Proposals for Amendment of the ICSID Rules — Consolidated Draft Rules
X. ANNEX E: ADDITIONAL FACILITY RULES OF PROCEDURE FOR MEDIATION PROCEEDINGS
((ADDITIONAL FACILITY) MEDIATION RULES)

Introductory Note

The Additional Facility Rules of Procedure for Mediation Proceedings (the (Additional Facility) Mediation Rules) were adopted by the Administrative Council of the Centre pursuant to Administrative and Financial Regulation 7(1).


The (Additional Facility) Mediation Rules apply from the submission of a Request for mediation until conclusion of the proceeding.

Chapter I
General Provisions

Rule 1
Application of Rules

(1) These Rules shall apply to any mediation proceeding conducted under the Additional Facility Rules, except to the extent the parties agree otherwise and subject to paragraph (2).

(2) If any of these Rules, or any aspect of the parties’ agreement to modify the application of these Rules, conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.

(3) The applicable (Additional Facility) Mediation Rules are those in force on the date of filing of the request for mediation.

(4) The official languages of the Centre are English, French and Spanish. The texts of these Rules are equally authentic in each official language.

(5) These Rules may be cited as the “(Additional Facility) Mediation Rules” of the Centre.
Rule 2
Meaning of Party and Party Representation

(1) For the purposes of these Rules, “party” may include, where the context so admits, all parties to the mediation and an authorized representative of a party.

(2) Each party may be represented or assisted by agents, counsel or advocates (“representatives”), whose names and proof of authority to act shall be notified by that party to the Secretariat.

Chapter II
Institution of the Mediation

Rule 3
Institution of Mediation Based on Prior Party Agreement

(1) If the parties have agreed in writing to refer the dispute to mediation under the (Additional Facility) Mediation Rules, any party wishing to institute a mediation proceeding shall file a request for mediation together with the required supporting documents (“Request”) with the Secretary-General and pay the lodging fee published in the schedule of fees.

(2) The Request may be filed by one or more requesting parties, or filed jointly by the parties to the dispute.

(3) The Request shall:

(a) be in English, French or Spanish;

(b) identify each party to the proceeding and its nationality and provide their contact information (including electronic mail address, street address and telephone number);

(c) be signed by each requesting party or its representative and be dated;

(d) attach proof of each representative’s authority to act;

(e) be filed electronically, unless the Secretary-General authorizes the filing of the Request in an alternative format;
(f) if the requesting party is a juridical person, state that it has obtained all necessary authorizations to file the Request, and attach the authorizations;

(g) with regard to Article 2(1)(c) of the Additional Facility Rules, indicate that the mediation is between a State or an REIO on the one hand and a national of another State on the other hand, describe the investment to which the mediation pertains, and include a brief statement of the issues in dispute;

(h) contain any provisions agreed to by the parties regarding the appointment and qualifications of the mediator and any procedural proposals or agreements reached between the parties; and

(i) attach a copy of the agreement of the parties to refer the dispute to mediation under the (Additional Facility) Mediation Rules.

(4) Upon receipt of the Request, the Secretary-General shall:

(a) promptly acknowledge receipt of the Request to the requesting party; and

(b) transmit the Request to the other party upon receipt of the lodging fee.

(5) The Secretary-General shall act as the official channel of written communications between the parties.

Rule 4
Institution of Mediation Absent a Prior Party Agreement

(1) If the parties have no prior agreement to refer the dispute to mediation under the (Additional Facility) Mediation Rules, any party wishing to institute a mediation proceeding shall file a Request with the Secretary-General, pay the lodging fee published in the schedule of fees and make an offer to mediate to the other party in accordance with paragraphs (2)-(5).

(2) The Request shall:

(a) comply with the requirements in Rule 3(3)(a)-(i);

(b) include an offer to refer the dispute to mediation under these Rules; and

(c) request that the Secretary-General invite the other party to accept the offer to mediate referred to in paragraph (b).

(3) Upon receipt of the Request, the Secretary-General shall:
(a) promptly acknowledge receipt of the Request to the requesting party;

(b) transmit the Request to the other party upon receipt of the lodging fee; and

(c) invite the other party to inform the Secretary-General within 30 days of transmittal of the Request pursuant to paragraph (3)(b) whether it accepts the offer to mediate referred to in paragraph (2)(b).

(4) If the other party informs the Secretary-General that it accepts the offer to mediate referred to in paragraph (2)(b), the Secretary-General shall acknowledge receipt and transmit the acceptance of the offer to mediate to the requesting party.

(5) If the other party fails to accept or rejects the offer to mediate referred to in paragraph (2)(b) within the 30-day period referred to in paragraph (3)(c), the Secretary-General shall acknowledge receipt and transmit any communication received to the requesting party and inform the parties that no further action will be taken on the Request.

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**Rule 5**

**Registration of the Request**

(1) Upon receipt of:

(a) the lodging fee; and

(b) a Request pursuant to Rule 3; or

(c) a Request and an agreement to mediate pursuant to Rule 4;

the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is not manifestly outside the scope of Article 2(1) of the Additional Facility Rules.

(2) The Secretary-General shall notify the parties of the registration of the Request, or the refusal to register the Request and the grounds for refusal.

(3) The notice of registration of the Request shall:

(a) record that the Request is registered and indicate the date of registration;
(b) confirm that all correspondence to the parties in connection with the proceeding will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Centre; and

(c) invite the parties to appoint the mediator without delay.

Chapter III
The Mediator

Rule 6
Qualifications of the Mediator

(1) The mediator shall be impartial and independent of the parties.

(2) The parties may agree that the mediator shall have particular qualifications or expertise relevant to the subject-matter of the Request.

Rule 7
Number of Mediators and Method of Appointment

(1) There shall be one mediator or two co-mediators. Each mediator shall be appointed by agreement of the parties. All references to “mediator” in these Rules shall include co-mediators, where the context so admits.

(2) If the parties do not advise the Secretary-General of an agreement on the number of mediators within 30 days after the date of registration, there shall be one mediator appointed by agreement of the parties.

(3) The parties may jointly request that the Secretary-General assist with the appointment of a mediator at any time.

(4) If the parties are unable to appoint the mediator within 60 days after the date of registration, either party may request that the Secretary-General appoint the mediator not yet appointed. The Secretary-General shall consult with the parties as far as possible on the qualifications, expertise, nationality and availability of the mediator and shall use best efforts to appoint any mediator within 30 days after receipt of the request to appoint.
If no step is taken by the parties to appoint the mediator pursuant to this Rule within 120 days after the date of registration, or such other period as the parties may agree, the Secretary-General shall inform the parties that the mediation cannot proceed.

If the parties notify the Secretary-General prior to the appointment of a mediator that they have agreed to terminate the mediation, the Secretary-General shall notify the parties that the mediation cannot proceed.

**Rule 8**

**Acceptance of Appointment**

(1) The parties shall notify the Secretariat of the appointment and provide the name, and contact information of the appointee.

(2) The Secretariat shall request an acceptance from the appointee as soon as the appointee is selected.

(3) An appointee shall accept the appointment and provide a signed declaration in the form published by the Centre within 20 days after the receipt of the request for acceptance.

(4) The Secretariat shall notify the parties of the acceptance of appointment by the mediator and provide the signed declaration.

(5) The Secretariat shall notify the parties if a mediator fails to accept the appointment or provide a signed declaration within the time limit referred to in paragraph (3), and another person shall be appointed in accordance with the method followed for the previous appointment.

(6) The mediator shall have a continuing obligation to disclose any change of circumstances relevant to the declaration referred to in paragraph (3).

(7) Unless the parties and the mediator agree otherwise, the mediator may not act as arbitrator, counsel, expert, witness, judge or in any other capacity in any other proceeding relating to the dispute that is the subject of the mediation.
Rule 9
Notice of Acceptance

As soon as the mediator has, or both co-mediators have, accepted the appointment(s), the Secretary-General shall notify the parties of such acceptance (“notice of acceptance”) and transmit the Request, any supporting documents, and the notice of registration to each mediator.

Rule 10
Resignation and Replacement of Mediator

(1) A mediator may resign by notifying the Secretary-General and the parties.

(2) A mediator shall resign:

   (a) on the joint request of the parties; or

   (b) if the mediator becomes incapacitated or is unable to perform the duties required of a mediator.

(3) Following the resignation of a mediator, a new mediator shall be appointed by the same method used to make the original appointment, except that the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of the vacancy, or such other period as agreed by the parties.

(4) Following the resignation of a co-mediator, the parties may agree to continue the mediation with the remaining co-mediator acting as a sole mediator. The parties shall notify the Secretary-General of such agreement within 45 days after the notice of the vacancy or such other period as agreed by the parties pursuant to paragraph (2).

Chapter IV
Conduct of the Mediation

Rule 11
Role and Duties of the Mediator

(1) The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the dispute.
(2) The mediator shall treat the parties equally and provide each party with a reasonable opportunity to participate in the proceeding.

Rule 12
Duties of the Parties

(1) The parties shall cooperate with the mediator and with one another and shall conduct the mediation in good faith.

(2) The parties shall provide all relevant explanations, documents or other information requested by the mediator.

Rule 13
First Session

(1) Each party shall file a brief, initial written statement describing the issues in dispute and its views on these issues and on the procedure to be followed. Such statement shall be filed simultaneously with the Secretariat 15 days after the date of the notice of acceptance, or such other period as the mediator may determine, but in any event before the first session. The Secretary-General shall transmit the initial statements to the mediator and the other party.

(2) The mediator shall hold a first session with the parties within 30 days after the date of the notice of acceptance or such other period as the parties may agree.

(3) At the first session, the mediator shall determine the protocol for the mediation (“Protocol”) after consulting with the parties on procedural matters, including:

(a) the procedure for the conduct of the mediation, such as the procedural languages, method of communication, place of meetings, the next steps in the proceeding, confidentiality arrangements, participation of other persons in the mediation and any other procedural and administrative matters;

(b) any agreement between the parties not to initiate or pursue other proceedings in respect of the dispute during the mediation;

(c) any agreement between the parties concerning the application of prescription or limitation periods; and
(d) any other relevant matters.

(4) At the first session or within any other period as the mediator may determine, each party shall:

(a) identify a representative who is authorized to settle the dispute on its behalf; and

(b) describe the process that would be followed to implement a settlement.

**Rule 14**

**Conduct of the Mediation**

(1) The mediator shall conduct the mediation in accordance with the Protocol and shall take into account the views of the parties and the circumstances of the dispute.

(2) The mediator shall conduct the mediation in an expeditious and cost-effective manner.

(3) The mediator may meet and communicate with the parties jointly or separately. Such communications may be in person or in writing, and by any appropriate means of communication.

(4) The mediator may request that the parties provide additional information or written statements.

(5) If requested by the parties, the mediator may make oral or written recommendations for the resolution of all or part of the dispute.

(6) The mediator may obtain expert advice with the agreement of the parties.

**Rule 15**

**Payment of Advances and Costs of the Proceeding**

Unless the parties agree otherwise, each party shall:

(a) pay one half of the advances payable in accordance with (Additional Facility) Administrative and Financial Regulation 7(5);
(b) pay one half of the fees and expenses of the mediator, as well as the administrative fee for the use of the facilities of the Centre, in accordance with (Additional Facility) Administrative and Financial Regulation 7(5); and

(c) bear any other expenses it incurs in connection with the proceeding.

Rule 16
Confidentiality of the Mediation and Use of Information in Other Proceedings

(1) Unless the parties agree otherwise, all matters relating to the mediation other than the information to be published by the Centre pursuant to (Additional Facility) Administrative and Financial Regulation 4, shall remain confidential, except to the extent that disclosure may be required by law or for purposes of implementation and enforcement.

(2) The parties may consent to the publication by the Centre of documents generated in connection with the mediation.

(3) The parties shall not make any use of information or documents obtained in the mediation, and shall not rely on any positions taken, admissions made, or views expressed by the other party or the mediator during the mediation in other proceedings.

Chapter V
Termination of the Mediation

Rule 17
Notice of Termination of the Mediation

(1) The mediation shall be terminated upon:

(a) the signing of a settlement agreement by the parties;

(b) a notice of withdrawal by any party, unless the remaining parties agree to continue the mediation;

(c) a determination by the mediator that there is no likelihood of resolution through this mediation; or
(d) a determination by the mediator that a party failed to participate in the mediation or cooperate with the mediator.

(2) The mediator shall take note of the termination in writing. The notice of termination shall contain a brief summary of the proceeding and the reason for termination of the mediation pursuant to paragraph (1). The notice shall be signed by the mediator.

(3) The Secretary-General shall promptly dispatch a certified copy of the notice of termination to each party, indicating the date of dispatch; and deposit the notice in the archives of the Centre. The Secretary-General shall provide additional certified copies of the notice to a party upon request.