United Nations Commission on International Trade Law

Working Group III (Investor-State Dispute Settlement Reform)

Possible reform of investor-State dispute settlement (ISDS): Mediation and other forms of alternative dispute resolution (ADR)

Submission from the Government of Bahrain

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I. Introduction

1. The Kingdom of Bahrain appreciates this opportunity to offer comments on the initial draft prepared by the United Nations Commission on International Trade Law (UNCITRAL) Secretariat of a Note on "Mediation and other forms of alternative dispute resolution (ADR)" (draft Note) and its annexed draft "Guidelines for participants in investor-State mediation" (draft Guidelines).

2. The draft Note recalls the request of the Working Group that the Secretariat work on the elaboration of mediation rules, model clauses on mediation for investment treaties, and guidelines for the effective use of mediation in settling investor-State disputes. The Kingdom of Bahrain agrees with the conclusion of the draft Note at paragraph 2 that, as there already exist sets of investment mediation rules, the focus of the Working Group should be on the development of model clauses and guidelines. The Kingdom of Bahrain commends the Secretariat for its thoughtful examination in the drafts of points to be considered by the Working Group in these respects.

II. Possible models for a clause on mediation in investment treaties

3. Three options for model treaty clauses on mediation are put forward in the draft Note. Option 1 would be a clause merely referring to mediation as an available means for settling disputes. Option 2 would be a clause embodying an undertaking at least to attempt mediation. The final option 3 would be a clause providing for mandatory mediation. As the Secretariat points out in the draft Note, option 3 departs from the voluntary nature of mediation. The voluntary nature is preserved in varying degrees by options 1 and 2. Option 3, however, may be the most conducive for the use of mediation.

4. The draft Note indicates at paragraph 26 that, since option 3 calls for mandatory mediation, "a longer period is provided for mediation so as to ensure that the parties would follow a comprehensive procedure with the assistance of the mediator."

Option 3 currently envisages a mandatory mediation period of 6 to 9 months ("[i]f the parties cannot reach an agreement within [6] [9] months after the [commencement of the mediation procedure] [appointment of the mediator], the dispute shall upon request of any party, be submitted to [arbitration] [other ISDS method]").

5. The Kingdom of Bahrain notes, however, that where one of the parties is reluctant to meaningfully engage with the mediation process, the mandatory mediation period under option 3 could be interpreted as preventing the more diligent party from referring the dispute to another ISDS method prior to the expiry of the prescribed mediation period. The mandatory mediation period would effectively be operating as another cooling-off period. To avoid such an undesirable scenario, the Kingdom of Bahrain recommends that future versions of option 3 allow a party to refer the dispute to another ISDS method if (i) a party fails to participate meaningfully in the mediation process during a given period (e.g., 2 months), or (ii) following a written declaration of the mediator that further efforts at mediation would not, in his or her opinion, contribute to a settlement of the dispute.

6. In further developing a clause along the lines of option 3 (and perhaps also option 2), the Secretariat may also wish to add a provision designed to help assure that such a mediation clause in an investment treaty will not be displaced by operation of any most-favored-nation clause of the treaty.

III. Data on investor-State mediation

7. The draft Note and the draft Guidelines both refer to ADR methods as "underutilized" in the ISDS context. Among ADR methods, this is certainly true of ICSID conciliation. According to information published on the website of ICSID,[1] only eleven ICSID Convention conciliation cases have been registered to date. Just one of them was an investment treaty case, and the rest were contract cases.

8. With their several references to approaches "typically" followed in investor-State mediation, the draft Guidelines seem to imply that the number of such mediations, though likewise small, may be larger than the number of ICSID conciliations. This is not, however, stated directly or supported by data in the drafts. It would be helpful if, in future drafts, the Secretariat could provide estimates or likely ranges of the number of investor-State mediations, together with indications as to the respective proportions of treaty and contract cases--all, of course, while respecting confidentiality concerns.

IV. Conciliation as one of the "other forms" of ADR

9. Lastly, although the full titles of the draft Note and draft Guidelines both mention, alongside mediation, "other forms" of ADR, both drafts focus exclusively on mediation. While this is in keeping with the request of the Working Group, it could be useful if, in future drafts, consideration were also given to advantages of conciliation in the ISDS context. Among the unique advantages of ICSID Convention conciliation, for example, are immunities extended under the Convention to participants in Convention conciliation (and arbitration) proceedings

[1] https://icsid.worldbank.org/cases/case-database

which are not shared by participants in mediation or other non-Convention proceedings.