

ICSID's Proposed Mediation Rules

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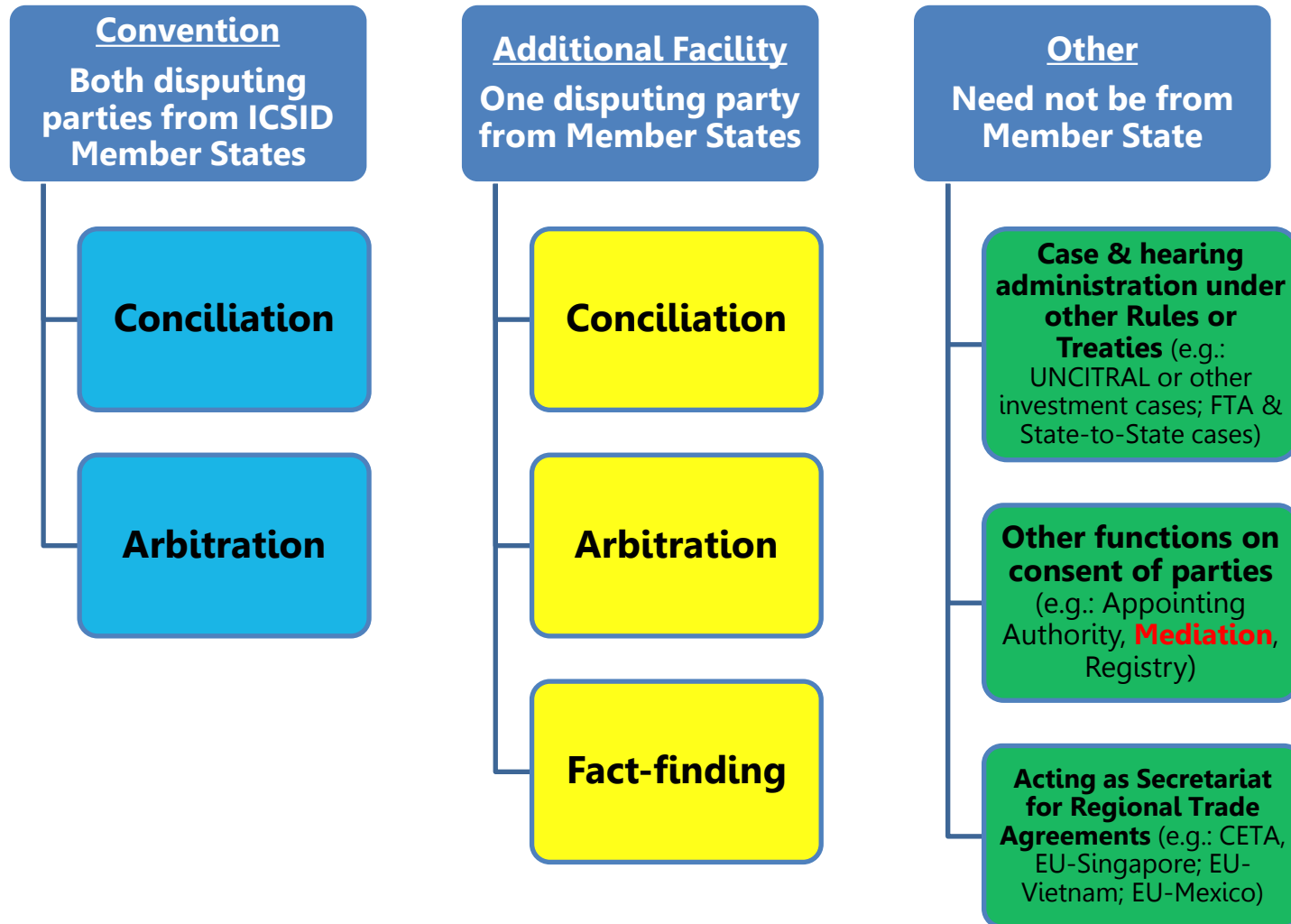
The Role of Mediation in ISDS

UNCITRAL Webinar

June 18, 2020



ICSID's Current Dispute Settlement Services



ICSID & Mediation – Background

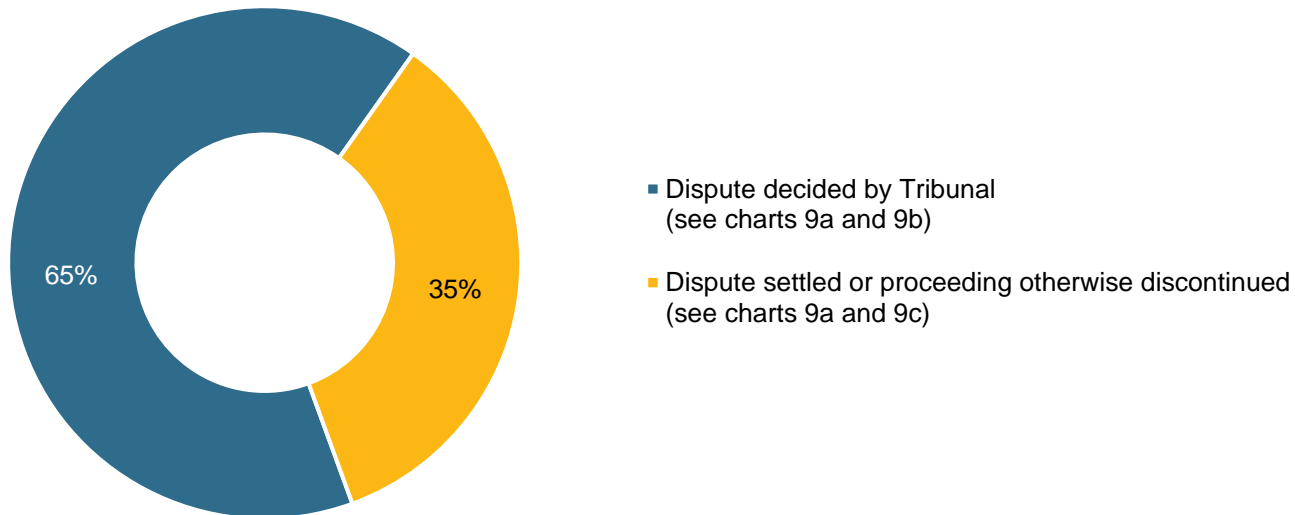
Trend to consider mediation as a tool to resolve investment disputes:

- **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

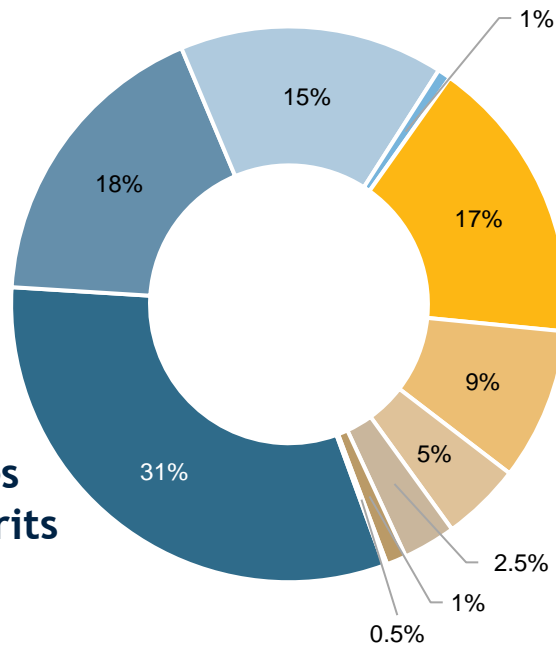
Arbitration Proceedings under the ICSID Convention and Additional Facility Rules – Outcomes



The ICSID Caseload – Statistics
(Issue 2020-1)

ICSID & Mediation – Background (cont.)

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

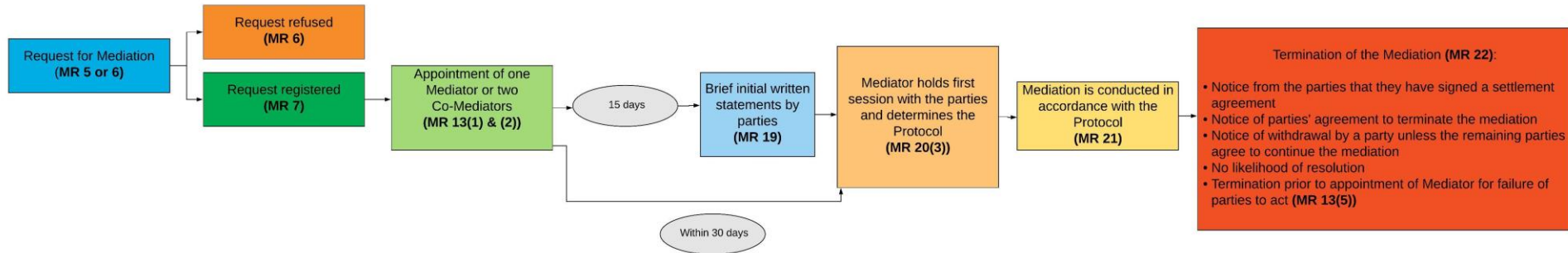
Differences to Conciliation – examples:

- 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



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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