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## The Proposed ICSID Mediation Rules

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## ARTICLE

# THE PROPOSED ICSID MEDIATION RULES

FRAUKE NITSCHKE\*

### I. INTRODUCTION

In 2018, the International Centre for Settlement of Investment Disputes (ICSID), responding to requests by member states and facility users, proposed to its member states the adoption of the first set of institutional mediation rules to resolve investment disputes.<sup>1</sup> ICSID's investor-state mediation rules are intended to provide states and investors with a neutral, trusted forum to engage in facilitated negotiations to amicably resolve investment disputes, building on the Centre's longstanding reputation as the leading institution for investment-dispute settlement.<sup>2</sup>

The proposed mediation rules offer a party-driven, flexible process that allows for customized solutions to be reached in an efficient and cost-effective manner. The rules will also assist states to implement their international investment agreements, which increasingly reference mediation as a dispute settlement mechanism. With another service offering available in the Centre's palette of dispute settlement processes, investors and states are

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1. Int'l Ctr. for Settlement of Inv. Disps. [ICSID], *Proposals for Amendment of the ICSID Rules*, at Annex E: Additional Facility Rules of Procedure for Mediation Proceedings (Working Paper No. 1, Aug. 3, 2018), [https://icsid.worldbank.org/sites/default/files/publications/WP1\\_Amendments\\_Vol\\_3\\_WP-updated-9.17.18.pdf](https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf) [hereinafter WP 1]. The proposed mediation rules have not yet been adopted by ICSID's Administrative Council. A final vote on the proposed rules is anticipated in 2021.

2. ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* March 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966). Since its inception, ICSID has registered 768 cases (as of June 30, 2020). ICSID originally offered facilities for the settlement of investment disputes by arbitration and conciliation between an ICSID contracting state and a national of another contracting state. In 1978, the ICSID Administrative Council expanded this dispute settlement offering to include arbitration and conciliation facilities where one of the disputing parties is not an ICSID member or a national of an ICSID Member State. See ICSID, *ICSID Additional Facility Rules*, at 5 (Apr. 10, 2006), [https://icsid.worldbank.org/sites/default/files/AFR\\_2006%20English-final.pdf](https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf). In addition, the Additional Facility framework offers fact-finding proceedings.

enabled to choose the process—or combination of processes—offered by ICSID that best suits their dispute settlement needs.

The ICSID mediation rules have been developed in tandem with proposed amendments to ICSID's procedural rules for arbitration, conciliation, and fact-finding. This has been an iterative process, in which the ICSID Secretariat has advanced proposals in a series of working papers, on which it then consults with the ICSID membership and other stakeholders.

The first draft of the mediation rules was released in *Working Paper #1: Proposals for Amendment of the ICSID Rules*. The proposed rules were posted on the Centre's website, and comments from the general public were encouraged.<sup>3</sup> ICSID engaged in an extensive dialogue with its 155 member states, inviting comments and holding various rounds of in-person consultations.<sup>4</sup> Thereafter, the ICSID Secretariat considered the comments and suggestions received, updated the text of the proposed rules, and prepared a second working paper.<sup>5</sup> A similar procedure was followed to prepare a third<sup>6</sup> and fourth<sup>7</sup> working paper. The final vote on the proposed mediation rules by the ICSID Administrative Council is anticipated in 2021.

This article first reviews the background against which the ICSID mediation rules were developed (II), before addressing mediation in the ICSID context (III). The article then provides a short, nontechnical overview of the provisions in each chapter of the mediation rules as proposed to ICSID membership most recently, in *Working Paper No. 4* (IV), which was published in February 2020. Finally, the article discusses the outlook for mediation of investment disputes (V).

Should readers wish further detail, the text of the mediation rules as proposed in February 2020 is attached to this article as Annex I. The mediation rules are supplemented by the (Mediation) Administrative and Financial Regulations, which address aspects such as financial matters, including the parties' advance payments to cover the cost of the mediation and payment of the mediator's fees and expenses; maintenance of registers by IC-

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3. See ICSID, *Rule Amendment Project—Member State & Public Comments on Working Paper # 1 of Aug. 3, 2018*, [https://icsid.worldbank.org/sites/default/files/amendments/Compendium\\_Comments\\_Rule\\_Amendment\\_3.15.19.pdf](https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf).

4. Following the publication of WP 1, in-person consultations with member states were held in Washington, D.C., on September 27–29, 2018. Between September 29 and December 27, 2018, ICSID gave over fifty presentations explaining the rules proposed in WP 1, during which further comments were received. See ICSID, *Proposal for Amendments to the ICSID Rules*, at 1 (Working Paper No. 2, Mar. 15, 2019), [https://icsid.worldbank.org/sites/default/files/amendments/Vol\\_1.pdf](https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf) [hereinafter WP 2]. Subsequent in-person consultations were held in Washington, D.C., on April 7–9, 2019, and November 11–15, 2019.

5. WP 2, *supra* note 4.

6. ICSID, *Proposal for Amendments to the ICSID Rules* (Working Paper No. 3, Aug. 16, 2019), [https://icsid.worldbank.org/sites/default/files/amendments/WP\\_3\\_VOLUME\\_1\\_ENGLISH.pdf](https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf) [hereinafter WP 3].

7. ICSID, *Proposal for Amendments to the ICSID Rules* (Working Paper No. 4, Feb. 28, 2020), [https://icsid.worldbank.org/sites/default/files/amendments/WP\\_4\\_Vol\\_1\\_En.pdf](https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf) [hereinafter WP 4].

SID; and other administrative matters. These regulations are not the focus of this article. However, the text of the (Mediation) Administrative and Financial Regulations as proposed in February 2020 is attached to this article as Annex II. Details on ICSID's amendment process are available on the ICSID website, which is constantly updated to reflect the latest developments.<sup>8</sup>

## II. BACKGROUND ON MEDIATION IN THE INVESTMENT-DISPUTE-SETTLEMENT CONTEXT

Mediation has been an effective tool in resolving cross-border commercial disputes. Mediation has also been a topic of discussion more recently in the context of investor-state dispute settlement (ISDS). This section will review policy developments and data in investment dispute settlement that led to ICSID's decision to propose to its member states the adoption of an institutional framework for investment mediation.

In recent years, state representatives, arbitration practitioners, and academics have looked at and extensively discussed investment mediation from different angles. ICSID member states in particular have recognized mediation as a tool for investment-dispute settlement and have included reference to mediation in their bilateral and multilateral treaties, including in investment chapters in free-trade agreements. These references range from (i) listing mediation as a possible process to use during the so-called amicable settlement periods built into many bilateral and multilateral investment agreements<sup>9</sup> to (ii) making mediation a precondition to arbitration (often called multi-tier clauses)<sup>10</sup> to (iii) providing for investor-state mediation as a stand-alone mechanism alongside other processes, such as arbitration.<sup>11</sup>

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8. ICSID, *ICSID Rules and Regulations Amendment—Working Papers*, <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers> (last visited Jan. 30, 2021).

9. *See, e.g.*, Agreement for the Reciprocal Promotion and Protection of Investments, Arg.-U.A.E., art. 20(1), *signed* Apr. 16, 2018 (not yet in force); Free Trade Agreement, Austl.-Peru, ch. 8, art. 8.19, *signed* Feb. 12, 2018 (entered into force Feb. 11, 2020); Free Trade Agreement, Cent. Am.-Kor., ch. 9, art. 9.16, *signed* Feb. 21, 2018 (entered into force Nov. 1, 2019); The United States-Mexico-Canada Agreement, ch. 14, Annex 14-D, art. 14.D.2, *signed* Nov. 30, 2018 (entered into force July 1, 2020).

10. *See, e.g.*, Art. 26(4) of the Investment Agreement for the COMESA Common Investment Area, *signed* May 23, 2007 (not yet in force), which requires a six-month amicable settlement period, during which the parties "shall seek the assistance of a mediator," unless an alternative method of dispute settlement is agreed upon. *See also* Comprehensive and Progressive Agreement for Trans-Pacific Partnership, ch. 9, art. 9.18, *signed* Mar. 8, 2018 (entered into force Dec. 30, 2018).

11. *See, e.g.*, Comprehensive Economic and Trade Agreement, Can.-EU, Annex 29-C, *signed* Oct. 30, 2016 (provisionally entered into force Sept. 21, 2017); Investment Protection Agreement, EU-Viet., ch. 3, art. 3.4, *signed* June 30, 2019 (not yet in force); Investment Protection Agreement, EU-Sing., ch. 3, art. 3.4, *signed* Oct. 15, 2018 (not yet in force).

Professional associations such as the International Bar Association (IBA) have also engaged in extensive work on investment mediation. The IBA's subcommittee has, under the leadership of Anna Joubin-Bret and Barton Legum, developed the IBA Investor-State Mediation Rules, which were adopted in 2012.<sup>12</sup>

Recent developments have also sought to support the practice and enhance the procedural framework of mediating investment disputes. In 2016 the Energy Charter,<sup>13</sup> in which about one-third of ICSID's member states are also members, adopted the *Guide on Investment Mediation*,<sup>14</sup> an explanatory document intended to help states decide whether to pursue mediation. In addition, the guide provides an overview of the mediation process and practical tips as to how to prepare for an investment mediation.

Contemporaneously with the commencement of the ICSID amendment process, the international community has further engaged in multilateral discussions to develop an international framework for enforcing mediated settlement. This effort ultimately led to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), a multilateral agreement addressing the recognition and enforcement of mediated settlement agreements, which was signed in August 2019 and entered into force in September 2020.<sup>15</sup> Although principally addressing the recognition of mediated settlement agreements resolving international *commercial* disputes, the *travaux préparatoires*<sup>16</sup> to the Singapore Convention indicate that the drafters did not intend for the Convention to exclude mediated settlements reached in the context of investment disputes

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12. Int'l Bar Ass'n [IBA], *IBA Rules for Investor-State Mediation* (Oct. 4, 2012), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F>.

13. The Energy Charter Conference is an intergovernmental organization established by the 1994 Energy Charter Treaty and is the governing and decision-making body for the Energy Charter process. The membership of the Energy Charter Conference consists of the states and regional economic integration organizations that have signed or acceded to the Energy Charter Treaty. See Energy Charter Conference, *Meetings of the Energy Charter Conference*, <https://www.energycharter.org/who-we-are/energy-charter-conference> (last updated Jan. 9, 2020).

14. Energy Charter Conference, *Guide on Investment Mediation*, CCDEC 2016 12 INV (adopted July 19, 2016), <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

15. U.N. Convention on International Settlement Agreements Resulting from Mediation, *opened for signature* Aug. 7, 2019 (adopted Dec. 20, 2018) [hereinafter Singapore Convention on Mediation]. Fifty-three states signed the Singapore Convention within the first twelve months.

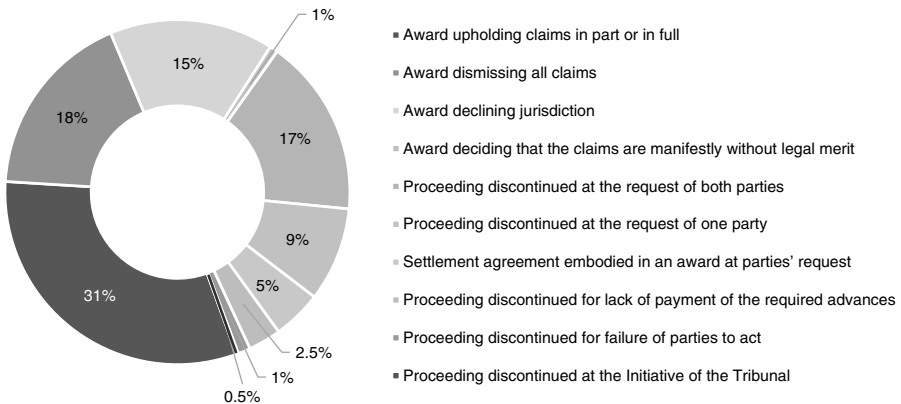
16. See U.N. Comm'n Int'l Trade L. Secretariat, *Settlement of Commercial Disputes: International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation*, Note by the Secretariat, U.N. Doc. A/CN.9/942, at 11 (Mar. 2, 2018), <https://undocs.org/en/A/CN.9/942>. See also Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 22 (2019).

from the scope of the convention's application.<sup>17</sup> By August 2020, a record fifty-three states had signed the convention.

Finally, data on settlements in investor-state arbitrations administered by ICSID since its inception indicate that a significant number of investment arbitrations settle before an award is rendered by an arbitral tribunal.<sup>18</sup> Over the course of ICSID's history, 35 percent of all arbitrations registered have settled or otherwise been discontinued.<sup>19</sup> These data suggest that settlement of investment disputes is a phenomenon that constantly occurs in practice. Mediation might be a tool to make such settlements more time- and cost-efficient.

When one looks at the outcomes of ICSID arbitration in further detail, it becomes clear that fewer than 50 percent of investment arbitrations initiated are decided by a tribunal on the merits of the dispute.<sup>20</sup> As the chart below illustrates, in 31 percent of cases, the claims are upheld in full or in part, and in 18 percent, all claims are dismissed; the remainder of the cases either are found to manifestly lack legal merit or to be outside the tribunal's jurisdiction or are, as already noted, in fact settled or otherwise discontinued. These data seem to suggest that some portion of investment disputes brought to arbitration could benefit from a mediation procedure to find a resolution—either mediation before arbitration commences or mediation concurrent to arbitration to assist interested parties to settle the dispute.

### *Arbitration Proceedings under the ICSID Convention and Additional Facility Rules—Outcomes<sup>21</sup>*



17. As will be seen Chapter V below, the proposed ICSID Mediation Rules are drafted with the requirements set out by the Singapore Convention in mind.

18. See ICSID, *THE ICSID CASELOAD—STATISTICS (2020-1)*, at 13 chart 9 (Feb. 7, 2020), <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf>.

19. See *id.*

20. See *id.* at 13 chart 9a.

21. See *id.* at 13 chart 9a.

### III. MEDIATION WITHIN THE ICSID CONTEXT

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) as a neutral, international forum for the settlement of investment disputes.<sup>22</sup> The mechanisms envisioned for such settlement facilities were arbitration and conciliation.<sup>23</sup> In 1978, the Administrative Council of ICSID authorized the ICSID Secretariat to administer arbitrations and conciliations regarding certain additional categories of investment disputes, and also adopted a fact-finding mechanism.<sup>24</sup> In adding mediation as a complement of alternate-dispute-resolution tools to ICSID's offerings, the Secretariat was careful to take into account both the core characteristics of the mediation process, and the other dispute settlement mechanisms already available at ICSID.

Mediation is an entirely voluntary process.<sup>25</sup> The mediator is an independent and impartial third party whose role it is to assist the disputing parties to amicably resolve all or parts of their dispute.<sup>26</sup> The mediator has a number of tools available to fulfill this mandate—the mediator may meet jointly or separately with the parties or ask the parties to provide information or explanations.<sup>27</sup> Unlike an arbitrator, the mediator does not have the power to decide the dispute or to otherwise prescribe how the dispute is to be resolved.<sup>28</sup> The mediation process and the outcome—including the decision to remain in the mediation or to withdraw from the process—remain in the parties' control. The mediation process is flexible and can be adapted to the circumstances of the dispute and the needs of the parties.<sup>29</sup> Nondisputing parties may participate in the mediation process in various forms with the parties' and the mediator's consent.

Mediation therefore significantly differs from arbitration. As mentioned above, ICSID also offers a framework for conciliation proceedings. Users have sometimes inquired what differences exist between ICSID mediation and ICSID conciliation under the ICSID Convention or the Addi-

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22. ICSID, *ICSID Convention, Regulations and Rules*, at 5 (2006) [hereinafter *ICSID Convention*], <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>.

23. *Id.* at art. 1(2).

24. ICSID, *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules)* (1978). The types of proceedings referred to in the document title include inter alia arbitration, conciliation, and fact-finding proceedings involving a party that is not a contracting state or a national of a contracting state.

25. *See, e.g.*, CTR. FOR EFFECTIVE DISP. RESOL., *THE CEDR MEDIATOR HANDBOOK* 30 (2015) [hereinafter *CEDR HANDBOOK*].

26. *See, e.g., id.* at 84.

27. *See, e.g., id.* at 31.

28. *See, e.g., id.* at 70.

29. *Id.* at 28.

tional Facility Rules.<sup>30</sup> This request for clarification is understandable, especially in light of article 2(3) of the Singapore Convention framework, which does not differentiate between processes named mediation and those named conciliation.<sup>31</sup>

Within the ICSID context (and perhaps more broadly in the context of some treaty provisions adopted by states distinguishing the two processes), there are noteworthy differences between the mediation and conciliation processes.

Starting with the scope of application, one sees a difference between the mediation and conciliation rules. The mediation rules allow broader access to ICSID's mediation facilities<sup>32</sup> than the ICSID conciliation rules. The mediation rules authorize the Secretariat to administer mediations that involve a state party and relate to an investment and that the parties consent in writing to submit to the Centre. Unlike under the ICSID Convention, the parties need not have a link to different ICSID contracting states, nor is it required that the mediation involve both a national on one hand and a state party on the other. Indeed, the parties to a mediation may be from the same member state (provided at least one state, or its agency or constituent subdivision, is a party to the mediation) and may be two state entities, provided that the parties consent to ICSID mediation. In addition, for ICSID mediation, it is not required for a dispute to arise directly out of an investment.<sup>33</sup> The broader scope *ratione personae* also distinguishes the mediation rules from the scope of the Additional Facility Rules as currently in force.<sup>34</sup>

Other noteworthy differences between ICSID conciliation and mediation concern the commencement of each process: mediations can be instituted absent a preexisting agreement to mediate, and a party wishing to commence mediation proceedings may include in its request an offer to mediate that the Secretariat will transmit to the other party, inviting that party to state whether it wishes to accept or reject that offer.<sup>35</sup> This service offering on the part of the Secretariat is not available in the context of ICSID conciliation, where there must be a preexisting agreement to enter into a conciliation at the time the request for conciliation is filed.<sup>36</sup>

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30. WP 4, *supra* note 7. The ICSID Convention Conciliation Rules are set out in *ICSID Convention*, *supra* note 22. The ICSID Additional Facility Conciliation Rules are set out in *ICSID Additional Facility Rules*, *supra* note 2.

31. Art. 2(3) of the Singapore Convention on Mediation provides “‘Mediation’ means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (‘the mediator’) lacking the authority to impose a solution upon the parties to the dispute.” Singapore Convention on Mediation, *supra* note 15, at art. 2(3).

32. WP 4, *supra* note 7, at 216, MR 2.

33. *Id.*

34. ICSID Additional Facility Rules, *supra* note 2, at art. 2.

35. WP 4, *supra* note 7, at 218, MR 6.

36. See *ICSID Convention*, *supra* note 22, at art. 25. *ICSID Additional Facility Rules*, *supra* note 2, at art. 2.



In addition, once the process is underway, the conciliation and mediation processes differ in a number of respects. For example, with regard to the third party neutral tasked to assist the parties to reach a mutually agreeable solution, in conciliations, the framework envisions the appointment of an uneven number of conciliators; the default provision envisions a three-member commission, with each party appointing one conciliator and the third, presiding conciliator to be appointed by agreement of the parties.<sup>37</sup> The mediation rules, on the other hand, envision one mediator or two co-mediators, appointed by agreement of the parties, with the default being one mediator appointed by party agreement.<sup>38</sup>

The conduct of the conciliation further differs from that of the mediation in that the ICSID Convention and the Additional Facility Rules provide for the filing of jurisdictional objections in conciliation proceedings;<sup>39</sup> the filing of such objections is not envisioned under the mediation rules. ICSID mediation and conciliation also differ in terms of settlement and status quo recommendations; both are possible under the ICSID Convention and Additional Facility Rules even absent specific party agreement on these points,<sup>40</sup> while the mediation rules require party agreement in this regard.<sup>41</sup>

Finally, pursuant to article 25 of the ICSID Convention, a party may not unilaterally withdraw its consent to ICSID conciliation, and a party may not unilaterally withdraw from the process once consent is given.<sup>42</sup> In contrast, in mediation, a party may withdraw from the mediation at any time,<sup>43</sup> which reflects the entirely voluntary nature of the mediation and the concept of “ongoing consent.”

#### IV. THE PROPOSED MEDIATION RULES

Having reviewed the background and context of ICSID’s proposed mediation rules, this article will now review the mediation provisions set out in the various chapters of the rules.

##### A. Chapter I: General Provisions

The first chapter of the proposed mediation rules is devoted to general provisions applicable to the mediation process. The chapter covers at the outset the definition of certain terms used throughout the mediation rules. This follows the style of ICSID’s current Additional Facility drafting

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37. *ICSID Convention*, *supra* note 22, at arts. 29(2)(b), 30.

38. WP 4, *supra* note 7, at 221, MR 13.

39. *ICSID Convention*, *supra* note 22, at art. 32.

40. *Id.* at art. 34.

41. WP 4, *supra* note 7, at 225, MR 21(3).

42. *ICSID Convention*, *supra* note 22, at art. 25.

43. WP 4, *supra* note 7, at 225–26, MR 22(1)(c).

style.<sup>44</sup> In addition, the terms “party” and “party representative” are clarified.<sup>45</sup>

As mentioned above, the mediation rules are intended to provide a broad access to parties involved in investment disputes. This intention is reflected in mediation rule 2, which authorizes the Secretariat to administer mediations that (1) relate to an investment, (2) involve a state or a Regional Economic Integration Organization (REIO), and (3) which the parties consent in writing to submit to the Centre. Accordingly, the mediation rules provide state parties with broad access to investment mediation facilities. In particular, while the rules do require a state or REIO (or a constituted subdivision of a state or an agency of the state or REIO)<sup>46</sup> to be a party to the dispute, they do not prescribe who the other disputing party or parties might be. The other disputing party could therefore be a foreign or a local entity, for example. Further, proposed mediation rule 2 does not require that the dispute be of a legal nature or that it “arise directly out” of an investment (as is the case for ICSID Convention conciliation). Rather, mediation rule 2 adopts the broad term “relate to an investment,” which is to be given its ordinary meaning and is not intended as a legal term of art.<sup>47</sup> Proposed mediation rule 2 does, however, require a written agreement between the disputing parties to ICSID mediation. This agreement could be in a contract or another ad hoc agreement providing for ICSID mediation. It could also be composed of mediation provisions in a bilateral or multilateral investment treaties or in an investment law providing for access to ICSID mediation, and an acceptance of these by the other party to the mediation.<sup>48</sup>

A few technical aspects of the process are addressed in mediation rule 3—the ability of the parties to amend by agreement provisions of the rules other than those dealing with scope, definitions, and institution of a mediation process at ICSID,<sup>49</sup> and the applicability of the (Mediation) Administrative and Financial Regulations ((M)AFR) to mediation proceedings. Mediation rule 3 also contains a provision clarifying that should any of the applicable mediation rules or any agreement by the parties to modify these rules conflict with a provision of law from which the parties cannot derogate, that provision of law shall prevail.<sup>50</sup> Finally, proposed mediation rule 3 stipulates that the three languages in which the proposed mediation rules

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44. *Id.* at 215, MR 1.

45. *Id.* at 216, MR 4.

46. *See id.* at MR 2(2).

47. WP 3, *supra* note 6, at 211.

48. The requirement for agreement, or consent, does not apply only to the agreement to institute a mediation. Rather, there must be continuing agreement to stay in the mediation throughout the process (“ongoing consent”). This is clear from Mediation Rule 22(1)(c), pursuant to which either party may withdraw from the mediation at any time. WP 4, *supra* note 7, at 211.

49. *Id.* at 216–19, MR 1–7.

50. *Id.* at 216, MR 3(3).

are adopted—English, French, and Spanish—are each equally authentic;<sup>51</sup> however, parties are free to agree on the language they wish to use during the mediation.

### B. Chapter II: Institution of Mediation Chapter

Chapter II of the proposed mediation rules sets out (1) the requirements that a party must comply with should it request to commence a mediation at ICSID and (2) the process that is followed once the Secretariat receives a request for mediation.

The requirements to request mediation at ICSID are simple: a party must file a request for mediation with ICSID and pay the lodging fee set out in ICSID's fee schedule.<sup>52</sup> The request should be written in English, French, or Spanish<sup>53</sup> and be dated and signed (either by the party or an authorized representative). A request may be filed electronically<sup>54</sup> by one or multiple parties.<sup>55</sup> The request for mediation should provide information about the parties to the mediation (including contact information)<sup>56</sup> and describe the investment to which the mediation relates and the issues in dispute.<sup>57</sup> The request should also contain the written agreement of the parties to mediate.<sup>58</sup> Should the parties have already discussed and reached agreement on certain procedural matters (e.g., concerning the appointment process or qualifications of the mediator), such agreements are to be included in the request.<sup>59</sup> Should the party requesting the mediation have certain procedural proposals in mind, the party should also include these.<sup>60</sup> Proceeding in this manner will then allow the party receiving the mediation request to respond promptly to any such proposals.

As noted above, a written agreement to mediate is required before a mediation can be registered by ICSID and before the mediation process begins. Some ICSID member states have pointed to the fact that mediation is a relatively new way of resolving investment disputes and have asked ICSID to assist with transmitting an offer to mediate to the other party, requesting that party to indicate whether it wishes to accept or reject the offer.<sup>61</sup> The proposed mediation rules address this request by including a provision to facilitate this process in mediation rule 6. While new to the

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51. *Id.* at 216, MR 3(5).

52. *Id.* at 217, MR 5(1); 218, MR 6(1).

53. *Id.* at 217, MR 5(3)(a).

54. WP 4, *supra* note 7, at 217, MR 5(3)(e).

55. *Id.* at 217, MR 5(2).

56. *Id.* at 217, MR 5(3)(b).

57. *Id.* at 217, MR 5(2); 218, MR 6(2).

58. *Id.* at 217, MR 5(3)(i).

59. *Id.* at 217, MR 5(3)(h).

60. WP 4, *supra* note 7, at 217, MR 5(3)(h).

61. WP 3, *supra* note 6, at 569; WP 4, *supra* note 7, at 495.

ICSID system, the provision of such assistance by the administering institution is commonly found in the frameworks of commercial mediation.<sup>62</sup>

Upon receiving a request containing an agreement to mediate (pursuant to mediation rule 5) or a request to mediate in which the parties have subsequently reached a written agreement to mediate (pursuant to mediation rule 6), the Secretary-General of ICSID will register the request for mediation if it appears, on the basis of the information provided, that the request falls within the scope of mediations the Secretariat is authorized to administer pursuant to mediation rule 2.<sup>63</sup> In the registration notice sent to the parties, the Secretary-General will invite the parties to appoint the mediator without delay and inform the parties that ICSID will send all mediation-related correspondence to the contact address appearing on the notice unless a party communicates different information to the Centre.<sup>64</sup> If it appears that the request does not fall within the scope of authorization, the Secretary-General will inform the parties of a refusal to register and set out the grounds for the refusal.<sup>65</sup>

### C. Chapter III: Chapter on General Procedural Provisions

Following the registration of a request for mediation, the mediation commences. Chapter III sets out a number of general procedural provisions, including a general rule on calculation of time limits, rules on costs and confidentiality, and a provision on the use of information in other proceedings.

The default provision on time limits in mediation rule 8 is intended to help the parties calculate time limits set out in the proposed rules—such as the time limit within which a party is invited to respond to an offer to mediate pursuant to mediation rule 6 or the time frame after which a party may invoke the default procedure to appoint a mediator in mediation rule 12(4).<sup>66</sup>

In terms of mediation costs, the proposed rules envision in mediation rule 9 that each party pays one-half of the mediator's fees and expenses and one-half of the cost of administrative charges and direct costs incurred in connection with the mediation (e.g., ICSID's administrative fee and costs for meeting venues and catering). Each party shall bear its own costs and expenses. Of course, the parties may agree to a different cost division if they wish.

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62. *E.g.*, International Chamber of Commerce (ICC), the Singapore International Arbitration Center (SIAC), the London Court of International Arbitration (LCIA), and the Judicial Arbitration and Mediation Services (JAMS).

63. WP 4, *supra* note 7, at 219, MR 7(1).

64. *Id.* at 219, MR 7(3).

65. *Id.* at 219, MR 7(2).

66. WP 3, *supra* note 6, at 572.

Confidentiality is considered a cornerstone of mediation and assists parties to freely engage in the mediation in good faith and candor.<sup>67</sup> There are two aspects to confidentiality in mediations—the confidentiality vis-à-vis information shared by a party with the mediator in a private session, and confidentiality as regards nonparties to the mediation, e.g., the general public. With regard to the latter, the proposed mediation rules provide in mediation rule 10 that all information relating to the mediation (including documents generated in or obtained in the mediation) is to be kept confidential, unless the parties agree otherwise, the information or document is independently available (e.g., it is a public document), or disclosure of the information or document is required by law. Some comments by states on the proposed mediation rules have underlined that confidentiality could be an important consideration for parties in deciding whether to engage in mediation at all.<sup>68</sup> The proposed mediation rule therefore provides that—unless the parties agree otherwise—the fact that a mediation is ongoing or took place in the past shall be confidential.<sup>69</sup> Should disclosure of the mediation be required, pursuant to a treaty provision or otherwise, the exceptions to the confidentiality principles set out in mediation rule 10 allow for that.

Finally, Chapter III contains a “without prejudice” provision that is similar to the one that can be found in ICSID Convention article 35.<sup>70</sup> The rule ensures that any statement a party makes in the mediation (including an admission or offer of settlement) is without prejudice to the position that party may take in any other proceeding. The provision is intended to ensure the parties have the space and confidence to freely participate and engage in the mediation.

#### D. Chapter IV: The Mediator

The provisions relevant to the mediator are found in Chapter IV.<sup>71</sup>

Chapter IV does not identify any specific qualifications required of the mediator other than being impartial and independent of the parties.<sup>72</sup> In fact, the proposed rules specify that the parties may by agreement determine any particular qualifications or expertise.<sup>73</sup> Of course, the parties may jointly

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67. WP 1, *supra* note 1, at 788 para. 1391.

68. WP 4, *supra* note 7, at 497.

69. *Id.* at 210, MR 10(2).

70. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, *supra* note 2, at art. 35 (“Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.”).

71. The definition of “mediator” is set out in proposed Mediation Rule 1(7) in Chapter I, which clarifies that there might be either one or two co-mediators, appointed by party agreement. WP 4, *supra* note 7, at 215. *See also id.* at 221, MR 13(1).

72. *Id.* at 220, MR 12(1).

73. *Id.* at 221, MR 12(2).

request at any time that ICSID assist with the appointment of a mediator,<sup>74</sup> such as by identifying a list of mediators for the parties to consider.<sup>75</sup>

The parties are to notify ICSID of the mediator appointment and provide the mediator's name and contact information.<sup>76</sup> ICSID will then request acceptance of the appointment from the appointee.<sup>77</sup> Within twenty days of receiving the request for appointment, the mediator shall inform the Secretariat of the acceptance of the appointment and provide an extensive disclosure declaration, addressing matters related to the mediator's independence, impartiality, availability, and commitment to maintain the confidentiality of the mediation.<sup>78</sup> ICSID will then notify the parties of the acceptance and transmit the declaration to the parties. The mediator then assumes a continuing obligation to disclose any change of circumstances that is relevant to the disclosure statement.<sup>79</sup> Finally, the proposed mediation rules envision that—unless the parties and the mediator agree otherwise—a mediator appointed in an ICSID mediation may not act as arbitrator, conciliator, counsel, expert, judge, or witness, or in any other capacity, in any other proceeding related to the issues in dispute.<sup>80</sup>

In terms of default appointment provisions, the mediation rules provide that, should the parties not be able to agree on the number of mediators within thirty days from the date of registration, there shall be one mediator, who is appointed by agreement.<sup>81</sup> If within sixty days from the date of registration no mediator has been appointed, either party may ask ICSID to appoint the mediator(s) not yet appointed.<sup>82</sup> In this process the Secretary-General will consult the parties regarding qualifications, expertise, nationality, and availability and aim to appoint the mediator within thirty days after receiving the appointment request.<sup>83</sup>

If a mediator does not accept the appointment (or provide the disclosure statement) within the twenty-day time limit, another person shall be appointed in accordance with the method followed for the previous appointment (i.e., either party agreement or the default method).<sup>84</sup>

If the parties do not take any step toward the appointment of the mediator (such as communicating the parties' agreement on the number of mediators or requesting to initiate the default appointment process) within 120 days after registration (or any other period the parties may agree upon),

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74. *Id.* at 221, MR 13(3).

75. WP 1, *supra* note 1, at 770 para. 1355.

76. WP 4, *supra* note 7, at 221, MR 14(1).

77. *Id.* at 221, MR 14(2).

78. *Id.* at 221–22, MR 14(3).

79. *Id.* at 222, MR 14(5).

80. *Id.* at 222, MR 14(7).

81. *Id.* at 221, MR 13(2).

82. WP 4, *supra* note 7, at 221, MR 13(4).

83. *Id.* at 222, MR 13(4).

84. *Id.* at 222, MR 14(5).

ICSID will inform the parties that the mediation is terminated.<sup>85</sup> This will prevent the proceeding from being held in limbo because of the parties' failure to act.<sup>86</sup>

As soon as the mediator has accepted the appointment, the Secretary-General will transmit the request for mediation and all correspondence between ICSID and the parties to the mediator.<sup>87</sup> The transmission of documents is also important for the calculation of timelines regarding the parties' initial written statements and the first session.

The proposed rules envision that if the parties had originally agreed on two co-mediators and one mediator resigns in the course of the mediation, the parties may agree to continue the mediation with the remaining mediator as the sole mediator to save time and cost and ensure continuity.<sup>88</sup>

The proposed mediation rules do not contain any provision regarding the possibility for a party to file a proposal for disqualification similar to the mechanism available in ICSID arbitration and conciliation. Instead, the proposed rules envision that the parties may require the mediator to resign by agreement.<sup>89</sup> If only one party has concerns about the mediator, that party may raise the matter with the mediator or withdraw from the mediation.<sup>90</sup>

### *E. Chapter V: Conduct of the Mediation*

The conduct of the mediation is dealt with in Chapter V of the proposed mediation rules. This chapter deals with the role and duties of the mediator, the duties of the parties to the mediation, the initial written statements to be prepared by the parties, and the first joint meeting between the parties and the mediator (called a first session). Chapter V also addresses the subsequent mediation procedure as well as the termination of the mediation.

#### *1. Role and duties of the mediator*

The role of the mediator is set out in proposed mediation rule 17, and it is to "assist the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute."<sup>91</sup> The rule makes clear that the mediator, unlike an arbitrator, does not have the authority to impose a resolution of the dispute on the parties.<sup>92</sup> The mediator has a duty to treat the parties equally and provide each of the disputing parties with a reasonable opportu-

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85. *Id.* at 221, MR 13(5).

86. WP 1, *supra* note 1, at 770 para. 1357.

87. WP 4, *supra* note 7, at 222, MR 15.

88. *Id.* at 223, MR 16(3)(b).

89. *Id.* at 222, MR 16(2)(a).

90. *Id.* at 225–26, MR 22.

91. *Id.* at 223, MR 17(1).

92. *Id.*

nity to participate in the mediation.<sup>93</sup> In addition, the mediator should conduct the mediation in good faith and in an expeditious manner, keeping cost effectiveness in mind.<sup>94</sup> In the course of the mediation, the mediator may meet with the parties jointly or separately.<sup>95</sup> Communications between the mediator and the parties may be in writing, orally in person, or by any other appropriate means.<sup>96</sup>

When and if the mediator communicates with one party separately, any information received by the mediator during such conversations are not to be disclosed to the other party without authorization from the disclosing party.<sup>97</sup> This reflects the confidentiality principle within the mediation, which was already mentioned in the context of mediation rule 8 above.

## 2. *Duties of the parties*

The proposed mediation rules impose duties not only on the mediator but also on the parties: the parties have a duty to cooperate with the mediator and also with one another.<sup>98</sup> The parties too shall “conduct the mediation in good faith and in an expeditious and cost-effective manner.”<sup>99</sup>

## 3. *Initial stage of the mediation*

Within fifteen days following the Secretariat’s transmittal of all documents to the mediator,<sup>100</sup> each party is to file a brief initial written statement.<sup>101</sup> These statements are meant to provide each party an opportunity to set out its views on the disputed issues and on procedural aspects of the mediation. These initial statements are not intended as statements of claim in the legal sense but rather as an opportunity for each party to simultaneously present its views, which will help the mediator prepare for the first joint meeting with the parties, the first session.<sup>102</sup>

## 4. *The first session*

The first session between the parties and the mediator offers an opportunity to work on and determine the protocol for conducting the media-

93. WP 4, *supra* note 7, at 223, MR 17(3).

94. *Id.* at 223, MR 17(2).

95. *Id.* at 224, MR 20(2).

96. *Id.* at 223, MR 17(4).

97. *Id.*

98. *Id.* at 223, MR 18.

99. WP 4, *supra* note 7, at 223, MR 18.

100. *See id.* at 222, MR 15.

101. *Id.* at 224, MR 19(1). The parties and the mediator may by agreement determine a different time period for the filing of the initial statements.

102. WP 1, *supra* note 1, at 782 para. 1357.



tion.<sup>103</sup> In preparation for the first session, the mediator may meet with the parties jointly or separately.<sup>104</sup>

At the first session, which is to be held within thirty days of the transmittal of the request to the mediator,<sup>105</sup> the parties will address together with the mediator a number of matters. These are listed in mediation rule 20 and include procedural matters such as procedural language of the mediation, method of communication, place of meetings, timeline and next steps in the mediation, participation of other persons in the mediation, confidentiality arrangements, the division of advances to be paid to cover the cost of the mediation, and any other relevant procedural matters.<sup>106</sup> The mediator will also inquire whether the parties have reached any agreement regarding (i) the treatment of information disclosed by one party to the mediator by way of separate communication, (ii) the application of prescription or limitation periods, and (iii) the disclosure of any settlement agreement resulting from the mediation.<sup>107</sup> In addition, the mediator will address with the parties whether they have reached any agreement not to initiate or pursue other proceedings regarding the disputed issues while the mediation is ongoing.<sup>108</sup>

Following the discussions with the parties at the first session, the mediator will prepare the mediation protocol, which will then guide the further mediation procedure.<sup>109</sup> Finally, either at the first session or shortly thereafter, each party is to identify a representative who is authorized to settle the dispute, and each party shall describe the process that would be followed to implement a settlement reached in the mediation.<sup>110</sup>

Once the mediation protocol is established, the mediation will be conducted in accordance with that document.<sup>111</sup> The mediation rules specify certain tools the mediator has available during the mediation process. For example, the mediator may request that the parties provide additional information or written statements.<sup>112</sup> With the agreement of the parties, the mediator may also obtain expert advice.<sup>113</sup> The proposed mediation rules do not prescribe whether the mediation is to be conducted in a facilitative or evaluative manner; that is a matter the parties and the mediator may address at the first session or otherwise agree upon during the mediation. Should

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103. See WP 4, *supra* note 7, at 224–25, MR 20 (listing items to be addressed during a first session).

104. *Id.* at 224, MR 20(2).

105. *Id.* at 224, MR 20(1).

106. *Id.* at 224–25, MR 20(3).

107. *Id.* at 224–25, MR 20(3)(g).

108. *Id.*

109. See WP 4, *supra* note 7, at 225, MR 21(1).

110. *Id.* at 225, MR 20(4).

111. *Id.* at 225, MR 21(1).

112. *Id.* at 225, MR 21(2).

113. *Id.* at 225, MR 21(4).

parties desire the mediator to make settlement recommendations, they may reach an agreement to that effect.<sup>114</sup>

### 5. *Termination of the mediation*

There are a number of ways an ICSID mediation may terminate. As mentioned above, the mediation terminates if the parties take no step to appoint the mediator within the specified time frame.<sup>115</sup> In addition, the mediation terminates upon (i) notice from the parties that they have signed a settlement agreement,<sup>116</sup> (ii) notice from the parties that they have agreed to terminate the mediation,<sup>117</sup> (iii) notice of withdrawal by any party (unless the remaining parties agree to continue the mediation),<sup>118</sup> or (iv) a determination by the mediator that there is no likelihood of resolution through the mediation.<sup>119</sup> The notice of termination will contain a brief summary of the procedural steps and the basis for termination of the mediation. The mediator (or the Secretary-General as the case may be) shall sign the termination notice and dispatch a copy of the notice to each party.<sup>120</sup>

## V. TRAINING AND KNOWLEDGE DISSEMINATION ACTIVITIES

### A. *Training Activities*

Over the past years, ICSID has been receiving an increasing number of requests for training in the context of mediation. In response to that demand, ICSID, together with the Centre for Effective Dispute Resolution (CEDR), the Energy Charter Secretariat, and the International Mediation Institute, has been organizing training courses that bring together government officials and experienced mediators for capacity building in the investment-mediation context. These trainings have been held since 2017 in North America, Europe, and Asia. In addition, ICSID staff and CEDR have been conducting an interactive mediation skills course for the International Finance Corporation (IFC), which is tailored to government officials involved in investment grievances. ICSID also regularly offers technical assistance workshops on dispute prevention and management.<sup>121</sup>

114. *Id.* at 225, MR 21(3).

115. *See* WP 4, *supra* note 7, at 221; 225–26, MR 22(1)(e); 221, MR 13(5).

116. *Id.* at 225–26, MR 22(1)(a).

117. *Id.* at 225–26, MR 22(1)(b).

118. *Id.* at 225–26, MR 22(1)(c).

119. *Id.* at 225–26, MR 22(1)(d).

120. *Id.* at 226, MR 22(2)–(3). The parties may request additional certified copies.

121. *See generally* ICSID, <https://icsid.worldbank.org> (last visited Oct. 14, 2020) (for updated information on ICSID's training courses, visit ICSID's website or email [icsidsecretariat@worldbank.org](mailto:icsidsecretariat@worldbank.org)).

### B. Knowledge Dissemination

Numerous international conferences have been organized on the topic and ICSID staff has participated in the dissemination of information on investment mediation through speaking engagements at conferences and other events. Events at which mediation of investment disputes has been a focus have increased considerably in recent years, as interest has grown. The Secretariat's staff also publishes articles on investment mediation on a regular basis and devotes a section on its website to investment mediation.<sup>122</sup>

## VI. OUTLOOK

The flexibility of the mediation mechanism proposed for adoption, and the ability to combine mediation with the Centre's other offerings, supports the view that a number of users might avail themselves of the mediation rules when they enter into force. As mentioned at the outset, mediation at ICSID may be pursued as a stand-alone process or in conjunction with other processes, such as arbitration or conciliation. There are no limits to the manner in which these processes may be combined, such as "med-arb" or "arb-med" or "arb-med-arb" combinations. Parties may, for example, conduct a mediation prior to an arbitration, or they may commence an arbitration and then suspend the same to commence a mediation procedure related to all or part of the issues in dispute. Should a full settlement be reached in the mediation, the parties may agree to discontinue the arbitration (in which case a party could pursue any potential enforcement action related to the mediated settlement under the umbrella of the Singapore Convention). Or the parties may decide to resume the arbitration and request the tribunal to embody their settlement in an award, which, for an arbitration under the ICSID Convention, will benefit from the simplified enforcement mechanism in articles 53 and 54. If a partial settlement is reached—that is, if some but not all disputed issues are settled—parties may continue to arbitrate only these remaining disputed matters, thereby saving time and cost.

Of course, it remains to be seen how much the new mediation mechanism will be used once the rules are adopted. However, there are signs that suggest that the prospect for mediation of investor-state disputes is bright. User interest in investment mediation has been growing significantly over the past decade; policy developments in treaties and discussions in multilateral fora such as the UNCITRAL WG III indicate global interest in mediation as a means to resolve investment disputes. During the consultations with ICSID member states, it became clear that states welcome the expansion of ICSID's services by offering a mediation mechanism.

The development of the mediation rules marks another significant step in the evolution of ICSID. The Centre is expanding its dispute settlement

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122. ICSID, *Investor-State Mediation*, <https://icsid.worldbank.org/services/mediation-conciliation/mediation/overview> (last visited Oct. 14, 2020).

offerings and serves its member states by offering a framework that helps implement recent treaty provisions on mediations and offers disputing parties another avenue to resolve investment disputes. The adoption of the mediation rules by ICSID's Administrative Council is anticipated for early 2021.

**ANNEX I—PROPOSED ICSID MEDIATION RULES  
(FEBRUARY 2020)<sup>123</sup>**

**RULES FOR MEDIATION PROCEEDINGS  
(ICSID MEDIATION RULES)**

*Introductory Note*

*The Rules for Mediation Proceedings (ICSID Mediation Rules) were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.*

*The ICSID Mediation Rules are supplemented by the (Mediation) Administrative and Financial Regulations (Annex A).*

**Chapter I  
General Provisions**

**Rule 1  
Definitions**

- (1) “Secretariat” means the Secretariat of the Centre.
- (2) “Regional Economic Integration Organization” or “REIO” means an organization constituted by States to which they have transferred competence in respect of matters governed by these Rules, including the authority to make decisions binding on them in respect of those matters.
- (3) “Centre” or “ICSID” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
- (4) “Request” means a request for mediation together with the required supporting documents.
- (5) “Secretary-General” means the Secretary-General of the Centre.
- (6) “Schedule of fees” means the schedule of fees published by the Secretary-General.
- (7) “Mediator” includes, where required by the context, two co-mediators appointed in accordance with these Rules.

**Rule 2  
Mediation Proceedings**

- (1) The Secretariat is authorized to administer mediations that relate to an investment, involve a State or an REIO, and which the parties consent in writing to submit to the Centre.

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123. WP 4, *supra* note 7, at 215.

- (2) Reference to a State or an REIO includes a constituent subdivision of the State, or an agency of the State or the REIO. The State or the REIO must approve the consent of the constituent subdivision or agency which is a party to the mediation pursuant to paragraph (1), unless the State or the REIO concerned notifies the Centre that no such approval is required.
- (3) The (Mediation) Administrative and Financial Regulations, attached as Annex A, shall apply to mediations pursuant to these Rules.

### **Rule 3** **Application of Rules**

- (1) These Rules shall apply to any mediation conducted pursuant to Rule 2.
- (2) The parties may agree to modify the application of any of these Rules other than Rules 1-7.
- (3) If any of these Rules, or any agreement pursuant to paragraph (2), conflicts with a provision of law from which the parties cannot derogate, that provision shall prevail.
- (4) The applicable ICSID Mediation Rules are those in force on the date of filing the Request, unless the parties agree otherwise.
- (5) The texts of these Rules are equally authentic in English, French and Spanish.
- (6) These Rules may be cited as the “ICSID Mediation Rules”.

### **Rule 4** **Party Representative**

Each party may be represented or assisted by agents, counsel, advocates or other advisors, whose names and proof of authority to act shall be promptly notified by that party to the Secretary-General (“representative(s)”).

## **Chapter II** **Institution of the Mediation**

### **Rule 5** **Institution of Mediation Based on Prior Party Agreement**

- (1) If the parties have agreed in writing to mediate pursuant to Rule 2, any party wishing to institute a mediation shall file a 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 mediation.
- (3) The Request shall:
  - a) be in English, French or Spanish;

- (b) identify each party to the mediation 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 any 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 internal authorizations to file the Request, and attach the authorizations;
  - (g) indicate that the mediation involves a State or an REIO, describe the investment to which the mediation relates, and include a brief statement of the issues in dispute;
  - (h) contain any proposals or agreements reached by the parties concerning the appointment and qualifications of the mediator and the procedure to be followed during the mediation; and
  - (i) attach the agreement of the parties to mediate pursuant to these Rules.
- (4) Any supporting document in a language other than English, French or Spanish shall be accompanied by a translation into one of those languages. Translation of only the relevant part of a document is sufficient, provided that the Secretary-General may require a fuller or complete translation of the document.
- (5) 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.

### **Rule 6**

#### **Institution of Mediation Absent a Prior Party Agreement**

- (1) If the parties have no prior written agreement to mediate pursuant to Rule 2, any party wishing to institute a mediation shall file a Request with the Secretary-General and pay the lodging fee published in the schedule of fees.
- (2) The Request shall:
- (a) comply with the requirements in Rule 5(3)(a)-(h);
  - (b) include an offer to the other party to mediate pursuant to Rule 2; and
  - (c) request that the Secretary-General invite the other party to accept the offer to mediate.
- (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 60 days after transmittal of the Request whether it accepts the offer to mediate.
- (4) If the other party informs the Secretary-General that it accepts the offer to mediate, the Secretary-General shall acknowledge receipt and transmit the acceptance of the offer to mediate to the requesting party.
- (5) If the other party rejects the offer to mediate, or fails to accept the offer to mediate within the 60-day period referred to in paragraph (3)(c) or within such other period as the parties may agree, the Secretary-General shall acknowledge receipt and transmit any communication received to the requesting party and shall inform the parties that no further action will be taken on the Request.

### **Rule 7** **Registration of the Request**

- (1) Upon receipt of:
- (a) the lodging fee; and
  - (b) a Request pursuant to Rule 5 or a Request and an agreement to mediate pursuant to Rule 6;
- the Secretary-General shall register the Request if it appears, on the basis of the information provided, that the Request is within the scope of Rule 2(1).
- (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 mediation will be sent to the contact address appearing on the notice, unless different contact information is indicated to the Secretary-General; and
  - (c) invite the parties to appoint the mediator without delay.



### **Chapter III**

#### **General Procedural Provisions**

##### **Rule 8**

##### **Calculation of Time Limits**

Time limits referred to in these Rules shall be calculated from the day after the date on which the procedural step starting the period is taken, based on the time at the seat of the Centre. A time limit shall be satisfied if a procedural step is taken on the relevant date, or on the subsequent business day if the date falls on a Saturday or Sunday.

##### **Rule 9**

##### **Costs of the Mediation**

Unless the parties agree otherwise:

- (a) the fees and expenses of the mediator and the administrative charges and direct costs of the Centre shall be borne equally by the parties; and
- (b) each party shall bear any other costs it incurs in connection with the mediation.

##### **Rule 10**

##### **Confidentiality of the Mediation**

- (1) All information relating to the mediation, and all documents generated in or obtained during the mediation shall be confidential, unless:
  - (a) the parties agree otherwise;
  - (b) the information or document is independently available; or
  - (c) disclosure is required by law.
- (2) Unless the parties agree otherwise, the fact that they are mediating or have mediated shall be confidential.

##### **Rule 11**

##### **Use of Information in Other Proceedings**

A party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made, or views expressed by the other party or the mediator during the mediation, unless the parties agree otherwise.

### **Chapter IV**

#### **The Mediator**

##### **Rule 12**

##### **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.

**Rule 13**  
**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.
- (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.
- (5) If no step has been taken by the parties to appoint the mediator within 120 consecutive days after the date of registration, or such other period as the parties may agree, the Secretary-General shall notify the parties that the mediation is terminated.

**Rule 14**  
**Acceptance of Appointment**

- (1) The parties shall notify the Secretary-General of the appointment of the mediator and provide the name and contact information of the appointee.
- (2) Upon receipt of a notification pursuant to paragraph (1), the Secretary-General shall request an acceptance from the appointee.
- (3) Within 20 days after receipt of the request for acceptance of an appointment, the appointee shall:
  - (a) accept the appointment; and
  - (b) provide a signed declaration in the form published by the Centre, addressing matters including the mediator's independence, impartiality, availability and commitment to maintain the confidentiality of the mediation.
- (4) The Secretary-General shall notify the parties of the acceptance of appointment by the mediator and transmit the signed declaration to them.
- (5) The Secretary-General 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 as mediator 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)(b).
- (7) Unless the parties and the mediator agree otherwise, a mediator may not act as arbitrator, conciliator, counsel, expert, judge, or witness, or in any other capacity, in any proceeding relating to the issues in dispute in the mediation.

### **Rule 15** **Transmittal of the Request**

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

### **Rule 16** **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 fails to perform the duties required of a mediator.
- (3) Following the resignation of a mediator, the Secretary-General shall notify the parties of the vacancy. A new mediator shall be appointed by the same method used to make the original appointment, except that:
  - (a) the Secretary-General shall fill any vacancy that has not been filled within 45 days after the notice of the vacancy; or
  - (b) if a co-mediator resigns and the parties notify the Secretary-General within 45 days after the notice of the vacancy that they have agreed to continue the mediation with the remaining co-mediator acting as sole mediator, no new mediator shall be appointed.

## **Chapter V** **Conduct of the Mediation**

### **Rule 17** **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 issues in dispute. The mediator does not have the authority to impose a resolution of the dispute on the parties.
- (2) The mediator shall conduct the mediation in good faith and in an expeditious and cost-effective manner.

- (3) The mediator shall treat the parties equally and provide each party with a reasonable opportunity to participate in the mediation.
- (4) The mediator may meet and communicate with the parties jointly or separately. Such communication may be in person or in writing and by any appropriate means. Information received by the mediator from one party shall not be disclosed to the other party without authorization from the disclosing party.

### **Rule 18** **Duties of the Parties**

The parties shall cooperate with the mediator and with one another and shall conduct the mediation in good faith and in an expeditious and cost-effective manner.

### **Rule 19** **Initial Written Statements**

- (1) Each party shall file a brief initial written statement with the Secretary-General describing the issues in dispute and its views on these issues and on the procedure to be followed during the mediation. These statements shall be filed within 15 days after the date of the transmittal of the Request pursuant to Rule 15, or such other period as the mediator may determine in consultation with the parties.
- (2) The Secretary-General shall transmit the initial written statements to the mediator and the other party.

### **Rule 20** **First Session**

- (1) The mediator shall hold a first session with the parties within 30 days after the date of the transmittal of the Request pursuant to Rule 15 or such other period as the parties may agree.
- (2) The agenda, method and date of the first session shall be determined by the mediator after consulting with the parties. In preparation for the first session, the mediator may meet and communicate with the parties jointly or separately.
- (3) At the first session, the mediator shall determine the protocol for the conduct of the mediation (“Protocol”) after consulting with the parties on procedural matters, including:
  - (a) the procedural language(s);
  - (b) the method of communication;
  - (c) the place of meetings;
  - (d) the next steps in the mediation;
  - (e) the treatment of confidential or protected information;
  - (f) the participation of other persons in the mediation;

- (g) any agreement between the parties:
    - (i) concerning the treatment of information disclosed by one party to the mediator by separate communication pursuant to Rule 17(4);
    - (ii) not to initiate or pursue other proceedings in respect of the issues in dispute during the mediation;
    - (iii) concerning the application of prescription or limitation periods; and
    - (iv) concerning the disclosure of any settlement agreement resulting from the mediation;
  - (h) the division of advances payable pursuant to (Mediation) Administrative and Financial Regulation 7; and
  - (i) any other relevant procedural and administrative matters.
- (4) At the first session or within such other period as the mediator may determine, each party shall:
- (a) identify a representative who is authorized to settle the issues in dispute on its behalf; and
  - (b) describe the process that would be followed to implement a settlement.

### **Rule 21** **Mediation Procedure**

- (1) The mediator shall conduct the mediation in accordance with the Protocol and shall take into account the views of the parties and the issues in dispute.
- (2) The mediator may request that the parties provide additional information or written statements.
- (3) If requested by all parties, the mediator may make oral or written recommendations for the resolution of any issues in dispute.
- (4) The mediator may obtain expert advice with the agreement of the parties.

### **Rule 22** **Termination of the Mediation**

- (1) The mediator, or the Secretary-General if no mediator has been appointed, shall issue a notice of termination of the mediation upon:
  - (a) a notice from the parties that they have signed a settlement agreement;
  - (b) a notice from the parties that they have agreed to terminate the mediation;
  - (c) a notice of withdrawal by any party, unless the remaining parties agree to continue the mediation;

- (d) a determination by the mediator that there is no likelihood of resolution through the mediation; or
  - (e) fulfilment of the requirements of Rule 13(5).
- (2) The notice of termination shall contain a brief summary of the procedural steps and the basis for termination of the mediation pursuant to paragraph (1). The notice shall be dated and signed by the mediator or the Secretary-General, as applicable.
  - (3) The Secretary-General shall promptly dispatch a certified copy of the notice of termination to each party 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.

**ANNEX II—PROPOSED (MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS (FEBRUARY 2020)<sup>124</sup>**

**ADMINISTRATIVE AND FINANCIAL  
REGULATIONS FOR MEDIATION  
(ANNEX A)**

**((MEDIATION) ADMINISTRATIVE AND FINANCIAL REGULATIONS)**

*Introductory Note*

*The (Mediation) Administrative and Financial Regulations apply to mediations and were adopted by the Administrative Council of the Centre pursuant to Article 7 of the ICSID Convention and Administrative and Financial Regulation 7.*

**Chapter I  
General Provisions**

**Regulation 1  
Application of these Regulations**

- (1) These Regulations apply to mediations which the Secretariat of the Centre is authorized to administer pursuant to Rule 2 of the ICSID Mediation Rules.
- (2) The applicable Regulations are those in force on the date of filing the Request for mediation pursuant to the ICSID Mediation Rules.
- (3) These Regulations may be referred to as the “(Mediation) Administrative and Financial Regulations” of the Centre (“Annex A” to the ICSID Mediation Rules).

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124. *Id.* at 229.

**Chapter II**  
**General Functions of the Secretariat**  
**Regulation 2**  
**Secretary**

The Secretary-General of the Centre shall appoint a Secretary for each mediation. The Secretary may be drawn from the Secretariat and shall be considered a member of its staff while serving as a Secretary. The Secretary shall:

- (a) represent the Secretary-General and may perform all functions assigned to the Secretary-General by these Regulations or the ICSID Mediation Rules applicable to individual mediations and delegated to the Secretary; and
- (b) assist the parties and the mediator with all aspects of the mediation, including the expeditious and cost-effective conduct of the mediation.

**Regulation 3**  
**The Registers**

The Secretary-General shall maintain a Register for each mediation containing all significant data concerning the institution, conduct and disposition of the mediation. The information in the Register shall not be published, unless the parties agree otherwise.

**Regulation 4**  
**Depositary Functions**

- (1) The Secretary-General shall deposit in the archives of the Centre and arrange for the permanent retention of:
  - (a) all Requests for mediation;
  - (b) all documents and communications filed in a mediation;
  - (c) any records of meetings or sessions in a mediation; and
  - (d) any notice of termination of a mediation pursuant to ICSID Mediation Rule 22.

Subject to the ICSID Mediation Rules and the agreement of the parties to the mediation, and upon payment of any charges required by the schedule of fees, the Secretary-General shall make certified copies of the documents referred to in paragraph (1)(c) and (d) available to the parties.

**Regulation 5**  
**Certificates of Official Travel**

The Secretary-General may issue certificates of official travel to mediators, to persons assisting them, to members of the Secretariat, and to the parties, agents, counsel, advocates, advisors, witnesses or experts appearing in a mediation, indicating that they are traveling in connection with a mediation pursuant to the ICSID Mediation Rules.

### **Chapter III Financial Provisions**

#### **Regulation 6 Fees, Allowances and Charges**

- (1) Each mediator shall receive:
  - (a) a fee for each hour of work performed in connection with the mediation;
  - (b) when not travelling to attend a meeting or session, reimbursement of expenses reasonably incurred for the sole purpose of the mediation; and
  - (c) when required to travel to attend a meeting or session held away from the place of residence of the mediator:
    - (i) reimbursement of the cost of ground transportation between the points of departure and arrival;
    - (ii) reimbursement of the cost of air and ground transportation to and from the city in which the meeting or session is held; and
    - (iii) a *per diem* allowance for each day the mediator spends away from their place of residence.
- (2) The Secretary-General shall determine and publish the amount of the fee and the *per diem* allowance referred to in paragraph (1)(a) and (c). Any request by a mediator for a higher amount shall be made through the Secretary-General, and not directly to the parties. Such a request must be made before the transmittal of the Request for mediation to the mediator pursuant to ICSID Mediation Rule 15 and shall justify the increase requested.
- (3) The Secretary-General shall determine and publish an annual administrative charge payable by the parties to the Centre.
- (4) All payments, including reimbursement of expenses, shall be made by the Centre to:
  - (a) mediators and any assistants approved by the parties;
  - (b) any experts appointed by a mediator pursuant to ICSID Mediation Rule 21(4);
  - (c) service providers that the Centre engages for a mediation; and
  - (d) the host of any meeting or session held outside an ICSID facility.
- (5) The Centre shall not be required to provide any service in connection with a mediation or to pay the fees, allowances or reimbursements of the mediator, unless the parties have made sufficient payments to defray the costs of the mediation.

#### **Regulation 7 Payments to the Centre**

- (1) To enable the Centre to pay the costs referred to in Regulation 6, the parties shall make payments to the Centre as follows:



- (a) upon registration of a Request for mediation, the Secretary-General shall request the party instituting the mediation to make a payment to defray the estimated costs of the mediation through the first session of the mediation, which shall be considered partial payment by the instituting party of the payment referred to in paragraph (1)(b);
  - (b) upon the transmittal of the Request for mediation pursuant to ICSID Mediation Rule 15, the Secretary-General shall request the parties to make a payment to defray the estimated costs of the subsequent phase of the mediation; and
  - (c) the Secretary-General may request that the parties make supplementary payments at any time if required to defray the estimated costs of the mediation.
- (2) Each party shall pay an equal share of the payments referred to in paragraph (1)(b) and (c), unless the parties agree on a different division.
  - (3) The Centre shall provide a statement of the case account to the parties with each request for payment and at any other time upon request of a party.

### **Regulation 8** **Consequences of Default in Payment**

- (1) The payments referred to in Regulation 7 shall be payable on the date of the request from the Secretary-General.
- (2) The following procedure shall apply in the event of non-payment:
  - (a) if the amounts requested are not paid in full within 30 days after the date of the request, the Secretary-General may notify both parties of the default and give them an opportunity to make the required payment;
  - (b) if any part of the required payment remains outstanding 15 days after the date of the notice in paragraph (2)(a), the Secretary-General may suspend the mediation until payment is made, after giving notice to the parties and to the mediator if appointed; and
  - (c) if any mediation is suspended for non-payment for more than 90 consecutive days, the Secretary-General may discontinue the mediation, after giving notice to the parties and to the mediator if appointed.

### **Regulation 9** **Special Services**

- (1) The Centre may perform any special services related to disputes if the requestor deposits in advance an amount sufficient to defray the charge for such services.
- (2) Charges for special services shall normally be based on a schedule of fees published by the Secretary-General.

**Regulation 10**  
**Fee for Lodging Requests**

The party or parties (if a Request is filed jointly) wishing to institute a mediation shall pay the Centre a non-refundable lodging fee determined by the Secretary-General and published in the schedule of fees.

**Regulation 11**  
**Administration of Mediations**

The ICSID Secretariat is the only body authorized to administer mediations conducted pursuant to the ICSID Mediation Rules.

**Chapter IV**  
**Official Languages and Limitation of Liability**

**Regulation 12**  
**Languages of Regulations**

- (1) These Regulations are published in the official languages of the Centre, English, French and Spanish.
- (2) The texts of these Regulations in each official language are equally authentic.
- (3) Unless otherwise stated or required by the context of the provision, the singular form of a word in these Regulations and in the ICSID Mediation Rules includes the plural form of that word.
- (4) Where required by the context, the masculine gender of a word in the French and Spanish versions of these Regulations and the ICSID Mediation Rules shall be used as a gender-neutral form and shall be understood as referring to the masculine or feminine gender.

**Regulation 13**  
**Prohibition Against Testimony and Limitation of Liability**

- (1) Unless required by applicable law or unless the parties and the mediator agree otherwise in writing, no mediator shall give testimony in any judicial, arbitral or similar proceeding concerning any aspect of the mediation.
- (2) Except to the extent such limitation of liability is prohibited by applicable law, no mediator shall be liable for any act or omission in connection with the exercise of their functions in the mediation, unless there is fraudulent or willful misconduct.