

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)
Working Group III: Investor-State Dispute Settlement Reform

Colombia's comments on ADR initial draft

I. General comment

Colombia thanks the Secretariat for preparing the ADR initial draft. It is a comprehensive document that takes in to account different views.

In general, we support the implementation of draft provisions that maintain the voluntary nature of the participation of all parties in any mediation process.

II. Specific comments

1. Nature of the offer to mediate, timeframe and level of conduciveness

DP1 - Option 1 – Reference to mediation as available means for solving disputes

[The parties may] “Each party to the dispute may, **[at any time]** request” **[agree on]** “the commencement of a mediation procedure.”

The clause as it is included in the draft does not specify that the other party might reject the request to mediate. Although it is obvious that the intention of the text is that mediation would commence only *upon invitation by a party and acceptance of the other¹*, other interpretations might be possible.

Therefore, for the avoidance of doubt, we recommend adopting more precise language, such as the one suggested in red above.

Having the possibility to opt for mediation expressly included in a treaty, might help some States to justify internally its use and cost.

If the parties agree to mediate their disputes in parallel to an existing arbitration, they must have the option to agree on whether the proceedings should be stayed or not. However, if they don't come to an agreement, the default provision should be in favor of a stay.

DP1 -Option 2 – Reference to undertaking to commence mediation

If the intention to mediate a complex dispute doesn't exist, there is no point in assisting to a first meeting with a mediator.

DP1- Option 3 – Mandatory mediation

Compulsory mediation in the context of ISDS might increase costs in most cases. While all disputes might be resolved through ADR methods, not all parties are genuinely willing to do so within a reasonable framework of expectations.

¹ https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_guidelines_on_mediation.pdf para 19

Investors and States should always prefer to solve its disputes amicably. However, since sometimes the view of the parties on their respective positions is so far away, arbitration or court proceedings become the only viable solution.

2. Other procedural matters

Draft Provision 3

We suggest adding [*unless the parties otherwise agree*] to paragraph 1.

While we are not opposed to encouraging a specific set of rules, the parties should have the option to agree on the procedure they deem useful for their specific case. We note that there are many other reputable mediation rules and institutions providing such service.

Draft provision 4

A written notice should not be included in the case of an agreement to enter mediation. In any event, the parties must communicate to reach an agreement to mediate, which in turn, should specify which rules to follow.

Draft provision 6

Transparency is key to avoiding corruption. We support the language of DP6.