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International Trade Law  
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Settlement Reform)  
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## Possible reform of investor-State dispute settlement (ISDS)

### Dispute prevention and mitigation - Means of alternative dispute resolution

Note by the Secretariat

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## I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of investor-State Dispute Settlement (ISDS), based on the mandate given to it by the Commission at its fiftieth session, in 2017.<sup>1</sup> At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

2. At its thirty-eighth session, the Working Group agreed on a project schedule on reform options,<sup>2</sup> and requested the Secretariat to undertake preparatory work on dispute prevention and mitigation as well as on means of alternative dispute resolution (A/CN.9/1004, para. 25).

3. Accordingly, this Note provides information on these matters. The Working Group may wish to note that the proposals for reform submitted by Governments in preparation for the deliberations on the third phase of the mandate (“Submissions”) underline the importance of measures to prevent disputes from arising and address means to solve disputes through methods alternative to arbitration.<sup>3</sup>

4. 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,<sup>4</sup>

<sup>1</sup> *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264. The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and its addenda, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively.

<sup>2</sup> The deliberations and decisions of the Working Group at the thirty-eighth session are set out in document A/CN.9/1004; document A/CN.9/WG.III/WP.166 and its addendum provide an overview of reform options.

<sup>3</sup> Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, para. 19, on mandatory mediation); Submission from the European Union and its member States (A/CN.9/WG.III/WP.159/Add.1, para. 12, on conciliation and mediation as part of a standing mechanism for dispute settlement); Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 14, on dispute prevention and promotion of ADR); Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 24, on alternative dispute resolution mechanisms, and para. 25, on guidelines for dispute prevention); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163, p. 7, annex I, on encouragement of alternative dispute settlement to avoid formal disputes); Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.164, annex I and A/CN.9/WG.III/WP.178, annex II, on good practices for dispute prevention); Submission from the Government of Brazil (A/CN.9/WG.III/WP.171, on an alternative system based on dispute prevention); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41, on alternative dispute settlement and paras. 47 and 48 on ombuds office and State-State cooperation); Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5, on alternative dispute resolution measures and pre-arbitration consultation procedures); Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5, on international cooperation on investment dispute prevention and response); Submission from the Government of Mali (A/CN.9/WG.III/WP.181, section F, on strengthening the mediation and dispute prevention bodies); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182, p. 6, on encouragement of mediation, conciliation and other mechanisms to prevent investment arbitration).

<sup>4</sup> This Note was prepared with reference to a broad range of published information on the topic, including: UNCTAD – International Investment policy Series Investor-State disputes: prevention and alternatives to arbitration, volume I (Joubin-Bret, A. and Knoerich, J.), [https://unctad.org/en/Docs/diaeia200911\\_en.pdf](https://unctad.org/en/Docs/diaeia200911_en.pdf); volume II (Franck, S. and Joubin-Bret, A.), [https://unctad.org/en/Docs/webdiaeia20108\\_en.pdf](https://unctad.org/en/Docs/webdiaeia20108_en.pdf); UNCTAD, Best Practices in Investment for Development. How to prevent and manage investor-State disputes: Lessons from Peru, Investment Advisory Series, Series B, number 10 (by Constain, S.); available at [https://unctad.org/en/Docs/webdiaepcb2011d9\\_en.pdf](https://unctad.org/en/Docs/webdiaepcb2011d9_en.pdf); OECD, Report: Investment Dispute Management and Prevention (available at <https://www.oecd.org/mena/competitiveness/REPORT-Regional-seminar-investment-disputes-Cairo-062018.pdf>); OECD Stocktaking of Investment Dispute Management and Prevention in the Mediterranean Region, available at <http://www.oecd.org/mena/competitiveness/BN-Stocktaking-of-Investment-Dispute-Cairo-062018.pdf> (Ruiz Turque, D., Rey, M.E., Pallez, D.); USAID/APEC, Investor-State Dispute Prevention Strategies: Selected Case Studies, (Constain, S.), available at

and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

## II. Dispute prevention and mitigation

### A. Proposals and comments in the Submissions

5. The Submissions that address the matter of dispute prevention and mitigation underline the need for mechanisms to prevent and reduce the occurrence of investor-State disputes.<sup>5</sup> As mentioned in Submissions, dispute prevention is a means to improve the business environment, to retain investments and to resolve investors' grievances swiftly.<sup>6</sup> Focusing on the "prevention" of disputes, rather than "post-dispute" regulation, is presented as a cost-effective approach to the reform of ISDS.<sup>7</sup> The Submissions also provide information on dispute prevention and mitigation measures developed at the national level, in investment treaties, as well as disputes prevention initiatives and programmes available at the international level.

#### *National level*

6. Certain Submissions highlight dispute prevention and mitigation measures that should be taken by States at the national level, such as undertaking awareness raising activities on dispute prevention, instituting policies to prevent disputes from escalating,<sup>8</sup> and establishing a framework on the management of ISDS cases (see below, paras. 11–23).<sup>9</sup>

#### *Investment treaty level*

7. It is also suggested that Parties, when negotiating a treaty, should consider providing for dispute prevention and mitigation<sup>10</sup> and pre-arbitration consultation

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[https://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/\\_media/Files/Groups/IEG/20130625\\_IEG-DisputePrevention.pdf](https://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/_media/Files/Groups/IEG/20130625_IEG-DisputePrevention.pdf), World Bank Group, Retention and Expansion of Foreign Direct Investment (Echandi, R.), <http://documents.worldbank.org/curated/en/387801576142339003/pdf/Political-Risk-and-Policy-Responses.pdf>; 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, to be found under <https://cil.nus.edu.sg/publications> Echandi, R. "Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention", <https://pdfs.semanticscholar.org/012c/df959a91c6bb4a76be20a786937f7fa90f22.pdf>; Reassertion of Control over the Investment Treaty Regime, Kulick, A., Cambridge; Mediation in International Commercial and investment Disputes, by Titi, C., Fach Gómez, K., Oxford, 2019.

<sup>5</sup> Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 14); Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 25); Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.164, annex I; A/CN.9/WG.III/WP.178, annex II); Submission from the Government of Brazil (A/CN.9/WG.III/WP.171); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 47 and 48); Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5); Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5); Submission from the Government of Mali (A/CN.9/WG.III/WP.181, section F); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182, footnote 20).

<sup>6</sup> Submission from the Government of Brazil (A/CN.9/WG.III/WP.171); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182, footnote 20).

<sup>7</sup> Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5).

<sup>8</sup> Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 38 and 39).

<sup>9</sup> Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 9); Submission from the Government of Brazil (A/CN.9/WG.III/WP.171, para. 2); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, para. 50); Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5); Submission from the Government of Mali (A/CN.9/WG.III/WP.181, section F); see also Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182, footnote 20).

<sup>10</sup> Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 25).

procedures.<sup>11</sup> In addition, certain Submissions mention the need for treaty Parties to cooperate so as to reduce the occurrence of disputes, for instance, through an institutionalized dialogue between the treaty Parties.<sup>12</sup> In that respect, a suggested model is to focus primarily on cooperation and investment facilitation, rather than investment protection.<sup>13</sup>

#### *International level*

8. Further, certain Submissions indicate that deficiencies in dispute prevention and mitigation, such as lack of awareness, knowledge and capacity,<sup>14</sup> should be addressed at the international level, for instance through technical assistance and capacity-building activities.<sup>15</sup> It is further underlined that government agencies responsible for handling ISDS matters in many developing countries still lack the know-how to identify looming disputes and to manage them. Narrowing this knowledge gap is presented as a way to significantly decrease the number of disputes with investors.<sup>16</sup>

9. As a means for cooperation, it is suggested that States could greatly benefit from the development of a systematic method of sharing knowledge and practices on dispute prevention.<sup>17</sup> A Submission suggests developing guidelines that could serve as a platform for States to share their experience, good practice, know-how, and could include guidance on dispute prevention provisions and the use of alternative means of dispute resolution.<sup>18</sup>

## **B. Available means of dispute prevention and mitigation**

10. The Working Group may wish to note that a number of initiatives have been developed by States, as highlighted in certain Submissions, as well as by international, regional, governmental and non-governmental organizations regarding investor-State dispute prevention and mitigation. The sections below draw from such initiatives.

### **1. At the national level**

11. The Working Group may wish to note that dispute prevention measures are available for implementation at the national level. Below is a brief outline of certain of such measures.

#### **(a) Identifying a lead agency**

12. The identification of a lead agency, which usually aims at establishing a unique channel of communication between the investor and the State and at achieving consistency in the implementation of investment obligations, is an important step. A lead agency is usually legally empowered to perform, in addition to information gathering and dissemination, functions such as coordination with other governmental agencies in the development of dispute prevention policies. It may also operate as a focal point within the Governments of the respective treaty parties, tasked with facilitating investors' interactions with local authorities. It may be mandated to

<sup>11</sup> Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5).

<sup>12</sup> Submission from the Government of Brazil (A/CN.9/WG.III/WP.171); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 104 and 109).

<sup>13</sup> Submission from the Government of Brazil (A/CN.9/WG.III/WP.171).

<sup>14</sup> Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, paras. 24 and 25); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 49 and 50).

<sup>15</sup> Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 25); Submissions from the Government of Costa Rica (A/CN.9/WG.III/WP.164, annex I and A/CN.9/WG.III/WP.178, annex II); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, para. 50).

<sup>16</sup> Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 25).

<sup>17</sup> Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5).

<sup>18</sup> Submissions from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 25).

administer investment treaties and contracts. It is therefore usually involved in the various steps listed below, in paras. 15–23.

13. The Working Group may wish to note that various models have been developed regarding the information gathering of investors' complaints and their channelling to the appropriate governmental entity. Under existing models, the information gathering has been assigned to a specialized body, such as an investment ombudsperson,<sup>19</sup> a coordinator responsible for dispute prevention,<sup>20</sup> or an institution responsible for both the prevention and management of disputes.<sup>21</sup>

14. Aspects for consideration include the financial resources as well as the political and legal authority of the lead agency which will guarantee its effectiveness.<sup>22</sup>

**(b) Mapping of information and making it available**

15. A further step in the dispute prevention and mitigation is the systematic compilation, mapping and evaluation of investment contracts and treaties, as well as the analysis of investment dispute cases, so as to ensure adequate knowledge of the State's obligations and of their interpretation by ISDS tribunals.

16. In addition, a challenge for States is to ensure that information on investment treaties and contracts is available and easily accessible, when needed, to the relevant governmental entities. The Working Group may wish to note that various initiatives have been developed, aimed at enhancing availability and accessibility of such information.<sup>23</sup>

<sup>19</sup> See, for example, the Korean Office of the Foreign Investment Ombudsman (OFIO), referred to in the Submissions from the Government of Brazil (A/CN.9/WG.III/WP.171, paras. 1–15) and the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5).

<sup>20</sup> Submission by the Government of Mali (A/CN.9/WG.III/WP.181, section F).

<sup>21</sup> For example:

- In Colombia, the Directorate of Foreign Investment and Services was established within the Ministry of Trade, as the leading governmental agency responsible for dealing with potential investor-State disputes. This agency channels information between the State and the investor and coordinates the involvement of relevant authorities. Its scope of activity also includes planning the State's defence in potential disputes, acting as facilitator of settlement when appropriate, and management of resources for a State's defence and for payment of dispute costs. The agency further conducts training programmes on main aspects of investment treaties.
- In Peru, the Peruvian System for the Coordination and Response of the State in International Investment disputes ("SICRECI") uses an information-sharing platform for an early alert system. Under Peru's Coordination and Response System of the State on Investment-related Disputes, a Special Commission represents the State in ISDS cases. The Special Commission is chaired by a representative of the Ministry of Economy and Finance. With the information-sharing system in place, the State can thus obtain early information about potential investment disputes, which the Special Commission can in turn use for strategic assessment of the possibilities of reaching amicable settlement.

<sup>22</sup> In its Submission, the Government of Mali suggests the establishment of a shared fund that would finance the services of arbitrators and counsel used by African countries. Such a fund would address issues relating to cost and representation (A/CN.9/WG.III/WP.181, section F).

<sup>23</sup> See, for example, the Peruvian System for the Coordination and Response of the State in International Investment disputes ("SICRECI"), which encompasses an electronic platform with a database of all investment treaties and investment contracts foreseeing ISDS. This is complemented by a comprehensive system for information-sharing, operated by the Ministry of Economy and Finance: provincial and municipal authorities and State agencies can be informed of the international commitments undertaken by the central government (including investment treaties and commitments thereunder, ISDS cases, and dispute settlement clauses in contracts) through the platform. Such subnational governmental entities can also report on potential disputes and seek higher-level involvement through the platform, enabling the central Government's involvement at the early stages of a dispute. To ensure the efficacy of this system, Peru established a mandatory legal obligation for information-sharing (Law 28933 of December 2006), binding on all levels of government, state-owned enterprises, and public funds. Under Law 28933, such bodies must report to the Ministry of Economy and Finance (the coordinator) all information on investment treaties, relevant agreements, or any emerging disputes, to enable the consolidation and tracking of commitments. Investors may also signal issues to the central

**(c) Monitoring communication with investors**

17. Empirical data show that investment disputes are more likely to arise in the context of certain types of contracts or activities and in certain economic sectors. For instance, disputes are more common in complex State contracts involving build-operate-transfer contracts, privatization schemes, concession agreements for public services, and mining and petroleum extraction projects.<sup>24</sup>

18. A further step in the dispute prevention and mitigation would be to identify sensitive sectors or contractual arrangements so as to strengthen preventive measures in these areas.

19. Identifying sensitive sectors and addressing specific issues might also be combined with continuous communication with investors. A Submission highlights that providing investment aftercare to support investors who face grievances in their day-to-day business and to make sure that the investment environment is appropriate, is the ideal way forward.<sup>25</sup>

**(d) Raising awareness on investment obligations among government officials and training**

20. Information-sharing within the State agencies, preferably through a lead agency, is also a key aspect of dispute prevention so that stakeholders at various levels – central, provincial, municipal – are well-informed, and that coherence in the administration of investment-related matters can be achieved. Indeed, Government officials as well as public entities may be involved in taking sectoral measures and in the implementation of obligations under investment treaties and contracts, and therefore, they need to be aware of the commitments taken by the States in such instruments.

21. Access to relevant information can be effected by means such as shared platforms with all relevant updated information, handbooks, or training events in which officials involved in foreign investment share information on investment policies, developments and current disputes.<sup>26</sup> The purpose is to ensure that Government officials are aware of potential consequences of their decisions, understand the underlying investment framework, and are enabled to manage investment-related inquiries and grievances.<sup>27</sup>

**(e) Early settlement discussions and handling disputes**

22. Timing is an important factor in preventing a complaint from escalating into a dispute. Therefore, an early detection/alert mechanism, combined with the use of information technology tools usually allow the lead agency (whatever its form) to be informed of the existence of a grievance as early as possible, and be prepared for the potential escalation of the grievance into a dispute. A question to consider is how such early detection/alert mechanism could be organized, including, for instance, whether private sector associations could be involved.

23. To strengthen a State's capacity to address disputes arising out of investment treaties and contracts, and to take advantage of both the institutional knowledge accumulated by the lead agency during the earlier phases of the conflict, the lead

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authorities and seek solutions directly through the information system; see also, the system for the identification, monitoring and resolution of foreign investment barriers ("SINOI") set up in Colombia.

<sup>24</sup> See UNCTAD Investment Dispute Settlement Navigator by economic sector, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>25</sup> Submission from the Government of Brazil (A/CN.9/WG.III/WP.171, para. 5).

<sup>26</sup> Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5), which highlights the usefulness of handbooks and booklets to complement lectures and trainings. See also the Submission from the Government of Thailand (A/CN.9/WG.III/WP.147, paras. 24–25).

<sup>27</sup> A number of States focus on awareness-raising for Government officials, the Peruvian System for the Coordination and Response of the State in International Investment disputes ("SICRECI").

agency could be mandated to coordinate the handling of disputes and represent the State during any negotiations and proceedings.<sup>28</sup>

## 2. At a bilateral or multilateral level

### (a) State-to-State cooperation in dispute prevention

24. As mentioned in several Submissions, dispute prevention and mitigation could be enhanced through the organization of channels of communication between the parties to the investment treaties.<sup>29</sup>

25. Joint committees or commissions established by States parties to an investment treaty are presented in Submissions as a means to promote regular exchange of information to prevent disputes, and if a dispute nevertheless arises, to implement a dispute settlement mechanism based on consultations, negotiations and mediation. Joint committees or commissions operate “reactively” at the State-to-State level, on the basis of a request by either treaty Party’s government. They are presented in Submissions as playing a critical part in the early management of complaints before they escalate to a dispute.<sup>30</sup> It may be noted that initiatives, combining focal points and a joint committee or commissions of treaty parties have been implemented in certain investment treaties.<sup>31</sup>

### (b) Capacity-building

26. The Working Group may wish to note that several programmes are already in place at the multilateral level, tackling cross-border issues arising out of ISDS.<sup>32</sup>

<sup>28</sup> The World Bank Systemic Investor Response Mechanism (SIRM), developed by the World Bank, serves as an early warning and tracking system. SIRM collects data and identifies patterns of political risks that impact investments, and quantifies investment lost or gained as a result, forming a basis for potential reform or steps to minimize the recurrence of investment-related problems. SIRM needs to be adapted to the political economy circumstances of every country. However, four elements remain common, namely: (1) the empowerment of a lead agency that implements and coordinates the system; (2) an early alert mechanism and tracking tool to communicate problems to the lead agency; (3) problem-solving methods available to the lead agency and other agencies to find a solution, including exchanges of information, consultations, or legal opinions; and (4) political decision-making at higher levels when the lead agency is unable to recommend a solution.

<sup>29</sup> Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 9); Submission from the Government of Brazil (A/CN.9/WG.III/WP.171, paras. 5–6); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, para. 48).

<sup>30</sup> Submission from the Government of Brazil (A/CN.9/WG.III/WP.171, para. 5); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, para. 47); Submission from the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5).

<sup>31</sup> Submission from the Government of Morocco, (A/CN.9/WG.III/WP.151, para. 9); in addition, certain treaties foresee the holding of regular meetings between States, with the purpose of resolving disputes arising out of investments, and which take place on the request of either treaty party (see, for example, China-Latvia investment treaty (2004); Japan’s Joint Committee/Subcommittee on Investment, under the Japan-Malaysia EPA (2005), and the Japan-Singapore EPA (2007); Morocco’s Model Bilateral treaty; see also the Free Trade Commission established under NAFTA, which supervised and implemented the Agreement, resolved disputes arising from the interpretation or application of the Agreement, and considered issues relevant to the operation of NAFTA; the Commission has addressed operating procedures for handling notices; the necessary authorities for representing the State, e.g. authorization to hire external counsel, appropriate coordination capacity to evaluate the case and instruct outside counsel; resources to pay the costs; and the national institutional framework designed for preventing and facing investment disputes).

<sup>32</sup> For example:

- UNCTAD serves as the United Nations focal point for issues related to investment and development. UNCTAD policy guidance for dispute prevention, treaty implementation and treaty reform is set out in UNCTAD’s Investment Policy Framework for Sustainable Development, UNCTAD’s Roadmap for IIA Reform and UNCTAD’s Global Action Menu for Investment Facilitation. All of these policy toolkits provide options and guidance for SDG-related national and international investment policymaking needs. UNCTAD’s work on sustainable development-oriented investment policy reform is disseminated through its Investment Policy Hub, an online platform servicing as the one-stop shop for investment policymakers;

Activities covered include developing comprehensive databases, training on investment and ISDS issues with a view to preventing disputes, assistance in developing communication networks (including coordinated access to documents and document management) within the government, and establishing a lead agency. The training and capacity-building programmes are often tailored to the specific needs of a State.

### C. Questions for consideration

27. The Working Group may wish to note that the question of dispute prevention and mitigation is closely connected to the reform option of establishing an advisory centre possibly tasked with dispute prevention and capacity-building activities.<sup>33</sup> Such a centre would provide the basis for a systematic sharing of knowledge and practices on dispute prevention. The Working Group may wish to consider whether, as already indicated in relation to the establishment of an advisory centre, information about dispute prevention and mitigation measures currently adopted by States, and provided by regional and international organizations would need to be gathered with a view to identifying possible overlaps and gaps.<sup>34</sup> This would require considering: (i) available models developed at the national level, and whether more guidance would need to be provided in that respect; (ii) the need for the development of model clauses on dispute prevention in investment treaties, including on mechanisms for the establishment of a joint committee or commission; and (iii) possible coordination among available programmes and initiatives on dispute prevention and mitigation at the international level.

28. The question of dispute prevention and mitigation is also closely connected to the topic of treaty interpretation by States parties (see document [A/CN.9/WG.III/WP.191](#)). Indeed, disputes might be prevented where investment treaties are coherently interpreted and administered. For instance, the risk of disputes might increase where identical wording is interpreted in an inconsistent manner, including in the course of defending cases. In addition, coherent interpretation helps in understanding better how to implement investment treaties and provides certainty to officials implementing investment treaty obligations.

## III. Alternative dispute resolution methods

### A. Proposals and comments in the Submissions

29. The Submissions underline the need to further explore mediation, conciliation and other alternative dispute resolution methods. It is pointed out in a Submission that

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- The International Development Law Organization's (IDLO) Investment Support Programme for Least Developed Countries (ISP/LDCs) is an assistance mechanism that is specific to investment-related negotiations, dispute settlement, and other investment law-related support; it was designed in collaboration with the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States and was launched in September 2017;
  - The OECD's Investment Committee and its subsidiary bodies provide forums for policy dialogue and analysis on a wide range of topics related to investment policy, including responsible business conduct, green finance, investment promotion and facilitation, linkages between trade and investment, infrastructure investment, sustainable development indicators and FDI statistics;
  - Various non-profit centres carry out in-country training courses for officials from developing country governments and regional organizations. They offer multiple services to governments, including trainings, forums for information-sharing, technical legal assistance, and tools to facilitate policy development. Noteworthy is also the initiative called Trade Law, which is a global network of universities and training centres that conduct pro bono projects for developing countries, SMEs, civil society organizations, and other stakeholders.

<sup>33</sup> [A/CN.9/1004](#), para. 31.

<sup>34</sup> [A/CN.9/1004](#), para. 42.



such methods, which may take various forms, are an alternative to both investment treaty arbitration and resort to national courts<sup>35</sup> and should be strengthened as part of the reform.<sup>36</sup>

30. Nearly all Submissions referring to alternative dispute resolution methods highlight that their use is less time- and cost-intensive than arbitration, and that their increased use would therefore address concerns regarding cost and duration of ISDS.<sup>37</sup> In addition, alternative dispute resolution methods are considered as offering a high degree of flexibility and autonomy to the disputing parties, allowing the preservation of long-term relationships and the protection of foreign investment through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts.<sup>38</sup>

31. Submissions also indicate that mediation usually helps clarify the positions of the disputing parties, thereby reducing the gap between them,<sup>39</sup> and allowing to focus on the issues that are at stake.<sup>40</sup>

32. Mandatory mediation, after the exhaustion of the consultation process, is referred to in a Submission as a way to prevent a dispute from escalating into a legal dispute which can be costly and damaging to the disputing parties' relationship.<sup>41</sup>

33. A Submission refers to the need for alternative dispute resolution rules specific to investment treaties and ISDS, that could also provide the procedural framework for combining adjudicative and non-adjudicative processes (sometimes referred to as hybrid or mixed-mode dispute resolution).<sup>42</sup>

## **B. Alternative dispute resolution methods in investment treaties**

### **1. Cooling-off period**

34. The Working Group may wish to note that investment treaties foresee a time frame, more commonly known as the "cooling-off" period, ranging from three to eighteen months during which the disputing parties may attempt amicable settlement, before arbitration.

35. Often, investment treaties include a two-tiered dispute settlement clause, providing first for some form of alternative dispute resolution before culminating, at the second tier, with a resolution of the investor-State dispute by an arbitral tribunal. The first tier may foresee consultations and negotiations, mediation or conciliation, or make reference to amicable settlement without indicating how this is to be achieved. Recent investment treaties, while maintaining the cooling-off period, provide more guidance on the requirements the investor must meet to fulfil under the

<sup>35</sup> Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, para. 40).

<sup>36</sup> Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, para. 19); Submission from the European Union and its member States (A/CN.9/WG.III/WP.159/Add.1, para. 12); Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 14); Submissions from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 24); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163, page 7, annex I); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41); Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5); Submission from the Government of Mali (A/CN.9/WG.III/WP.181, section F); Submission from the Governments of Chile, Israel, Japan, Mexico and Peru (A/CN.9/WG.III/WP.182, p. 6).

<sup>37</sup> 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 Turkey (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).

<sup>38</sup> Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5).

<sup>39</sup> Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 11).

<sup>40</sup> Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41).

<sup>41</sup> Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, paras. 19 and 20).

<sup>42</sup> Submissions from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 24).

first tier as well as more detailed alternative dispute resolution provisions, including stand-alone mediation provisions.<sup>43</sup>

36. In general, the cooling-off period should be an opportunity for an investor and a State to avoid arbitration by solving the dispute through negotiations, consultations or mediation. Given the process which necessarily precedes the conduct of amicable negotiations (signalling to the appropriate governmental subdivision, investigating the circumstances, adopting a negotiation strategy, securing the necessary funds to organize a proper defence, consulting with external advisors so as to assess the case and nominating negotiators, to name but a few steps), cooling-off periods should have a sufficient duration. Especially where no strategy regarding subgovernmental communications for signalling the existence of disputes exists within the respondent State, short cooling-off periods may not be efficiently taken advantage of, since the dispute will likely not be signalled to the appropriate authorities in time.

## 2. Use of alternative dispute resolution methods

### (a) Existing framework

37. As highlighted by the Submissions, resort to arbitration is the predominant means used in resolving investor-State disputes. Alternative dispute resolution methods are available, but they seem to be rarely used, despite the existing legal framework.

38. Indeed, rules on mediation and other alternative dispute resolution methods that could be applied in ISDS have been developed.<sup>44</sup> ICSID adopted its Conciliation Rules in 1967, as well as its Fact-Finding Additional Facility Rules in 1978. In 2018, ICSID initiated work on a new, stand-alone set of mediation rules for investment disputes. As part of a broader effort to update and further modernize the Centre's procedural rules for resolving investment disputes, the mediation rules complement ICSID's existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings.<sup>45</sup>

39. In 1980, UNCITRAL adopted its Conciliation Rules, which are also available for use in the context of ISDS. UNCITRAL is currently in the process of updating the Rules, as part of a newly developed framework on international mediation.<sup>46</sup>

<sup>43</sup> See, for example, Energy Charter Guide to Investment Mediation on how to use the cooling-off period included in Article 26 of the Energy Charter Treaty; See also Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (provisionally in force since 21 September 2017); European Union-Singapore Investment Protection Agreement (signed on 19 October 2018); European Union-Viet Nam Investment Protection Agreement (signed on 30 June 2019); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam (effective as of 30 December 2018).

<sup>44</sup> It may be noted that, in the context of privately financed infrastructure projects, UNCITRAL included in its Legislative Guide certain useful mechanisms, such as independent experts evaluation, that provides an early or preliminary neutral evaluation or assessment to ascertain the merits of the claim and the risks of liability; the other mechanisms foreseen include dispute review boards and dispute adjudication boards (See PPP legislative guide, chapter VI, paras. 3–37, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9.982.add6\\_.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9.982.add6_.pdf).)

<sup>45</sup> See <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms--mediation.aspx>.

<sup>46</sup> The United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the “Singapore Convention on Mediation” (the “Singapore Convention” or the “Convention”), adopted by General Assembly Resolution 73/198 in December 2018, applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. It provides a uniform and efficient framework for the enforcement of international settlement agreements resulting from mediation and for allowing parties to invoke such agreements, akin to the framework that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”) provides for arbitral awards. UNCITRAL also prepared and adopted the Model Law on International Commercial Mediation and International Settlement Agreements

40. The Energy Charter Conference adopted in 2016 a Guide on Investment Mediation, providing guidance on the conduct of investment mediation under the Energy Charter Treaty.<sup>47</sup>

41. The Mediation Rules of the International Chamber of Commerce (ICC)<sup>48</sup> and Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)<sup>49</sup> were both adopted in 2014 and may apply to investor-State disputes. Ad hoc Rules for Investor-State Mediation have been adopted by the International Bar Association (IBA) and were released in 2012.<sup>50</sup>

42. In order to foster the enforcement of settlement agreements resulting from mediation, UNCITRAL prepared the United Nations Convention on International Settlement Agreements Resulting from Mediation, (the Singapore Convention on Mediation), which was adopted by the United Nations General Assembly in December 2018 and opened for signature in August 2019.<sup>51</sup>

**(b) Data on the use of alternative dispute resolution methods**

43. As alternative dispute resolution methods are usually confidential, it is difficult to collect accurate data on their use. However, data from institutions suggest that they are not often used.<sup>52</sup> For example, 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.<sup>53</sup> It has not provided administrative assistance to parties wishing to resort to mediation either. The Permanent Court of Arbitration has so far 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 so far administered only one treaty-based mediation, which ended unsuccessfully, due to partial participation of a party.<sup>54</sup>

44. 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. The reluctance 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.<sup>55</sup> In addition, the involvement of a State actor, accountable to the general public, may make the use of alternative dispute resolution methods more challenging than for private parties. Further, divergent treaty interpretations adopted by ISDS tribunals makes it difficult to assess the strength and weakness of the State's position and to thus decide whether

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Resulting from Mediation. In addition to revised Rules on Mediation, UNCITRAL is also developing Notes on Mediation.

<sup>47</sup> See <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

<sup>48</sup> See <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>.

<sup>49</sup> See <https://sccinstitute.com/dispute-resolution/mediation/>.

<sup>50</sup> See [https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20\(Approved%20by%20IBA%20Council%204%20Oct%202012\).pdf](https://icsid.worldbank.org/en/Documents/process/IBA%20Rules%20for%20Investor-State%20Mediation%20(Approved%20by%20IBA%20Council%204%20Oct%202012).pdf).

<sup>51</sup> See [https://uncitral.un.org/en/texts/mediation/conventions/international\\_settlement\\_agreements](https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements).

<sup>52</sup> 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.

<sup>53</sup> See the ICSID caseload – statistics, issue 2019-2 statistics, p. 9, [https://icsid.worldbank.org/en/Documents/ICSID\\_Web\\_Stats\\_2019-2\\_\(English\).pdf](https://icsid.worldbank.org/en/Documents/ICSID_Web_Stats_2019-2_(English).pdf).

<sup>54</sup> This case is not covered by ICC Statistics, but is mentioned in *Mediation in International Commercial and Investment Disputes*, by Titi, C., Fach Gómez, K., pp. 97–98.

<sup>55</sup> 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, to be found under <https://cil.nus.edu.sg/publications>; see also Echandi, “Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention”, pp. 15–19.

settling is the right path to opt for in a specific case (see also document [A/CN.9/WG.III/WP.191](#)).

### C. Questions for consideration

45. The Working Group may wish to consider how mediation, conciliation and other forms of alternative dispute settlement could be promoted and more widely used. To this end, the Working Group may wish to consider how to address difficulties regarding the intergovernmental coordination that is required when negotiating an amicable settlement to a dispute, and how to create legal certainty for officials involved in such settlement. Further, the Working Group may wish to consider how to incentivize investors and States to both actively engage in alternative dispute settlement methods.

46. Regarding references to mediation, conciliation and other forms of alternative dispute settlement in investment treaties, the Working Group may wish to consider whether to undertake the development of model clauses, which would: (i) amend older-generation treaty provisions on pre-arbitration requirements; (ii) indicate steps the disputing parties need to take to discharge the obligation to attempt amicable settlement; (iii) include a realistic time frame; and (iv) possibly address mandatory mediation as a prerequisite to arbitration.<sup>56</sup>

47. The Working Group may wish to note that the question of strengthening alternative dispute mechanisms is also closely connected to the reform option of establishing an advisory centre possibly tasked with alternative dispute settlement. Also, an advisory centre may become a platform for the exchange of best practices, as well as for services on the administration of alternative dispute settlement.<sup>57</sup>

48. Other reform options which may be combined with the strengthening of mediation include those relating to the setting up of a multilateral standing body.<sup>58</sup> Such a body could encourage amicable settlements and could provide institutional support. In addition, the reform options that aim at addressing coherence and consistency generally have an impact on alternative dispute settlement, as coherent and consistent interpretation would make it easier for the parties to assess a dispute and its potential outcome and base the search for a settlement on solid grounds.

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<sup>56</sup> Submission from the Government of Indonesia ([A/CN.9/WG.III/WP.156](#), para. 15).

<sup>57</sup> [A/CN.9/1004](#), para. 31.

<sup>58</sup> [A/CN.9/WG.III/WP.159/Add.1](#).