



ICSID

**International Centre for
Settlement of Investment Disputes**
WORLD BANK GROUP

Background Paper on Investment Mediation

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1 Introduction

In 2018, ICSID proposed stand-alone mediation rules to its Member States. The ICSID Mediation Rules (“MR”) provide broad access to investment mediation facilities without the jurisdictional conditions for proceedings under the ICSID Convention or Additional Facility Rules (see Mediation Rule (MR) 2(1)). The MR complement ICSID’s existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings. While the MR have not yet been adopted by the ICSID Administrative Council, parties are free to adopt the MR in their current form by agreement and request ICSID to administer their mediation.

ICSID supports mediations by providing facilities and administrative services, including a dedicated staff team which assists the parties and the mediator(s) throughout the process. ICSID’s services include identifying qualified mediators, facilitating communication between the parties and the mediator, handling all aspects related to the organization of joint or separate mediation sessions, and managing the finances of the process.

This background paper on investment mediation is intended to provide participants in investor-State mediation (“ISM”) and other interested persons with an overview of mediation in the investor-State context. ICSID also supported the development of the guidelines for participants in investment mediation discussed by UNCITRAL Working Group III on Investor-State Dispute Settlement Reform.

2 What is Investment Mediation?

Mediation is a consensual process in which parties negotiate their dispute directly with one another, with the help of a third party (the mediator). The mediator’s role is to assist the disputing parties with their negotiations. Therefore, mediation is often called ‘facilitated negotiation’ or ‘facilitated dialogue’. These terms are used interchangeably in this document.

The consensual nature of mediation and the principle of party autonomy are reflected not only at the outset of a mediation in the agreement to mediate, but throughout the facilitated negotiation process.

The parties’ agreement to mediate may be set out in an investment contract or in an *ad hoc* agreement. Many recent investment treaties contain a State’s standing offer to mediate, which is subsequently accepted by an investor (see [ICSID’s Overview of Investment Treaty Clauses on Mediation](#)). Parties are free to agree on the scope of the mediation and may agree to submit all, or just some, of the matters in dispute to mediation. Given its consensual nature, a party may withdraw from the mediation at any time.

As mediation is a negotiation between the disputing parties facilitated by a mediator, their active participation is essential for the successful conduct of the process. Unlike a judge or arbitrator,

the mediator does not decide the legal merits of a claim based on past events, and does not have any authority to determine, or impose, a binding resolution of the dispute. The parties are free to agree to a settlement of all or parts of the dispute, and to determine by agreement the detailed terms of settlement, allowing for customized solutions.

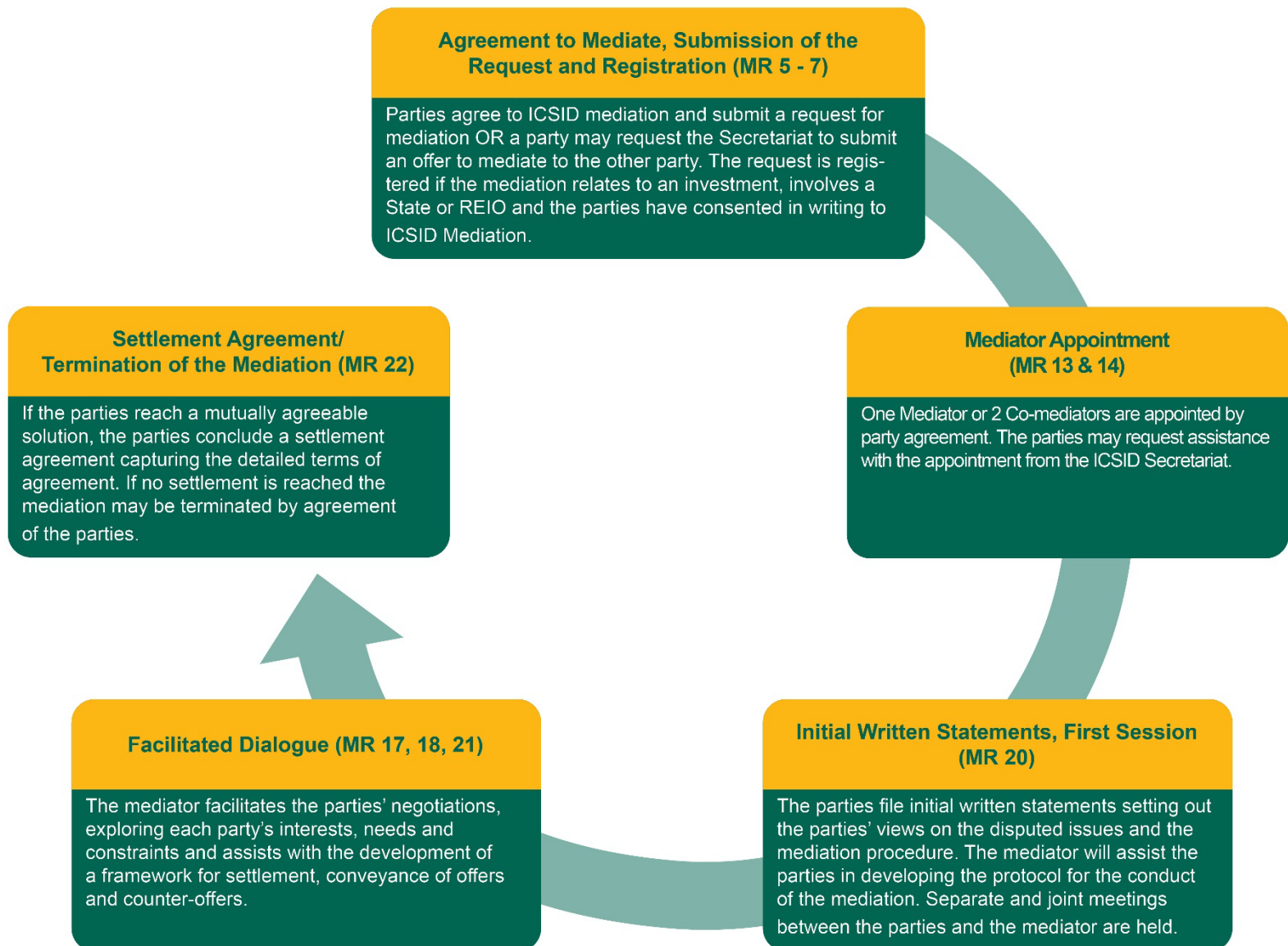
Investment Mediation in the ICSID context is a mediation that relates to an investment and involves a State, State entity or Regional Economic Integration Organization (REIO). Unlike proceedings under the ICSID Convention and Additional Facility Rules, ICSID Mediation does not require any link of the parties to ICSID membership, nor do the MR impose any specific nationality requirements. Therefore, 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.

3 ICSID Mediation – Process Overview

ICSID Mediation is available to all States and investors and does not require a nexus to ICSID membership nor does it impose any specific nationality requirements. The mediation process commences with an agreement to mediate, which may be concluded before or after a dispute arises (MR 5-6). Once the parties have agreed to mediate (with or without the assistance of the ICSID Secretariat), they file a request for mediation, which is registered (MR 7). The next step is the selection and appointment of the mediator (MR 12-14). The mediator is appointed either by agreement of the parties or by the ICSID Secretary-General upon request of the parties. The parties then provide the mediator with initial written statements setting out the issues in dispute and their views on these issues as well as on the mediation procedure (MR 19). Thereafter, the mediator and the parties will meet to determine the ground rules for the conduct of the mediation (called the Mediation Protocol) (MR 19 and 20). During the process the mediator will assist the parties to identify their needs and interests and facilitate the negotiation of a mutually agreeable solution (MR 17-18, 21). If the parties reach an agreement on all or some of the issues in dispute, a settlement agreement will be concluded.

The ICSID mediation process and the role of the mediator is illustrated in the chart below.

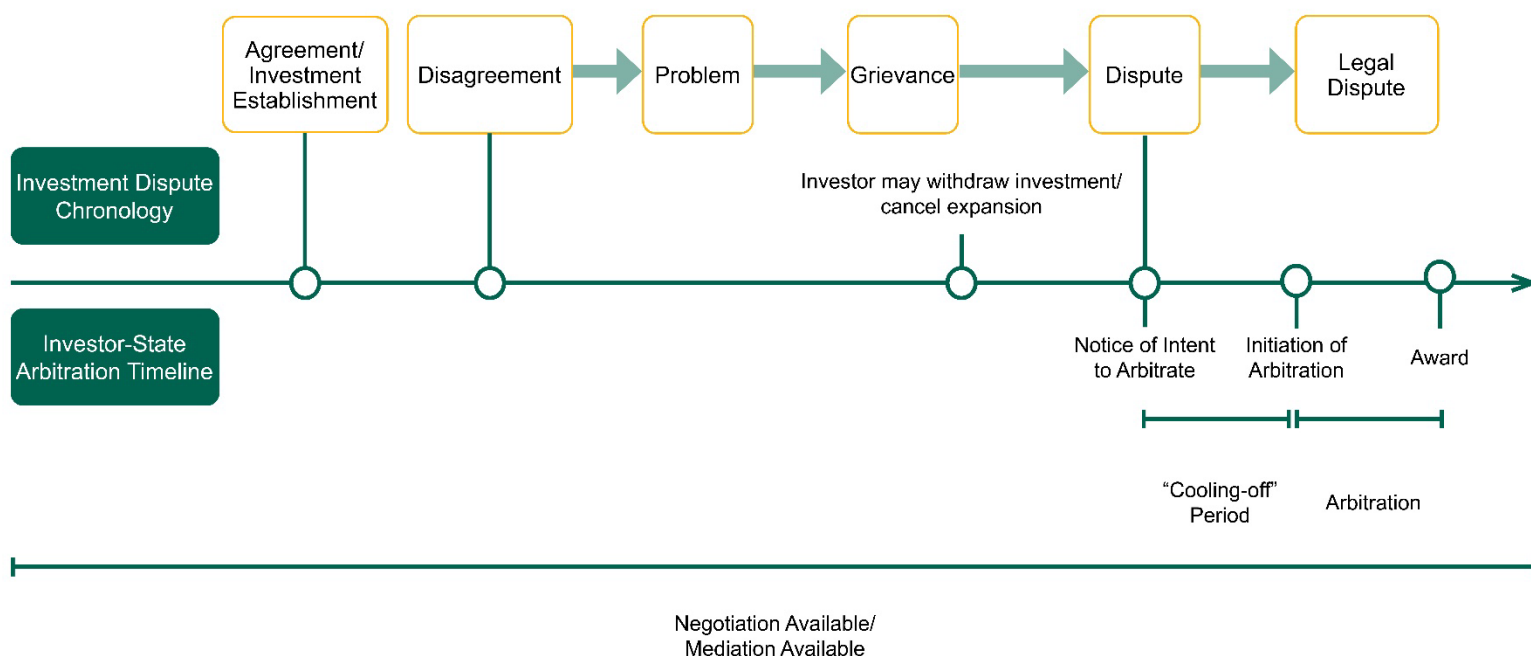
ICSID Mediation – Process Overview



4 When Can Mediation Be Used in the Investment Context?

Mediation is a facilitated dialogue between the disputing parties and is one of multiple tools available to resolve investment disputes. Mediation can be used whenever negotiations between the parties are considered suitable. Therefore, mediation is not limited to the time after a dispute has formally crystallized but could also be employed throughout the investment life cycle, during consultations, and alongside arbitration, as the chart below indicates.

Investment Dispute Chronology and Availability of ISDS Processes



5 What are the Differences between ICSID Conciliation and ICSID Mediation?

While the terms “conciliation” and “mediation” are sometimes used interchangeably (see for example the Singapore Convention or the UNCITRAL Mediation Rules), significant differences exist between ICSID conciliation and mediation. Key differences include:

- 1) ICSID mediation is open to all States and broadly accessible, with no nationality limitations or ICSID membership requirements;

- 2) ICSID mediation envisions the appointment of 1 mediator or 2 co-mediators by agreement of the parties, with the default being one mediator appointed by party agreement. By contrast, ICSID conciliation envisions a 3-member conciliation commission with each party appointing one conciliator and the third, presiding conciliator appointed by agreement;
- 3) there is no jurisdictional determination by the mediator and hence no jurisdictional objection during the process;
- 4) the role of the conciliation commission is to clarify the issues in dispute, whereas the role of the mediator is solely to assist the parties with reaching a mutually agreeable solution;
- 5) the mediator may not issue any recommendations absent agreement of the parties;
- 6) the mediation process is more informal; for example, the mediator does not issue any orders or decisions and there are no 'deliberations' in mediation; and
- 7) a party to a mediation may withdraw from the process at any time, as "ongoing consent" is required throughout the mediation process.

6 What Factors Should Be Considered when Assessing the Suitability of Mediation?

Numerous criteria have been developed to assess which dispute resolution procedure is the most effective process for resolving a particular dispute.

Factors that parties may wish to consider when determining whether mediation is a suitable process may include:

- 1) Is there a desire to continue the relationship of the parties?
- 2) Do the parties wish to manage (or terminate) their relationship amicably?
- 3) Is there a willingness to enter into negotiations or have a dialogue?
- 4) Is there hostility or distrust between the disputing parties?
- 5) Do the parties want a rapid resolution of the dispute or a more rapid resolution than might be achieved through other available processes?
- 6) Do the parties prefer to keep control over the outcome?
- 7) Do the parties seek tailored solutions other than the relief available in accordance with the applicable provision (usually monetary relief)?
- 8) Are there multiple conflicts or issues in dispute between the parties, some of which could be negotiated/mediated? and

9) Are there multiple parties involved with differing interests?

Not all factors need to be present at the same time or for all disputing parties. Disputing parties may wish to revisit their assessment of the suitable dispute resolution process, as such assessment may change over time, especially if surrounding circumstances change.

Separate from the question of whether mediation is a suitable dispute resolution process is the question of whether the parties have an agreement to resort to mediation. Some investment contracts and investment agreements contain provisions on mediation. If mediation is not specifically provided for in an applicable investment instrument, parties are free to agree to mediate on an *ad hoc* basis, which has occurred in practice,

7 What Support does ICSID Provide to Mediations?

ICSID is the only international organization that offers investment-specific mediation rules. The services ICSID provides to mediations it administers include:

- 1) A dedicated staff team is available throughout a mediation to provide information and guidance on investment mediation. Should parties wish to suspend an ongoing arbitration and commence mediation on all or parts of the dispute, the ICSID Secretariat offers separate teams to handle the two processes.
- 2) Upon request, the ICSID Secretariat will convey offers to mediate to the other party (MR 6);
- 3) Parties may request ICSID's assistance with the appointment of the mediator (MR 13(3) and (4));
- 4) Parties and mediators are supported in all administrative and logistical aspects of the mediation by a team of ICSID staff ((M)AFR 2), including meeting organization, and advanced technological support for remote meetings;
- 5) ICSID handles all financial aspects of a mediation (e.g., requesting, holding and managing advance payments made by the parties to cover the costs of the mediation, processing of mediator fees and expenses, etc) ((M)AFR 6-8);
- 6) ICSID provides any other special service requested by the parties in connection with the mediation ((M)AFR 9);
- 7) ICSID provides a cost-effective fee structure (currently no registration fee and an hourly charge for staff time);
- 8) ICSID certifies that a mediation took place, which helps parties to comply with the requirements of the Singapore Convention or other requirements possibly established in Investment Treaties requiring mediation as a pre-condition (MR 22);

8 The Mediator – Role, Qualifications and Appointment

8.1 The Mediator's Role

The mediator facilitates the parties' negotiations to reach a mutually agreeable solution. Accordingly, mediators do not decide the dispute for the parties, but rather they support the parties in resolving the issues themselves through negotiation. The mediator does not make judgments concerning past conduct or give legal, financial, or other expert advice. When appropriate, the mediator assists the parties to assess the strengths and weaknesses of their views through techniques such as reality testing and risk assessment.

8.2 Mediator Qualifications

Given the role of the mediator, it is important to select an experienced mediation professional, with excellent procedural/mediation process competence. Ideally, a mediator should have training in a variety of communication and negotiation styles and be versed in the tools to assist the parties to develop mutually acceptable solutions, considering the parties' needs, interests, concerns, constraints and motivations. Disputing parties wishing to appoint a mediator may contact the ICSID Secretariat for assistance.

8.2.1 What are Competency Criteria for Mediators?

Standards and competency criteria for investor-State mediators have been developed in recent years.¹ These include:

- 1) Experience serving as mediator;
- 2) Mediation training, including any accreditation as a mediator by an internationally recognized organization;
- 3) Experience in international dispute resolution involving States or State entities (in investment or other matters), including different forms of negotiation, mediation and conciliation;
- 4) Experience working in or with governments or public entities;

¹ Several documents identify standards and competency criteria, including an [Appendix to the 2012 IBA Rules \(Appendix B\)](#), the [Energy Charter Secretariat's 2016 Investment Mediation Guide](#), and the [IMI's 2016 Competency Criteria for Investor-State Mediators](#).

- 5) Understanding of the context and framework of investor-State disputes, including economic, legal, social, and cultural considerations;
- 6) Demonstrated competence in dealing with cross-cultural relationships; and
- 7) The ability to conduct the mediation in a timely manner.

8.2.2 Does the Mediator have to be Impartial and Independent?

There is general consensus that the investment mediator should be impartial and independent of the parties, which is reflected in MR 12(1)).

8.2.3 Are there any Nationality Limitations for Mediators?

Under the ICSID Mediation Rules, there is no nationality limitation for mediators, and the mediator could have the same nationality as any of the disputing parties. However, parties can agree to exclude certain nationalities if they wish, and they may consider familiarity with the language, customs, and culture of the disputing parties as a relevant consideration during their mediation.

8.2.4 Does the Mediator Need to be an Expert in Investment Law?

Given the mediator's role as a negotiation facilitator, practical mediation process experience and competence are key to exercising the position. Additional investment law expertise could be beneficial to probe the strengths and weaknesses of a party's stated position; however, it is not essential as the mediator does not decide the legal dispute or otherwise perform a legal assessment of the merits of a claim. Should the parties desire an independent legal opinion in relation to any disputed matter, they may agree to appoint a legal expert to provide such opinion to the parties and the mediator.

8.3 How is the Mediator Appointed?

One of the core principles in mediation is that the mediator is appointed by agreement of the parties. This is also reflected in MR 13(1) for ICSID Mediation.

Unlike arbitrations which are typically conducted by a 3-member tribunal, mediations are conducted by 1 or 2 mediators, each appointed by party agreement. The MR do not require particular mediator qualifications, although the parties are free to agree on any specific qualifications they see fit (MR 12).

Parties may agree on a named candidate to serve as mediator or on a procedure for the appointment of the mediator. Should the parties be unable to agree either on a person or a procedure, they may request assistance from the ICSID Secretary-General, who could assist in the identification of candidates for appointment, develop an appointment procedure or provide any other assistance helpful to the parties (MR 13(3)). Should the parties be unable to reach agreement on whether to appoint one or two mediators, the default method in MR 13(2) is one mediator. A default appointment process assists parties to overcome any impasse during the early stages of the process (MR 13(4)). Once appointed, the mediator(s) provide(s) a declaration

addressing matters such as the mediator's independence, impartiality, availability, and commitment to maintain the confidentiality of the mediation (MR 14(3)-(6)).

8.4 What is Co-Mediation and when is it suitable?

Disputing parties may consider the appointment of two mediators, which is called co-mediation. In co-mediation, both appointees serve as mediators and they are appointed jointly by the parties (MR 13(1)). Co-mediation requires the mediators to possess sophisticated team-working skills to jointly facilitate the parties' negotiations. The appointment of two mediators may be considered beneficial by the parties in particularly complex situations surrounding the dispute, if a large number of disputing parties are involved or when the parties consider that particular geographic, gender, racial or cultural diversity is helpful to the successful facilitation of the parties' negotiations.

9 Role of Other Mediation Participants

Besides the mediator and the parties, mediations may be attended by lawyers, experts and in some cases by non-disputing parties whose input would be beneficial for the resolution of the disputed issues.

9.1 What is the Role of the Parties in a Mediation?

The parties work with the mediator to outline the issues in dispute and explore potential options for settlement. The size and composition of each party's team is typically discussed between the parties and the mediator at the outset of the mediation.

While it is helpful to have a team member vested with settlement authority present throughout the mediation, it may not always be possible given structural or organizational aspects (e.g. need for approval/sign-off from a ministry or ministries or cabinet on the side of the State party, or a board of directors or corporate oversight body on the investor's side). It is desirable to have at least one member within a team who has a clear line of communication to the relevant entity with settlement authority. Parties will be asked early in the mediation to share information regarding their settlement authority and any applicable approval process (MR 20(4)).

9.2 What is the Role of Lawyers in a Mediation?

The role of a legal representative in a mediation differs from their role in an adjudicative process such as arbitration. The lawyer in a mediation does not focus on legal argument and evidence regarding breach of legal obligations. Instead, consistent with the nature of the mediation process, the role of lawyers in mediation shifts to a collaborative, transactional approach, assisting the client to explore their interests and goals, and advocating for these with a focus on future-oriented solutions to disputed issues within the applicable legal framework.

The tasks of a lawyer in a mediation may include:

- 1) Educating the party (their client) about the mediation and available investment mediation rules;
- 2) Drafting a request for mediation for the client;
- 3) Assisting with the selection of a mediation professional;
- 4) Assisting with the exploration of interests and constraints;
- 5) Providing to the client a realistic assessment of strengths and weaknesses of the client's legal case;
- 6) Assisting in drafting written statements for use in the mediation (MR 19);
- 7) Identifying and compiling relevant documents to be used in the mediation;
- 8) Discussing procedural aspects of the mediation with the client (i.e., the Mediation Protocol, MR 20 and 21);
- 9) Preparation of opening statements, and
- 10) Drafting of the detailed terms of an eventual settlement agreement.

9.3 What is the Role of Experts in a Mediation?

A party to a mediation may want to retain experts, such as financial experts or subject-matter experts, to advise it on non-legal aspects relevant to generating offers or finalizing detailed terms of settlement.

In addition, the parties may agree to jointly appoint independent experts to provide the parties and the mediator with expert advice on legal, financial, or other matters. The type of participation and the scope of the expert's input will be determined by the parties and the mediator.

9.4 Do Non-disputing Parties Have a Role in Mediation?

In certain circumstances, the input of non-disputing parties might be relevant or helpful to the resolution of the dispute (for example a non-disputing party or a non-disputing treaty party). The flexibility of the mediation process allows the parties to consider whether any non-disputing party participation is desired and determine the scope and procedural framework for such participation (MR 19). The scope of such participation may range from consultation during the process on specific points, providing written statements for consideration by the parties or more active participation as agreed between the parties and the mediator.

10 Conduct of an ICSID Mediation

Mediation as a facilitated form of negotiation is a structured process. The ICSID mediation process consists of three main phases following the mediator's appointment:

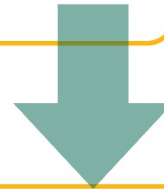
- 1) **An initial phase**, during which the parties provide the mediator with initial written statements, and the mediator works with the parties to develop the mediation protocol on the basis of which the mediation will be conducted (MR 19 & 20);
- 2) **The opening, exploration, and negotiation phase**, during which the parties will present their opening statements and the mediator works with the parties to explore the parties' interests, needs, and constraints. The parties and the mediator develop a general framework for settlement and identify aspects important to the disputing parties for the settlement of the dispute. Afterwards, the mediator assists the parties to develop options for settlement, exchange offers and counteroffers (MR 17-18, 20-21);
- 3) **A concluding phase**, during which the parties will develop and memorialize detailed terms of settlement and obtain the approval of relevant entities as needed. If no agreement is reached, the mediation will terminate (MR 22).

The chart below visualizes the three stages of an ICSID mediation process:

Conduct of an ICSID Mediation

Initial Phase - Initial Written Statements, Initial Contacts, First Session (MR 19 & 20)

The parties provide the mediator with initial written statements and develop the protocol for the conduct of the mediation, covering issues such as language, venue(s), confidentiality and disclosure of information.



Opening, Exploration & Negotiation Phase - Facilitated Dialogue (MR 17, 18, 21)

During the opening, the parties will provide opening statements. Subsequently, the mediator explores with each party its needs and interests. With the mediator's assistance, the parties develop a framework for settlement and negotiate possible options for settlement of disputed issues. Tools used may include: joint and separate meetings, seeking expert advice (e.g. legal, financial, etc), field trips.



Concluding Phase - Settlement Agreement/ Termination of the Mediation (MR 22)

If the parties reach a mutually agreeable solution of all or parts of the dispute, they will develop the detailed terms of settlement; if no settlement is reached, the parties may agree to terminate the mediation.

10.1 What are the Mediator's Duties in an ICSID Mediation?

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. (MR 17(1)). In so doing, the mediator has a duty to maintain impartiality and independence throughout the mediation and assumes a continuing disclosure obligation in this regard (MR 14(6)). The mediator is obligated to conduct the mediation in a cost-effective and timely manner (MR 21(1)) and commits to the confidentiality of the process (MR 14). The mediator is further obliged to treat the parties equally and provide them with a reasonable opportunity to participate in the mediation (MR17).

The mediator may meet with the parties jointly or separately (MR 17(4)). Shuttle diplomacy by way of separate meetings is a common feature in mediation and allows the mediator to explore with each party its interests and concerns and to develop possible options for settlement. Information shared by a party with the mediator in caucus is confidential unless the disclosing party expressly authorizes disclosure to the other party (MR 17(4)). The mediator will develop the Mediation Protocol with the parties (MR 20), and the mediation is conducted based on this Protocol (MR 21(1)). The mediator does not have the authority to impose a resolution of the dispute on the parties (MR 17(1)) and may make recommendations only upon the joint request of the parties (MR 21(3)).

10.2 What are the Parties' Duties in an ICSID Mediation?

Mediation as facilitated negotiation requires the active participation of the disputing parties; without it, the mediation cannot proceed. During the mediation, the parties have a duty to cooperate with the mediator and with one another (MR 18), which includes the duty to respond to requests for information from the mediator (MR 21(2)), and to conduct the process in a cost-effective and timely manner (MR 18).

10.3 In-Person and Remote Meetings

While many mediations have been conducted by way of in-person meetings, the use of video-conferencing technology for mediation sessions has significantly increased in the recent past. Remote meetings are cost-effective and offer the advantage that no additional travel time is required from any participant. Therefore, such meetings can be a useful tool either for some selected sessions (for example sessions to prepare the first session or separate meetings between the mediator and each party) or the entire mediation (MR 19). The use of in-person meetings and remote meetings and the parties' preferences are considered by the parties and the mediator at the outset and throughout the mediation.

10.4 Without Prejudice Principle

For facilitated negotiations to succeed, the parties must feel able to engage without concern that information exchanged during the mediation will be used by the other party in another proceeding, either as evidence or otherwise. To facilitate this, parties typically agree that the 'without prejudice' principle applies to information exchanged during the mediation. This means that a party may not rely on any document, statement, admission, or offer of settlement made by one party, or anything said by the mediator, in any other proceeding, unless the parties jointly agree to waive

this privilege (MR 11). This principle is also reflected in a number of recent investment agreements providing for mediation (see [ICSID's Overview of Investment Treaty Clauses on Mediation](#)).

10.5 Confidentiality, Limits to Confidentiality and Affirmative Information Disclosure Obligations

Confidentiality obligations, limitations on confidentiality and affirmative disclosure requirements applicable to an investment mediation can be found in various instruments. These obligations and limitations may (1) be prescribed in international agreements applicable to the mediation; (2) be established by party agreement; (3) be set out in the investment mediation rules agreed upon by the parties; and (4) be established by the domestic legal framework applicable to the mediation and/or applicable to its participants (including for example domestic rules applicable to lawyers or mediator).

The ICSID Mediation Rules provide in MR 10 that information relating to the mediation, including documents generated in or obtained during the mediation shall be confidential unless the parties agree otherwise, the information or document is independently available, or disclosure is required by law. Affirmative disclosure requirements may be found for example in domestic legislation applicable to public-private partnerships (the [World Bank's PPP Disclosure Framework](#) which is illustrative of the objectives and scope of such disclosure regimes), public financial management regulations, budget transparency legislation or freedom of information legislation.

11 ICSID's Mediation Capacity-Building Programs

Capacity-building plays an important role in any field, including investment mediation. Capacity-building is needed for various persons involved in the process:

11.1 Expansion of the pool of skilled Investment Mediators

To expand the existing pool of experienced mediators skilled to mediate investment disputes, ICSID, the Energy Charter Treaty (ECT) Secretariat and the Centre for Effective Dispute Resolution (CEDR) have organized 3-day training courses for investor-State mediators. This course has been offered in-person and online on an annual basis. For course offerings, please visit the [ICSID website](#).

11.2 Mediation Training for Government Officials

In response to requests from States, ICSID, the ECT Secretariat and CEDR have developed a training course providing government officials with an overview of the mediation process and basic tools to effectively participate in an investment mediation. For course offerings, please visit the [ICSID website](#).

ICSID has also provided mediation skills training to government officials through the International Finance Corporation's Investor Grievance Mechanism.

11.3 Mediation Training for Investment Dispute Practitioners

ICSID offers training for investment dispute practitioners. For course offerings, please visit the ICSID website.

11.4 Customized Investment Mediation Training Modules

ICSID also offers customized trainings on investment mediation upon request. Please contact the ICSID Secretariat for details (ICSIDsecretariat@worldbank.org).

11.5 Raising Awareness and Information Dissemination about Investment Mediation

ICSID works together with other international organizations, academic institutions and professional associations to raise awareness of and disseminating information about investment mediation to stakeholders. Conference announcements, publications and other activities are posted on the [ICSID website](#).

ICSID Documents on Investment Mediation

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