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COMMENTS OF THE FORUM FOR INTERNATIONAL CONCILIATION AND ARBITRATION (FICA)
TASK FORCE ON THE UNCITRAL DRAFT CLAUSES ON MEDIATION AND OTHER FORMS OF
ALTERNATIVE DISPUTE RESOLUTION (ADR) AND DRAFT GUIDELINES FOR PARTICIPANTS IN
INVESTOR-STATE MEDIATION

Introduction

FICA is a non-profit, non-governmental organization founded in 1996. In 2002, FICA was granted Observer status to attend UNCITRAL Working Group sessions. Through its members and the publication and dissemination of position papers, articles and comments, FICA participates in the negotiation and development of international instruments impacting all forms of transnational dispute resolution. More information is available on the FICA website: www.fica-disputeresolution.com.

FICA has been attending the sessions of UNCITRAL Working Group III: Investor-State Dispute Settlement Reform since the Working Group began its deliberations on that topic. After the 41st Session of Working Group III (15-19 November 2021), the Secretariat posted on the Working Group III website (https://uncitral.un.org/en/working_groups/3/investor-state) two Notes by the Secretariat for comment entitled “Mediation and other forms of alternative dispute resolution.” The first Note contains draft clauses relating to mediation. The second Note contains proposed “Guidelines for participants in investment mediation.”

In this Report, FICA presents its comments and views relating to the first Note, containing draft clauses relating to mediation.

FICA believes that mediation, particularly in the Investor-State Dispute Settlement system (ISDS), is under-utilized for a variety of reasons, primarily a lack of understanding or knowledge of the process by various stakeholders. This is unfortunate. Mediation is an efficient and cost-effective means to resolve disputes at any time – whether before commencement of an arbitral proceeding, during an arbitral proceeding, or even after issuance of an award that is subject to further proceedings. FICA believes that mediation and its use should be encouraged at each of the stages of ISDS. FICA believes, accordingly, that awareness should be raised to the manifold advantages of mediation in the remit of Investor-State dispute resolution proceedings.

Accordingly, possible clauses relating to mediation in ISDS should be formulated with this goal in mind.¹ As will be seen in the discussion that follows, FICA generally supports those proposed

¹ FICA notes that the draft clauses contained in the Secretariat’s Note presume that provisions relating to mediation should be contained in the applicable treaty underlying a dispute. FICA respectfully



draft clauses that: (1) would have the effect of encouraging mediation at each of the stages of a dispute resolution process, including after arbitral proceedings formally have been commenced; (2) maintain flexibility in the process while still ensuring an overt procedure; (3) promote its use in order to decrease costs and encourage resolution of disputes; and (4) allow either party to request resort to mediation with minimal effort.

Discussion

FICA hereafter addresses the various options and proposed clauses identified in each of the three main sections listed in the Secretariat's Note on draft clauses relating to mediation.

1. Nature of the offer to mediate, timeframe and level of conduciveness (Draft Provision 1)

FICA does not support the option of not providing any clause on mediation in view of the wide support for mediation. Not mentioning the procedure is not a viable option.

Mediation should be a voluntary process. Whilst it cannot be thrust upon parties, FICA believes that mediation should be regarded as a viable dispute resolution option at any stage of the dispute resolution process.

FICA believes that mediation should be available at any time, before or even after the commencement of an arbitral proceeding. Even if conducted prior to the filing of any request for arbitration, a dispute may not be set in stone but the nub and context should be clear. FICA does not believe that any formal agreement to mediate should be required in advance, because any debate between the parties regarding the terms in such an agreement may exacerbate the dispute. Pragmatism should prevail. Therefore, to further enhance the attractiveness of mediation, the deadlines and processes that may have been established by a tribunal should be stayed pending successful completion or termination of mediation.

With these principles in mind, FICA supports proposed Option 2, amended as indicated below, and adding the complementary draft provision 2 relating to the use of mediation parallel to on-going arbitration or litigation, to include the suggested options regarding timing and staying of deadlines:²

Option 2 – Reference to an undertaking to commence mediation

1. *The parties to the dispute ~~shall commence~~ may request a mediation procedure at any time, including after the commencement of other ISDS proceedings. The parties shall attend the first meeting convened by the*

suggests that consideration should be given to including mediation clauses in the rules applicable to arbitration of ISDS disputes.

² Removed language, where appropriate, is indicated by ~~strike-through~~. Inserted language is indicated by underlining.



mediator. If any party does not wish to pursue mediation after having attended the first meeting or at any time thereafter, it shall communicate a written notice to the mediator and to the other party terminating the mediation procedure.

- 2. If the disputing parties agree to mediate after the investment dispute has been submitted to arbitration or a standing mechanism, upon request of all disputing parties, the tribunal shall stay its proceedings until the mediation is terminated.*

2. Other procedural matters

Regarding the application of rules on mediation, FICA believes that such rules should be explicitly identified in advance in order to minimize disagreement between the parties, unless they are able to reach agreement. Further, if the parties are unable to agree on a mediator, the selected appointing authority should appoint the mediator. A single mediator should be appointed, again unless the disputing parties agree otherwise.

Accordingly, FICA suggests the following draft provision to address the topics of applicable mediation rules, number of mediators, and appointment:

- 1. Mediation of an investment dispute shall be conducted in accordance with either: (i) the ICSID Mediation Rules; (ii) the UNCITRAL Mediation Rules; (iii) the IBA Rules for Investment State Mediation; or (iv) such other rules as may be agreed by the parties, and the provisions of this section.*
- 2. The mediation is to be conducted by one mediator, unless otherwise agreed by the disputing parties. A mediator shall be appointed by agreement of the disputing parties. If the disputing parties are unable to agree on a mediator, the authority administering the arbitration (if commenced) or an appointing authority as identified in the applicable treaty, shall select a mediator.*

Concerning the nature and scope of the written notice requesting arbitration, FICA recommends brevity, lest the written request turn into an argumentative exposition of the requesting party's position. Therefore, FICA suggests the following provisions relating to the written request:

- 1. To commence mediation, a party shall communicate to the other party or parties a request for mediation ("request"), which shall contain:*

A brief summary of the factual and legal basis of the complaint or defence and information on the subject matter of the claim made or received.



2. *The other party or parties shall acknowledge receipt of any request for mediation within fourteen (14) business days of its receipt. Thereafter, the disputing parties shall commence mediation, by selecting or having selected for them, a mediator within thirty (30) days of the date of the receipt of the request, or such other period as they may agree.*

Mediation is naturally without prejudice to the legal or factual positions of any party. Although that aspect of mediation is inherent in the process, FICA agrees that the point should be explicitly stated for the avoidance of doubt:

1. *Recourse to mediation is without prejudice to the legal positions or rights of the disputing parties.*

Similarly, mediation should be a confidential process in order to maximize flexibility and to encourage the parties to consider outcomes that may not otherwise result from a formal dispute resolution process. FICA therefore opposes the suggestion, “*Mutually agreed solutions shall be made publicly available.*” If the parties agree to make their agreed settlement public, that is solely for them to decide. But such publication should not be forced upon any party.

3. Settlement Agreement (Draft provision 7)

FICA believes that any resolution of all or any disputes within the scope of the reference to mediation reached should fully and finally terminate any and all disputes within the scope of the resolution. Further, in order to assuage any concerns any party might have regarding enforceability of a mediated settlement agreement, the Singapore Convention on enforcement of internationally mediated settlement agreements should be applicable. FICA suggests the following language in this regard:

1. *Where a mutually agreed resolution has been reached, then all disputes within the scope of such resolution are ended, and all parties are prohibited from continuing or attempting to pursue the disputes by any dispute settlement procedure. The disputing parties shall not commence nor continue any other dispute settlement procedure relating to the dispute subject to mediation while the mediation is pending if the disputing parties have reached a mutually agreed solution.*
2. *Any settlement agreement resulting from a mediation shall comply with the requirements for reliance on a settlement agreement provided for under the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted on 20 December 2018 (“Singapore Convention on Mediation”), provided that one or both of the Contracting Parties are signatories of the Singapore Convention on Mediation.*



Conclusion

FICA has not directly commented on the draft Guidelines submitted for comment at the same time as the proposed clauses. FICA assumes that the propose Guidelines will be consistent with the proposed clauses and will support and encourage disputing parties in ISDS to seriously consider and participate in mediation throughout the dispute resolution process, whether before, during or after formal proceedings.

The FICA Task Force trusts that its comments in this Report can usefully contribute to elaborate appropriate mediation-related clauses by UNCITRAL Working Group III.

Respectfully submitted,

The FORUM FOR INTERNATIONAL CONCILIATION AND ARBITRATION (FICA) TASK FORCE ON THE UNCITRAL DRAFT CLAUSES ON MEDIATION AND OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) AND DRAFT GUIDELINES FOR PARTICIPANTS IN INVESTOR-STATE MEDIATION

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