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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)

Draft provisions on mediation

Note by the Secretariat

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I. Introduction

1. At its thirty-ninth session in October 2020, 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 to resolve investor-State disputes (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 provisions 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. During the forty-third session in September 2022, the Working Group reiterated its support for promoting mediation as a means of resolving investment disputes in a cost-effective manner, while preserving the relationship between the investor and the State (A/CN.9/1124, para. 145). The Working Group further expressed the view that the development of a new set of rules for mediation would be redundant in light of existing sets of rules, namely the UNCITRAL Mediation Rules (2021), the ICSID Mediation Rules (2022), and the International Bar Association (IBA) Rules on Investment for Investor-State Mediation (2012) (the “IBA Rules”) (A/CN.9/1124, para. 147).

3. At that session, upon considering the draft provisions on the use of mediation in document A/CN.9/WG.III/WP.217, the Working Group requested the Secretariat to revise the draft provisions based on the deliberations and to simplify their structure (A/CN.9/1124, para. 172). Accordingly, this Note provides a revised version of the draft provisions broadening the offer to mediate and reiterating the voluntary and consensual nature of mediation. This Note, however, does not seek to express a view on the reform element, which is for the Working Group to consider.

II. Draft provisions on mediation

4. Where mediation is provided for in an investment treaty as a means to resolve investment disputes, there is a clear legal basis to conduct mediation. The lack thereof is considered a hurdle to engaging in mediation. Therefore, States may wish to consider providing for mediation in their investment treaties¹ and establishing favourable conditions for its use.²

5. In view of the existing mediation rules (both institutional and ad hoc, see para. 2 above) that comprehensively address all aspects of the mediation proceeding, the draft provisions on mediation have been prepared to reflect existing treaty language and to allow the parties to choose from and refer to existing mediation rules for the conduct of mediation. The draft provisions have also been prepared for inclusion in investment treaties or a multilateral instrument on ISDS reform (A/CN.9/1124, para. 71) and as such, would need to be adjusted if they were to become part of mediation rules or domestic legislation.

¹ See ICSID, Overview of Investment Treaty Clauses on Mediation (July 2021), available at https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf; see also Romesh Weeramantry, Brian Chang and Joel Sherard-Chow, Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis, ICSID Review – Foreign Investment Law Journal, advance article (4 April 2022).

² 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 and participate in a mediation proceeding and are not personally liable for the mediation proceeding or its outcome. See more generally, the draft guidelines on investment mediation in document A/CN.9/WG.III/WP.227.

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

6. Draft provision 1 reflects the understanding of the Working Group that mediation should be encouraged as a means to achieve amicable resolution of international investment disputes (A/CN.9/1124, para. 148) and contains two options. Option A has been revised to emphasize the usefulness of mediation without imposing an obligation upon the parties to mediate. Option B has been revised to reflect the preference expressed by States for parties' mandatory engagement in mediation (A/CN.9/1124, paras. 149–150).

Option A (Availability of mediation)

Draft Provision 1, option A (Availability of mediation)

1. *The parties shall consider mediation as a means of settling an international investment dispute amicably. The parties may agree to engage in mediation at any time including after the commencement of any other dispute resolution proceeding.*
2. *“Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute.*
3. *A party may invite the other party in writing to engage in mediation at any time in accordance with provision 2. The other party shall accept or reject the invitation in writing within [30] days of the receipt.*
4. *If a party does not receive an acceptance of the invitation to mediate within the period of time in paragraph 3, that party may elect to treat it as a rejection of the invitation.*
5. *The mediation shall be conducted in accordance with these provisions and:*
 - (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 parties.*
6. *The parties may at any time agree to exclude or vary any of the provisions.*

7. Option A preserves the flexible and consent-based nature of mediation and does not impose mediation upon the parties, which may result in delays in the resolution of the dispute (A/CN.9/1124, para. 149).

8. Paragraph 1 of option A urges parties to consider the use of mediation as a possible means for resolving international investment disputes amicably (A/CN.9/1124, paras. 148 and 152).

9. Paragraph 2 includes the definition of mediation as found in the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the “Singapore Convention on Mediation”) for the sake of clarity (A/CN.9/1124, para. 154).

10. Paragraph 3 has been simplified noting that a party may invite the other party or parties to engage in mediation and provides a time period (for example, 30 days) for the other party to respond (A/CN.9/1124, paras. 153 and 156). Paragraph 4 states that if a party does not respond within that time period, it could be deemed as a rejection (A/CN.9/1124, para. 157).

11. Paragraph 5 lists available mediation rules, which can be incorporated by reference (A/CN.9/1124, para. 151). As such rules address a number of procedural

issues, such as the commencement of mediation, the selection of the mediator, the draft provisions do not address those issues. Paragraph 6 provides that the parties are free to exclude or vary any of the provisions at any time.

Option B (Commencement of mediation upon request by a party)

Draft provision 1, option B (Commencement of mediation upon request by a party)

1. A party shall send a request in writing to the other party to commence mediation to settle an international investment dispute. The mediation is deemed to commence upon receipt of the request by the other party.
2. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.
3. The mediation shall be conducted in accordance with these provisions and:
 - (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 parties.
4. The parties shall appoint a mediator within [20] days after the commencement of the mediation. If a mediator is not appointed within that period of time, the parties shall agree on an institution or a person that shall assist them in appointing a mediator.
5. The mediator shall convene a meeting within [15] days after the appointment and the parties are required to attend that meeting. A party wishing to withdraw from mediation after having attended that meeting or at any time thereafter, shall communicate the same in writing to the mediator, who shall terminate the mediation.
6. The dispute may not be subject to any other dispute resolution proceeding for a period of [nine] months after the commencement of mediation or until the mediator determines that there is no likelihood of a settlement agreement.
7. Mediation shall remain available to the parties at any time, including after the commencement of any other international investment dispute resolution proceedings.
8. The parties may at any time agree to exclude or vary any of the provisions.

12. Option B combines former options B and C, which mandated the commencement of mediation to promote early constructive dialogue. It could be an option for States that wish to require parties' mandatory engagement in mediation (A/CN.9/1124, para. 150).

13. Paragraph 1 of options B provides that upon the receipt of a written request by one of the parties, mediation would automatically commence. As in option A, paragraph 2 of option B includes a definition of mediation (A/CN.9/1124, para. 154) and paragraph 3 lists available mediation rules that parties could refer to for the conduct of mediation (A/CN.9/1124, para. 151).

14. Unlike option A, option B provides a number of default rules in case the parties have not yet agreed or are unable to agree on a set of mediation rules. Paragraph 4 provides the rule on the appointment of the mediator indicating a short time frame within which the parties shall agree on the mediator (for example,

20 days) and that in case they are not able to agree on the mediator, they should agree to an institution or a person to assist them.

15. Paragraph 5 requires the mediator to convene a first meeting within a short period of time after his or her appointment (for example, 15 days) and requires all parties to attend that meeting. It further stipulates that attendance at the meeting is a precondition for withdrawing from mediation, which shall be communicated to the mediator. Upon receipt of that communication, the mediator is required to terminate the mediation ensuring clarity on the status of the proceeding.

16. Paragraph 6 limits the initiation of other dispute resolution proceedings upon commencement of mediation for a certain time period or until the mediator determines that there is no likelihood of a settlement agreement. Paragraph 7 highlights that mediation remains available even if the initial mediation failed and functions as a reminder to parties of the availability of mediation at a later point in time. Paragraph 8 provides that the parties are free to exclude or vary any of the provisions at any time.

B. Information required in an invitation or a request (draft provision 2)

17. The Working Group may wish to consider draft provision 2 which lists the information to be contained in an invitation to engage in mediation (option A) or a request to commence mediation (option B). The terms “invitation” and “request” distinguish the voluntariness of the parties to the commencement of mediation.

Draft provision 2 (Information required in an invitation or a request)

1. [The invitation to engage in mediation as referred to in paragraph 3 of provision 1 option A] [The request to commence mediation as referred to in paragraph 1 of provision 1 option B] shall contain the following information:

(a) The name and contact details of the party and its legal representative(s) and, if submitted by a legal person, the place of its incorporation;

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

(c) Government agencies and entities that have been involved in the matters giving rise to the dispute; and

(d) A description of any prior steps taken to resolve the dispute, including information on any pending claim.

18. Draft provision 2 addresses the content of the invitation to engage in, or request to commence, mediation and requires certain information to enable the other party to obtain an overview of the matters at issue as well as to understand and assess them efficiently.

19. Draft provision 2 functions as a default rule when the parties have not yet chosen a set of applicable rules. Rule 5 of the ICSID Mediation Rules and article 2(3) of the IBA Rules opt for more descriptive and detailed requirements, while the UNCITRAL Mediation Rules do not contain such a requirement. Regarding subparagraph (b), the Working Group may wish to consider requiring not only a description of the factual basis of the dispute, but also the legal basis of the dispute. The inclusion of subparagraph (c) aims to allow the party to gather information from the relevant stakeholders so as to coordinate the response and to be able to invite them to the mediation process.

C. Relationship with arbitration and other dispute resolution proceedings (draft provision 3)

20. The Working Group showed wide support for a provision which would state that arbitration, litigation, and other proceedings would be stayed upon the commencement of mediation without the need for a separate agreement by the parties. It was said that such an automatic stay would reduce the risk of interference between the proceedings and ensure that the disputing parties, particularly States with limited resources, could concentrate on mediation (A/CN.9/1124, para. 162). Some recent investment treaties have addressed this aspect³ as well as the impact that the initiation and conduct of a mediation may have on time limits.⁴ The Working Group may wish to consider draft provision 3 which addresses that relationship.

Draft provision 3 (Relationship with arbitration and other dispute resolution proceedings)

- 1. Commencement of mediation shall stay any other dispute resolution proceeding.*
- 2. If the parties agree to meditation while any other dispute resolution proceeding is ongoing, the parties should inform the other dispute resolution forums in writing that the proceeding is suspended until the mediation is terminated, subject to the applicable rules of that proceeding.*

21. Paragraph 1 of draft provision 3 provides that any ongoing arbitration, litigation or other dispute resolution proceedings to resolve the investment dispute shall be suspended upon the commencement of mediation. Paragraph 2 addresses the circumstance where the parties have agreed to mediate but the proceeding has yet to commence. In that case, the parties need to notify the arbitral tribunal or the court in writing to trigger a suspension of the proceeding, which would be in accordance with the applicable rules of that proceeding or available treaty provisions.

D. Confidentiality (draft provision 4)

22. The Working Group emphasized the need to strike a balance between transparency and confidentiality in mediation, on the one hand to account for the public interest in investment disputes, and on the other to allow for a candid exchange of views and for constructive negotiations between the parties (A/CN.9/1124, para. 167). In that context, the Working Group may wish to consider draft provision 4 which aims to strike such a balance.

³ For example, Article 3.31(1) of the EU-Viet Nam Investment Protection Agreement (IPA) (2019) provides 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.”

⁴ For example, the EU-Viet Nam IPA (2019) limits the initiation of “consultations”, which follows the initial stage of “negotiations or mediation” in the IPA’s three-tier disputes clause. Article 3.31 of the IPA provides that the timeframe for initiating consultations is tolled for the period of any voluntary mediation that takes place prior to consultations.

Draft provision 4 (Confidentiality)

1. All information relating to the mediation, and all documents generated in or obtained during the mediation, shall be confidential, unless the information or document is independently available, or disclosure is required by law.
2. A party may disclose the fact that mediation is taking place or took place.
3. A party may disclose the outcome of the mediation, including any settlement agreement.

23. Draft provision 4 is modelled on Rule 10 of the ICSID Mediation Rules with paragraph 1 stating that mediation is confidential, unless the information is available independent of the mediation or disclosure is mandated under domestic legislation (A/CN.9/1124, para. 168). Furthermore, paragraph 2 allows parties to disclose the fact that mediation is taking place or took place. Similarly, paragraph 3 allows the parties to disclose the outcome of the mediation, regardless of whether it resulted in a settlement agreement and including any settlement agreement (A/CN.9/1124, para. 169).

E. Without prejudice provision (draft provision 5)

24. During mediation, parties typically exchange suggestions and views regarding proposals for a possible settlement, make admissions and indicate their willingness to settle. If the mediation does not result in a settlement agreement despite such efforts and a party initiates arbitration or other proceedings, the views, suggestions, admissions, or willingness to settle expressed during the proceeding should not be used to the detriment of the party who made them. In that context, the Working Group may wish to consider draft provision 5.

Draft provision 5 (Without prejudice provision)

Engaging in mediation is without prejudice to the legal position or rights of a party in any other dispute resolution proceedings.

25. Some investment treaties that provide for mediation include an express “without prejudice” clause underlining that: (i) the participation in a mediation proceeding shall not be considered as a concession with regard to jurisdiction, should the dispute proceed to arbitration;⁵ and (ii) information shared during a mediation proceeding should not prejudice the legal position of the parties in any other proceedings.⁶ Existing mediation rules also include similar provisions.⁷

26. There was general support within the Working Group for a draft provision which states that the engagement in mediation is without prejudice to the legal position or rights of any party in any other proceeding and not necessarily limited to international investment dispute resolution proceedings (A/CN.9/1124, para. 166, see also A/CN.9/WG.III/WP.227, para. 25).

⁵ See, for example, the Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (2018), Article 25(1) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), Article 9.18(3). Other treaties, such as Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) (2016), do not limit this caveat to the question of jurisdiction, instead stipulate as follows: “[r]ecourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter.” (Article 8.20(2)).

⁶ New Zealand-United Kingdom Free Trade Agreement (2022), Article 31.20; Chile-Paraguay Free Trade Agreement (2021), Article 17.19.

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

F. Settlement agreement (draft provision 6)

27. The Working Group may wish to consider draft provision 6 on settlement agreements.

Draft provision 6 (Settlement agreement)

The parties shall ensure that a settlement agreement resulting from mediation meets the requirements set forth in the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted on 20 December 2018 (“Singapore Convention on Mediation”).

28. Draft provision 6 draws the attention of the parties to the requirements set forth in the Singapore Convention (A/CN.9/1124, para. 171). 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)(a), 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”.