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Draft provisions on mediation

Note by the Secretariat

Contents

	<i>Page</i>
Introduction	2
I. Text of the draft provisions on mediation	2
II. Annotations to the draft provisions on mediation	4



Introduction

At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS).¹ At its fifty-fourth session in 2021, the Commission commended the Working Group for its consideration of other means of alternative dispute resolution, such as mediation² as a reform element. At its fifty-fifth session in 2022, the Commission expressed its satisfaction with the progress made by the Working Group³ and encouraged the Working Group to submit to the Commission for its consideration texts on alternative dispute resolution mechanisms.⁴

At its thirty-ninth session in 2020, the Working Group requested the Secretariat to work with interested organizations to develop and adapt model provisions providing for mediation that could be used in investment treaties or a potential multilateral instrument on ISDS reform. During its forty-third and forty-fifth sessions, the Working Group undertook further work on the preparation of such provisions.⁵ In accordance with the request of the Working Group, this note contains draft provisions on investment mediation based on the deliberations and decisions of the Working Group at its forty-fifth session.⁶

The Working Group prepared the draft provisions on mediation as follows and the draft guidelines on investment mediation (A/CN.9/1150) to encourage the use of mediation as a means of resolving investment disputes in a cost-effective manner, while preserving the relationship between the investor and the State (A/CN.9/1124, para. 145).

I. Text of the draft provisions on mediation

Draft provision 1 (Availability and commencement of mediation)⁷

1. “Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (the “mediator”) lacking the authority to impose a solution upon the parties to the dispute.
2. The parties should consider mediation to settle an international investment dispute amicably.
3. The parties may agree to engage in mediation at any time, including after the commencement of any other dispute resolution proceeding.
4. A party may invite the other party in writing to engage in mediation in accordance with draft provision 2 (the “invitation”).
5. The other party should make all reasonable efforts to accept or reject the invitation in writing within 30 days of receipt of the invitation. If the inviting party does not receive an acceptance within 60 days of receipt of the invitation, that party may elect to treat it as a rejection of the invitation.

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 264.

² *Ibid.*, *Seventy-sixth session, Supplement No. 17 (A/76/17)*, para. 197.

³ *Ibid.*, *Seventy-seventh session, Supplement No. 17 (A/77/17)*, para. 186.

⁴ *Ibid.*, para. 194(c).

⁵ The deliberations and decisions of the Working Group at its thirty-ninth, forty-third and forty-fifth sessions are set out in documents A/CN.9/1044, paras. 36–40, A/CN.9/1124, paras. 173–200, and A/CN.9/1131, paras. 14–35 respectively.

⁶ A/CN.9/1131, para. 34.

⁷ For approval of draft provision 1 at the forty-fifth session of the Working Group, see A/CN.9/1131, para. 18; for consideration of the matter, see A/CN.9/1131, paras. 16–18, 25–28; and A/CN.9/1124, paras. 148–157, 165, 167–169) and A/CN.9/1044, paras. 29–40.

6. The mediation shall be deemed to have commenced on the day on which the other party accepts the invitation.
7. The parties shall agree to conduct the mediation in accordance with these draft Provisions and:
 - (a) The United Nations Commission on International Trade Law (UNCITRAL) Mediation Rules;
 - (b) The International Centre for Settlement of Investment Disputes (ICSID) Mediation Rules;
 - (c) The International Bar Association (IBA) Rules for Investor-State Mediation; or
 - (d) Any other rules.
8. Unless provided otherwise in the rules agreed by the parties pursuant to paragraph 7:
 - (a) The parties shall appoint a mediator within 30 days of the commencement of the mediation. If a mediator is not appointed within that period of time, the parties shall agree on an institution or a person that shall assist them in appointing a mediator; and
 - (b) The mediator shall convene a meeting with the parties within 15 days after the appointment and the parties shall attend that meeting.
9. The parties may at any time agree to exclude or vary any of these draft Provisions.
10. Where any of these draft Provisions is in conflict with a provision of the law applicable to the mediation from which the parties cannot derogate, including any applicable instrument or court order, that provision of the law shall prevail.

Draft provision 2 (Information required in an invitation)⁸

The invitation to engage in mediation referred to in draft provision 1(4) shall contain at least the following information:

- (a) The name and contact details of the inviting party and its legal representative(s) and, if the invitation is made by a legal person, the place of its incorporation;
- (b) Government agencies and entities that have been involved in the matters giving rise to the invitation;
- (c) A description of the basis of the dispute sufficient to identify the matters giving rise to the invitation; and
- (d) A description of any prior steps taken to resolve the dispute, including information on any pending claim.

Draft provision 3 (Relationship with arbitration and other proceedings to resolve the dispute)⁹

1. Upon the commencement of the mediation, a party shall not initiate or continue any other proceeding to resolve the dispute until the mediation is terminated.

⁸ For approval of draft provision 2 at the forty-fifth session of the Working Group, see [A/CN.9/1131](#), para. 21; for consideration of the matter, see [A/CN.9/1131](#), para. 20; [A/CN.9/1124](#), paras. 160, 161 and 164.

⁹ For approval of draft provision 3 at the forty-fifth session of the Working Group, see [A/CN.9/1131](#), para. 24; for consideration of the matter, see [A/CN.9/1131](#), paras. 22–23; [A/CN.9/1124](#), paras. 161–165, 170.

2. If the mediation commences while another proceeding to resolve the dispute is in progress, the parties shall request the suspension of that proceeding pursuant to the rules applicable to that proceeding.

Draft provision 4 (Use of information in other proceedings)¹⁰

A party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made, or views expressed by the other party or the mediator during the mediation.

Draft provision 5 (Settlement agreement)¹¹

The parties should consider whether the settlement agreement resulting from mediation meets the requirements set forth in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018).

II. Annotations to the draft provisions on mediation

1. General considerations

1. Considering that mediation was still being underutilized to resolve investment disputes, the Working Group reiterated the need to encourage parties to conduct mediation where appropriate without creating an obligation (A/CN.9/1131, para. 14). In view of the existing mediation rules (both institutional and ad hoc)¹² that comprehensively address all aspects of the mediation proceeding, the draft provisions on mediation have been prepared to reflect existing treaty language and to allow the parties to choose from and refer to existing mediation rules for the conduct of mediation.

2. Draft provision 1 — Availability and commencement of mediation

2. Draft provision 1 reflects the voluntary, consensual, and flexible nature of mediation (A/CN.9/1131, para. 16). It provides for a clear legal basis for mediation, including for the commencement of mediation.
3. Paragraph 1 includes the definition of mediation as found in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the “Singapore Convention on Mediation”).
4. Paragraph 2 emphasizes the usefulness of mediation without imposing an obligation upon the parties to mediate and encourages parties to consider mediation as a means to settle international investment disputes amicably.
5. Paragraph 3 signals the availability of mediation, and that the parties may agree to engage in mediation at any time.
6. Paragraph 4 notes that a party may invite the other party or parties to engage in mediation in writing.
7. Paragraph 5 provides a time period (within 30 days of receipt of the invitation) for the other party to make all reasonable efforts to respond to the invitation in writing. If a party does not respond within 60 days of the receipt, the inviting party may treat the absence of a response as a rejection of the invitation to mediate.

¹⁰ For approval of draft provision 4 at the forty-fifth session of the Working Group, see A/CN.9/1131, para. 31; for consideration of the matter, see A/CN.9/1131, paras. 29–30, A/CN.9/1124, para. 166.

¹¹ For approval of draft provision 5 at the forty-fifth session of the Working Group, see A/CN.9/1131, para. 33; for consideration of the matter at previous sessions, see A/CN.9/1124, para. 32; A/CN.9/1124, paras. 170–171.

¹² Namely, the UNCITRAL Mediation Rules (2021); ICSID Mediation Rules (2022); and the IBA Rules for Investor-State Mediation (2012).

8. Paragraph 6 provides a default rule on the commencement date, which is the day on which the other party accepts the invitation. Parties are free to agree that the mediation commences on a different date.

9. Paragraph 7 lists available mediation rules, which can be incorporated by reference. The current version of the mediation rules are the UNCITRAL Mediation Rules 2021; the ICSID Mediation Rules 2022; and the IBA Rules for Investor-State Mediation 2012. These rules address several procedural issues and therefore need not be addressed in the draft provisions. For example, the Working Group decided to not address the issues of confidentiality in the draft provisions as they were generally dealt with in mediation rules (A/CN.9/1131, paras. 28).

10. Subparagraph 8(a) provides the default rule on the appointment of the mediator – that the parties shall agree on the mediator within 30 days and that in case they are not able to agree on the mediator, they shall agree to an institution or a person to assist them. Subparagraph 8(b) requires the mediator to convene a first meeting within 15 days after his or her appointment and requires all parties to attend that meeting. Both subparagraphs are subject to any mediation rules agreed by the parties.

11. Paragraph 9 provides that the parties are free to exclude or vary any of the draft provisions at any time.

12. Paragraph 10 provides a conflict clause to ensure the coherent interaction between the draft provisions and provisions in the applicable mediation laws from which the parties cannot derogate. In such a case the provisions of the law prevail.

3. Draft provision 2 — Information required in an invitation

13. Draft provision 2 lists the information to be included in an invitation to engage in mediation, in order to enable the other party to obtain an overview of the matters at issue as well as to understand and assess them efficiently.

4. Draft provision 3 — Relationship with arbitration and other dispute resolution proceedings

14. Draft provision 3 addresses the question how the parties' agreement to engage in mediation would impact other dispute resolution proceedings, such as arbitration or domestic court proceedings. The provision aims to avoid concurrent proceedings.

15. Paragraph 1 obliges the parties to not initiate or continue any other proceeding to resolve the dispute upon the commencement of mediation and until it is terminated.

16. Paragraph 2 addresses a situation where the mediation commences while another proceeding to resolve the dispute is already in progress. In such cases, the parties are required to notify the arbitral tribunal or the court in writing to request for a suspension of the proceeding. However, the suspension would be determined pursuant to the rules applicable to that proceeding.

5. Draft provision 4 — Use of information in other proceedings

17. Draft provision 4 ensures that the active engagement in mediation does not prejudice any legal position of a party participating in a mediation in any other dispute resolution proceeding. Views, proposals, admissions, or willingness to settle expressed during the mediation proceeding should not be used to the detriment of the party who made them in other proceedings, unless such information or document is independently available.

6. Draft provision 5 — Settlement agreement

18. Draft provision 5 draws the attention of the parties to the formal requirements set forth in the Singapore Convention on Mediation and aims to facilitate the enforcement of the settlement agreement in any State Party to the Singapore Convention on Mediation. It would also be possible to enforce a settlement agreement to which a State is a party to the mediation in that State, if that State did not formulate

the reservation provided for under article 8(1)(a) of the Singapore Convention on Mediation.¹³

7. The title of the draft provisions and its implementation

19. The Commission may wish to note that the draft provisions have been prepared for use by States to include in investment treaties and a multilateral instrument on ISDS reform (A/CN.9/1124, para. 35). In that context, the Commission may wish to consider ways to implement the draft provisions including how to promote their use by States. The Commission may wish to further consider how the draft provisions should be referred, for example as “UNCITRAL [Model][Draft] Provisions on [Investment Mediation][Mediation for Investment Disputes][Mediation for Investor-State Dispute Settlement]”.

¹³ Article 8(1)(a) reads as follows: “A party may declare that it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration”.