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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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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.

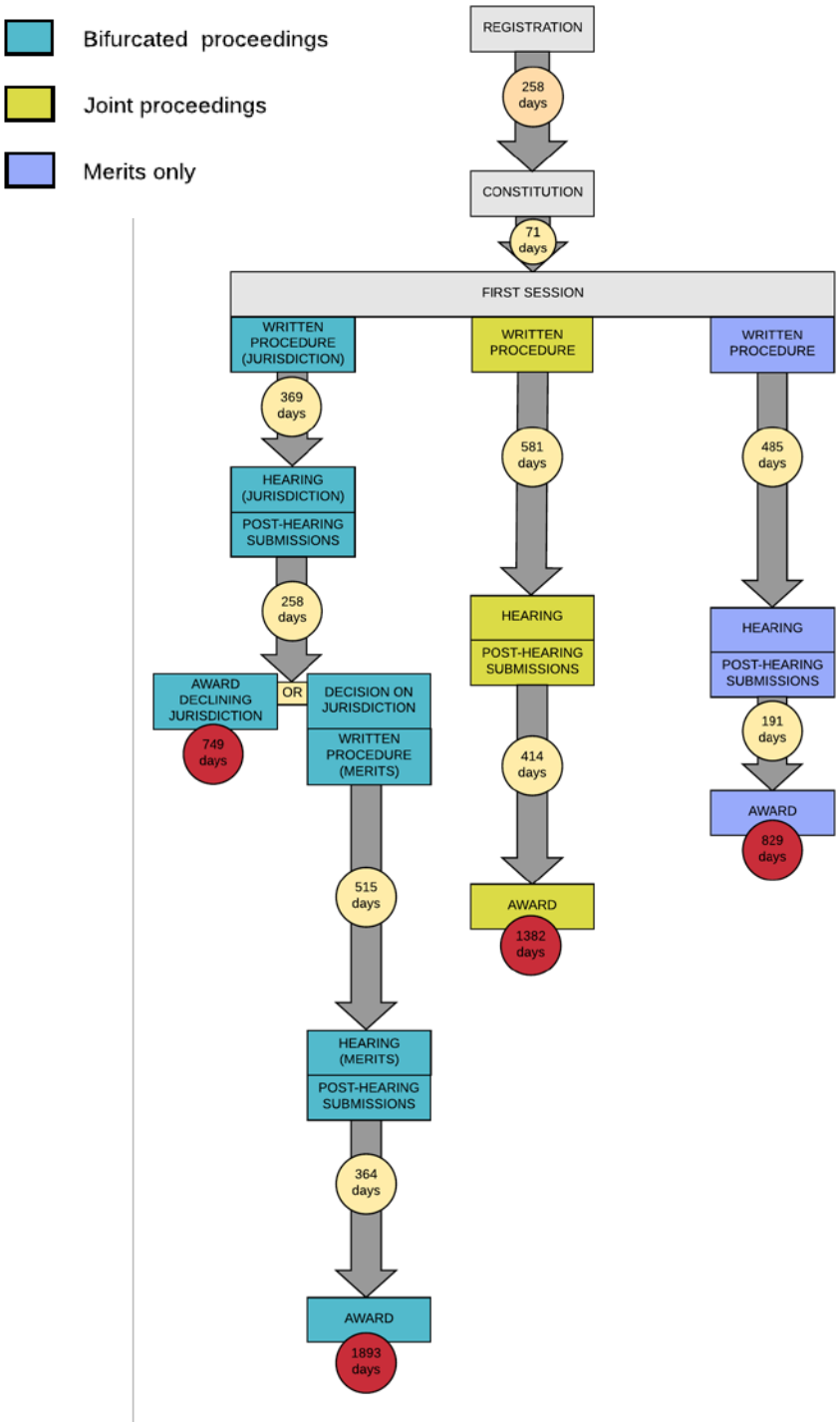
6. Finally, the Centre also proposes to develop best practice notes and guidelines to complement the AR and (AF)AR (*see* Section V). This provides practical information to parties, counsel and arbitrators on how to best address time and cost.

II. REVIEW OF CASE DURATION

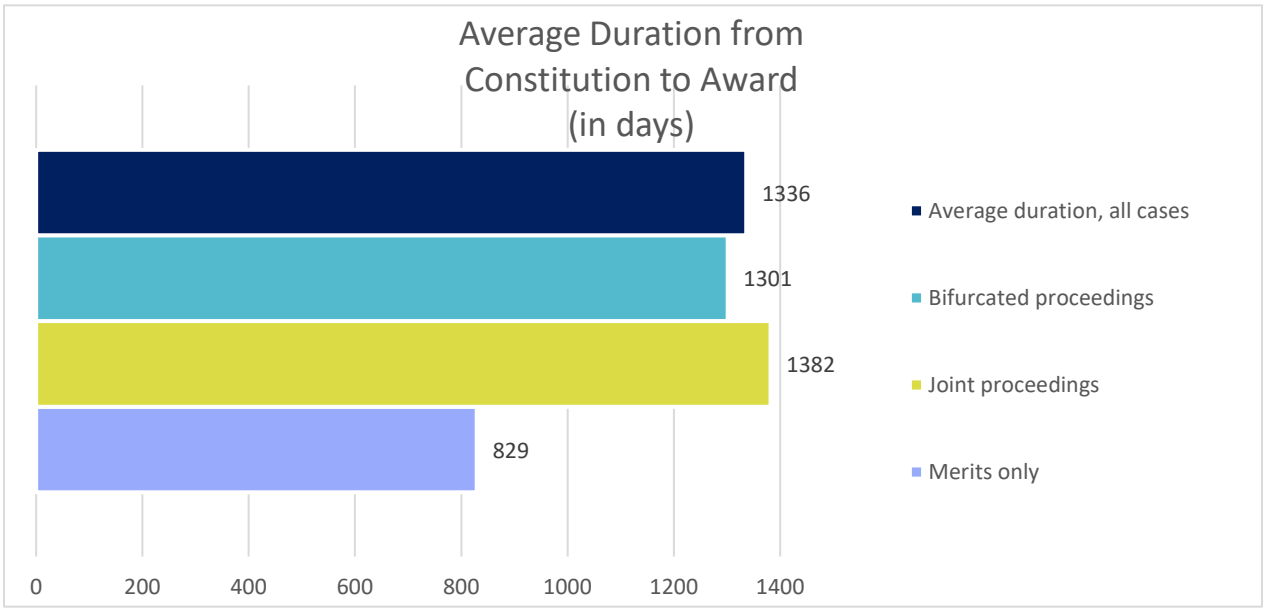
7. The Centre reviewed 63 cases which concluded with an Award in the period January 1, 2015 to June 30, 2017 to better understand the duration of cases (excluding any post-award remedy proceedings). The 63 cases were sorted into similar types of proceedings: (i) one proceeding was a proceeding on the 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.

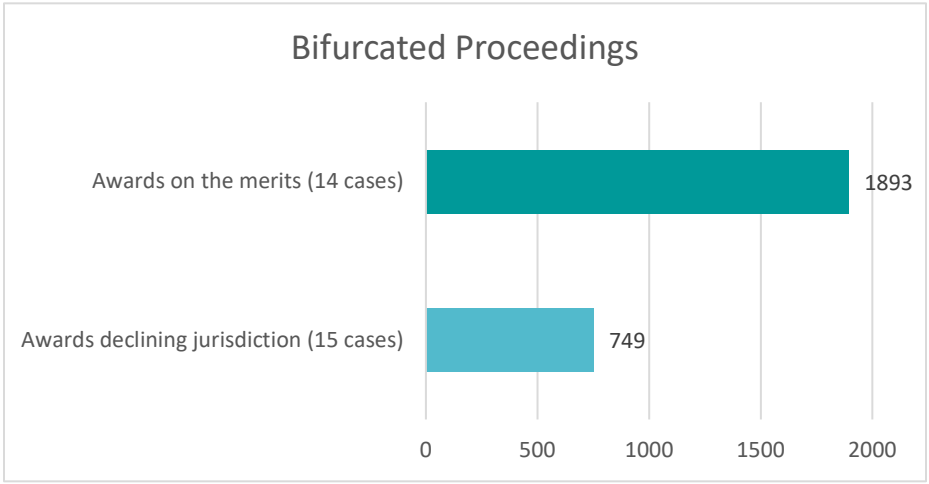
Time Line of Cases Reviewed and Overall Duration
(Cases concluding with Award: January 1, 2015 – June 30, 2017)



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).



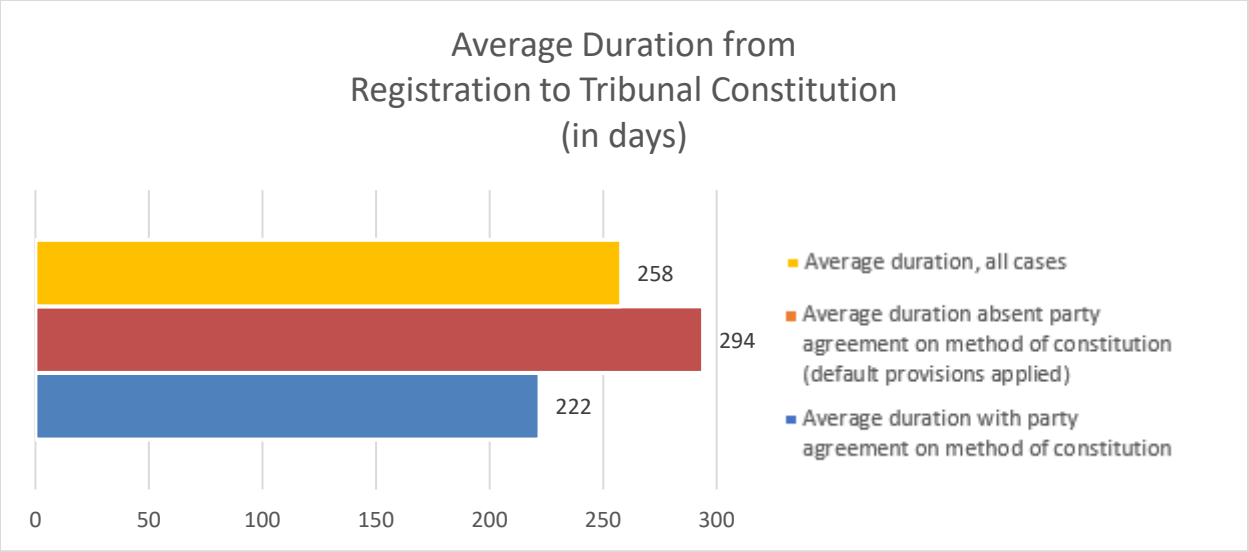
11. These numbers show significant discrepancies between a joint proceeding and a bifurcated proceeding that led to an Award declining jurisdiction, on the one hand, and an Award on the merits, on the other hand. Where jurisdiction was upheld in bifurcated proceedings and there was an Award on the merits, 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).



15. The data shows that it takes much longer to constitute Tribunals than the intended 60 days after the date of registration in the AR and (AF)AR (*see* current AR 2 and A(AF)R Art. 4), or the default of 90 days for invoking Art. 38 of the Convention (*see* current AR 4).

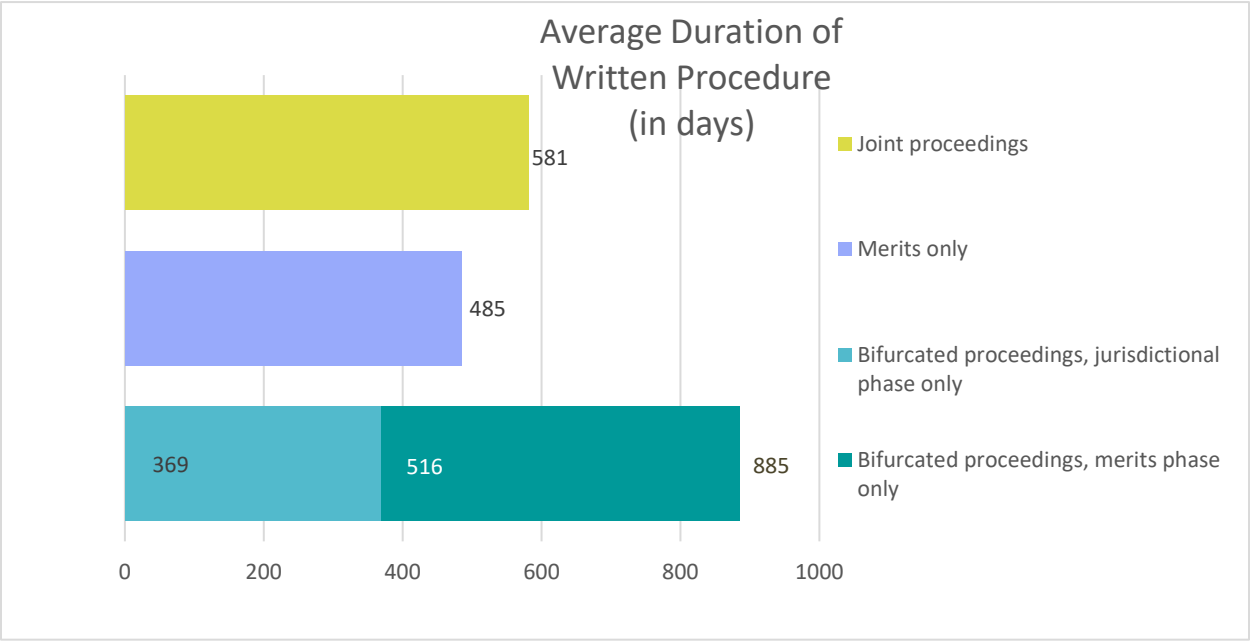
16. The reasons for delay include: (i) settlement negotiations between the parties; (ii) no initial participation by the respondent due to delay in organizing its defense; (iii) methods that provide for a long appointment process; (iv) no immediate request by a party for the Chairman of the Administrative Council to appoint a missing arbitrator after the expiry of the 90-day period provided in Art. 38 of the Convention; and (v) agreed methods that eventually lead to default.

17. The Secretariat has observed a trend for parties to agree on methods to constitute the Tribunal that are complex and sometimes lead to a lengthy appointment process.

B. LENGTH OF WRITTEN PROCESS

18. The written process is the time from the first session (to be held within 60 days after the date of registration in accordance with current AR 13(1)) until the final written pleading before the hearing.

19. In the cases reviewed, the average duration of the written process on jurisdiction for the bifurcated proceedings was 369 days (after deducting any days of suspension and excluding any proceedings on manifest lack of legal merit). Where the bifurcated proceedings continued on the merits and led to an Award on the merits, the written process on the merits took 516 days on average (326 days for first round submissions and 190 days for second round submissions). In proceedings dealing jointly with the merits and jurisdiction, the average duration of the written process was 581 days (308 days for first round submissions and 273 days for second round submissions). The written process in the merits only proceeding was 485 days long.



20. Almost 60% of the cases experienced some delay in the written schedule. The average length of the delay was 90 days.

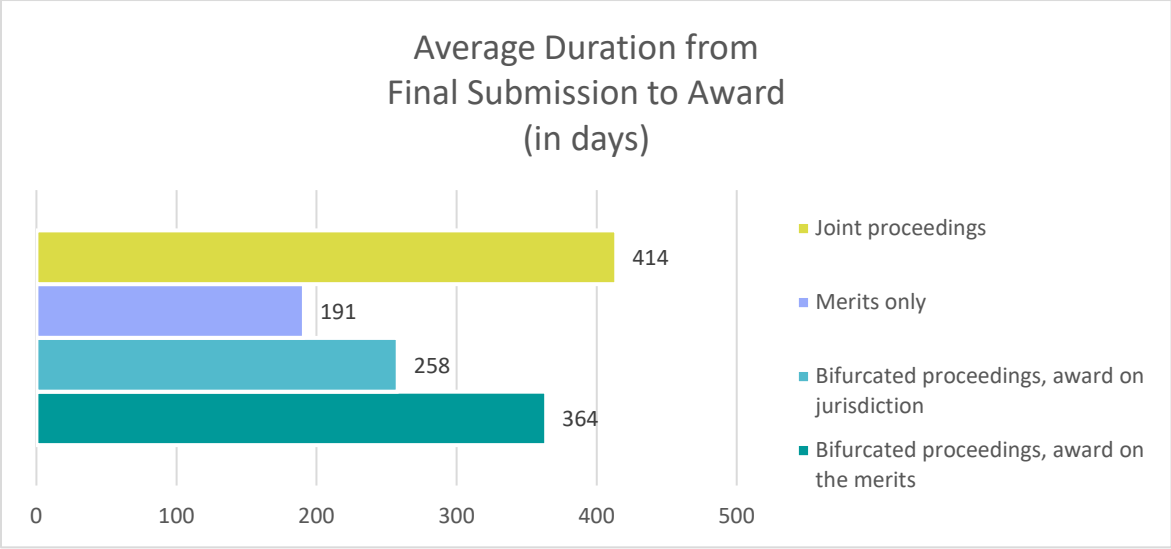
21. The reasons for the delay included: (i) suspension of the proceeding (due to agreement of the parties, a proposal to disqualify an arbitrator or resignation of an arbitrator); (ii) longer than expected preparation times; (iii) requests for production of documents that led to an extension of time limits (in 41 cases, either party or both parties requested documents from the other party); (iv) requests for bifurcation of the proceeding (in 28 cases it took on average 47 days to deal with any disagreement between the parties on whether preliminary objections should be heard as a preliminary question); and (v) consecutive written schedules on an objection that a claim manifestly lacks legal merit, followed by a bifurcated proceeding on jurisdiction, followed by a proceeding on the merits. Current AR 41(5) objections were raised in 10 cases: two led to a dismissal of all claims; four led to awards declining jurisdiction; four led to awards on the merits. The awards on the merits had an average duration of 1,556 days.

22. The delays in the written process sometimes also required postponement of the hearing on jurisdiction or the merits.

C. LENGTH OF TRIBUNAL DELIBERATIONS

23. The 63 cases were also reviewed for the average duration from the final written or oral submission to the Award. For bifurcated proceedings that led to an Award on jurisdiction after the jurisdictional phase, the average length was 258 days. For bifurcated proceedings where jurisdiction was upheld and led to an Award on the merits, the average was 364 days. The average combined deliberation length of bifurcated proceedings that first saw a decision on jurisdiction and then an Award on the merits was thus over 600 days. For joint proceedings on jurisdiction and the merits, the average was 414 days. The merits only proceeding took 191 days in the deliberation phase.

24. These numbers show that the deliberation phase typically took 30-34% of the total length of the process from Tribunal constitution to the Award.



III. PROPOSALS ADDRESSING TIME AND COST IN THE PROPOSED AR AND (AF)AR

25. The proposed Rule amendments in the AR and (AF)AR address many issues of time and cost while maintaining the ability of the parties to agree on time limits and other procedural matters. The rationale for each of the proposed amendments is explained in the WP and are summarized in the below table which compare them with the current rules.

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Filing of the Request for Arbitration	• Limited guidance on contents and scope in IR • Hard copy filing of Request	• IR contain exhaustive check-list and provide guidance on contents (proposed IR 2 and 3; (AF)AR 3 and 4) • Request for arbitration may be considered as the Claimant's memorial (proposed AR 13(2); (AF)AR 22(2)) • Electronic filing of Request (proposed IR 4; (AF)AR 5)
Registration	• Prompt registration by the Secretary-General (typically less than 18 days)	• No change
Method of Constituting the Tribunal	• Parties to agree on method within 60 days (current AR 2); if no agreement, either party may invoke default method under Conv. Art. 37(2)(b)	• Default method automatically triggered if no party agreement within 60 days from registration (proposed AR 22(2); (AF)AR 33(2)) • Parties may ask that the Secretary-General assist with appointments (proposed AR 24; (AF)AR 34)
Appointment of Arbitrators	• If Tribunal is not constituted within 90 days, either party may request the Chairman of the Administrative Council to appoint the missing arbitrators (Conv. Art. 38)	• No change (mandatory Convention provision)
Acceptance of Appointment	• Arbitrator must accept within 15 days after request for acceptance and must provide arbitrator declaration at the latest at the first session	• Arbitrator must both accept and provide detailed arbitrator declaration within 20 days after request for acceptance (proposed AR 26; (AF)AR 36)

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Constitution of the Tribunal	• Immediately when all arbitrators have accepted their appointments	• No change (proposed AR 28; (AF)AR 38)
First Session	• Within 60 days or such other time as the parties may agree • Default method of holding the session is typically in-person meeting • Overlap with preliminary procedural consultation in current AR 30 • Limited list of matters to be discussed	• No change • May be held by any means the Tribunal deems appropriate • Matters to be discussed include: o the number, type and format of pleadings (including Tribunal directions on length) o to what extent requests for document production should be allowed and the procedure for such requests o the full procedural calendar, with pleadings, hearings, the Tribunal's orders, decisions and the Award • Tribunal must issue Procedural Order No. 1 within 15 days after the first session or last submission on procedural matters (proposed AR 34; (AF)AR 44)
The Conduct of the Written and Oral Process - **General Duty to Act Expeditiously**	• No general duty	• Tribunal and the parties must conduct the proceeding in an expeditious and cost-effective manner (proposed AR 11(3); (AF)AR 20(3))
- **Time Limits for Tribunal**	• No specific time limits except to render the Award within 120 days after the closure of the proceeding (current AR 46)	• Best effort time limits for orders, decisions and the Award with requirement to advise if time limit won't be met and anticipated date of delivery (proposed AR 8(3)) • Time limits start from last written or oral submission: o Procedural Order No. 1: 15 days (proposed AR 34(5); (AF)AR 44(5)) o Decision on disqualification: 30 days (proposed AR 30(3); (AF)AR 40(2)) o Decision on an objection that a claim is manifestly without legal merit: 60 days (proposed AR 35(2)(d); (AF)AR 45(2)(d))

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
		o Decision on a preliminary objection: 180 days (proposed AR 36(2)(d); (AF)AR 46(7)) o Decision on bifurcation: 30 (proposed AR 37(2)(d); (AF)AR 47(2)(d)) o Decision on provisional measures: 30 days (proposed AR 50(2)(d); (AF)AR 59(2)(d)) o Decision on security for costs: 30 days (proposed AR 51(2)(d); (AF)AR 60(2)(d)) o Award: 240 days (proposed AR 59(1)(c); (AF)AR 69(1)(c)) o Supplementary decision and rectification: 60 days (proposed AR 62(6); (AF)AR 72(9)) o Decision on stay of enforcement: 30 days (proposed AR 62(3)(d)) o Decision on annulment, interpretation or revision: 120 days (proposed AR 66(5))
- **Time Limits for Filing Submissions by the Parties**	• No time limit for proposal to disqualify an arbitrator • No time limits for submissions on proposal for disqualification • Objection that a claim manifestly lacks legal merit: within 30 days after the constitution of the Tribunal and before first session (current AR 41(5)) • Preliminary objections: as soon as possible, no later than the expiration of the time limit fixed for the filing of the	• Proposal to disqualify an arbitrator must be filed within 20 days after the date on which the party proposing the disqualification first knew or first should have known of the facts leading to the proposal (proposed AR 29(2); (AF)AR 39(2)) • Response to proposal for disqualification must be filed within 7 days of the proposal; arbitrator may file a statement within 5 days after the response; parties may file final observations within 7 days after the arbitrator's statement; decision to be issues within 30 days after the final observations (proposed AR 29(2), 30(3); (AF)AR 39(2), 40(2)) • Objection that a claim manifestly lacks legal merit: can be filed before constitution of the Tribunal, must be filed within 30 days after constitution (proposed AR 35(2)(a); (AF)AR 45(2)(a)) • Preliminary objections: as soon as possible, no later than the date to file the counter-memorial (proposed AR 36(2); (AF)AR 46(3))

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
	counter-memorial (current AR 41(1))	
	• No time limit for request for bifurcation	• Request for bifurcation: within 30 days after the filing of the memorial on the merits (if it relates to a preliminary objection) (proposed AR 37(2)(a); (AF)AR 47(2)(a))
	• Counter-claim no later than memorial (current AR 40(2)) • Incidental or additional claim no later than the reply (current AR 40(2))	• Counter-claim no later than the date to file the counter-memorial • Incidental or additional claim no later than the date to file the reply (proposed AR 52(2); (AF)AR 61(2))
	• Request for provisional measures at any time	• Request for provisional measures at any time, request for security for costs also available under new rule (proposed AR 50, 51; (AF)AR 59, 60)
	• Request for supplementary decision and rectification within 45 days after the award (Conv. Art. 49) • Application for revision within 90 days after discovery of new fact that decisively affects the Award, with cap of three years after the Award (Conv. Art. 51) • Application for annulment within 120 days after the Award (with some exceptions) (Conv. Art. 52)	• Time limits for post-award remedies remain the same (Convention mandatory provisions); reduced to 30 days in (AF)AR proceedings for rectification, supplementary decision and interpretation (proposed (AF)AR 72(2))
	• Other time limits to be agreed by the parties or decided by Tribunal	• Other time limits to be agreed by the parties or decided by the Tribunal, taking into account the general duty of expeditiousness (proposed AR 11(3); (AF)AR 20(3)) • Expedited Arbitration offers a fixed schedule for submissions (proposed AR Chapter XII; (AF)AR Chapter XII)
- **Extension of Time Limits**	• Tribunal may extend any time limit that it has fixed (current AR 26(2))	• Tribunal may extend a time limit upon reasoned application made prior to the expiry of the time limit (proposed AR 9(2); (AF)AR 17(2)) • Parties may extend by agreement, if it is not a mandatory time limit under the

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
	• No rule on extension of time limits specified by the Convention or AR	Convention (proposed AR 8(1)); no limitation on party agreement under (AF)AR (proposed AR 16(1))
- **Filing and Routing of Communications**	• Default is hard copy filing with a minimum of 5 copies • Certification of copies of supporting documents and translations needed (current AFR 30) • All communications typically go through the Secretary of the Tribunal	• Default is electronic filing • No certification of documents or translations needed • Extracts of documents may be filed unless otherwise ordered by the Tribunal (proposed AR 3; (AF)AR 11) • The parties may communicate directly with the Tribunal if requested to do so (proposed AR 4; (AF)AR 12)
- **Procedural Languages, Translations and Interpretation**	• Parties can choose up to two languages; if they do not agree on language, they may each choose an official language of the Centre	• No change regarding the number of languages and default languages • If two procedural languages, a party may file documents in either language unless the Tribunal requires both languages • Parties may agree that Tribunal issue all orders and decisions in only one procedural language • Translation can be limited to the relevant part of a supporting document (proposed AR 5; (AF)AR 13)
- **Case Management Conference**	• Pre-hearing conference can be held to identify uncontested facts and consider the issues in dispute (current AR 21)	• To expedite the proceeding, the Tribunal can address any other procedural or substantive issues at any time (proposed AR 14(c); (AF)AR 23(c))
- **Hearings**	• Hearings are held in-person • Witnesses and experts are examined before the Tribunal (current AR 35)	• President of the Tribunal consults with members and parties about the method of holding hearings (proposed AR 15(2); (AF)AR 25(2)) • Witnesses and experts can only testify if they have filed written statements or reports; if they are not called to testify, their written evidence is evaluated by the Tribunal (proposed AR 41; (AF)AR 51)
- **Deliberations**	• No indication when the Tribunal should deliberate (current AR 15)	• Tribunal must deliberate on any matter immediately after the last submission on the matter (proposed AR 16(4); (AF)AR 26(4))

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Costs	• Parties share expenses of arbitration unless agreed or directed otherwise and subject to the Tribunal's final decision on costs (current AFR 14, AR 28) • If there is default to pay advances to defray costs and neither party pays, the proceeding is suspended after 15 days and may be discontinued after 6 months • Tribunal has discretion to allocate the costs of the proceeding (Conv. Art. 61(2))	• No change, except to underscore that Tribunal may make interim decisions on costs at any time (proposed AR 19(5); AFR 14(5); (AF)AR 29(5); (AF)AFR 7(5)) • In case of default, proceeding is suspended after 15 days but may be discontinued after 90 days (proposed AFR 14(5)(e); AR 58; (AF)AFR 7(5)(e); (AF)AR 67) • No change (Convention mandatory provision), but guidance is provided on the circumstances to be considered, including success in the case, party conduct, and the extent to which the parties acted in an expeditious and cost-effective manner (proposed AR 19(4)(b); (AF)AR 29(4)(b))
Suspension and Discontinuance	• No rule on suspension • If the parties fail to take any step in the proceeding for 6 months, it is discontinued (current AR 45) • Proceeding can be discontinued for failure to pay 6 months after it is suspended for non-payment	• Proceeding may be suspended by agreement of the parties, on request for a party or on the Tribunal's own initiative; period must be specified (proposed AR 54; (AF)AR 63) • If parties fail to take any step in the proceeding for 150 days, they are notified and have 30 more days to take step before proceeding is discontinued (proposed AR 57; (AF)AR 66) • Proceeding can be discontinued for failure to pay 90 days after it is suspended for non-payment (proposed AR 58, AFR 14(5)(d); (AF)AR 7(5)(e); (AF)AR 67)
Award	• Award must be rendered within 120 days after the closure of the proceeding (closure is discretionary to the Tribunal)	• Award must be rendered within: 60 days if it is addressing an objection that a claim is manifestly without legal merit; 180 days if it is addressing a preliminary objection; and 240 days for all other matters (proposed AR 59; (AF)AR 69)

STEP IN PROCEEDING	CURRENT IR AND AR	PROPOSED IR, AR AND (AF)AR AMENDMENT
Post-Award Remedies	• Request for supplementary decision and rectification within 45 days after the award (Conv. Art. 49)	• No change for time limits in AR (Convention mandatory provisions); change in (AF)AR to 30 days instead of 45 days for filing a request for supplementary decision, rectification and interpretation
	• Application for revision within 90 days after discovery of new fact that decisively affects the Award, with cap of three years after the Award (Conv. Art. 51) • Application for annulment within 120 days after the Award (with some exceptions) (Conv. Art. 52)	• Procedure is streamlined for interpretation, revision and annulment in AR: default is one round of pleadings; hearing must be requested (proposed AR 66)
	• No time limits for decisions	• Decision on interpretation, revision or annulment must be issued within 120 days after the last submission in AR (proposed AR 66(5))

26. As shown above, the proposals for amendment retain party discretion in Tribunal constitution, but make shorter default timelines applicable unless the parties expressly choose otherwise.

27. The proposals for written submissions include shorter, mandatory, time frames which should reduce the overall time of proceedings.

28. The AR and (AF)AR address the length of the deliberation process, including directions to Tribunals that they must deliberate promptly after the last submission on a matter for decision (proposed AR 16(4); (AF)AR 26(4)) and specify time limits for orders, decisions and the Award. While these are "best effort" obligations under proposed AR 8(3) and (AF)AR 16(3), it is expected that Tribunals will meet the deadlines unless there are special circumstances notified to the parties before the expiry of the relevant time limit. The expectations in this regard should be discussed at the first session (proposed AR 34(4)(i); (AF)AR 44(4)(j)).

29. In addition, the Tribunal and the parties are invited to discuss efficiency at the first session pursuant to proposed AR 34(4). This includes establishing a procedural schedule which takes into account the general duty of parties and Tribunals to conduct the proceeding in an expeditions and cost-effective manner (proposed AR 34 and 11; (AF)AR 44 and 20). It also means that the Tribunal may provide directions on the scope and length of written submissions in determining the number, type and format of written submissions, and on the procedure for requests for production of documents (proposed AR 34(4)(f) and (g); (AF)AR 44(4)(f) and (i)). Limiting the size of submissions may be necessary if Tribunals are to meet the time limits for issuing orders, decisions and the Award. The AR therefore

provide Tribunals with enhanced discretion to guide the parties on efficiency-related matters.

30. The proposed AR provide for case management conferences which the Tribunal can use to address efficiency (proposed AR 14; (AF)AR 23). The proposed Rule is meant to empower parties and Tribunals to actively manage the case. For example, a Tribunal could convene a case management conference after the first-round submissions to guide the parties with regard to the scope, subject matters and questions to be covered in the parties' second round submissions. This will help the parties to focus their submissions and assist the Tribunal in the deliberative process.

31. The AR allow Tribunals to be more restrictive in approving procedural requests. For example, requests for extensions of time limits fixed by the Tribunal may only be extended upon reasoned application made prior to the expiry of the relevant time limit (proposed AR 9(2); (AF)AR 17(2)). If no extension is approved and a party's procedural step is late, the step is disregarded unless there are special circumstances (proposed AR 8(2) and 9(3); (AF)AR 16(2) and 17(3)). In addition, a party must seek leave before filing any unscheduled submission or supporting document, and the Tribunal may only grant such application if the submission or supporting document is necessary in view of all relevant circumstances (proposed AR 13(4); (AF)AR 22(4)).

32. Thus, to enable Tribunals to succeed in meeting new time limits, Tribunals are given tools in the AR and (AF)AR to provide guidance and directions to the parties concerning the conduct of the proceeding.

33. Finally, the AR and (AF)AR have been carefully drafted to address efficiency while maintaining the parties' due process rights and equality of treatment. These are equally important principles.

IV. EXPEDITED ARBITRATION

34. In view of the comments received from Member States and the public concerning case duration and cost, the proposal also includes an expedited arbitration option.

A. FAST-TRACK ARBITRATION MODELS

35. "Fast-track procedures," are offered by many commercial arbitration institutions (*see e.g.*, Appendix VI of the ICC Expedited Procedure Rules (2017); Article 41 of the HKIAC Rules (2013), Rule 5 of the SIAC Rules (2016), and the SCC Rules for Expedited Arbitrations (2017)). They can either be triggered automatically if a claim is under a certain monetary threshold or by way of opt-in (the parties must expressly agree on their application) or opt-out mechanisms (the expedited rules apply unless the parties expressly agree not to apply them). For example, Art. 30(2) on Expedited Procedure of the ICC Rules (2017) provides that:

> The Expedited Procedure Rules (…) shall apply if a) the amount in dispute does not exceed the limit set out in Article 1(2) (…); or b) the parties so agree.

36. A typical fast-track arbitration is conducted by a sole arbitrator nominated by the parties or appointed by the arbitration institution, with an expedited schedule for pleadings, the option to deal with the case on the basis of the written record without a hearing, and leading to an Award within 6 months. The following table compares the features of expedited arbitration under the rules of the SCC, SIAC, ICDR, ICC and HKIAC:

	SCC	SIAC	ICDR	ICC	HKIAC
Arbitrators	1	1, unless SIAC determines otherwise	1	1	1, unless agreement for 3
Monetary threshold	No	Yes; S$6 million	Yes; US$250,000	Yes; US$2 million	Yes; HK$5 million
Application	Opt-in	Party request/Opt-in	Opt-out	Opt-out	Party request/Opt-in
Option to switch/exempt rules	SCC may invite parties to change rules	Upon party request	Silent	Yes	Silent
Case mgmt. conference / P.O.	Conference 7 days from case referral	Silent	P.O. within 14 days from appointment	Conference within 15 days from case referral	Silent
Submissions	RfA and Answer + 1 p/p; Filings not exceed 15 working days	Silent	Submissions due within 60 days of P.O.	Silent	RfA and Answer + 1 p/p
Hearing	Yes, if appropriate	Yes, if appropriate	Yes, if appropriate	Yes, if appropriate	Yes, if appropriate
Award	3 months from case referral	6 months from constitution	30 days from final hearing or receipt final written submissions	6 months from case mgmt. conference	6 months from case referral
Award (reasons)	Reasoned award upon party request	Summary reasons	Silent	Reasoned	Summary reasons

37. Some arbitration institutions that offer fast-track procedures have an *ad valorem* system, meaning that the fees chargeable for the administration of the case are based on the amount of the claim. They require the claimant and respondent to quantify the value of their respective claims and counterclaims in the request for arbitration and in the answer (*see e.g.*, Art. 4(3)(d) and 5(5)(b) ICC; Rule 3(1)(e) and 4(1)(b) SIAC; Art. 6(iii) and 9(1)(iii) SCC; Art. 4(3)(e) HKIAC). This also determines whether the expedited procedure is applicable. ICSID does not require claimants to indicate the amount of the claim, although this is recommended in proposed IR 3(a). It charges an annual flat fee once a case is registered and such fee is not linked to the amount in dispute.

38. Investment arbitrations can have the same level of complexity regardless of the amount in dispute. This is due to the particular characteristics of investment arbitration. As shown above, many cases involve jurisdictional and admissibility objections relating to interpretation of international law instruments. These matters are often heard separately from the merits. As a result, the procedural calendar of cases may look very different in each case and it is difficult to draft a model schedule that fits all scenarios. As a result, mandatory fast-track procedures are not apt for all ICSID cases.

39. At the same time, it is important to offer expedited arbitration for the parties' consideration where the parties agree such procedures are appropriate. The WP has therefore elected an opt-in model by which the parties can consent to apply Chapter XII of the AR and (AF)AR in their arbitration agreement or after the dispute arises, within 20 days after the date of registration of the Request for arbitration.

B. ICSID'S OPT-IN MODEL

40. The proposed EA are incorporated as a Chapter in the AR and (AF)AR, but would not apply automatically. Parties must expressly agree in writing to the application of Chapter XII of the AR and (AF)AR. Such agreement is in addition to an agreement to arbitrate under the ICSID Convention or the Additional Facility.

41. An EA arbitration clause in a contract could be formulated as follows:

> The [Government]/[name of constituent subdivision or agency] of name of Contracting State and name of investor hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "Centre") any dispute arising out of this agreement for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter the "Convention"). The Parties agree to apply Chapter XII of the [2019] Arbitration Rules of the Centre (Expedited Arbitration) to the arbitration proceeding.

42. The EA may also be suitable for certain disputes under investment laws or treaties. For example, the CETA contains provisions applicable to SMEs, *e.g.* the possibility of mediation, of a sole arbitrator when both parties agree, and for the parties to adopt ceilings for costs claims brought by SMEs (*see* Arts. 8.20, 8.19.3 and 8.23.5 of the CETA). The EA could complement this type of provisions by offering expedited arbitration.

43. Thus, the EA could be a good alternative for parties who want a speedy and lower cost process under arbitration rules that take into account the special characteristics of investment disputes.

C. FEATURES OF ICSID EXPEDITED ARBITRATION

44. The features of the EA are explained in detail in Chapter XII – Expedited Arbitration. In essence, the expedited procedures allow an arbitration to conclude within 470-530 days after the date of registration of the Request for arbitration. They provide for a Sole Arbitrator or three-member Tribunal to be appointed on an expedited basis, and for all matters to be heard in a single proceeding before the Tribunal without any bifurcation. The Arbitration Rules in Chapters I – XI apply to an expedited arbitration, except as expressly modified or excluded.

45. The EA focus on reducing the length of three main phases of the arbitration with long duration: (i) the establishment of the Tribunal; (ii) written procedures, especially interlocutory applications; and (iii) rendering the Award. These areas are also addressed in Chapters I-XI of the AR. However, the EA go a step further in that they offer a simple and expedited process, with clear expectations on the time it takes for each step from the registration of the Request for arbitration, to rendering the Award and any post-Award remedies.

46. The time limits in the EA endeavor to strike a balance between an expedited procedure under commercial arbitration rules and a realistic schedule for investment disputes. The time limits are on a slower track than in commercial arbitration but would significantly reduce the usual length of ISDS cases.

47. As mentioned above, the EA merge all matters before the Tribunal in one procedural schedule and do not allow for bifurcation. However, this does not mean that an EA would be slower than a bifurcated proceeding. As shown in Section II, in the current system, even a bifurcated proceeding dealing with jurisdiction as a preliminary matter typically has a substantially slower track. A review of the bifurcated proceedings showed that these had an average of 369 days for the written process (first session to the last written submission) and 258 days from the hearing for the Tribunal to decide on the objection to jurisdiction. The average length from the constitution of the Tribunal to an Award declining jurisdiction was 750 days. In an EA, the written and oral process are completed within 300 days after Tribunal constitution, and the Award is rendered within 120 days after the hearing, reducing the time by almost 340 days compared to a bifurcated proceeding that led to an Award declining jurisdiction.

48. Electing an EA necessarily means parties and counsel have to make certain compromises. First, parties and counsel must be prepared to limit the length of submissions and the number of separate procedural applications (*e.g.* requests for provisional measures and production of documents). Practice has shown that many arbitrations are delayed due to the high number of procedural applications made by the parties during the proceeding. By definition, an arbitration cannot be expedited if there are numerous disputes as to refusals to produce documents, special procedures, and the like. As a result, the approach of counsel will be vital to making the EA effective.

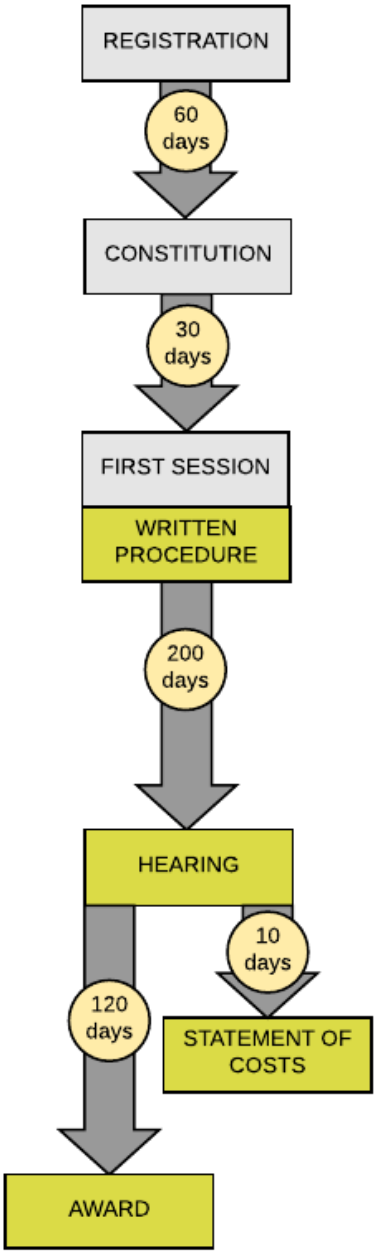
49. Second, parties must be prepared to merge all matters before the Tribunal in one procedural schedule. There is no option to bifurcate proceedings or have parallel schedules. If a party

wishes to raise objections to jurisdiction or to an ancillary claim, these would need to be included in that party's counter-memorial or reply (*see* proposed AR 36) and heard jointly with the other issues in dispute at the hearing.

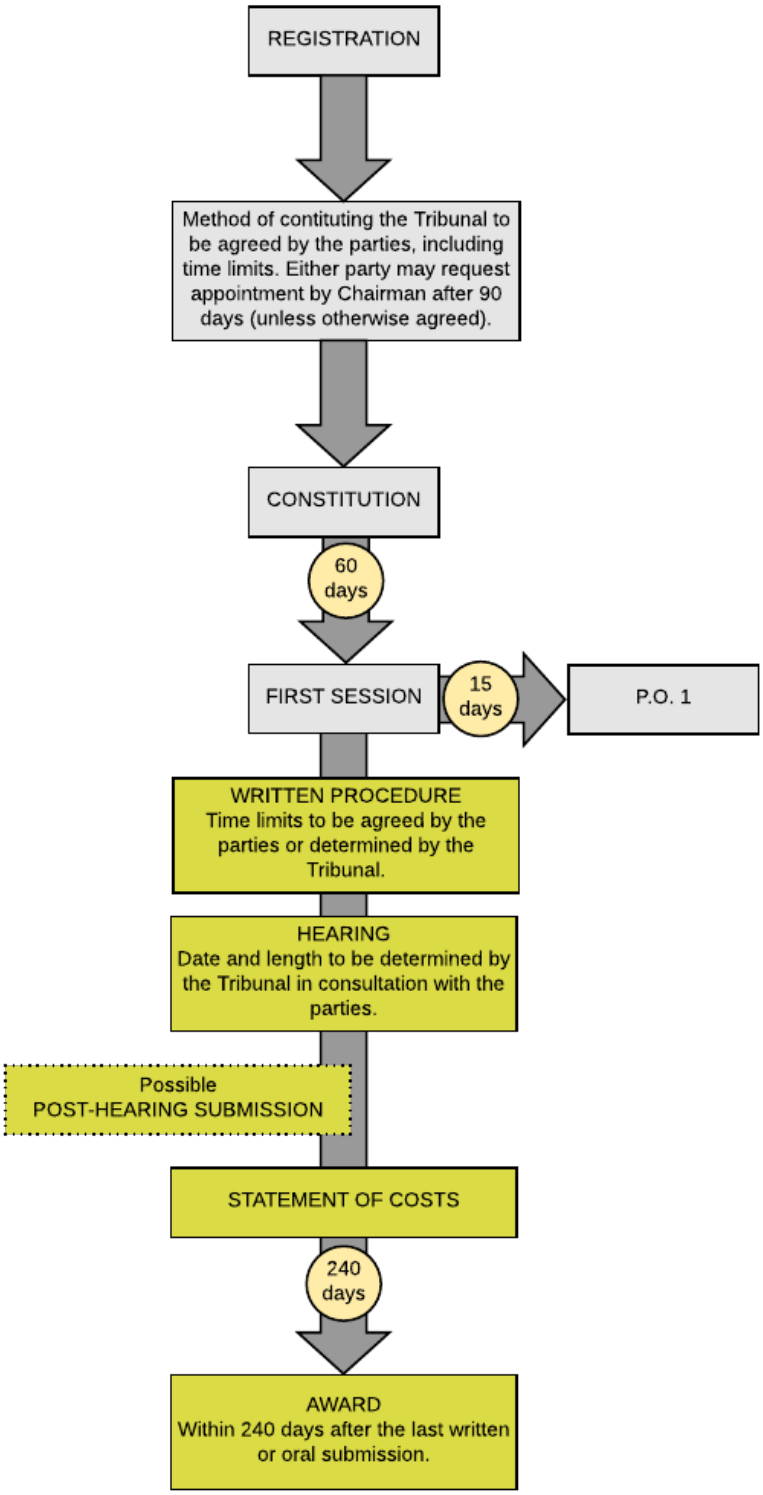
50. Third, the Tribunal must be available to conduct the proceeding under the EA. An expedited proceeding means the Tribunal must devote significant time from the moment it is constituted until the Award is rendered, *i.e.* during a period of approximately 450 days. Candidates for appointment should therefore be prepared to devote the time required to meet the shorter deadlines of the EA.

51. The table below shows the basic time line of an EA compared with an arbitration proceeding under the proposed AR and (AF)AR. It shows an ambitious but feasible procedural schedule, which concludes with an Award within 470-530 days after the registration of the Request for arbitration.

Timeline under EA



Timeline under Proposed AR



V. BEST PRACTICE NOTES AND GUIDELINES

52. The Centre also received a number of suggestions to prepare best practice notes and guidelines to address time and cost efficiency matters. The Centre has previously issued Practice Notes for Respondents in ICSID Arbitration which, among other things, provided suggestions on dispute prevention and pre-arbitration planning. The Centre also offers template documents for case management purposes, *e.g.* a template Procedural Order No. 1 with the matters addressed at the first session.

53. The proposed practice notes would be complementary to the Rule amendments and similar to those issued by ICSID in the past. They would concern different stages of the proceeding and particular matters where the Centre can contribute its experience in administering cases.

54. The practice notes will include case management techniques to reduce time and cost, including:

- how to manage electronic filing and organize submissions, *e.g.* how evidence should be produced (how exhibits should be numbered, whether or not publicly available legal authorities should be annexed, how to deal with electronic documents and meta data, etc.);
- how to handle bi-lingual cases in the most cost-effective manner (*e.g.* concerning translation and interpretation);
- templates of possible matters to be discussed in case management conferences;
- protocol regarding the role of secretaries and assistants to Tribunals;
- how to best manage documents for publication, and other transparency matters;
- consolidation and coordination of cases;
- how to conduct efficient and cost-effective hearings;
- how to manage the case finances; and
- guidance for the deliberations phase and for the preparation of the Award.

55. Some of the practice notes will focus on parties and counsel, and others will focus on arbitrators. This reflects the proposed amendments in the AR and EA, which expect that all involved will contribute to the efficient conduct of the proceedings.