THE ICSID PERSPECTIVE ON MEDIATION OF INVESTMENT DISPUTES

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ICSID’s Current Dispute Settlement Services

- **Convention**
  - Both disputing parties from ICSID Member States
    - Conciliation
    - Arbitration

- **Additional Facility**
  - One disputing party from Member States
    - Conciliation
    - Arbitration
    - Fact-finding

- **Other**
  - Need not be from Member State
    - Case & hearing administration under other Rules or Treaties (e.g.: UNCITRAL or other investment cases; FTA & State-to-State cases)
    - Other functions on consent of parties (e.g.: Appointing Authority, Mediation, Registry)
    - Acting as Secretariat for Regional Trade Agreements (e.g.: CETA, EU-Singapore; EU-Vietnam; EU-Mexico)

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Proposed Amendments –
Update and Increase Options for Dispute Settlement

• Updated Arbitration Rules
• Updated Conciliation Rules
• Updated Fact-Finding Rules
• New Mediation Rules
Why ICSID Mediation Rules?

The ICSID Mediation Rules are intended to:

- Offer disputing parties broad access to investment mediation facilities;
- Provide States and investors with an impartial, trusted forum to engage in facilitated negotiations;
- Provide a party-driven, flexible process with tailor-made solutions;
- Offer a time and cost-effective dispute resolution process;
- Reflect formal requirements for settlement agreements in the Singapore Convention.
Nature of ICSID Mediation – Consent Based

• ICSID Mediation is entirely voluntary

• Requires party consent at the outset & throughout the process

• Either party may unilaterally withdraw at any time ("ongoing consent")
Two Ways to Consent to Mediation

(1) MR 5: CONSENT IN PRIOR PARTY AGREEMENT

- Written consent to mediate is found in relevant treaty, contract or law

(2) MR 6: CONSENT ABSENT PRIOR PARTY AGREEMENT

- Request for mediation includes an offer to mediate
- SG transmits the offer to the other party
- Other party can accept the offer and continue to mediation
- If other party refuses or fails to accept, no further action is taken on mediation
ICSID Mediation – Scope (MR 2)

• The Secretariat is authorized to administer any mediation that relates to an investment, involves a State or an REIO, and which the parties consent in writing to submit to ICSID.

• Provides States and investors with broad access to investment mediation facilities without the limitations applicable to Convention or Additional Facility arbitration and conciliation proceedings.
ICSID Mediation – Process Overview

- Request for Mediation with/without pre-existing agreement
  - Request Registered
    - Appointment of 1-2 Mediators
    - Brief Initial Statement
    - First Session and determination of Protocol
    - Conduct of Mediation
    - Termination of the Mediation
  - Request Refused
    - Notice from the parties that they have signed a settlement agreement
    - Notice of parties’ agreement to terminate the mediation
    - Notice of withdrawal by a party unless the remaining parties agree to continue the mediation
    - No likelihood of resolution
    - Termination prior to appointment of Mediator for failure of parties to act
ICSID Mediation – General Provisions

**Costs (MR 9)**
- Unless parties agree otherwise, the costs of the mediation are borne equally by the parties and each party to bear its own costs and expenses.

**Confidentiality (MR 10)**
- All information relating to the mediation, and all documents generated in or obtained during the mediation, shall be kept confidential, unless:
  - the parties agree otherwise
  - the information or document is independently available
  - disclosure is required by law

**Without Prejudice Provision (MR 11)**
- Any position taken, admissions or offers of settlement made, or views expressed by a party during the mediation is without prejudice to the legal positions it may take in any other proceeding.
Enforcement of Mediated Resolution

• Embody in Award if corollary to ongoing arbitration (AR 43) – benefits of ICSID enforcement regime

• MR are aligned with formal requirements in Art. 4 of the Singapore Convention
  
  • Settlement needs to be in writing & signed
  
  • Evidence that the settlement agreement resulted from mediation (as defined by the Singapore Convention)
ICSID Mediation Activities in 2020

- Member State Consultations on MR – aiming to have Rules adopted as soon as possible
- Offering administration of investment mediations
- Mediation Capacity-building activities
  - Investor-State Mediator Training
  - Training for Government Officials with IFC
- Technical assistance workshops on dispute prevention and management
- Dissemination of information on investment mediation
Final Points

• Developing internal awareness about mediation and capacity to mediate

• Consider internal framework
  • Lead agency
  • Liability concerns
  • Authorizations needed

• Communications
  • Tie to attracting, retaining and expanding FDI
Thank you

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