

**Possible reform of Investor-State Dispute Settlement (ISDS):
Mediation and other forms of alternative dispute resolution (ADR)**

**Submissions of the Government of Armenia
December 2021**

Armenia respectfully submits its comments with regard to the initial draft of the Note and Guidelines prepared by the UNCITRAL Secretariat related to the Possible reform of Investor-State dispute settlement (ISDS): Mediation and other forms of alternative dispute resolution (ADR). Armenia is grateful to the Secretariat for preparing this initial draft which forms an excellent basis for further discussions. Armenia reserves its right to amend or supplement its positions expressed herein as the Working Group's discussions advance.

Preliminary remarks

Development of Rules for mediation in the investor-state dispute settlement (ISDS) context

Armenia is of the opinion that establishing specific mediation rules within the Working Group would be redundant given that there already exists various sets of comprehensive mediation rules that may apply in the Investor-State dispute settlement context (e.g. UNCITRAL Mediation Rules, ICSID Mediation Rules, IBA Rules on Investment for Investor-State Mediation, ICC Mediation Rules, SCC Mediation Rules). The Working Group may rather concentrate its efforts and resources on developing model clauses providing for mediation that could be used in investment treaties or a potential multilateral instrument on ISDS reform, and guidelines for effective use of mediation in international investment dispute settlement.

Draft provision 1

a. No clause on mediation

Option 1 – Reference to mediation as an available means for solving disputes

“Each party to the dispute may, [before and during the cooling off period], ~~at any time,~~ request the commencement of a mediation-~~process~~~~procedure~~. If the disputing parties agree to a mediation, they shall sign an agreement to mediate, which shall determine the applicable procedure”.

Armenia supports Option 1 of Draft provision 1, taking into due account the voluntary and flexible character of the mediation process. The necessity and relevance of mediation should be assessed on the case-by-case basis, and not be imposed on the parties in each and every case. Armenia's motives of disapproval of Option 2 (compulsory attendance at the first mediation meeting) and Option 3 (compulsory mediation) are mainly twofold: *first*, investors often file a notice of dispute in an attempt to threaten the State with a possible arbitral process and to achieve certain gains. Even if their claims are frivolous and they might not have the real intention to pursue arbitration, the investors use this tactic with the media coverage to impose the state to sit at the negotiation table. Naturally, the State has little to no desire to maintain a dialogue with such bad faith investors. By contrast, if the Government feels that there is a prospect of dispute settlement through mediation, it may even come up with the mediation request itself. For instance, in a dispute arisen out of an investment contract in the medical field, Armenia has initiated a mediation with the aim of settling the dispute before resorting to arbitration. *Second*, the State may no longer wish to maintain the relationship with a given investor for the lack of trust or for any other reason. The relationship

may have been deteriorated to an extent when the mediation cannot serve its purpose. In that instance, imposing the parties to attend even a single mediation session will be merely artificial and not fulfill the objective of mediation. Therefore, there may be cases when arbitration will be preferred over mediation in order to put an end to the outstanding matters between the parties. The decision to mediate or not shall hence be entrusted to the parties and not be predetermined by investment treaties.

Armenia also suggests replacing the term “mediation procedure” with “mediation process” given that mediation is not constrained by rigid procedural rules but is rather a process towards an amicable dispute settlement.

Armenia is also in favor of signing a mediation agreement which will set forth the applicable procedure or will make a reference to the applicable mediation rules, modify or supplement them, if necessary.

Draft provision 2

*[before and during the cooling off period] [within – days from ---]
{at any time}*

While we understand that the disputing parties may wish to prevent arbitration through negotiation and mediation, and thus enter into a dialogue before or during the cooling off period that is meant for that very purpose, the parties should nevertheless have the opportunity to have access to mediation **at any time** during subsequent arbitral proceedings. Therefore, Armenia believes that the mediation may occur both in the pre-arbitration stage (before and during the cooling-off period), and during the arbitral proceedings with the consent of all the parties.

Relationship with arbitration and other ISDS mechanisms

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

3. *All timelines ~~pursuant to [arbitration]/[standing mechanism]~~with respect to adjudication are suspended from the date on which the disputing parties agreed to have recourse to mediation and shall resume on the date on which either disputing party decides to terminate the mediation. Any party may terminate the mediation at any time by written notice to the mediator and to the other party.*

We support the idea that adjudication (arbitration, proceeding before a standing mechanism) should be stayed pending mediation. The third paragraph could also make clear when the adjudicators should be notified of the termination of mediation and restart the proceedings. Meanwhile, in order to avoid using either the term “arbitration” or “standing mechanism”, we suggest using the more general term “adjudication” taking also into consideration that arbitrators and judges are collectively referred to as “Adjudicators” in the Draft Code of Conduct for Adjudicators in International Investment Disputes.

Draft provision 3

1. *Mediation of an investment dispute shall be conducted in accordance with either: (i) the ICSID Mediation Rules; (ii) the UNCITRAL Mediation Rules; or (iii) the IBA Rules for Investment State Mediation, and the provisions of this section.*

2. The mediation is to be conducted by [one mediator] / [two co-mediators] unless otherwise agreed by the disputing parties. A mediator shall be appointed by agreement of the disputing parties. The disputing parties may also request that a selected appointing authority proposes the mediator to be selected.

We think that the parties to the mediation agreement, and not the treaty should determine which procedural mediation rules shall apply. If the parties are willing to mediate, the chances are they will also reach an agreement on the applicable mediation rules. Besides, even if the treaty provided for several options of mediation rules, in each individual case the parties would have to determine which one should apply to their case. Armenia does not want to give its automatic consent to the operation of one of the listed mediation rules at the investor's choice by way of their inclusion in the treaty, but rather decide the rules for each individual case. In the event the treaty provided for exhaustive options, it would restrict the parties' choices.

In the mediation agreement, the parties can determine the applicable procedural rules themselves or preferably opt for the already established procedural mediation rules given that they contain all relevant information, including the commencement of the procedure, the appointment of mediators, the confidentiality and transparency requirements, the flow of communications, and the termination of the procedure. The parties may also supplement or modify the selected rules in the mediation agreement.

Paragraph 2 is unnecessary provided that the parties will have the possibility to decide the number of mediators at a later stage taking into account the specifics of the dispute. As to the appointment of mediators by an appointing authority, this matter will already be regulated by the applicable mediation rules or parties' mediation agreement.

Draft provision 4

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

Option 2:

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

2. The other party shall acknowledge receipt of any request for mediation within ~~14~~ days of its receipt.

Option 1:

The addressee of the request shall give due consideration to it and accept or reject it in writing within ~~15~~~~30~~ days of receipt.

Armenia favors a more liberal approach with regard to the content of the request for mediation and prefers to leave the matter on the party initiating the mediation. Hence, Option 2 corresponds to Armenia's approach. With regard to timeframes for acknowledgment of the request for mediation and its acceptance or refusal, we agree to 14 days for the former and 30 days for the latter. The State may need to consult different government agencies before accepting or rejecting the mediation offer, thus, it would be preferable to provide for a longer time period (30 days instead of 15) for that purpose.

Draft provision 5

Recourse to mediation is without prejudice to the legal position or rights of the disputing parties.

We understand that mediation rules regulate this matter, but we could also enshrine it in the treaty as a general principle.

Draft provision 6

Mutually agreed solutions shall be made publicly available.

While the mediation process should be confidential, we see no reason to keep the final solutions secret. Nonetheless, it would be preferable that the parties decide the level of details they wish to make public. The information may be disclosed through a joint press release, and be provided to the media outlets upon request.

Draft provision 7

1. *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 ~~set forth 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 to the Singapore Convention on Mediation.~~*

We believe that as long as the mediation is pending and regardless of its stage, other dispute settlement procedure relating to the dispute subject to mediation shall not commence or continue.

We also favor the retention of the bracketed text in paragraph 2 and suggest replacing the word “provided” in line 2 with “set forth” in order to avoid the repetition of the word “provided” in line 4.

Guidelines for participants in Investor-State mediation

General remarks

The draft Guidelines provide a comprehensive overview of the mediation process and are valuable informative and practical tools for interested stakeholders in investment mediation. Armenia thinks that the Guidelines could be presented as a stand-alone text for investment mediation. Further, for greater certainty the Guidelines could provide explanations on the model treaty clause once finalized.

Armenia also wishes to inform the Secretariat that since November 2019, the Government of Armenia has established a department within the Prime Minister’s Office for representation of State’s interests before international courts and tribunals. In the context of Investor-State dispute settlement, the department has been managing 3 ICSID cases (2 pending, 1 concluded in favor of Armenia), 1 Investor-State mediation at the initiative of Armenia (unsuccessful), and several negotiations (mainly successful). The department carries out all the tasks described in paragraph 38 of the draft Guidelines. In addition, the department has recently expanded its scope and is now vested with the task to revise the dispute resolution clauses of investment treaties and contracts. Moreover, the representatives of the department take part in or observe the UNCITRAL Working Groups II and III, ECT Modernization Negotiation rounds and State

Consultations at ICSID. As the experience grows, the department will thus be in a position to provide more practical and problem-based comments and proposals within the mentioned working groups.

With a view to exchanging experience and borrowing the best practices from other Governments having a unit/entity with similar tasks, Armenia thinks it would be a good idea to hold an informal session or a side event with the participation of relevant Government representatives. The States not having such a unit/entity may gain insights where to start, and the newly formed entities may benefit from the experience and know-how of the more accomplished ones. Such meetings could also be organized within the advisory center activities mentioned in paragraph 55 of the draft Note.
