ICSID’s Proposed Mediation Rules

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The Role of Mediation in ISDS
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ICSID’s Current Dispute Settlement Services

**Convention**
Both disputing parties from ICSID Member States

- Conciliation
- Arbitration

**Additional Facility**
One disputing party from Member States

- Conciliation
- Arbitration
- Fact-finding

**Other**
Need not be from Member State

- Case & hearing administration under other Rules or Treaties (e.g.: UNCITRAL or other investment cases; FTA & State-to-State cases)
- Other functions on consent of parties (e.g.: Appointing Authority, Mediation, Registry)
- Acting as Secretariat for Regional Trade Agreements (e.g.: CETA, EU-Singapore; EU-Vietnam; EU-Mexico)

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ICSID & Mediation – Background

Trend to consider mediation as a tool to resolve investment disputes:

• **Mediation in treaties** – as prerequisite or stand-alone mechanism
  - **COMESA** – *Common Market for Eastern and Southern Africa*
  - **CAFTA** – *Central America & DR Free Trade Agreement*
  - **CETA** – *EU-Canada FTA*
  - **EU-Vietnam FTA // EU-Singapore FTA**

• **2016 Guide on Investment Mediation** adopted by the Energy Charter Conference (57 of ICSID’s 155 Member States)

• Multilateral work on the **Singapore Convention** for enforcement of mediated settlements, intended to apply to settlements in investment disputes
ICSID & Mediation – Background (cont)

• ICSID Arbitration Statistics

Arbitration Proceedings under the ICSID Convention and Additional Facility Rules – Outcomes

- 65% Dispute decided by Tribunal (see charts 9a and 9b)
- 35% Dispute settled or proceeding otherwise discontinued (see charts 9a and 9c)

The ICSID Caseload – Statistics
(Issue 2020-1)
Arbitration Proceedings under the ICSID Convention and Additional Facility Rules – Outcomes

- Award upholding claims in part or in full
- Award dismissing all claims
- Award declining jurisdiction
- Award deciding that the claims are manifestly without legal merit
- Proceeding discontinued at the request of both parties [1]
- Proceeding discontinued at the request of one party [2]
- Settlement agreement embodied in an award at parties’ request [3]
- Proceeding discontinued for lack of payment of the required advances [4]
- Proceeding discontinued for failure of parties to act [5]
- Proceeding discontinued at the Initiative of the Tribunal [6]

49% of cases ruling on merits

The ICSID Caseload – Statistics
(Issue 2020-1)
Why ICSID Mediation Rules?

The ICSID Mediation Rules are intended to:

- Provide States and investors with a neutral, trusted forum to engage in facilitated negotiations;
- Offer disputing parties broad access to investment mediation facilities;
- Provide a party-driven, flexible process with tailor-made solutions;
- Offer a time and cost-effective dispute resolution process;
- Reflect formal requirements for settlement agreements in the Singapore Convention.
Nature of ICSID Mediation

**ICSID Mediation is entirely voluntary**

- Requires party consent at the outset & throughout the process
- Either party may unilaterally withdraw at any time ("ongoing consent")
- Secretariat can assist with transmittal of offer to mediate

**Differences to Conciliation – examples:**

- ICSID mediation is more widely available than ICSID Convention or Additional Facility conciliation (see MR 2)
- No “preliminary objections” – mediation begins immediately
- No Three Member Commission
- No Report
ICSID Mediation – Scope (MR 2)

• The Secretariat is authorized to administer any mediation that relates to an investment, involves a State or an REIO, and which the parties consent in writing to submit to ICSID.

• Provides States and investors with broad access to investment mediation facilities without the limitations applicable to Convention or Additional Facility arbitration and conciliation proceedings.
ICSID Mediation – Process Overview

- Request for Mediation (MR 5 or 6)
- Request refused (MR 6)
- Request registered (MR 7)
- Appointment of one Mediator or two Co-Mediators (MR 13(1) & (2))
- Brief initial written statements by parties (MR 19)
- Mediator holds first session with the parties and determines the Protocol (MR 20(3))
- Mediation is conducted in accordance with the Protocol (MR 21)
- Termination of the Mediation (MR 22):
  - Notice from the parties that they have signed a settlement agreement
  - Notice of parties' agreement to terminate the mediation
  - Notice of withdrawal by a party unless the remaining parties agree to continue the mediation
  - No likelihood of resolution
  - Termination prior to appointment of Mediator for failure of parties to act (MR 13(b))
ICSID Mediation – General Provisions

Costs (MR 9)
• Unless parties agree otherwise, the costs of the mediation are borne equally by the parties and each party to bear its own costs and expenses.

Confidentiality (MR 10)
• All information relating to the mediation, and all documents generated in or obtained during the mediation, shall be kept confidential, unless:
  • the parties agree otherwise
  • the information or document is independently available
  • disclosure is required by law

Without Prejudice Provision (MR 11)
• Any position taken, admissions or offers of settlement made, or views expressed by a party during the mediation is without prejudice to the legal positions it may take in any other proceeding.
ICSID Mediation is Flexible & Offers Opportunities

- Mediation Rules may be used as **stand-alone** process OR
- Mediation Rules may be **combined** with other processes

= “med-arb” // “arb-med” // “arb-med-arb”:

- Mediation prior to an arbitration (e.g. multi-tier clause)
- Mediation with a parallel ICSID arbitration:
  - If **full** settlement is reached in the mediation, parties may:
    - agree to discontinue arbitration; **OR**
    - resume arbitration & request tribunal to embody settlement in award
  - If **partial** settlement reached, parties may continue to arbitrate only remaining issues in dispute
ICSID Mediation Activities in 2020

• Member State Consultations on MR – aiming to have Rules adopted as soon as possible

• Offering administration of investment mediations

• Mediation Capacity-building activities
  • Investor-State Mediator Training
  • Training for Government Officials with IFC

• Technical assistance workshops on dispute prevention and management

• Dissemination of information on investment mediation
Thank you

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