

“ICSID’s New Mediation Rules: A Small but Positive Step Forward”

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In August this year the International Centre for the Settlement of Investment Disputes (ICSID) announced its fourth and most extensive changes to dispute resolution rules, to date.¹ The proposed amendments only concern the rules and not the Convention itself. ICSID Additional Facility (AF) rules will now be applicable to cases where neither respondent nor claimant is the ICSID Contracting State or national of a Contracting State, whereas previously at least one side had to be a (national of a) Contracting State. Thus, these dispute settlement facilities will be more widely available world-wide.

These proposals are important not only due to their scale, but also some unique aspects. ICSID is proposing a new dispute settlement mechanism, the Mediation Rules, deemed to be part of the ICSID AF Rules. These will be the first set of institutional rules for investor-state mediation (ISM) released by the world’s main arbitral institution for investment disputes. The International Bar Association published ISM Rules in 2012² but so far these seem to have had little impact in practice.³ The new ICSID Rules are likely to have more impact, but States like Australia should do more than just agree to AF Rules in its investment treaties or contracts.

Voluntary Mediation Option

ICSID AF Mediation Rules provide a procedure for voluntary ISM. The proposal covers two grounds for initiating such mediation. One is when there is an existing agreement to mediate in the treaty that carries the consent to ISDS (Rule 3). Yet only a very small number of international

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¹ ICSID Website, <https://icsid.worldbank.org/en/amendments>.

² Burch, Micah and Nottage, Luke R. and Williams, Brett G., Appropriate Treaty-Based Dispute Resolution for Asia-Pacific Commerce in the 21st Century (May 24, 2012). University of New South Wales Law Journal, Vol. 35, No. 3, pp. 1013-1040; Sydney Law School Research Paper No. 12/37. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065636.

³ For a rare reported instance of the IBA being used, in a dispute with the Philippines, see Nottage, Luke R. and Thanitcul, Sakda, International Investment Arbitration in Southeast Asia: Guest Editorial (November 1, 2016). Sydney Law School Research Paper No. 16/95. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862272.

investment agreements (IIAs) specifically mention mediation by including advance consent to mediate in their ISDS provisions. Indeed, according to the introductory text of the proposal, there is only one IIA that has a mandatory mediation clause incorporated in its ISDS provision as a pre-condition to arbitration – the Investment Agreement for the COMESA Common Investment Area (not yet in force).⁴ However, Article 26 of COMESA arguably does not provide for mandatory mediation as a pre-condition to arbitration. A mandatory pre-condition would arise if mediation were to be the only required step before arbitration, but that is not the narrative of Article 26. According to Article 26, parties shall seek the assistance of a mediator ‘where no alternative means of dispute settlement are agreed upon...’⁵

The second ground for initiating mediation according to the ICSID Mediation Rules is where there is no prior agreement to mediate (Rule 4). In this case, a party interested in mediation can still invoke the process and seek the consent of the other party through the assistance of ICSID’s Secretary-General. This provision should be welcomed in the present reality where most IIAs have no mention of agreements to mediate. It makes these Mediation Rules accessible to everyone who may be interested.

Rule 13 of the ICSID AF Mediation Rules covers the process of the First Session. What could require further attention is the Rule 13(4) (a), stating ‘At the first session or within any other period as the mediator may determine, each party shall: identify a representative who is authorized to settle the dispute on its behalf...’. If and when Australia agrees on these Mediation Rules, it may be beneficial for the State to identify beforehand the person(s) having authority to mediate.

Unlike the 2012 IBA Mediation Rules, the ICSID AF Mediation Rules allow the mediator to engage in caucusing i.e. conduct meetings and communications with the parties separately. This is something opponents of ISM might protest due to the sensitivity of caucusing, but it should not be problematic because the mediator is not envisaged to be the same person as the arbitrator(s) appointed if the dispute proceeds to arbitration.

⁴ Proposals for Amendment of the ICSID Rules — Working Paper, Annex R: (Additional Facility) Mediation Rules, Volume 3, ICSID Secretariat, August 2, 2018, p. 748. Available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf.

⁵ Article 26 (3)(4) the Investment Agreement for the COMESA Common Investment Area. Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>.

Rule 14(4) of the ICSID AF Mediation Rules preclude mediator recommendations for settlement terms, absent party agreement, thus favouring a more facilitative style mediation even for investor-state disputes. This contrasts with the more formalised ICSID Additional Facility Conciliation Rules (draft Annex C),⁶ including proposed Rule 30(2)-(3) allowing settlement recommendations by the conciliators, which is similar to Rule 30(3) of the current 2006 Conciliation Rules.⁷ Where the parties choose Conciliation Rules instead under the ICSID Convention, applicable where a claimant investor is from a home state as well as the respondent host state are member states of this multilateral treaty, Convention Article 34(1) also allows conciliators to make settlement recommendations.

Transparency

Rule 16 provides the parties with the opportunity to keep their mediation process and settlement agreement as confidential as the parties choose it to be, with two exceptions: (a) when the disclosure is required by law or for the purposes of the enforcement of such agreement and (b) in compliance with the proposed amendments to the AF Rules, Rule 4, according to which only the benchmark information is published by ICSID: the fact of mediation, parties to the mediation and the identity of the appointed mediators. Another major setback commonly identified by opponents of ISM is the secrecy or (less pejoratively) the lack of transparency of this dispute settlement mechanism. Due to this characteristic it has commonly been believed that mediation was not suitable for ISDS because public awareness and transparency constitute a crucial component of a dispute settlement regime where one of the parties is a State. Stakeholders in ISDS have expressed growing concerns that mediation will be used to bypass transparency⁸ and also have access to universal enforceability through the 2018 UN Convention on International Settlement Agreements.⁹ A major argument against settlement in ISDS is that it will be used to keep cases confidential and remove them from public scrutiny. This leaves the impression that

⁶ https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf

⁷ https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf

⁸ See eg Hafner-Burton, Emilie Marie and Puig, Sergio and Victor, David G., Against Secrecy: The Social Cost of International Dispute Settlement (May 7, 2017). 45 Yale Journal of International Law, 2017, Forthcoming; Available at SSRN: <https://ssrn.com/abstract=2720706>.

⁹ Schnabel, Timothy, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements (August 27, 2018). Available at SSRN: <https://ssrn.com/abstract=3239527>

settlements are only used to keep cases confidential and that every other arbitration outcome other than amicable settlement ensures transparency.

In fact, Ana Ubilava conducted an empirical study of all known and concluded treaty-based investor-state claims, over 1990-2017, to determine the confidentiality levels of (ICSID and other) arbitration cases that had been settled during the arbitral process but before the final arbitral award had been rendered.¹⁰ In 43% of cases the fact of the settlement, identity of the parties, and the settlement amounts that had been amicably agreed by the parties was found to be publicly available. This figure is nonetheless significantly lower in comparison to investor-won cases where awarded amounts are known in 98% of cases. Based on these results, we can assume that settled cases are indeed more susceptible to confidentiality than any other ISA outcome.

It is possible that the settlement amounts of such cases are known because the dispute had originally been registered for arbitration and once the claimed amounts were publicly known, it was in the interests of the State to then publicize the settlement amounts in order to show to their public that they did not strike a bad deal. The picture could therefore be very different if the mediation is initiated before the arbitration is registered. Under the proposed new ICSID Rules, the benchmark information does not include the dispute amount. So, there may be a greater chance for such mediation settlement agreements and their settlement amounts to stay confidential. If this is of concern for States like Australia, however, they can add in their individual treaties a provision requiring fuller transparency.

Meanwhile, having general procedural rules ready and available through ICSID is better than having none. This is because there may well already be numerous cases of investors and States engaging into conflict resolution procedures with third-party neutrals behind closed doors. There is no database where any such conflict resolution process is or could be registered. Nobody knows what is said or agreed upon during such communications, which means total secrecy. Through the mediation settlement procedure offered by ICSID, the international community will,

¹⁰ Nottage, Luke R. and Ubilava, Ana, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (August 6, 2018). *International Arbitration Law Review*, Vol. 21, Issue 4, 2018; Sydney Law School Research Paper No. 18/46. Available at SSRN: <https://ssrn.com/abstract=3227401>

at the very least, have information on the existence of such a dispute that is being attempted to be settled amicably during a particular mediation process, even if the terms of the final mediation settlement agreement do not automatically become public.

Enforceability of Settlement Agreements

In addition, while the ICSID AF Mediation Rules provide the procedural rules for the initiation and the conduct of ISM procedure, they do not provide for the enforcement mechanism for the settlements that result from successful mediations. The ICSID commentary on its proposed Rules refers in this respect to the 2018 Singapore Mediation Convention. That assumes first that the Convention, which provides for enforceability of “commercial” settlement agreements subject to exclusions similar to (but more extensive than) those listed in the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. This is plausible, in light of this and other UN instruments or commentaries referring to “commercial” agreements, as discussed by Em Prof Catharine Kessedjian at the International Law Association conference in Sydney recently.

In addition, if the enforceability of mediation settlement agreements is believed to be essential, the efficiency of these Mediation Rules depends on the Singapore Convention on Mediation. That begins on the premise that amicable settlements take the form of a contract, a new agreement between the parties, and often parties are unable or unwilling to comply with its terms. Some ISDS stakeholders fear that the non-binding nature of amicable settlements could cause similar non-compliance issues and hence prolong the already complex investor-state dispute settlement process. The non-enforceable nature of mediation settlement agreements is often named to be the main reason why amicable settlements in any form or shape, be it mediation or conciliation are believed to be unsuitable for investor-state disputes, which could also explain the underutilization of ICSID Conciliation Rules. This was the reason why in 2014 UNCITRAL began working on the convention responsible for uniform enforceability of such mediation settlement agreements both in purely commercial and investment dispute settlement platforms. Now, ICSID is offering procedural rules for ISM while UNCITRAL is offering a convention for enforcement of settlements reached during such mediations.

Interestingly, however, Ubilava's empirical study of 541 concluded, investor-state treaty-based arbitration cases tells a different story. Once the arbitration process is initiated, parties to investor-state arbitration are not prohibited from attempting amicable settlement of their dispute. When such settlements are successful parties usually have two options: to terminate the arbitration process based on party consent or to embody their settlement agreements in an arbitral award. By embodying their settlements into the arbitral awards, parties attribute the simple settlement contract with the enforceability powers granted by the ICSID or the New York Conventions. The empirical analysis found that approximately one-third of the total number of studied cases were amicably settled by the parties before the final award was reached by the tribunal. If the non-enforceable nature of amicable settlement agreements (including mediation) is a critical concern, then logically the majority of such settlement agreements would be expected to have been embodied into arbitral awards. This has not been the case, however. The study showed that 60% of all known amicably settled ISA cases were in fact not embodied. These findings challenge but do not undermine, the importance of the Singapore Convention. Even if the numbers show that non-enforceability does not seem to be an issue to many parties who settle, the existence of such a convention and its enforcement mechanism should only encourage the non-believers to engage more in amicable settlement negotiations with stronger feeling of security. Australia should therefore consider adopting the Singapore Convention, as part of its response to the new ICSID Rules.

Conclusion

The ICSID proposal for ISDS is therefore a useful step towards improving the ISDS system but should be accompanied by other initiatives and may not have a large impact in practice. Providing mandatory mediation as pre-condition to arbitration would be much more far-reaching, but it is questionable whether ICSID could or should do this through Rule rather than Convention revisions. This may be so even for AF Arbitration Rules, but all the more so for investor-state dispute settlement under the ICSID Convention (where the claimant is from a member state and the respondent is one too). For such a mandatory pre-step to be possible, allowing cost and time savings as well as more creative dispute settlement options, Australia should meanwhile consider consenting to multi-tier ISDS clauses in its IIAs. This could be

achieved when replacing all Australia's existing BITs and FTAs, especially when superseded by broader regional FTAs, as well as by starting to implement such multi-tier dispute settlement clauses in future IIAs.