

# Kluwer Mediation Blog

## Part 3 – ICSID Mediation and ICSID Conciliation—Understanding the Differences

Frauke Nitschke (International Centre for Settlement of Investment Disputes) · Monday, December 6th, 2021

*This series of blogs posts explores investment mediation from a variety of angles. In this third installment, we explain the primary differences between mediation and conciliation at ICSID. In part one, we explore how to determine whether mediation is an appropriate option for resolving an investment dispute, while part two looked at what mediation is—and how it works—in the context of investment disputes.*

Efforts to modernize investor-State dispute settlement have been ongoing for a number of years in various fora, including at the [International Centre for Settlement of Investment Disputes \(ICSID\)](#), the world's leading facility for resolving international investment disputes. These efforts have included the most wide-ranging update to ICSID's procedural rules for arbitration and conciliation since their establishment over 50 years ago—a process started in late 2016 and now near completion.

Responding to requests from Member States and users of ICSID's arbitration and conciliation services, ICSID also proposed the adoption of the first set of institutional mediation rules to resolve investment disputes. The proposed [Mediation Rules](#), offer a flexible process that allows disputing States and investors to develop customized solutions in a cost-effective manner. The Mediation Rules also assist States in implementing provisions in their bilateral or multilateral investment agreements, which increasingly refer to mediation as a tool for investor-State dispute resolution (see [ICSID's Overview of Investment Treaty Clauses on Mediation](#)).

A number of developments have led to the drafting of ICSID's Mediation Rules. States have requested that ICSID, as a neutral and trusted international organization, offer mediation services. Additionally, [statistics reveal](#) that about 30-40% of ICSID arbitrations are settled or otherwise discontinued before a final Award, indicating that amicable resolution of investment disputes, is not infrequent. More generally, the international community's focus on mediation as evidenced by the development of the [Singapore Convention on Mediation](#). It is against this backdrop that ICSID decided to expand its service offerings to include mediation, which, as explained below, differs in certain key respects from its conciliation offerings.

The ICSID Mediation Rules may be used as a standalone process, or in combination with ICSID's other dispute settlement mechanisms depending on what the parties deem best suited to resolve their particular dispute. Mediation assistance is available at ICSID prior to the formal adoption of

the Mediation Rules by the Administrative Council—parties are free to apply these Rules by agreement, which has already happened in practice.

### **Differences between Conciliation and Mediation at ICSID**

While the terms conciliation and mediation are sometimes used interchangeably, there are significant process differences between these two dispute resolution mechanisms—at least in the ICSID context. Here are a few key distinctions:

**First**, there are differences between the scope of application of ICSID Convention and Additional Facility conciliation on the one hand and ICSID mediation on the other. Specifically, the ICSID Mediation Rules will be available to all States regardless of their ICSID membership status. As a result, mediations need not involve parties from two ICSID Contracting States, or even one party with a link to ICSID membership.

**Second**, there are no nationality requirements applicable to ICSID mediation, and the mediation rules do not require that the mediation involve a “national of another State” as is required for conciliation under the Convention and the Additional Facility.

**Third**, consent of the parties is required both at the outset and throughout the mediation. In contrast to conciliation, a party may withdraw from the mediation at any time, (hence one might speak of an “ongoing consent” to mediate).

**Fourth**, the number of mediators and method of their appointment differs in mediation: under the ICSID Mediation Rules, the default is one or two mediators appointed by party agreement, whereas in conciliation, a conciliation commission must have an uneven number of conciliators.

**Fifth**, the default appointment provision in the ICSID Mediation Rules envisions the appointment of one mediator by party agreement. In ICSID conciliation, by contrast, the default mechanism in conciliation is a three-member conciliation commission with each party appointing one conciliator and the third, presiding conciliator being appointed by party agreement.

**Sixth**, the role of the mediator in ICSID mediation is limited to assisting the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute, whereas in conciliation, the mandate of the conciliation commission is broader and includes an obligation to “clarify the issues in dispute.”

**Seventh**, with ICSID mediation, in contrast with ICSID conciliation, there is no “jurisdictional” determination by the mediator, which allows the parties and the mediator to focus on the substance of the disputed issues.

**Eighth**, mediation is a more informal process. Unlike a conciliation commission, the mediator does not have the authority to issue formal orders or decisions.

Mediation and conciliation at ICSID therefore differ significantly in terms of scope and process. By adding mediation to ICSID’s dispute settlement offerings, the Centre provides the parties with a greater choice of dispute settlement procedures.

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