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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on mediation

Note by the Secretariat

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I. Introduction

1. At its thirty-ninth session, the Working Group noted the general interest in pursuing further work on alternative dispute resolution (ADR) methods, including mediation, with a view to ensuring that such methods could be more effectively used (A/CN.9/1044, para. 35). It was observed that those methods were still largely underutilized in the settlement of international investment disputes. The structural, legislative and policy impediments to their use, in particular for Governments, were noted (A/CN.9/1044, para. 35). The Working Group, therefore, requested the Secretariat to work with interested organizations, including with the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID), to develop or adapt: (i) rules for mediation in the investor-State dispute settlement (ISDS) context; (ii) model clauses providing for mediation that could be used in investment treaties or a potential multilateral instrument on ISDS reform; and (iii) guidelines for effective use of mediation (A/CN.9/1044, paras. 36–40).

2. The UNCITRAL Mediation Rules were adopted by the Commission at its fifty-fourth session in 2021 updating the 1980 UNCITRAL Conciliation Rules. As the UNCITRAL Mediation Rules are of a generic nature, they can be used for ISDS. There are also specific rules designed for ISDS, such as the newly adopted ICSID Mediation Rules (2022)[1] and the International Bar Association (IBA) Rules on Investment for Investor-State Mediation (2012).[2] In that light, the Working Group may wish to consider whether to develop a specific set of rules on investment mediation, which might, however, be redundant considering the existing standards. Therefore, this Note focuses on the development of model treaty provisions which would broaden the offer to mediate (see section III below). Document A/CN.9/WG.III/WP.218 provides draft guidelines on mediation, which also aim at fostering the use of mediation in ISDS.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic.[3] This Note does not seek to express a view on the reform options, which is a matter for the Working Group to consider.

[1] See *ICSID Mediation Rules*, International Centre for Settlement of Investment Disputes (ICSID), available at https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf.

[2] See *IBA Rules for Investor-State Mediation*, International Bar Association, available at www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.

[3] Such published information include: the 2016 Energy Charter Secretariat, Investment Guide Energy Charter Conference: Guide on Investment Mediation (adopted 19 July 2016), available at: www.energychartertreaty.org/fileadmin/user_upload/Guide_Investment_Mediation.pdf and the Model Instrument on Management of Investment Disputes, available at: www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf; ICSID, Background Paper on Investment Mediation, July 2021, available at: https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf, and Overview of Investment Treaty Clauses on Mediation (ICSID overview), July 2021, available at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf; K. Fan, Mediation of Investor-State Disputes: A Treaty Survey, Journal of Dispute Resolution (2020), No. 2, pp. 327–342, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549661; C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), available at: www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf (AF Study); F. Nitschke, The ICSID Conciliation Rules in Practice, in: Mediation in International Commercial and Investment Disputes, edited by C. Titi, K. Fach Gómez, p. 1, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257031 (Nitschke).

II. Background information

4. Mediation has been mentioned as an element of reform in submissions by States ("Submissions") in preparation for the third phase of the Working Group's mandate. Nearly all Submissions referring to mediation highlighted that it was less time- and cost-intensive than arbitration, and that its increased use would address concerns regarding cost and duration of ISDS.[4] In addition, mediation was considered as offering a high degree of flexibility and autonomy to the disputing parties and allowing the preservation of long-term relationships, thus serving the purpose of averting disputes and avoiding intensification of conflicts (A/CN.9/1044, para. 27).[5]

5. The following provides an overview of existing investment treaties that contain a reference to mediation. Without such reference States often face difficulties in using mediation.

A. Mediation under existing investment treaties

6. A vast majority of investment treaties provide for a specified time period that must elapse before a claimant can submit a claim to arbitration.[6] This period of time is meant to allow the parties to reach an amicable settlement and in certain treaties, the lapse of the time period is a pre-condition to the commencement of arbitration.[7] Often referred to as the "cooling-off" or the "amicable settlement" period, the time period ranges from 3 months to 2 years.[8] However, because of the need to coordinate among the different agencies, a period of 3 to 6 months is generally too short to commence and conclude mediation.

7. While some treaties do not indicate how this period of time is to be used, a few treaties explicitly provide for the use of mediation.[9] The following outlines the different approaches in existing investment treaties:

- No reference to mediation nor any other form of non-binding ADR;
- A general indication that the parties to the dispute should attempt to resolve the dispute "amicably" during the time period;[10]
- Reference to mediation as (i) one of the means for reaching amicable settlement:[11] (ii) together with consultation and negotiation,[12] or (iii) with a

[4] Submission from the Government of Thailand (A/CN.9/WG.III/WP.147, para. 7); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163, p. 7, annex I); Submission from the Government of Türkiye (A/CN.9/WG.III/174, p. 3, bullet point 7); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41); Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru (A/CN.9/WG.III/WP.182, p. 6, annex).

[5] Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5, bullet point 4).

[6] The AF study estimates that more than 70 per cent of the investment treaties contain such a clause.

[7] Some older treaties required investors to choose between either conciliation or arbitration. This exclusive choice might be the reason why conciliation was not utilized, see Nitschke, p. 3.

[8] Some treaties additionally require that local remedies must be exhausted, see e.g. India-Kyrgyzstan BIT (2019), Article 15; Belarus-India BIT (2018), Article 15; Morocco-Nigeria BIT (2016), Article 26.5.

[9] The AF Study indicates that 44 per cent of the treaties with a cooling-off period do not mention any means. Forty-two per cent mention negotiation, 10 per cent mention consultations, 3 per cent mention conciliation and 1 per cent mention mediation.

[10] For example: Peru-UK BIT (1993), Article 10; Indonesia-Netherlands BIT (1994), Article 9; Georgia-Israel BIT (1995), Article 8.

[11] See Austria-Kyrgyzstan BIT (2016), Article 20, Iraq-Saudi Arabia BIT (2019), Article 12(1); Austria-Nigeria BIT (2013), Article 20.

[12] See Colombia-Singapore BIT (2013), Article 13(2); Mali-Morocco BIT (2014) Articles 9(1) and (2), Egypt-Mauritius BIT (2014), Article 10(1); Kazakhstan-United Arab Emirates (2018), Article 10(1); Türkiye-Ghana BIT (2016), Article 14; Netherlands Model BIT (2019), Article 17; see also Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) (CPTPP), Article 9.18 ("Consultation and Negotiation 1. In the event of an investment dispute, the

provision allowing investors to choose mediation among different options on the basis of an advance consent of the respondent State, making mediation optional for the investor;[13]

- A requirement that a disputing party shall give favourable consideration to a request for mediation by the other disputing party;[14]

- A requirement that both disputing parties undertake mediation as a precondition for submitting the claim to arbitration;[15] and

- An obligation for the claimant investor to participate in mediation (or conciliation), at the State's election.[16]

8. Most investment treaties refer to mediation during the pre-arbitration stage or during the cooling-off period. However, some treaties highlight that the disputing parties can refer their dispute, by mutual agreement, to ad hoc or institutional

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claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.").

[13] For example, Bahrain-Russian Federation BIT (2014), Article 8; Mainland and Hong Kong Closer Economic Partnership Arrangement Investment Agreement (CEPA 2017), Articles 19 and 20.

[14] See, for example, the Netherlands Model BIT (2019), Article 17.1 which provides: "[a] disputing party shall give favourable consideration to a request for negotiations, conciliation or mediation by the other disputing party". The EU-Singapore IPA (2018), Article 3.2 and the EU-Viet Nam IPA (2019), Article 3.2 both include provisions requiring the recipient to "give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt." Canada-EU Comprehensive Economic and Trade Agreement (CETA) (2016) contains a similar provision (Annex 29(C), Article 2(2)).

[15] The Costa Rica-United Arab Emirates BIT (2017), Article 14 (1) foresees two stages before the investor is entitled to proceed to arbitration: the first stage being consultations and negotiation (for which 3 months are reserved), followed "by a third-party procedure such as conciliation or mediation before an authorized centre of the Party complained against in the dispute". Article 14(4) states that: "For greater certainty, compliance with the requirements pursuant to paragraphs 1, 2 and 3 regarding consultation and negotiation and third-party procedures is mandatory and a condition precedent to the submission of the dispute to arbitration". See also the Rwanda-United Arab Emirates BIT (2017), Article 12: "Mediation and Conciliation, 1. In lieu of, or in addition to, the mandatory negotiation requirement, the parties to the Investor-State Dispute may agree to mediation or conciliation, without prejudice to their rights, claims and defences under this Agreement. 2. The parties to the Investor-State Dispute shall agree upon the rules applicable to (i) the mediation or conciliation of the dispute and (ii) the method of appointment of the mediator or conciliator." See further the EU-Viet Nam IPA (2019), which provides for a three-tier dispute resolution: first, negotiations or mediation, which are then followed by "consultations," and if the dispute is not resolved, the disputing parties may resort to arbitration; Article 3.31(1) provides that "[t]he disputing parties may at any time … agree to have recourse to mediation". Having stipulated this multi-tier method for dispute resolution, the EU-Viet Nam IPA (2019) also conditions, in Article 3.35, the submission of a claim to arbitration not only on (i) a minimum period of 6 months having passed since the request for consultations and 3 months having passed since the notice of intent to submit an arbitration claim, but also on (ii) the condition that "the legal and factual basis of the dispute was subject to prior consultations."

[16] The Australia-Indonesia CEPA (2019) provides for consultations in the initial phase and then stipulates, in Article 14.23(1), that "[i]f the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party [i.e., the State party to the dispute] may initiate a conciliation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement." Article 14.26(2)(b) further conditions the commencement of an arbitration on 120 days having elapsed since the State initiated the conciliation process, where the State has elected to do so. The provisions of the Indonesia-Korea CEPA (2020) are similar. The Mauritius-UAE BIT (2015) also provides for "consultations and negotiations" in the initial phase, and thereafter makes mediation or conciliation mandatory for investors, at the State's election. Article 10(3) provides that "When required by the Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice, it shall be submitted to the competent authority of that Contracting Party or arbitration centres thereof, for conciliation and mediation." Article 10(4) provides that the investor can initiate an arbitration "if the dispute cannot be settled amicably within six months from the date of the start of the conciliation and mediation process." The Armenia-UAE BIT (2016) contains similar provisions.

mediation before or during the arbitral proceedings,[17] thereby allowing mediation at any time, subject only to an agreement to mediate between the investor and the State.[18]

- *Procedural guidance*

9. The vast majority of investment treaty provisions that expressly provide for mediation or other ADR methods do not provide detailed rules that parties can apply. They usually address one or two procedural aspects with minimal guidance.[19]

10. On the other hand, a few recent treaties include detailed provisions on the mediation procedure. Where detailed provisions have been included in investment treaties, they have addressed the commencement of the process, and how the process interacts with other types of proceedings relating to the same dispute.[20]

B. Identified need to foster the use of mediation in ISDS

11. While data suggest that around 20 per cent of ISDS cases are settled, it is not possible to ascertain whether the settlements have been reached through mediation.[21] As part of the obstacles to use mediation, the Working Group mentioned the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement, the legal certainty required for officials to be

[17] See also Colombia-Türkiye BIT (2014), Article 12(4), which reads as follows: "Nothing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation before or during the arbitral proceeding." See also Colombia-United Arab Emirates BIT (2017), Art. 15(2); and Japan-Morocco BIT (2020), which states in Article 16(3) that "Nothing in this paragraph precludes the use of non-binding, third party procedures, such as good offices, conciliation or mediation."

[18] Australia-China FTA (2015), Article 15(6); Eurasian Economic Union-Viet Nam FTA (2015), Article 14.5; EU-Singapore IPA (2018), Annex 6, Article 2(1), and EU-Viet Nam IPA (2019), Annex 9, Article 3(1). Other examples include the Burkina-Faso-Canada BIT (2015), Article 23; CETA (2016), Article 8.20; the Netherlands Model BIT (2019), Article 17(1); and the Thailand Model BIT (2012), Article 10(4).

[19] Such treaties in this last category include: the COMESA IA (2007), Article 26(4); the Belgium-Luxembourg Model BIT (2019), Article 19(C), which designates the Secretary-General of ICSID as appointing authority to appoint a mediator where the parties request (see also CETA (2016), Article 8.20).

[20] These treaties include: CETA (2016), Annex 29(C); the EU-Mexico Global Agreement (agreement in principle in 2018), Section Resolution of Investment Disputes, Article 4; the EU-Singapore IPA (2018), Annex 6; and the EU-Viet Nam IPA (2019), Annex 9. Some ISDS clauses in recent investment treaties have clarified the time frame within which mediation can be used and its possible interaction with other dispute settlement methods: for example, the EU-Viet Nam IPA (2019) provides to agree to mediation at any time, making explicit that this option can be exercised even if an arbitration proceeding has already been commenced, and mandates that, if there is already an arbitral tribunal constituted at the time of the mediation, the arbitral tribunal shall stay its proceedings until the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.

[21] According to the IIA Issues Note in Investor-State Dispute Settlement Cases: Facts and Figures 2020, dated September 2021 (https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf), p. 3, about 20 per cent of cases are settled, without specifying any details. ICSID statistics indicate that about 34 per cent of ICSID cases were settled or otherwise discontinued, which might indicate the use of ADR by the parties to some extent (see the ICSID caseload – statistics, issue 2021-2 statistics, p. 13 https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf). To date, ICSID has registered 12 conciliation cases, including 2 additional facility conciliation cases, and no case under the ICSID Fact-Finding Additional Facility Rules. The Permanent Court of Arbitration has to date not administered mediation proceedings based on a treaty, nor the Energy Charter Secretariat and neither has the SCC administered any investor-State mediation. The ICC has administered only one treaty-based mediation, which ended unsuccessfully due to the difficulty in involving all the relevant agencies on the State side into the procedure as well as general elections that resulted in a change of administration and of the representatives of the agencies involved (A/CN.9/WG.III/WP.190, para. 43).

involved in such settlements, and the need to ensure that the necessary approval process was set up, including that those negotiating the settlements had the necessary authority to agree to a settlement. It was said that policies as well as the legal framework for encouraging mediation would need to be developed or strengthened (A/CN.9/1044, para. 29; see also document A/CN.9/WG.III/WP.190, paras. 29–48).[22]

12. As indicated above (see paras. 6 and 7), very few treaties offer mediation and fewer regulate the mediation procedure. If the investment treaty does not refer to mediation or does not include a provision requiring the disputing parties to undertake mediation, an ad hoc agreement to mediate will be required to conduct mediation. Concluding such an agreement is an additional procedural step, requires efforts and time and for government officials the necessary authority to engage in a voluntary mediation. The strengthening of the offer to resort to mediation is therefore an important condition for States and investors alike.

III. Draft provisions on the use of mediation

13. Where mediation is provided for in the underlying investment treaty, there is a clear policy basis to conduct mediation (A/CN.9/1044, para. 29). Therefore, States should consider providing for mediation in their investment treaties,[23] so as to establish favourable conditions for its use.[24] Leaving the decision as to whether to use mediation fully in the hands of the parties, as they should be best placed to assess whether mediation would be appropriate, had indeed proven unsuccessful. There are different possible options for developing model provisions for use in investment treaties which, as indicated below, could be conducive to the use of mediation by the disputing parties.

14. When preparing draft provisions on mediation to foster its use, the Working Group may wish to consider the following:

[22] A study on obstacles to settlements in ISDS concluded that it might be challenging for the State to settle. The reasons identified are manifold and include fear of public criticism, particularly if the case is a sensitive or politicized one, with extensive media coverage, fear of allegations of corruption, or future prosecution for corruption, fear of setting a precedent, difficulties regarding access to public funds to organize the defence, as well as difficulties regarding intergovernmental coordination in short time frames. Such challenges may be particularly prevalent in cases involving multiple stakeholders in agencies and ministries across various levels of government who may all need to approve or at least provide input to the settlement (Report: Survey on Obstacles to Settlement of Investor-State Disputes, National University of Singapore, NUS Centre for International Law Working Paper 18/01, by Chew, S., Reed, L., Thomas, J.C. QC, available at https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf; see also Echandi, R. "Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention", pp. 15–19).

[23] See for example Law 26 November 2021 No. 206 of Italy entitled "Delegation of powers to the Government for the efficiency of civil proceedings and for the revision of the discipline of the alternative dispute resolution instruments and urgent measures for the rationalization of the procedures concerning the rights of individuals and families as well as concerning forced execution". (21G00229) (OJ General Series n.292 of 09-12-2021). Article 1 para. 4 letter g reads as follows: "4. In the exercise of the delegation referred to in paragraph 1, the legislative decree or decrees amending the rules on mediation and assisted negotiation shall be adopted in compliance with the following principles and guidelines: (…) g) provide for the representatives of the public administrations referred to in Article 1(2) of Legislative Decree No 165 of 30 March 2001 that *conciliation in the mediation procedure or in court shall not give rise to accounting liability, except in the case of wilful misconduct or gross negligence, consisting in inexcusable negligence resulting from a serious breach of the law or misrepresentation of the facts*" (emphasis added). See also the example in Ecuador with the Suplemento del Registro Oficial No. 524, 26 de Agosto 2021, Última Reforma: Decreto 165 (Suplemento del Registro Oficial 524, 26-agosto-2021) Reglamento a la Ley de Arbitraje y Mediación (Decreto No. 165).

[24] States may also wish to adapt their domestic laws and investment contracts. Additionally, States should have in place adequate legislation that would ensure that government officials have the necessary delegation of power to conduct a mediation procedure and are not personally liable for the mediation procedure or its outcome.

- Whether to include mediation as one of the options disputing parties can choose from or to make mediation a stand-alone option;
- How to provide sufficient predictability in the mediation procedure to allow States and investors to have confidence in mediation; and
- Whether to provide for recourse to mediation at all times or whether there should be a specific timeframe that would be appropriate and sufficient for resorting to mediation; and
- The interplay with other dispute resolution means.

15. The following draft provisions have been prepared for possible inclusion in investment treaties or a multilateral instrument on ISDS reform and may need to be adjusted should they become part of mediation rules or domestic legislation.

A. Availability of mediation and level of conduciveness (Draft provision 1)

1. Availability of mediation (Option A)

16. Option A refers to mediation as an available means for resolving international investment dispute. As the focus of the provisions lies solely on mediation, other non-adversarial dispute resolution methods are not mentioned.

Option A

1. The disputing parties may, at any time including after the commencement of any other international investment dispute resolution proceedings, agree to engage in mediation.

2. A disputing party may request another party at any time to engage in mediation in accordance with draft provision 3. The party so invited shall give favourable consideration to the request and accept or reject it in writing within [15] days of receipt of the request.

3. The agreement to engage in mediation shall be in writing and signed by the disputing parties. The disputing parties may determine the applicable rules of mediation in that agreement.

4. The disputing parties shall endeavour to agree on the mediator. If the parties cannot agree on the mediator within 15 days after their agreement to mediate, the parties may request that an institution or person as agreed by the parties selects the mediator.

17. Under Option A, mediation is expressly mentioned as a possible means for resolving disputes. Providing mediation when disputes first arise may help prevent them from escalating, as mediation often facilitates parties to find a mutually agreed solution.

18. Expressly permitting mediation during the course of an arbitration proceeding may also allow the parties to resolve some elements or potentially the entirety of the dispute, which would consequently reduce the scope of the matters remaining for a binding decision and hence save costs and time and ensure the greatest flexibility with the safeguards of a procedure to the disputing parties. The Working Group may wish to consider clarifying in the draft provision that parties may also submit only parts of a broader dispute to mediation. Reference is made to "international investment dispute" in paragraph 1 as currently defined in the draft Code of Conduct.[25]

19. While paragraph 1 foresees that the disputing parties would agree to engage in mediation, paragraph 2 foresees that mediation could commence upon invitation ("the

[25] See A/CN.9/WG.III/WP.216, article 1 (a).

request") by a party and acceptance by the other. The second sentence of paragraph 2 requires the recipient of the request to respond within a specified time period. Providing for such an obligation may ensure early establishment of a line of communication, thereby enhancing the potential for an amicable settlement. The request and acceptance thereof should be both in writing (see draft provision 3(1)).

20. While Option A provides for mediation to be an available method at any time, the Working Group may wish to consider specifying a time period within which the use of mediation would be encouraged before a claim is submitted to arbitration. Mediation at an early stage can be an alternative method, as the dispute has not crystallized and it may be easier to find creative solutions to solve the dispute, those not limited to financial compensation. Under Option A, a disputing party may withdraw from the mediation at any time.

Agreement to mediate and the mediation procedure

21. While mediation is a flexible method to settle investment disputes, it is important to provide sufficient guidance to the parties at the outset and define the precise steps to be followed. Therefore, paragraph 3 suggests that the parties may agree on the applicable mediation rules as they usually contain all relevant rules, including on the commencement of the procedure, the appointment of mediators, the confidentiality and transparency requirements, the flow of communications, and the termination of the procedure.

22. The Working Group may wish to consider the detail that need to be included in the agreement to mediate, and whether it should be in writing and signed by the parties (see draft provision 4).

2. Automatic commencement of mediation and requirement of a meeting (Option B)

23. Option B would be more conducive to the use of mediation as it requires the parties to commence mediation. While it preserves the flexibility of the procedure, engagement in the procedure would be mandated.

Option B

1. To commence mediation, a party shall send a request to the other party in accordance with draft provision 3.

2. The disputing parties shall agree to appoint a mediator within [20] days after the receipt of the request, or such other period as they may agree. If the parties have not jointly appointed a mediator within that time period, the parties shall within 14 days agree on an institution or person that shall assist them in selecting a mediator.

3. The mediator shall convene a meeting which all disputing parties are required to attend. If any party wishes to withdraw from the mediation after having attended that meeting or at any time thereafter, it shall communicate the same in writing to the mediator, who shall terminate the mediation.

4. Mediation shall remain available to the disputing parties at any time, including after the commencement of any other international investment dispute resolution proceedings.

24. Option B foresees the automatic commencement of mediation, upon request of one of the parties. While Option A only highlights the availability of mediation, Option B would go a step further, as it provides for an undertaking of the parties to appoint a meditator and to attend at least a first, preferably joint, meeting set up by the mediator. The purpose of the first meeting is to inform parties about mediation, to give mediation a chance and to make sure, that parties would at least attempt mediation and are aware of the possibility. The second sentence of paragraph 3 is intended to give parties the necessary comfort to be able to withdraw from mediation

at any time after the first meeting. Paragraph 4 underlines that mediation remains available at any time.

3. Automatic commencement of mediation and determined settlement period (Option C)

25. The Working Group may wish to consider Option C which is identical to Option B except for paragraph 3. While Option B foresees the automatic commencement of mediation and the holding of a mandatory first meeting, Option C foresees the automatic commencement of mediation combined with a 9-month period during which mediation should be properly explored. The mediation process itself remains consensual. This means that the parties remain free to withdraw from the mediation at any time and retain control over whether to settle and over the terms of any agreed settlement. However, arbitration is available only after the period of 9-month lapses, unless the mediator determines that there is no likelihood of resolution through mediation.

Option C

1. To commence mediation, a party shall send a request to the other party in accordance with draft provision 3.

2. The disputing parties shall agree to appoint a mediator within [20] days after the receipt of the request, or such other period as they may agree. If the parties have not jointly appointed a mediator within that time period, the parties shall within 14 days agree on an institution or person that shall assist them in selecting a mediator.

3. If the disputing parties cannot reach a settlement agreement within [9] months after the receipt of the request for mediation, or if the mediator determines that there is no likelihood of resolution through mediation, the dispute may be submitted to any other international investment dispute resolution proceedings.

4. Mediation shall remain available to the disputing parties at any time, including after the commencement of any other international investment dispute resolution proceedings.

26. The time period provided for in paragraph 3 should give the parties sufficient time to mediate only after which other international investment dispute resolution proceedings could be commenced. Paragraph 3 suggest a 9-month period in line with amicable settlement periods found in existing treaties and as it would be a reasonable time frame to conduct an investor-State mediation while ensuring that related costs are limited. As only the commencement of the mediation is mandatory, neither party is required to mediate for the entire 9-month period. Even if parties do not settle the entire dispute through mediation, the procedure may lead to partial settlement and help parties to better understand the strengths and weaknesses of their case. Paragraph 4 clarifies that if the mandatory commencement of mediation did not end in a settlement, the parties would remain free to engage in a mediation procedure, on a voluntary basis, at any time thereafter.

4. Combining Options B and C

27. The approaches in both Option B and C are rarely found in investment treaties. However, inclusion of either option would guarantee that the disputing parties would engage in mediation. The two options might be combined, which would mean an automatic commencement of mediation, the mandatory first meeting and a 9-month period for the mediation.

28. Either option or a combination thereof could address potential concerns that proposing or accepting mediation is a sign of weakness. It would also provide a clear

policy basis for the State to engage in mediation.[26] Anchoring mediation in the legal framework would also obliviate concerns of personal liability by government officials involved.

29. In the domestic context, mandating the commencement of mediation has seen success in various jurisdictions. This policy tool is also seen as the most conducive option for the use of mediation and for ensuring that parties would become more familiar with it. A study found that a "mandatory mediation phase" requirement would be welcomed.[27] A matter that has raised some comments, however, relates to the relationship between direct negotiation and mediation, in particular whether mediation should be mandated only after direct negotiation. However, a staged or multi-tiered approach, which provides for direct negotiations first followed by mandatory mediation, has been described as inefficient. This suggests that mandatory mediation could be provided for in lieu of, or in addition to, direct negotiation in the cooling off period.[28]

30. The Working Group may wish to consider the situation where one of the parties refuses to meaningfully participate in the mediation process, and whether the other (diligent) party should be allowed to refer the dispute to another type of international investment dispute resolution: (i) after a short time period (e.g. 2 months); or (ii) only following a determination of the mediator that further efforts at mediation would not, in his or her opinion, contribute to a settlement of the dispute, as foreseen in paragraph 3 of Option C.

B. Relationship with arbitration and other dispute resolution proceedings (Draft provision 2)

31. The Working Group may wish to consider including a draft provision, which would address the use of mediation in parallel to arbitration or litigation. Some recent investment treaties have addressed this topic[29] as well as the impact that the initiation and conduct of a mediation may have on time limits.[30]

32. The Working Group may wish to consider draft provision 2.

Draft provision 2

1. Unless the parties agree otherwise, mediation shall continue while the dispute proceeds for resolution via any other international investment dispute resolution proceeding.

2. If the disputing parties agree to mediation while any other international investment dispute resolution proceeding is ongoing, and subject to its applicable rules of procedure, the disputing parties may request that such proceeding be suspended until the mediation is terminated.

33. Draft provision 2 foresees that arbitration or litigation processes could either continue and that applications can be made for the processes to be stayed while

[26] See Explanatory Note to the Model Instrument on Management of Investment Disputes, p. 17, available at: www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf.

[27] 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS MUL investors' survey, available at https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf, p. 24–25.

[28] See AF Study, p.7.

[29] For example, the EU-Viet Nam IPA (2019), which provides in Article 3.31 that parties may have recourse to mediation at any time even if an arbitration proceeding has already been commenced, and mandates that, if there is already an arbitral tribunal constituted at the time of the mediation, it "shall stay its proceedings until the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party".

[30] For example, the EU-Viet Nam IPA (2019) imposes a limitation period for the initiation of "consultations" (a step that itself follows the initial period of "negotiations or mediation" in this treaty's three-tier disputes clause). The treaty provides expressly that this timeframe is tolled for the period of any voluntary mediation that takes place prior to "consultations" (Article 3.31).

mediation commences. They aim at providing a framework for ensuring that mediation could proceed at any time.

C. Request to commence mediation (Draft provision 3)

34. There should be a clear provision on how to commence mediation, including a request for mediation and an acknowledgement of receipt of the request for mediation and, if needed, an agreement to mediate that, inter alia, would identify which entities of the State must/should be represented or participate.

35. The Working Group may wish to consider draft provision 3 regarding the request to commence mediation:

Draft provision 3

1. To commence mediation, a disputing party shall communicate to the other disputing party or parties a request in writing for mediation ("request").

2. The request shall contain the following information:

(a) The name and address of that party and its legal representative(s) and, where a request is submitted on behalf of a legal person, the name, address, and place of incorporation of the legal person;

(b) A detailed description of the factual basis of the dispute;

(c) An indication of the agencies and entities of the Contracting Party that have been involved in the matters giving rise to the dispute; and

(d) An explanation of any prior steps taken to resolve such matters, including information on a pending claim.

36. Draft provision 3 addresses the request for mediation, which is often covered by mediation rules. Paragraph 1 provides that the request could be sent by either party.

37. The request for mediation is usually done through a written notification, separate from a written notice of intent to submit a claim to arbitration.

38. The Working Group may wish to consider whether draft provision 3 should simply require the request to be in writing (paragraph 1) and not be prescriptive as to its content.[31] This would have the advantage of enabling the parties to quickly commence mediation, without having to assemble information or comprehensively articulate the legal basis to protect their legal positions.

39. Another approach would be to require certain information to be included in the request (paragraph 2). This would enable the disputing parties to obtain a comprehensive overview of the matters at issue, understand and assess the dispute and to gather information from the entities involved in the dispute, so as to allow for a meaningful participation in the mediation.

40. Investment treaties have taken different approaches as to the request for the commencement of mediation[32] especially with regard to the information to be included therein. As an illustration, treaty provisions (i) require that the request be "*accompanied by a sufficiently detailed memorandum*" or include "*detailed*

[31] For example, the Australia-Hong Kong BIT (2019), Article 23(1) requires the parties to "initially seek to resolve the investment dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation." And Article 23 (2) requires that the initiating party "deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue."

[32] Article 152 of the China-New Zealand FTA (2008) calls for the submission of a written request for the institution of the designated amicable dispute procedure: "a request for consultations and negotiations shall be made in writing…"). CPTPP (2018), Article 9.18(2) utilized a similar approach.

information of the facts and legal basis" of the dispute;[33] (ii) incorporate a qualitative standard describing the amount of details that such written request should contain;[34] or (iii) stipulate the required content of a request for the initiation of mediation, which could include a factual description of the dispute, information relating to the investor, an identification of the provisions allegedly breached, the outcome/relief sought, and/or the supporting documents.[35] A small number of investment treaties require the recipient of such a request to provide a response.[36]

41. The Working Group may wish to consider, whether the receipt of the request to commence mediation should be acknowledged and, whether an additional subsequent agreement needs to be set up that, inter alia, would identify which entities of the State must/should be represented or participate. This might depend on the option chosen for draft provision 1.

D. Applicable mediation rules (Draft provision 4)

42. It would be prudent for parties to agree on the mediation rules that would apply to the proceeding, which would provide the necessary clarity and guidance as to the procedure. The Working Group may wish to consider draft provision 4 regarding this aspect.

Draft provision 4

The mediation shall be conducted in accordance with the [draft provisions] and one of the following set of rules:

(a) The UNCITRAL Mediation Rules;

(b) The ICSID Mediation Rules;

(c) The IBA Rules for Investment State Mediation; or

(d) Any other rules as agreed by the disputing parties.

43. Draft provision 4 provides that mediation would be conducted in accordance with the draft provisions and a specified set of mediation rules. Mediation rules would ensure a comprehensive procedural mediation framework and avoid procedural lacunae. Subparagraph (d) includes the possibility for parties to agree on any other set of rules, which is the approach taken in certain treaties.[37]

[33] For example, Belgium-Luxembourg-Montenegro BIT (2010), Article 12(1); China-Colombia BIT (2008), Article 9(2); the Central America-Korea FTA (2018), Article 9.16.

[34] For example, Article 14(6) of the Norway Model BIT (2015), which requires a notification in the form of a request for consultation to "include information sufficient to present clearly the issues in dispute so as to allow the Parties and the public to become acquainted with them."

[35] For example, Article 20(4) of the Argentina-United Arab Emirates BIT (2018) requires that "The investor seeking consultations will submit a written request for consultation, specifying: (a) the name and address of the investor and, where the claim is made on behalf of an enterprise, the name, address and place of incorporation of the enterprise; (b) the provision of this Agreement alleged to have been breached and any other applicable provisions; (c) the factual and legal basis for the claim; (d) the relief sought, and the approximate amount of damages claimed; and (e) the evidence proving its condition of investor of the other Party and the existence of an investment." See also CEPA (2017), Annex 8, Article 2.

[36] For example, Article 17.1 of the Netherlands Model BIT (2019) states that disputes should be settled amicably through negotiations, conciliation or mediation in the first instance, stipulating that "[a] disputing party shall give favourable consideration to a request for negotiations, conciliation or mediation by the other disputing party". The EU-Singapore IPA (2018), Annex 6, Article 2(2) and the EU-Viet Nam IPA (2019), Annex 9, Article 3(2) both include provisions requiring the recipient to "give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt." CETA (2016) contains a similar provision referring to "good faith consideration" (Annex 29(C), Article 2(2).

[37] See Armenia-United Arab Emirates BIT (2016), Article 10(3); see also Mauritius-United Arab Emirates BIT (2015), Art. 10(3).

44. Alternatively, parties may choose an institution, such as ICSID or PCA, to administer the mediation. Most institutional rules give parties a high degree of flexibility, while providing at the same time for robust administrative support. It should be noted that choosing a set of mediation rules might entail the choice of an institution, e.g. choosing the ICSID Mediation Rules would entail that the mediation be administered by ICSID.

45. The Working Group may wish to discuss whether additional elements should be addressed by draft provision 4, for example whether to require parties to mediate in good faith, which could ensure that the discussions are constructive.

E. Without prejudice provision (Draft provision 5)

46. During a mediation proceeding, the parties typically exchange suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If the mediation does not result in a settlement despite such efforts and a party initiates arbitral or other proceedings, it should be ensured that those views, suggestions, admissions, or indications of willingness to settle are not used to the detriment of the party who made them.

47. Some investment treaties that provide for mediation include an express "without prejudice" clause, underlining that (i) the participation in the mediation procedure shall not be considered as a concession with regard to jurisdiction should the dispute proceed to arbitration[38] and (ii) information shared during the mediation should not prejudice the legal position of either party in any other proceedings.[39] This is also addressed in existing mediation rules.[40]

48. In that context, the Working Group may wish to consider the following draft provision.

Draft provision 5

Engaging in mediation is without prejudice to the legal position or rights of any disputing party in any other international investment dispute resolution proceeding.

F. Confidentiality

49. A framework providing for confidentiality and for a candid exchange of views between the parties forms the ground for constructive negotiations. This includes ensuring that documents and views exchanged between the parties will remain confidential. Existing mediation rules usually address the issue of confidentiality.[41] National legislation may provide for confidentiality and also contain affirmative disclosure obligations. In that light, the Working Group may wish to consider whether a detailed provision on confidentiality would need to be prepared.[42]

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[38] Examples of such clauses can be found, inter alia, in the Argentina-Japan BIT (2018), Article 25(1) and the CPTPP (2018), Article 9.18(3). Other treaties, such as CETA (2016), do not limit this caveat to the question of jurisdiction, instead stipulating "[r]ecourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter." (Article 8.20(2)).

[39] New Zealand-United Kingdom Free Trade Agreement (2022), Article 31.20; Chile-Paraguay Free Trade Agreement (2021), Article 17.19.

[40] For example, ICSID Mediation Rules, Rule 11; UNCITRAL Mediation Rules, Article 7(1).

[41] For example, ICSID Mediation Rules, Rule 10; IBA Rules on Investment for Investor-State Mediation, Article 10; UNCITRAL Mediation Rules, Article 6.

[42] Investment treaties occasionally address the question of confidentiality and disclosure in mediation proceedings. These include the Thailand Model BIT (2012), which stipulates in Article 10(4) that a mediation shall be confidential; and CETA (2016), which foresees in Annex 29(C), Article 4, para. 6, that the mediation proceeding shall be confidential, except for the fact that the mediation is taking place, and subject to the position that, "*mutually agreed*

G. Transparency (Draft provision 6)

50. The Working Group may wish to consider the usefulness of a draft provision allowing parties to disclose the fact that a mediation is taking or took place as well as to make the outcome of the mediation publicly available.

Draft provision 6

1. Unless otherwise agreed by the disputing parties, a disputing party may disclose the fact that a mediation is taking or took place.

2. Unless otherwise agreed by the disputing parties, the outcome of the mediation including any settlement agreement may be made available to the public. However, any information that is confidential or protected shall not be disclosed.

51. With regard to paragraph 1, the Working Group may wish to consider whether States would have the flexibility to determine at what point in time they wish to make the fact of the mediation public.[43]

52. Paragraph 2 provides that the outcome of the mediation or the settlement agreement resulting therefrom could be made public. The Working Group may wish to consider whether there shall be any limitations, for example, whether the entirety of the agreement could be made public, or only a redacted version thereof. The Working Group may wish to keep in mind that domestic disclosure requirements may apply to settlement agreements resulting from mediation, such as those found in legislation concerning budget and spending, public-private partnership or freedom of information.

H. Settlement Agreement (Draft provision 7)

53. The Working Group may wish to consider the following draft provision regarding settlement agreements:

Draft provision 7

1. The parties shall not commence nor continue any other international investment dispute resolution proceeding relating to all or parts of the dispute subject to mediation insofar as the disputing parties have reached a settlement agreement.

2. The disputing parties should ensure that any settlement agreement resulting from mediation complies with the requirements set forth under the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted on 20 December 2018 ("Singapore Convention on Mediation").

54. Paragraph 1 clarifies that if the parties resolved the dispute or parts thereof through mediation, that they shall not commence any other international investment dispute resolution proceeding thereafter and suspend any ongoing process.

55. Paragraph 2 draws the attention of the parties to the existing international framework on enforcement of settlement agreements resulting from mediation. It aims to facilitate the enforcement of the settlement agreement in any State Party to the Singapore Convention which did not formulate the reservation provided for under article 8(1)(b) which provides that a party "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".

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solutions shall be made publicly available" subject to the redaction of information a Party designates as confidential.

[43] See IBA Rules on Investment for Investor-State Mediation, Article 10(3); the ICSID Mediation Rules, Rule 10 (2) have a different approach, as unless the parties agree otherwise, the fact that parties are mediating or have mediated shall be confidential.