

**Volume 1**  
**ICSID Secretariat**  
**August 2, 2018**

**Proposals for Amendment of  
the ICSID Rules — Synopsis**



**ICSID**

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

**PROPOSED AMENDMENTS FOR ICSID RULES – SYNOPSIS OF MAIN CHANGES**

**I. SCOPE OF AMENDMENTS**

1. The proposals for amendment deal with arbitration (AR) and conciliation (CR) under the ICSID Convention, initiation of Convention arbitration and conciliation proceedings (IR), and administrative and financial rules for Convention arbitration and conciliation (AFR). They also address the Additional Facility Rules AF Rules, and proceedings under those rules – namely arbitration (AF)AR, conciliation (AF)CR, fact-finding (AF)FFR – and a new set of mediation rules (AF)MR under the AF, with a set of administrative and financial regulations for all AF proceedings (AF)AFR.

**TABLE OF ABBREVIATIONS**

<b>ABBREVIATIONS</b>	<b>PROCEEDINGS UNDER THE ICSID CONVENTION</b>
<b>AFR</b>	<b>Administrative and Financial Regulations</b>
<b>IR</b>	<b>Institution Rules</b>
<b>AR</b>	<b>Arbitration Rules</b>
<b>CR</b>	<b>Conciliation Rules</b>
	<b>PROCEEDINGS UNDER THE ICSID ADDITIONAL FACILITY</b>
<b>AF Rules</b>	<b>Additional Facility Rules</b>
<b>(AF)AFR</b>	<b>Additional Facility Administrative and Financial Regulations (Annex A)</b>
<b>(AF)AR</b>	<b>Additional Facility Arbitration Rules (Annex B)</b>
<b>(AF)CR</b>	<b>Additional Facility Conciliation Rules (Annex C)</b>
<b>(AF)FFR</b>	<b>Additional Facility Fact-Finding Rules (Annex D)</b>
<b>(AF)MR</b>	<b>Additional Facility Mediation Rules (Annex E)</b>

## **II. GENERAL APPROACH**

2. The rules have been fully redrafted in plain, modern, gender-neutral language and re-organized in a user-friendly manner. Inaccurate translations have been revised to ensure the Rules convey the same meaning in English, French and Spanish.
3. All filing will be done electronically, unless there are special reasons to maintain paper filing (AR 3; CR 3; (AF)AR) 11; (AF)CR 11; (AF)FFR 4; (AF)MR 3).
4. Time lines have been specified for numerous procedures, and in many cases, reduced.

## **III. ADMINISTRATIVE AND FINANCIAL REGULATIONS – “AFR”**

### **A. PROPOSED AFR AMENDMENTS APPLICABLE TO GOVERNANCE OF ICSID**

5. States are given increased time (from 7 to 14 days) to add items to the Administrative Council meeting agenda (AFR 3).
6. The procedure for designating a Presiding Officer in the absence of the Chairman is simplified. A WB Vice-President is proposed for this role rather than nominating a different country representative each time, as is currently the case (AFR 4).
7. The Chairman may call for a vote by correspondence at any time rather than only when the action contemplated relates to something that must be done before the next Annual Meeting. The time to cast a vote by correspondence is extended to 30 days (AFR 7). This will allow more business to be done between Annual Meetings.
8. The Secretary-General (SG) will be able to designate which Deputy Secretary-General (DSG) acts in the absence of the SG, and can alternate between DSGs rather than always naming the more senior in post (AFR 9).

### **B. PROPOSED AFR AMENDMENTS APPLICABLE TO FINANCES AND SECRETARIAT FUNCTIONS**

9. The AFR remains the relevant set of administrative and financial regulations for Convention arbitration and conciliation. In addition, the (AF)AFR, a new set of AF-specific AFR, are adopted for arbitration, conciliation, fact-finding and mediation under the AF. The two sets of AFR are similar, and are overviewed here.
10. Arbitrators, Conciliators, Fact-Finders and Mediators will be paid on an hourly basis rather than according to the current mixed (days and hours) formula, and will receive a flat *per diem* for expenses other than transportation to and from the hearing (AFR 14(1); (AF)AFR 7(1) & Schedule 1- Memorandum of Fees).
11. Requests to be paid more than the ICSID tariff (currently USD 3000/ day) are further regulated. They must be made through the SG, before the first session and must be justified (AFR 14(2); (AF)AFR 7(2)).
12. The time during which a proceeding can be suspended for non-payment of advances is reduced from 6 months to 3 months and the SG can discontinue the case at the end of the 3-month period without further intervention of the Tribunal (AFR 14(5); (AF)AFR 7(5)).
13. Certain provisions previously included in the AFR regarding conduct of proceedings (time limits, supporting documents) have been incorporated in the AR and CR and in the relevant AF rules.

14. The provisions on privileges and immunities remain in the AFR and apply to all ICSID Convention proceedings.

#### **IV. INSTITUTION RULES – “IR”**

15. The Institution Rules (IR) apply to initiation of arbitration and conciliation under the Convention. Institution rules for AF cases are included in each set of AF rules.
16. The IR have a clear checklist of what must be included in a Request to initiate proceedings (IR 2) and of recommended but not mandatory points which will expedite subsequent proceedings (IR 3).
17. A claimant may opt to have the request to initiate proceedings substitute for the first memorial in the arbitration, thus expediting proceedings from an early date (AR 13(2); (AF)AR 22(2)).
18. The IR accommodate multiparty cases, reflecting practice to date (IR 1, 8).

#### **V. ARBITRATION RULES – “AR AND (AF)AR”**

19. The Convention Arbitration Rules (AR) are amended and simplified. Similar amendments are included in the Additional Facility Arbitration Rules ((AF)AR). The summary below addresses changes to the AR and notes where the (AF)AR have the same provision.

##### **A. GENERAL PROVISIONS AND CONDUCT OF THE PROCEEDING**

20. AR 5 maintains the right to bilingual proceedings while trying to reduce the cost and time resulting from use of two languages. Parties must indicate their proposed language of proceeding before arbitrator appointment, to coordinate language capacity of appointees. Submissions and correspondence may be filed in the preferred procedural language of a party, with translation only if the Tribunal finds it necessary (AR 5; (AF)AR 13; IR 3-4).
21. AR 8-9 ((AF)AR 16-17) stipulate that steps taken by a party after expiry of a time limit are disregarded unless the late party establishes there were special circumstances justifying the delay. A request for extension of a time limit must be reasoned and may only be granted if made prior to expiry of the time limit. Tribunals must use best efforts to meet time limits for issuing orders, decisions and Awards, and have a new duty to advise parties if they are unable to do so and to state when they anticipate meeting the time frame.
22. A new rule establishes general duties for the parties and Tribunal, including equality of treatment of the parties, acting in an expeditious and cost-effective manner, and for parties to cooperate in implementing Tribunal decisions (AR 11; (AF)AR 20).
23. AR 13 ((AF)AR 22) states that parties shall file a memorial and a counter-memorial, and if necessary or agreed by the Parties, a reply and rejoinder. Reply and rejoinder should not be automatic for every application. Further, reply and rejoinder are limited to new facts or argument and should not replay the contents of prior pleadings. An innovation is found in AR 13(2) ((AF)AR 22(2)) which allows a party to elect that its Request be considered its first Memorial.
24. AR 14 ((AF)AR 23) encourages the Tribunal to hold case management conferences to identify uncontested facts, and to narrow and resolve procedural or substantive issues as the case proceeds. This reflects a philosophy of empowering Tribunals to actively case manage proceedings throughout.

25. Tribunals must deliberate immediately after the last submission on any matter for decision. This simple practice increases timely delivery of Awards and decisions and hence is made mandatory by AR 16(4) ((AF)AR 26(4)).
26. Awards of costs remain in the discretion of the Tribunal pursuant to Convention Art. 61. However, AR 19(4) now expressly requires the Tribunal to consider four specific factors: (i) the outcome of the proceeding; (ii) the parties' conduct during the proceeding; (iii) the complexity of the issues; and (iv) the reasonableness of the costs claimed when making a costs Award. AR 19 also encourages Tribunals to make costs orders on an interim basis and not just in the final Award. This is intended to keep parties cost-conscious during interlocutory stages (see also (AF)AR 29). While these interim costs can only be executed with the Award, this practice will help parties gauge the on-going costs of a case and may encourage parties to refrain from continuing conduct that could give rise to further adverse costs orders.

## **B. CONSTITUTION OF TRIBUNALS**

27. AR 21 ((AF)AR 32) imposes a new obligation on the parties to disclose whether they have third-party funding, the source of the funding, and to keep such disclosure of information current through the proceeding. They are not required to disclose the funding agreement or its contents for this purpose. The name of an involved funder will be provided to the arbitrators prior to appointment to avoid inadvertent conflicts of interest, and the Arbitrator Declaration requires confirmation that there is no conflict with the named funder.
28. AR 22 enhances efficiency in constitution of Tribunals. The default formula in Convention Art. 37(2)(b) (two-party appointed arbitrators and an agreed-upon President) will apply automatically 60 days after the date of registration unless the parties advise the Secretary-General otherwise. This allows parties to continue negotiating about arbitrator selection after the 60 days, but only if they give express notice to the SG.
29. The (AF)AR is slightly different in this respect. The parties to an (AF)AR arbitration have 60 days to decide on the number and method of selecting arbitrators. If they do not advise the SG of an agreement within 60 days the Tribunal will consist of three persons, one selected by each party and the President selected by agreement of the parties ((AF)AR 33). If the Tribunal has not been constituted within 90 days of registration, either party may ask the SG (rather than the Chairman) to make the missing appointments. The SG will consult the parties as far as possible, and use best efforts to appoint within 30 days ((AF)AR 35).
30. AR 23 and (AF)AR 33 both eliminate the former multi-step process for Tribunal constitution which was rarely followed and had no effect.
31. AR 24 ((AF)AR 34) offers the assistance of the SG in appointing the President of the Tribunal or sole arbitrator. It supplements and expands upon the current practice of providing ballots automatically when Art. 38 of the Convention is invoked. Instead, it allows parties to request assistance at any stage and gives them the ability to ask for different types of assistance including a (non-binding) ballot, a (binding) list process or otherwise.
32. AR 26 ((AF)AR 36) gives appointees 20 days to accept appointment and send their declaration, instead of allowing the declaration to be filed by the first session as is currently done. An expanded arbitrator declaration form giving more information for purposes of identifying potential conflict is at Schedule 2. Similar declaration forms for Committee

members, conciliators, fact-finders and mediators are at Schedules 3, 4, 5 and 6 respectively.

### **C. DISQUALIFICATION OF ARBITRATORS**

33. ICSID is currently working with the UNCITRAL Secretariat on a Code of Conduct for Arbitrators. This will ensure a consistent Code of Conduct across all the major sets of rules used for ISDS, and can be incorporated into the ICSID declarations made by arbitrators at the start of a case.
34. In the interim, the disclosure requirements have been increased in the declarations and with respect to third-party funding. This will help to avoid conflicts of interest in the selection process and will give parties better information as to whether an application for disqualification is warranted.
35. Number of changes are also made to the disqualification chapter.
  - A specific time limit of 20 days is added for filing a disqualification motion, replacing the former requirement that it be filed “promptly” (AR 29; (AF)AR 39). A challenge to an arbitrator may be made any time before the Award is rendered, provided it is made within 20 days after the basis for the challenge arises.
  - AR 29 ((AF)AR 39) stipulates an expedited schedule for parties filing a challenge: the proposal must include all submissions and supporting documents; the reply is filed in seven days; arbitrator observations are filed within a further five days; the parties file final observations simultaneously within seven days; and the decision is made in 30 days.
  - The former “automatic suspension” upon filing a challenge is deleted. Instead, proceedings continue with the challenged arbitrator, except to the extent that both parties agree to suspend any part of the case during the challenge. For example, parties might agree to suspend a filing date scheduled for the next week, but not suspend filing dates for submissions scheduled for eight months from the date of the challenge. If the challenged arbitrator is ultimately disqualified, either party may request that any decision made while the proposal was pending be reconsidered by the newly constituted Tribunal (AR 29(3); (AF)AR 39(4)).
  - AR 30 addresses the decision-making process in challenges. The Convention requires two co-arbitrators to decide a challenge to a single member of a three-person Tribunal; in all other circumstances, the Chairman makes the decision on a challenge. New AR 30 allows the deciding co-arbitrators to send the challenge to the Chairman if they are unable to decide the challenge for any reason. In addition, if a second proposal is filed while a first is pending, both can be sent to the Chairman for decision. (AF)AR 40 is slightly different in this respect as AF challenges do not go to the Chairman. Under (AF)AR 39-40, the SG makes the final decision on disqualification.

### **D. INITIAL PROCEDURES**

36. First Sessions must still take place within 60 days (AR 34; (AF)AR 44) and Tribunals are encouraged to schedule the procedural calendar as far into the future as possible to preserve availability. The Procedural Order resulting from the first session must be issued within 15 days after the session.

37. Objections for Manifest Lack of Legal Merit are in AR 35 ((AF)AR 45). The rule clarifies that such objections may be raised concerning the substance of the claim, the jurisdiction of the Centre or the competence of the Tribunal.
38. Preliminary objections remain; however, they must be filed as soon as possible, at the latest on the date for filing the counter-memorial if the objection relates to the main claim, or on the date for filing the next submission after an ancillary claim if related to the ancillary claim (AR 36; (AF)AR 46). If a party files a preliminary objection on the last date allowed, it must also file a counter-memorial on the merits or the reply on the merits, if the objection relates to an ancillary claim (AR 36(4); (AF)AR 46(5)).
39. An express rule allowing bifurcation is added in AR 37 ((AF)AR 47), requiring parties to request bifurcation within 30 days of the memorial on the merits or ancillary claim.
40. AR 38 ((AF)AR 48) proposes a new rule for consolidation or coordination of claims on consent of the parties. This provides parties greater flexibility to consolidate claims or to coordinate procedures, taking advantage of joint methods of dispute resolution. In addition, AR 38BIS (Schedule 7) proposes a draft mandatory consolidation provision with an expedited schedule and a single consolidating arbitrator. This provision is for discussion of members, and is not currently proposed for inclusion unless Member States so indicate.

#### **E. EVIDENCE AND TRANSPARENCY**

41. The evidence rules remain largely unchanged. AR 34 ((AF)AR 44) requires a Tribunal to address document production with parties during the first session and lists the relevant considerations when deciding disputes arising out of document production. Document production is one of the most time-consuming parts of the arbitration process, and this should give arbitrators further tools to prevent onerous production phases.
42. AR 42 ((AF)AR 52) allows Tribunal-Appointed Experts. Such experts are increasingly used, although there was no relevant rule addressing their participation.
43. Many proposals are made concerning transparency in each set of rules. Schedule 8 is a background paper addressing transparency generally and explaining these provisions. It should be read to understand the scheme proposed. The ICSID rules on transparency apply only where there is no specific treaty (investment treaty or the Mauritius Convention) applicable and no case specific agreement on the matter.
44. AR 44 proposes to publish Convention Awards with consent of the parties, but a new provision deems such consent after 60 days if a party does not object in writing. If a party objects, the Centre publishes legal excerpts. A new process and timeline for excerpting is included. The (AF)AR are not constrained by Art. 48 of the Convention requiring consent to publish Awards, and hence the AR provision differs from the (AF) AR provision. (AF)AR 54 provides for publication of Awards with redaction.
45. Under both the AR and the (AF)AR, decisions and orders will be published within 60 days of their issuance, with redactions agreed by the parties. If the parties cannot agree on redaction, the Tribunal will decide any disputes and then the Centre will publish the document (AR 45; (AF)AR 54).
46. Parties will be able to publish other documents with agreed redaction on the ICSID website procedural details section for each case (AR 46; (AF)AR 55).
47. The Tribunal shall allow open hearings unless a party objects. Open hearings will be subject to logistical arrangements to preserve confidential information. The Centre will

publish recordings and transcripts of hearings unless the parties object (AR 47; (AF)AR 56).

48. AR 48 ((AF)AR 57) continues the process for participation of non-disputing parties (NDP) but adds two criteria for consideration as to whether to allow an NDP written submission: identification of the activities of the NDP and any affiliation with a disputing party, and whether the NDP has received any assistance with its filing. The proposed rule also gives a Tribunal discretion to order NDPs to contribute to the increased cost attributable to their participation. Finally, the Tribunal may order that the NDP receive relevant documents, subject to objection by either party.
49. AR 49 ((AF)AR 58) would allow a non-disputing Treaty Party (NDTP) to file a written submission on the application or interpretation of the Treaty at issue. An NDTP wishing to file a written submission on other matters within the scope of the dispute would have to apply to be an NDP in accordance with AR 48 ((AF)AR 57), as is currently the case.

#### **F. SPECIAL PROCEDURES**

50. The rule on provisional measures (AR 50;(AF) AR 59) sets the criteria for such measures (urgent and necessary). It gives examples of measures that the Tribunal may recommend, taking into account all the circumstances. It also requires parties to advise when the circumstances upon which a provisional measure was granted have changed.
51. AR 51 ((AF)AR 60) proposes a new, stand-alone rule allowing a Tribunal to order security for costs. The Tribunal must consider the relevant party's ability to comply with an adverse decision on costs and any other relevant circumstances. If a party fails to comply with such an order, the Tribunal may suspend the proceeding for up to 90 days, and thereafter, may discontinue the proceeding after consulting with the parties. Parties must advise the Tribunal of any change in the circumstances upon which security for costs were ordered.
52. New rule AR 54 ((AF)AR 63) codifies suspension generally, allowing it on the agreement of the parties, request of a single party or on the initiative of the Tribunal, with or without conditions.
53. The proposals revise discontinuance for failure to take a step (AR 57; (AF)AR 66) by requiring notice after 150 days of inactivity, allowing a further 30 days to take a step, failing which the proceeding will be deemed discontinued. If parties wish to keep the proceeding suspended longer than the 30-day period, they can apply for a suspension under AR 54 ((AF)AR 63).

#### **G. AWARD AND POST-AWARD REMEDIES**

54. Awards must be rendered within 60 days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection and 240 days after the last submission on all other matters (AR 59; (AF)AR 69). AR 8(3) requires Tribunals to use best efforts to meet these timelines and to advise parties if they cannot, with a revised anticipated delivery date ((AF)AR 16(3)).
55. The time limits for filing post-Award remedies remain as before (AR 62-63). The procedure is streamlined for interpretation, revision and annulment, with one round of submissions unless the parties agree otherwise, and a hearing is held if requested. The decision on supplementary decision and rectification must be issued within 60 days after



the last submission (AR 62(8)), and the decision on interpretation, revision or annulment must be issued within 120 days after the last submission (AR 66(5)).

## **H. EXPEDITED ARBITRATION**

56. A new chapter for optional Expedited Arbitration (EA) is introduced in AR 69-79 ((AF)AR 73-81). This allows the parties to expressly opt into an expedited process for the full arbitration. The parties must select EA within 20 days of the notice of registration. They must select a Tribunal within 30 days of registration, and can opt for a Sole Arbitrator or three-person Tribunal. The provisions for selection and appointment are modified to accommodate the shorter timeframe.
57. The First Session is held within 30 days. memorials and counter-memorials are each filed in 60 days and limited to 200 pages, while replies and rejoinders may each be filed in 40 days and are limited to 100 pages. The hearing is held within 60 days after the last written submission.
58. The Tribunal can extend the timetable by 30 days to address document disclosure motions, if needed. It may also adjust the schedule if needed for preliminary objection or ancillary claim, but retaining the expedited nature of the process. All other applications run in parallel with the main timeline.
59. An expedited schedule is also provided for post-Award remedies under the AF.

## **VI. ADDITIONAL FACILITY RULES (AF Rules)**

60. The Additional Facility Rules have also been changed. The original AF Rules allowed conciliation or arbitration between a Contracting State or its national on the one hand, and a non-Contracting State or its national on the other hand. It was intended to allow investment proceedings where the jurisdictional requirements of the Convention were not met. While AF proceedings did not import the benefits of the Convention, notably the provisions on enforcement of Awards, they did provide specialized ISDS Rules for non-Convention arbitration and conciliation.
61. The proposed AF Rules make several changes to the framework for AF proceedings, which expand the circumstances in which rules under the AF can be invoked.
62. First, the AF Rules begin with a set of definitions that are key to its availability. Notably, a regional economic integration organization can now be a party to AF proceedings. Regional economic integration organization (“REIO”) is defined as an organization constituted by States to which they have transferred competence in respect of matters governed by the AF Rules, including the authority to take binding decisions in respect of those matters. This is the definition of REIO usually found in international treaties. Its inclusion allows REIOs to be parties to AF arbitration or conciliation. The inclusion of REIOs reflects the fact that increasingly States are negotiating IIAs as regional entities and may indeed sign an investment treaty as an REIO.
63. The AF Rules also include the term “Contracting REIO”, which would be an REIO that joins the ICSID Convention. To be clear, the current amendments do not address membership requirements at ICSID, which are found in the Convention.
64. Second, the inclusion of “REIO” means that the definition of a “national of another State” must be revised to include persons that are nationals of any constituent State of an REIO party to the dispute or the REIO itself.

65. Third, the proposed AF Rules would extend the availability of AF arbitration and conciliation at ICSID to cases where both the claimant and the respondent are not ICSID Contracting States or REIOs, or nationals of ICSID Contracting States or of any constituent States of Contracting REIOs (AF Rules, Art. 2(1)(a)(i)). To date, such cases could not be commenced under the ICSID AF (or the ICSID Convention). Some IIAs currently offer this possibility, hence this amendment gives effect to such treaties.
66. AF Rules Art. 2(1)(a)(ii) allows arbitration and conciliation proceedings between a Contracting entity and a non-Contracting entity, as has been the case since the AF Rules were adopted in 1978.
67. Fourth, arbitration and conciliation under the AF Rules are delinked from the Convention. One consequence of this is that the definition of investment will be based solely on the investment instrument, and the “double keyhole” test of the Convention will clearly be inapplicable. This has been the majority view in cases, but is confirmed by this amendment. Similarly, under the AF, the dispute must pertain to an investment. This means the terms negotiated between the treaty Parties in their IIA will provide the only relevant definition of investment.
68. The usual process for registration of a Request is adopted in the AF Rules for all the proceedings, and the requirement of “approval of access” in the former AF is deleted.
69. Finally, the administration of fact-finding and mediation proceedings is offered under the AF (Art. 2(1)(b)-(c)).

## **VII. AF ADMINISTRATIVE AND FINANCIAL REGULATIONS – “(AF)AFR”**

70. The (AF)AFR apply to arbitration, conciliation, fact-finding and mediation under the Additional Facility. They are modelled on the AFR for arbitration and conciliation under the ICSID Convention, and contain provisions relating to finances in proceedings and general provisions concerning the conduct of proceedings. They are reviewed above, under III(B) “Administrative and Financial Regulations”.

## **VIII. AF ARBITRATION RULES – “(AF)AR”**

71. The (AF)AR are similar to the AR, as noted above. The provisions specific to the (AF)AR are noted here.
72. (AF)AR 24 states that the place of arbitration will be agreed to by the parties. Failing agreement, the Tribunal will determine the place of arbitration after consulting the parties. Hearings may be held in any place ((AF)AR 25). The Award is deemed to be rendered at the place of arbitration no matter where hearings were held.
73. The rule regarding nationality of arbitrators is the same as for the AR. Because the (AF)AR allow REIOs as parties to the proceeding, they also specify that arbitrators may not have the same nationality as the constituent State of the REIO party to the dispute, except with consent of all parties ((AF)AR 30).
74. The revised process for disqualification of arbitrators for AR also applies to the (AF)AR, except that the SG makes the decision; there is no Chairman in (AF)AR challenges and the provision concerning decision-making by co-arbitrators also does not apply (AF)AR 39-40.
75. (AF)AR 54 provides for mandatory publication of Awards with redaction.

76. Upon request of the parties, the Secretariat will file a copy of the Award as required by the law of the place of arbitration ((AF)AR 71).
77. The procedure for supplementary decisions, rectification and interpretation of the Award remains as before, with a requirement that they be issued within 60 days of the last written or oral submission on such request ((AF)AR 72).

## **IX. CONCILIATION – “CR AND (AF)CR”**

78. The Convention CR are amended significantly, to introduce greater flexibility into the process. Similar amendments are included in the (AF)CR. The summary below addresses changes to the CR and notes where the AF Conciliation Rules ((AF)CR) have the same provision.
79. A request for conciliation under the CR is addressed by the Institution Rules. A request for AF conciliation is filed under the (AF)CR 2-5.
80. Filing under the CR and (AF)CR is by electronic means (CR 3; (AF)CR 11) and communications are routed through the Secretariat unless the parties or the Commission decide to communicate directly, keeping the Secretariat in copy (CR 4; (AF)CR 12).
81. Advance payments on costs are to be made in equal shares unless a different division is agreed to by the parties (CR 6; (AF)CR 14). Parties to conciliation share the costs of the proceeding, unless a different division is agreed to. Each bears their own costs of the conciliation (CR 6; (AF)CR 14).
82. Confidentiality rules in conciliation differ from arbitration due to the nature of the process (non-binding and non-adversarial). Documents are presumptively confidential but parties may consent to disclosure (CR 7; (AF)CR 15).
83. Parties cannot make collateral use of statements, admissions, settlement offers, Reports, recommendations, orders, decisions or documents obtained in the conciliation (CR 8; (AF)CR 16). Deliberations are confidential (CR 26; (AF)CR 34).
84. Meetings between the parties and the Commission may be conducted flexibly, and the conciliator may meet jointly or separately with the parties. Parties may agree to observations of meetings by persons other than the parties (CR 30; (AF)CR 38).
85. Parties are encouraged to agree on a Sole Conciliator but may select any uneven number. Under the Additional Facility, a Sole Conciliator is the default option if no selection is made within 60 days of registration ((AF)CR 17).
86. The Secretary-General can assist the parties with selection upon request of both parties at any time, and can appoint missing conciliators in an AF conciliation if requested by either party after 90 days. The Chairman appoints upon request after 90 days in a Convention conciliation. (CR 11-12; (AF)CR 19-20).
87. The relevant declaration for conciliators has been updated and expanded. A continuing obligation of disclosure has also been introduced (CR 14(6); (AF)CR 22(6)).
88. The procedure for challenge is the same under the CR and (AF)CR. The proposal must be made within 20 days of learning the facts upon which disqualification is proposed, a response submission filed in seven days, a conciliators statement filed within the next 5 days, final submissions within seven days and a decision within 30 days (CR 17-18; (AF)CR 25-26). The decision will be made by the Secretary-General. However, under the AF, all parties may agree to the proposal with the effect that the conciliator shall resign.

89. A new provision is introduced that requires a conciliator to resign if the parties agree ((AF)CR 28(2)). Further, the requirement that the co-conciliators consent to a resignation is removed in (AF)CR 28(1).
90. The conciliator's role is to clarify issues in dispute and help parties to reach a mutually agreeable resolution of all or part of their dispute. The conciliator can do so using various techniques, including recommending terms of settlement after consultation with the parties, recommending steps to avoid aggravating a dispute, requesting explanations or documents, communicating with parties together or separately and conducting site visits (CR 22; (AF)CR 30).
91. Instead of filing written submissions, parties to a conciliation file a brief initial statement before the first session describing the issues in dispute and their views on these issues, and further written statements if requested by the conciliator(s) (CR 28; (AF)CR 36).
92. Matters to be addressed at the first session have been updated and now include protection of confidential information, and exploration of agreements between the parties concerning (i) the initiation or pursuit of other settlement proceedings; (ii) the application of limitation or prescription periods; and (iii) identification of a representative who is authorized to settle the dispute on its behalf and a description of the process necessary for a settlement to be authorized.
93. New provisions are introduced allowing for the discontinuance of a conciliation prior to the constitution of the Commission by agreement of the parties or due to failure to take steps for 150 days prior to the constitution of the Commission of failure to make payments (CR 32-33; (AF)CR 40-41).
94. The final resolution of the conciliation is contained in the conciliation Report (CR 37; (AF)CR 45). It may note a parties' agreement (CR 34; (AF)CR 42), their failure to reach agreement (CR 35; (AF)CR 43), or failure to appear or participate (CR 36; (AF)CR 44).
95. A new provision has been introduced to allow the parties' signed and complete settlement agreement to be embodied in a Report. This change allows parties in ICSID conciliation to benefit from the enforcement regime for mediated settlements contemplated in the draft Convention on Mediated Settlements (Singapore Mediation Convention) (CR 34(2); (AF)CR 42(2)).

## **X. AF CONCILIATION – “(AF)CR”**

96. Conciliation under the Convention or AF Rules is largely similar, as noted above. Two main differences exist.
97. A request for AF conciliation is filed under the (AF)CR 2-5. As a result, the parties need not meet the jurisdictional constraints of the Convention.
98. Unlike in arbitration or conciliation, an AF conciliator must resign if both parties agree to the proposal for disqualification or otherwise request the conciliator to resign ((AF)CR 25, 28).

## **XI. AF FACT-FINDING – “(AF)FFR”**

99. The Fact-Finding Rules (“(AF)FFR”) are revised to be more simple, user-friendly and cost-effective.
100. The applicable (AF)FFR will be those in effect at the time of filing a Request for fact-finding ((AF)FFR 1). These rules can be modified or excluded by the parties in any respect.

101. A fact-finding is commenced by the parties jointly filing a Request for fact-finding. The (AF)FFR requires a joint Request because a successful fact-finding requires the consent and participation of both parties. The joint Request establishes that the parties are both committed to a fact-finding process from the outset ((AF)FFR 3).
102. The Request for fact-finding contains the usual information about the requesting parties and is filed electronically. It should also set out that the fact-finding pertains to an investment, the facts to be examined, the relevant circumstances and any provisions agreed between the parties as to the qualifications of the fact-finders or the process of constituting a fact-finding Committee ((AF)FFR 4).
103. The Request must also include a copy of the agreement between the parties allowing recourse to fact-finding. Of course, if no formal instrument exists recording such agreement, the parties can confirm in the Request that they have mutually agreed to fact-finding under the AF ((AF)FFR 4).
104. The Secretary-General reviews the Request and registers it if it is not manifestly outside the scope of Art. 2(1) of the Additional Facility Rules. Those Rules allow any parties to participate in fact-finding pertaining to an investment. Given this broad requirement, the review of the Request should be relatively simple, and fact-finding will be available to a broad range of parties. Fact-finding can take place between parties from Contracting States, non-Contracting States or REIOs. The jurisdictional limitations of the Convention or AF arbitration or conciliation in this respect do not apply to fact-finding; what is key is the consent of the parties and that the fact-finding pertains to an investment.
105. In particular, while fact-finding may occur in parallel with an on-going ICSID proceeding, it might also be a free-standing process between the parties to resolve a difference before a dispute crystallizes or another type of proceeding is instituted ((AF)FFR 4).
106. The notice of registration of the Request includes an invitation for the parties to constitute the fact-finding Committee without delay ((AF)FFR 5).
107. Members of a fact-finding Committee must meet the usual qualifications as to independence and impartiality. In addition, the parties may require that the fact-finder have particular expertise relevant to the Request. This is especially useful if the facts at issue are of a technical or scientific nature. Fact-finders sign a declaration as to their impartiality and have an obligation to keep this current throughout the proceeding ((AF)FFR 6, 8).
108. The parties must endeavor to agree on one or any uneven number of fact-finders on the Committee within 30 days of registration, failing which the Committee shall consist of a sole fact-finder. If the parties cannot name their fact-finder(s) within 60 days of registration, the Secretary-General shall appoint the fact-finder(s), after consulting with the parties on the profile of person required. The SG is also available to assist the parties at any time in agreeing on the number of members or the persons to be appointed. If no steps are taken within 120 days after registration, the proceeding cannot continue ((AF)FFR 7).
109. Once the fact-finders have accepted their appointment ((AF)FFR 8), the Committee is constituted ((AF)FFR 9).
110. The parties must each set out their views on the matter to be decided and the process to be followed in preliminary statements of up to 50 pages, filed within 15 days of constitution of the Committee. The Committee receives these and has a first session within the next 15 days where they establish the Protocol for the process. The Protocol essentially sets out the mandate of the Committee and the working methods it will follow ((AF)FFR 10). Important questions at this meeting include whether the Report will be binding and whether

the parties want simple fact-findings or also want recommendations based on the facts found.

111. Proceedings of the fact-finding Committee are confidential, and the parties are also not allowed to make use of information or documents obtained in the fact-finding in any other proceeding. This prohibition on collateral use of information from a proceeding is found in conciliation, fact-finding and mediation, and is intended to ensure full participation by parties on a “without prejudice” basis, in the hopes that the proceeding will be more likely to succeed ((AF)FFR 13).
112. The costs of the process are borne equally by the parties, through advances paid in accordance with the (AF)AFR, and the cost schedules of the Centre apply in the usual way ((AF)FFR 12).
113. The fact-finding concludes in two ways. Parties are free to withdraw or terminate the process at any time, or the Committee can issue a Report. The Committee’s Report can either make the findings (and recommendations) required, or note that parties have withdrawn or otherwise have not participated, making it impossible to reach conclusions on the facts ((AF)FFR 14-16). The Report is dispatched by the Secretary-General to each party ((AF)FFR 17).

## **XII. AF MEDIATION – “(AF)MR”**

114. The Mediation Rules of the Additional Facility ((AF)MR) are an entirely new set of rules. They respond to the requests of stakeholders to provide greater mediation capacity. They complement new bilateral and multilateral treaties providing for mediation and more generally, the objective of the Centre to provide parties with a greater breadth of dispute resolution tools.
115. Under Art. 2(1)(c) of the Additional Facility Rules, a mediation that pertains to an investment can be administered by the Centre. Like Fact-Finding, the MR are not bound by the jurisdictional constraints of the Convention or the requirements set out for AF arbitration and conciliation.
116. A mediation may be commenced under an existing agreement ((AF)MR 3) or may be agreed to by the parties on an ad hoc basis ((AF)MR 4). While few investment instruments contain mediation requirements or options, this is increasingly being included in BITs, MITs and contracts, and its use is likely to grow.
117. A mediation is commenced by submitting a Request for mediation, which is registered by the Secretary-General ((AF)MR 5). Parties may appoint a sole mediator or co-mediators, and the MR encourage parties to agree on the appointments. Failing agreement, the Secretary-General is available to help the parties to complete the mediator selection ((AF)MR 7).
118. Each party files a brief initial statement before the first session, and the parties determine the protocol for their mediation with the mediator(s) at the first session, to take place within 30 days of the mediator’s acceptance of appointment ((AF)MR 13).
119. The role of the mediator(s) is to find a mutually agreeable resolution of all or part of the dispute ((AF)MR 11). To that end, the mediator may conduct a very flexible process.
120. The mediation process is confidential, and parties cannot make collateral use of information or documents obtained from the mediation proceeding ((AF)MR 16).

121. The mediation process is determined by the parties with the mediator(s). It may include caucusing with a single party, meetings with both parties, gathering documents, hearing and utilizing other information gathering techniques ((AF)MR 14).
122. The mediation concludes by a notice of withdrawal from either party, a determination that resolution is unlikely, a determination that a party failed to participate or cooperate, or by a signed settlement agreement ((AF)MR 17). As in the case of conciliation, the MR have been drafted in a manner to allow such an agreement to fall within the purview of the proposed Singapore Convention on enforcement of mediated settlements.

Further details about the changes proposed are found in the ICSID Working Paper on Amendment of August 2, 2018. Questions or comments are welcomed and may be sent to: [icsidruleamendment@worldbank.org](mailto:icsidruleamendment@worldbank.org).