

## ICSID's New Mediation Rules approved by member states ICSID 新调解规则获成员国批准



### Introduction

On 21 March 2022, member states of the World Bank's International Centre for Settlement of Investment Disputes ("ICSID") adopted a new set of rules for mediation in investment treaty disputes (the "ICSID Mediation Rules"), which will come into effect on 1 July 2022.

In this article, we take a deep dive into the Mediation Rules, one of the pioneer institutional mediation rules designed specifically for investor-State disputes.

### Scope of Application

There are two pre-requisites for the use of the Mediation Rules, pursuant to Rule 2(1). First, the dispute must relate to an investment involving a State or a Regional Economic Integration Organisation (such as ASEAN or the African Union). Second, the parties must consent in writing to engaging in mediation under the Rules.

Rule 2(2) makes clear that the involvement of an agent of the State is sufficient to trigger the jurisdiction of the Mediation Rules, provided that the State approves the consent to mediate of the agent which is the party to the mediation (unless the State notifies ICSID that such approval is not required).

Unlike arbitrations and conciliations under the ICSID Convention and Additional Facility, there is no requirement for the State to be an ICSID Member State to utilise the Mediation Rules. This is to be welcomed given the expected rise in demand for investor-State mediation, particularly amidst investor-State arbitration's legitimacy crisis.

### 简介

2022年3月21日，世界银行国际投资争端解决中心（“ICSID”）的成员国通过了一套新的投资条约争端调解规则（“ICSID 调解规则”），该规则将于2022年7月1日开始生效。

下面，我们将分析这套专为解决投资者与东道国之间的争端而设计的 ICSID 调解规则。

### 启示

根据该《ICSID 调解规则》第 2(1)条，使用该规则有两个先决条件。首先，争议必须涉及一个国家或区域经济一体化组织（如东盟或非洲联盟）的投资。其次，各方必须以书面形式同意根据《ICSID 调解规则》进行调解。

《ICSID 调解规则》第 2(2)条明确规定，东道国代理人的参与就可以满足《ICSID 调解规则》下的管辖权，前提是东道国批准同意其代理人参加调解（除非该东道国通知 ICSID 不需要这种批准）。

与 ICSID 公约和附加机制下的仲裁和调停不同，一个国家并非必须是 ICSID 的成员国才能使用该《ICSID 调解规则》。鉴于对投资者与东道国之间的调解的需求预计会不断增加，特别是在投资者与东道国之间的仲裁的合法性危机中，这一点是值得欢迎的。

## ICSID Mediation Process

Under the Mediation Rules, the key steps in the investor-State mediation process can be broken down into: (i) request for mediation; (ii) appointment of mediator; (iii) initial written statements; (iv) first mediation session and mediation protocol; and (v) termination of the mediation.

We explore each stage in further detail below.

### (i) Request for mediation

To commence the mediation process, a Request for Mediation is required. The process of filing a Request for Mediation depends on whether there is a pre-existing agreement to mediate, which can usually be found in the relevant investment treaty.

If there is a pre-existing agreement to mediate, any party can file (whether independently or jointly with the other party) a Request for Mediation with the ICSID Secretary-General and pay the required fee. The Secretary-General will then transmit the request to the other party.

If there is no pre-existing agreement to mediate, any party can file a Request for Mediation with the Secretary-General and pay the required fee. If the other party rejects or fails to respond within 60 days from the transmission of the Request (or within such other period as the parties may agree), the Secretary-General will inform the parties that no further action will be taken. Similarly, the Secretary-General will communicate an acceptance of the Request to the requesting party.

In both scenarios, the Request for Mediation must contain the information set out in Rules 5(3) and 5(4). Additionally, if there is no pre-existing agreement to mediate, Rule 6(2)(b) requires the Request for Mediation to also include an offer to mediate pursuant to the Mediation Rules.

Once the parties have agreed to mediate and have filed the Request for Mediation, the Secretary-General will consider if the jurisdiction of the Mediation Rules is engaged. If so, the Secretary-General will register the Request for Mediation.

## ICSID 调解过程

根据《ICSID 调解规则》，投资者与东道国之间的调解程序有以下几个关键步骤：(i) 调解请求；(ii) 指定调解员；(iii) 首次书面陈述；(iv) 第一次调解会议和调解议程；及(v) 终止调解。

我们在下文中进一步探讨每个阶段。

### (i) 调解请求

要开始调解程序，需要提出调解请求。提出调解请求的过程取决于是否有事先存在的调解协议，该等协议通常可以在相关投资条约中找到。

如果事先达成调解协议，任何一方都可以向 ICSID 秘书长提交（无论是独立还是与另一方联合）调解请求，并支付所需费用。然后，秘书长将把该请求转交给另一方当事人。

如果事先没有达成调解协议，任何一方也可以向秘书长提交调解请求，并支付所需费用。如果另一方拒绝或未能在请求提交后的 60 天内（或各方同意的其他期限内）作出回应，秘书长将通知各方，不会采取进一步行动。同样，秘书长将向请求方通报接受请求的情况。

在这两种情况下，调解请求必须包含《ICSID 调解规则》第 5(3)条和第 5(4)条所规定的内容。此外，如果没有事先达成调解协议，《ICSID 调解规则》第 6(2)(b)条要求调解请求要包括根据《ICSID 调解规则》进行调解的要约。

一旦各方同意进行调解并提交调解请求，秘书长将考虑是否属于《ICSID 调解规则》下的管辖权。如果是，秘书长将登记该调解请求。

## (ii) Appointment of mediator

After the Request for Mediation is registered, the next step is to appoint the mediator in accordance with Rules 12 to 14. In summary, the appointment process is as follows:

- Since the parties can appoint either one or two mediators, the parties shall inform the Secretary-General on the agreed number of mediators within 30 days of the registration of the Request for Mediation, failing which there shall be one mediator.
- The parties shall jointly appoint the mediator within 60 days of the date of registration. Failing that, the Secretary-General may appoint the mediator on request. In this scenario, the Secretary-General shall consult with the parties as far as possible on any required expertise or qualification of the mediator, and shall use best efforts to appoint the mediator within 30 days of the request.
- If the parties fail to take any step to appoint the mediator within 120 days after the registration of the mediation, the mediation is terminated.

Under the Mediation Rules, mediators have an ongoing obligation to promptly disclose any change of circumstance which may affect their impartiality or independence. In a similar vein, Rule 14(7) prohibits mediators from double-hatting, i.e. a mediator may not act as arbitrator, counsel, expert, judge or witness in proceedings relating to issues in dispute in the mediation, unless the parties agree otherwise.

## (iii) Initial written statements

After the mediator has been appointed, Rule 19 requires each party to file a brief written statement with the Secretary-General within 15 days of the Request for Mediation being transmitted to the appointed mediator unless the mediator directs otherwise, but in any event before the first mediation session. The statements will then be circulated by the Secretary-General to all parties and the mediator.

## (ii) 指定调解员

调解请求经登记后，下一步是根据《ICSID 调解规则》第 12 至 14 条指定调解员。简而言之，过程如下：

- 由于各方可以指定一名或两名调解员，各方应在调解请求登记后 30 天内将商定的调解员人数通知秘书长，否则将只有一名调解员。
- 各方应在登记之日起 60 天内共同指定调解员。如果做不到，秘书长可应要求指定调解员。在这种情况下，秘书长应尽可能就调解员所需的任何专门知识或资格与各方协商，并应尽最大努力在提出指定请求后 30 天内指定调解员。
- 如果各方在调解登记后 120 天内没有采取任何措施指定调解员，则调解终止。

根据《ICSID 调解规则》，调解员有义务及时披露任何可能影响其公正性或独立性的情况及变化。同样地，第 14(7)条禁止调解员身兼数职，即调解员不得在与调解中的争议有关的程序中担任仲裁员、律师、专家、法官或证人，除非各方另有约定。

## (iii) 首次书面陈述

在指定调解员以后，第 19 条规定，除非调解员另有指示，否则每个当事方应在调解请求转交给被指定的调解员后 15 天内向秘书长提交一份简短的书面陈述，但无论如何应在第一次调解会议前提交。然后，秘书长将向所有当事方和调解员分发这些陈述。

The initial written statements will describe the issues in dispute and each party will set out their views on the respective issues, as well as the proposed procedure for the mediation.

#### **(iv) First mediation session and mediation protocol**

Pursuant to Rule 20, the first mediation session must be held within 30 days of the registration of the Request for Mediation, unless agreed otherwise. The purpose of the first session is for the mediator and the parties to agree the protocol of the conduct of the mediation and any other procedural matters (including next steps, key dates, whether further written statements or information are required, and whether expert evidence is required). Rule 20(3) sets out a useful list of topics to be considered at the first session.

More importantly, at the first session, the parties are expected to identify persons or entities who are authorised to negotiate and settle issues on their behalf, and to describe the process involved in concluding and implementing any settlement agreement.

Once the mediation protocol has been decided at the first session, Rule 21 requires the mediator to conduct the mediation in accordance with this protocol. This means that, after the first session, the process and timeline for the remainder of the mediation will be dictated by the parties' requirements (by consent), thereby affording great flexibility to the parties.

#### **(v) Termination of the mediation**

The mediation will conclude when the Secretary-General issues a notice of termination. Rule 22 provides that a notice of termination may be issued following the occurrence of specified events, including: (i) the parties signing a settlement agreement; (ii) the parties agreeing to terminate the mediation; (iii) any party withdrawing from the mediation; or (iv) the mediator determining that there is no likelihood of resolution through mediation.

首次书面陈述将描述争议的焦点，各方阐述他们各自对争议的看法，以及拟议的调解程序。

#### **(iv) 第一次调解会议和调解议程**

根据第 20 条，除非另有约定，第一次调解会议必须在调解请求登记后 30 天内举行。第一次会议的目的是让调解员和各方当事人商定进行调解的议程和任何其他程序性事项（包括接下来的步骤、关键日期、是否需要进一步的书面声明或资料，以及是否需要专家证据）。第 20(3)条规则列出了一份有用的清单，列出了在第一次会议上要考虑的议题。

更重要的是，在第一次会议上，各方应确定被授权代表他们谈判和解决争端的人士或实体，并说明缔结和执行任何和解协议的程序。

一旦在第一次会议上确定了调解议议程，第 21 条要求调解员按照该议程进行调解。这意味着，在第一次会议之后，其余的调解程序和时间表将按照各方的要求（经同意）来决定，从而为各方提供了很大的灵活性。

#### **(v) 终止调解**

调解将在秘书长发出终止通知时结束。第 22 条规定，终止通知可在发生特定事件后发出，这些事件包括 (i) 各方签署和解协议；(ii) 各方同意终止调解；(iii) 任何一方退出调解；或(iv) 调解员认定不能通过调解解决争端。

## Other Important Considerations

In practice, the Mediation Rules may be used as a stand-alone process or may be combined with other processes such as "med-arb", "arb-med", or "arb-med-arb". This means that the mediation may be conducted prior to or in parallel with an arbitration.

Other important considerations for parties involved in the Mediation Rules include:

- **Modification of the rules:** Pursuant to Rule 3(2), the parties can agree to modify any part of the Mediation Rules save for Rules 1 to 7.
- **Settlement:** If full settlement is reached in the mediation and arbitration proceedings are taking place in parallel, parties may agree to discontinue the arbitration and request the arbitral tribunal to incorporate the mediated settlement agreement into the arbitral award. If partial settlement reached, parties may continue to arbitrate the remaining disputed issues.
- **Costs:** Rule 9 provides that all fees and expenses of the mediator and administrative charges are to be borne equally by the parties, unless otherwise agreed. Further, the parties are to bear their own costs in relation to the mediation.
- **Confidentiality and without prejudice nature:** Rule 10 expressly provides for the confidentiality of the mediation, including the documents generated and obtained during the mediation. Further, the fact that the parties have engaged in the mediation is also confidential. Such confidentiality can be waived if the parties agree to do, or if the information is independently available outside the mediation, or if disclosure is required by law. Similarly, Rule 11 prohibits the parties from relying on any position, admission, views expressed or information obtained during the mediation in any other proceedings, unless the parties agree otherwise.

## 其他重要考量

实践中,《ICSID 调解规则》可以作为一个独立的程序使用,也可以与其他程序相结合,如“调解-仲裁”、“仲裁-调解”或“仲裁-调解-仲裁”。这意味着,调解可以在仲裁之前或与仲裁同时进行。

参与《ICSID 调解规则》的各方的其他重要考虑因素包括:

- **规则修改:** 根据第 3(2)条规则,各方当事人可以同意修改《ICSID 调解规则》的任何部分,但第 1 至 7 条规则除外。
- **和解:** 如果在调解中达成完全和解,而仲裁程序又在同时进行,当事人可协议终止仲裁,并要求仲裁庭将经调解达成的和解协议纳入仲裁裁决。如果达成部分和解,当事人可以继续对剩余的争议问题进行仲裁。
- **费用:** 第 9 条规定,除非另有约定,否则调解员的所有费用和开支以及行政费用由各方平等分担。此外,各方当事人应自行承担与调解有关的其它费用。
- **保密性和无损权益性:** 第 10 条明确规定了调解的保密性,包括调解期间产生和获得的文件。此外,各方参与调解的事实也是保密的。如果各方同意这样做,或者如果信息在调解之外可以独立获得,或者如果法律要求披露,则可以放弃这种保密性。同样,第 11 条禁止各方在任何其他程序中依据调解中的任何立场、承认、表达的观点或获得的信息,除非各方另有约定。

- Authority to settle: It is important to ensure that the State officials involved in the mediation have the necessary process set up to discuss and obtain approval of the final settlement terms. This is particularly so where it is expected that the settlement terms will change substantially over a short period of time.
- Legal representation: Rule 4 permits parties to be represented or assisted by their legal representatives throughout the mediation. Lawyers with proper training in investment mediation will be able to provide essential legal analysis and help parties understand their BATNA (Best Alternative to Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement) and to increase the likelihood of not only a successful mediation but more importantly a successful implementation of the mediated settlement agreement.
- 授权和解：重要的是要确保参与调解的国家官员已历经必要的程序并已获得对最终和解条款经授权有权作出批准。如果预计和解条款将在短时间内发生重大变化，则对和解的授权更为重要。
- 律师代表：第 4 条允许各方在整个调解过程中由其律师代表或协助。在投资调解方面受过适当培训的律师将能够为客户提供必要的法律分析，帮助当事人了解他们的 BATNA（谈判协议的最佳替代方案）和 WATNA（谈判协议的最差替代方案），并增加调解成功的可能性，更重要的是确保经调解的和解协议最终得到成功实施。

## How Stephenson Harwood can help

Please feel free to get in touch with any questions on the ICSID Mediation Rules or on investor-State disputes in general. Rovine Chandrasekera, a partner in our London office and the global head of the firm's international arbitration practice, has experience in investor-State disputes and also sits on the Centre for Effective Dispute Resolution's Advisory Board for investor-State mediation. Dr Fan Yang, a partner in our Hong Kong office, also sits on this board, in addition to being a CEDR-accredited mediator for investor-State disputes.

## 罗夏信律师事务所如何提供帮助

如有任何关于 ICSID 调解规则或关于有效解决投资者与东道国之间争端的任何问题，请随时与我们联系。Rovine Chandrasekera 是我们伦敦办公室的合伙人，也是本所国际仲裁业务的全球负责合伙人，他在投资者与东道国争端解决方面有丰富的经验，同时也是有效争端解决中心（CEDR）投资调解咨询委员会的成员。扬帆博士是我们香港办公室的合伙人，她也是该咨询委员会的成员。此外，扬帆博士还是经 CEDR 认证的投资者与东道国争端解决调解员。

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