Proposals for Amendment of the ICSID Rules — Working Paper

Propositions d’amendement des règlements du CIRDI — Document de travail

Propuesta de Enmiendas a las Reglas del CIADI — Documento de Trabajo
V. RULES GOVERNING THE ADMINISTRATION OF PROCEEDINGS BY THE SECRETARIAT OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ADDITIONAL FACILITY (ADDITIONAL FACILITY RULES)

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THE ADDITIONAL FACILITY RULES

INTRODUCTION

916. The Additional Facility Rules (AF Rules) currently enable the ICSID Secretariat to administer investor-State arbitration and conciliation proceedings that cannot be brought under the ICSID Convention. They also allow the Secretariat to administer fact-finding proceedings.

917. Proceedings administered under the Additional Facility are conducted pursuant to ISDS-specific procedural rules (currently in Schedules A to C to the Additional Facility Rules). The Additional Facility provides a stand-alone alternative to the use of other rules for ISDS such as the UNCITRAL Arbitration Rules. These and other commercial arbitration rules are sometimes used when the ICSID Convention is not available because of jurisdictional constraints, in particular where one of the parties is not an ICSID Contracting State.

918. ICSID’s authority to conduct proceedings under the Additional Facility complements its administration of arbitration and conciliation under the ICSID Convention. It is supplemented by the Centre’s administration of arbitration cases under other rules, including the UNCITRAL Arbitration Rules, ad hoc investor-State and State-State arbitration cases, as well as the mediation of international investment disputes, and the administration of other alternative dispute resolution mechanisms.

919. The Administrative Council adopted the AF Rules in 1978, with an undertaking to review their operation after five years. At the 1984 Annual Meeting, the Administrative Council decided to maintain the Additional Facility as a permanent feature of ICSID.

920. Unlike the ICSID Rules and Regulations adopted pursuant to Art. 6 of the ICSID Convention (which require a two-thirds majority vote of the Administrative Council to be amended), the AF Rules may be amended by a simple majority vote of the Administrative Council pursuant to AFR 7(1).

921. Under the current AF Rules, the ICSID Secretariat is authorized to administer arbitration, conciliation and fact-finding proceedings between States and foreign nationals that are outside the jurisdiction of the Centre under Art. 25(1) of the Convention. Because such proceedings are not covered by the ICSID Convention, the provisions of the ICSID Convention and of the ICSID Conciliation or Arbitration Rules are not applicable. Rather, currently such proceedings are governed by the Fact-Finding (AF) Rules (FF(AF)RF), the Conciliation (AF) Rules (C(AF)R), and the Arbitration (AF) Rules (A(AF)R) that are in Schedules A to C to the current AF Rules.

922. While there are some differences between proceedings governed by the AF Rules and the Convention, there is substantial similarity in the procedure for conciliation under the AF and the Convention and for arbitration under the AF and the Convention. The proposals in the Working Paper (WP) maintain this similarity for the most part, with some exceptions explained in the WP text.
923. Overall, there have been 59 AF proceedings to date (2 AF Conciliations, 57 AF Arbitrations, and no Fact-Findings), most of them under NAFTA.

924. This WP addresses the proposed amendments to the AF Rules themselves, as well as to the rules of procedure annexed thereto, namely the (AF) Arbitration Rules (Annex B), (AF) Conciliation Rules (Annex C) and (AF) Fact-Finding Rules (Annex D). This WP also introduces the (AF) Mediation Rules (Annex E) and a set of Administrative and Financial Regulations specifically for Additional Facility cases (Annex A).

925. This Section of the WP addresses the proposed amendments to the AF Rules themselves, which extend the services offered to Member States and investors under the Additional Facility. It also simplifies the AF Rules to four articles.

### Introductory Note

Additional Facility proceedings are governed by the Additional Facility Rules, the relevant (Additional Facility) Arbitration (Annex B), Conciliation (Annex C), Fact-Finding (Annex D) or Mediation Rules (Annex E), and the Additional Facility Administrative and Financial Regulations (Annex A). They apply to investment proceedings that cannot be brought under the ICSID Convention due to lack of jurisdiction.

### Note introductive

Les instances conduites en vertu du Mécanisme supplémentaire sont régies par le Règlement du Mécanisme supplémentaire et, selon le cas, le Règlement d’arbitrage (Annexe B), le Règlement de conciliation (Annexe C), le Règlement de constatation des faits (Annexe D) ou le Règlement de médiation (Annexe E) (Mécanisme supplémentaire), ainsi que le Règlement administratif et financier (Mécanisme supplémentaire) (Annexe A). Ces règlements s’appliquent aux instances relatives à des investissements qui ne peuvent pas être engagées sur le fondement de la Convention CIRDI pour incompétence.

### Nota Introductoria

Los procedimientos del Mecanismo Complementario están regulados por el Reglamento del Mecanismo Complementario, y según corresponda, las Reglas del Mecanismo Complementario de Arbitraje (Anexo B), Conciliación (Anexo C), Comprobación de Hechos (Anexo D) o Mediación (Anexo E) (Mecanismo Complementario), y el Reglamento Administrativo y Financiero del Mecanismo Complementario (Anexo A). Este Reglamento se aplica a los procedimientos en materia de inversiones que no pueden iniciarse en virtud del Convenio del CIADI por falta de jurisdicción.
926. The introductory note is modified to remind users that AF proceedings are governed by the AF Rules, the relevant (AF) Arbitration, Conciliation, Fact-Finding or Mediation Rules and the (AF) Administrative and Financial Regulations ((AF)AFR). The proposed (AF)AFR in Annex A incorporates all administrative and financial regulations that are relevant to proceedings under the AF and makes the AF system a stand-alone set of rules.

927. To simplify matters for users, the WP proposes calling the rules in the Annexes “Rules” rather than “Articles” used in the current English formulation.

**ARTICLE 1 – DEFINITIONS**

**CURRENT RELATED PROVISIONS: AF Rules Art. 1**

<table>
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<tr>
<th>Article 1</th>
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<tbody>
<tr>
<td>Definitions</td>
</tr>
<tr>
<td>(1) “Secretariat” means the Secretariat of the Centre.</td>
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<tr>
<td>(2) “Centre” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.</td>
</tr>
<tr>
<td>(3) “Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which entered into force on October 14, 1966.</td>
</tr>
<tr>
<td>(4) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of those matters.</td>
</tr>
<tr>
<td>(5) “National of another State” means, unless otherwise agreed:</td>
</tr>
<tr>
<td>  (a) a natural person that is not, at the date of consent to the proceeding and at the date of the Request, a national of the State party to the dispute, or a national of any constituent State of the REIO party to the dispute;</td>
</tr>
<tr>
<td>  (b) a juridical person that is not, at the date of consent to the proceeding, a national of the State party to the dispute, or a national of any constituent State of the REIO party to the dispute; and</td>
</tr>
<tr>
<td>  (c) any juridical person that is, at the date of consent to the proceeding, a national of the State party to the dispute or that is a national of any constituent State of the REIO party to the dispute, and which the parties agree not to treat as a national</td>
</tr>
</tbody>
</table>
of that State for the purpose of these Rules.

(6) “Request” means a request for arbitration, conciliation, fact-finding or mediation.

(7) “Contracting State” means a State for which the Convention is in force.

(8) “Contracting REIO” means an REIO for which the Convention is in force.

**Article 1**

**Définitions**

(1) « Secrétariat » désigne le Secrétariat du Centre.

(2) « Centre » désigne le Centre international pour le règlement des différends relatifs aux investissements, créé en application de l’article 1 de la Convention.

(3) « Convention » désigne la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d’autres États, entrée en vigueur le 14 octobre 1966.

(4) « Organisation d’intégration économique régionale » ou « OIER » désigne une organisation constituée par des États à laquelle ils ont transféré des compétences à l’égard de questions régies par le présent Règlement, y compris le pouvoir de prendre des décisions ayant force obligatoire pour eux sur ces questions.

(5) « Ressortissant(e) d’un autre État » désigne, sauf accord contraire :

   (a) une personne physique qui n’est pas, tant à la date du consentement à l’instance qu’à la date de la requête, un(e) ressortissant(e) de l’État partie au différend, ou un(e) ressortissant(e) d’un État membre de l’OIER partie au différend ;

   (b) une personne morale qui n’est pas, à la date du consentement à l’instance, un ressortissant(e) de l’État partie au différend ou un(e) ressortissant(e) d’un État membre de l’OIER partie au différend ; et

   (c) une personne morale qui est, à la date du consentement à l’instance, une ressortissante de l’État partie au différend ou une ressortissante d’un État membre de l’OIER partie au différend, et que les parties conviennent de ne pas considérer comme ressortissante de cet État aux fins du présent Règlement.

(6) « Requête » désigne une requête d’arbitrage, de conciliation, de constatation des faits ou de médiation.

(7) « État contractant » désigne un État pour lequel la Convention est en vigueur.
Artículo 1
Definiciones

(1) “Secretariado” significa el Secretariado del Centro.

(2) “Centro” significa el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones establecido de conformidad con lo dispuesto en el Artículo 1 del Convenio.

(3) “Convenio” significa el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados que entró en vigor el 14 de octubre de 1966.

(4) “Organización Regional de Integración Económica” u “ORIE” significa una organización constituida por Estados a la que éstos han transferido competencia con respecto a cuestiones reguladas por este Reglamento, lo cual incluye la facultad para tomar decisiones vinculantes para dichos Estados con respecto a dichas cuestiones.

(5) “Nacional de otro Estado” significa, salvo acuerdo en contrario:

(a) una persona física que no sea nacional del Estado parte en la diferencia o nacional de cualquiera de los Estados que integren la ORIE parte en la diferencia, a la fecha del consentimiento al procedimiento y a la fecha de la solicitud;

(b) una persona jurídica que no sea nacional del Estado parte en la diferencia o nacional de cualquiera de los Estados que integren la ORIE parte en la diferencia, a la fecha del consentimiento al procedimiento; y

(c) cualquier persona jurídica que sea nacional del Estado parte en la diferencia o que sea nacional de cualquiera de los Estados que integren la ORIE parte en la diferencia, a la fecha del consentimiento al procedimiento, y que las partes acuerden en no tratar como nacional de dicho Estado a los fines de este Reglamento.

(6) “Solicitud” significa una solicitud de arbitraje, conciliación, comprobación de hechos o mediación.

(7) “Estado Contratante” significa un Estado con respecto al cual ha entrado en vigor el Convenio.

(8) “ORIE Contratante” significa una ORIE con respecto a la cual ha entrado en vigor el
Proposed Art. 1 sets forth necessary definitions. The definitions in proposed Art. 1 paras. (1) (Secretariat), (2) (Centre) and (3) (Convention) have been re-ordered but are the same as in the current AF Rules. The definition of Secretary-General in current Art. 1(5) is deleted as no reference is made to the Secretary-General in the AF Rules; rather, the Secretary-General is now referred to in (AF)AFR 2 under Annex A to the AF Rules.

Contracting State. The definition in current Art. 1(4) of a Contracting State is slightly modified by proposed Art. 1(7). Specifically, the current formulation of “a State for which the Convention has entered into force” is replaced by “a State for which the Convention is in force”. This modification takes account of the possibility that a State has ceased to be an ICSID Member State, due to denunciation in accordance with the ICSID Convention. The relevant date to determine ICSID Convention membership is the date the Request for arbitration, conciliation, fact-finding or mediation is filed.

REIO. The definitions in proposed Art. 1(4) and 1(8) address one of the main changes proposed for the AF Rules, namely to allow Regional Economic Integration Organizations (REIOs) to be parties to AF cases. Recently, REIOs have been more active in international investment agreements (IIAs) and some have concluded IIAs in their own name. A well-known example is the European Union, which has signed several IIAs as the EU, along with its constituent States. To accommodate the possibility of REIOs entering into IIAs and investment chapters providing for arbitration, the proposed AF Rules would allow REIOs to be parties to AF proceedings. Art. 1(4) defines REIO and is integral to allowing REIOs to access the AF upon adoption of these Rules.

In addition, Art. 1(8) defines a “Contracting REIO”. This would apply to an REIO that has joined the ICSID Convention. Article 67 of the Convention is currently open for signature by World Bank States members or ICJ State members invited to join ICSID by the Administrative Council. However, in the future, ICSID Member States may wish to consider an amendment to the Convention allowing REIOs to join the Convention. If so, the definition of a “Contracting REIO” would be required to determine access to the AF and the Convention. It should be highlighted that no formal amendment to this effect is under consideration at this time, and this process concerns rule amendments only.

In view of the proposed change to allow REIOs access to the AF, two new definitions are suggested.

First, proposed Art. 1(4) contains the definition of an REIO as “an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to take decisions binding on them in respect of those matters”. This definition embraces two main elements: (i) the constitution of an REIO by States; and (ii) the transfer of certain competencies by these States to the organization with regard to a subject matter covered by the AF Rules. The requirement that the REIO have the power to bind its member States is typically implied by the competencies transferred to the organization. Nonetheless, adding this requirement implies a certain level of
integration. This can be contrasted with those international organizations having cooperation objectives only, and not being legally integrated as a single organization.

934. The proposed definition of REIO is currently used in other international instruments such as the **ECT**, the **FAO Constitution**, the **WHO Framework Convention on Tobacco Control**, and the **Southern Indian Ocean Fisheries Agreement**. Very similar definitions can also be found in the **UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions**, the **UN Convention on the Use of Electronic Communication in International Contracts**, and the **UN Convention on the Rights of Persons with Disabilities**.

935. **Second**, proposed Art. 1(8) defines a “Contracting REIO” as “an REIO for which the Convention is in force”. Whether a party is eligible to participate in an AF proceeding depends on whether the ICSID Convention is in force for that party at the time of filing of the Request. This requirement has been maintained. Therefore, if the Convention was amended to allow REIOs to join the Convention, such REIO membership would be considered to determine whether proceedings could be initiated under the AF.

936. **National of another State.** The definition of a National of another State in proposed Art. 1(5) contains several changes from the existing AF Rules and provides additional flexibility to parties through the inclusion of the “unless otherwise agreed” language.

937. **First**, current Art. 1(6) defines a “National of another State” as a person who is “not a national of the State party to the proceeding”. This requirement is maintained in proposed Art. 1(5), but the definition is also expanded to include a national of a constituent State of an REIO that is a party to the dispute. Since nationals of an REIO do not technically exist as such, the nationality of its constituent States is retained because a national of a constituent State of the REIO could not file a claim against that REIO.

938. **Second**, proposed Art. 1(5) further clarifies that a “national of another State” can be either a physical or a juridical person. As indicated above, such person or company could not sue its own State, or the REIO to which its own State belongs, unless otherwise agreed.

939. **Third**, the definition in proposed Art. 1(5)(c) clarifies that the parties to the proceeding can agree to treat a juridical person as a national of another State. Typically, this would be the case of a locally incorporated company suing the State in which it is incorporated (i.e., its own State), provided that the State agrees to treat it as a foreign national, for example, because of its foreign ownership or control. The requirement for such an agreement in the proposed AF Rules imposes no requirement that States agree to treat a national as a foreign national. Instead, this is left to the agreement of the parties as there might be various reasons for parties to agree to treat a locally incorporated company as a foreign national.

940. **Fourth**, proposed Art. 1(5)(a) to (c) now includes the relevant dates for determination of the nationality of natural and juridical persons. The current AF Rules do not mention anything regarding the relevant dates on which nationality is to be assessed. It is proposed to mirror the current Convention system. The relevant dates for a physical person are the date of consent to the proceeding and the date of the Request (as under Art. 25(2)(a) of the
Convention). For a juridical person, the relevant date is the date of consent only, as under Art. 25(2)(b). As a result, the definition of “national” under the AF is:

**National of Another State – Art. 1(5) of the AF Rules**

<table>
<thead>
<tr>
<th>Natural Person</th>
<th>• Is not a national of the State Party to the dispute or of any constituent States of an REIO party to the dispute on the date of consent to the proceeding and on the date of the Request.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juridical Person (different nationality from respondent)</td>
<td>• Is not a national of the State Party to the dispute or of any constituent States of an REIO party to the dispute on the date of consent to the proceeding.</td>
</tr>
<tr>
<td>Juridical Person (same nationality as respondent)</td>
<td>• Is a national of the State Party to the dispute or of any constituent State of an REIO party to the dispute, but the parties agree not to treat it as a national for the purposes of the AF Rules on the date of consent to the proceeding.</td>
</tr>
</tbody>
</table>

941. **Request.** Proposed Art. 1(6) introduces the definition of a Request which is a request for arbitration, conciliation, fact-finding or mediation under the proposed (AF) Arbitration Rules (Annex B), (AF) Conciliation Rules (Annex C), (AF) Fact-Finding Rules (Annex D) or (AF) Mediation Rules (Annex E).

**ARTICLE 2 – ADDITIONAL FACILITY PROCEEDINGS**

**CURRENT RELATED PROVISIONS:** AF Rules Art. 2

**Article 2**  
**Additional Facility Proceedings**

(1) The Secretariat of the Centre is authorized to administer the following proceedings between a State or an REIO on the one hand, and a national of another State on the other hand, which the parties consent in writing to submit to the Centre:

(a) arbitration and conciliation proceedings for the settlement of legal disputes
arising out of an investment if:

(i) none of the parties to the dispute is a Contracting State, a Contracting REIO or a national of a Contracting State; or

(ii) either the State or the REIO party to the dispute, on the one hand, or the State whose national is a party to the dispute, on the other hand, but not both, is a Contracting State or a Contracting REIO;

(b) fact-finding proceedings pertaining to an investment; and

(c) mediation proceedings pertaining to an investment.

(2) Reference to a State or an REIO includes a constituent subdivision of a State, or an agency of a State or an REIO. The State or REIO must approve the consent of the constituent subdivision or agency which is a party to the proceeding pursuant to Article 2(1), unless the State or the REIO concerned notifies the Centre that no such approval is required.


**Article 2**

**Instances en vertu du Mécanisme supplémentaire**

(1) Le Secrétariat du Centre est autorisé à administrer les instances suivantes entre un État ou une OIER, d’une part, et un(e) ressortissant(e) d’un autre État, d’autre part, que les parties consentent par écrit à soumettre au Centre :

(a) instances d’arbitrage et de conciliation pour le règlement de différends juridiques en relation avec un investissement, si :

(i) aucune des parties au différend n’est un État contractant, une OIER contractante ou un(e) ressortissant(e) d’un État contractant ; ou

(ii) soit l’État ou l’OIER partie au différend, d’une part, soit l’État dont le ou la ressortissant(e) est partie au différend, d’autre part, mais pas les deux, est un État contractant ou une OIER contractante ;

(b) instances de constatation des faits en rapport avec un investissement ; et

(c) instances de médiation en rapport avec un investissement.
Artículo 2
Procedimientos del Mecanismo Complementario

(1) El Secretariado del Centro se encuentra autorizado para administrar los siguientes procedimientos entre un Estado o una ORIE, por una parte, y un nacional de otro Estado, por la otra, que las partes hayan consentido por escrito en someter al Centro:

(a) procedimientos de conciliación y arbitraje para el arreglo de diferencias de naturaleza jurídica que surjan de una inversión si:

(i) ninguna de las partes de la diferencia es un Estado Contratante, una ORIE Contratante o un nacional de un Estado Contratante; o

(ii) si el Estado o la ORIE parte en la diferencia, por una parte, o el Estado cuyo nacional es parte en la diferencia, por la otra, pero no ambos, es un Estado Contratante o una ORIE Contratante;

(b) procedimientos de comprobación de hechos en relación con una inversión; y

(c) procedimientos de mediación en relación con una inversión.

(2) La referencia a un Estado o a una ORIE incluye una subdivisión política de un Estado, un organismo público de un Estado o de una ORIE. El Estado o la ORIE deberá aprobar el consentimiento de la subdivisión política o del organismo público que sea parte del procedimiento de conformidad con lo dispuesto en el Artículo 2(1), salvo que el Estado o la ORIE en cuestión notifique al Centro que tal aprobación no es necesaria.

(3) Los procedimientos de arbitraje, conciliación, comprobación de hechos y mediación en virtud de este Reglamento serán tramitados de conformidad con las Reglas de
The changes proposed to Art. 2 in this WP are discussed below.

Title of proposed Art. 2. Current Art. 2 deals with the ICSID Secretariat’s authority to administer arbitration, conciliation and fact-finding proceedings that are outside of the jurisdiction of the Centre under Art. 25(1) of the Convention. The current title of the provision is “Additional Facility,” which refers to the administration of proceedings authorized by the Rules (see Art. 2 last sentence). In practice, the term “Additional Facility” is more commonly used to describe the mechanism as a whole, and the WP therefore proposes to change the title of proposed Art. 2 to “Additional Facility Proceedings” to describe the proceedings covered under the Additional Facility.

AF proceedings and who may be a party to them. The WP proposes to keep the three categories of AF proceedings currently capable of being administered: arbitration and conciliation (proposed Art. 2(1)(a)) and fact-finding (proposed Art. 2(1)(b)). In addition, it adds that the Secretariat can administer mediation proceedings (proposed Art. 2(1)(c)).

Proposed Art. 2(1) provides that the Centre is authorized to administer the listed types of proceedings between a State, on the one hand, and a national of another State, on the other hand, which the disputing parties consent in writing to submit to the Centre. It also introduces REIOs as potential disputing parties.

The use of the singular in Art. 2 does not prevent multiparty proceedings, provided that each party independently satisfies the applicable conditions. This reflects current practice.

Scope of AF Arbitration and Conciliation Proceedings (proposed Art. 2(1)(a)). Proposed Art. 2(1)(a) streamlines the prior rule and amends the scope of disputes that can be administered under the AF. The proposed (AF) Arbitration and (AF) Conciliation Rules are found at Annex B and C of the AF Rules.

The Centre is currently authorized to administer conciliation and arbitration under the AF that cannot be Convention cases because they are outside the jurisdiction of the Centre under Art. 25(1) of the Convention. The requirements for jurisdiction under the Convention are that: (i) there is a legal dispute arising directly out of an investment; (ii) between an ICSID Member State (or any constituent subdivision or agency of an ICSID Member State designated to the Centre by that State); and (iii) a national of another ICSID Member State; (iv) which the parties to the dispute consent in writing to submit to the Centre.

Under the current AF Rules, there are two categories of arbitration or conciliation proceedings that ICSID can administer. Current Art. 2(a) and (b) describe these categories.
They are disputes that do not meet the jurisdictional requirements under the Convention because:

(i) the State party to the dispute or the home State of the foreign national is not an ICSID Member State (current Art. 2(a)); or

(ii) the dispute does not arise directly out of an investment (but can be distinguished from an ordinary commercial transaction), and at least one of the parties is an ICSID Member State or a national of an ICSID Member State (current Art. 2(b)).

950. In practice, all 59 AF cases filed to date have been filed under Art. 2(a). No disputes have been filed under Art. 2(b) to date. As a result, the WP proposes to limit AF proceedings to one category of disputes and delete current Art. 2(b).

951. The WP also proposes to expand the category of disputes that can be pursued under the AF beyond that stipulated in current Art. 2(a). Proposed Art. 2(1)(a) simplifies and clarifies the wording of current Art. 2(a) and amends the scope of disputes that can be administered under the AF. The four principal simplifications and changes to this scope are explained below.

952. First, reference in the rule to the jurisdiction under Art. 25 of the ICSID Convention is deleted. This ensures that the rules regarding the jurisdiction of the AF are stand-alone, without any need to resort to the text of the ICSID Convention to determine whether a particular dispute fits under Convention Art. 25 (and hence is not covered under the AF). As a result, proposed Art. 2(1)(a) no longer defines jurisdiction under the AF by reference to what would not be eligible for resolution under the ICSID Convention. The jurisdiction for proceedings commenced under the AF would be delinked from the ICSID Convention and would instead be determined by reference to the relevant instrument of consent (IIAs, laws and contracts) and the AF requirements for administration of such proceedings.

953. In particular, delinking the AF from the Convention means that the definition of investment for the purposes of an AF arbitration or conciliation case relies solely on the definition established by the relevant States in their instrument of consent. The so-called “double keyhole” test applied in Convention cases would not be relevant in an AF case; the relevant definition of investment would be that of the Treaty Parties in their agreement.

954. This is consistent with current practice. An analysis of AF awards to date shows that the vast majority of tribunals have not required the investor to establish any jurisdictional prerequisites (e.g. definition of investment) beyond those established expressly in the instrument invoked. These tribunals only examined whether there was an investment for the purposes of the IIA or contract invoked, without doing the “double-keyhole” test usually employed under the Convention. This has been the majority practice in NAFTA and CAFTA cases (see e.g., Apotex v. USA (ARB(AF)/12/1), Award (August 25, 2014), Bayview v. Mexico (ARB(AF)/05/1), Award (June 19, 2007)). Only a very few cases have applied the “double-keyhole” jurisdictional test to AF proceedings (see e.g., Nova Scotia v. Venezuela (ARB(AF)/11/1), Award (April 30, 2014)). Therefore, removing the Convention nexus from proposed Art. 2 would reflect current practice, and make clear that
the test *ratione materiae* is to be assessed only on the basis of the instrument invoked, allowing Treaty Parties and disputing parties to determine the meaning and scope of an investment in their investment treaties, laws and contracts.

955. This allows States to define investment in their agreements without being limited by ICSID Convention case law, as is the case under the UNCITRAL Rules. Of course, international law still applies and Tribunals can examine the term “investment” in the context of international law definitions, as currently.

956. *Second*, the WP proposes deleting the requirement in current Art. 2(a) that the legal dispute at issue in an AF case arises “directly” out of an investment.

957. The directness requirement stems from the Convention. While the drafters of the Convention did not define “directly”, it has been discussed in a few cases. The directness requirement means that the dispute must be closely connected to an investment. This begs the question of whether transactions that are ancillary to an investment operation, such as loans, are sufficiently closely connected, and whether Tribunals ought to look at each element of the transaction or rather at the overall operation in determining whether the directness requirement has been satisfied.

958. The drafting history indicates that when the drafters of the AF Rules devised current Art. 2(b) for disputes “not arising directly” out of an investment, they intended that some investments that would not have qualified under the Convention at that time, would be covered under the AF. A good example of this is turnkey contracts. However, the evolution of the case law shows that nowadays most disputes arising out of a turnkey contract would probably be considered as disputes arising “directly” out of an investment.

959. Deleting the word “directly” in proposed Art. 2(1)(a) avoids discussion as to whether a dispute arises directly (or not) out of an investment, and again would mean the terms of the instrument containing the State or REIO’s consent is the only relevant definition of investment.

960. A number of IIAs do not specifically address the question of whether the dispute must arise directly or indirectly out of the investment. Rather, they refer to disputes “relating to” an investment. States are free to posit different or more specific requirements in their instrument of consent, should they wish to do so. In addition, this proposed change is consistent with the deletion of current Art. 2(b).

961. *Third*, under proposed Art. 2(1)(a)(i), recourse to AF arbitration or conciliation is now offered when neither the State or the REIO party to the dispute, nor the State whose national is a party to the dispute, is a Contracting State or Contracting REIO. Arbitration and conciliation proceedings with a State, an REIO and a national of another State are thus authorized when none of them are parties to the Convention. Some BITs already provide for such a possibility. For example, Indian BITs concluded with Poland, Mexico and Djibouti contain the States’ consent to the AF Rules if both disputing parties agree, and where neither party comes from or is an ICSID Contracting State. As a result, the proposed amendment ensures that such provisions can be implemented in practice.
Whether to open the AF to non-Contracting States was discussed in 1978, but was rejected at that time due to the opposition of a single delegation. The arguments for not extending the AF to non-Contracting States in 1978 were two-fold. First, that opening the AF to non-Contracting States would operate as a disincentive to such States joining ICSID, and second, that the costs of the Centre are borne by Contracting States, while the costs of the proceedings are borne by the parties to the dispute.

Neither argument appears convincing today. There are 153 Contracting States currently at ICSID (soon to be 154 States with the deposit of Mexico’s instrument of ratification on July 27, 2018). If anything, participating in an ICSID-administered proceeding could give remaining non-Contracting States an incentive to join the Convention. Further, making the AF available to non-Contracting State parties supports the overall goal of encouraging stable investment climates and increased investment. With respect to costs to date, Contracting States have never been assessed a contribution charge, and ICSID operations are largely supported by lodging and administrative fees in actual cases.

Fourth, under proposed Art. 2(1)(a)(ii), recourse to AF arbitration or conciliation is also possible when either the State or the REIO party to the dispute on the one hand, or the State whose national is a party to the dispute on the other hand, but not both, is a Contracting State or Contracting REIO. This is the scenario addressed in current Art. 2(a). Given that REIOs are not currently party to the ICSID Convention, any proceeding involving an REIO under proposed Art. 2(1)(a)(ii) would, for the time being, necessarily involve a national or nationals of a Contracting State on the other side.

Pursuant to this proposal, the ability of parties to avail themselves of either ICSID Convention arbitration or AF arbitration would operate as outlined in the charts below:

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**ICSID Convention Arbitration and Conciliation - Ratione Personae**

![Chart showing the availability of AF arbitration and ICSID Convention arbitration based on the nationality of parties.](chart-url)
966. **Proposed deletion of current Art. 2(b).** The WP proposes deleting current Art. 2(b). That provision deals with disputes *not* arising *directly* out of an investment and thus not falling within the scope of the ICSID Convention in any event, because there is no investment *per se* (but there is more than a simple commercial operation) or because the directness is not sufficient. This provision has never been used; its removal will simplify the AF Rules, and removes a potential source for confusion for users.

967. The WP also proposes deleting current Art. 4(3) and 4(4). Current Art. 4(3) stipulates that, in order to access the AF, the “underlying transaction” must have “features which distinguish it from an ordinary commercial transaction”. Current Art. 4(4) requires that, in order to access the AF, the current *rationae personae* requirements of Art. 25 be met and that the Secretary-General be “of the opinion that it is likely that a Conciliation Commission or Arbitral Tribunal, as the case may be, will hold that the dispute arises directly out of an investment”. These provisions are no longer required in light of the removal of current Art. 2(b), and the deference proposed to be given to the parties’ definition of investment in the AF. This gives parties full autonomy to determine the nature of disputes which can be referred to AF arbitration in the relevant instrument of consent.

968. **Updating Fact-finding Proceedings (proposed Art. 2(1)(b)).** Fact-finding proceedings offer parties the opportunity to constitute a Committee to inquire into and report on relevant circumstances. They can be used to avoid disputes by ascertaining certain facts through investigation by an independent Committee. They can also be followed by arbitration, conciliation or mediation proceedings, or in parallel with such procedures. Any State, or REIO, irrespective of its membership in the ICSID Convention, and a national of another State, may agree to use the Fact-finding Rules. Fact-finding proceedings are not currently subject to any jurisdictional requirements *rationae materiae*. Proposed Art. 2(1)(b) adds that the fact-finding proceeding must be in connection with an investment to ensure that...
the request relates to the Centre’s expertise. This mirrors the requirement for Mediation. The proposed Fact-Finding Rules are found at Annex D of the AF Rules.

969. **Introduction of Mediation Proceedings (proposed Art. 2(1)(c)).** Over the past decade, the concept of resolving investment disputes through mediation has been widely discussed in the ISDS community. Indeed, Member States have acknowledged the suitability of mediation for the resolution of investment disputes and have included mediation provisions in many new bilateral and multilateral treaties. In some cases, mediation has been introduced as a pre-condition to the commencement of investor-State arbitration. In other cases, mediation has been introduced as a stand-alone mechanism for dispute resolution, providing an alternative to arbitration or conciliation. Recent IIAs concluded by the EU and its member States refer to mediation and provide for the ICSID Secretary-General to appoint a mediator where the parties cannot agree to one themselves (see e.g., CETA, Art. 8.20). In addition, a multilateral international framework for the recognition and enforcement of mediated settlements will soon be adopted.

970. It is therefore also proposed to allow the Secretariat to administer mediation proceedings, that will be conducted pursuant to a new set of proposed Mediation Rules at Annex E. This would seamlessly complement the other services offered by the Centre, offering a full range of ADR services.

971. Any State, or REIO, irrespective of its membership in the ICSID Convention, and a national of another State, may agree to use the Mediation Rules, as provided by Art. 2(1)(c) of the AF Rules.

972. Mediation services would be available for proceedings pertaining to an investment. Mediation proceedings may be conducted prior to, or in parallel with, any other dispute resolution proceeding. There is no requirement for the dispute to be of a legal nature or for the dispute to have formally crystalized.

973. The chart below shows the entire scope of Art. 2(1):
Constituent subdivisions and agencies (proposed Art. 2(2)). Proposed Art. 2(2) makes clear that AF proceedings are open to constituent subdivisions of a State or agencies of a State or an REIO under the same scenarios as contemplated in proposed Art. 2(1). Currently, the constituent subdivisions and agencies of a State are referred to in the chapeau of Art. 2 but are not mentioned elsewhere, potentially giving rise to doubt as to the eligibility of such subdivisions/agencies to be a party to proceedings under those Rules. Proposed Art. 2(2) erases this doubt.
Proposed Art. 2(2) thus makes clear that AF proceedings are open to a proceeding between a subdivision of a State or an agency of a State or of an REIO and a national of another State. However, the subdivision or agency’s consent to the AF proceedings must be approved by the State or the REIO, unless the Centre has been notified that no such approval is required. This is a safeguard for States and mirrors the condition in Art. 25(3) of the Convention. The approval of consent can predate the filing of a Request or can be given on an *ad hoc* basis.

Since the Convention does not apply to AF proceedings, the requirement in Art. 25(1) of the Convention that only subdivisions or agencies designated to the Centre by the relevant State can be a party to a proceeding does not exist.

Proposed Art. 2(2) would allow greater flexibility for related disputes to be heard by the same Tribunal in the case of arbitration proceedings. For example, the investor’s subsidiary and an agency of the State (which has not been designated under the Convention but is eligible under the AF Rules) may have entered into a contract. That contract could refer to arbitration under the AF Rules for any dispute related to the contract. It would allow the two cases (the case against the State, and the case against the agency) to be administered in parallel by ICSID, with the same tribunal or having joint hearings (see Schedule 7 on Multiparty Claims and Consolidation).

Proposed Art. 2(3). Proposed Art. 2(3) specifies that the arbitration, conciliation, fact-finding, and mediation proceedings are conducted according to the Rules in Schedule B to E to the AF Rules. The term “Schedule” in English is changed to “Annex,” and a reference to Annex A containing the AFR applicable to AF proceedings is added.

**ARTICLE 3 – CONVENTION NOT APPLICABLE**

| Article 3  
Convention Not Applicable |
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<td>The provisions of the Convention do not apply to the conduct of Additional Facility proceedings.</td>
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| Article 3  
Inapplicabilité de la Convention |
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<tr>
<td>Les dispositions de la Convention ne s’appliquent pas à la conduite d’instances sur le fondement du Mécanisme supplémentaire.</td>
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Artículo 3
Inaplicabilidad del Convenio
Las disposiciones del Convenio no son aplicables a la tramitación de procedimientos en virtud del Mecanismo Complementario.

979. The WP proposes to keep the substance of current Art. 3, which recalls that the Convention is not applicable or relevant to defining the application of the AF. This applies in particular, to the recognition and enforcement of AF Awards rendered in such proceedings.

ARTICLE 4 – FINAL PROVISIONS

Article 4
Final Provisions
(1) The applicable Rules are those in force on the date of filing of the Request unless the parties agree otherwise.

(2) These Rules may be cited as the “Additional Facility Rules” of the Centre.

Article 4
Dispositions finales
(1) Le Règlement applicable est celui qui est en vigueur à la date du dépôt de la requête, sauf accord contraire des parties.

(2) Le présent Règlement peut être cité comme le « Règlement du Mécanisme supplémentaire » du Centre.

Artículo 4
Disposiciones Finales
(1) El Reglamento aplicable será aquel que esté en vigor en la fecha de presentación de la solicitud, salvo acuerdo de las Partes en contrario.

(2) Este Reglamento podrá ser citado como el “Reglamento del Mecanismo Complementario” del Centro.
Proposed Art. 4(1) states that the applicable AF Rules are the ones in force on the date of submission of the Request. The current AF Rules do not address this expressly, although the proposed amendment would codify existing practice. A similar provision is contained in the proposed (AF) Arbitration, Conciliation, Fact-Finding and Mediation Rules. It is assumed that the proposed AF Rules and each Annex to those Rules will apply to consent already given in existing treaties, as long as the request is filed after the rules come into effect.

These proposed changes do not alter the consent given by the States in their existing IIAs. While the categories of proceedings and possible parties have expanded, these changes do not prejudice States that can currently be parties to AF proceedings. Indeed, such changes show the flexibility of these Rules. The biggest change in terms of scope is for arbitration and conciliation under proposed Art. 2(1)(a), where the link to the Convention has been removed. As explained, this actually reflects current practice.

In addition, mediation and fact-finding would require specific consent in each case, as they cannot proceed unless both parties are agreeable to the application of these rules.

**Deleted Provisions**

**CURRENT RELATED PROVISIONS: AF Rules Art. 3-6**

The WP proposes deleting the remainder of the AF Rules, as explained below.

**Proposed deletion of approval of access process (current Art. 4).** Current Art. 4 deals with approval of access for cases brought under current Art. 2(a) and (b). Instead of maintaining this step, the WP proposes that a request for conciliation or arbitration be filed and registered by the Secretary-General under each individual set of rules (see (AF)AR ?). There are four principal aspects to this proposed change.

First, the approval of access is eliminated.

There is currently a two-step process to institute arbitration and conciliation proceedings: (i) the Secretary-General must first approve the agreement of the parties providing for arbitration or conciliation proceeding in respect of existing or future disputes (“approval of access”), and (ii) in a second and separate step, the Secretary-General can register the request, which the current rules envision will be filed separately, after approval of access is obtained.

The two-step process of approval and registration is not necessary for cases brought under a law or a treaty. In those cases, the consent of the investor is usually given, and the parties’ agreement will come into existence, in conjunction with the institution of the proceedings, hence the approval step is artificial.
988. Given that fact, in practice requesting parties will often request the Secretary-General simultaneously to approve access to the AF and to register the request in the Arbitration AF Register (even though current Art. 3(1)(c) of the AF Arbitration Rules requires the request to indicate the date of approval of the agreement of the parties providing for access to the AF). Indeed, for most cases filed under NAFTA or a BIT, the date of the approval has been the date of registration of the request.

989. The purpose of a two-step process is now unclear. Its removal and the retention of the registration process is therefore proposed. Under this proposal, there would be a screening process at the registration stage (see below WP (AF)AR 7).

990. Second, the WP proposes the elimination of the conditions of access set forth in current Art. 4(2) and 4(3) as a necessary corollary of the elimination of the approval of access.

991. Proposed deletion of current Art. 5. It is proposed to delete current Art. 5 since proposed Annex A contains the administrative and financial regulations applicable to AF proceedings.

992. Proposed deletion of current Art. 6. It is proposed to delete current Art. 6 and to insert it under proposed Art. 2(3).