

A Preview Of ICSID's New Investor-State Mediation Rules

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Over the past decade, the concept of resolving international investment disputes through mediation has gained traction among States, practitioners and academics. This is seen in the significant number of recent investment treaties that refer to mediation either as a pre-condition to arbitration, or as a stand-alone mechanism for resolving disputes. Support for mediation is also evidenced by the many States that have signed the Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation), which opened for signature in August 2019 and has been signed by 51 States thus far. The Convention creates an international regime to enforce mediated settlements broadly akin to the 1958 New York Convention for the enforcement of arbitral awards. As is evident by the drafting history and its Art 8, the Singapore Convention intends to include settlements reached in the context of investment disputes.

The International Centre for Settlement of Investment Disputes (ICSID) has also been active in several ways to support the development of investor-State mediation. For example, ICSID makes its extensive services and facilities available for investment mediations, and has organized numerous events and courses on the subject.

In 2018, ICSID also began work on a new set of rules for investor-State mediation as part of a broader update to its procedural rules. These are the first institutional mediation rules designed specifically for investment disputes. They complement ICSID's existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings. The latest draft of the rules was published in August 2019 in *Working Paper #3: Proposals for Amendment of the ICSID Rules*.

ICSID Mediation Rules—Scope

Notably, the mediation rules have a broader scope of application than those relating to ICSID arbitration or conciliation. Under the proposed rules, the ICSID Secretariat would be authorized to administer any mediation proceeding that relates to an investment and involves a State or a regional economic integration organization (REIO). In other words, the mediation process would be available irrespective of the ICSID membership status of the State party or nationality of the investor.

ICSID Mediation Rules—Key Features

As with ICSID's arbitration, conciliation and fact-finding rules, ICSID's proposed mediation rules cover all aspects of the procedure from start to finish. They are designed to be flexible enough to be tailored to the specific needs of the parties, while providing sufficient structure to ensure an efficient and effective process.

Key features of the mediation process under these rules include:

Initiation of the Mediation

The mediation framework commences with the filing of a request for mediation based on a written agreement to mediate between the disputing parties. In the absence of a pre-existing agreement, the party wishing to institute the mediation may file a request to mediate with the Secretary-General. This request must include an invitation to the other party to mediate the dispute, which ICSID's Secretary-General would transmit. If the other party accepts the offer, the Secretary-General will review the request and register it, if it appears on the basis of the information provided that it is within the scope of the mediation rules. If the other party does not accept the offer within 60 days, the mediation will not proceed.

Appointment of the Mediator(s)

Following registration, the parties are to appoint one mediator or two co-mediators by agreement. If the parties fail to appoint within 45 days of registration, either party may request that the mediator be appointed pursuant to the default method. In this case, the appointment of a sole mediator is made by ICSID's Secretary-General in consultation with the parties.

Mediators must provide an extensive declaration with respect to their independence, impartiality, availability and commitment to maintain the confidentiality of the mediation. The mediator may not act as arbitrator, conciliator, counsel, expert, witness or in any other capacity in relation to the same dispute, unless the parties and the mediator agree otherwise.

Resignation of the Mediator(s)

A mediator may resign of their own volition at any time, and must resign upon the joint request of the parties. Any replacement mediator will be appointed by the same method as the original mediator. If only one of two co-mediators resigns, the parties may agree to continue the mediation with only the sole remaining mediator.

Conduct of the Mediation

To facilitate the preparation of the first session between the parties and the mediator, each party will provide the mediator with a brief initial statement describing the issues in dispute, their positions on these issues, and views on the procedure to be followed in the mediation. This must be done within 15 days of the mediator's appointment.

A joint first session will be held within 30 days of the mediator's appointment to establish the ground rules of the process. This would include procedures for the conduct of the mediation (i.e. the language, the method of communication, the place of meetings, the protection of confidential information, and the participation of non-disputing parties). During the first session, the parties are also encouraged to address: (i) whether they agree not to initiate or pursue other proceedings in respect of the subject of the mediation; (ii) how they wish to treat information disclosed by one party to the mediator by way of separate communication; (iii) issues concerning the application of prescription or limitation periods.

The ICSID mediation rules further envision that each party identify at the first session, or soon thereafter, a representative who is authorized to settle the dispute on its behalf and to describe the process that would be followed to implement a settlement agreement.

Based on the discussions at the joint first session, the mediator will determine the protocol for the conduct of the mediation. This protocol will guide the process going forward.

Communication

The mediator may communicate and meet with the parties jointly or separately, in writing or in person, or by any other appropriate means of communication. The mediator may also request that the parties provide additional information or written statements. If requested by the parties, the mediator may make oral or written recommendations for the resolution of all or part of the dispute. The mediator may also obtain expert advice with the agreement of the parties.

Termination of the Mediation

A mediation may terminate either upon: (i) the signing of a settlement agreement; (ii) an agreement of the parties to terminate the mediation; (iii) the withdrawal by one party from the mediation; (iv) the failure by any party to participate in the mediation or cooperate with the mediator; or (v) a determination by the mediator that there is no likelihood of resolution through mediation. A mediation may also be terminated if no mediator is appointed within 120 days following the registration of the request or if the parties fail to make the advance payments required.

Confidentiality and Without Prejudice Principle

In response to comments from ICSID Member States underlining the importance of confidentiality for amicable dispute settlement proceedings, the mediation rules envision that all information relating to the mediation shall be kept confidential between the parties, unless the parties agree otherwise, the information is independently available, or disclosure is required by law.

However, the fact that a mediation is taking place, or has taken place, shall not be confidential. This provision addresses the fact that mediation may be a pre-condition to arbitration and a party may need to disclose the existence of the mediation. In keeping with current practice, the mediation rules also envision that the parties may consent to the publication of information or materials by ICSID.

What Comes Next

ICSID is consulting with its Member States and the broader public on the proposed rules, with the aim of submitting the final rules for approval in 2020. They require the endorsement of at least 50% of ICSID's membership to come into effect. Once approved, the mediation rules may be used with the consent of both parties—thereby providing States and investors with a highly flexible and cost-effective option for resolving investment disputes.