

Possible reform of investor-State dispute settlement (ISDS)

Mediation and other forms of alternative dispute resolution (ADR)

Note by the Secretariat

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I. Introduction

1. At its thirty-ninth session, 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 these methods could be more effectively used (A/CN.9/1044, para. 35). It was observed that these methods were still largely underutilised in the settlement of international investment disputes. The structural, legislative and policy impediments to their use, in particular for governments, were also noted (A/CN.9/1044, para 35). The Working Group therefore requested the Secretariat to work with interested organisations, 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 clauses 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. Regarding the development of mediation rules, the Working Group may wish to note that the UNCITRAL Mediation Rules, adopted by the Commission at its fifty-fourth session in 2021, are of a generic nature and are available for the settlement of international investment disputes.¹ It may also be noted that there are specific rules designed for the settlement of investor-State disputes, such as the ICSID Mediation Rules² and the IBA Rules on Investment for Investor-State Mediation.³ In that light, the Working Group may wish to consider whether the development of specific rules would be necessary or rather duplicative of the existing standards, and whether reform efforts should focus on the development of model clauses (see section B below) and guidelines (see section C in the addendum to this Note), which aim at fostering the use of mediation in international investment dispute settlement.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic. This also includes research and analysis undertaken by the Secretariat of ICSID on the topic.⁴ This Note does not

¹ According to a definition in Footnote 1 of the Model Law on International Commercial Mediation and Settlement Agreements resulting from Mediation (2018), “the term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: (...) investment (...)” (see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf).

² See <https://icsid.worldbank.org/fr/node/18906>.

³ See <https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C>.

⁴ Such published information include: the 2016 Energy Charter Secretariat, Investment Guide Energy Charter Conference: Guide on Investment Mediation (adopted 19 July 2016), available at <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>, and the Model Instrument on Management of Investment Disputes, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes; ICSID, Background Paper on Investment Mediation, July 2021, available at https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf, and Overview of Investment Treaty Clauses on Mediation, July 2021, available at https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf; K. Fan, Mediation of Investor-State Disputes: A Treaty Survey, Journal of

seek to express a view on the reform options which is a matter for the Working Group to consider.

4.

II. Mediation in international investment disputes

A. Background information on mediation in ISDS

5. The Working Group may wish to note that mediation has been mentioned as an element of reform in many submissions by States in preparation for the third phase of its mandate (“Submissions”). Nearly all Submissions referring to mediation highlight that it is less time- and cost-intensive than arbitration, and that its increased use would therefore address concerns regarding the cost and duration of ISDS.⁵ In addition, mediation is considered as offering a high degree of flexibility and autonomy to the disputing parties and allowing the preservation of long-term relationships through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts (A/CN.9/1044, para. 27).⁶

6. The Working Group may wish to consider the brief overview below regarding the reference to mediation under existing investment treaties, noting also the difficulties faced by States in using mediation where it is not already provided for under investment treaties.

1. Mediation under existing investment treaties

- *Reference to mediation*

7. It may be noted that a vast majority of ISDS clauses in investment treaties foresee a so-called cooling off period before arbitration can be triggered,⁷ ranging from 3 months to 2 years, but only a few provide for mediation either before or during this period.

8. Clauses range from those:

- Providing for a specified time period that must elapse before submission of a claim to arbitration, without any reference to mediation and other forms of ADR,⁸ or with a general direction that the parties to

Dispute Resolution (2020), No. 2, Article 8, pp. 327-342, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549661; C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, ‘Mediation in Future Investor-State Dispute Settlement’, Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf> (AF Study); R. Weeramantry, B. Chang and J. Sherard-Chow, Investor-State Arbitration Meets Mediation: Putting Mediation and Conciliation Back into ISDS—The Asian Experience, Kluwer Arbitration Blog (2 October 2020), available at <http://arbitrationblog.kluwerarbitration.com/2020/10/02/investor-state-arbitration-meets-mediation-putting-mediation-and-conciliation-back-into-isds-the-asian-experience/>.

⁵ Submission from the Government of Thailand (A/CN.9/WG.III/WP.147, para. 7); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163, p. 7, annex I); Submission from the Government of Turkey (A/CN.9/WG.III/174, p. 3, bullet point 7); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41); Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru (A/CN.9/WG.III/WP.182, p. 2, annex).

⁶ Submission from the Government of China (A/CN.9/WG.III/WP.177, p. 5).

⁷ A study suggests that more than 70% of the treaties contain cooling off clauses, see C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, ‘Mediation in Future Investor-State Dispute Settlement’, Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020).

⁸ See, for example, the Bolivia-US BIT (1998), Article IX(2) (“a ... party to an investment dispute may submit the dispute for resolution” to binding arbitration provided, inter alia, “that three months have elapsed from the date on which the dispute arose.”)

the dispute should attempt to resolve the dispute “amicably” during such specified time period, while remaining silent as to the method and process the parties might use to achieve a settlement, and not requiring the parties to follow any determined procedure;⁹

- Referring to direct negotiation or consultation;
- Providing for mediation as one of the means for reaching amicable settlement¹⁰ together with consultation and negotiation,¹¹ or as a separate means,¹² with some clauses including the advance consent of the State to mediation at the investor’s election, making it optional for the investor;¹³
- Providing that a disputing party shall give favourable consideration to a request for mediation by the other disputing party;¹⁴
- Imposing a de facto obligation on both disputing parties to undertake mediation as a precondition to arbitration;¹⁵

⁹ See, for example, Peru-UK BIT (1993), Article 10 (“Any legal dispute arising between one Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former shall, as far as possible, be settled amicably between the two parties concerned. If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID] for settlement by conciliation or arbitration...”) Other examples are found in the Hungary-UK BIT (1987), Article 8, the Indonesia-Netherlands BIT (1994), Article 9, and the Georgia-Israel BIT (1995), Article 8.

¹⁰ See Iraq-Saudi Arabia BIT (2019), Article 12 (1), which refers to direct amicable means, mediation or conciliation; Egypt-Mauritius BIT (2014), Article 10 (1); Mali-Morocco BIT (2014) Articles 9 (1) and (2); Colombia-Singapore BIT (2013), Article 13 (2); Austria-Nigeria BIT (2013), Article 20 see also Bahrain-Russian Federation BIT (2014), Article 8, which mentions mediation to be held under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes.

¹¹ See Kazakhstan-United Arab Emirates (2018), Article 10 (1); Austria-Kyrgyzstan BIT (2016), Article 20; Turkey-Ghana BIT (2016), Article 14; Netherlands Model BIT (2019), Article 17; see also CPTPP, Article 9.18 (“Consultation and Negotiation 1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.”)

¹² See C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, ‘Mediation in Future Investor-State Dispute Settlement’, Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), which indicates that 44% of the cooling off periods do not mention any means, 42% mention negotiation, 10% mention consultations, 3% mention conciliation and 1% mention mediation.

¹³ For example, the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement (2017), Articles 19 and 20; see also the Mainland China-Macau CEPA Investment Agreement (2017), Articles 19 and 20.

¹⁴ See, for example, the Netherlands Model BIT (2019), Article 17.1 which provides that disputes should be settled amicably through negotiations, conciliation or mediation in the first instance: “[a] disputing party shall give favourable consideration to a request for negotiations, conciliation or mediation by the other disputing party”. The EU-Singapore IPA (2018) and the EU-Viet Nam IPA (2019) both include provisions requiring the recipient to “give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt.” CETA (2017) contains a similar provision (Annex 29(C), Article 2(2)).

¹⁵ The Costa Rica-United Arab Emirates BIT (2017) foresees two stages before the investor is entitled to proceed to arbitration: the first stage being consultations and negotiation (for which 3 months are reserved), see Article 14 (1), followed “by a third party procedure such as conciliation or mediation before an authorized centre of the Party complained against in the dispute”. Article 14 (4) foresees that: “4. For greater certainty, compliance with the requirements pursuant to paragraphs 1, 2 and 3 regarding consultation and negotiation and third-party procedures is mandatory and a condition precedent to the submission of the dispute to arbitration”. See also the Rwanda-United Arab Emirates BIT (2017), Article 12: “Mediation and Conciliation, 1. In lieu of, or in addition to, the mandatory negotiation requirement, the parties to the Investor-State Dispute may agree

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- Making participation in the designated amicable dispute resolution procedure mandatory for the investor, at the State's election.¹⁶

9. While most investment treaties reserve mediation to the pre-arbitration stage during the amicable settlement or cooling off period, some treaties highlight that the disputing parties can refer their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation before or during the arbitral proceedings,¹⁷ thereby allowing mediation at any time.¹⁸ Such clauses provide for a stand-alone mechanism for mediation where

to mediation or conciliation, without prejudice to their rights, claims and defences under this Agreement. 2. The parties to the Investor-State Dispute shall agree upon the rules applicable to (i) the mediation or conciliation of the dispute and (ii) the method of appointment of the mediator or conciliator." See further the EU-Viet Nam IPA (2019), which provides for a three-tier dispute resolution: first, negotiations or mediation, which is then followed by "consultations," and if the dispute is not resolved, the disputing parties may resort to arbitration; Article 3.31 provides that "[t]he disputing parties may at any time ... agree to have recourse to mediation". Having stipulated this multi-tier method for dispute resolution, the EU-Viet Nam IPA (2019) also conditions, in Article 3.35, the submission of a claim to arbitration not only on (i) a minimum period of 6 months having passed since the request for consultations and 3 months having passed since the notice of intent to submit an arbitration claim, but also on (ii) the condition that "the legal and factual basis of the dispute was subject to prior consultations."

¹⁶ The Australia-Indonesia CEPA (2019) provides for consultations in the initial phase and then stipulates, in Article 14.23, that "[i]f the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party [i.e., the State party to the dispute] may initiate a conciliation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement." Article 14.26(2)(b) further conditions the commencement of an arbitration on 120 days having elapsed since the State initiated the conciliation process, where the State has elected to do so. The provisions of the Indonesia-Korea CEPA (2020) are similar. The Mauritius-UAE BIT (2015) also provides for "consultations and negotiations" in the initial phase, and thereafter makes mediation or conciliation mandatory for investors, at the State's election. Article 10(3) provides that "When required by the Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice, it shall be submitted to the competent authority of that Contracting Party or arbitration centres thereof, for conciliation and mediation." Article 10(4) provides that the investor can initiate an arbitration "if the dispute cannot be settled amicably within six months from the date of the start of the conciliation and mediation process." The Armenia-UAE BIT (2016) contains similar provisions.

¹⁷ See also Colombia-Turkey BIT (2014), Article 12 (4), which reads as follows: "Nothing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation before or during the arbitral proceeding." See also Colombia-United Arab Emirates BIT (2017), Art. 15 (2); and Japan-Morocco BIT (2020), which states in Article 16 (3) that "Nothing in this paragraph precludes the use of non-binding, third party procedures, such as good offices, conciliation or mediation."

¹⁸ Australia-China FTA (2015), Article 15(6): "Good Offices, Mediation and Conciliation 1. The Parties may at any time agree to good offices, conciliation, or mediation. They may begin at any time and be terminated at any time. 2. If the Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before an arbitral tribunal convened under Article 15.7; Eurasian Economic Union-Vietnam FTA (2015), Article 145: "Good Offices, Conciliation or Mediation The disputing Parties may at any time agree to good offices, conciliation, or mediation. Procedures for good offices, conciliation or mediation may begin at any time and be terminated at any time upon the request by either disputing Party. If the disputing Parties so agree, good offices, conciliation or mediation may continue while the proceedings of the Arbitral Panel provided for in this Chapter are in progress. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the disputing Parties during those proceedings, shall be confidential and without prejudice to the rights of either disputing Party in any further proceeding."

mediation is optional, and subject to an agreement to mediate between the investor and the State.¹⁹

- *Procedural guidance*

10. The substantial majority of ISDS clauses in investment treaties that expressly provide for mediation or other ADR methods do not seek to regulate the applicable procedure in detail. They usually address one or two procedural aspects with minimal guidance.²⁰ It is noteworthy that a small number of recent treaties include a detailed provision on the mediation procedure.²¹

11. Where a procedure for mediation is provided for, procedural matters addressed have included the commencement of the process, and how the process interacts with other proceedings relating to the same dispute.²²

2. Identified need to foster the use of mediation in ISDS

12. Data from institutions suggest that mediation and other ADR methods are not often used.²³ As part of the obstacles to their use, the Working Group mentioned the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal certainty required for officials to be involved in such settlement and the need to ensure that the necessary approval process was set up, including that those negotiating the settlements had the necessary authority to agree to a settlement. It was said that policies as well as the legal framework for encouraging mediation would need to be developed or

¹⁹ The EU-Singapore and EU-Viet Nam IPAs are examples of treaties with stand-alone mediation mechanisms, providing that “[t]he disputing parties may at any time, including prior to the delivery of a notice of intent, agree to have recourse to mediation.” Other examples include the Burkina-Faso-Canada BIT (2015) (“The disputing parties may at any time, be it after notice of intent to submit a claim to arbitration has been given or after a claim has been submitted to arbitration, agree to mediation”, Article 23); CETA (2016), Article 8.20; the Netherland Model BIT (2019); Article 17(1); and the Thailand Model BIT (2012), Article 10.

²⁰ Such treaties in this last category include: the COMESA IA (2007), Article 26(4); the Belgium-Luxembourg Model BIT (2019), Article 19(C), which designates the Secretary-General of ICSID as appointing authority to appoint a mediator where the parties request (see also CETA (2017)).

²¹ These treaties include: CEPA (2017) (Annex 8); CETA (2017) (Annex 29(C)); the EU-Singapore IPA (2018) (Annex 6); and the EU-Viet Nam IPA (2019) (Annex 9).

²² Some ISDS clauses in recent investment treaties have clarified the timeframe within which mediation can be used and its possible interaction with other dispute settlement methods: for example, the EU-Viet Nam IPA (2019), which provides in Article 3.31(5) for a stand-alone ability to agree to mediation at any time, making explicit that this option can be exercised 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*”.

²³ ICSID statistics indicate that about 35 per cent of ICSID cases were settled or otherwise discontinued, which might indicate the use of ADR by the parties to some extent (see the ICSID caseload – statistics, issue 2021-1 statistics, p. 11). To date, ICSID has registered 13 conciliation cases, including 2 additional facility conciliation cases, and no case under the ICSID Fact-Finding Additional Facility Rules. The Permanent Court of Arbitration has so far not administered mediation proceedings based on a treaty, nor the Energy Charter Secretariat and neither has the SCC administered any investor-State mediation. The ICC has so far administered only one treaty-based mediation, which ended unsuccessfully due to partial participation of a party (see document A/CN.9/WG.III/WP.190, para. 43).

strengthened (A/CN.9/1044, para. 29; see also document A/CN.9/WG.III/WP.190, paras. 29-48).²⁴

13. As indicated above (see paras. 9 and 10), very few treaties regulate the mediation procedure. If the investment treaty does not refer to mediation or does not include a provision requiring the State to undertake mediation, an ad hoc agreement to mediate will be required, which may make it more difficult for government officials to engage in a voluntary mediation.

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

14. As noted above (see para. 13), where mediation is not provided for in the underlying investment treaty, it may be more difficult for a State to proceed with a mediation on an ad hoc basis (A/CN.9/1044, para. 29). Therefore, treaty Parties should consider providing for mediation in their investment treaties, so as to establish a favourable framework for its use. There are different possible options for developing model clauses for use in investment treaties which, as indicated below, would be more or less conducive to the use of mediation by the disputing parties.

15. In that light, the Working Group may wish to consider the following questions when developing a model clause on mediation for investment treaties:

- (i) How to foster resort to mediation, and whether making it a stand-alone method, available at any time to all parties, would be more conducive to the use of mediation;
- (ii) How to provide sufficient predictability in the mediation procedure to allow States and investors to have confidence in mediation; and
- (iii) What timeframe, if any, would be appropriate for resorting to mediation in light of the other available methods for solving investor-State disputes and the need to retain the flexibility inherent to mediation.

1. Nature of the offer to mediate, timeframe and level of conduciveness (Draft provision 1)

a. No clause on mediation

16. The Working Group may wish to consider that, given the voluntary nature of mediation and the flexibility inherent in the process, a first possible approach could be to leave the decision as to whether to use mediation fully in the hands of the disputing parties, as they are best placed to assess whether mediation would be appropriate.

²⁴ A study on obstacles to settlements in ISDS concluded that it might be challenging for the State to settle. The reasons identified are manifold and include fear of public criticism, particularly if the case is a sensitive or politicized one, with extensive media coverage, fear of allegations of corruption, or future prosecution for corruption, fear of setting a precedent, difficulties regarding access to public funds to organize the defence, as well as difficulties regarding intergovernmental coordination in short time frames. This reluctance may be particularly prevalent in cases involving multiple stakeholders in agencies and ministries across various levels of government who may all need to approve or at least provide input to the settlement (Report: Survey on Obstacles to Settlement of Investor-State Disputes, National University of Singapore, NUS Centre for International Law Working Paper 18/01, by Chew, S., Reed, L., Thomas, J.C. QC, to be found under <https://cil.nus.edu.sg/publications>; see also Echandi, "Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention", pp. 15–19).

17. This approach would come close to the current situation where mediation is rarely referred to in the investor-State dispute settlement clauses in investment treaties, and therefore also rarely used as it is not part of the ISDS framework.

b. Availability of mediation (Option 1)

18. The Working Group may wish to consider option 1 below which refers to mediation as an available means for solving investor-State disputes. Under such an option, the voluntary nature of mediation would be fully preserved.

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 procedure.

19. Under this option, mediation would be expressly mentioned in the investment treaty as a possible means for resolving disputes. It would be upon invitation by a party and acceptance by the other that mediation would commence. It is suggested that the request and acceptance thereof should be made in writing (see also below, paras. 40-46).

20. The Working Group may wish to consider whether it would be preferable to also provide that once the parties agree to undertake mediation, they should enter into an agreement to mediate that would set up the agreed procedure. If so, the corresponding provision could read as follows: *“If the disputing parties agree to a mediation, they shall sign an agreement to mediate, which shall determine the applicable procedure.”* The Working Group may wish to consider the level of details that should be provided regarding the content of the agreement to mediate.

21. As an alternative to providing details in the agreement to mediate, the treaty could determine which procedural mediation rules would apply. Mediation rules usually 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 (see below, paras. 35-37).

c. Undertaking to commence mediation (Option 2)

22. The Working Group may wish to consider option 2 below, which would be more conducive to the use of mediation as it requires the disputing parties to commence mediation. It would also preserve the flexibility of the procedure, but the first step of engaging in the procedure would be mandated.

Option 2 – Reference to an undertaking to commence mediation

1. The parties to the dispute shall commence a mediation procedure [within – days from ---] and attend the first meeting convened by the mediator. If any party does not wish to pursue mediation after having attended the first meeting or at any time thereafter, it shall communicate a written notice to the mediator and to the other party terminating the mediation procedure.

2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings [arbitration – standing mechanism].

23. Option 2 would go a step further as compared to option 1, as it provides for an undertaking of the disputing parties to attend at least the first meeting set up by the mediator under paragraph 1. The objective would be to facilitate the formation of a mutually agreed solution, and to make

sure that parties would at least attempt mediation. The Working Group may wish to consider the timing for the commencement of the mediation. Paragraph 2 underlines that mediation remains available at any time.

24. The remarks under paragraphs 19 and 20 above are also relevant for this option.

d. Mandatory mediation (Option 3)

25. The Working Group may wish to consider option 3 below which provides for mandatory mediation. This option would depart from the voluntary nature of mediation as there is no room for the disputing parties to decide whether to either undertake mediation (as under option 1) or continue with mediation after a first meeting (as under option 2).

Option 3 – Mandatory mediation

1. The parties shall submit their dispute to mediation [within – days from --]. If 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].

2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings (arbitration).

26. Option 3 provides for mandatory mediation, which implies that 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. The length of such period should also be reasonable, so as to encourage an expeditious procedure. Paragraph 2 clarifies that if the mandatory mediation did not end in a settlement, the parties would remain free to engage in a mediation procedure, on a voluntary basis, at any time thereafter.

27. Such mandatory language directing the parties to mediation is more rarely found in investment treaties. It is however a guarantee that the disputing parties would engage in mediation and it would provide a clear policy basis to do so. Mandatory mediation is also seen as the most conducive option for the use of mediation and for ensuring that parties would become more familiar with it. It would require active participation by the parties in the negotiation and should also be appropriate for the dispute at hand.

28. Where a treaty would provide for mandatory mediation, it would be advisable that it also regulates the mediation procedure to be followed by the parties, including by referring to a set of mediation rules (see below, paras. 37-39).

e. Considerations on timeframe (Draft provision 2)

29. The Working Group may wish to consider the various options regarding the timeframe for mediation as provided for under the various options of draft provision 1 above.

[before and during the cooling off period] [within – days from ---]

30. Mediation is often conceived of as a pre-dispute settlement method available to parties to find a mutually agreed solution, failing which litigation would commence. If mediation takes place at an early stage, then the dispute has not crystalized and it may be easier to find creative solutions to solve the dispute, not limited to financial compensation. A possible option would be to refer to the cooling-off period as a point of reference in time for the mediation to take place as investment treaties usually specify

such a period to encourage the use of ADR methods before parties can initiate formal arbitration procedures. Another option could be to provide for a specific timeframe for mediation as a standalone method disconnected from cooling off periods.

31. Regarding mandatory mediation (option 3 of draft provision 1), which is to be used by parties before the dispute escalates to arbitration, the findings of a study might be noted. Such study has found that a mandatory mediation requirement would be welcomed.²⁵ A matter that has raised some comments, however, relates to the relationship between direct negotiation and mediation, in particular whether mediation should be mandated after direct negotiation. A staged or multi-tiered approach, which would provide for direct negotiations first followed by mandatory mediation, has been described as inefficient. A possible conclusion from the study would be that mandatory mediation could be provided for in lieu of, or in addition to, direct negotiation in the cooling off period.²⁶

[at any time]

32. Mediation could also be considered as a standalone method available for use by the parties at any time during the dispute settlement stage, including before a formal investment dispute has even crystallized.

33. Permitting the mediation of disputed issues between the parties when they first arise may help prevent fully formed investment disputes from arising in the first place. Expressly permitting mediation during the course of an arbitration may also allow the parties to resolve some elements or potentially the entirety of the dispute, which would consequently reduce the scope of the matters remaining for a binding decision and hence save costs and time and ensure the greatest flexibility to the disputing parties.

- *Relationship with arbitration and other ISDS mechanisms (Draft provision 2)*

34. The Working Group may wish to consider whether additional provisions would be needed to address the use of mediation in parallel to arbitration or litigation in cases in which mediation can be used at any time. Some ISDS clauses in recent investment treaties have addressed this topic²⁷ as well as the impact on applicable time limits that the initiation and conduct of a mediation may have.²⁸

35. The Working Group may wish to consider draft provision 2 below which would complement draft provision 1 (as it is relevant for options 1 and 2 and paragraph 2 of option 3).

1. If the disputing Parties agree, mediation may continue while the dispute proceeds for resolution before an ISDS tribunal.

²⁵ 2019/2020 QMUL investors' survey, available at <http://www.arbitration.qmul.ac.uk/research/>, p. 25.

²⁶ C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), (AF paper) available at <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf>.

²⁷ For example, the EU-Viet Nam IPA (2019), which provides in Article 3.31(5) 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".

²⁸ For example, the EU-Viet Nam IPA (2019) imposes a limitation period for the initiation of "consultations" (a step that itself follows the initial period of "negotiations or mediation" in this treaty's three-tier disputes clause). The treaty provides expressly that this timeframe is tolled for the period of any voluntary mediation that takes place prior to "consultations" (Article 3.31(4)).

2. *If the disputing parties agree to mediate after the investment dispute has been submitted to [arbitration] / [standing mechanism], 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] 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.*

36. Draft provision 2 above foresees that arbitration or litigation processes could either continue or be stayed while mediation commences. They aim at providing a framework for ensuring that mediation could proceed at any time.

2. Other procedural matters

37. The Working Group may wish to consider that, in order to provide for an adequate level of trust in mediation, an ISDS clause would need to adequately spell out matters relevant to the procedure, including by:

- (i) Encouraging the application of a set of investment mediation rules, such as the ICSID Mediation Rules, the UNCITRAL Mediation Rules or the IBA Rules for Investor-State Mediation;
- (ii) Providing for a clear mechanism to commence mediation, including a request to commence mediation and an acknowledgement of receipt of the request for mediation and, if needed, an agreement to mediate that, *inter alia*, would identify who within the State has had involvement in relation to the dispute; and
- (iii) Providing the necessary framework for protecting confidentiality and for a candid exchange of views between the parties, which includes ensuring that documents and views exchanged between the parties will not be used in any further proceedings.

a. Application of rules on mediation (Draft provision 3)

38. The Working Group may wish to consider draft provision 3 below regarding the procedure of mediation.

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.*

39. Draft provision 3 provides for mediation to be governed by a specified set of mediation rules. The application of mediation rules would aim at ensuring the use of a comprehensive procedural mediation framework and avoiding procedural lacunae or unintended omissions. The Working Group may wish to note that a possible alternative to providing for the application of mediation rules could be to refer to a mediation centre that would provide for a comprehensive mediation framework. A similar approach is found in certain treaties.²⁹

²⁹ See Armenia-United Arab Emirates BIT (2016), Article 10 (3): “When required by the

40. Regarding paragraph 2, while there would be no need to include such a provision because mediation rules usually address all these matters, States may wish to consider whether there are certain key aspects that they nevertheless would wish to address. The Working Group may wish to consider whether and to what extent other elements of the mediation procedure should be covered in the model clause.

b. Written notice (Draft provision 4)

41. The Working Group may wish to consider draft provision 4 below regarding the service of notice for mediation which would apply in relation to options 1 and 2 of draft provision 1 as well as option 3 where mediation is undertaken under paragraph 2 (at any time):

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

Option 1:

- a. The name and address of that party and its legal representative(s) and, where a request is submitted on behalf of a legal person, the name, address, and place of incorporation of the legal person;*
- b. A [brief/detailed] description of the factual and legal basis of the dispute;*
- c. An indication of the agencies and entities of the Contracting Party that have been involved in the matters giving rise to the dispute;*
- d. An explanation of any prior steps taken to resolve the matters in issue.*

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

Option 2:

The disputing parties shall commence mediation within [20] days of the date of the request, or such other period as they may agree.

42. The Working Group may wish to note that draft provision 4 addresses the request to mediation, a matter also often covered by mediation rules. Draft provision 4 provides that the request could be sent by either disputing party.

43. The request for mediation under a treaty is usually (although not always) a separate written notification, distinct from a subsequent written notice of intent to submit a claim to arbitration. The request is meant to enable the parties to understand and assess the dispute and to gather information from the entities involved in the dispute, so as to allow for

Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice, it shall be submitted to the competent authority of that Contracting Party or arbitration centres thereof, for conciliation and mediation.”; see also Mauritius-United Arab Emirates BIT (2015), Art. 10 (3).

meaningful participation in the mediation. It may be noted that a very small number of ISDS clauses contain requirements regarding when and how a request for mediation should be responded to by its recipient.³⁰

44. There are different approaches in investment treaties as to whether an initial notice must merely inform the other Party of the existence of a dispute³¹ or must contain a request regarding the commencement of mediation.³²

45. Option 1 of draft paragraph 1 provides for specific information to be included in the request. It may be noted that there is also a range of approaches with regard to the information required to be included in any written notice of dispute/written request for the initiation of mediation. As an illustration, clauses may (i) require that the written notice be “*accompanied by a sufficiently detailed memorandum*” or that the notice includes “*detailed information of the facts and legal basis*” of the dispute;³³ (ii) incorporate a qualitative standard describing the amount of details that such written notice should contain;³⁴ or (iii) stipulate the required content of a written notice of dispute/request for the initiation of mediation, which could include a factual description of the dispute, information relating to the investor, an identification of the provisions allegedly breached, the outcome/relief sought, and/or the supporting documents.³⁵

46. By contrast, option 2 does not list specific items to be included in the request to mediation. It provides flexibility to the parties regarding the relevant information needed to commence mediation. This approach is also found under certain investment treaties.³⁶ It can be noted that, in a number

³⁰ For example, Article 17.1 of the Netherlands Model BIT (2019) states that disputes should be settled amicably through negotiations, conciliation or mediation in the first instance, stipulating that “[a] disputing party shall give favourable consideration to a request for negotiations, conciliation or mediation by the other disputing party”. The EU-Singapore IPA (2018) and the EU-Viet Nam IPA (2019) both include provisions requiring the recipient to “give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt.” CETA (2017) contains a similar provision (Annex 29(C), Article 2(2)).

³¹ For example, the Central America-Korea FTA (2018) (which provides for initial settlement by consultation and negotiation, including through optional mediation) calls for notification of the dispute only, requiring a “dispute ... [to] be notified by submitting a notice of the dispute (notice of dispute) in writing...”.

³² Article 152 of the China-New Zealand FTA (2008) calls for the submission of a written request for the institution of the designated amicable dispute procedure: “a request for consultations and negotiations shall be made in writing...”). The CPTPP (2018), (Article 9.18(2), Article 23(2)); and Australia-Peru BIT (2020) (Article 8.19(2)) take this same approach.

³³ For example, Belgium-Luxembourg-Montenegro BIT (2010) (Article 12(1)); China-Colombia BIT (2008) (Article 9(2)).

³⁴ For example, Article 14(6) of the Norway Model BIT (2015), which requires a notification in the form of a request for consultation to “include information sufficient to present clearly the issues in dispute so as to allow the Parties and the public to become acquainted with them.”

³⁵ For example, Article 20(4) of the Argentina-UAE BIT (2018) requires that “The investor seeking consultations will submit a written request for consultation, specifying: (a) the name and address of the investor and, where the claim is made on behalf of an enterprise, the name, address and place of incorporation of the enterprise; (b) the provision of this Agreement alleged to have been breached and any other applicable provisions; (c) the factual and legal basis for the claim; (d) the relief sought and the approximate amount of damages claimed; and (e) the evidence proving its condition of investor of the other Party and the existence of an investment.” See also CEPA (2017) (Annex 8, Article 2).

³⁶ For example, the Australia-Hong Kong BIT (2019) requires the parties to “*initially seek to resolve the investment dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.*” It requires that the initiating party “*deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure*

of treaties, a second written notice requesting arbitration may be required if no amicable settlement can be reached; that notice can require additional details to be provided at that later stage.

47. Paragraph 2 requires the recipient of a request to mediate to acknowledge receipt of the request within a specified time period. Imposing such an obligation may help ensure early establishment of a line of communication, thereby enhancing the potential for an amicable settlement. Option 1 would be relevant for situations where mediation is not mandated under the treaty provision, whereas option 2 would only work where mediation is mandated. Where institutional mediation would be chosen, this matter would already be regulated under the institutional mediation rules.

c. Without prejudice provision (Draft provision 5)

48. The Working Group may wish to consider the following draft provision:

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

49. In mediation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the mediation does not result in a settlement and a party initiates arbitral or other proceedings, it should be ensured that those views, suggestions, admissions or indications of willingness to settle will not be used to the detriment of the party who made them.

50. In this respect, it is noteworthy that ISDS clauses in investment treaties that explicitly provide for mediation sometimes include an express “without prejudice” clause, underlining that the participation in the procedure shall not be considered as a concession as to jurisdiction should the dispute proceed to arbitration or that information shared during the mediation should not prejudice the legal position of either party in any other proceedings.³⁷ This matter is also addressed in existing mediation rules.³⁸

d. Confidentiality and transparency (Draft provision 6)

51. The Working Group may wish to consider that confidentiality of the mediation process is carefully addressed under mediation rules regarding both the fact that a mediation is being undertaken and the mediation process.³⁹ In this light, it would be redundant to provide for detailed provisions on confidentiality.⁴⁰ It should be noted that national legislation

or measures at issue.” More detail is required to be provided in a subsequent “*written notice of its intention to submit a claim to arbitration*”, and is only necessary if the dispute has not been resolved in the initial “consultations” phase.

³⁷ Examples of such clauses can be found, *inter alia*, in the Argentina-Japan BIT (2018), Article 25(1) and the CPTPP (2018), Article 9.18(3). Other treaties, such as CETA (2017), do not limit this caveat to the question of jurisdiction, instead stipulating “[r]ecourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter.” (Article 8.20(2)). See also CEPA (2017), Annex 8, Article 3.3.

³⁸ For example, see, proposed ICSID Mediation Rule 11, Article 10(2); IBA Rules on Investment for Investor-State Mediation, Article 7(1); UNCITRAL Mediation Rules, Article 7(1).

³⁹ For example, see, proposed ICSID Mediation, Rule 10; IBA Rules on Investment for Investor-State Mediation, Article 10(1); UNCITRAL Mediation Rules, Article 6.

⁴⁰ It may be noted that ISDS clauses also occasionally address the question of confidentiality and disclosure in mediation proceedings. These include the Thailand Model BIT (2012), which stipulates in Article 10(4) that a mediation shall be confidential; and CETA (2017), which foresees in Annex 29(C), Article 6, that the mediation proceeding shall be confidential, except for the fact that the mediation is

may provide for disclosure obligations, for example on re-negotiated concession agreements. However, the Working Group may wish to consider whether to provide for information disclosure regarding the outcome of the mediation, as proposed in the following draft provision:

Mutually agreed solutions shall be made publicly available.

52. The Working Group may wish to consider whether transparency regarding the outcome of a mediation would enhance confidence in this method and also alleviate concerns that mediation could be criticized as an opaque means of solving disputes.

3. Settlement Agreement (Draft provision 7)

53. The Working Group may wish to consider the following draft provision regarding the settlement agreement:

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 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].

54. Paragraph 1 clarifies that parties should be bound by any mutually agreed solution, and therefore, that they shall not commence any other dispute settlement procedure thereafter. Paragraph 2 serves to draw the attention of the disputing parties to the existing international framework on enforcement of settlement agreements resulting from mediation. The Working Group may wish to consider whether the bracketed text should be retained, given that a settlement agreement may need to be enforced in a country other than that of a Contracting State to the investment treaty. States may also be signatory to the Singapore Convention and have formulated the reservation provided for under article 8(1)(b) 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”.

C. Linkage to other reform options

55. The Working Group may wish to consider:

- Whether the role of third-party funding would need to be addressed considering that, where third-party funding is provided, the third-party funding arrangement may become an obstacle for the funded party to negotiate and accept a settlement;⁴¹
- How the dispute prevention measures could be used to create a favourable environment for mediation;⁴² and

taking place, and subject to the position that, “*mutually agreed solutions shall be made publicly available*” subject to the redaction of information a Party designates as confidential.

⁴¹ More information on the reform element regarding third party funding is available at: <https://uncitral.un.org/en/thirdpartyfunding>.

⁴² More information on the reform element regarding dispute prevention and mitigation is available at: <https://uncitral.un.org/en/strengtheningmechanisms>.

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- How the advisory centre, by providing certain mediation services, could have an impact on the use of mediation.⁴³

⁴³ More information on the reform element of an advisory centre is available at: <https://uncitral.un.org/en/multilateraladvisorycentre>.