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REVIEW

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Amicable Investor-State Dispute Settlement at ICSID: Modernizing Conciliation and Introducing Mediation

Frauke NITSCHKE*

ABSTRACT

The International Centre for Settlement of Investment Disputes (ICSID) has embarked on a comprehensive reform of its existing dispute settlement mechanism and also added a set of mediation rules to its service offerings. This article reviews the proposed amendments to the ICSID conciliation mechanism and ICSID's proposed investment mediation framework. In relation to the proposed amendments to the ICSID conciliation mechanism, the article analyzes key differences and similarities between ICSID Convention arbitration and ICSID Convention conciliation, before providing an overview of the amendments proposed to the conciliation framework and offering some conclusions. Subsequently, the article reviews the background against which the ICSID Mediation Rules have been developed and sets out the key differences and similarities between ICSID's existing conciliation process and the newly proposed mediation mechanism. The article then provides a comprehensive overview of the Mediation Rules before offering conclusions and a positive outlook for amicable investor-State Dispute Settlement.

1 INTRODUCTION

Amicable investor-State dispute settlement is not a new phenomenon. In 1966, the International Centre for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Disputes between States and Nationals of Other States (ICSID Convention). The ICSID Convention provided for arbitration and conciliation frameworks to resolve disputes arising between States and foreign investors.¹ In 1978, the ICSID Administrative Council adopted the Additional Facility Rules that expanded the Centre's process offerings, to also include arbitration and conciliation proceedings for investment disputes that would

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¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).

otherwise fall outside of the scope of ICSID's mandate under the Convention, and a fact-finding mechanism.²

The drafters of the ICSID Convention originally envisioned that conciliation would be the preferred method of resolving international investment disputes

because (a) the Bank has had successful experience with conciliation; and (b) conciliation d[oes] not in any way infringe or appear to infringe upon a country's sovereignty. It was true that arbitration, if freely accepted, was not an infringement of sovereignty either, but it had the psychological disadvantage that smaller and newer countries, cautious in these matters, might interpret it as a curtailment of their sovereignty. Conciliation being more acceptable than arbitration, it was likely to be more effective.³

While the drafters had envisioned conciliation to be the primary tool for the settlement of such disputes, arbitration at ICSID has been the preferred dispute resolution process. By June 30, 2020, ICSID had registered 768 arbitrations and only 12, of all registered cases, were conciliations.⁴

In October 2016, ICSID embarked on a comprehensive reform of its existing dispute settlement mechanisms. In 2017, the Centre commenced consultations with its Member States on possible amendments to ICSID's dispute settlement frameworks. In 2018, the ICSID Secretariat released proposals to its Member States and the public, in the form of a Working Paper (WP 1), inviting comments and engaging in extensive consultation processes. The reform proposals in WP 1 not only included proposals for amendments of the existing arbitration and conciliation frameworks, but also included a set of mediation rules.⁵ Following the release of WP 1),⁶ in-person consultations were held with Member States in

² 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). These types of proceedings include (i) conciliation and arbitration proceedings for the settlement of investment disputes where either the State party to the dispute or the home State of the foreign national is a contracting State of the Convention; (ii) conciliation and arbitration proceedings for the settlement of investment disputes between parties at least one of which is a contracting State or a national of a contracting State for the settlement of disputes that do not arise directly out of an investment; and (iii) fact-finding proceedings.

³ ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, vol 2, pt 1 (ICSID Publication published 1968, reprinted 2009) (History of ICSID Convention) 14, para 8 (Mr. Elmandjra's comment in Memorandum of the Meeting of the Executive Directors, SecM 62-68, 13 March 1962).

⁴ See ICSID, *Caseload – Statistics (Issue 2020-2)*, *infra* (n 191).

⁵ ICSID, *Proposals for Amendment of the ICSID Rules – Working Paper # 1, Annex E: Additional Facility Rules of Procedure for Mediation Proceedings ((Additional Facility) Mediation Rules)*, vol 3 (August 3, 2018) https://icsid.worldbank.org/sites/default/files/publications/WP1_Amendments_Vol_3_WP-updated-9.17.18.pdf 9 (“WP 1”), para 708. 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.

⁶ See ICSID, *Rule Amendment Project – Member State & Public Comments on Working Paper # 1 of August 3, 2018*, https://icsid.worldbank.org/sites/default/files/amendments/Compendium_Comments_Rule_Amendment_3.15.19.pdf (“Comments on WP 1”).

Washington, D.C.⁷ Comments from Member States and the public were received subsequently.⁸ Working Paper 2 (WP 2) was released in March 2019, with another round of in-person consultations being held in Washington on April 7-9, 2019.⁹ A third Working Paper (WP 3) was released in August 2019,¹⁰ with another round of consultations held in November 2019.¹¹ A fourth Working Paper (WP 4) was released on February 28, 2020.¹² In total, well over 100 consultations with facility users have been held since the release of WP 1 and the preparation of a fifth Working Paper is currently underway.

2 PROPOSED AMENDMENTS TO THE ICSID CONCILIATION RULES

The goal of the amendments to the existing ICSID conciliation framework is to clarify and simplify the conciliation process, and to offer parties greater flexibility.¹³ This section will first provide an overview of the key differences between ICSID Convention arbitration and conciliation (2.1), before describing the similarities between the two (2.2). An understanding of the similarities and differences between ICSID Convention conciliation and arbitration is essential to better understand the amendments proposed to the ICSID conciliation framework, which in certain matters mirror those changes proposed to the arbitration mechanism. Subsequently, the proposed amendments to the ICSID Convention conciliation framework will be described as set out in WP 4 (2.3), followed by some concluding remarks on these proposed amendments (2.4).¹⁴

⁷ Consultations with Member States were held in Washington, D.C. on September 27-29, 2018. See ICSID, *Proposal for Amendments to the ICSID Rules – Working Paper # 2*, vol 2 (March 15, 2019) para 3, https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf (“WP 2”).

⁸ Between September 29, and December 27, 2018, ICSID gave over 50 presentations explaining the rules proposed in WP 1, during which further comments were received. WP 2, para 3.

⁹ The second consultations were held in Washington, D.C. from April 7-9, 2019. See WP 2, para 9.

¹⁰ ICSID, *Proposal for Amendments to the ICSID Rules – Working Paper # 3*, vol 1 (August 16, 2019) https://icsid.worldbank.org/sites/default/files/amendments/WP_3_VOLUME_1_ENGLISH.pdf (“WP 3”).

¹¹ The third in-person consultations were held in Washington, D.C. from November 11-15, 2019. WP 3, para 2.

¹² A fourth Working Paper (WP 4) was released on February 28, 2020. ICSID, *Proposal for Amendments to the ICSID Rules – Working Paper # 4*, vol 1 (February 28, 2020) https://icsid.worldbank.org/sites/default/files/amendments/WP_4_Vol_1_En.pdf (“WP 4”). The current texts of the draft Mediation Rules and Conciliations Rules are contained in this document at p. 215 (p. 219 of the PDF) and p. 632 (p. 636 of the PDF) respectively.

¹³ ICSID Rules of Procedure for Conciliation Proceedings (April 2006) (Current Conciliation Rules).

¹⁴ Conciliation proceedings are also available under the Centre’s Additional Facility framework, with some differences, primarily regarding the availability of ICSID conciliation to disputing parties. See Art. 4 of the Additional Facility Rules, *supra* (n 2).

2.1 KEY DIFFERENCES BETWEEN ICSID CONVENTION ARBITRATION AND CONCILIATION

There are two key differences between ICSID Convention conciliation and arbitration: (a) the powers and functions of the conciliation commission differ as compared to those of an arbitral tribunal, and (b) the different legal nature and content of the final instrument issued by each body.¹⁵

As to the first, the ICSID Convention sets out in its Art. 34 that the conciliation commission's function is twofold: to "clarify the points in dispute between the parties and to endeavor to bring about an agreement between them upon mutually acceptable terms."¹⁶ To exercise that function, the ICSID Convention enables the conciliation commission to make recommendations to the parties, including specific terms of settlement, *at any stage* of the proceedings.¹⁷ In contrast, the role of an arbitral tribunal is to "decide a dispute in accordance with such rules of law as may be agreed by the parties."¹⁸

With regard to the second difference, the final instrument in an ICSID conciliation is called a "report,"¹⁹ whereas an arbitral tribunal will issue an "award."²⁰

Unlike an arbitral award rendered under the ICSID Convention, which is final and binding and enforceable under the ICSID Convention's simplified enforcement mechanism,²¹ a conciliation commission's report is non-binding. As envisioned in Article 34(2) of the Convention, a report in a conciliation proceeding merely notes the issues in dispute and records either (i) that the parties have reached agreement, (ii) that the parties have not reached an agreement and that there is no likelihood of resolution, or (iii) that a party has failed to appear or participate in the conciliation.²²

There is a common misconception based on an often cited article that ICSID conciliation necessarily concludes with an evaluation by the conciliation

¹⁵ Contribution of Mr. Sapateiro of Portugal, stating "that the Committee had previously agreed to have identical systems for conciliation and arbitration." History of the ICSID Convention (n 3) vol 2, pt 2, 783 (Summary Proceedings of the Legal Committee Meeting, 4 December 1964, morning, SID/LC/SR/12, 29 December 1964).

¹⁶ ICSID Convention, Art. 34(1).

¹⁷ ICSID Convention, Art. 34(1).

¹⁸ ICSID Convention, Art. 41(1).

¹⁹ ICSID Convention, Art. 34(1). *See also* Nassib G. Ziadé, 'ICSID Conciliation' (1996) 13(2) News from ICSID 3.

²⁰ ICSID Convention Art. 34(2) for the commission's report; ICSID Convention Art. 48 for the tribunal's award.

²¹ ICSID Convention, Art. 53(1). An award rendered under the ICSID Convention is not subject to any other remedy except for those provided for in the ICSID Convention. *See also* ICSID Convention Arts. 49-52.

²² *See also* Rule 22 of the current Conciliation Rules.

commission resulting in final settlement recommendations.²³ However, that is rooted neither in the text of the applicable provisions of the Convention and the Rules, nor in the drafting history of the ICSID Convention.²⁴ As Art. 34 of the ICSID Convention makes clear, the commission's recommendations may be made at *any stage* of the process, and the provisions covering the report's content do not contain any requirement to include an evaluation or recommendations of settlement.²⁵

In addition to these principal differences, there are other notable differences relating to the procedure set out in the Conciliation Rules. The conciliation procedure is generally more flexible and less prescriptive than an arbitration.²⁶ The "without prejudice" provision in Art. 35 of the ICSID Convention further specifies that, unless agreed otherwise by the parties, neither party may rely or invoke any views, statements or admissions, or settlement offers made by the other party in the course of a conciliation proceeding, nor on the commission's report or any recommendation made by a conciliation commission.

Further, in terms of confidentiality, the ICSID conciliation framework has, since 1967, contained a provision requiring that conciliation hearings be "held in private" and "shall remain secret" unless the parties agree otherwise. No such concept exists in the ICSID arbitration framework.²⁷

²³ Lester Nurick and Stephen J Schnably, 'The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago' (1986) 1(2) ICSID Rev—FILJ 340, 348.

²⁴ To explain the role of the conciliation commission, commentators have often cited the statement made by the first, sole conciliator in the *Tesoro* conciliation of the 1980s. Lord Wilberforce understood "his task ... is to examine the contentions raised by the parties, to clarify the issues, and to endeavor to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement." Lester Nurick and Stephen J Schnably, 'The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago' (1986) 1(2) ICSID Rev—FILJ 340, 348.

²⁵ In addition, while Art. 25 of the ICSID Convention limits the scope of ICSID to the settlement of "legal" disputes, the plain wording of ICSID Convention Art. 34 and current Conciliation Rule 22 does not appear to limit the function of a commission to a mere legal analysis. The wording appears to suggest that the task of a conciliation commission was intended to be broader. One might also add the observation that – unlike its arbitration counter-part – the chapter on conciliation in the ICSID Convention does not contain any guiding provision that suggests that law (and which law) was to be applied by the conciliators in the exercise of their functions.

²⁶ The differences are less apparent in the ICSID Convention but are spelled out in the Conciliation Rules (2006) and the Rules of Procedure for Arbitration Proceedings (2006) (Arbitration Rules), namely the provisions on oral and written procedures, evidence, and the award. See cc IV, V and VI of the ICSID Arbitration Rules.

²⁷ ICSID Regulations and Rules (1968), available at <https://icsid.worldbank.org/sites/default/files/ICSID%20regulations%20and%20rules%201968%20-%20ENG.pdf>; ICSID Basic Documents (1984), available at <https://icsid.worldbank.org/sites/default/files/1984%20rules%20-%20ENG.pdf>; ICSID Convention, Regulations and Rules (2003), available at https://icsid.worldbank.org/sites/default/files/ICSID_Conv%20Reg%20rules_EN_2003.pdf and ICSID Convention, Regulations and Rules (2006) available at <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf>.

Finally, the conciliation framework does not contain any provision empowering the commission to decide on the allocation of costs. Rather, Art. 61(1) of the ICSID Convention sets out that the costs of the conciliation are to be borne by the parties in equal parts and each party is to bear its own costs. By contrast, in arbitration, the tribunal has the discretion to allocate costs between the parties and the tribunal's decision on costs is to be included in the tribunal's award pursuant to Art. 61(2) of the ICSID Convention.

2.2 SIMILARITIES BETWEEN ICSID CONVENTION CONCILIATION AND ARBITRATION

Notwithstanding these differences, the drafters of the ICSID Convention did opt to align the arbitration and conciliation frameworks in a number of ways.²⁸

Conceptually, the drafters opted for an identical jurisdictional scope for ICSID arbitration and conciliation, as reflected in Art. 25 of the Convention. Under this provision, ICSID's "jurisdiction" in the context of both conciliation and arbitration extends to "any legal dispute arising directly out of an investment, between a Contracting State (or any constituted subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."²⁹ Once such consent to conciliation or arbitration is given, it may not be withdrawn by a party unilaterally.³⁰ As the Executive Directors' Report to the ICSID Convention explains, the term "jurisdiction" "is used as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available."³¹

Second, the ICSID Convention's provisions relating to the institution of arbitration and conciliation proceedings in Arts. 28 and 36 are identical, and hence there is only one set of Institution Rules which apply to both arbitration and conciliation.³²

²⁸ Contribution of Mr. Sapateiro *supra* (n 15).

²⁹ ICSID Convention, Art. 25(1).

³⁰ ICSID Convention, Art. 25(1).

³¹ *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 22. While it is possible to raise "objections to jurisdiction" in the context of ICSID conciliation (*see* ICSID Convention, Art. 32), and the Conciliation Rules are clear that a commission's ruling that it does not have jurisdiction is to take the form of a report, the Conciliation Rules are silent as to the legal nature of a commission's decision that it has jurisdiction; the Convention's drafting history is inconclusive on this point. *See* Christoph H Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (first published 2001, 2nd edn, CUP 2009) Art. 32, note 3.

³² These are the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (April 2006), which are available at <https://icsid.worldbank.org/resources/rules-and-regulations/convention/institution-rules>.

Third, the ICSID Convention's provisions regarding the constitution of the conciliation commission and the constitution of the arbitral tribunal mirror one another. These provisions envision an uneven number of conciliators/arbitrators with the default being a three-member body, one member appointed by each party and the third presiding member to be appointed by agreement of the parties.³³ The provisions on appointments by the Chairman of the ICSID Administrative Council in the event of one or more conciliators or arbitrators not having been appointed are also identical.³⁴ The Convention's articles regarding the qualifications of conciliators and arbitrators are substantively the same,³⁵ except that the conciliation framework does not contain a provision limiting the appointment of conciliators on the basis of nationality as Art. 39 of the ICSID Convention contains for arbitrators.³⁶

Fourth, the Convention envisions that after a commission or tribunal has been constituted, its composition shall remain unchanged.³⁷ The Convention's process for resignation and replacement applies to arbitrators and conciliators alike.³⁸ Similarly, the Convention's process to address proposals for disqualification of any member of a tribunal or commission is the same.³⁹

Fifth, the Convention further sets out that conciliation commissions, like arbitral tribunals, shall be the "judge of their own competence," and that any objection to such competence asserting that the dispute is not within the jurisdiction of ICSID (or for other reasons not within the competence of the commission) shall be considered by the commission.⁴⁰

Sixth, the Convention's provisions regarding the place of proceedings do not distinguish between arbitration or conciliation proceedings.⁴¹

³³ See ICSID Convention Art. 29 and Art. 37.

³⁴ See ICSID Convention, Art. 30 for conciliators and Art. 38 for arbitrators.

³⁵ See Art. 31 for conciliators and Art. 40 for arbitrators.

³⁶ For arbitration, the Convention contains such a limitation in Art. 39, namely that "[t]he majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties."

³⁷ ICSID Convention, Art. 56(1).

³⁸ ICSID Convention, Art. 56(2) and (4).

³⁹ ICSID Convention, Art. 57 and 58.

⁴⁰ ICSID Convention, Art. 32(2) and Art. 40(2). In terms of procedure, the conciliation commission, like a tribunal, may deal with such objection as a preliminary question or "join it to the merits of the dispute."

⁴¹ These are to be held at the seat of the Centre unless the parties have agreed to hold them at another place approved by the tribunal or commission after consultation with the Secretary-General, or at an institution with which the Centre has made arrangements for that purpose. ICSID Convention, Arts. 62 and 63. For a list of institutions with which ICSID has concluded such arrangements, see <https://icsid.worldbank.org/services/hearing-facilities/other-facilities>.

Finally, ICSID's administrative and financial regulations applicable to Convention proceedings are largely identical for conciliation and arbitration proceedings.⁴²

2.3 OVERVIEW OF PROPOSED AMENDMENTS TO THE CONCILIATION RULES⁴³

In the areas where ICSID Convention arbitration and conciliation differ, namely with respect to the actual conciliation process and outcome, the proposed amendments seek to clarify the amicable nature of the conciliation procedure and to make the rules more flexible, user-friendly and streamlined. A number of the further amendments to the conciliation rules are rooted in the structural similarities between ICSID conciliation and arbitration set out in the ICSID Convention, and have been made to ensure the continued alignment of the revised conciliation and arbitration provisions. In the following section, the proposed amendments to each chapter of the ICSID Convention conciliation framework, as reflected in WP 4, will be reviewed.⁴⁴

2.3[a] Chapter I: General Provisions

The first chapter of the revised conciliation rules sets out general provisions applicable to conciliation proceedings under the ICSID Convention. This chapter contains a number of provisions that are largely similar to the revisions made to corresponding provisions in the ICSID arbitration framework.

Proposed Conciliation Rule 1(1)⁴⁵ contains an express reference to Art. 33 of the ICSID Convention, stipulating that the applicable conciliation rules are those in force at the time of consent. Conciliation Rule 1(2) and (3) reflect what is set out in the final provisions of the current Conciliation Rules,⁴⁶ namely that the official languages of ICSID are English, French and Spanish and that the texts of the Rules are equally authentic,⁴⁷ and that the Rules may be cited as the "Conciliation Rules" of the Centre.⁴⁸

⁴² See ICSID, Administrative and Financial Regulations (April 2006), specifically Ch III, Financial Provisions, and Ch V, Functions with Respect to Individual Proceedings.

⁴³ Throughout this article, reference is made to the proposals as set out in WP 4, *supra* (n 12).

⁴⁴ WP 4, *supra* (n 12).

⁴⁵ In the following and unless otherwise indicated, the reference "Conciliation Rule" (CR) refers to the rules proposed in WP 4 [*supra* (n 12)]. Where the text refers to the conciliation rules currently in force, the term "current Conciliation Rule" is used.

⁴⁶ Current CR 34.

⁴⁷ WP 4, *supra* (n 12) CR 1(2).

⁴⁸ *Ibid.* CR 1(3).

Proposed Conciliation Rule 2 on the meaning of party and party representation is current Conciliation Rule 18 with some modifications, specifying that “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.”

Conciliation Rule 3 sets out the revised method of introducing documents into the conciliation, envisioning electronic filing as the default, unless the Commission orders otherwise.⁴⁹ Documents shall be filed with the Secretary-General, who will acknowledge their receipt.⁵⁰ Conciliation Rule 4 deals with the filing of supporting documentation (setting out the principle that such documentation is to be filed together with the written statement, request, observations or communication to which it relates, and that extracts of documents may be filed). Conciliation Rule 5 addresses the routing of documents, specifically the principle that the Secretary-General is the channel of communication between the parties and the conciliation commission or the Chairman of the ICSID Administrative Council.⁵¹ In addition, the proposed Conciliation Rules in WP 4 now contain gender neutral language and define the term “Chairman” as used in the ICSID Convention as “Chair.”⁵² Together, these provisions reflect the method of filing and communication set out in current Conciliation Rule 25(2) (Written Statements), current Administrative and Financial Regulation 24 (Channel of Communication), current Administrative and Financial Regulation 30 (Supporting Documentation) and current Administrative and Financial Regulation 28 (Depositary Function).

Conciliation Rule 6 regulates the applicable framework for the selection of the procedural languages of the conciliation, as well as translation and interpretation. This provision reflects and amends current Conciliation Rule 21 (Procedural Languages), current Administrative and Financial Regulation 30 (Supporting Documentation), and codifies existing practice. Conciliation Rule 6 stipulates that the parties may agree on the use of one or two languages in the conciliation, adding a requirement to consult with the Commission and the Secretary-General if the chosen language is not an official language of ICSID. Should the parties be unable to reach an agreement on this point, each party may select one of ICSID’s official languages.⁵³ Conciliation Rule 6(2) further specifies

⁴⁹ WP 4, *supra* (n 12) CR 3(1).

⁵⁰ *Ibid.* CR 3(2). This reflects the “channel of communications” principle in current Administrative and Financial Regulation 24, as well as the current Administrative and Financial Regulation 30 (Supporting Documentation).

⁵¹ *Ibid.* CR 5(b) is intended to also include direct communications between the commission and one party only, consistent with CR 24(4)(b).

⁵² *See* CR 5(c).

⁵³ *Ibid.* CR 6.

the applicable framework if the conciliation is conducted in one language only (i.e., documents shall be filed and meetings be conducted in that language,⁵⁴ documents in another language shall be accompanied by a translation⁵⁵ and oral statements made in another language shall be interpreted into the procedural language).⁵⁶

Conciliation Rule 6(3) addresses the filing, translation and interpretation requirements in proceedings with two languages. Conciliation Rule 6(4) envisions the possibility of the parties filing translations of only relevant parts of a document, unless the Commission orders otherwise.

Conciliation Rule 7 has been added as a default provision regarding the calculation of time limits under the Conciliation Rules. The addition of this rule reflects the fact that the time limit calculation currently in Administrative and Financial Regulation 29 is moved into the arbitration and conciliation frameworks,⁵⁷ and applies, for example, to the time limits before the default method of constitution might be invoked,⁵⁸ the time limit for the first session,⁵⁹ or the limits prescribed for initial written statements.⁶⁰

The costs of the conciliation are addressed in Conciliation Rule 8 which reflects the principle set out in Art. 61(1) of the ICSID Convention, namely, that the costs of the conciliation (including the fees and expenses of the members of the Commission and the administrative charges of ICSID incurred in connection with a particular proceeding) shall be borne equally by the parties. Unlike an arbitral tribunal, the conciliation commission does not have the authority to decide any question related to costs.⁶¹

Confidentiality provisions are set out in Conciliation Rule 9. Since 1967, ICSID's conciliation framework has contained a provision that covered the confidentiality of hearings, stipulating that "hearings of the Commission shall take place in private and, except as the parties otherwise agree, shall remain secret."⁶² Conciliation Rule 9 maintains this concept and reflects current conciliation practice.⁶³ Similar confidentiality provisions are common in international conciliation and mediation rules and assist the parties to fully engage in the

⁵⁴ *Ibid.* CR 6(2)(a).

⁵⁵ *Ibid.* CR 6(2)(b).

⁵⁶ *Ibid.* CR 6(2)(c).

⁵⁷ WP 4, *supra* (n 12) Arbitration Rule (AR) 9.

⁵⁸ WP 4, *supra* (n 12) CR 13.

⁵⁹ *Ibid.* CR 31.

⁶⁰ *Ibid.* CR 30.

⁶¹ *See also ibid.* CR 38(1)(h).

⁶² Current CR 27(1). Similar language is found in current CR 15(1) on the commission's deliberations.

⁶³ Very little information has been made publicly available by parties to ICSID conciliation proceedings. One example of information released is summarized in Lester Nurick and Stephen J Schnably, 'The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago' (1986) 1(2) ICSID Rev—FILJ 340. However parties have chosen to keep such information confidential.

process.⁶⁴ Conciliation Rule 9 provides that all information relating to the conciliation and all documents generated in or obtained during the conciliation shall be confidential, unless (a) the parties agree otherwise, (b) the information is to be published by ICSID in the conciliation register,⁶⁵ (c) the information or document is independently available, or (d) disclosure is required by law.

Conciliation Rule 10 reflects the “without prejudice” principle set out in Art. 35 of the ICSID Convention. Art. 35 provides that—unless the parties otherwise agree—neither party may invoke or rely on any views, statements, admissions or offers of settlements made by the other party in the conciliation, and may also not invoke or rely on the report or any recommendation made by the conciliation commission.⁶⁶ Notably, the principle contained in Art. 35 and reflected in Conciliation Rule 10 also applies to the raising, or not raising, of jurisdictional objections pursuant to Art. 32 of the ICSID Convention. Therefore, the fact that a party might not have raised any objections to jurisdiction during the conciliation proceeding cannot later be invoked in a subsequent arbitration.

2.3[b] Chapter II: Constitution of the Commission

Chapter II of the Conciliation Rules deals with the constitution of the conciliation commission.⁶⁷ This chapter includes general provisions regarding the number of conciliators and the method of their appointment,⁶⁸ disclosure requirements imposed on the parties regarding third party funding,⁶⁹ and provisions regarding the appointment process,⁷⁰ including the acceptance of appointment and related disclosures by conciliators.⁷¹ It also covers replacement of conciliators prior to the commission’s constitution⁷² as well as the commission’s constitution.⁷³

Conciliation Rule 11(1) sets out the general obligations regarding the establishment of the conciliation commission, including the duty to constitute the conciliation commission without delay after registration of the request, a concept

⁶⁴ See HKIAC Mediation Rules Art. 12, SIAC Art. 9, ICSID, Art. 10, ICC, Art. 9, SCC, Art. 3.

⁶⁵ WP 4, *supra* (n 12) AFR 26.

⁶⁶ Similar “without prejudice” provisions are set out in the EU-Singapore Investment Protection Agreement (signed October 18, 2018, not yet entered into force) Annex 6, Art. 6(1); Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (final draft of 1 February 2016), Annex 10, Art. 6(1); EU-Mexico Free Trade Agreement (draft as of April 2017) Annex 2, Art. 2.21; EU-Indonesia Free Trade Agreement (proposed text as of July 2020) Annex 2, Art. 2.21.

⁶⁷ Instead of “constitution,” “the title of the chapter now refers to “establishment” of the commission.

⁶⁸ WP 4, *supra* (n 12) CR 11.

⁶⁹ *Ibid.* CR 12.

⁷⁰ *Ibid.* CR 13–15.

⁷¹ *Ibid.* CR 16.

⁷² *Ibid.* CR 17.

⁷³ *Ibid.* CR 18.

that is reflected in Art. 29(1) of the ICSID Convention.⁷⁴ The ICSID Convention provides that a conciliation commission must consist either of a sole conciliator or an uneven number of conciliators.⁷⁵ This principle is reflected in Conciliation Rule 11(3).⁷⁶ In terms of conciliator qualifications, the ICSID Convention provides that members of a commission must possess the qualities stipulated in Art. 14.⁷⁷ Unlike its arbitration counterpart, the ICSID Convention does not contain any nationality limitations for conciliators that are similar to those contained in Art. 39 for arbitrators. Therefore, conciliators may possess the same nationality as one of the disputing parties; consent of the other party to any such appointment is not required.⁷⁸

Conciliation Rule 11(2) codifies the principle that the number of conciliators and the method of their appointment needs to be determined before the Secretary-General can take any action on an appointment a party wishes to make. This provision has been added to clarify that the Secretary-General can only seek acceptance of an appointment from an appointee once it is determined how many conciliators are to serve on the commission, and how each of them is to be appointed.⁷⁹

Regarding the determination of the number of conciliators and method of constitution, Art. 29(2)(a) of the ICSID Convention stipulates that the number of conciliators and method of appointment is to be established on the basis of party agreement; should the parties not be able to agree on these points, the default provision in Art. 29(2)(b) provides that the conciliation commission is to consist of three members, one appointed by each party and the third conciliator (who will serve as the President of the commission) is to be appointed by agreement of the parties.

Current Conciliation Rule 2(1) sets out deadlines and a detailed process for each step to be taken by the parties in reaching agreement on the number of conciliators and the method of their appointment. This detailed process is eliminated in the proposed amendments to the Conciliation Rules. Proposed Conciliation Rule 9(3) establishes a duty on the parties to attempt to agree on the

⁷⁴ See also current CR 1(2).

⁷⁵ ICSID Convention, Art. 29(2).

⁷⁶ CR 11(4) stipulates that references to a commission or a President of a commission includes a Sole Conciliator.

⁷⁷ ICSID Convention, Art. 14 states in relevant part that conciliators "... shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."

⁷⁸ See also current AR 1(4) implementing ICSID Convention Art. 39.

⁷⁹ In practice, this relates to situations in which a request for conciliation already contains a nomination of a conciliator; however if the number of conciliators to serve on the commission and the method of their appointment has not been determined at that stage, the Secretary-General cannot seek acceptance from the nominee.

number and method of appointment of the conciliators.⁸⁰ If the parties do not advise the Secretary-General within 45 days of any agreement reached on these two points, Conciliation Rule 9(3) maintains the current process that a party may inform the Secretary-General that it wishes to invoke the default method of constitution set out in Art. 29(2)(b) of the ICSID Convention.⁸¹ Under the current conciliation framework, the default provision may only be invoked 60 days after registration. The intent of shortening the time to 45 days is to expedite the commission's constitution upon a party's request if the parties are unable to reach agreement.⁸²

Finally, the principle set out in current Conciliation Rule 2(2), i.e., that any correspondence regarding the constitution of the commission is either to be made through the Secretary-General or is to be copied to the Secretary-General, is removed, requiring the parties to advise the Secretary-General only once an agreement has been reached.

Conciliation Rule 12 introduces an obligation on the disputing parties to make certain disclosures related to third party funding ("TPF"). In recent years, there has been increased use of TPF in domestic and international litigation, including ICSID arbitration. While it is not known whether TPF has been used to fund any ICSID conciliations to date, it is theoretically possible for TPF to be provided to a disputing party in the context of a conciliation.⁸³ Given the structural similarities between arbitration and conciliation, the TPF provision set out in the proposed revised arbitration framework is replicated in the Conciliation Rules with slight language adjustments.⁸⁴ Conciliation Rule 12(1) would thus require a party to file a written notice disclosing the name and contact information of any non-party from which that party has directly or indirectly received funds for the pursuit of the conciliation, in the form of either a donation or grant, or in return for remuneration dependent on the outcome of the conciliation.⁸⁵ The notice proposed in WP 4 is to be filed by the party upon the registration of the conciliation, or immediately after the conclusion of a third-party funding arrangement where that agreement is concluded after registration. Changes to such arrangements are to be notified immediately by the party in question to the Secretary-General.⁸⁶ The Secretary-General will then

⁸⁰ WP 4, *supra* (n 12) CR 11(2).

⁸¹ In this regard the Conciliation Rules differ from the revisions to the ICSID arbitration framework which envisions an automatic application of the default method in proposed AR 15 in WP 4, *supra* (n 12).

⁸² WP 2, *supra* (n 7) para 533.

⁸³ Conciliation proceedings cost on average 91,000 USD per party. *See* WP 1, *supra* (n 5) para 740.

⁸⁴ *See* WP 4, *supra* (n 12) AR 14.

⁸⁵ WP 4, *supra* (n 12) CR 12(1). CR 12(2) in WP 4 specifies that a non-party does not include a representative of a party.

⁸⁶ WP 4, *supra* (n 12) CR 12(3).

transmit such notice (or a notification of a change) to the parties and to any conciliator proposed for appointment, or already appointed, to ensure the conciliator's full knowledge of interested parties when completing the conciliator's declaration of independence and impartiality (or considering whether any further disclosures thereunder are warranted).⁸⁷ In addition, Conciliation Rule 12(5) envisions that the commission may request further information regarding the funding agreement and the non-party providing such funding pursuant to Conciliation Rule 24(4)(a).

Conciliation Rules 13 to 15 deal with the process of the appointment of conciliators. Conciliation Rule 13 specifies that if a commission is to be constituted in accordance with Art. 29(2)(b) of the ICSID Convention, each party is to appoint one conciliator and the parties shall jointly appoint the third, who shall serve as the President of the commission. Conciliation Rule 14 is a new provision which clarifies that the parties may at any time jointly request assistance from the Secretary-General to appoint the sole conciliator or any uneven number of conciliators. The provision has been added to codify existing practice. If called upon to make an appointment, the Secretary-General will consult with the parties as to the kind of assistance that is most suitable in the particular circumstances.⁸⁸ Conciliation Rule 15 amends current Conciliation Rule 4 and implements the provisions contained in Art. 30 of the ICSID Convention, namely that a party may request the Chairman of the Administrative Council to appoint the conciliators not yet appointed if a commission is not constituted within 90 days following the registration of the request (or within such other period as the parties may agree).⁸⁹ Consistent with Art. 30 of the ICSID Convention, Conciliation Rule 15(1) clarifies that any request made by a party for the Chairman of the Administrative Council to appoint pursuant to that article needs to relate to all appointments that have not been made. Finally, Conciliation Rule 15(2) codifies existing practice that if the Chairman is asked to appoint the presiding conciliator and another conciliator, the non-presiding conciliator is to be appointed first.⁹⁰ Finally, Conciliation Rule 15(3) reflects the consultation requirement in Art. 30 of the ICSID Convention and the principle that the Chairman is to use best efforts to make any such appointments within 30 days.

The process regarding the appointment and the acceptance of an appointment by an appointee, including the required disclosures to be made by the appointee, is set out in Conciliation Rule 16. Conciliation Rule 16(1) specifies

⁸⁷ WP 4, *supra* (n 12) CR 9(4).

⁸⁸ WP 1, *supra* (n 5) para 760.

⁸⁹ WP 4, *supra* (n 12) CR 15(1).

⁹⁰ In practice, until the appointment is made by the Chairman, a party or the parties may make the outstanding appointment.

that a party wishing to appoint a conciliator is to provide the candidate's name and contact information to the ICSID Secretariat.⁹¹ Once such information is received, the Secretariat will request acceptance from the appointee.⁹² The appointee is required to provide a signed declaration, addressing matters related to the appointee's independence, impartiality, availability and commitment to maintain the confidentiality of the conciliation. The declaration to be provided by the conciliator is broader than the language in current Conciliation Rule 6(2) and includes specific reference to the conciliator's independence and impartiality vis-à-vis the parties.⁹³ The conciliator is also required to disclose any professional, business and other significant relationships (within the past five years) with the parties, their counsel, other members on the commission (if already known) and any third-party funder disclosed by the parties.⁹⁴ In addition, the declaration should list other investor-State proceedings in which the conciliator is currently acting as counsel, arbitrator, conciliator, *ad hoc* Committee member, Fact-Finding Committee member, mediator or expert.

The acceptance and the completed declaration are to be provided to the ICSID Secretariat within 20 days from the date of the request to accept the appointment,⁹⁵ and will be transmitted to the parties.⁹⁶ Each conciliator has a continuing obligation to promptly disclose any change of circumstances relevant to the matters covered in the declaration.⁹⁷

Conciliation Rule 16(5) further deals with the scenario of a candidate failing to accept the appointment and provide a signed declaration within the 20-day time frame. In that circumstance, another person is to be appointed, applying the same method used for the previous appointment.

Reflecting current practices in alternative dispute resolution processes, Conciliation Rule 16(7) prohibits a conciliator from acting in any other capacity

⁹¹ As noted above, section 2.2, neither the ICSID Convention nor the Conciliation Rules contain any nationality restrictions. However, CR 16(1) in WP 4 maintains the requirement to indicate the nationality of the appointee to keep with current practice.

⁹² The Secretariat will also transmit any information received from the parties that is relevant to the appointee's disclosure declaration to be made pursuant to CR 14(3).

⁹³ WP 4, *supra* (n 12) CR 16(3)(b). The proposed declaration expands the declaration in current CR 6, and includes language that the conciliator is "impartial and independent of [...] the parties." The English version of Art/14 of the Convention only references the notion of "impartiality"; however, the Spanish version requires "*imparcialidad de juicio*." In light of the fact that the language versions of the Convention are equally authentic, it is accepted that Art. 14 of the Convention requires both, impartiality and independence. See WP 1, *supra* (n 5) para 784.

⁹⁴ The full text of the declaration is reproduced in WP 4, 251.

⁹⁵ WP 4, *supra* (n 12) CR 16(3).

⁹⁶ *Ibid.* CR 16(4).

⁹⁷ *Ibid.* CR 16(6).

in relation to the dispute that is the subject of the conciliation, unless the parties and the conciliator agree otherwise.⁹⁸

Once each conciliator has accepted his or her appointment, the Secretariat will notify the parties and the conciliation commission is deemed to have been constituted on the date of that notification, pursuant to Conciliation Rule 18(1). Upon constitution, the Secretary-General will transmit the request for conciliation (including the supporting documents), the notice of registration and all communications with the parties to each conciliator.⁹⁹

The possibility of replacing conciliators already appointed prior to the constitution of the commission is covered in Conciliation Rule 17. This rule stipulates that prior to constitution, a conciliator may withdraw an acceptance at any time. In addition, a party may replace a conciliator whom it had previously appointed, or the parties may agree to replace any conciliator.¹⁰⁰

2.3[c] Chapter III: Disqualification of Conciliators, Resignation & Vacancies on the Commission

Chapter III deals with the process regarding the disqualification of conciliators, resignation and the filling of vacancies on the conciliation commission.

As mentioned above, the composition of the conciliation commission shall remain unchanged except for the circumstances listed in Art. 56(1) of the ICSID Convention, i.e., disqualification, death, incapacity and resignation of conciliators. The mechanism established by the ICSID Convention to propose the disqualification of conciliators is identical to that applicable to arbitrators.¹⁰¹ Art. 57 of the ICSID Convention provides that a party may propose the disqualification of a conciliator (or an arbitrator) on the basis of a manifest lack of the qualities prescribed in Art. 14 of the ICSID Convention.

While proposals for disqualification of arbitrators are not unusual in ICSID arbitration,¹⁰² in practice, in over 50 years of ICSID conciliation, only one disqualification proposal has been filed to date, with the conciliator subsequently

⁹⁸ *Ibid.* CR 16(7) specifically references the roles of "... arbitrator, counsel, expert, judge, mediator, witness," and adds that this prohibition extends to "any other capacity in any proceeding relating to the dispute." See also WP 1, *supra* (n 5) para 790. The current Arbitration Rules contain a limitation in the context of arbitrator appointments, namely that "[n]o person who had previously acted as conciliator ... in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal." Current Arbitration Rule 1(4).

⁹⁹ WP 4, *supra* (n 12) CR 18(2).

¹⁰⁰ This may include conciliators appointed jointly by the parties or appointed by an appointing authority pursuant to an agreement by the parties.

¹⁰¹ See above section 2.2.

¹⁰² To date, 182 proposed disqualifications have been filed in ICSID arbitration.

resigning before a decision on the disqualification proposal was issued.¹⁰³ Given the systemic similarities between the frameworks for disqualification and resignation in arbitration and conciliation, Chapter III of the Conciliation Rules reflects the corresponding changes made to ICSID's arbitration disqualification process.

Conciliation Rule 19 replaces current Conciliation Rule 9 with some modifications. Conciliation Rule 19(1) reflects the corresponding provision in the ICSID Convention, namely that a party may file a proposal to disqualify one or more conciliators, and specifies the following procedure: first, the disqualification proposal is to be filed within 21 days of the commission's constitution or within 21 days of the date on which the party proposing the disqualification first knew or first should have known of the underlying facts.¹⁰⁴ The disqualification proposal is to include the grounds on which it is based, a statement of the facts, law and arguments, and any supporting documentation.¹⁰⁵ The other party is then given 21 days to comment on the disqualification proposal.¹⁰⁶ Within five days of the other party's comments, the conciliator to whom the proposal relates may file a statement limited to factual information.¹⁰⁷ Each party may then file a final written submission on the proposal within seven days after either the date of receipt of the conciliator's factual statement or the expiration of the seven-day time limit for the conciliator's factual statement. This process largely codifies what has been ICSID's practice in the context of disqualification proposals filed in arbitrations pursuant to Art. 56 of the ICSID Convention. Conciliation Rule 19(2) maintains the principle in current Conciliation Rule 9(6) that the conciliation is suspended until a decision on the proposal has been made.

The decision-making process on the disqualification proposal is addressed in Art. 58 of the ICSID Convention and provides that the other (unchallenged) conciliators are to decide the proposed disqualification. If the unchallenged conciliators are equally divided on deciding the challenge, or the proposal relates to a majority of the conciliation commission, the Chairman of the ICSID Administrative Council will decide the proposed disqualification.

This principle is reflected in Conciliation Rule 20(1). Conciliation Rule 20(2) specifies that if the unchallenged conciliators are unable to decide the

¹⁰³ *La Camerounaise des Eaux (CDE) v. Republic of Cameroon and Cameroon Water Utilities Cooperation (CAMWATER)* (ICSID Case No. CONC/19/1), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=CONC/19/1>.

¹⁰⁴ WP 4, *supra* (n 12) CR 19(1)(a). This replaces the term "promptly" in current CR 9(1) and provides greater clarity in this respect. In addition, the time limit to file a proposal prior to the closure of the proceeding is also removed. *See* current CR 9(1).

¹⁰⁵ *Ibid.* CR 19(1)(b).

¹⁰⁶ *Ibid.* CR 19(1)(c).

¹⁰⁷ *Ibid.* CR 19(1)(d).

proposal for any reason, they are to be considered as equally divided, hence clarifying that the term “equally divided” in Art. 58 of the ICSID Convention does not require the unchallenged conciliators to disagree with respect to the substance of the challenge but rather that any lack of consensus leads to an inability to decide the challenge.¹⁰⁸ The situation where a second proposal for disqualification is filed while a prior challenge is still under consideration has arisen in a number of arbitration cases. In these arbitrations, the parties agreed to treat such consecutive challenges as one proposal for the disqualification of the majority of the tribunal, which was then decided by the Chairman of the Administrative Council.¹⁰⁹ This procedure is codified in the proposed Arbitration Rules and also reflected in Conciliation Rule 20(2)(b). Finally, Conciliation Rule 20(3) provides that the unchallenged conciliators and the Chairman of the ICSID Administrative Council should make their best efforts to decide a disqualification proposal within 30 days from the last pleading filed by the parties or from the notification that the unchallenged conciliators are equally divided.

Conciliation Rule 21 modifies current Conciliation Rule 8 dealing with the incapacity of conciliators to exercise their functions. The concept of a conciliator’s “inability to perform” is now substituted with a conciliator’s “failure to perform.” Reflecting the mechanism in current Conciliation Rule 8, Conciliation Rule 21 envisions that a conciliator who becomes incapacitated or fails to perform the duties may be subject to the same procedure that applies for the proposal for disqualification prescribed in Rule 20.

Resignation and the resignation procedure, currently addressed in Conciliation Rule 8(2), is moved into its own rule, Conciliation Rule 22. Conciliation Rule 22(1) specifies that a conciliator who wishes to resign should notify the Secretary-General and the other members of the commission and provide the reasons for the resignation.¹¹⁰ Conciliation Rule 22(2) reflects the requirement set out in Art. 56(3) of the ICSID Convention, namely that the other members on the commission need to consent to the resignation of a party-appointed conciliator; if they do not, the vacancy will be filled by the Chairman of the ICSID Administrative Council (and not by the party who originally appointed the conciliator pursuant to the principle in Conciliation Rule 23(3)).

The filling of vacancies, set out in current Conciliation Rules 10, 11 and 12 is codified in Conciliation Rule 23, which simplifies the current wording.

¹⁰⁸ WP 4, *supra* (n 12) CR 20(2)(a). *See also* WP 1, *supra* (n 5) paras 813–814.

¹⁰⁹ *See* WP 4, *supra* (n 12) AR 22 and 23.

¹¹⁰ Current CR 8(2) does not set out a requirement to provide reasons for the resignation; however if a party-appointed conciliator resigns, the other members of the commission shall either consent or not consent to such resignation, considering the reasons provided.

Conciliation Rule 23(1) establishes the general principle that the Secretary-General is to notify the parties of any vacancy on the commission. Conciliation Rule 23(2) specifies that the conciliation is automatically suspended upon the notification of a vacancy until the vacancy is filled. Conciliation Rule 23(3) requires vacancies to be filled applying the same method as for the original appointment; however, the Chairman of the ICSID Administrative Council is to make the appointment (a) if a vacancy is caused by resignation of a party-appointed conciliator to which the other members of the commission did not consent,¹¹¹ or (b) if a vacancy has not been filled within 45 days after notification of the vacancy.¹¹² Finally, Conciliation Rule 23(4) sets out that the conciliation is to continue from the point it had reached at the time the vacancy was notified.¹¹³ The possibility of the repetition of a meeting in whole or in part at the request of the newly appointed conciliator in current Conciliation Rule 12 is omitted, given *inter alia* that meetings of the conciliation commission with the parties do not take the form of a strict hearing of evidence and instead offer the parties and the commission greater flexibility to assist the parties to clarify the disputed issues and bring about agreement between them.¹¹⁴ Therefore, it is difficult to envision that such meetings could be repeated.¹¹⁵

2.3[d] Chapter IV: Conduct of the Conciliation

Revised Chapter IV of the Conciliation Rules deals with the conduct of the conciliation, and sets out provisions that are spread across current Chapter III (Working of the Commission), current Chapter IV (Conciliation Procedure), and current Chapter V (Termination of the Proceeding). Revised Chapter IV addresses the duties of the commission and the parties, and contains provisions on quorum, deliberations and the issuance of orders and decisions. The chapter further includes provisions related to the parties' written statements, the first session, meetings between the parties and the commission and the process to implement Art. 32 of the ICSID Convention which provides *inter alia* for the possibility to raise objections to the commission's jurisdiction.

The functions of the conciliation commission are defined in Art. 34(1) of the ICSID Convention. As already quoted above, these functions are twofold "to

¹¹¹ WP 4, *supra* (n 12) CR 23(3)(a).

¹¹² *Ibid.* CR 23(3)(b).

¹¹³ There are two modifications compared to the current framework, first, the reference point is now the reconstitution of the commission rather than the resumption of the proceeding and second, the resumed proceeding will continue from the time of the notification of the vacancy, rather than the moment when the vacancy occurred.

¹¹⁴ See section 2.3[d] below on the conduct of the proceeding.

¹¹⁵ WP 1, *supra* (n 5) para 828.

clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms.”¹¹⁶

Conciliation Rule 24(2)(a) and (b) implement Art. 34(1) of the ICSID Convention, specifying that the conciliation commission may – at any stage of the proceeding – recommend specific terms of settlement or recommend that the parties refrain from taking specific action that might aggravate the dispute while the conciliation is ongoing.¹¹⁷ Conciliation Rule 24 further sets out a requirement for the commission to consult the parties prior to issuing a recommendation, reflecting the party-driven nature of the process and existing practice.

Conciliation Rule 24(3) stipulates that recommendations by the commission may be made by the commission orally or in writing, maintaining the concept in current Conciliation Rule 22(2). It modifies current Conciliation Rule 22(2) in that recommendations need not be reasoned, however a party may request such reasons if it so desires.

The last sentence in Conciliation Rule 24(2) provides that the commission may invite a party to file observations on any recommendation made by the commission. This replaces the current wording requiring a party to inform the commission of any “decision” that party has taken in relation to a recommendation. This change reflects the amicable nature of the conciliation process and should be read together with the parties’ obligation to give their “utmost consideration” to any recommendation made by the commission, as set out in Art. 34(2) of the ICSID Convention and Conciliation Rule 29(4).

Conciliation Rule 24(4) sets out various tools that the conciliation commission may employ to fulfill its mandate. Conciliation Rule 24(4)(a) stipulates that the conciliation commission may request explanations or documents from either party or other persons at any stage of the proceedings. This largely reflects current Conciliation Rule 22(3)(a); however, current Conciliation Rule 22(3)(b) is removed. This change removed the rigid concept of evidence and broadens the type of information that could be requested by the commission and the manner in which information may be provided by the parties, allowing the commission greater flexibility in the way it conducts the conciliation process and clarifies the disputed issues.¹¹⁸ Conciliation Rule 24(4)(b) reflects the “caucus” concept employed in ICSID conciliation practice. It stipulates that the commission may meet with the parties not only by way of joint meetings but also separately to clarify the disputed issues and assist the parties in reaching an amicable and mutually acceptable resolution. Conciliation Rule 24(4)(c) largely maintains current Conciliation Rule 22(3)(c), i.e., that the commission may conduct site

¹¹⁶ ICSID Convention, Art. 34(1).

¹¹⁷ ICSID Convention, Art. 34(1).

¹¹⁸ WP 1, *supra* (n 5) para 834.

visits to and inquiries at any place connected with the dispute; however, the provision now clarifies that such site visits and inquiries not only require the consent of the party concerned, but are also subject to the consent of both disputing parties.¹¹⁹

The general duties of the commission are set out in Conciliation Rule 25. These include the commission's duty to treat the parties equally and provide each party with a reasonable opportunity to appear and participate in the proceeding,¹²⁰ and the duty to conduct the conciliation in an efficient and cost-effective manner.¹²¹

Conciliation Rule 26 combines current Conciliation Rules 16 (Decisions of the Commission), 19 (Procedural Orders) and 20(2) (dealing with the application of any agreement by the parties on procedural matters) with minor language modifications. Conciliation Rule 26 clarifies that the commission has the authority to issue orders and decisions that are required for the conduct of the conciliation. Such rulings shall be made by a majority of the commission, with abstentions counting as a negative vote.¹²² Conciliation Rule 26(4) updates the wording of current Conciliation Rule 20(2), maintaining the commission's duty to apply procedural agreements reached by the parties. Finally, Conciliation Rule 26(3) addresses the formal requirements of orders and decisions issued by the commission, reflecting ICSID practice. This paragraph further stipulates that such orders and decisions may be made by any appropriate means of communication and may be signed by the President acting on behalf of the commission.

Conciliation Rule 27, the quorum provision, reflects current Conciliation Rule 14(2), with some language modifications. The term "sittings" is replaced with a specific reference to the first session, meetings or deliberations, and the provision further clarifies that a quorum does not necessarily require in-person attendance but can cover participation by any appropriate means of communication, such as telephone or video conference, unless the parties agree otherwise.

Conciliation Rule 28 concerning the commission's deliberations corresponds largely to current Conciliation Rule 15(1) and (2) on deliberations. Conciliation Rule 28(1) provides that deliberations shall take place in private and remain confidential. Conciliation Rule 28(3) clarifies that the commission may be assisted during its deliberation by the secretary of the commission, and that no other persons may provide assistance unless the commission decides otherwise and

¹¹⁹ WP 1, *supra* (n 5) para 836.

¹²⁰ WP 4, *supra* (n 12) CR 23(1). These principles can also be found in the ICSID arbitration and mediation frameworks, *e.g.*, WP 4, *supra* (n 12) AR 3(2); (AF)AR 11(2) and MR 17(3).

¹²¹ WP 4, *supra* (n 12) CR 23(2). These duties can also be found in other ICSID frameworks, *see for example* MR 17(2), WP 4, AR 3.

¹²² WP 4, *supra* (n 12) CR 26(2).

notifies the parties thereof. Conciliation Rule 28(2) is a new provision and reflects ICSID practice that the commission may deliberate at any place and by any means it considers appropriate.

Conciliation Rule 29, entitled “Cooperation of the Parties,” sets out the parties’ duties, implementing Art. 34(1) and (2) of the ICSID Convention and reflecting current Conciliation Rule 23 with some changes to the language. Parties to a conciliation have a general duty to cooperate not only with one another but also with the commission, and shall conduct the conciliation in good faith and in an expeditious and cost-effective manner.¹²³ Further, mirroring the commission’s ability to request explanations, documents or other information, parties have a duty to provide such explanations, documents or other information if requested by the commission.¹²⁴ In addition, and reflecting current Conciliation Rule 23(1), the parties have a duty to facilitate visits to any place connected with the dispute, and use their best efforts to facilitate the participation of other persons if requested by the commission.¹²⁵ Conciliation Rule 29(3) retains the duty of the parties to comply with time limits set by the commission.¹²⁶ Implementing Art. 34(1) of the ICSID Convention, Conciliation Rule 29(4) stipulates that the parties are to give their most serious consideration to the commission’s recommendations. Unlike an arbitral tribunal, the commission’s recommendations are not binding upon the parties; however, the ICSID Convention imposes a significant obligation on the parties to engage with the recommendations, and give the “most serious consideration” to them, which is reflected in Conciliation Rule 29(4).

The conciliation process following the commission’s constitution commences with filing the parties’ written statements. Conciliation Rule 30 modifies current Conciliation Rule 25 and addresses the initial written statements that are to be filed simultaneously by the parties. These statements are to be brief and describe the issues in dispute and the party’s views on these issues. As such, written statements are not “pleadings” in the technical sense,¹²⁷ and may contain descriptions, explanations, summaries of facts, arguments or observations.¹²⁸

The initial written statements should be filed within 30 days following the commission’s constitution.¹²⁹ The 30-day time frame may be extended by the commission but in any event must be filed before the first session.¹³⁰ This

¹²³ WP 4, *supra* (n 12) CR 29(1).

¹²⁴ *Ibid.* CR 29(2).

¹²⁵ *Ibid.* CR 29(2).

¹²⁶ See current CR 23(2).

¹²⁷ See also Note B to CR 25 (1968), *supra* (n 27).

¹²⁸ WP 1, *supra* (n 5) para 858.

¹²⁹ The commission may fix a longer time frame for the filing of these initial statements.

¹³⁰ The first session is to be held within 60 days following the commission’s constitution, see WP 4, *supra* (n 12) CR 31(3).

provision allows the commission to have, in addition to the request for conciliation, each party's views on the disputed issues prior to the first session. The commission will hence be in a position to commence the conciliation immediately following the procedural discussions that typically take place at the first session. Conciliation Rule 30(2) further stipulates that the parties may file additional written statements in the course of the conciliation, within timelines set by the commission.

Conciliation Rule 31 regarding the first session merges current Conciliation Rules 13(1) (Sessions of the Commission) and 20 (Preliminary Procedural Consultations) and codifies current practice. The main purpose of the first session is for the commission and the parties to address the procedure to be followed in the conciliation.¹³¹ The commission will determine the agenda and date of the first session after consulting the parties.¹³² Conciliation Rule 31(2) specifies that the first session may be held in person or remotely, and by any means that the commission considers appropriate. Conciliation Rule 31(3) sets out the timeline, maintaining the 60-day period in the current Conciliation Rule 13(1), with the possibility to extend that time limit with the agreement of the parties.

The matters to be addressed at the first session are set out in Conciliation Rule 31(4).¹³³ The commission shall invite the parties' views on these issues prior to the session. Among the matters to be addressed at the first session are the applicable conciliation rules,¹³⁴ the procedural language(s) (including matters related to translation of documents and interpretation),¹³⁵ the method of filing and routing of documents,¹³⁶ a schedule for further written statements and meetings,¹³⁷ the place and format of meetings between the commission and the parties (including the possibility of holding joint and separate meetings),¹³⁸ the manner of recording or keeping minutes of meetings, if any,¹³⁹ the treatment of confidential or protected information,¹⁴⁰ the publication of documents,¹⁴¹ and any agreement between the parties (i) concerning the treatment of information

¹³¹ WP 4, *supra* (n 12) CR 31(1).

¹³² *Ibid.* CR 31(2).

¹³³ It should be noted that the reference in current CR 20(1)(d) to the number of copies to be filed is deleted as the electronic filing is the default (*see* WP 4, *supra* (n 12) CR 3). Further, the concept of evidence in current 20(1)(c) is deleted consistent with CR 24(4)(a) in WP 4 described above.

¹³⁴ WP 4, *supra* (n 12) CR 31(4)(a).

¹³⁵ *Ibid.* CR 31(4)(b).

¹³⁶ *Ibid.* CR 31(4)(c).

¹³⁷ *Ibid.* CR 31(4)(d).

¹³⁸ *Ibid.* CR 31(4)(e). *See also* WP 4, *supra* (n 12) CR 24(4)(b) and CR 31(4)(i)(i) above (on separate meetings with the parties).

¹³⁹ *Ibid.* CR 31(4)(f).

¹⁴⁰ *Ibid.* CR 31(4)(g).

¹⁴¹ *Ibid.* CR 31(4)(h).

disclosed by one party to the commission by way of separate communication,¹⁴² (ii) not to initiate or pursue while the conciliation is ongoing any other proceeding in respect of the same dispute,¹⁴³ (iii) concerning the application of prescription or limitation periods,¹⁴⁴ (iv) concerning the disclosure of any settlement agreement resulting from the conciliation,¹⁴⁵ and (v) any agreement pursuant to Art. 35 of the ICSID Convention regarding the use of information from the conciliation in other proceedings.¹⁴⁶

In addition, Conciliation Rule 31(5) requires each party to identify a representative who is authorized to settle the dispute on its behalf and describe the process that would be followed to implement a settlement.¹⁴⁷ Given the nature of the parties to an investor-State dispute, it is not inconceivable that multiple government agencies and multiple corporate entities may be involved in the sign-off on a settlement agreement. Conciliation Rule 31(5) is therefore intended to create a link between the ongoing negotiations in the conciliation and the eventual conclusion and implementation of a settlement.¹⁴⁸

Finally, pursuant to Conciliation Rule 31(6), the outcome of the discussions at the first session is to be recorded in the form of summary minutes, which reflect the parties' agreements and the commission's decisions on procedural matters. These minutes are issued within 15 days of the first session (or the last written communication on procedural issues addressed at the first session in the event there are any follow up exchanges in writing).

Conciliation Rule 32 replaces current Conciliation Rule 27. Current Conciliation Rule 27 provides for "hearings" between the conciliation commission and the parties to hear testimony from witnesses and experts,¹⁴⁹ but it does not otherwise provide any specific direction as to the conduct of hearings. Keeping in mind the mandate of the commission, which is to clarify the disputed issues and assist the parties in reaching an amicable resolution, Conciliation Rule 32 introduces a number of changes. The terminology is changed from "hearing" to "meeting" to underline the flexible nature of such gatherings. As mentioned above, since 1967, the conciliation framework provided that meetings between the commission and the parties shall "take place in private and remain secret" and

¹⁴² WP 4, *supra* (n 12) CR 31(4)(i)(i).

¹⁴³ *Ibid.* CR 31(4)(i)(ii).

¹⁴⁴ *Ibid.* CR 31(4)(i)(iii).

¹⁴⁵ *Ibid.* CR 31(4)(i)(iv).

¹⁴⁶ *Ibid.* CR 31(4)(i)(v). ICSID Convention, Art. 35 contains the "without prejudice" provision. See above section 2.3[a].

¹⁴⁷ *Ibid.* CR 31(5)(a) and (b).

¹⁴⁸ WP 1, *supra* (n 5) para 879.

¹⁴⁹ Current CR 27(2).

allowed for observation by non-parties.¹⁵⁰ This concept is maintained in Conciliation Rule 32(4) with a simplification of the language, now referencing the confidential nature of meetings. The parties may agree to persons besides the parties and the members of the commission observing meetings.¹⁵¹ The practice in ICSID conciliations of conducting meetings between the commission with the parties either jointly or separately is codified in Conciliation Rule 32(1).¹⁵²

Conciliation Rule 32(3) implements the principle regarding the venue of in-person meetings contained in Art. 62 of the ICSID Convention, specifying that conciliation meetings must be held at the seat of the Centre in Washington, D.C. unless the parties agree otherwise. Finally, Conciliation Rule 32(2) specifies that the date, time and method of holding meetings is determined by the commission, following consultation with the parties.

As discussed in the context of the similarities between ICSID Convention arbitration and conciliation,¹⁵³ the jurisdictional scope of ICSID Convention conciliation and arbitration is set out in Art. 25 of the ICSID Convention. For both the conciliation commission and the arbitral tribunal, the ICSID Convention provides that these bodies shall be the judge of their own competence, and that parties to arbitrations and conciliations may raise objections to jurisdiction and competence. Preliminary objections to jurisdiction are common in arbitration, but rare in conciliation. In practice, such objections have been raised in only two conciliations.

Conciliation Rule 33 implements Art. 32 of the ICSID Convention which provides that the conciliation commission shall be the judge of its own competence and allows a party to file objections that the dispute is not within the Centre's jurisdiction or for other reasons is not within the competence of the commission. Art. 32 further provides that the commission shall consider such an objection and may determine whether to address it as a preliminary question or join it "to the merits of the dispute."¹⁵⁴

¹⁵⁰ This concept is reflected in WP 4, *supra* (n 12), CR 9 and discussed above. For the corresponding provisions in prior ICSID Conciliation Rules see Conciliation Rule 27(1) (1968), *supra* (n 27), Conciliation Rule 27(1) (1984), *supra* (n 27), Conciliation Rule 27(1) (2003), *supra* (n 27). As Nassib G. Ziadé notes, *supra* (n 19), 6, witnesses and experts providing testimony in ICSID Convention conciliations have since 1967 been exempt from making the solemn declaration provided for in the ICSID Arbitration Rules thereby underlining the informal and flexible character of ICSID conciliation.

¹⁵¹ WP 4, *supra* (n 12) CR 32(4). Under current CR 27, this is to be determined by the conciliation commission, and is now made subject to the party's agreement only. See in this context also WP 4, CR 24(4)(a), which enables the commission to request the participation of parties other than the disputing parties.

¹⁵² See also WP 4, *supra* (n 12) CR 24(4)(b) on the functions of the commission and CR 31(4)(i)(i) on the matters to be addressed at the first session.

¹⁵³ See above section 2.2.

¹⁵⁴ ICSID Convention, Art. 32 and the corresponding provision in the ICSID Convention related to arbitration, Art. 40, are identical.

Conciliation Rule 33 dealing with such objections is now entitled “Preliminary Objections”¹⁵⁵ and located in the chapter on the conduct of the conciliation. The timeline for a preliminary objection in the current conciliation framework is maintained:¹⁵⁶ any preliminary objection pursuant to Art. 32 of the Convention is to be filed as early as possible and no later than the initial written statement.¹⁵⁷ Conciliation Rule 33 further sets out a few procedural changes. The automatic suspension of the conciliation upon the raising of a preliminary objection is removed.¹⁵⁸ The commission may address a preliminary objection separately or together with the other disputed issues.¹⁵⁹ Should the commission decide to address the objection separately from the other disputed issues, it may suspend the conciliation on the other issues to the extent necessary.¹⁶⁰ Reflecting Art. 32 of the ICSID Convention, Conciliation Rule 33(4) stipulates that the commission may at any stage of the conciliation on its own initiative consider whether the dispute is within the jurisdiction of ICSID or within its own competence.¹⁶¹ If a commission concludes that the dispute is not within the Centre’s mandate or within the commission’s competence, the commission will close the proceeding and issue a report to that effect, providing reasons for that conclusion.¹⁶² Otherwise, the commission will issue a decision on the objection, setting out brief reasons and fixing any time limits for the next steps in the conciliation.¹⁶³

In the context of determining whether to raise a preliminary objection in ICSID conciliation, parties may wish to keep in mind the “without prejudice” principle in Art. 35 of the ICSID Convention, which is reflected in Conciliation Rule 10. As discussed above, that principle provides that any views, statements, admissions or offers of settlement made, or positions taken by the other party in the conciliation may not be invoked or relied upon in any other dispute settlement proceeding, absent an agreement between the parties. Applying this principle to preliminary objections, the fact that a party did not raise any objection pursuant to

¹⁵⁵ Current CR 29 is entitled “Objections to Jurisdiction” and located in the chapter related to the termination of the conciliation. The term “preliminary objections” was introduced into the arbitration framework in 2006 to reflect that such objections may not only relate to jurisdiction but also to admissibility; this change was not reflected in the 2006 Conciliation Rules.

¹⁵⁶ Current Conciliation Rule 29(1).

¹⁵⁷ WP 4, *supra* (n 12) CR 33(2). See also WP 4, *supra* (n 12), CR 30 on written statements.

¹⁵⁸ This modification was introduced into the arbitration framework in 2006 but not reflected in the conciliation framework at the time. See AR 41 and current CR 29.

¹⁵⁹ See CR 31(3). Rather than utilizing the formulation “on the merits” as seen in Art. 32, Conciliation Rule 33(3) adopts the term “other issues in dispute,” which better reflects the nature of the conciliation process.

¹⁶⁰ WP 4, *supra* (n 12), CR 33(3).

¹⁶¹ *Ibid.* CR 33(4).

¹⁶² *Ibid.* CR 33(5).

¹⁶³ *Ibid.* CR 33(5).

Art. 32 of the ICSID Convention may not later be raised in a subsequent ICSID arbitration.¹⁶⁴

2.3[e] Chapter V: Termination of the Conciliation

The termination of the conciliation is addressed in the final chapter, Chapter V, of the Conciliation Rules. This chapter implements the termination of a conciliation by way of a report issued by a commission as envisioned in Art. 34 of the ICSID Convention. It also introduces discontinuance options prior to the constitution of a commission, which are currently absent from the conciliation framework.¹⁶⁵ The termination of the conciliation on the basis of the parties' failure to pay the required advances is regulated in proposed ICSID Administrative and Financial Regulation 8. Chapter V also contains provisions relating to the formal requirements of a report and the process to issue the same.

In conciliation practice, there have been two cases in which the parties requested that the Secretary-General discontinue the conciliation prior to the commission's constitution, a matter not explicitly covered in the current rules. To address this scenario, Conciliation Rule 34(1) and (2) codify the existing practice that the Secretary-General is authorized to discontinue the conciliation prior to the constitution's commission if both parties request the discontinuance jointly or if one party requests the discontinuance and the other party does not object.

Similarly, the current conciliation framework does not contain any provision authorizing the Secretary-General to discontinue a conciliation prior to the commission's constitution if both parties abandon the conciliation and do not take any step towards the constitution of the commission. Conciliation Rule 34(3) addresses such situations, providing that if the parties fail to take any steps in the conciliation for more than 150 days, the Secretary-General will notify them of the time elapsed since the last procedural step was taken. If the parties then fail to take any action within 30 days following such a notification, they are deemed to have discontinued the conciliation and an order noting the discontinuance of the conciliation will be issued by the Secretary-General.¹⁶⁶

As noted above, the types of reports a conciliation commission may issue are reflected in Art. 34(2) of the ICSID Convention, and include (a) a report noting

¹⁶⁴ WP 1, *supra* (n 5), para 899.

¹⁶⁵ For the termination of the conciliation upon a commission's conclusion that it lacks jurisdiction, *see* above CR 33(5).

¹⁶⁶ WP 4, *supra* (n 12) CR 34(2). However, if either party takes a step during the 30-day window, the conciliation continues. For termination for the failure of only one party to participate, *see* CR 38 below.

the parties' agreement on the issues in dispute,¹⁶⁷ (b) a report noting that the parties failed to reach agreement,¹⁶⁸ or (c) a report recording that one party failed to appear or participate in the conciliation.¹⁶⁹ These possibilities are addressed in Conciliation Rules 35 to 38.

Conciliation Rule 35, dealing with a report noting the parties' settlement agreement, reflects current Conciliation Rule 30(1), with the clarification that an agreement on some but not all matters is also covered by this provision, thereby codifying existing practice. In addition, this provision stipulates that if the parties have reached agreement, they may provide the commission with the complete and signed text of their agreement and jointly request the commission to embody the same in its report.¹⁷⁰ This change is introduced into the ICSID framework to enable parties to benefit from the enforcement mechanism created under the Singapore Convention on Mediation.¹⁷¹ Pursuant to its Art. 1, the Singapore Convention also applies to settlement reached in the context of conciliation processes, and it appears from the Singapore Convention's drafting history and other sources that the drafters of the Singapore Convention did not intend to exclude investment disputes from the Convention's scope of application.¹⁷² Hence, should parties wish to avail themselves of this framework for enforcement, a settlement agreement reached in the course of an ICSID conciliation and recorded in a commission's report meets these form requirements.

Should the commission determine that there is no likelihood of an agreement between the parties, or if the parties advise the commission that they have agreed to discontinue the conciliation, Conciliation Rule 36 requires the commission to close the proceedings and issue a report, taking note of this fact.¹⁷³

The scenario in which one party fails to appear or participate in the conciliation is addressed in Conciliation Rule 37, specifying that the conciliation commission may issue a report noting such failure to appear or participate

¹⁶⁷ Current CR 30(1).

¹⁶⁸ Current CR 30(2).

¹⁶⁹ Current CR 30(3).

¹⁷⁰ The current CR 30(1) only provides for the inclusion of the terms of the settlement in the report, and does not contain a signature requirement.

¹⁷¹ The Singapore Convention on Mediation is further addressed below in section 3.1.

¹⁷² See UNCITRAL Secretariat, *International commercial mediation: draft convention on international settlement agreements resulting from mediation: Note by the Secretariat*, p 11, <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 LJ* 1, 22 (2019), <https://digitalcommons.pepperdine.edu/drlj/vol19/iss1/1>. See also Art. 8 of the Singapore Convention regarding the possibility for States to exclude mediated settlements to which the State is a party from the Convention's application.

¹⁷³ WP 4, *supra* (n 12) CR 36(a) and (b).

following notification to the parties. This provision highlights the need for participation by the parties during the conciliation process. Unlike in arbitration, where the lack of participation does not prevent the arbitration from moving forward, the conciliation must terminate absent active participation of all parties.¹⁷⁴

The formal requirements and basic content of the commission's report are covered in Conciliation Rule 38, incorporating many of the provisions in current Conciliation Rule 32. Such a report is to be issued in writing and include a precise designation of each party¹⁷⁵ and their representatives,¹⁷⁶ a statement that the commission was constituted in accordance with the ICSID Convention with a description of the method of constitution,¹⁷⁷ the names of the conciliation commission members and an indication of the appointing authority,¹⁷⁸ dates and places of the first session and meetings between the commission and the parties,¹⁷⁹ a brief summary of the conciliation,¹⁸⁰ and any agreement reached by the parties in the context of the without prejudice provision in Art. 35 of the ICSID Convention.¹⁸¹ A new requirement is introduced to assist with the implementation of the cost principle set out in Art. 61(1) of the ICSID Convention, namely that the report is also to contain a statement of costs of the conciliation (including fees and expenses of each conciliator and the costs to be paid by each party).¹⁸² Upon request of the parties pursuant to Conciliation Rule 35(2), the report may also contain the complete and signed text of the parties' settlement agreement.¹⁸³ Conciliation Rule 38(2) provides that the report is to be signed by the members of the commission and may be signed by electronic means if the parties agree.

It is noteworthy in this regard to reiterate that an ICSID conciliation does not necessarily terminate with a settlement recommendation by the conciliation commission. Art. 34 of the ICSID Convention specifies that the commission may make recommendations at any stage of the proceeding but does not require a settlement recommendation to be made at the end of the process.¹⁸⁴

The issuance of the report is covered in Conciliation Rule 39, specifying that the report is to be dispatched to the parties by the Secretary-General, indicating

¹⁷⁴ WP 1, *supra* (n 5) 910.

¹⁷⁵ WP 4, *supra* (n 12) CR 38(1)(a).

¹⁷⁶ *Ibid.* CR 38(1)(b).

¹⁷⁷ *Ibid.* CR 38(1)(c).

¹⁷⁸ *Ibid.* CR 38(1)(d).

¹⁷⁹ *Ibid.* CR 38(1)(e).

¹⁸⁰ *Ibid.* CR 38(1)(f).

¹⁸¹ *Ibid.* CR 38(1)(i). *See also ibid.* CR 10.

¹⁸² *Ibid.* CR 38(1)(h).

¹⁸³ *Ibid.* CR 38(1)(g).

¹⁸⁴ *See also* WP 1, *supra* (n 5) para 914 and the discussion in sections 2.1. and 2.3[d].

the date of dispatch and depositing the report in ICSID's archives.¹⁸⁵ Parties may request additional certified copies pursuant to Conciliation Rule 39(2).

2.4 CONCLUSION

Despite the structural similarities vis-à-vis ICSID arbitration at the early stages of the process,¹⁸⁶ ICSID conciliation differs significantly from arbitration once the commission is constituted and the conciliation begins. The guiding principles for the proposed amendments to the ICSID Conciliation Rules are to clarify and underline the nature of conciliation as an amicable dispute settlement mechanism, while emphasizing the facilitative and evaluative functions of the commission. The amendments are further intended to streamline the conciliation procedure and provide greater flexibility for the commission to exercise its mandate to "clarify the issues in dispute and bring about agreement between the parties on mutually acceptable terms."¹⁸⁷

The proposed amendments also benefit from practices developed in ICSID conciliation over the years,¹⁸⁸ such as the codification of the commission's ability to hold separate caucuses with each party. Existing omissions, such as the absence of a discontinuance option prior to the constitution of the commission, have been further addressed. Finally, the proposed amendments reflect ICSID's goal of providing a variety of time- and cost-effective dispute settlement options to its users.

The ICSID Conciliation Rules have been aligned with the formal requirements in the Singapore Convention on Mediation, ensuring that a report recording a settlement reached in the ICSID conciliation meets the form requirements and should parties wish to seek enforcement under the Singapore Convention, these requirements are met.

In short, the proposed amendments to the existing Conciliation Rules mark the most comprehensive overhaul of the conciliation framework in the Centre's history. Alongside the amendments proposed to its conciliation framework, ICSID is also introducing a new mediation framework. The background, key differences and an overview of the mediation process are the subject of the next section.

¹⁸⁵ The question regarding the disclosure of the report by the parties is covered by Conciliation Rule 9. The publication of the report by ICSID is governed by AFR 25. See WP 4, *supra* (n 12).

¹⁸⁶ See *supra*, section 2.2. Reflecting the systemic similarities between conciliation and arbitration stemming from the ICSID Convention (such as the scope in Article 25, the institution of proceedings and appointment of conciliators), the revised Conciliation Rules reflect, where apt, corresponding changes proposed to the Arbitration Rules to ensure consistency between the two frameworks.

¹⁸⁷ See WP 4, *supra* (n 12) CR 24(2) and (3).

¹⁸⁸ To date, ICSID has registered 13 conciliations.

3 PROPOSED ICSID MEDIATION RULES

The ICSID Secretariat also proposed to ICSID Member States the adoption of the first set of institutional, investor-State specific, mediation rules in 2018.¹⁸⁹ This chapter will review the background to the proposed mediation rules (3.1), address the key differences between ICSID mediation and ICSID conciliation (3.2), provide an overview of the ICSID Mediation Rules (3.3), and provide concluding remarks on this new offering (3.4).

3.1 BACKGROUND

ICSID's mediation rules were drafted in response to requests by Member States desiring that ICSID, as the neutral international forum trusted by disputing parties, offer investor-State mediation services.¹⁹⁰ In addition, a number of developments in the recent past are worth noting in this context: (a) ICSID's data on settlement and discontinuance in investment arbitration, (b) policy developments in international investment agreements, (c) work done by international associations and organizations, and (d) the efforts of the international community to develop an enforcement mechanism for mediated settlements, giving rise to the Singapore Convention on Mediation, which entered into force in September 2020.

The ICSID Secretariat regularly publishes statistics related to many aspects of the Centre's caseload.¹⁹¹ From this data covering over 50 years of ICSID's existence, it is readily apparent that not all arbitrations commenced at ICSID terminate with a ruling by the Tribunal. In fact, 35% of arbitrations are settled or discontinued without a final ruling by the arbitral tribunal.¹⁹² This data indicates that parties to investment disputes are frequently resolving their disputes by means other than a final and binding tribunal ruling. This proportion of settled disputes suggests that disputing parties are interested in an amicable resolution even after arbitration proceedings are instituted and that parties could benefit from an amicable dispute settlement process – either instead of arbitration or in parallel to the arbitration.

Mediation is offered as a means to resolve disputes between foreign investors and host-States in a number of new-generation bilateral and multilateral investment agreements. Mediation is a tool to be used during the cooling-off period (i.e., following the filing of a notice of intent and prior to the institution of

¹⁸⁹ WP 1, *supra* (n 5) para 708. In WP 2, the Mediation Rules were de-linked from the Additional Facility Framework. See WP 2, *supra* (n 7) para 751.

¹⁹⁰ Since its inception, ICSID has registered 768 cases (as of June 30, 2020). See ICSID, Caseload – Statistics (Issue 2020-2), *infra* (n 191).

¹⁹¹ See ICSID, Caseload – Statistics, available at <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>.

¹⁹² *Ibid.* Chart 9, p 13. <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>.

an arbitration)¹⁹³ and as a stand-alone process that can be used separately or in parallel to an ongoing arbitration.¹⁹⁴

The past decade has seen considerable work by international organizations and associations to advance mediation as a method to resolve investor-State disputes. In 2012, the International Bar Association (IBA) adopted the investor-State mediation rules, which established the first set of *ad hoc* mediation rules for investment disputes.¹⁹⁵ Much work has also been undertaken on the practical side of investment mediation. About one-third of ICSID's 155 Member States adopted the Energy Charter Conference's 2016 Investment Mediation Guide, which provides practical guidance on investment mediation, including aspects related to preparation and conduct of the mediation, selection of the mediator and the role of party representatives.¹⁹⁶ Since 2017 ICSID, together with the Centre for Effective Dispute Resolution (CEDR) and the Energy Charter Secretariat, has offered investment mediator training to develop a cadre of mediators familiar with investment disputes.

Further, significant multilateral efforts led by UNCITRAL have led to the Singapore Convention on Mediation (Singapore Convention), which opened for signature in September 2019 and entered into force on 12 September 2020.¹⁹⁷ The success of the Singapore Convention with the high rate of signatories in its first year is a strong indicator of the extent of the international community's desire for

¹⁹³ E.g., Agreement for the Reciprocal Promotion and Protection of Investments Between The Argentine Republic and the United Arab Emirates (signed April 16, 2018, not yet in force) Art. 20(1); <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5761/download>; Peru-Australia Free Trade Agreement (signed February 12, 2018, entered into force February 11, 2020), Ch 8, Art. 8.19 (<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5720/download>); Central America-Korea Free Trade Agreement (signed February 21, 2018, entered into force November 1, 2019), Ch 9, Art. 9.16. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3807/central-america---republic-of-korea-fta-2018>; United States-Mexico-Canada Agreement (signed November 30, 2018, entered into force July 1, 2020), Ch 14, Annex 14-D, Art. 14.D.2. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3841/usmca-2018>.

¹⁹⁴ See, e.g., EU-Canada Comprehensive Economic and Trade Agreement (signed October 30, 2016, provisionally entered into force September 21, 2017) Annex 29-C on Mediation; <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016->; EU-Vietnam Investment Protection Agreement (signed June 30, 2019, not yet in force), Ch 3, Art. 3.4; <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-nam-investment-protection-agreement-2019>; EU-Singapore Investment Protection Agreement (signed October 15, 2018, not yet in force), Annex 6. <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu---singapore-investment-protection-agreement-2018->

¹⁹⁵ IBA, IBA Rules for Investor-State Mediation (adopted October 4, 2012). <https://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F>

¹⁹⁶ Energy Charter Conference, Guide on Investment Mediation (adopted July 19, 2016) <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

¹⁹⁷ United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted on December 20, 2018 and opened for signature on August 7, 2019) ("Singapore Convention on Mediation").

mediation to become an even more effective tool to resolve international disputes. The Singapore Convention applies to international settlement agreements resulting from mediation and provides a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. While Art. 1 of the Singapore Convention limits the scope of the Convention's application to settlement agreements in "commercial" disputes, the *travaux préparatoires*, the reservation option contained in Art. 8, and other secondary sources¹⁹⁸ indicate that the drafters of the Singapore Convention did not intend to exclude from the ambit of the Convention's application mediated settlements reached in the context of investment disputes.¹⁹⁹

ICSID's mediation rules are intended to offer a flexible mediation process tailor-made for investment disputes, that is broadly accessible to State parties, without the limitations otherwise found in the ICSID Convention or Additional Facility Rules.²⁰⁰

3.2 KEY DIFFERENCES AND SIMILARITIES BETWEEN ICSID MEDIATION AND CONCILIATION

While the term conciliation and mediation are sometimes used interchangeably, systemic and structural differences exist between ICSID's mediation and conciliation processes.

Key differences relate to: a) the scope of application (the ICSID Mediation Rules provide States with broad access to mediation facilities, removing requirements linked to nationality or ICSID membership applicable to Convention or Additional Facility conciliations); b) the number of mediators and the method of appointment (under the ICSID Conciliation Rules, there must be an uneven number of conciliators; by contrast the ICSID Mediation Rules envision the appointment of one or two co-mediators, appointed by agreement of the parties); c) the default provision for the appointment of the mediator (there is only one mediator appointed by party agreement instead of the three-member default in the conciliation mechanism with each party appointing one conciliator and the third being appointed by party agreement); d) the flexible and more informal nature of mediation (for example, unlike a conciliation commission, the mediator does not issue decisions or orders); e) the absence of a "jurisdictional"

¹⁹⁸ See Schnabel, *supra* (n 172) p 22.

¹⁹⁹ Singapore Convention, Art. 8.

²⁰⁰ In WP 1, *supra* note 5 released in 2018, the mediation mechanism was introduced as part of the Additional Facility. See WP 1, *supra* note 5 para 708. However, following extensive consultations with stakeholders, the Mediation Rules were subsequently proposed as a stand-alone framework in WP 2 (see WP 2, *supra* (n 7) para 751), to underline the differences in scope of application between the Additional Facility Rules and those of the Mediation Rules (see WP 3, *supra* (n 10) para 339).

determination by the mediator; f) the absence of the mediator's duty "to clarify the issues" and g) the absence of a disqualification process in mediation.

Key similarities between conciliation and mediation at ICSID concern the mandate of the mediator, which is to "assist the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute."²⁰¹ Like a conciliation commission, a mediator does not have the authority to impose a resolution of the dispute on the parties.²⁰² In addition, certain procedural aspects are similar. For example the information to be included in a request for mediation (but not the commencement process *per se*), the "without prejudice" principle, certain aspects related to confidentiality principles, the process for accepting a mediator appointment and the comprehensive declaration of impartiality and independence to be made by the mediator²⁰³ and the topics discussed at the first joint session between the mediator and the parties.²⁰⁴ Each of the proposed Mediation Rules will be addressed in the next Section.

3.3 OVERVIEW OF THE PROPOSED ICSID MEDIATION RULES

The proposed ICSID Mediation Rules are divided into five chapters, addressing (1) general provisions, (2) provisions dealing with the institution of the mediation, (3) procedural provisions of a general nature, (4) provisions dealing with the appointment of the mediator, and (5) provisions regarding the conduct and the termination of the mediation. The provisions in each of these chapters will be reviewed in turn.

3.3[a] Chapter I: General Provisions

Proposed Mediation Rule 1 provides definitions of certain terms used throughout the rules, including terms otherwise defined in the ICSID Convention²⁰⁵ and terms introduced into the ICSID system in the context of the 2018 amendments.²⁰⁶

Mediation Rule 2 states the broad scope of application of the ICSID Mediation Rules, stipulating that the ICSID Secretariat is authorized to administer

²⁰¹ WP 4, *supra* (n 12) MR 17(1).

²⁰² *Ibid.* MR 17(1).

²⁰³ *Ibid.* MR 14.

²⁰⁴ *Ibid.* MR 20.

²⁰⁵ *E.g.*, the "Centre," "Secretariat" and "Secretary-General."

²⁰⁶ For example, the term "Regional Economic Integration Organization" (REIO), or the definition of the term "Mediator," which also includes two co-mediators appointed in accordance with the Rules. This drafting structure reflects the structure used in the current (and proposed) Additional Facility Rules.

mediations that relate to an investment and involve a State or a Regional Economic Integration Organization (“REIO”), provided the parties have agreed in writing to submit this mediation to ICSID. Hence, the Centre’s mediation mandate is much broader than the “jurisdiction of the Centre” under Art. 25 of the ICSID Convention²⁰⁷ or Art. 2 of the current Additional Facility Rules.²⁰⁸

As a consequence, disputing parties need not be linked to an ICSID Convention Member State to participate in a mediation. In addition, the mediation framework is not only available to States or constituent subdivisions or agencies of a State, but also to REIOs, such as the European Union.²⁰⁹ Further, while the Mediation Rules require a State or REIO to be a party, they do not prescribe who the other disputing party or parties might be. The other disputing party could be a national of another State, or a local entity; requirements as to nationality of ICSID membership status common to other ICSID Rules are omitted in the ICSID Mediation Rules. In addition, the proposed Mediation Rules do not require the dispute to be of a legal nature or that such dispute arise directly out of an investment (as is the case under Art. 25 of the ICSID Convention); instead, Mediation Rule 2 requires only that the mediation “relate” to an investment, a term that is to be given its ordinary meaning and is not intended as a legal term of art.²¹⁰

Reflecting the voluntary nature of mediation, Mediation Rule 2 requires a written agreement between the disputing parties before the mediation can commence.²¹¹ Such an agreement could be set out in a contract to which the State, State entity or REIO is a party, or in an *ad hoc* agreement between the parties providing for ICSID mediation. Such written agreement could also be based on a standing offer for ICSID mediation set out in a bilateral or multilateral instrument or in an investment law, with a subsequent acceptance of such an offer by the other party.²¹²

Mediation Rule 3 contains several provisions regarding the application of the Mediation Rules.²¹³ Mediation 3(1) makes clear that the Mediation Rules apply to mediations that fall within the scope of Mediation Rule 2. Mediation Rule 3(2) sets out that parties may agree to modify the application of any of the rules other than those rules dealing with (a) the Secretariat’s authorization to administer,

²⁰⁷ For the jurisdictional requirements under Art. 25, *see above*, section 2.2.

²⁰⁸ For the scope of the Additional Facility Rules as currently in force, *see supra* note 2.

²⁰⁹ *See* WP 1, *supra* (n 5) para 930.

²¹⁰ WP 3, *supra* (n 10) para 337.

²¹¹ This written agreement can, but does not have to, be included in the Request for Mediation. *See* MR 5 and 6. However, the consent must have been perfected prior to the registration of the request for mediation.

²¹² The requirement for agreement, or consent, does not only apply 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 MR 22(1)(c) in WP 4, pursuant to which either party may withdraw from the mediation at any time.

²¹³ Pursuant to MR 3(1) in WP 4, the Mediation Rules apply to any mediation conducted pursuant to Rule 2.

(b) the application of rules, (c) and the institution of the mediation and (d) the registration of requests for mediation.²¹⁴ Mediation Rule 3(3) stipulates that any agreement to modify the Mediation Rules is subject to any applicable mandatory law, which is consistent with the corresponding provisions in the Centre's Additional Facility arbitration, conciliation and fact-finding mechanisms. Mediation Rule 3(4) provides that the applicable mediation rules are the ones that are in force at the time of the filing of the request for mediation.²¹⁵ The principle that each of the texts of the Mediation Rules in the three official languages of ICSID (English, French and Spanish) are equally authentic is reflected in Mediation Rule 3(5).²¹⁶

Party representation is addressed in Mediation Rule 4, which requires the parties to notify the Secretary-General of the names of representatives and to provide proof of their authority to act.

3.3[b] Chapter II: Institution of the Mediation

The provisions addressing the institution, or commencement, of a mediation at ICSID are set out in Chapter II. There are two steps in this process: (1) the filing of a request for mediation and (2) the registration of the request by ICSID's Secretary-General.

The requirements as to method of filing, form and content of a request for mediation are similar to those found in ICSID's other dispute settlement frameworks and are set out in Mediation Rule 5.²¹⁷ The request for mediation should be submitted electronically,²¹⁸ and may be filed by one or more requesting parties, or can be filed jointly by the parties.²¹⁹ The request should be drafted in English, French or Spanish,²²⁰ identify each requesting party with contact details, and be signed by a representative of each.²²¹ The request should indicate that the

²¹⁴ WP 4, *supra* (n 12) MR 3(2).

²¹⁵ Technically speaking this provision is not required at this stage given that these are the first mediation rules to be adopted by the Centre; however, the provision is included to reflect this principle, which is consistent with the Additional Facility frameworks.

²¹⁶ It should be noted in this regard that the Mediation Rules require the mediation to be commenced in one of these languages; however, the mediation process may be conducted in another language. This question is to be addressed between the parties and the mediator at the first session. See WP 4, *supra* (n 12) MR 3(5). See WP 4, *supra* (n 12) MR 20(3)(a). See also WP 2, *supra* (n 7) para 765.

²¹⁷ See Institution Rules (for arbitrations and conciliations under the ICSID Convention) or the Additional Facility Arbitration, Conciliation of Fact-Finding Rules.

²¹⁸ WP 4, *supra* (n 12) MR 5(3)(e).

²¹⁹ *Ibid.* MR 5(2). Any juridical party filing a request for mediation shall also indicate that it has obtained the necessary internal authorizations to file the request and attach such authorizations.

²²⁰ 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 is generally sufficient. See MR 5(4).

²²¹ *Ibid.* MR 5(3)(a) and (b) and (c).

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.²²² In addition, requesting parties should include any proposals or agreements reached by the parties concerning the appointment and qualification of the mediator and the conduct of the mediation.

Reflecting the consensual nature of mediation and ICSID's dispute settlement system, consent of the parties to ICSID mediation is the foundation of the process. Therefore, a copy of the parties' agreement to ICSID mediation must be included with the request.²²³ Upon receipt of a request pursuant to Mediation Rule 5, ICSID's Secretary-General will acknowledge receipt of the request and will transmit the request to the other party upon payment of the lodging fee.

In addition to filing a request for mediation that is based on an existing written agreement to mediate pursuant to Mediation Rule 5, the ICSID Mediation Rules also envision the possibility of a party filing a request for mediation in the absence of such pre-existing mediation agreement. In that latter scenario, covered by Mediation Rule 6, the request for mediation should contain all information required by ICSID Mediation Rule 5, and instead of the agreement to mediate, the request should contain an offer to mediate addressed to the other party²²⁴ and a request that the Secretary-General invite the other party to accept this mediation offer.²²⁵ This filing process is consistent with that offered by other institutions administering mediations in different contexts,²²⁶ and reflects requests by ICSID Member States.²²⁷ The Secretary-General will then transmit the offer to the other party and invite that party to accept or reject this offer to mediate.²²⁸

The Secretary-General will inform the requesting party if the offer is accepted.²²⁹ If the other party fails to reject or fails to accept the offer to mediate within 60 days, the Secretary-General will inform the parties that no further action will be taken on the request for mediation.²³⁰

²²² *Ibid.* MR 5(3)(g).

²²³ *Ibid.* MR 5(3)(i).

²²⁴ WP 4, *supra* (n 12) MR 6(2)(b).

²²⁵ *Ibid.* MR 6(2)(c).

²²⁶ See the International Chamber of Commerce (ICC), ICC Mediation Rules (2014) Arts. 2 and 3; the Singapore International Mediation Centre, SIMC Mediation Rules (2020) Art. 2; the London Court of International Arbitration (LCIA), LCIA Mediation Rules (2020) Arts. 1 and 2; and the Judicial Arbitration and Mediation Services (JAMS), JAMS International Mediation Rules (2012) paras 2-4.

²²⁷ WP 3, *supra* (n 10) para 343.

²²⁸ WP 4, *supra* (n 12) MR 6(3)(a)-(c).

²²⁹ *Ibid.* MR 6(4).

²³⁰ Any communications received during the 60-day period that do not contain an acceptance or refusal of the offer will be acknowledged and transmitted to the requesting party. See WP 4, *supra* note 12, MR 6(5).

Following the filing of a request pursuant to Mediation Rule 5, or following the filing of a request pursuant to Mediation Rule 6 and a subsequent acceptance of the offer to mediate by the other party, the ICSID Secretariat will commence the screening process at the end of which the Secretary-General will decide whether the request for mediation will be registered pursuant to Mediation Rule 7.

Mediation Rule 7 provides that upon receipt of a request containing a written agreement to mediate (or a request with an offer to mediate that is then accepted within the applicable time period) and payment of the lodging fee, 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 Mediation Rule 2(1), i.e., that the mediation involves a State, state entity or REIO, that it relates to an investment and that the parties have consented in writing to ICSID mediation. The screening process by the Secretary-General is intended to be limited. The Secretary-General will then notify the parties of the registration or refusal to register the request. In the event of a refusal, the grounds for the refusal will be provided to the parties, which is required in Mediation Rule 7(2). If the request is registered, the notice of registration will record the date of registration,²³¹ confirm that all correspondence with the parties will be sent to the contact addresses on file with ICSID and invite the parties to appoint the mediator or two co-mediators without delay.²³²

3.3[c] Chapter III: General Procedural Provisions

The third chapter of the Mediation Rules contains general procedural provisions, covering calculation of time limits, costs, confidentiality and the use of information in other proceedings.

Mediation Rule 8 contains a basic principle on the calculation of time limits established by the Mediation Rules,²³³ and is a simplified version of time period calculation provisions proposed in other ICSID rules.²³⁴

The cost division principle is set out in Mediation Rule 9, which provides that unless the parties agree otherwise, the costs of the mediation are shared

²³¹ WP 4, *supra* (n 12) MR 7(3)(a).

²³² *Ibid.* MR 7(3)(c).

²³³ Such as, e.g., the 60-day period to accept an offer to mediate in MR 6(5), the time periods for the initial written statements in MR 19(1), the time period for the first session in MR 20(1).

²³⁴ See proposed AR 7 in WP 4 and CR 7 in WP 4, and the corresponding provisions in the (AF)AR 15 and (AF)CR 14.

equally by the parties, and that each party shall bear any other costs it incurs relating to the mediation.

The proposed rule on confidentiality, Mediation Rule 10, is the result of extensive consultations with ICSID Member States, during which the importance of the confidentiality principle for mediations was underlined. Mediation Rule 10 strikes a balance between the principles of confidentiality and transparency, providing that all information relating to the mediation, and all documents generated in or obtained during the mediation, shall be confidential²³⁵ unless the parties agree otherwise,²³⁶ the information or document is publicly available²³⁷ or disclosure is required by law.²³⁸ As is common in commercial mediation, parties to an investment mediation may wish to consider agreeing on information disclosure protocols, covering the content, timing and process to make information from the mediation available to non-parties. States may of course also regulate applicable confidentiality regimes in their treaties providing for investor-State mediation.

Following extensive consultations with Member States who underscored their preference that the fact of the existence of the mediation is to be kept confidential, Mediation Rule 10(2) reflects that the fact of the mediation shall be confidential, unless the parties agree otherwise.²³⁹

Finally, Mediation Rule 11 contains a “without prejudice” principle, similar to the one in Art. 35 of the ICSID Convention for conciliation proceedings.²⁴⁰ The consequence of this provision is that any statement made by a party in the mediation is without prejudice to the legal positions it may take in any other dispute settlement proceeding related to the same dispute.²⁴¹ This rule enables the parties to fully engage in the mediation without the concern about subsequent use of information that came to light in that proceeding.²⁴²

²³⁵ WP 4, *supra* (n 12) MR 10(1).

²³⁶ *Ibid.* MR 10(1)(a).

²³⁷ *Ibid.* MR 10(1)(b).

²³⁸ *Ibid.* MR 10(1)(c). The ICSID Mediation Rules differ in this respect from some recent treaties, such as the EU–Singapore FTA, which provides in its Annex 6, Art. 6.3. that any disputing party may disclose to the public that mediation is taking place; however under that FTA, all steps of the procedure, including any advice or proposed solution, shall be confidential. *See also* EU–Vietnam FTA, Annex 10, Art. 6.3. Likewise, under the (Mediation) Administrative and Financial Regulation 3, ICSID will not make information public absent an agreement of the parties to that effect.

²³⁹ If disclosure of the fact of the mediation is required, *e.g.*, if a dispute settlement provision in a treaty required mediation to take place before arbitrations could be commenced, that scenario appears to be covered by MR 10(1).

²⁴⁰ *See* above section 2.3[a]. *See also* the evolution of the confidentiality provision between WP 1 (n 5), WP 2 *supra* (n 7), WP 3 *supra* (n 10) and WP 4 *supra* (n 12).

²⁴¹ Similar without prejudice provisions can be found in recent treaties including the EU–Singapore FTA, Annex 6, Art. 6(1) (*see also* (n 66) above).

²⁴² WP 1, *supra* (n 5) para 1394.

3.3[d] Chapter IV: The Mediator

Chapter IV of the Mediation Rules contains the provisions related to the mediator, including the mediator's qualifications, method of appointment, the process of appointing and accepting appointments, and provisions related to the resignation and replacement of the mediator.

In terms of qualifications, Mediation Rule 12(1) requires that the mediator be independent and impartial.²⁴³ No other qualifications are required by the rules; however, the parties may agree that a mediator have particular qualifications or expertise pursuant to Mediation Rule 12(2).²⁴⁴ Notably, the Mediation Rules do not prescribe any nationality restrictions for the mediator, consistent with the principle adopted for ICSID conciliation.²⁴⁵

Competencies and qualifications for investor-State mediators have been addressed in Appendix B to the International Bar Association's Investor-State Mediation Rules,²⁴⁶ and the International Mediation Institute's Competency Criteria for Investor-State Mediators.²⁴⁷ In addition, the Guide on Investment Mediation, adopted by the Energy Charter Conference in 2016,²⁴⁸ also provides guidance on mediator selection.

The number of mediators and the method of their appointment is covered in Mediation Rule 13, which stipulates that there shall be one mediator or two co-mediators, each appointed by party agreement.²⁴⁹ This reflects common practice in mediation and highlights the difference from conciliation (or arbitration), where conciliation commissions and tribunals typically consist of three

²⁴³ WP 4, *supra* (n 12) MR 12(1). The mediator is further required to sign a declaration of independence and impartiality, *see* below MR 14.

²⁴⁴ *Ibid.* MR 12(2). Parties could agree on qualifications related to subject-matter expertise or process expertise, nationality or language skills. The question on which qualifications a mediator in investment mediation should possess is subject to many views. Helpful sources for parties to consult in this regard is Appendix B to the International Bar Association's Investor-State Mediation Rules ([https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Approved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/sites/default/files/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012).pdf)) or the International Mediation Institute's Competency Criteria for Investor-State Mediators (<https://www.imimmediation.org/download/104/investor-state-mediation-task-force/1472/investor-state-mediation-competency-criteria.pdf>). In addition, the Guide on Investment Mediation (<https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>), adopted by the Energy Charter Conference in 2016, further contains practical information regarding the selection of mediators.

²⁴⁵ However, Art. 39 of the Convention and Art. 7 of the Arbitration (Additional Facility) Rules do contain provisions on nationality of arbitrators.

²⁴⁶ IBA Rules for Investor-State Mediation, *supra* (n 195), Annex B.

²⁴⁷ International Mediation Institute, 'Competency Criteria' available at <https://imimmediation.org/practitioners/competency-criteria/>.

²⁴⁸ Energy Charter Secretariat, 'Guide on Investment Mediation' <https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>

²⁴⁹ WP 4, *supra* (n 12) MR 13(1).

members.²⁵⁰ Should the parties be unable to reach agreement on whether to appoint one or two mediators within 30 days following the registration of the request for mediation, the default method in Mediation Rule 13(2) is one mediator.²⁵¹ Such default provisions, which can be found in other international mediation frameworks, assist parties that are at an impasse at the outset of the mediation.²⁵² Should the parties so wish, they may request the Secretary-General to provide assistance with the mediator appointment at any time, as stipulated in Mediation Rule 13(3).²⁵³ Such assistance could range from (a) an identification of candidates for the parties to consider for appointment; (b) assisting the parties to develop a procedure to identify the mediator; or (c) any other assistance which the parties consider helpful during the appointment process.²⁵⁴

If 60 days have passed since the registration of the request for mediation, either party may request that the Secretary-General appoint the mediator not yet appointed in accordance with Mediation Rule 13(4).²⁵⁵ In this process, the Secretary-General will engage in consultations with the parties to best assist them in identifying the qualifications and expertise required for a mediator candidate both parties consider suitable.²⁵⁶ The Secretary-General will use best efforts to appoint any mediator within 30 days.²⁵⁷

Finally, Mediation Rule 13(5) covers situations in which the parties do not take any steps towards the appointment of the mediator, providing that if no such step has been taken within 120 days of the registration of the request, the Secretary-General will notify the parties that the mediation is terminated.²⁵⁸ This is intended to avoid a mediation in limbo when the parties are inactive.²⁵⁹

The procedure for appointment and acceptance of the mediator is set out in Mediation Rule 14. Pursuant to Mediation Rule 14(1), the parties are to notify the Secretary-General of the appointment of the mediator, or two co-mediators, and provide the name and contact information of the appointee.²⁶⁰ The Secretary-General will request the acceptance from each appointee pursuant to

²⁵⁰ See *e.g.*, ICSID Convention, Art. 29 and Art. 37 and above section 2.3[b]. It should be noted that co-mediators are appointed by agreement of the parties; it is not envisioned that each party appoint a co-mediator.

²⁵¹ WP 4, *supra* (n 12) MR 13(2).

²⁵² See ICDR, Art. 4; SIAC, Art. 4.2, ICC Art. 5(2), SCC Art. 6. See WP 4 *supra* (n 12) para 233.

²⁵³ WP 4, *supra* (n 12) MR 13(3).

²⁵⁴ WP 2, *supra* (n 7) para 785.

²⁵⁵ For example, should the parties agree on one mediator, or if the default provision in MR 10(2) applies, the Secretary-General will appoint one mediator. If the parties have agreed on two co-mediators, the request may be for both mediators provided that no mediator has previously been appointed by the parties.

²⁵⁶ WP 1, *supra* (n 5) para 1356.

²⁵⁷ WP 4, *supra* (n 12) MR 13(4).

²⁵⁸ See also WP 4, *supra* (n 12) MR 22(1)(e).

²⁵⁹ WP 1, *supra* (n 5) para 1357.

²⁶⁰ WP 4, *supra* (n 12) MR 14(1).

Mediation Rule 14(2). Consistent with ICSID's conciliation framework, the mediator should accept the appointment within 20 days, and sign a comprehensive declaration of independence and impartiality,²⁶¹ which will then be transmitted to the parties.²⁶² Like ICSID arbitrators and conciliators, the mediator has a continuing obligation throughout the mediation to disclose any changes relevant to the disclosures made in this declaration, which is set out in Mediation Rule 14(6).²⁶³ Should a mediator fail to accept the appointment or fail to provide a signed declaration within the 20-day time period, Mediation Rule 14(5) provides that another person shall be appointed, applying the same method of appointment followed for the previous appointment.²⁶⁴

Finally, Mediation Rule 14(5) reflects the current practice in conciliation and mediation of prohibiting a mediator from acting in any other role with respect to the same dispute absent an agreement to the contrary. Hence, unless the parties and the mediator agree otherwise, a mediator may not act, for example, as arbitrator, conciliator, expert, witness or judge, in relation to the issues in dispute in the mediation.

Once the mediator has accepted the appointment, the Secretary-General will submit the request for mediation, all communications received from the parties and the notice of registration to each mediator.²⁶⁵ This transmittal is codified in Mediation Rule 15, which is also the starting point for the calculation of timelines for the submission of the parties' initial written statements²⁶⁶ and the first session with the parties.²⁶⁷

No rule on TPF has so far been included in the proposed mediation rules. WP 4 however contains a proposal for consideration by Member States. Given that mediation is not adversarial and does not result in a binding ruling, and considering that third party funding is not typically secured until it is needed to fund a more costly procedure (such as arbitration), no such provision is included at this stage.²⁶⁸

The provisions governing resignation and replacement of a mediator are set out in Mediation Rule 16. Mediation Rule 16(1) provides for the resignation in the discretion and at the initiative of the mediator. Mediation Rule 16(2)(a) reflects the importance of the parties' trust in the mediator, stipulating that a

²⁶¹ *Ibid.* MR 14(3)(b). This declaration also covers matters related to the availability and commitment to confidentiality. See WP 4, *supra* note 12, p. 251.

²⁶² *Ibid.* MR 14(4).

²⁶³ *Ibid.* MR 14(6).

²⁶⁴ *Ibid.* MR 14(5). Unless the default provision is invoked for the Secretary-General to appoint the mediator, this means that the mediator will be appointed pursuant to the parties' agreement.

²⁶⁵ WP 4, *supra* (n 12) MR 15.

²⁶⁶ *Ibid.* MR 19.

²⁶⁷ *Ibid.* MR 20.

²⁶⁸ See WP 3, *supra* (n 10) para 356; WP 4, *supra* (n 12), paras 235-236.

mediator must resign on the joint request of the parties. Similarly, pursuant to Mediation Rule 16(2)(b), a mediator must resign if the mediator becomes incapacitated or fails to perform the duties required.²⁶⁹

Following the resignation of a mediator, Mediation Rule 16(3) stipulates that the incoming mediator is to be appointed by the same method used for the original appointment, hence typically by agreement of the parties unless the Secretary-General has been requested to make the appointment. However, there are two exceptions to this principle: if no mediator has been appointed within 45-days of the notification to the parties of the mediator's resignation (or such other period as the parties may have agreed upon), the Secretary-General will appoint the mediator.²⁷⁰ In addition, should one of two co-mediators resign, Mediation Rule 16(3)(b) enables the parties to agree to continue the mediation with the remaining co-mediator acting as sole mediator.

The Mediation Rules do not contain any specific mediator disqualification mechanism. Should a party have concerns about the mediator's independence and impartiality or more generally about the mediator's ability to exercise the required functions, that party may address such concerns with the mediator, or require the mediator to resign following an agreement with the other party.²⁷¹ Alternatively, the concerned party may withdraw from the mediation.²⁷²

Capacity building efforts to create a pool of investor-State mediators has been ongoing at ICSID since 2017. Together with the Energy Charter Secretariat, the Centre for Effective Dispute Resolution (CEDR) and the International Mediation Institute (IMI), ICSID has developed a training course for investor-State mediators. This skills-based, interactive course has been held in-person in Hong Kong, Paris and Washington and also virtually.

3.3[e] *Conduct & Termination of the Mediation*

Provisions regarding the conduct of the mediation are set out in Mediation Rules 17 to 21. The termination of the mediation is covered in Mediation Rule 22.

The role of the mediator is to "assist the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute."²⁷³ To underscore the voluntary nature of mediation, Mediation Rule 17(1) expressly states that the

²⁶⁹ *Ibid.* MR 16(2)(b).

²⁷⁰ *Ibid.* MR 16(3)(a).

²⁷¹ WP 4, *supra* (n 12) MR 16(a).

²⁷² *Ibid.* MR 22(1)(c).

²⁷³ *Ibid.* MR 17(1).

mediator does not have the authority to impose any resolution of the dispute on the parties.²⁷⁴

Mediation Rule 17(2) confirms certain fundamental mediator duties, such as the duty to conduct the mediation in good faith²⁷⁵ and in an expeditious and cost-effective manner, the duty to ensure equal treatment of the parties, and the duty to provide each party with a reasonable opportunity to participate in the mediation. The common feature in mediation to communicate with parties either jointly or separately is reflected in Mediation Rule 17(4), which further stipulates that any separate communications are not to be disclosed to the other party, absent express authorization from the disclosing party.²⁷⁶

In turn, the duties of the parties are covered in Mediation Rule 18. The parties are required to cooperate with the mediator and one another. In addition, the duty to conduct the mediation in good faith and in an expeditious and cost-effective manner applies not only to the mediator but also to the parties.²⁷⁷

The provisions covering the mediation procedure are set out in Mediation Rule 19 (Initial Written Statements), Mediation Rule 20 (First Session), and Mediation Rule 21 (the subsequent mediation procedure).

Following transmittal of the request to the mediator pursuant to Mediation Rule 15, each party is to provide to the mediator within 15 days²⁷⁸ a brief initial written statement, describing the issues in dispute and its views on these issues. The initial written statements should also set out each party's views on the procedure to be followed during the mediation. These statements will help the mediator gain an understanding of the disputed matters to be addressed in the mediation. They also assist the mediator's preparation for the procedural discussions with the parties at the first, joint session, which will determine the mediation protocol on the basis of which the mediation is to be conducted.²⁷⁹ As Mediation Rule 19(1) makes clear, the initial written statements are not meant to be responsive to one another and they are intended to be exchanged simultaneously. At the outset of the mediation in preparation of the first session, the mediator may meet and communicate with the parties jointly or separately,²⁸⁰ which reflects standard practice in mediation proceedings.

²⁷⁴ *Ibid.* MR 17(1).

²⁷⁵ This duty is also reflected in AR 4, WP 4, *supra* (n 12) Rule 3(1). The good faith concept also appears in a number of international mediation frameworks, ICC, Art. 7(3); UNCITRAL Conciliation Rules Art. 11; SIMC, Art. 6.9, IBA Art. 8.

²⁷⁶ For confidentiality provisions applicable vis-à-vis external parties, *see* WP 4, *supra* (n 12) MR 9.

²⁷⁷ WP 4, *supra* (n 12) MR 18.

²⁷⁸ The 15-day period may be amended by the mediator in consultations with the parties. This will allow the mediator to ensure that there is sufficient time for the mediator to prepare for the first session, and reflects regular practice in mediation proceedings. WP 3, *supra* (n 10) para 363.

²⁷⁹ *See* the text accompanying MR 20 below.

²⁸⁰ WP 4, *supra* (n 12) MR 20(2).

Mediation Rule 20(1) stipulates that the first session between the mediator and the parties is to be held within 30 days²⁸¹ after the date of the transmittal of the request pursuant to Mediation Rule 15.²⁸² The goal of the first session is to establish the “Mediation Protocol”²⁸³ on the basis of which the subsequent mediation process will be conducted.²⁸⁴

The agenda, mode²⁸⁵ and date of the first session will be determined by the mediator in consultation with the parties.²⁸⁶ A list of matters to be addressed at the first session is set out in Mediation Rule 20(3), and reflects certain commonalities with ICSID conciliation. These matters include: (a) procedural questions, such as the language of the mediation,²⁸⁷ the method of communication,²⁸⁸ the place of meetings,²⁸⁹ the next steps in the mediation,²⁹⁰ confidentiality arrangements within the mediation²⁹¹ and vis-à-vis non-parties,²⁹² disclosure of any potential settlement agreement resulting from the mediation,²⁹³ and the participation of other persons than the parties in the mediation;²⁹⁴ (b) administrative matters, such as the division of the payment of advances,²⁹⁵ and the appointment of the Secretary to the mediator from the ICSID Secretariat’s staff;²⁹⁶ and (c) any agreements reached between the parties, including agreements concerning the application of prescription or limitation periods²⁹⁷ and agreements not to initiate or pursue other proceedings in respect of the issues in dispute during the pendency of the mediation.²⁹⁸

In order to link the discussions during the mediation with the possible outcome, Mediation Rule 20(4) requires each party to identify at the first session (or within such other period as the mediator may determine) who is authorized to

²⁸¹ The 30-day period may be amended by party agreement. See WP 4, *supra* (n 12) MR 20(1).

²⁸² See WP 4, *supra* (n 12) MR 15.

²⁸³ WP 4, *supra* (n 12) MR 20(3).

²⁸⁴ See WP 1, *supra* note 5, 1381. See also MR 21(1).

²⁸⁵ This refers to in-person conduct or the use of remote technology such as audio or video-conferencing. WP 2, *supra* (n 7) para 798.

²⁸⁶ WP 4, *supra* (n 12) MR 20(2).

²⁸⁷ *Ibid.* MR 20(3)(a).

²⁸⁸ *Ibid.* MR 20(3)(b).

²⁸⁹ *Ibid.* MR 20(3)(c).

²⁹⁰ *Ibid.* MR 20(3)(d).

²⁹¹ *Ibid.* MR 20(3)(g)(i).

²⁹² *Ibid.* MR 20(3)(e).

²⁹³ *Ibid.* MR 20(3)(g)(iv).

²⁹⁴ *Ibid.* MR 20(3)(f).

²⁹⁵ *Ibid.* MR 20(3)(h) and (M)AFR 6.

²⁹⁶ *Ibid.* (M)AFR 2.

²⁹⁷ *Ibid.* MR 20(3)(g)(iii).

²⁹⁸ *Ibid.* MR 20(3)(g)(ii).

settle the issues in dispute on that party's behalf²⁹⁹ and describe the process that would be followed to conclude such a settlement.³⁰⁰

As mentioned above, once the mediation protocol is established, it will serve as the basis for the conduct of the mediation.³⁰¹ Mediation Rule 21(1) underlines that, while conducting the mediation, the mediator is to continuously take into account the views of the parties and the circumstances of the issues in dispute.³⁰² Certain process tools available to the mediator are set out in Mediation Rule 21. During the mediation, the mediator may request the parties to provide additional information or written statements³⁰³ to facilitate the exploration of underlying needs and interest and the problem-solving stage where possible solutions are being generated. The mediator may also continue to meet and communicate with the parties individually or separately.³⁰⁴ This shuttle diplomacy is an important element in mediation processes. Should the mediator consider it helpful, the mediator may obtain expert advice with the agreement of the parties.³⁰⁵ This reflects the fact that expertise on a particular subject matter may not necessarily need to lie within the mediator; however, if considered helpful, the mediator may seek such advice.

The ICSID Mediation Rules do not prescribe a specific style of mediation, but allow parties to jointly agree on the tasks and role of the mediator. Should the parties want the mediator to not only facilitate the parties' negotiations but also make recommendations for the resolution of the disputed issues, parties may jointly request the mediator to do so pursuant to Mediation Rule 21(3).

The termination of the mediation and related procedural aspects are addressed in Mediation Rule 22. Mediation Rule 22(1) provides five grounds to terminate the mediation. A mediation may terminate upon a notice from the parties either that they have signed a settlement agreement,³⁰⁶ or that they have agreed to terminate the mediation.³⁰⁷

Reflecting the consensual and voluntary nature of the mediation process, a party may withdraw from the mediation at any time. Such withdrawal terminates

²⁹⁹ *Ibid.* MR 20(4)(a). This could be a government entity such as a lead agency for investment disputes, a ministry or ministries, or Cabinet; or for the investor a board of directors, a corporate oversight body, a principal shareholder, etc.

³⁰⁰ This provision also addresses concerns a party may have regarding the need to involve government representatives or entities (such as third-party funders) that need to be involved to approve an eventual settlement agreement.

³⁰¹ WP 4, *supra* (n 12) MR 21(1).

³⁰² *Ibid.* MR 21(1).

³⁰³ *Ibid.* MR 21(2).

³⁰⁴ WP 4, *supra* (n 12) MR 19.

³⁰⁵ *Ibid.* MR 21(4).

³⁰⁶ *Ibid.* MR 22(1)(a).

³⁰⁷ *Ibid.* MR 22(1)(b).

the mediation,³⁰⁸ unless – in cases of multi-party mediation – the remaining parties wish to continue the mediation.³⁰⁹ If the mediator determines there is no likelihood of resolution through the mediation, the mediator may terminate the process.³¹⁰ Finally, Mediation Rule 22 also references the termination ground in Mediation Rule 12(5), i.e., when the parties fail to take any steps to appoint the mediator within a specified time frame, the mediation is terminated by the Secretary-General.³¹¹

The termination of the mediation is recorded in the form of a notice.³¹² As mentioned above, the notice requirements are aligned with the formal requirements established by the Singapore Convention on Mediation to facilitate enforcement under that Convention should such be sought.³¹³ In the event of termination on other grounds, the notice of termination may assist the parties to evidence their participation in a mediation if required prior to the commencement of other dispute settlement proceedings such as arbitration.³¹⁴

This termination notice is issued either by the mediator, or by the Secretary-General if no mediator has been appointed.³¹⁵ This notice shall contain a brief summary of the procedural steps and the ground on the basis of which the mediation has terminated. The notice should be signed and dated by the issuer, i.e., the mediator or the Secretary-General as the case may be.³¹⁶ Certified copies of the notice will be sent to each party and the notice will be deposited in the archives of ICSID.

3.4 CONCLUSION

States have expressed a desire for impartial, international facilities to assist with investment mediation processes, and ICSID, as the world's only institution devoted to investment dispute settlement, has answered that call. ICSID's proposed mediation framework is notable for a number of reasons. First, the scope and hence the availability of the mediation facilities is expansive. Mediation at ICSID provides broad access to States and is entirely delinked from ICSID membership. It

³⁰⁸ *Ibid.* MR 22(1)(c).

³⁰⁹ *Ibid.* MR 22(1)(c). Allowing for such a possibility avoids the otherwise undesirable scenario that the remaining parties would need to commence a new mediation thereby increasing time and costs to achieve the same result. WP 4, 242.

³¹⁰ *Ibid.* MR 22(1)(d). This covers the scenario where a party failed to participate in the mediation or cooperate with the mediator.

³¹¹ See above section 3.3[d].

³¹² *Ibid.* MR 22(3).

³¹³ See above section 3.1.

³¹⁴ WP 1, *supra* (n 5) para 1398.

³¹⁵ *Ibid.* MR 22(1).

³¹⁶ *Ibid.* MR 22(2).

does not contain nationality requirements as can be found in ICSID's conciliation and arbitration mechanisms.³¹⁷ Second, ICSID's mediation mechanism responds to requests from Member States for ICSID to assist parties to reach a written agreement to mediate where none exists, by providing for such assistance.³¹⁸ Third, the rules propose a comprehensive mediation mechanism, reflecting the principles of mediation with one or two co-mediators, tailored to investment dispute settlement. General principles on costs, confidentiality and "without prejudice" provisions have been included in consultation with ICSID's Member States and the public. The mediation protocol, to be adopted following the first session, provides, in addition to the rules themselves, a framework clarifying the "rules of the game" and addressing relevant due process matters.

Fourth, the mediation framework combines a structured, facilitated negotiation process and the realities of implementing an eventual settlement agreement. In particular, the requirement that each party identify who is authorized to settle the dispute and describe the process to be followed to conclude any settlement creates the necessary link between the parties' negotiations during the mediation, and the practical conclusion of settlements resulting from that process.

Fifth, the mediation rules are aligned with the Singapore Convention requirements as to form, thereby ensuring that the ICSID mediation framework will enable parties to make use of the newly established enforcement mechanism should they wish to do so.

Sixth, as to the timing of mediation, the ICSID mediation process is flexible and can be used by disputing parties at any stage: (a) parties may mediate under the ICSID Mediation Rules early on during the lifecycle of the investment activities as soon as differences or grievances arise; or (b) parties may mediate prior to arbitration, or right after a Notice of dispute has been filed, for example during the so-called amicable settlement period; (c) parties may mediate in parallel to an ongoing ICSID arbitration; and (d) parties may of course resort to mediation as an alternative to arbitration, i.e. as an independent mechanism. Concerning parallel proceedings, Art. 26 of the ICSID Convention does not stand in the way of the option of a parallel ICSID Convention arbitration and an ICSID mediation, as that provision explicitly provides the option for the parties to agree on the pursuit of other remedies ("... unless otherwise stated ...").³¹⁹

³¹⁷ See section 3.3[a].

³¹⁸ See MR 6.

³¹⁹ If ICSID mediation is pursued in parallel to an ongoing ICSID Convention arbitration and the parties reach a settlement during the mediation, they have a choice as to the way forward: they could agree to discontinue the arbitration and, should enforcement action be needed at some point, they might proceed to enforce their settlement agreement under the Singapore Convention. Otherwise, parties could terminate the mediation, resume the arbitration and request the tribunal to embody their

Finally, as described in section 3.2. and 3.3 above, the proposed ICSID Mediation Rules differ significantly from ICSID's existing conciliation framework and provide a broadly accessible and flexible investment mediation mechanism complementing ICSID's other dispute settlement services.

4 OUTLOOK FOR AMICABLE SETTLEMENT OF INVESTMENT DISPUTES

Over the past decade, the interest in amicable investment dispute settlement mechanisms, such as conciliation or mediation, has grown significantly. The suitability of mediation as a process to resolve investor-State disputes is acknowledged in principle. This is evidenced in treaty provisions referencing mediation alongside arbitration and conciliation, either as a tool to be used during amicable settlement (or cooling-off) periods, or as a stand-alone mechanism parties can resort to independently of or alongside arbitration. It is also evidenced in the ongoing investor-State dispute settlement reform efforts, such as in UNCITRAL Working Group III. It remains to be seen whether mediation will be widely used in the future in the context of investment dispute settlement. A number of factors suggest that it will.

The multilateral work of the international community leading to the Singapore Convention on Mediation was a significant milestone, which is likely to enhance the willingness of parties to resort to mediation in the first place.³²⁰ More broadly, the Singapore Convention has placed the spotlight of dispute settlement on mediation. The large number of States that have signed the Singapore Convention since it opened for signature is another sign of the acceptance mediation enjoys in the international arena.³²¹ The policy developments in bilateral or multilateral investment treaties are further indicators of the trend towards offering mediation as an amicable investment dispute settlement process. These trends are underscored in practice by ICSID's statistics on settlement in arbitration, evidencing the significant portion of disputes for which arbitration is

settlement in an award, which then might benefit from either the simplified enforcement mechanism under the ICSID Convention (in the event it is an ICSID Convention arbitration that is suspended), or enforcement under the New York Convention (for an Additional Facility or UNCITRAL arbitration).

³²⁰ See International Mediation Institute (IMI), "Report on International Mediation and Enforcement mechanisms" available at <https://www.imimediation.org/2017/01/16/users-view-proposal-un-convention-enforcement-mediated-settlements/>. Eighty-four percent of the participants in this survey would be more likely to use mediation in a cross-border dispute, if there were a Convention on mediation akin to the New York Convention.

³²¹ Fifty-three States have signed the Singapore Convention within the first 12 months of its opening for signature in August 2019. See Singapore Convention on Mediation, 'Convention, Status' at <https://www.singaporeconvention.org/convention/status/>.

commenced but which are in fact settled or discontinued prior to a binding decision by a Tribunal. However, greater use of mediation may require not only the adoption of a mediation-specific framework at ICSID and an enforcement mechanism for mediated settlements, but also more comprehensive reform efforts in other areas.

Work could be undertaken, as discussed in UNCITRAL Working Group III, to develop model clauses for use in treaties that encourage the use of mediation and do away with the binary choice between arbitration and conciliation prevalent in many existing bilateral treaties, instead offering mediation or conciliation as a real alternative to arbitration.³²²

Structural reforms at the domestic level should also be considered. Investment disputes typically involve multiple agencies or State entities (and not infrequently also on the part of the investor). This multi-agency scenario may require inter-agency coordination, channels of communication and information flow.³²³ The creation at the national level of so-called lead agencies tasked with the handling of investment disputes could make a notable difference in a State's ability to effectively manage investment grievances. Such an agency could be tasked with preliminary assessment of different aspects of the investment grievance or dispute which can then assist to identify the most suitable process for resolving the matter. In this regard the work of the World Bank's investment climate unit developing a country-specific Systemic Investment Response Mechanism (SIRM)³²⁴ and that of the Energy Charter Secretariat developing model provisions States could adopt in their domestic framework³²⁵ deserve particular attention.

Besides the creation of lead agencies at the national level, the use of mediation in investment dispute settlement might also benefit from the adoption of domestic legislative frameworks that specifically encourage the use of mediation, envisaging that specific government entities or a particular agency may agree to, and participate in, mediation. Such frameworks would legitimize the

³²² B Legum; "The Difficulties of Conciliation in Investment Treaty Cases: A Comment on Professor Jack C. Coe's 'Toward A Complementary Use Of Conciliation In Investor-State Disputes—A Preliminary Sketch'" TDM 1 (2007), www.transnational-dispute-management.com/article.asp?key=963.

³²³ See Legum, *supra* (n 322).

³²⁴ The SIRM offers a framework to enable governments to identify, track and resolve investor-State issues that affect investment projects in host countries. World Bank Group and European Commission, "Retention and Expansion of Foreign Direct Investment—Political Risk and Policy Responses: Summary of Research Findings and Policy Implications" available at <http://documents1.worldbank.org/curated/en/528401576141837231/pdf/Political-Risk-and-Policy-Responses-Summary-of-Research-Findings-and-Policy-Implications.pdf>.

³²⁵ The Energy Charter's 2018 Model Instrument on Management of Investment Disputes provides practical guidance on a possible legal framework to create such lead agency, identifying the areas which might benefit from regulation, taking into account varying domestic needs and differing organizational structures of states around the globe. See Energy Charter Secretariat, Model Instrument on Management of Investment Disputes (with explanatory notes), available at <https://www.energychartertreaty.org/model-instrument/>.

State's involvement in mediation and help address concerns surrounding political responsibility for engaging in facilitated negotiations and agreeing to possible solutions giving rise to some level of liability on the part of the State.

In order to ensure comprehensive reform towards greater use of mediation, buy-in from stakeholders, capacity building and awareness raising is also required. The policy developments and ongoing discussions taking place in the context of the ICSID rules amendment process and the UNCITRAL Working Group III discussions show the in principle buy-in of government officials. ICSID has further provided very practical mediation skills training to government officials as part of the World Bank's work in this area.

The development of a special cadre of trained mediators will be an important factor in the development of investment mediation. ICSID has also, together with the Centre for Effective Dispute Resolution and the Energy Charter Secretariat, organized trainings that bring together experienced mediators and government officials. As of 2020, government officials from over 40 jurisdictions have participated in these trainings, which indicates the interests by governments to gain more practical insights in the process. ICSID will continue its training activities in this area.

Finally, raising the awareness of mediation as a process suitable for investment dispute resolution is a last piece of the puzzle that has been on the minds of many. ICSID has organized several webinars on the topic that are open to academics, practitioners and the public at large. An investment mediation colloquium was held at Harvard University in December of 2019, and the British Institute for International and Comparative Law devoted the 2020 Investment Treaty Forum to investment mediation. UNCITRAL's Working Group III's intersessional meeting in November 2020 has also focused on the topic. In addition to these events, guidelines and practice notes might be beneficial to assist the awareness raising and capacity building for parties to learn about mediation and actively participate in the process.

Thus, given the many changes, initiatives and developments at the policy, institutional, awareness raising and capacity building level, comprehensive reform is underway which allows for some optimism vis-à-vis the future use of amicable investor-State dispute settlement mechanisms such as mediation or conciliation.

