14 March 2023

**MIAMI INTERNATIONAL ARBITRATION SOCIETY (MIAS)**

**REPORT OF THE MIAS TASK FORCE**
**ON ISSUES PRESENTED TO WORKING GROUP III**
**AT THE FORTY-FIFTH SESSION**
**OF UNCITRAL WORKING GROUP III**
**(27-31 March 2023, New York)**

The MIAS Task Force on Issues Presented to Working Group III has reviewed the drafts and proposals posted by the Secretariat and offers the following comments and suggestions. We hope they are useful to the Working Group, and we look forward to the continuing dialogue with the Working Group on these important initiatives.

Respectfully submitted,

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# I. MIAS Comments on the Draft Provisions on Mediation

*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 neutral 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, at the election of the party making the request to mediate:*

*(a) The UNCITRAL Mediation Rules;*

*(b) The ICSID Mediation Rules; or*

*(c) The IBA Rules for ~~Investment~~ Investor-State Mediation.~~; or~~*

*~~(d) Any other rules as agreed by the parties.~~*

*6. The parties may at any time agree to use any mediation rules not listed in paragraph 5, or agree to exclude or vary any of the ~~provisions~~ rules applicable to the mediation.*

**Commented [AR(1]:** " Provisions" here could mean the provisions of the *treaty*. This change clarifies that what the parties can vary is the *mediation rules*.

*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 neutral 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, at the election of the party making the request to mediate:*

*(a) The UNCITRAL Mediation Rules;*

*(b) The ICSID Mediation Rules; or*

*(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 Secretary General of the International Centre for the Settlement of Investment Disputes ~~parties shall agree on an institution or a person that~~ shall ~~assist them in~~ appoint~~ing~~ 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 all opposing parties and the mediator.~~,~~ ~~who~~ The mediator shall terminate the mediation.*

*6. The dispute may not be subject to any other dispute resolution proceeding until mediation is terminated or unless the disputing parties agree otherwise. ~~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.~~ Commencement of mediation stays any prescription period to bring a claim under this treaty or 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 use any mediation rules not listed in paragraph 3, or agree to exclude or vary any of the ~~provisions~~rules applicable to the mediation.*

**Commented [AR(2]:** MIAS observes that ISDS is already a long process, and thus encourages all efforts to keep delays to a minimum.

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

***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 may 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.~~*

**Commented [AR(3]:** Sometimes, the identity these entities may not be known to the investor, particularly early in the dispute.

**Commented [AR(4]:** MIAS believes the requirement to include "information on any pending claim" is vague.

Also, a "description of prior steps" is superfluous and unnecessary at this stage, particularly given that one of the parties is already making a request to mediate. If mediation is conducted, any such prior attempts can be addressed by the parties or the mediator during mediation itself if the parties or mediator so wish.

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

***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~~ shall inform the other dispute resolution ~~forums~~ fora in writing that the proceeding is suspended until the mediation is terminated, subject to the applicable rules of that proceeding.*

*~~2.~~3. A mediation shall be considered terminated pursuant to the applicable mediation rules, or, in the alternative, when the parties sign an agreement settling the dispute, when a party withdraws from mediation, or when the mediator determines that there is no likelihood of settling the dispute*

## D. Confidentiality (draft provision 4)



***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.*

## E. Without prejudice provision (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.* The views, suggestions, admissions, or willingness to settle expressed by the parties during the mediation shall be inadmissible in other proceedings.

## F. Settlement agreement (draft provision 6)

***Draft provision 6 (Settlement agreement)***

*1. 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").*

*2. A mediation agreement can be signed by the disputing parties directly or by their legal representatives. A State's legal representative shall include any of the following: a legal representative designated in this Agreement, a legal representative pursuant to a power of attorney, or any person that meets the requirements of a representative under Article 7 of the 1969 Vienna Convention on the Law of Treaties.*

*3. The disputing parties shall be bound to the settlement agreement once it is signed by the disputing parties, regardless of any other internal or domestic proceeding.*

## II. MIAS Comments on the Draft Guidelines on Investment Mediation

[. . .]

### E. Timing and duration of mediation

8. While the suitability of mediation may change with the evolving circumstances, it is available at any point in time – at the stage of a mere grievance, prior to the crystallization of the dispute, prior to the initiation of any other dispute resolution proceedings as well as during and after such proceedings (for example, with regard to the implementation of an arbitral award). It can thus be employed as a tool throughout the life cycle of an investment whenever issues or conflicts arise. Investment treaties and contracts may specify a period of time, during which parties are encouraged to reach an amicable settlement (referred to as the "cooling-off" period). In certain instances, the lapse of the cooling-off period may be a precondition for initiating arbitration.

9. If mediation takes place at the grievance stage, the dispute might not have yet crystallized. Mediation may resolve some of the underlying issues, which might help to de-escalate the dispute or narrow it down. In general, it is easier to find creative solutions mutually agreeable to the parties, if mediation takes place prior to parties taking adversarial positions.

[*Note to the Working Group: The previous version of the draft Guidelines contained a time chart on when mediation would be available. However, such a chart would be too complicated to draft so as to reflect the various situations and the different considerations of the parties. Accordingly, the chart has been deleted (A/CN. 9/1124, para. 176)*].

10. When parties agree to mediate, they may wish to fix a time period during which they will engage in mediation. The duration should not be too short and be sufficient to conduct mediation in an efficient and streamlined manner, but it should not be so long that it delays the administration of justice (for example, a reasonable timeframe for a mediation under some circumstances could be six months, counting from the date of the request to the date of termination).

[. . .]

**2. Qualifications and other requirements of a mediator**

[. . .]

19. *Nationality* – The nationality of the mediator may also be a factor to be taken into account. For example, it may be advisable to select a mediator other than the nationalities of the parties to avoid any perception of bias or lack of independence. However, when a party feels the need for the mediator to be familiar with its language, customs and culture, a mediator of the same nationality can be appointed, including as a co-mediator (see para. 22 below).

[. . .]

## I. Role of the parties and other participants in mediation

[. . .]

*27. Role of non-disputing parties* – The flexibility of mediation allows for the participation of non-disputing parties in the process, which is one way to take into account the public interest in investment disputes and might assist in achieving an amicable solution (A/CN.9/1124, para. 191). However, participation of non-disputing parties may also complicate and prolong the mediation process, adding to time and expense of the parties. Examples of non-disputing parties may include States Parties to the underlying investment treaty not party to the dispute, local communities affected by the investment, the dispute, or any negotiated solution, the civil society at large, and other interested stakeholders. The scope and the procedural framework for participation by non-disputing parties would need to be determined by the parties. Non-disputing parties may be consulted during the process on specific points or may be asked to provide written statements for consideration by the parties.

## III. MIAS Comments on the Proposal Regarding Articles 3, 4, and 11(e) of the Code of Conduct for Arbitrators

### Draft proposal

91. It was recalled that there had been support for a ban on double-hatting and at least a cooling-off period of 10 years, on the one hand, as well as support for no limitation, on the other hand. In a spirit of flexibility, willingness to explore various time periods for cooling-off was generally expressed. Specifically, time periods of 6 months, 1 year, 3 years, and 5 years were proposed. After discussion, it was agreed that this should be taken into further consideration as the Working Group sought to reach agreement on a compromise on limitation on multiple roles based on the following proposal regarding articles 3, 4 and 11:

**"Article A3 – Independence and Impartiality**

…

2. Paragraph 1 includes the obligation not to:

…

(c) Be influenced by any past, present or prospective financial, business, professional, or personal relationship; …

**Article A4 – Limit on multiple roles**

1. Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving:

(a) The same measure(s);

(b) The same or related party(parties); or

(c) The same provision(s) of the same instrument of consent.

2. For the sake of clarity, a legal representative or expert witness acts in a proceeding from the date in which she is engaged until the date in which the engagement is terminated.

~~For a period of […], a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same measure(s) unless the disputing parties agree otherwise.~~

~~3. For a period of […], a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same or related party(parties) unless the disputing parties agree otherwise.~~

~~4. For a period of […], a former Arbitrator shall not act as a legal representative or an expert witness in any other IID or related proceeding involving the same provision(s) of the same instrument of consent unless the disputing parties agree otherwise.~~

**Commented [AR(5]:** MIAS believes that as long as these acts or representations are not concurrent, there is no basis for a "cooling off period" for any of these provisions in paras. 2-4.

**Article A11 – Disclosure obligations**

…

2. Regardless of whether required under paragraph 1, the following information shall be disclosed:

…

(e) Any prospective concurrent appointment as a legal representative or an expert witness in any other IID or related proceeding."

92. It was further proposed that the commentary to article 11(2)(e) should read along the following lines: "The purpose of the disclosure prior to an Arbitrator accepting an appointment as a legal representative or an expert witness in any other IID or related proceeding is to allow the disputing parties to know in advance, to ask questions, and to raise any concerns that they may have in terms of whether they believe that acting in the other capacity would violate Article 3 of the Code of Conduct. If an Arbitrator accepts the appointment as a legal representative or an expert witness, a disputing party may challenge the Arbitrator under the applicable arbitration rules."