. The EA can be particularly useful for investment contracts entered into by SMEs (*see e.g.*, focus

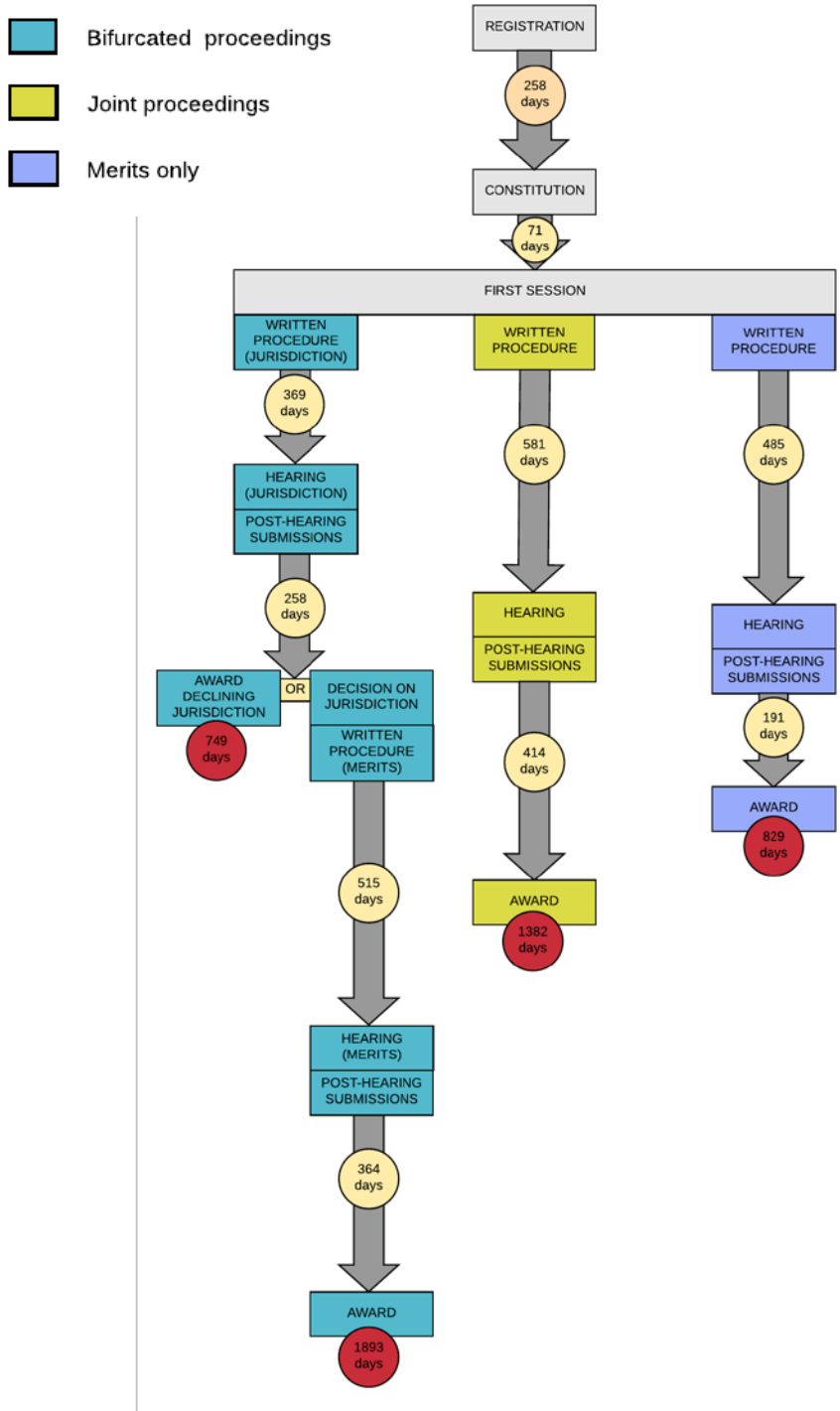
on SMEs under the [CETA](#) Art. 8.19(3), 8.23(5), 8.27(9)). The EA thus provide parties wishing to proceed with a rule-based expedited process with an option to do so.

6. Finally, the Centre also proposes to develop best practice notes and guidelines to complement the AR and (AF)AR (*see* Section V). This provides practical information to parties, counsel and arbitrators on how to best address time and cost.

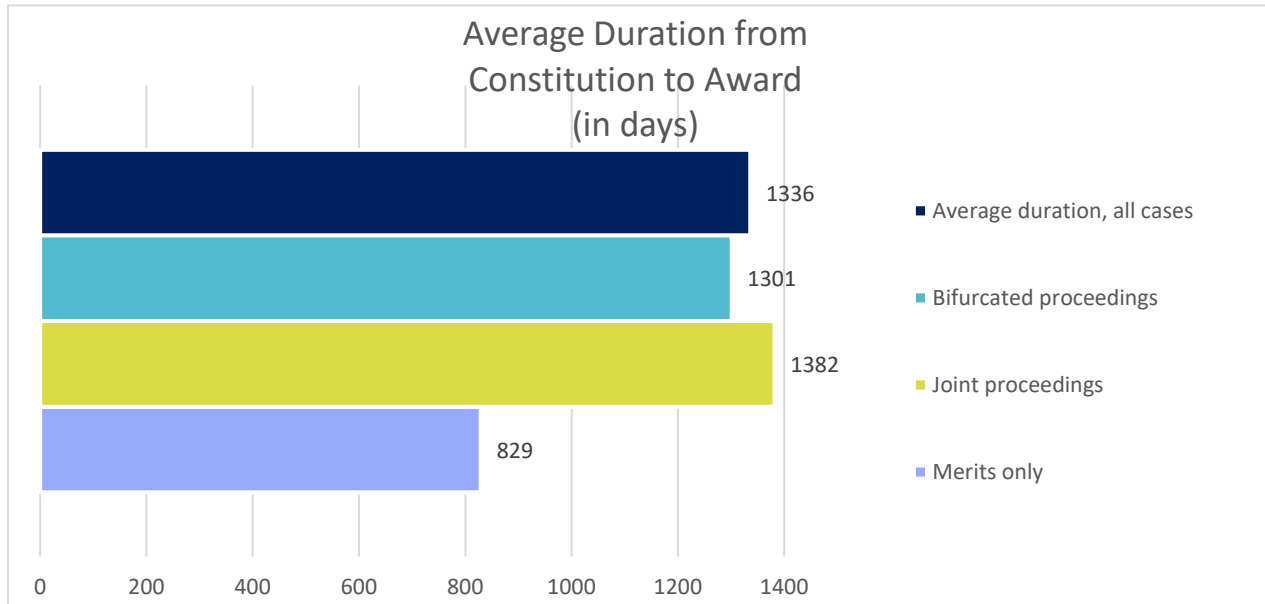
II. REVIEW OF CASE DURATION

7. The Centre reviewed 63 cases which concluded with an Award in the period January 1, 2015 to June 30, 2017 to better understand the duration of cases (excluding any post-award remedy proceedings). The 63 cases were sorted into similar types of proceedings: (i) one proceeding was a proceeding on the merits only (“merits only”); (ii) 29 proceedings were bifurcated to deal with jurisdictional and admissibility issues first before the merits (“bifurcated proceedings”); and (iii) 33 proceedings were joint proceedings on jurisdiction and the merits (“joint proceedings”).
8. The majority of these cases (53 cases) asserted ICSID jurisdiction on the basis of investment treaties, eleven cases were brought on the basis of investment laws, and seven cases relied on investment contracts between the investor and the host-State to assert the Centre’s jurisdiction. Five cases relied on two bases for jurisdiction, and two cases relied on three bases for jurisdiction.

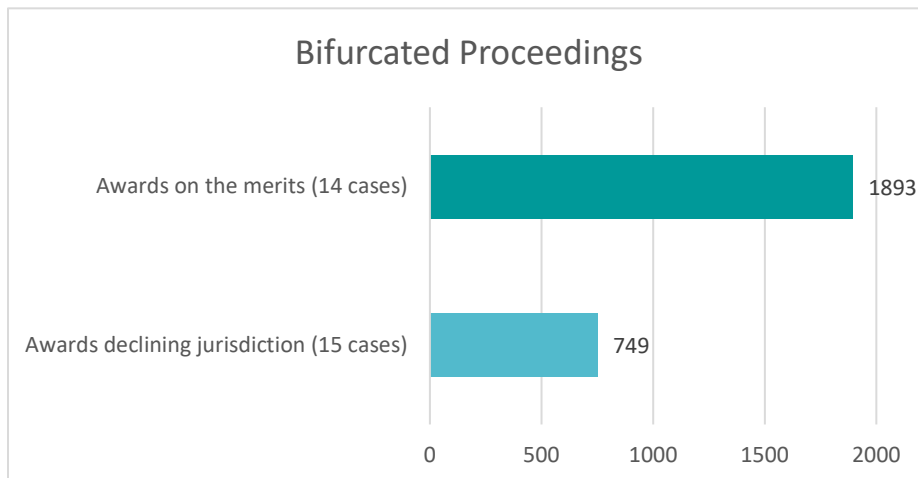
Time Line of Cases Reviewed and Overall Duration
 (Cases concluding with Award: January 1, 2015 – June 30, 2017)



9. The study shows that the average length from the constitution of the Tribunal to the dispatch of the Award of all 63 cases was 1,336 days (3 years and 7 months). When broken down by the type of proceeding, the average length was: (i) 1,382 days (3 years 9 months) for a joint proceeding; (ii) 1,301 days (3 years 6 months) for a bifurcated proceeding; and (iii) 829 days for the merits only proceeding.



10. The bifurcated proceedings were further classified based on the Tribunal declining jurisdiction after hearing the case on jurisdiction (Awards on jurisdiction); and the Tribunal upholding jurisdiction and hearing the case on the merits in a further stage of the proceeding, rendering a final Award on the merits. In the bifurcated proceedings that led to an Award on jurisdiction, the average length from the constitution of the Tribunal to the dispatch of the Award was 749 days (corresponding to 15 cases, including two awards on manifest lack of legal merit). In the bifurcated proceedings that led to an Award on the merits, the average length was 1,893 days (corresponding to 14 cases).



- 11. These numbers show significant discrepancies between a joint proceeding and a bifurcated proceeding that led to an Award declining jurisdiction, on the one hand, and an Award on the merits, on the other hand. Where jurisdiction was upheld in bifurcated proceedings and there was an Award on the merits, the proceedings were over 550 days longer than the general average. Where the bifurcated proceeding led to an award declining jurisdiction, it was almost 600 days shorter than the average.
- 12. From the perspective of duration, this indicates that bifurcation is not the best option for all cases with jurisdictional objections. Parties and Tribunals should therefore carefully consider whether to bifurcate jurisdictional objections or join them to the merits (including whether to raise an objection that a claim manifestly lacks legal merit under current AR 41(5)) to address case length.

A. LENGTH OF TRIBUNAL CONSTITUTION

- 13. The 63 cases were also reviewed for data on the time to appoint arbitrators, from registration of the Request for arbitration to the Tribunal constitution.
- 14. Under the AR and (AF)AR, the parties may agree on a method to appoint the Tribunal, or the Tribunal may be established under a default method. The review of cases showed that there was a slight difference in duration based on whether the parties agreed on a method of appointment or whether the default applied. The average for cases where the parties agreed on a method was 222 days, whereas the average for cases where the default method applied was 294 days. Recent data for Tribunals constituted in FY2017 confirm this conclusion, but show a reduction of time to 200 days where parties agree on the method and 246 days where the default method applied. The average duration of all 63 Tribunal constitutions was 258 days (whereas the average duration for Tribunal constitutions in all ICSID original arbitrations concluded during FY2017 was 234 days).

