

Ideas for ICSID Amendments in 2017: *Exploring Early Mediation or Conciliation*

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In 1982, Broches noted that:

“[T]here is a growing wish to explore the possibilities of conciliation, possibly in an attempt to combine the advantages of both procedures. The idea of a convention to recognize and enforce agreements arrived at after conciliation has been suggested by Dr. Otto-arrndt Glossuer, the well-known German arbitration expert, but I think that is too tricky an enterprise. I think we have other more pressing worries.”¹

More than 34 years later, in 2016, approximately 36-40% of ICSID arbitrations are consistently settled or withdrawn before the final award.² Out of the 444 concluded investor-state cases to date, approximately 26-28% of investor-state arbitrations are settled before an award.³ There is therefore, the potential for settlement of roughly one-third of investment arbitrations by mediation or conciliation.

This brief discussion paper discusses the enduring suitability of investment disputes for mediation or conciliation, and suggests amendments to improve the use of mediation or conciliation to build in windows for settlement of ICSID disputes. Mediation and conciliation are used interchangeably in this paper.

A. THE VALUE OF MEDIATION OR CONCILIATION FOR INVESTMENT DISPUTES

1. *Preserving investor-State relationships*

The informal mediation or conciliation environment is likely to be warmer than that of the

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¹ Aron Broches, ‘Avoidance and Settlement of International Investment Disputes’, (1984) 78 American Society of International Law Proceedings 38 (‘Broches, Avoidance’), p 54.

² ICSID Caseload Statistics, Issue 1, ICSID publication 2017, p 13; ICSID Caseload Statistics, Issue 1, ICSID publication 2012, p 13; ICSID, ‘Background Information on the International Centre for Settlement of Investment Disputes (ICSID)’ <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English>>; ‘ICSID Arbitration: How Long Does It Take?’ <www.goldreserveinc.com/documents/ICSID%20arbitration%20%20How%20long%20does%20it%20take.pdf>.

³ UNCTAD, ‘Recent Developments in Investor-State Dispute Settlement (ISDS)’ IIA Issues Note No. 1 (February 2015) – 28%; UNCTAD, ‘Investor-State Dispute Settlement: Review of Developments in 2015’ IIA Issues Note No. 2 (June 2016) – 26%; UNCTAD, ‘Investor-State Dispute Settlement: Review of Developments in 2014’ IIA Issues Note No. 2 (May 2015) – 28%.

adjudicative forum. The "win-win" character of the conciliatory process is a major advantage since it facilitates the maintenance of a harmonious business relationship, whereas the use of an adjudicative form may rupture this connection.⁴ Conciliation can be particularly effective in "cases in which the parties are engaged in an ongoing long-term project, involving significant amounts in sunk costs, where it is necessary to resolve disputes while the project is still continuing. Disputes in oil and gas explication projects, mining and long-term infrastructure projects are well-suited."⁵ The relationship between the investor and the State in *Hess Equatorial Guinea Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea*⁶ which has continued with further investments, despite a suspended conciliation process and threat of international dispute settlement proceedings, is a good example of the compatibility of conciliation with preserving long-term investment projects.

2. Saving 'face'

Where "bringing disputes settlement proceedings against a state is regarded as an 'unfriendly act' that may imply diplomatic costs in inter-state relations", conciliation procedures with its consensual outcomes may be more acceptable as it is a "softer" form of dispute settlement which is "less threatening to the sovereignty of host states".⁷ In 1961, the executive director representing several Latin American States at the World Bank Mr Machado noted that as a cultural matter, "[c]onciliation enabled a government to save face."⁸ The conciliation commission's report was considered extremely useful in certain cultures that placed particular emphasis on pride and reputation.

3. Saving costs

If unsuccessful, it has been argued that conciliation as a process itself is a waste of time and costs. Roughly 64% of respondents are developing countries. Legal and procedural expenses divert much-needed financial and human resources away from development priorities.⁹ Prime examples of unsuccessful conciliations are *Togo Electricité v Republic of Togo*,¹⁰ *RSM v Cameroon*,¹¹ wherein the conciliation procedures that preceded arbitration appear on hindsight, to have been a complete waste of costs by duplicating the dispute settlement process.

⁴ Silvia Constain, 'Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape', (2014) Vol. 29, No. 1 ICSID Review 25-40 ('Constain'), p 33.

⁵ Ucheora Onwuamaegbu, 'The Role of ADR in Investor-State Dispute Settlement: The ICSID Experience', (2005) Volume 22, No. 2 News from ICSID ('Onwuamaegbu'), p 13; Susan Franck, 'Reconsidering Dispute Resolution in International Investment Agreements', in Karl P Sauvart (ed.) *Appeals Mechanism in International Investment Disputes* (OUP, 2008), p 176.

⁶ *Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea* (ICSID Case No. CONC(AF)/12/1)
<[https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC\(AF\)/12/1](https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC(AF)/12/1)>.

⁷ August Reinisch 'Elements of Conciliation in Dispute Settlement Procedures' in Christian Tomuschat, Riccardo Pisillo Mazzeschi, Daniel Thuürer (eds.) *Conciliation in International Law* (Brill, 2017), p 126, 128.

⁸ VOL 1, 68: 48 Machado [emphasis added].

⁹ Constain, p 25.

¹⁰ *Togo Electricité v. Republic of Togo* (ICSID Case No. CONC/05/1).

¹¹ *RSM Production Corporation v. Republic of Cameroon* (ICSID Case No. CONC/11/1)
<<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC/11/1&tab=PRO>>.

If successful however, conciliation is less costly than other adjudicative methods.¹² It also reduces enforcement risks and narrows pleadings. According to one practitioner, a complex international dispute can be resolved within six months, with proper professional mediation.¹³ If a small claim is involved, conciliation should be preferred since it will be more cost-effective than litigation.¹⁴

B. THE PROBLEM WITH MEDIATION OR CONCILIATION USED AS A STEP BEFORE ARBITRATION

A survey in 2016 showed that the most common practice of combining non-binding dispute settlement with binding arbitration in commercial disputes was sequential, using a ‘stacked’ dispute resolution clause.¹⁵

Using conciliation as a step to arbitration is however, not the most efficient way to use conciliation in encouraging settlement of investment disputes. In practice, practitioners and government officials facing claims from foreign investors will know that structuring an unsuccessful conciliation or mediation as a preliminary step to arbitration lends itself to being used as a significant delay tactic.¹⁶ Coe has accurately identified the problem—the chief weakness of the conventional two-step model of med-arb is that arbitration makes no progress during the conciliation process.¹⁷

C. RE-CONSTRUCTING MEDIATION OR CONCILIATION INTO THE ARBITRATION PROCEEDINGS

1. *Arb-Med-Arb*

The purpose and most effective use of Alternative Dispute Resolution (ADR) is often “building in *complementary* resolution methods, not usurping current adjudicatory procedure”.¹⁸ One proposal for reforming ICSID conciliation as a popular and effective tool for resolving investment disputes, is

¹² Gabriel Bottini, and Veronica Lavista, ‘Conciliation and BITs’, (A. Rovine ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (2010, Brill) 358-373, pp 358-359.

¹³ Wolf von Kumberg, Jeremy Lack and Michael Leathes, ‘Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come’, (2014) Vol. 29, No. 1, *ICSID Review* 133-141, p 141.

¹⁴ Linda C Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 *Fordham International Law Journal* 578 (1990-91) (‘Reif’), p 634.

¹⁵ Dilyara Nigmatullina, ‘The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study’ (2016) Volume 33 Issue 1 *Journal of International Arbitration* 37, p 49.

¹⁶ Jack C Coe Jr, ‘Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch’, (2005) Vol 12UC Davis J. Int’l L. & Pol’y 7 (‘Coe’), p 31: There may be reasons, especially for a respondent sovereign, to welcome delay. For a state facing multiple claims, delay may be a method of managing its resources. It may also be, however, a tool for effecting more Machiavellian strategies.”

¹⁷ Coe, p 32.

¹⁸ Judith Resnik, ‘Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication’ (1994-1995) 10 *Ohio St. J. on Disp. Resol.* 211, p 253.

to structure conciliation as a mechanism to be used *during* the arbitration.¹⁹ This creates optimal “intertwining between negotiation and third-party dispute settlement”²⁰, and “mixing those characteristics”.²¹ Such an intertwining Arb-Med-Arb approach has seen great success in domestic legal systems such as Germany, Singapore, Switzerland and China where the same or different judges regularly interact with the parties in the course of proceedings to attempt to settle the case.²²

Tribunals have been instrumental in the settlement of many ICSID arbitration cases.²³ In 1982, Broches reported that out of 10 ICSID arbitration cases concluded, 6 were discontinued after settlement. He remarked that “*even in those instances where the disputants went beyond the edge of the water, they got out again and settled the case.*”²⁴ On hindsight, it is precisely because these parties had gone “beyond the edge” by instituting binding proceedings, that they were able to reach a settlement.

The system provided under the SIAC-SIMC Arb-Med-Arb Protocol of the Singapore International Mediation Centre started in November 2014 may be considered as a model. The Protocol provides that after receipt of the notice of arbitration and response, the case will be referred to mediation. To prevent delay of the arbitration, the mediation is limited to eight weeks. If settlement attempts fail, parties will revert to arbitration.²⁵ The looming threat of the strict timeline of an arbitration can be a significant motivation for negotiating settlements.

2. Exploring mediation or conciliation at the first procedural conference

In 1996, a prominent counsel at ICSID Ziadé suggested that pre-hearing conferences between the parties to arbitration proceedings led to early settlements.²⁶ Under the 1984 ICSID Arbitration Rules, it was envisioned that the first pre-hearing conference between the Arbitral Tribunal and the parties would be used to facilitate an early amicable settlement.²⁷ Using the first procedural conference call of an ICSID arbitration to explore whether conciliation could resolve the dispute, could reduce ICSID’s

¹⁹ Klaus Peter Berger, Integration of Mediation Elements into Arbitration ‘Hybrid’ Procedures and ‘Intuitive’ Mediation by International Arbitrators, 19 Arb. Int’l 396 (2003); James T. Peter, *Med-Arb in International Arbitration* 83, 84-85 (1997), pp 101-03; Christian Buhning-Uhle, ‘Designing Procedures for Effective Conflict Management’, in *Arbitration and Mediation in International Business* (1996) (‘Buhning-Uhle’), pp 370-381.

²⁰ Helene Ruiz Fabri, ‘The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute’, Laurence Boisson de Chazournes, Marcelo Kohen and Jorge E. Viñuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement* (Brill, 2012), p 94.

²¹ Paul de Waart, ‘ICSID and other forms of Arbitration’, *Foreign Investment in the Present and a New International Economic Order* (University Press, Fribourg, 1987), p 117.

²² German Code of Civil Procedure (ZPO), Article 278 (1), Swiss Federal Code of Civil Procedure, Article 124(3) cited in Michael E Schneider, ‘Investment Disputes – Moving Beyond Arbitration’, in Laurence Boisson de Chazournes, Marcelo G. Kohen, Jorge E. Viñuales (eds.) *Diplomatic and Judicial Means of Dispute Settlement* (‘Schneider’), p 123.

²³ Nassib G Ziadé, ‘ICSID Conciliation’, *News from ICSID*, (1996) Vol. 13(2) 3 (‘Ziadé’), p. 7; Schreuer, p 449.

²⁴ Broches, Avoidance p 54.

²⁵ SIAC-SIMC Arb-Med-Arb Protocol <<http://simc.com.sg/siac-simc-arb-med-arb-protocol/>>; Gerald Aksen, Comments on Enforceability of Awards on the Role of Arbitrators as Settlement Facilitators, in Albert Jan van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond*, 12 ICCA Congress Series 565, (Kluwer Law International, 2005), p 566.

²⁶ Ziadé, p 8.

²⁷ Ziadé, p 7.

arbitration caseload. The first procedural conference also intervenes at an early stage, when both parties to the dispute may be more flexible in their ability to act, and their relationship may still stand on positive ground.²⁸ Non-monetary or policy-based alternatives are more readily available and acceptable at this stage.²⁹

3. Early costs estimates

It has also been suggested that an early evaluation given by the conciliator of the estimated costs of the potential arbitration and a forecast of timelines with potential delays, may be helpful to incentivise settlement.³⁰ Estimates of future costs could assist parties in weighing the costs and benefits of proceeding with conciliation or arbitration. Disputing parties are often unable to predict just how astronomical costs of legal representation and proceedings could become.

4. Calling 'time out'

Conciliation without a time limit can also be used as a dilatory tactic.³¹ It is recommended that the ICSID conciliation commission's powers to determine that a dispute cannot be settled should be strengthened. To master efficient timelines, provisions may be adopted such as ICC Conciliation Rule 4: "The conciliator shall inform the parties of his appointment and set a time-limit for the parties to present their respective arguments to him".³² There is no requirement that the ICC conciliator invite written statements. Time limits can be issued in procedural orders.³³

5. Flexibility in using experts

Procedures for mediation or conciliation requires a certain degree of flexibility and goodwill from the parties.³⁴ A good example is in a case involving several infrastructure projects, two disputing governments agreed to appoint an even number of conciliators, comprising one legal and one technical expert. The findings of those two experts were not binding, but served as the basis for successful negotiations concluding with a settlement.³⁵

6. Allowing third party participation

Third party participation in the mediation or conciliation should be explored. It has been

²⁸ Constain, p 34.

²⁹ Constain, p 34.

³⁰ Schneider, p 141.

³¹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (CUP, 2010), p 217; Susan Franck, 'Reconsidering Dispute Resolution in International Investment Agreements', in Karl P Sauvart (ed.) *Appeals Mechanism in International Investment Disputes* (OUP, 2008), p 178.

³² ICC Conciliation Rules 1988, Article 4.

³³ ICSID Conciliation Rules, Rule 19.

³⁴ Schreuer, p 444; Reif, pp 586-587, 634-368.

³⁵ Michael E. Schneider, "The Art of Blending Arbitration and Other ADR Methods", in Ingen-Husz, *ADR in Business 2* (2011) 313, p 324.

recognized that getting governments to compromise is difficult, because “the central government or the competent ministry alone may... require mechanisms and procedures through which the negotiator on the side of the host State receives from other departments involved the necessary information and authority to conduct the negotiations and reach settlement” and “budgetary authority is of particular importance.”³⁶ Depending on the control and audit process of that state, it is critical that every competent institution is involved in the conciliation.³⁷ Non-governmental organizations may wish to participate in the process, and failure to include them could result in repercussions on the legitimacy of conciliation.³⁸

7. Safeguards for conflict risks

It remains important to note that it is not ideal that arbitrators act as conciliators in politically sensitive investment disputes.³⁹ Arbitrators descending into the fray as mediators is a practice only culturally accepted in a handful of jurisdictions.⁴⁰ Thus, a 2009 commission studying the low rate of settlement in international arbitrations, encouraged arbitrators to facilitate settlements, but concluded with a slew of warnings. Some notable warnings were that “[a]rbitrators should not meet with the Parties separately”, they should not “obtain any information from one Party which is not shared with the other Parties”, “arbitrators must also avoid putting pressure on the parties to settle”, and most fatally, “[i]f, as a consequence of his or her involvement in the facilitation of settlement, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings, that arbitrator should resign”.⁴¹

8. Early neutral evaluation

Government officials also face limitations on authority to settle and risks of personal liability.⁴² Written recommendations of a respected conciliator could be helpful to government officials in justifying their recommendations to settle. An early neutral evaluation given by an evaluative mediator could assist in narrowing the legal issues in dispute or the divide in quantum. The difference

³⁶ Schneider, p 144.

³⁷ Schneider, p 144.

³⁸ Franck, p 184.

³⁹ Eloise Obadia, “How Proactive Arbitrators Really Are in Conducting Arbitral Proceedings: An ICSID Perspective”, *News from ICSID* 16(2) (1999), p 8; Bernd Ehle, ‘The Arbitrator as a Settlement Facilitator in Walking A Thin Line – What an Arbitrator Can Do, Must Do or Must Not Do, Recent Developments and Trends’ (Bruylant 2010), p 94; Buhning-Uhle, p 262; Philip Naughton, ‘The Role of Arbitrators and Arbitration Institutions in the Use of Alternatives for the Settlement of Disputes’, 73(1) *Arb.* 31, 37 (2007); Lucy Greenwood, ‘A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in order for Parties to Explore Settlement’, (2011)27(2) *Arb. Int’l.* 199, pp 204–206; Weixia, Gu ‘The Delicate Art of Med-Arb and its Future Institutionalisation in China’ (2014) 31(2) *Pacific Basin Law Journal*, pp 101-111, 118-120.

⁴⁰ Centre for Effective Dispute Resolution Commission on Settlement in International Arbitration, Draft Paper for Consultation (2009), Chaired by Lord Woolf and Professor Gabrielle Kaufmann-Kohler (‘CEDR’), p 1, para 1.3.

⁴¹ CEDR, recommendations 4.2.6, 4.2.7, and 4.3.

⁴² Franck, p 185; Barton 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’’, (2006) Vol. 21 (April) *Mealey’s International Arbitration Report* (‘Legum’), p 2.

between private negotiations on the side and evaluative conciliation is the expertise and trust of a third party neutral, who would provide a rational view on the merits of the case. The arbitrators cannot provide this, and the parties cannot glean such information from procedural orders alone. Commonly, the claimant's expert's calculation is several times larger than the respondent's expert's calculation.

9. Consider strict time limits

A limited timeframe for ICSID conciliation is worth considering. The conciliation procedures in Annex V of the UN Convention on the Law of the Sea were designed with a one-year termination date.⁴³ Setting an 'expiry date' for the conciliation ensures that parties cannot use conciliation to delay compulsory dispute settlement procedures.

10. Provisions for 'consent' awards

In order to circumvent the problem of unenforceable settlement agreements, an amendment of the ICSID arbitration rules, to structure in a window for early mediation or conciliation, could make it part of the arbitration process. If a settlement is reached, the result would be a *consent award*,⁴⁴ enforceable under the ICSID Convention, the New York Convention and recognized as an arbitral award under domestic laws. In 2013, 40 out of 471 ICC arbitration awards were consent awards.⁴⁵

D. CONCLUSION

These suggestions are part of the author's larger study on ICSID Conciliation. The ICSID Conciliation Rules have remained largely untouched since 1968. It is hoped that the 10 suggestions above are starting points for the Secretariat's work in updating and modernizing the ICSID Rules and Regulations.

In particular, it is suggested that the following amendment be made to ICSID Arbitration Rule 20:

Rule 20

Preliminary Procedural Consultation

(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to

⁴³ See for example, United Nations Convention on the Law of the Sea Annex V, Article 7:

"1. The commission shall report within 12 months of its constitution. Its report shall record any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement. The report shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute.

2. The report of the commission, including its conclusions or recommendations, shall not be binding upon the parties."

⁴⁴ Yaroslau Kryvoi, Dmitry Davydenko, 'Consent Awards in International Law' (2015) 40(3) Brooklyn Journal of International Law 828.

⁴⁵ International Court of Arbitration, 2013 Statistical Report (2014) 25 ICC Int'l Arb Bull 1, p 14.

ascertain the views of the parties regarding questions of procedure and whether the parties are willing to attempt mediation or conciliation by a third party. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

- (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
- (b) the language or languages to be used in the proceeding;
- (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
- (d) the number of copies desired by each party of instruments filed by the other;
- (e) dispensing with the written or the oral procedure;
- (f) the manner in which the cost of the proceeding is to be apportioned; and
- (g) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

(3) For the purposes of ascertaining the views of the parties regarding whether they are willing to attempt mediation or conciliation by a third party, the President of the Tribunal shall, in particular, seek their views on the following matters:

- (a) the selection of a mediator or conciliator;
- (b) the time limit for mediation or conciliation;
- (c) the confidentiality and 'without prejudice' nature of the mediation or conciliation;
- (d) the procedures for mediation or conciliation; and
- (e) the costs of the mediation or conciliation.