VIAC Vienna International Arbitral Centre

EXPLANATORY NOTES

Investment Rules

VIENNA RULES OF INVESTMENT ARBITRATION AND MEDIATION 2021

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COMMENCEMENT OF THE ARBITRATION

PREFACE

In 2021, VIAC for the first time adopted a set of investment arbitration rules, the VIAC Investment Arbitration Rules 2021 (**"Vienna Investment Rules"**). The Vienna Investment Rules entered into force on 1 July 2021 and apply by agreement of the parties to arbitrations initiated after 1 July 2021. The Vienna Investment Rules are supplemented by the VIAC Investment Mediation Rules, which may be applied independently or in connection with arbitration proceedings.

The Vienna Investment Rules are a stand-alone set of arbitral rules specifically tailored to the resolution of investment disputes. The rules are designed for investment arbitrations involving sovereign parties (States, political subdivisions, State agencies, State-owned enterprises, and international organizations). However, there are no objective requirements as to the nature of the dispute or restrictions as to the parties. The parties are free to qualify a dispute as an investment dispute that they wish to settle under the Vienna Investment Arbitration Rules.

The Vienna Investment Rules are based on and retain the basic structure of the Vienna Rules for commercial arbitration but contain several innovations and modifications that accommodate the differences between commercial and investment arbitration. Important modifications of and additions to the standard Vienna Rules include:

- Arbitration agreement: consent to arbitrate may be expressed in any type of instrument, including a contract, treaty, statute, or other instrument, and may be accepted by the other party by any means, including by simply commencing arbitration under the Vienna Investment Rules.

- Composition of the arbitral tribunal: by default, an arbitral tribunal constituted under the Vienna Investment Rules consists of three arbitrators, or, if the amount in dispute does not exceed EUR 10 million, a sole arbitrator. The parties are free to choose who to nominate, but no arbitrator may have the same nationality of either of the parties, unless the parties agree otherwise.

- Constitution of the arbitral tribunal: the VIAC Board, not the Secretary General, is competent to confirm nominated arbitrators. The Board also appoints the arbitrator(s) if a party fails to nominate an arbitrator, or the co-arbitrators fail to nominate the chairperson within the time periods set forth in the Vienna Investment Arbitration Rules. In addition, each party may request that the Board appoint the chairperson directly.

- Place of arbitration: absent party agreement, the arbitral tribunal determines the place of arbitration.

- Third-party-funding: in addition to each party being required to disclose the existence of third-party funding and the identity of the funder, the tribunal may order disclosure of specific details of the third-party funding arrangement if it deems such disclosure necessary.

- Early dismissal: a party may request early dismissal of a claim, counterclaim or defense on the ground that the claim, counterclaim or defense is manifestly outside the jurisdiction of the arbitral tribunal, manifestly inadmissible, or manifestly without legal merit.

- Non-disputing party submissions: third parties may request to make written submissions on legal or factual issues within the scope of the dispute submitted to arbitration. States and international organizations that are parties to the treaty providing consent to arbitration but that are not parties to the arbitration have a right to make written submissions concerning questions of treaty interpretation.

- Publication of information: VIAC may publish in the public interest certain limited information about the arbitration on its website.

The Vienna Investment Rules are a cost-effective alternative to the rules traditionally used in investment arbitrations, also suited for smaller investment claims. They can further be applied in arbitrations involving States that are not parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention), such

as Poland, Liechtenstein, and Kyrgyzstan, and their citizens. The Vienna Investment Rules aim to address two concerns frequently raised by users of investment arbitration, namely duration and cost, *inter alia*, by streamlining the process of the constitution of the arbitral tribunal and imposing a six-month time limit for the issuance of awards.

The Vienna Investment Rules were prepared by a working group which was led by *Claudia Annacker* (Dechert) and consisted of members of VIAC's Board (in alphabetical order): *Dietmar Prager* (Debevoise), *Lucia Raimanova* (Allen&Overy), *Franz Schwarz* (WilmerHale), and *Nathalie Voser* (rothorn legal).

SCOPE OF APPLICATION OF THE VIAC RULES OF INVESTMENT ARBITRATION

Article 1

(1) An agreement to submit a dispute to arbitration in accordance with the VIAC Rules of Investment Arbitration (hereinafter "Vienna Investment Arbitration Rules") may be expressed in a contract, treaty, statute or other instrument, or through an offer by a party in a contract, treaty, statute or other instrument which is subsequently accepted by the other party by any means, including by the other party's commencement of arbitration.

(2) Where the parties have agreed to submit their dispute to arbitration in accordance with the Vienna Investment Arbitration Rules, the parties shall be deemed to have agreed that the arbitration shall be administered by VIAC.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 The VIAC Rules of Investment Arbitration Rules are based on the standard VIAC Rules, but contain a number of special provisions and modifications that address issues specific to investment arbitration.

2 Article 1 para 1 Vienna Investment Rules defines the scope of application of the Vienna Investment Rules and Article 1 para 2 provides for VIAC administration unless the parties agree otherwise.

3 Article 1 Vienna Rules for commercial disputes has been amended in 2021 to explicitly authorize VIAC to administer investment arbitrations (which VIAC was already authorized to do under Article 1 para 1.3 Vienna Rules 2018 "*if the parties have agreed otherwise upon the competence of VIAC*"and Annex 4 to the Vienna Rules 2018).

VIAC may also act as "appointing authority" (Annex 4) or "administering authority" (Annex 5) in *ad hoc* proceedings (cf. VIAC Explanatory Notes Vienna Investment Rules (2022) Annexes 4 and 5) if the parties so agree.

In addition, VIAC administers other ADR proceedings on the basis of its Rules of Investment Mediation (cf. VIAC Explanatory Notes Vienna Investment Mediation Rules (2022) Art 1). 4

2. Scope of application (para 1)

The preamble of the Vienna Investment Rules clarifies in recital 2 that the Vienna Investment Rules are designed to apply by agreement of the parties to the arbitration of investment disputes involving a State, a State-controlled entity or an intergovernmental organization. However, unlike in ICSID arbitration, there are no objective requirements as to the parties, or the nature of the dispute or investments involved. The parties are entirely free to decide whether a dispute is an investment dispute that they wish to resolve under the Vienna Investment Rules, reducing the time and resources necessary to resolve disputes over the jurisdictional requirements under the ICSID Convention. 5

Pursuant to Article 1 para 1, an agreement to arbitrate under the Vienna Investment Rules may be contained in a contract, treaty, law or other instrument. Article 1 para 1 further clarifies that an arbitration agreement can also be concluded by an offer made by one party, typically a State in an investment treaty, and acceptance of that offer by the other party, including by initiating arbitration. 6

In practice, the parties to an investment dispute typically consent to arbitration in one of three ways: 7

- through a contractual arbitration clause;
- an investor-state arbitration clause in a treaty that contains an offer to arbitrate by each contracting state to the nationals of the other contracting state(s), which any qualifying investor may accept and thereby perfect an arbitration agreement; or
- by way of a provision in the domestic legislation that contains an offer to arbitrate by the host State to (certain categories of) foreign investors, which any qualifying investor may accept and thereby perfect an arbitration agreement.

8 Consent to arbitrate under the Vienna Investment Rules may be expressed before or after a dispute has arisen.

9 As preamble to the Vienna Investment Rules clarifies, the parties to a dispute may also agree to submit a dispute to arbitration under the Vienna Investment Rules where they *"have previously consented, or a party has previously offered to consent, to arbitration in accordance with rules of arbitration other than the Vienna Investment Arbitration Rules."*

3. Administration by VIAC (para 2)

10 In practice, parties sometimes specify the applicable arbitration rules but not the administering institution. Pursuant to Article 1 para 2, parties who agree to submit their dispute to arbitration under the Vienna Investment Rules without specifying an arbitral institution as administering authority are deemed to have agreed that VIAC shall administer the proceedings.

11 The parties are free however to agree on VIAC administration of arbitrations governed by rules other than the Vienna Investment Rules, e.g., the UNCITRAL Arbitration Rules.

REFUSAL TO ADMINISTER PROCEEDINGS UNDER THE VIENNA INVESTMENT ARBTIRATION RULES

Article 2

The Board may refuse to administer proceedings if the arbitration agreement deviates fundamentally from and is incompatible with the Vienna Investment Arbitration Rules.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 While an agreement to arbitrate under the Vienna Investment Rules includes an agreement to administration by VIAC, unless the parties agree otherwise (Article 1 para 2), the VIAC Board may refuse to administer proceedings if the arbitration agreement deviates fundamentally from and is incompatible with the Vienna Investment Rules (Article 2).

2 This provision mirrors Article 1 para 3 of the Vienna Rules for commercial disputes (Article 1 para 3), but, for systematic reasons, was incorporated in a separate Article in the Vienna Investment Rules. For commentary on this provision, cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mn 24 et seq.

2. The procedure

3 The grounds on which the administration of an arbitration case may be refused are very limited since only a deviation from the Vienna Investment Rules that is both fundamental and incompatible with the Vienna Investment Rules allows the VIAC Board to refuse to administer proceedings.

4 Before it decides on whether to refuse to administer a case, VIAC will provide the respondent with the statement of claim and request comments. The VIAC Board takes a decision under Article 2 only after each party has been heard

or after having given the parties an opportunity to rectify their clause.

APPLICABLE VERSION TO THE VIENNA INVESTMENT ARBITRATION RULES

Article 3

Unless the parties have agreed otherwise, the Vienna Investment Arbitration Rules shall apply in the version in effect at the time of the commencement of the arbitration (Article 7 paragraph 1) if the parties, before or after the dispute has arisen, have agreed to submit their dispute to the Vienna Investment Arbitration Rules.

EXPLANATORY NOTE

1 This provision mirrors Article 1 para 2 of the Vienna Rules for commercial disputes, but, for systematic reasons, was incorporated in a separate article in the Vienna Investment Rules. For commentary on the provision (cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mn 21 et seqq).

2 In the course of the revision of the VIAC rules in 2021, this provision was slightly amended in the Vienna Rules, which is reflected in this Art 3 (cf. *Explanatory Notes Vienna Rules* (2022) Art 1). The provision now expressly clarifies that the parties may agree to the application of a different version, which was alreadsible under Art 1 VR.

WAIVER OF IMMUNITY

Article 4

By agreeing to submit a dispute to arbitration pursuant to the Vienna Investment Arbitration Rules, a party shall be deemed to have waived any right of immunity from jurisdiction in respect of proceedings relating to the arbitration to which such party might otherwise be entitled. A waiver of immunity relating to the enforcement of an arbitral award must be expressed separately.

EXPLANATORY NOTE

An agreement to submit a dispute to arbitration under the Vienna Investment Rules is deemed to constitute a waiver of immunity from jurisdiction to which a sovereign party may otherwise be entitled under international or national law in court proceedings relating to the arbitration. A similar provision is included in the Vienna Rules for commercial disputes (Article 46 para 2). **1**

In accordance with the customary international law rules on State immunity, Article 4 specifies that the waiver of immunity implicit in an agreement to submit a dispute to arbitration under the Vienna Investment Rules does not extend to immunity from enforcement of an arbitral award, which "*must be expressed separately*". In order to enforce an award against assets of a sovereign party that are protected by immunity, an investor must therefore obtain a separate waiver of immunity from enforcement. **2**

DEFINITIONS

Article 6

(1) In the Vienna Investment Arbitration Rules

1.1 **party** or **parties** refer to one or more claimants, respondents or one or more third parties joined to the arbitration in a statement of claim;

1.2 **claimant** refers to one or more claimants;

1.3 **respondent** refers to one or more respondents;

1.4 **third party** refers to one or more third parties who are neither a claimant nor respondent in the pending arbitration and whose joinder to this arbitration has been requested pursuant to Article 14;

1.5 **non-disputing party** refers to one or more third parties who are neither a claimant nor respondent in the pending arbitration and who have requested or been invited to make written submissions pursuant to Article 14a;

1.6 **non-disputing treaty party** refers to one or more contracting parties to a treaty pursuant to which the dispute has been submitted to arbitration who are neither a claimant nor respondent in the pending arbitration and who make or have been invited to make written submissions pursuant to Article 14a;

1.7 **arbitral tribunal** refers to a sole arbitrator or a panel of three arbitrators;

1.8 **arbitrator** refers to one or more arbitrators;

1.9 **co-arbitrator** refers to any member of a panel of arbitrators except its chairperson;

1.10 **award** refers to any final, partial or interim award;

1.11 **third-party funding** refers to any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative (Article 13), to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings;

1.12 **VIAC** refers to the Permanent International Arbitration Institution of the Austrian Federal Economic Chamber (Vienna International Arbitral Centre);

1.13 **Board**, **Secretary General** and **Secretariat** shall have the meaning and functions set forth in Articles 2 and 4 of the VIAC Rules of Arbitration ("Vienna Rules").

(2) To the extent the terms used in the Vienna Investment Arbitration Rules refer to natural persons, the form chosen shall apply to all genders. In practice, the terms in these rules shall be used in a gender-specific manner.

(3) References to "Articles" without further specification relate to the relevant articles of the Vienna Investment Arbitration Rules.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 For the definitions of key terms, which are included in the Vienna Rules for commercial disputes and are also employed in the Vienna Investment Rules cf. *Schwarzenbacher* in VIAC Handbook (2019) Art 6. Definitions specific to the Vienna Investment Rules are explained below.

2 The Vienna Investment Rules include a provision on non-disputing party and non-disputing treaty party submissions (Article 14a). Article 6 paras 1.5 and 1.6 contains for the definitions of the terms "non-disputing party" and "non-disputing treaty party".

Both the Vienna Investment Rules and the Vienna Rules contain a new provision on third-party funding (Article 13a). The term "third-party funding" is defined in Article 6 para 11, which is discussed in Section 4 below.

3 In contrast to the Vienna Rules for commercial disputes, the Vienna Investment Rules in Article 6 contain a definition of VIAC and its Board, the Secretary General, and the Secretariat. The reasons for the inclusion of paras 1.12 and 1.13 will also be addressed below.

2. Non-disputing party (para 1.5)

4 A non-disputing party is a natural or legal person that is not a party to the arbitration, but participates in the arbitration by making written submissions (*amicus curiae* brief) on factual or legal issues within the scope of the dispute (Article 14a para 1). Arbitral tribunals may authorize such submissions by non–disputing parties after hearing all parties and considering all relevant circumstances.

The term "non-disputing party" is to be distinguished from the terms "non-disputing treaty party" (see below) and "third party", who is joined to a contractual arbitration pursuant to Article 14. For comment on the definition of "third party", cf. *Schwarzenbacher* in VIAC Handbook (2019) Art 7 mn 7). 5

3. Non-disputing treaty party (para 1.6)

A non-disputing treaty party is a State or international organization that is a party to the treaty providing consent to arbitration but not a party to the arbitration. Non-disputing treaty parties have the right to make written submissions on questions of interpretation of the treaty pursuant to which the dispute has been submitted to arbitration (Article 14a para 2). 6

The term "non-disputing treaty party" is to be distinguished from "non-disputing party" (see above) and from a "third party", who is joined to a contractual arbitration pursuant to Article 14. For comment on the definition of "third party" (cf. *Schwarzenbacher* in VIAC Handbook (2019) Art 7 mn 7). 7

4. Third-party funding (para 1.11)

Investment arbitration has seen a marked increase in third-party funding ("TPF"), which is also spreading into commercial arbitration. Several arbitral institutions responded to the increase in third-party funding by including a provision on TPF in their institutional rules (e.g., Article 43 CAM Rules, SIAC, Article 11(7) ICC Rules, Article 44 HKIAC Rules). Consistent with this trend, a separate provision on TPF has been introduced into both the Vienna Investment Rules and the Vienna Rules 2021. Third-party funding was previously only addressed in a chapter in the VIAC Handbook 2019 (cf. *Brekoulakis/Riegler/Kröll* in VIAC Handbook (2019) Excursus on TPF to Art 33 mn 37-91). 8

9 TPF is defined in Article 6 para 1.11. as follows:

10 "*any agreement entered into with a natural or legal person who is not a party to the proceedings or a party representative (Article 13), to fund or provide any other material support to a party, directly or indirectly financing part or all of the costs of the proceedings either through a donation or a grant, or in exchange for remuneration or reimbursement that is wholly or partially dependent upon the outcome of the proceedings".*

11 Article 6 para. 1.9 Vienna Rules for commercial disputes contains an identical TPF definition.

12 The definition is sufficiently broad to cover any material support *that is dependent on the outcome of the proceedings*, including portfolio funding, as well as non-profit funding.

13 The definition also includes after-the-event (ATE) insurance to the extent premiums payable only in the event of an award in favor of the insured and are thus dependent the outcome of the arbitration. As such ATE insurance closely resembles modern forms of third-party funding. BTE insurance, by contrast, is payable before a dispute arises and independent of the outcome of any future arbitration. BTE insurance, is therefore not covered by the TPF definition in Article 6 para 1.9.

14 Commercial loans are also not covered by the definition of TPF in Article 6 para 1.9. Nor is funding received from a party's counsel, such as contingency fee arrangements, since such disclosure is not necessary to guard against conflicts of interest.

15 Article 13a para 1 requires disclosure of both the existence of TPF and the funder's identity in its Statement of Claim or Answer, or thereafter immediately upon the conclusion of a third-party funding agreement. The

purpose of this disclosure requirement is to avoid conflicts of interest that may arise from a party's reliance on third-party funding.

Article 13a para 3 expressly authorizes the tribunal to order the disclosure of specific details of the funding arrangement (and not the whole agreement) if it deems such disclosure necessary, for instance to decide an application for security for costs. For further commentary on Article 13a, cf. VIAC *Explanatory Notes Vienna Investment RulesI* (2022) Art 13a. **16**

5. VIAC (para 1.12)

VIAC refers to the Permanent International Arbitration Institution of the Austrian Federal Economic Chamber according to Section 139 para 2 of the Federal Statute on the Economic Chambers 1998, Federal Law Gazette I No 103/1998 as amended by Federal Law Gazette I No 27/2021. The acronym "VIAC" stands for the Vienna International Arbitral Centre. For detailed commentary on the VIAC, cf. *Horvath/Fremuth-Wolf* in VIAC Handbook (2019) Art 1 mn 1 et seqq. **17**

The Vienna Investment Rules are based on the Vienna Rules for commercial disputes, which define the VIAC bodies and their functions in detail. Article 6 para 1.12 is therefore limited to definitions of the VIAC and its bodies (see above, point 5) and para 1.13 Vienna Investment Rules. **18**

6. Board, Secretary General and Secretariat (para 1.13)

The Board, Secretary General and Secretariat are defined in Article 6 para 1.13 by reference to the Vienna Rules for commercial disputes, which contain a detailed provision on the Board (Article 2) and the Secretary General, Deputy Secretary General and the Secretariat (Article 4). **19**

For the constitution of the Board and its tasks, cf. *Baier/Heider* in VIAC Handbook (2019) Art 2 mn 1 et seqq. For the duties and competences of the Secretary General, the Deputy Secretary General, and the Secretariat cf. **20**

Fremuth-Wolf/Vanas-Metzler in VIAC Handbook (2019) Art 4 mn 1 et seqq.

COMMENCEMENT OF THE ARBITRATION

STATEMENT OF CLAIM

Article 7

(1) The arbitral proceedings shall be initiated by submitting a statement of claim. The proceedings shall commence on the date of receipt of the statement of claim by the Secretariat in hardcopy form or in electronic form (Article 12 paragraph 1); hereby, the proceedings become pending. The Secretariat informs the other parties of the receipt of the statement of claim.

(2) The statement of claim shall contain the following information:

2.1 the full names, addresses, including electronic mail addresses, and other contact details of the parties;

2.2 the nationalities of the parties;

2.3 a statement of the facts and a specific request for relief;

2.4 the monetary value of each individual claim at the time of submission of the statement of claim if the relief requested is not exclusively for a specific sum of money;

2.5 particulars regarding the number of arbitrators in accordance with Article 17;

2.6 the nomination of an arbitrator if the dispute shall be decided by a panel of three arbitrators, or a request that the arbitrator or the chairperson be appointed by the Board; and

2.7 particulars regarding the arbitration agreement and its content, including a reference to the instrument(s) in which each party's agreement to submit the dispute to arbitration under the Vienna Investment Arbitration Rules is recorded and a statement how the parties are bound by the arbitration agreement.

(3) If the statement of claim does not comply with paragraph 2 of this Article, the Secretary General may request that the claimant remedy the defect within a time-period set by the Secretary General. If the claimant complies with the order to remedy the defect within the set deadline, the statement of claim shall be deemed to have been submitted on the date on which it was first received. If the claimant does not comply with the order to remedy the defect within the set deadline, the Secretary General may declare the proceedings terminated (Article 34 paragraph 3). This shall not prevent the claimant from raising the same claims at a later time in another proceeding.

(4) The Secretary General shall transmit the statement of claim to the respondent if no order to remedy pursuant to paragraph 3 of this Article was issued or if the claimant complied with such an order. The Secretary General may defer transmission of the statement of claim to the respondent until the claimant has complied with a request to submit copies pursuant to Article 12 paragraph 1.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 Article 7 Vienna Investment Rules differs from Article 7 Vienna Rules for commercial disputes in certain respects, which are discussed below. The provision sets forth the minimum (formal and substantive) requirements that an application must satisfy to qualify as a statement of claim whose submission has the effect of initiating the proceedings. It further contains a remedial procedure if the content of a statement of claim does not contain necessary particulars and/or copies are missing.

2. Form of submission of the statement of claim (para 1)

2 According to Article 7 para 1, a statement of claim may be submitted to the Secretariat either in electronic or hardcopy form. Submission in either form suffices for the formal commencement of the proceedings, and thus for the arbitration to become "pending" (cf. *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7). The Secretary General may require the statement of claim to be submitted in both electronic and hardcopy form if necessary (Article 12 para 1 last sentence). If a claimant does not comply with this request, the Secretary General may defer transmission of the statement of claim to the respondent until the claimant has complied with the request (Article 7 para 4, see point 5 below). For further commentary on the form of submission of the statement of claim, the consequences of the commencement of arbitration, and information to the parties by the Secretariat (cf. *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 as well as the VIAC Explanatory Notes Vienna Rules (2022) Art 7.

3. Requirements regarding the contents of the statement of claim (para 2)

3 Article 7 para 2 requires that the statement of claim contains

- the parties's contact details (para 2.1);
- the parties' nationalities (para 2.2);

- a statement of the facts and a specific request for relief (2.3);
- the monetary value of each individual claim at the time of submission of the statement of claim if the relief requested is not exclusively for a specific sum of money (para 2.4);
- particulars regarding the number of arbitrators in accordance with Article 17 (para 2.5);
- the nomination of an arbitrator if the dispute shall be decided by a panel of three arbitrators, or a request that the arbitrator or chairperson be appointed by the Board (para 2.6); and
- particulars regarding the arbitration agreement and its content, including a reference to the instrument(s) in which each party's agreement to submit the dispute to arbitration under the Vienna Investment Rules is recorded and a statement how the parties are bound by the arbitration agreement (para 2.7).

Paras 2.2, 2.6 and 2.7 deviate from the Vienna Rules for commercial disputes and are discussed below. For commentary on the remaining paragraphs, cf. *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 as well as *VIAC Explanatory Notes Vienna Rules* (2022) Art 7. **4**

3.1. Nationalities of the parties (para 2.2)

Since Article 17 para 8 requires that, unless otherwise agreed by the parties, arbitrators shall have nationalities different from those of the parties, para 2.2 of Article 7 requires that a statement of claim indicates the parties' nationalities. This information also allows the Secretariat to carry out necessary sanction checks. **5**

3.2. Nomination/appointment of arbitrators (para 2.6)

In line with the Vienna Rules for commercial disputes, a claimant must nominate an arbitrator in the statement of claim if the dispute is to be decided by a panel of three arbitrators or request that the arbitrator or chairperson be appointed by the Board. **6**

3.3. Particulars regarding the arbitration agreement and its content (para 2.7)

7 Article 7 para 2.7 expands the requirement to provide particulars regarding the arbitration agreement for arbitrations under the Vienna Investment Rules. A claimant is required to specifically provide "*a reference to the instrument(s) in which each party's agreement to submit the dispute to arbitration under the Vienna Investment Arbitration Rules is recorded and a statement how the parties are bound by the arbitration agreement*". This specification is intended to assist in the early identification of potential jurisdictional issues, such as whether the claimant qualifies as an investor that has made a protected investment under the relevant investment treaty.

8 The Secretary General examines whether the particulars contain any indication of the VIAC's jurisdiction or (at least) whether the jurisdiction of the VIAC is not *obviously excluded*. For commentary on the limited examination of jurisdiction by the VIAC Secretariat, cf. *Rechberger/ Hofstätter* in VIAC Handbook (2019) Art 7 mns 16 et seqq.

9 The details listed in Article 7 para 2 constitute minimum requirements that a statement of claim must satisfy. The claimant may add other information and list or adduce evidence together with the statement of claim.

4. Incompleteness and transmission of the statement of claim to respondent (paras 4 - 5)

10 The Secretariat will review the statement of claim in accordance with Article 7 para 2. If any required particular is missing, the Secretary General may request the claimant to remedy the defect within the time period set by the Secretary General according to Article 7 para 3 ("order to remedy"). Article 7 para 3 is a discretionary provision, and time limits to remedy defects may be extended on sufficient grounds (Article 12 para 8). If the claimant does not comply with an order to remedy:

i) the statement of claim is not deemed to have been submitted

on the date on which it was first received by the Secretariat;

ii) the Secretary General may defer transmission of the statement of claim to the respondent;

iii) the Secretary General may declare the proceedings terminated (Article 7 para 3 in connection with Article 34 para 3).

11

If the claimant complies with an order to remedy within the deadline set by the Secretary General, the statement of claim is deemed to have been submitted on the day of its initial receipt by the Secretariat (Article 7 para 3) and will then be transmitted to the respondent (Article 7 para 4 first sentence).

12

In circumstances where physical transmission of a statement of claim to the respondent is deemed necessary – in particular where proof of delivery cannot be established by forwarding a copy of a statement of claim by email or via the VIAC Portal – Article 12 para 1 authorizes the Secretary General to request a hardcopy of an electronically transmitted statement of claim. The Secretary General is also authorized to request an electronic version of a statement of claim that was only submitted in hardcopy form if it is deemed necessary. Pursuant to Article 7 para 4, the Secretary General may defer transmission of the statement of claim to the respondent until the claimant has complied with a request to submit the statement of claim in both forms.

13

For further commentary on the transmission of the statement of claim to the respondent, cf. *Rechberger/Hofstätter* in VIAC Handbook (2019) Art 7 mns 21 et seqq. as well as *VIAC Explanatory Notes Vienna Rules* (2022) Art 7.

ANSWER TO THE STATEMENT OF CLAIM

Article 8

(1) The Secretary General shall request the respondent to submit to the Secretariat an answer to the statement of claim (Article 12 paragraph 1) within a period of 60 days upon receipt of the statement of claim.

(2) The answer to the statement of claim shall contain the following information:

2.1 the full name, address, including electronic mail address, and other contact details of the respondent;

2.2 the nationalities of the parties;

2.3 without prejudice to Article 24 paragraph 1, comments in response to any statements contained in the statement of claim under Article 7 paragraph 2.7 or with respect to the matters covered therein;

2.4 comments on the request for relief and the facts upon which the statement of claim is based, as well as the respondent's specific request for relief;

2.5 particulars regarding the number of arbitrators in accordance with Article 17; and

2.6 the nomination of an arbitrator if the dispute shall be decided by a panel of three arbitrators, or a request that the arbitrator or the chairperson be appointed by the Board.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 Pursuant to Article 7 para 4 and Article 8 para 1, the Secretary General transmits the statement of claim to the respondent and requests that the respondent submit its answer within 60 days from receipt of the statement of claim. Article 8 para 2 sets forth the requirements regarding the contents of the answer to the statement of claim.

2 For commentary on the corresponding provision in the Vienna Rules 2018 for commercial disputes (which is identical to Article 8 para 1 of the Vienna Investment Rules), cf. *Pitkowitz/Dobosz* in VIAC Handbook (2019) Art 8). On the respective changes in the Vienna Rules 2021 (cf. *VIAC Explanatory Notes Vienna Rules* (2022) Art 8.

2. Time limit and form of submission of answer (para 1)

Under the Vienna Investment Rules, the respondent must submit an answer to the statement of claim within 60 days of receipt the statement of claim, compared to 30 days under the Vienna Rules for commercial disputes. **3**

Regarding the form of submission of the answer, Article 8 refers to Article 12 para 1 (see in more detail the *VIAC Explanatory Notes* Vienna Investment Rules (2022) Art 12). Pursuant to Article 12 para 1, an answer may be submitted either in electronic or hardcopy form, but the Secretary General may require that the answer be submitted in both forms. Because VIAC relies on electronic case management and uses the VIAC Portal for submissions, the Secretariat requests the respondent to submit the answer to the statement of claim electronically (via the VIAC Portal; for further information on the VIAC Portal cf. the *VIAC Explanatory Notes Vienna Rules* (2022) Excursus to Art 12). **4**

3. Minimum contents of the answer (para 2)

The answer to the statement of claim must contain similar minimum information as a claimant is required to provide in the statement of claim under Article 7 para 2. **5**

The answer must therefore indicate the parties' nationalities (para 2.2), comment on the request for relief and the statement of facts (para 2.4), and the particulars of the arbitration agreement and its content, including specifically whether the parties are bound by the arbitration agreement invoked by the claimant (para 2.3), and nominate an arbitrator if the dispute is to be decided by three arbitrators or request that the Board appoint the arbitrator or chairperson (para 2.6). (cf. *VIAC Explanatory Notes* Vienna Investment Rules (2022) Art 12 for more details). **6**

4. Plea of lack of jurisdiction (para 2.3 and Article 24 para 1)

7 While Article 8 para 2.3 of the Vienna Investment Rules requires the respondent to comment on the particulars of the arbitration agreement and its content, this requirement is "*without prejudice to Article 24 para 1*", which stipulates that a plea of lack of jurisdiction "*shall be raised no later than the first pleading on the merits*". A respondent may thus invoke in its first merits pleading pleas of lack of jurisdiction that it has not raised in its answer.

WRITTEN COMMUNICATIONS, TIME LIMITS AND DISPOSAL OF FILE

Article 12

(1) A statement of claim and an answer to the statement of claim, including exhibits, shall be submitted either electronically or in hardcopy form in the number of copies necessary to provide each party with a copy. The Secretary General may require a statement of claim and an answer to the statement of claim to be submitted in both forms if necessary.

(2) After transmission of the file to the arbitral tribunal, all written communications and exhibits shall be sent to each party and each arbitrator in the manner stipulated by the arbitral tribunal. The Secretariat shall receive all written communications between the arbitral tribunal and the parties in electronic form.

(3) Written communications shall be sent in hardcopy form by registered mail, letter with confirmation of receipt, courier service, or in electronic form, or by any other means of communication that provides a record of sending.

(4) Written communications shall be sent to the address of the addressee for whom it is intended, as last notified. Once a party has appointed a representative, the written communication shall be sent to the representative's address, as last notified.

(5) Written communications shall be deemed to have been received on the day

5.1 the addressee has actually received the written communication; or

5.2 receipt can be presumed if the written communication was sent in accordance with paragraphs 3 and 4 of this Article.

(6) If a statement of claim against multiple respondents cannot be transmitted to all respondents, upon request of the claimant the arbitration shall proceed only against those respondents that received the statement of claim. Upon request of the claimant, the statement of claim against the remaining respondents shall be addressed in a separate proceeding.

(7) Time limits shall start to run on the day following the day of receipt (paragraph 5) of the respective written communication triggering the commencement of the time limit. If this day is an official holiday or a non-business day at the place of receipt, the time limit shall start to run on the next business day. Official holidays or non-business days falling during a time period shall not interrupt the continuation or extend the time limit. If the last day of the time limit is an official holiday or a non-business day at the place of receipt, the time limit shall end on the next business day.

(8) A time limit relating to any written communication is satisfied if it is sent in the manner stipulated in paragraphs 3 and 4 of this Article on the last day of the time limit. Time limits may be extended where sufficient grounds for such extension are considered to exist.

(9) After termination of the proceedings (Article 34), the Secretariat may dispose of the entire file of a case, with the exception of decisions (Article 35).

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 Article 12 deals with the form of submissions and written communications, time limits, and the disposal of files. This provision is virtually identical to Art 12 Vienna Rules for commercial disputes, which has been revised in the course of the Rules Revision 2021. Article 12 Vienna Investment Rules differs from Article 21 Vienna Rules only in one aspect – namely the form of submission of the statement of claim to the Secretariat (para 1). For the remaining paragraphs of Article 12, see the *VIAC Explanatory Notes Vienna Rules* (2022), Art 12.

2. Form of submission of the statement of claim (para 1)

2 Since 2019, all VIAC proceedings are administered through an electronic case management system, and since March 2021, the "VIAC Portal" (an electronic file share platform) is available to parties and arbitrators to securely exchange case-related documents (for detailed information on the VIAC Portal, cf. *VIAC Explanatory Notes Vienna Rules* (2022), Excusus 7 to Art 12). The Vienna Investment Rules, therefore, allow the submission of a statement of claim and the transmission of documents solely in electronic form (Article 7, 12 and 36 Vienna Investment Rules and Article 1 and 3 Vienna Investment Mediation Rules).

3 Article 12 para 1 Vienna Rules for commercial disputes, however, requires that a statement of claim, including its exhibits, be filed in both electronic and in hardcopy form in the number of copies necessary to provide each party with a copy. The Secretary General may defer the transmission of the statement of claim to the respondent if the claimant fails to send hardcopies. Under Article 12 para 1 Vienna Investment Rules, the submission of an electronic copy of the statement of claim suffices since a respondent in an

investment arbitration, typically a State or State entity, is less likely to deny receipt of a statement of claim sent in electronic form. If transmission of a hardcopy is nonetheless necessary (e.g., because the respondent's e-mail address is unknown), the Secretary General may require the claimant to submit a hardcopy of the statement of claim (Article 12 para 1 last sentence).

The same applies to the submission of the answer to the statement of claim (Article 8 para 1 in connection with Article 12 para 1). **4**

THIRD-PARTY FUNDING

Article 13a

(1) A party shall disclose the existence of any third-party funding and the identity of the third-party funder in its statement of claim or its answer to the statement of claim, or immediately upon concluding a third-party funding arrangement.

(2) If a party discloses third-party funding prior to the constitution of the arbitral tribunal, the Secretary General shall inform any arbitrator nominated for appointment or already appointed of such disclosure for purposes of completing the arbitrator declaration (Article 16 paragraph 3).

(3) If it deems it necessary, the arbitral tribunal may order the disclosure of specific details of the third-party funding arrangement and/or the third-party funder's interest in the outcome of the proceedings, and/or whether or not the third-party funder has committed to undertake adverse costs liability.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 Article 13a is designed to avoid undisclosed conflict of interests that may arise from a party's reliance on third-party funding by requiring disclosure of the existence of third-party funding and the identity of the funder (paras 1 and 2). The provision further clarifies the powers of tribunals constituted under the Vienna Investment Rules to order additional disclosure, if necessary, of third-party funding arrangements (para 3).

2 Following the Rules Revision 2021, paras 1 and 2, but not para 3, are included in Article 13a of the Vienna Rules for commercial disputes.[1]

3 The comments below on Article 13a are to be read in conjunction with the definition of TPF contained in Article 6 para 1.11 (cf. in more detail VIAC Explanatory Notes Vienna Rules (2022) Art 6). Furthermore, the VIAC Handbook (2019) contains a chapter on "Third-Party Funding in Arbitration

[1] Cf. Explanatory Notes Vienna Rules (2022) Art 13a.

under the Vienna Rules" (cf. *Brekoulakis/Kröll/Riegler* in VIAC Handbook (2019) Excursus to Art 33 mn 37 et seqq.), which is relevant and applicable for VIAC's policy regarding TPF.

2. Disclosure of the existence of TPF and the identity of funder (para 1)

Article 13a para 1 imposes on each party an obligation to disclose the existence of any third-party funding and the identity of the third-party funder in its statement of claim and answer to the statement of claim, respectively, but not the terms of the third-party funding agreement. This disclosure requirement continues throughout the arbitration and requires immediate disclosure upon conclusion of a third-party funding arrangement. The purpose of this disclosure obligation is to guard against conflicts of interest. **4**

3. Disclosure prior to the constitution of the arbitral tribunal (para 2)

Prior to the constitution of the arbitral tribunal, the existence of TPF and the funder's identity must be disclosed to the VIAC Secretariat. Following such disclosure, the Secretary General will immediately inform any arbitrator who has been nominated or appointed to enable the arbitrator to complete or amend the arbitrator declaration (Article 16 para 3).[2] After the constitution of the tribunal, such disclosure has to be made to the arbitral tribunal. **5**

4. Disclosure following an order by the arbitral tribunal (para 3)

Unlike Article 13a Vienna Rules for commercial disputes, Article 13a contains an additional paragraph 3, which expressly authorizesthe tribunal, if it deems it necessary, to order disclosure of: **6**

i) "*specific details of the third-party funding arrangement*",

[2] For the Arbitrator's Acceptance of Office [Status: July 2021]
see: https://www.viac.eu/en/arbitration/documents-for-arbitrators.

ii) "*and/or the third-party funder's interest in the outcome of the proceedings*", and/or

iii) whether the funder "*has committed to undertake adverse costs liability*".

7 The tribunal's discretionary power to order the disclosure of *specific details* of the funding arrangement is not a *carte blanche* for tribunals to order disclosure of the full text of the third-party funding arrangement. The tribunal may only order disclosure of specific details of the third-party funding agreement and only if it deems such disclosure necessary, for instance, to decide an application for security for costs or to allocate the costs of the arbitration (cf. *Brekoulakis/Kröll/Riegler* in VIAC Handbook (2019) Excursus to Art 33 mn 66 et seqq.). The specific details that a tribunal may order to be disclosed depend upon the particular circumstances of each case and the purpose for which disclosure is ordered.

8 The mere existence of a TPF arrangement does not as such justify an order for security for costs or the allocation of costs to a third-party funded party. Thus, instead of including a reference to TPF in Article 33 para 6 on security for costs or on allocation of costs in Article 38 para 2, para 3 of Article 13a confirms the power of an arbitral tribunal constituted under the Vienna Investment Rules to order disclosure of specific details of the third-party funding arrangement if it deems it necessary. For commentary on security for costs, cf. *Brekoulakis/Kröll/Riegler* in VIAC Handbook (2019) Excursus to Art 33 mn 83 et seqq. and on allocation of costs, cf. *Brekoulakis/Kröll/ Riegler* in VIAC Handbook (2019) Excursus to Art 33 mns 67 et seqq.

JOINDER OF THIRD PARTIES, SUBMISSIONS, CONSOLIDATION

JOINDER OF THIRD PARTIES

Article 14

(1) If a dispute has been submitted to arbitration pursuant to a contract, the joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstances.

(2) The request for joinder shall contain the following information:

2.1 the full name, address, including electronic mail address, and other contact details of the third party;

2.2 the grounds upon which the request for joinder is based; and

2.3 the requested manner of joinder of the third party.

(3) If a request for joinder of a third party is made with a statement of claim,

3.1 it shall be submitted to the Secretariat. The provisions of Article 7 et seqq shall apply by analogy. The Secretary General shall transmit the statement of claim to the third party to be joined as well as to the other parties for comments;

3.2 the third party may participate in the constitution of the arbitral tribunal pursuant to Article 18 if no arbitrator has yet been appointed; and

3.3 the arbitral tribunal shall return the statement of claim with a request for joinder of a third party to the Secretariat to be treated in separate proceedings if the arbitral tribunal refuses, in accordance with paragraph 1, to grant a request for joinder of a third party made with a statement of claim. In this case, the Board may revoke any confirmed nomination or appointment of arbitrators and order the renewed constitution of the arbitral tribunal or arbitral tribunals in accordance with Article 17 et seqq, if the third party participated in the constitution of the arbitral tribunal in accordance with paragraph 3.2.

EXPLANATORY NOTE

1. Purpose of the provision

The Vienna Investment Rules contain different provisions for the participation of third parties in the arbitral proceedings, depending on whether an arbitration is based on a contract or a treaty or statute. The rules for the joinder of third parties are set forth in Article 14 in contractual 1

arbitrations and follow those in Article 14 of the Vienna Rules for commercial disputes.

2. Joinder of third parties

2 Third parties may be joined to a contractual arbitration in the same manner as under the Vienna Rules for commercial disputes (Article 14). The Vienna Investment Rules do not impose specific conditions or limitations on the joinder of a third party in contractual arbitrations. Depending on the arbitration agreement and the applicable law and other relevant circumstances, and after hearing all parties as well as the third party to be joined to the proceeding, the arbitral tribunal decides whether a request for joinder is warranted and, if so, the manner of the joinder. For further details on the application of this provision in contractual arbitrations cf. *Oberhammer/Koller* in VIAC Handbook (2019) Art 14.

3 In arbitrations based on treaties or laws, non-disputing parties and non-disputing treaty parties may make written submissions on legal or factual issues within the scope of the dispute if authorized or invited by the tribunal (Article 14a para 1). In addition, non-disputing treaty parties have a right to make written submissions on the interpretation of the treaty pursuant to which the dispute has been submitted to arbitration (Article 14a para 2). Cf. VIAC Explanatory Notes Vienna Investment Rules (2022) Art 14a.

4 The tribunal has discretion to determine the format, length and scope of non-disputing and non-disputing treaty party submissions and whether to provide the non-disputing or non-disputing treaty party with access to relevant submissions and documents filed in the proceedings (Article 14a para 3).

5 Irrespective of whether a dispute has been submitted to arbitration under a contract, treaty, statute, or other instrument, the VIAC Board may consolidate two or more arbitral proceedings administered by VIAC under Article 15.

NON-DISPUTING PARTY AND NON-DISPUTING TREATY PARTY SUBMISSIONS

Article 14a

(1) If a dispute has been submitted to arbitration pursuant to a treaty or statute, a request of a non-disputing party to make written submissions on a factual or legal issue within the scope of the dispute submitted to arbitration pursuant to a treaty or statute shall be decided by the arbitral tribunal after hearing all parties as well as after considering all relevant circumstances. The arbitral tribunal may also invite such written submissions from a non-disputing party.

(2) A non-disputing treaty party shall have the right to make written submissions on questions of the interpretation of a treaty at issue in the dispute and pursuant to which the dispute has been submitted to arbitration. The arbitral tribunal may also invite such written submissions from a non-disputing treaty party.

(3) The arbitral tribunal may determine the format, length and scope of submissions made pursuant to this Article. The arbitral tribunal may provide the non-disputing party or non-disputing treaty party with access to relevant submissions and documents filed in the proceeding, taking into consideration the views of the parties.
(4) The parties shall have the right to make observations on written submissions made pursuant to this Article.

EXPLANATORY NOTE

1.1. Introduction; purpose of the provision

Following the trend in investment arbitration to allow third party submissions, Article 14a allows submissions by non-disputing parties, *i.e.*, third parties who are neither a claimant nor respondent in the pending arbitration (Article 6 para 1.5), as well as non-disputing treaty parties, *i.e.*, States and international organizations that are contracting parties to a treaty pursuant to which the dispute has been submitted to arbitration (Article 6 para 1.6). While non-disputing treaty parties have a right to make submissions on questions of treaty interpretation, submissions by other non-disputing parties must be authorized by the tribunal. Article 14a only applies in arbitrations based on treaties or laws, not contractual arbitrations. **1**

2 By contrast, Article 14 on the joinder of third parties applies in contractual arbitrations (Cf. VIAC Explanatory Notes Vienna Investment Rules (2022) Art 14).

1.2. Non-disputing parties (para 1)

3 In arbitrations based on treaties or laws, the tribunal may, after considering all relevant circumstances and hearing all parties, allow or invite submissions from non-disputing parties on any factual or legal issue within the scope of the dispute submitted to arbitration.

1.3. Non-disputing treaty parties (para 2)

4 In response to requests to improve the consistency, coherence, predictability and correctness of awards in investment arbitration *inter alia* by increasing State control over the interpretation of investment treaties, in arbitrations based on treaties or laws, the Vienna Investment Rules specifically allow non-disputing treaty parties to make written submissions on the interpretation of the treaty pursuant to which the dispute has been submitted to arbitration. The tribunal may also invite such submissions on its own initiative. A similar provision is also included in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and discussed in the ICSID Rules Amendment process.

5 In addition to its right to make written submissions on questions of treaty interpretation, a non-disputing treaty party may also make written submissions on other legal issues or factual issues within the scope of the dispute, but such submissions must be authorized or invited by the tribunal.

1.4. Access to submissions and documents (para 3)

6 According to para 3, the tribunal may determine the format, length and scope of non-disputing party and non-disputing treaty party submissions. Non-disputing parties and non-disputing treaty parties will have access to the parties' submissions and the documents submitted into to record only if and to the extent the tribunal grants them such access.

1.5. Parties' right to make observations (para 4)

According to para 4, the tribunal must accord the parties an opportunity to make observations on any submission made by a non-disputing party or non-disputing treaty party. **7**

CONSOLIDATION

Article 15

(1) Upon a party's request, two or more arbitral proceedings administered by VIAC may be consolidated if:

1.1 the parties agree to the consolidation; or

1.2 the same arbitrator(s) was/were nominated or appointed; and the place of arbitration is the same.

(2) The Board shall decide on a request for consolidation after hearing the parties and the arbitrators already appointed. The Board shall consider all relevant circumstances in its decision, including the compatibility of the arbitration agreements and the respective stage of the arbitral proceedings.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 Article 15 deals with consolidation of proceedings. The competence to consolidate two or more proceedings administered by VIAC is vested in the Board, which may do so if the place of arbitration is the same and the parties agree to consolidation or the same arbitrator(s) was/were nominated or appointed.

2 The Vienna Investment Rules provisions on joinder, *amicus curiae* and consolidation accord tribunals and the VIAC the flexibility and discretion needed to resolve complex, multi-party investment disputes in an efficient manner.

2. Consolidation in investment proceedings

3 Article 15 Vienna Investment Rules mirrors the provision in Article 15 Vienna Rules for commercial disputes but clarifies that consolidation of one or more proceedings is only permitted if all proceedings are administered by VIAC. Accordingly, the VIAC Board may consolidate two or more VIAC-administered proceedings - irrespective of whether they arise under a

contract, treaty, statute or other instrument and irrespective of whether they involve the same parties, the same legal relationship or the same arbitration agreement if:

- they have the same place of arbitration, and
- the parties agree to the consolidation; or
- the same arbitrator(s) was/were nominated or appointed.

Article 15 thus accords VIAC ample flexibility in making the required case management decisions in the specific circumstances of each case. **4**

For details on the rationale of this provision and the manner it is handled by the VIAC-Board cf. *Oberhammer/Koller* in VIAC Handbook (2019) Art 15. **5**

ARBITRAL TRIBUNAL

CONSTITUTION OF THE ARBITRAL TRIBUNAL

Article 17

(1) The parties may agree whether the arbitral proceedings will be conducted by a panel of three arbitrators or a sole arbitrator. The parties may also agree on the manner of appointment of the arbitrators. In the absence of an agreement, paragraphs 2 to 8 of this Article shall apply.

(2) Absent agreement on the number of arbitrators, the dispute shall be decided by a panel of three arbitrators. If the amount in dispute does not exceed EUR 10 million, the dispute shall be decided by a sole arbitrator, unless the Board, having due regard to the parties' views, considers that the complexity of the case or other relevant circumstances of the case warrant the appointment of a panel of three arbitrators.

(3) If the dispute is to be resolved by a sole arbitrator, the parties shall jointly nominate a sole arbitrator and indicate the arbitrator's name, address, including electronic mail address, and other contact details within 30 days after receiving the Secretary General's request. If such nomination is not made within this time period, the sole arbitrator shall be appointed by the Board.

(4) If the dispute is to be resolved by a panel of arbitrators, each party shall nominate an arbitrator (the claimant in the statement of claim and the respondent in the answer to the statement of claim). If a party fails to do so, the Secretary General shall request that party to submit the name, address, including electronic mail address, and other contact details of its nominee within 30 days after receiving the request. If such nomination is not made within this time period, that arbitrator shall be appointed by the Board.

(5) If the dispute is to be resolved by a panel of arbitrators, the co-arbitrators shall jointly nominate a chairperson and indicate his name, address, including electronic mail address, and other contact details within 30 days after receiving the Secretary General's request. If such nomination is not made within this time period or if a party so requests in its statement of claim or answer to the statement of claim, the chairperson shall be appointed by the Board.

(6) If the chairperson is to be appointed by the Board, the Secretary General shall transmit a list of candidates for appointment as chairperson to the parties and allow them to strike one name from the list and rank the remaining candidates in order of preference. The Board shall appoint the candidate with the best ranking. If two or more candidates share the best ranking, the Board shall select one of them.

(7) The parties are bound by their nomination of arbitrator once the nominated arbitrator has been confirmed by the Board (Article 19).

(8) Arbitrators shall have nationalities different from those of the parties, unless otherwise agreed by the parties.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

Article 17 determines the number of arbitrators and their method of appointment (in multi-party proceedings, the provision has to be read together with Article 18). The provision mirrors Article 17 Vienna Rules for commercial disputes (cf. *Riegler/Boras* in VIAC Handbook (2019) Art 17) except for two differences, one concerning the number of arbitrators in case the parties have not agreed on the number of arbitrators and the other on the method of appointment of the chairperson. **1**

2. Number of arbitrators

The parties may agree that the arbitral proceedings will be conducted by a panel of three arbitrators or a sole arbitrator. The parties are also free to agree on the manner of appointment of the arbitrators (para 1). **2**

If the parties have not agreed otherwise and the amount in dispute exceeds EUR 10 million, the arbitration will be conducted by a panel of three arbitrators (para 2). This differs from Article 17 Vienna Rules for commercial disputes where, in case the parties have not agreed on the number of arbitrators, the Board determines the number of arbitrators. **3**

If the amount in dispute does not exceed EUR 10 million, the proceedings are to be conducted by a sole arbitrator, unless the parties have agreed otherwise. The VIAC Board may decide, however, that the circumstances of the case, including the complexity of the case, the importance of the legal and factual questions at issue, and the nature of measure(s) challenged, warrant a panel of three arbitrators (para 2). **4**

5 The Board's decision under para 2 is discretionary. The Board is not obliged to provide reasons for its decision but will aim to take a decision that will most likely be acceptable to the parties.

3. Appointment of the chairperson

6 Article 17 para 3 sets forth the procedure for the appointment of a sole arbitrator, whereas Article 17 paras 4, 5, and 6 determine the procedure for the appointment of a panel of arbitrators. The provisions are subject to an agreement otherwise made by the parties. Paras 3, 4, and 5 mirror the respective paras in Article 17 Vienna Rules for commercial disputes (Cf. *Riegler/Boras* in VIAC Handbook (2019) Art 17 mns 14 *et seqq.*).

7 Para 6 contains special rules for the appointment of the chairperson by the Board which are not included in the Vienna Rules for commercial disputes.

3.1 Nomination of the chairperson by the co-arbitrators

8 If the dispute is to be resolved by a panel of arbitrators, the co-arbitrators shall jointly nominate a chairperson and indicate his or her name and contact details within 30 days after receiving the Secretary General's request (para 4). If the co-arbitrators fail to nominate a chairperson within this period, the Board appoints the chairperson. Each party may also, in its statement of claim or in its answer to the statement of claim, request that the Board appoint directly the chairperson. In such cases, paragraph 6 applies.

3.2 Appointment of the chairperson by the board

9 If the chairperson is to be appointed by the Board (either because the co-arbitrators failed to reach a timely agreement on the chairperson or a party requested the Board to appoint the chairperson), the Vienna Investment Rules provide for the following list-procedure. The Secretary General will transmit a list of candidates to the parties, who may strike one name from the list and rank the remaining candidates in order of preference. The Board will appoint the candidate with the best ranking. If two or more candidates

share the best ranking, the Board will select one of them.

When preparing the list of chairperson candidates to be ranked by the parties and when selecting the chairperson, the members of the Board must act in accordance with their best knowledge and ability. **10**

According to Article 19, appointments by the Board do not require confirmation (cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mn 5). **11**

4. Nationality of the arbitrators

Article 17 para 8 requires that all arbitrators have nationalities different from those of the parties, unless otherwise agreed by the parties. **12**

Although this requirement is not included in Article 17 Vienna Rules for commercial disputes, the Board also takes into account the parties' nationality when making appointments in commercial arbitrations (cf. *Riegler/Boras* in VIAC Handbook (2019) Art 16 mns 27 *et seq*.). **13**

CONFIRMATION OF THE NOMINATION

Article 19

(1) After an arbitrator has been nominated, the Secretary General shall obtain the arbitrator's declarations pursuant to Article 16 paragraphs 3 and 4. The Secretary General shall forward a copy of these statements to the parties. The Board shall confirm the nominated arbitrator if no doubts exist as to the impartiality and independence of the arbitrator and the ability to carry out the mandate.

(2) Prior to the decision of the Board, the Secretary General shall request comments from the arbitrator to be confirmed and from the parties. All comments shall be communicated to the parties and the arbitrator.

(3) Upon confirmation, the nominated arbitrator shall be deemed appointed.

(4) If the Board refuses to confirm a nominated arbitrator, the Secretary General shall request the party/parties entitled to nominate the arbitrator, or the co-arbitrators to nominate a different arbitrator or chairperson within 30 days. Articles 16 to 18 shall apply by analogy. If the Board refuses to confirm the newly nominated arbitrator, the right to nominate shall lapse and the Board shall appoint the arbitrator.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

1 The confirmation procedure serves to examine whether there are any doubts about the arbitrator's impartiality and independence and whether he or she will be able to properly carry out his or her mandate. Unlike under the Vienna Rules for commercial disputes, the power to confirm nominated arbitrators is vested in the Board of VIAC and not the Secretary General (Article 19 Vienna Rules; cf. *Riegler/Boras* in VIAC Handbook (2019) Art 19 mns 7 *et seqq*.)

2. Confirmation procedure

2 Prior to confirmation by the Board of an arbitrator nominated by the parties or the co-arbitrators, the arbitrator must provide the Secretary General with a statement confirming his or her impartiality and independence, availability,

qualification (cf. *Riegler/Boras* in VIAC Handbook (2019) Art 16 mns 7 et seqq.), acceptance of the office, and submission to the Vienna Investment Rules (Article 16 para 3). For the corresponding provision in Article 19 Vienna Rules, cf. *Riegler/Boras*, in VIAC Handbook (2019) Art 19 mns 2.

Upon receipt of the arbitrator's declaration(s), the Secretariat will forward them to the parties. Prior to the Board's decision on whether to confirm a nominated arbitrator, the Secretary General is required to request comments from the parties and the nominated arbitrator. The Vienna Rules for commercial disputes, by contrast, leave it to the Secretary General's discretion whether to request such comments. **3**

In their comments, the parties may pose questions and raise objections, if any, but this will not constitute a formal challenge. All comments shall be communicated to the parties and the nominated arbitrator. **4**

The time limit for lodging a challenge based on grounds resulting from arbitrator's declarations begins to run upon the arbitrator's confirmation, not upon the parties' receipt of the declarations (Article 20 para 2) cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mns 3 *et seqq*. for the procedure under Article 19 Vienna Rules. **5**

3. Confirmation by the board

As noted in the introduction, under the Vienna Investment Rules, the Board of VIAC, not the Secretary General, is competent to confirm nominated arbitrators. When the Board determines whether or not to confirm a nominated arbitrator, it will carefully review the declaration of acceptance, any disclosure made by the nominated arbitrators, and any comments submitted by the parties (cf. *Riegler/Petsche* in VIAC Handbook (2019) Art 19 mns 12 *et seqq)*. **6**

7 The Board's decision as to whether to confirm a nominated arbitrator is discretionary. While it is not required to provide reasons for its decision, in the interest of transparency, the Board does provide reasoned decisions. Upon confirmation, the nominated arbitrator is deemed to have been appointed.

JURISDICTION OF THE ARBITRAL TRIBUNAL

JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 24

(1) A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than the first pleading on the merits after the constitution of the arbitral tribunal. A party is not precluded from raising such an objection by the fact that it has nominated an arbitrator pursuant to Article 17 or has participated in the nomination of an arbitrator pursuant to Article 18. An objection that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to exceed the scope of its authority is raised during the arbitration. A later objection shall be barred in both cases; however, if the arbitral tribunal considers the delay to be sufficiently excused, it may admit a later objection.

(2) The arbitral tribunal shall decide on its own jurisdiction. The decision on jurisdiction may be made together with the decision on the merits or in a separate award. Where the arbitral tribunal declines jurisdiction, it shall, upon the request of one of the parties, decide on the parties' cost obligations.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

Article 24 generally corresponds to Article 24 Vienna Rules for commercial disputes except for the time available to a party to raise a jurisdictional objection (cf. *Pickl/Heider* in VIAC Handbook (2019) Art 24 for details on the corresponding provision in the Vienna Rules for commercial disputes). 1

2. Time limits for raising objections to jurisdiction (para 1)

Under the Vienna Investment Rules, jurisdictional objections must be raised no later than in the first pleading on the merits *after the constitution of the arbitral tribunal* (Article 24 para 1 first sentence). The phrase "after the constitution of the arbitral tribunal" was added to clarify that a party is not 2

required to raise jurisdictional objections before the tribunal is constituted (Article 11 Vienna Investment Rules). Unlike in commercial proceedings where such objections are usually raised in the answer to a statement of claim or an answer to a counterclaim, under the Vienna Investment Rules, the parties are only required to raise jurisdictional objections in these submissions if the tribunal is already constituted when they are filed.

EARLY DISMISSAL OF CLAIMS, COUNTERCLAIMS AND DEFENSES

Article 24a

(1) A party may apply to the arbitral tribunal in writing for the early dismissal of a claim, counterclaim or defense on the basis that:

1.1 a claim, counterclaim or defense is manifestly outside the jurisdiction of the arbitral tribunal;

1.2 a claim, counterclaim or defense is manifestly inadmissible; or

1.3 a claim, counterclaim or defense is manifestly without legal merit.

(2) A party shall file its application for early dismissal no later than 45 days after the constitution of the arbitral tribunal or the submission of the answer to the statement of claim, whichever is earlier. The party shall state in detail the facts and legal basis supporting its application. When filing its application for early dismissal with the arbitral tribunal, the party applying for early dismissal shall send a copy of its application to all other parties.

(3) The arbitral tribunal, in its discretion, may allow the application for early dismissal to proceed. If the application is allowed to proceed, the arbitral tribunal shall, after giving the other parties the opportunity to make written submissions on the application, decide whether to grant, in whole or in part, the application for early dismissal.

(4) Within 60 days of receiving the last written submission pursuant to paragraph 3 of this Article, the arbitral tribunal shall decide on the application for early dismissal in an order or award, unless the Secretary General in exceptional circumstances extends this period of time.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

The Vienna Investment Rules aim to address two concerns frequently raised by users of investment arbitration, namely duration and cost. The Vienna Investment Rules contain several provisions that are designed to facilitate efficient resolution of investment disputes. According to Article 32 para 2, tribunals must render awards no later than six months after the last hearing or the filing of the last authorized submission. Jurisdictional objections must be raised no later than in the first pleading on the merits following the constitution of the tribunal (Article 24 para 1). Under Article 45, parties may also agree on expedited proceedings to resolve investment disputes. **1**

2 Article 24a supplements these provisions by allowing early dismissal of manifestly defective claims, counterclaims and defenses, which may result in substantial efficiency and savings in cost and also deter parties from advancing frivolous claims or defenses. ICSID Arbitration Rule 41(5) contains a similar provision, which is however limited in scope to claims that manifestly lack legal merit.

3 The Vienna Rules for commercial disputes do not contain an analogous provision to discourage excessive or tactical requests for early dismissal in commercial arbitrations, in particular by parties from civil law jurisdictions who tend to be less familiar with early dismissal proceedings. However, early dismissal is considered to be an inherent power of arbitral tribunals constituted under the Vienna Rules.

2. Prerequisites for early dismissal

4 A party may request early dismissal of claims, counterclaims or defences on the ground that they are:

- manifestly outside the tribunal's jurisdiction;
- manifestly inadmissible; or
- manifestly without legal merit.

5 Applications for early dismissal must be filed within 45 days after the tribunal's constitution or the submission of the answer to the statement of claim, whichever is earlier.

6 It is within the tribunal's discretion to decide whether or not to allow an application for early dismissal to proceed. If the application is allowed to proceed, the tribunal must give the other party or parties the opportunity to make written submissions on the application, and rule within sixty days of receiving the last written submission, unless the Secretary General extends this period based on exceptional circumstances.

PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

PLACE OF ARBITRATION

Article 25

(1) The parties are free to agree on the place of arbitration. Absent party agreement, the place of arbitration shall be determined by the arbitral tribunal.

(2) The arbitral tribunal may deliberate or take procedural actions at any location it deems appropriate, without thereby resulting in a change of the place of arbitration.

EXPLANATORY NOTE

1. Purpose of the provision

Apart from the choice of the arbitral institution and the arbitrators, the choice of the place of arbitration is one of the most important decisions to be taken by the parties when drafting the arbitration agreement or initiating arbitration. 1

2. Default place of arbitration

Article 25 corresponds to Article 25 Vienna Rules for commercial disputes with one important exception. Absent party agreement, the place of arbitration is determined by the arbitral tribunal. By contrast, under the Vienna Rules, Vienna is the place of arbitration unless the parties agree otherwise (cf. *Kreindler/Plavec* in VIAC Handbook (2019) Art 25 for commentary on the place of arbitration and its implications and criteria for a choice). 2

APPLICABLE LAW, AMIABLE COMPOSITEUR

Article 27

(1) The arbitral tribunal shall decide the dispute in accordance with the law or rules of law agreed upon by the parties. Unless the parties have expressly agreed otherwise, any agreement as to a given national law or national legal system shall be construed as a direct reference to that national substantive law and not to the national conflict-of-laws rules.

(2) If the parties have not determined the applicable law or rules of law, the arbitral tribunal shall apply the applicable law or rules of law which it considers appropriate, including any relevant treaties, relevant national laws of any State, any relevant international custom and general principles of law.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only in cases where the parties have expressly authorized it to do so.

EXPLANATORY NOTE

1. Purpose of the provision

1 Article 27 governs the question of the substantive law applicable to the resolution of the claims submitted to arbitration under the Vienna Investment Rules. The provision corresponds to Article 27 Vienna Rules for commercial disputes with the following difference in paragraph 2: unless the parties have expressly agreed otherwise, the arbitral tribunal will apply the applicable law or rules of law which it considers appropriate, including *any relevant treaties, national laws of any State, international custom and general principles of law*.

2 The Vienna Investment Rules leave it to the arbitral tribunal to determine the applicable law in the absence of an agreement by the parties. Article 27 references the categories of law or rules of law that, depending on the legal basis of the claim and the specific issues to be determined, may be applicable to the resolution of investment disputes, namely public international law (treaties, customary international law, and general principles of law (see Article 38(1) of the Statute of the International Court of Justice) and domestic laws

(cf. *Busse* in VIAC Handbook (2019) Art 27 for further details on the applicable law and criteria for a choice).

CLOSURE OF THE PROCEEDINGS AND TIME FOR RENDERING THE AWARD

Article 32

(1) As soon as the arbitral tribunal is convinced that the parties have had sufficient opportunity to make submissions and to offer evidence, the arbitral tribunal shall declare the proceedings closed as to the matters to be decided in the award. The arbitral tribunal may reopen the proceedings at any time.

(2) The award shall be rendered no later than six months after the last hearing concerning matters to be decided in an award or the filing of the last authorized submission concerning such matters, whatever is the later. The Secretary General may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative. Exceeding the time limit for the award will not render the arbitration agreement invalid or deprive the arbitral tribunal of its jurisdiction.

EXPLANATORY NOTE

1. Purpose of the provision

1 Article 32 determines the closure of the proceedings and the time limit for rendering an award. The provision corresponds to Article 32 Vienna Rules for commercial disputes with one exception: the time limit for rendering the award under the Vienna Investment Rules is six months after the last hearing or the last authorized submission on the matter to be decided in an award, whichever is later, three months longer than under the Vienna Rules.

2 The period for the rendering of an award under the Vienna Investment Rules is thus not triggered by the closure of the proceedings by the arbitral tribunal, but by the last hearing or the last authorized submission. The Secretary General may extend the six-month time limit pursuant to a reasoned request from the arbitral tribunal, but may also decrease the arbitrators' fees by up to 40% for inefficient conduct of the proceedings.

For a detailed explanation of the background cf. *VIAC Explanatory Notes Vienna Investment Rules* (2022) Art 32. **3**

INTERIM AND CONSERVATORY MEASURES / SECURITY FOR COSTS

Article 33

(1) Unless the parties have agreed otherwise, as soon as the file has been transmitted to the arbitral tribunal (Article 11), the arbitral tribunal may, at the request of a party, grant interim or conservatory measures against another party as well as amend, suspend or revoke any such measures. The other parties shall be heard before the arbitral tribunal renders any decision on interim or conservatory measures. The arbitral tribunal may require any party to provide appropriate security in connection with such a measure. The parties shall comply with such orders, irrespective of whether they are enforceable before national courts.

(2) Any orders for interim or conservatory measures pursuant to this Article shall be in writing. In an arbitration with more than one arbitrator, the signature of the chairperson shall suffice. If the chairperson is hindered from acting, the signature of another arbitrator shall suffice, provided the arbitrator signing the order records the reasons for the absence of the chairperson's signature.

(3) Unless the parties have agreed otherwise, orders for interim or conservatory measures shall state the reasons upon which they are based. The order shall identify the date on which it was issued and the place of arbitration.

(4) Orders for interim and conservatory measures shall be retained in the same manner as awards (Article 36 paragraph 5).

(5) The provisions of paragraphs 1 to 4 of this Article do not prevent the parties from applying to any competent national authority for interim or conservatory measures. A request to a national authority to order such measures or to enforce such measures already ordered by the arbitral tribunal shall not constitute an infringement or waiver of the arbitration agreement and shall not affect the powers of the arbitral tribunal. The parties shall immediately inform the Secretariat and the arbitral tribunal of any such request as well as of all measures ordered by the national authority.

(6) The arbitral tribunal may, at the request of a party, order any party asserting a claim or counterclaim to provide security for costs, if the requesting party shows cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. When deciding on a request for security for costs, the arbitral tribunal shall give all parties the opportunity to present their views.

(7) If a party fails to comply with an order by the arbitral tribunal for security for costs, the arbitral tribunal may, upon request, suspend in whole or in part, or terminate, the proceedings (Article 34 paragraph 2.4).

EXPLANATORY NOTE

1. Introduction

For relevant commentary on the corresponding provision in the Vienna Rules for commercial disputes: cf. *Zeiler/Beisteiner* in VIAC Handbook (2019) Art 33 mns 1-18; *Gabriel/Haugeneder/Pörnbacher* in VIAC Handbook (2019) Art 33 mns 19-36. **1**

The provisions on security for costs in the paras 6 and 7 of Article 33 of the Vienna Rules for commercial disputes were amended in the course of the Rules Revision 2021. Since these provisions are relevant in conjunction with the provision on TPF in Article 13a, the Explanatory Notes Vienna Investment Rules include comments on these paragraphs. **2**

2. Security for costs

Cf. *Gabriel/Haugeneder/Pörnbacher* in VIAC Handbook (2019) Art 33 mns 19-36. **3**

Article 33 para 6 clarifies that any party, not only the respondent, may request from the arbitral tribunal an order for security for costs against any other party asserting a claim or counterclaim. As a result of the Rules Revision 2021, the Vienna Rules contain a clarification that was already implicit in the previous version of para 6 (cf. *Gabriel/Haugeneder/Pörnbacher* in VIAC Handbook (2019) Art 33 mn 25). **4**

In accordance with the practice of investment tribunals, the mere existence of a TPF arrangement does not itself justify an order of security for costs (cf. *Explanatory Notes V*ienna Rules (2022) Art 13a). **5**

6 If a party fails to comply with a security for costs order, the tribunal may, upon request, suspend in whole or in part, or terminate the proceedings.

PUBLICATION OF INFORMATION AND AWARDS

Article 41

(1) By agreeing to submit a dispute to arbitration pursuant to the Vienna Investment Arbitration Rules, the parties shall be deemed to have agreed that VIAC may publish certain information on the arbitral proceedings. VIAC may publish information in the public interest. Such information shall be limited to the nationality of the parties, the identity and nationality of the members of the arbitral tribunal, the date of commencement of the arbitration, the instrument under which the arbitration has been commenced, and whether the proceedings are pending or have been terminated.

(2) VIAC may also publish on the VIAC website, in legal journals or VIAC's own publications anonymized summaries or extracts of decisions and awards. Such summaries or extracts shall be anonymized with the exception of information that may be published under paragraph 1 of this Article.

EXPLANATORY NOTE

1. Introduction; purpose of the provision

Article 41 authorizes VIAC to publish, in the public interest, certain limited information on the arbitral proceedings, which allows third parties, including non-disputing treaty parties with a right to make written submissions on questions of treaty interpretation (Article 14a), to become aware of the proceedings. In addition, VIAC is authorized to publish anonymized summaries or extracts of decisions and awards, which fosters consistency and coherence of investment decisions and awards. This is without prejudice to an agreement by the parties on the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. **1**

2. Publication of certain limited information on the arbitration (para 1)

By agreeing to the Vienna Investment Rules, the parties are deemed to have agreed that VIAC may publish the following limited information on a pending arbitration: **2**

- nationality of the parties,
- the identity and nationality of the arbitrators,
- the date of commencement of the arbitration,
- the instrument under which the arbitration has been commenced, and
- whether the proceedings are pending or have been terminated.

3 Article 41 does not however authorize publication of the identity of the parties and their representatives.

4 The parties are, of course, free to agree on greater transparency, including by agreeing on the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in which case VIAC will not act as repository but refer the parties to UNCITRAL for this service.

3. Reasons for publication of arbitral awards (para 2)

5 Cf. *Kreindler/Rogge* in VIAC Handbook (2019) Art 41 for details on the rationale of publication of anonymized summaries or extracts of awards in commercial proceedings which also apply in investment proceedings.

PART II
VIAC RULES OF INVESTMENT MEDIATION ("VIENNA INVESTMENT MEDIATION RULES")

SCOPE OF APPLICATION OF THE VIENNA INVESTMENT MEDIATION RULES

Article 1

(1) An agreement to submit a dispute to proceedings in accordance with the VIAC Rules of Investment Mediation (hereinafter "Vienna Investment Mediation Rules") may be expressed in a contract, treaty, statute or other instrument, or through an offer by a party in a contract, treaty, statute or other instrument which is subsequently accepted by the other party by any means, including by the other party's commencement of such proceedings.

(2) Where the parties have agreed to submit their dispute to proceedings in accordance with the Vienna Investment Mediation Rules, the parties shall be deemed to have agreed that the proceedings shall be administered by VIAC.

(3) Unless the parties have agreed otherwise, the Vienna Investment Mediation Rules shall apply in the version in effect at the time of the commencement of the proceedings if the parties, before or after the dispute has arisen, have agreed to submit their dispute to the Vienna Investment Mediation Rules.

(4) The Vienna Investment Mediation Rules may be amended by a written agreement of all parties. Following the appointment of the mediator, any amendment is also subject to the mediator's consent.

(5) The Board may refuse to administer proceedings under the Vienna Investment Mediation Rules if any agreed amendments are incompatible with the Vienna Investment Mediation Rules.

(6) To the extent the Vienna Investment Mediation Rules do not contain any rules on a specific issue and to the extent compatible with the Vienna Investment Mediation Rules, the Vienna Investment Arbitration Rules shall apply by analogy.

EXPLANATORY NOTE

1. Purpose of the provision

1 Article 1 paras 1 and 2 define the scope of application of the Vienna Investment Mediation Rules and provide for administration of the proceedings by VIAC. They mirror Article 1 paras 1 and 2 Vienna Mediatio Rules for commercial disputes. Cf. VIAC Explanatory Notes Vienna Investment Rules (2022) Art 1. Art 1 paras 3 to 6, in turn, mirror Art 1 paras 2 to 5 Vienna Mediation Rules. (cf. VIAC Explanatory Notes Vienna Mediation Rules (2022) Art 1).

2 The Vienna Investment Mediation Rules are based on the the Vienna Mediation Rules for commercial disputes.

4 As the Vienna Rules for commercial disputes, the Vienna Investment Rules are complemented by mediation rules (Part II), which may be applied independently of or in conjunction with investment arbitration proceedings. In the ISDS reform discussions, there is increasing interest for investor-state mediation. Accordingly, and to meet possible demands for hybrid proceedings such as Arb-Med-Arb in investment disputes, the Vienna Investment Rules are supplemented by mediation rules.

5 The Vienna Investment Rules contain separate rules for the conduct of mediation of investment disputes as a flexible and cost-effective alternative to arbitration. Disputing parties may employ mediation independently from, or in conjunction with, arbitration. The Vienna Investment Mediation Rules thus respond to demands for effective dispute prevention and mitigation and alternative forms of dispute resolution solutions for investor-State disputes voiced during the ISDS reform discussion.

6 The Vienna Investment Mediation Rules require individuals involved in the mediation process to treat the information they obtain as a result of that process as confidential and prohibit the use such documents in subsequent court or arbitral proceedings. However, the very existence of proceedings pursuant to the Vienna Investment Mediation Rules will not be treated as confidential.

PART III
Annexes to the VIAC Rules of Investment Arbitration and Mediation

Explanatory Notes regarding annexes 1-5

Annex 1

1 Notwithstanding minor linguistic changes, Annex 1 Vienna Investment Rules is similar to Annex 1 Vienna Rules for commercial disputes (cf. *Fremuth-Wolf/Grill* in VIAC Handbook (2019) Annex 1). It contains special model clauses for arbitration and mediation under the Vienna Investment Rules.

Model investment arbitration clause for contracts:

2 Parties may agree to submit to arbitration in accordance with the Vienna Investment Arbitration Rules any dispute, including under a contract, treaty, statute or other instrument and involving a State, State-controlled entity or intergovernmental organization.

3 Where the parties to a contract wish to submit a dispute to arbitration in accordance with the Vienna Investment Rules, they may insert in the contract an arbitration clause in the following form:

4 *All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, shall be finally settled under the Rules of Investment Arbitration (Vienna Investment Arbitration Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber by one or three arbitrators appointed in accordance with the said Rules.*

Parties may wish to stipulate the following in the arbitration clause:
(1) the number of arbitrators (one or three) (Article 17 Vienna Investment Rules);
(2) the language(s) to be used in the arbitral proceedings (Article 26 Vienna Investment Rules);
(3) the substantive law applicable to the contractual relationship, the substantive law applicable to the arbitration agreement (Article 27 Vienna Investment Rules), and the rules applicable to the proceedings (Article 28 Vienna Investment Rules);
(4) the place of arbitration (Article 25 Vienna Investment Rules);
(5) the applicability of the provisions on expedited proceedings (Article 45 Vienna Investment Rules);
(6) the scope of the arbitrators' confidentiality (Article 16 par 2 Vienna Investment Rules) and its extension regarding parties, representatives and experts.
(7) If the parties wish to conduct Arb-Med-Arb proceedings, the following addition to the model arbitration clause should be included:

Furthermore, the parties agree to jointly consider, after due initiation of the arbitration, to conduct proceedings in accordance with the Mediation Investment Rules of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber (Vienna Investment Mediation Rules). Settlements that are generated in such proceedings shall be referred to the arbitral tribunal appointed in the arbitration. The arbitral tribunal may render an award on agreed terms reflecting the content of the settlement (Article 37 paragraph 1 Vienna Investment Arbitration Rules). **5**

Model investment mediation clauses:

Parties may agree to submit to mediation or other alternative dispute resolution methods in accordance with the VMRI any dispute, including under a contract, treaty, statute or other instrument and involving a State, State-controlled entity or intergovernmental organization. **6**

7 Where the parties to a contract wish to submit a dispute to mediation or other alternative dispute resolution methods in accordance with the VMRI, they may insert in the contract a mediation clause in one of the following forms:

Model clause 1 - optional mediation

8 *Regarding all disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, the parties agree to jointly consider proceedings in accordance with the Rules of Investment Mediation (Vienna Mediation Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber.*

Model clause 2 - obligation to refer disputes to mediation followed by arbitration

9 *All disputes or claims arising out of or in connection with this contract, including disputes relating to its validity, breach, termination or nullity, shall first be submitted to proceedings in accordance with the Rules of Investment Mediation (Vienna Investment Mediation Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber.*

10 *In the event that within a period of [60][1] days from commencing proceedings under the Vienna Investment Mediation Rules the dispute or claims are not resolved, they shall be finally settled under the Rules of Investment Arbitration (Vienna Investment Arbitration Rules) of VIAC by one or three arbitrators appointed in accordance with the said Rules.[2]*

Model clause 3 - obligation to refer a present dispute to mediation

11 *The parties agree that the present dispute shall be submitted to proceedings in accordance with the Rules of Investment Mediation (Vienna Investment Mediation Rules) of the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber. The proceedings shall be initiated by*

[1] or a different period of time agreed upon in writing by the parties
[2] see the optional supplementary agreements for arbitration clauses

submitting a joint request. The registration fee shall be borne by the parties in equal shares.

Parties may wish to stipulate the following in the mediation clause:
(1) the number of mediators or other third-party neutrals (e.g. one or two);
(2) the language(s) to be used in the proceedings (Art 6 VMRI);
(3) the substantive law applicable to the contractual relationship, the substantive law applicable to the mediation agreement, and the rules applicable to the proceedings (Art para 3 VMRI);
(4) the admissibility of parallel proceedings (Art 10 VMRI);
(5) the interruption of the statute of limitations or waiver to invoke the statute of limitations for a specific period of time.

Model clause for VIAC as appointing authority in investment proceedings

It is recommended that parties wishing to select VIAC as appointing authority pursuant to Annex 4 insert the following wording in their arbitration / mediation clause: **12**

The Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber shall act as appointing authority in accordance with Annex 4 to the VIAC Rules of Investment Arbitration and Investment Mediation. **13**

Model clause for VIAC as administering authority in investment proceedings

It is recommended that parties wishing to select VIAC as administering authority pursuant to Annex 5 insert the following wording in their arbitration / mediation clause: **14**

The Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber shall act as administering authority in accordance with Annex 5 to the VIAC Rules of Investment Arbitration and Investment Mediation. **15**

Annex 2

16 Annex 2 on the internal rules of the Board is contained only in the Vienna Rules for commercial disputes and left blank in the Vienna Investment Rules in order to avoid duplication. For commentary on Annex 2, cf. *Baier/Heider* in VIAC Handbook (2019) Annex 2.

Annex 3

17 One of the most appealing features of VIAC investment arbitration are the comparatively low costs. There is no separate fee schedule for investment proceedings, i.e., the same rates apply as in commercial proceedings. The registration fee and the administrative and arbitrators' fees depend on the amount in dispute.

18 VIAC's registration fee is significantly lower than the registration fees typically charged by other arbitral institutions that administer investment arbitrations, such as ICSID, whose registration fee is USD 25,000.00, regardless of the amount in dispute (*see* ICSID Schedule of Fees). The overall costs of VIAC investment arbitration can be assessed with the online cost calculator available on the VIAC website (https://www.viac.eu/en/investment-arbitration/cost-calculator).

19 For example, the VIAC cost calculator indicates that the arbitration costs (comprising the arbitrators' fees, administrative costs, and the registration fee) for an investment dispute of EUR 20 million to be decided by a panel of three arbitrators range from EUR 302,650 to EUR 406,750 and for an investment dispute of EUR 10 million, again with a panel of three arbitrators, amount to a maximum of EUR 322,850.

20 Arbitration under the Vienna Investment Rules thus constitutes a viable option for smaller investment claims, which may be an important consideration, particularly for parties from the CEE/CIS region.

Cf. VIAC Explanatory Notes Vienna Rules (2022) Annex 3 for further details on the revised fee schedule following the Rules Revision 2021. The arbitrators' fees were raised for disputes involving higher amounts in dispute in response to criticism voiced by arbitrators that the previous fees were too low for high stake disputes. They also reflect the complexity of investment disputes. **21**

Annexes 4 and 5

VIAC is also acts as appointing and administering authority in *ad hoc* investment proceedings. As appointing authority, VIAC does not administer the arbitration proceedings itself, but, depending on the request, appoints arbitrators if the parties fail to do so, and rules on challenges or requests for removal of arbitrators. As administering authority, VIAC assists with the provision of certain requested services but does not administer the whole arbitration proceedings. **22**

Detailed rules are set forth in Annexes 4 and 5 on: **23**

1. VIAC as appointing or administering authority and its respective services
2. Requests – submission and required content
3. Costs
4. Disclaimer – this provision mirrors the respective provisions in the Vienna Rules for commercial disputes.

For further information see commentary on Annex 4 to the Vienna Rules 2018, which is partially still applicable (cf. *Fremuth-Wolf/Vanas-Metzler* in VIAC Handbook (2019) Annex 4 – in particular mns 1 to 4). **24**

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