

## **Possible reform of investor-State dispute settlement (ISDS)**

### **Mediation and other forms of alternative dispute resolution (ADR)**

#### **Note by the Secretariat**

#### **I. Introduction**

The EU and its Member States thank the UNCITRAL Secretariat for the work done in bringing forward the conclusions of Working Group III and in particular for the production of these draft clauses on mediation in investment treaties and guidelines for participants in investment mediation. The EU and its Member States politely make the following comments to the draft.

As a preliminary comment, the EU and its Member States emphasise the importance of non-adversarial ways of dispute resolution and the need to improve the access to such methods, especially mediation. The issue of improving recourse to mediation should be seen in the broader context of the ISDS reform process. In this context, the EU and its Member States submit that a permanent Multilateral Investment Court could constitute a forum for the conduct of investment mediation in a manner that would bring significant advantages to the system of international investment dispute resolution. The ideas of the EU and its Member States in this sense are further developed below.

#### **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.<sup>5</sup> 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).<sup>6</sup>

**Para. 5:** The EU and its Member States share the views that investor-State mediation presents important advantages with respect to litigation in terms of reduced costs and duration and overall flexibility. Indeed, the EU’s and its Member States’ commitment to strengthening the role of mediation in investor-State dispute resolution is reflected in the recent bilateral agreements of the EU with Canada, Mexico, Singapore and Viet Nam. These agreements not only provide for the possibility of the disputing parties to resort to voluntary mediation at any point prior or during the dispute, but they also cater for a system of mediation governed by rules and timeframes different to those of the dispute. Among others, those agreements provide for rules for the appointment of the mediator and refer to strict ethical standards. Moreover, certain of those agreements provide for detailed rules on the conduct of the mediation.

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

The EU and its Member States are conscious that there are several issues that in

practice have a limiting effect on the effective recourse to alternative dispute resolution and in particular mediation in the resolution of investor-State disputes. The EU and its Member States submit that the creation of a standing body to hear investment disputes, i.e. a permanent Multilateral Investment Court, could address those issues. For that, a number of features would need to be incorporated into such standing body, starting with the ability to mediate between the disputing parties where those parties so decide. The Multilateral Investment Court should also cater for the various procedural, logistical and other needs required by the mediation rules that the disputing parties decide to abide by in any given case.

The Multilateral Investment Court's ability to mediate would be in line with its overall mandate to solve investment disputes. The Court could curate a list of individuals ready to serve as mediators with the relevant experience and expertise and different from that of adjudicators. Moreover, with the support of the Secretariat of the Multilateral Investment Court (whether internal to the Court or not), the Court could provide support to the mediator and the disputing parties throughout the mediation process, including in making sure that the mediation operates based on high ethical standards, especially of independence and impartiality and with no undue interferences.

More generally, the Court would provide the necessary support for mediation to be carried out in a reliable fashion and within a dedicated structure providing for the necessary procedural predictability, allowing for governments and investors to plan ahead and anticipate next steps in the process, thereby encouraging mediation. Because of its court structure, support to mediation would be carried out in a manner that ensures efficacy and fairness of procedures, providing for the necessary institutional and logistical support, while incorporating any necessary flexibilities in terms of conduct, timeframes and conclusion. As a permanent institution, the Court could facilitate mediation in a cost-effective manner to the benefit of the disputing parties.

In view of the EU and its Member States, there are advantages to the Multilateral Investment Court being able to support mediation in addition to providing for litigation.

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

### ***a. No clause on mediation***

In view of the EU and its Member States, not including any provision on mediation and thus requiring a specific agreement of the disputing parties, would fall short of achieving the objective of encouraging resort to methods of alternative dispute resolution, in particular mediation. Failure to include dedicated provisions would not contribute to strengthening the framework for access and conduct of investment mediation.

### ***b. Availability of mediation (Option 1)***

The EU and its Member States generally consider that the possibility of resorting to voluntary mediation at any time in investor-State dispute settlement proceedings is a desirable feature in investment agreements. In view of the EU and its Member States, mediation offers a less costly and more flexible, reliable alternative to litigation. Accordingly, the latest EU agreements with Canada, Mexico, Singapore and Viet Nam expressly cater for this possibility in the context of the Investment Court System.

Those agreements also foresee that where a permanent mechanism for the resolution of investment disputes is established multilaterally, it shall lead to the phasing out of the bilateral Investment Court System. In the event that the Multilateral Investment Court is able to support mediation between the disputing parties, it should also be able to do so for mediation processes conducted under those bilateral agreements.

As for other investment agreements, where they do not foresee mandatory resort to consultations or other methods of alternative dispute resolution, the EU and its Member States respectfully consider that merely providing for the availability of

mediation in investment treaties may be a suboptimal option. It is considered that this option may fall short of sufficiently encouraging disputing parties to avail themselves of the advantages of seeking an amicable solution to a dispute. However, the EU and its Member States recognise this to be a policy decision to be made by States when negotiating international investment agreements. For this reason, the EU and its Member States do not comment in detail on whether investment agreements *should* incorporate provisions on the availability of mediation but submit that, where an investment agreement provides for such option, related mediation processes should be susceptible of being handled by the Multilateral Investment Court.

***c. Undertaking to commence mediation (Option 2)***

In the assumption that it is a policy decision to be made by States when negotiating international investment agreements, the EU and its Member States respectfully consider that, in the absence of mandatory resort to consultations or other methods of alternative dispute resolution, including in international investment agreements provisions requiring the disputing parties to commence mediation may be a good option to encourage the resolution of disputes in an amicable manner.

The EU and its Member States believe that in order to prosper such option should be accompanied by effective mechanisms that ensure the smooth conduct of the mediation after its mandatory commencement. In this sense, and in line with the comments to paragraph 13 above, the EU and its Member States submit that a permanent Multilateral Investment Court with a Secretariat providing support to the mediation process could facilitate the commencement and conduct of mediation.

***d. Mandatory mediation (Option 3)***

In line with the comments above, the EU and its Member States submit that in the absence of mandatory resort to consultations or other methods of alternative dispute resolution, mandatory mediation is an option that may encourage amicable resolution of disputes. Assuming the parties' willingness to engage in mediation in a given case, mandatory mediation should be accompanied by effective mechanisms that ensure the smooth conduct of the mediation. As indicated above, a permanent Multilateral Investment Court could contribute to those objectives.

That being said, the EU and its Member States highlight that whether mediation should be mandatory or not is a policy element to be considered and agreed to by States in the context of their specific investment negotiations.

***e. Considerations on timeframe (Draft provision 2)***

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  
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The EU and its Member States consider that limiting recourse to mediation to certain procedural phases of the dispute settlement procedure may be a suboptimal option to the extent that it would lead to more limited possibilities for the disputing parties to resorting to mediation (in the event that mediation is not mandatory). It follows that such option may also lead to lower possibilities of the issue being effectively solved through a mediated solution.

*[at any time]*

As a matter of principle, the EU and its Member States consider that permitting resort to mediation at any moment of the dispute settlement procedure is more desirable than limiting it to a certain procedural stage, as it maximises its chances of success. This option also leaves an important feature of mediation as an example of alternative dispute resolution untouched, in the sense that it leaves it to the disputing parties to decide in what moment, considering the particular circumstances of the specific case, it is best to activate the mediation mechanism.

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

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

The EU and its Member States would welcome the inclusion of language regulating the link between mediation and litigation, in the event that those should take place before a Multilateral Investment Court, including specific features such as the coexistence of timelines and termination of mediation. In this sense draft provision 2 provides for a good basis for discussion.

Regulating these aspects is important to improve resort to mediation. In particular, rules on these features will bring legal certainty to disputing parties and allow them to make an informed assessment of the realistic possibilities, including of timelines, that mediation and litigation before a Multilateral Investment Court can bring about.

**2. Other procedural matters**

***a. Application of rules on mediation (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.*

The EU and its Member States agree with the importance of specifying what sets of mediation rules may govern a mediation process, as this brings added certainty and facilitates resort to mediation.

However, the EU and its Member States submit that draft provision 3, which limits the available sets of rules to the UNCITRAL, ICSID and IBA rules, may be unduly restrictive in that it leaves out other valid sets of mediation rules, notably those in existing or future bilateral agreements regulating mediation.

The EU and its Member States recall that the recent EU agreements with Canada, Mexico, Singapore and Viet Nam incorporate the possibility of mediation. Although the level of detail of the rules governing mediation varies across agreements, a common feature is that upon establishment of a Multilateral Investment Court, the bilaterally agreed rules on investor-State mediation would become subject to the realm of the Multilateral Investment Court. It follows that the Multilateral Investment Court should also be able to administer mediation applying those rules.

The EU and its Member States submit that ways to adapt draft provision 3 in this sense should be explored.

***b. Written notice (Draft provision 4)***

38. 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.*

The EU and its Member States submit that it is desirable that aspects related to the request to the commencement of mediation and the acknowledgement of receipt of such request be regulated. Indeed, having a clear understanding of those aspects is essential for the disputing parties to eventually agree to mediate (in the assumption that resort to mediation is not mandatory). This may also have an impact on the chances of success of a mediation process.

That being said, these aspects are often regulated by the set of mediation rules governing the conduct of the mediation process. In those cases aspects related to the written notice and reception thereof should effectively be regulated by those rules. In view of the EU and its Member States it would be undesirable to have the mediation rules govern only parts of the mediation, as this would likely lead to inconsistencies and ultimately undermine the objective of those rules, which are designed to be applied as a set of rules and therefore already incorporate any necessary flexibilities.

In this sense, the EU and its Member States believe that the question of the written notice of mediation and corresponding acknowledgement of receipt pertains to the realm of the policy choices to be made by States when designing their policy and negotiating their international investment agreements.]

**c. Without prejudice provision (Draft provision 5)**

39. 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.*

The EU and its Member States agree on the importance of a clear “without prejudice” provision. As an important rule in the wider context of the links between investor-State mediation and litigation, a provision along these lines is essential to bring certainty to the disputing parties and eventually increase the track-record of resort to mediation as well as the chances of success of a given mediation procedure.

The EU and its Member States recognise that it may be desirable to define the limits of the “without prejudice” provision, for example to clarify the scope of the ability to initiate litigation following the reaching of a mediated solution.]

#### **d. Confidentiality and transparency (Draft provision 6)**

*Mutually agreed solutions shall be made publicly available.*

40. 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.

The EU and its Member States understand the need to ensure a certain level of confidentiality of the mediation in order to allow a swift conduct of the dialogue between the disputing parties so that they can reach a mutually agreeable and beneficial solution.

This notwithstanding, the EU and its Member States emphasise the fundamental importance of transparency in investor-State mediation, given the important public policy considerations at stake. In this sense, whereas the details of the mediation might be subject to confidentiality, at least the fact that a mediation is taking place and the outcome of this mediation must be made publicly available. This assures accountability towards civil society. It is key to find the right balance between confidentiality in order to safeguard the functioning of a mediation and transparency in order to assure the accountability towards all relevant stakeholders.

In this sense, draft provision 6 appears to fall short of these considerations, and in view of the EU and its Member States it would need to be revised so that it incorporates the idea that the fact that mediation is taking place, in addition to the mediated solution, should also be published.

#### **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].*

The EU and its Member States recognise the importance of ensuring compliance with mediated solutions, as a functioning mediation mechanism presupposes respect for and effective compliance with the mediated solutions. This aspect is essential for the credibility of the system.

In this sense, ways to improve compliance with mediated solution should be explored in order to increase recourse to mediation in the future.

#### **C. Linkage to other reform options**

54. 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;
- How the dispute prevention measures could be used to create a favourable environment for mediation; and

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

On the possible role of the Advisory Centre on International Investment Law (ACIIL) in mediation, the EU and its Member States submit that although there is no clarity yet as to the precise role of the ACIIL, the Centre should be able to get involved in mediation to the extent that it supports beneficiaries involved in such processes. The EU and its Member States do not favour a broader role of the ACIIL as a mediation centre as this would change the advisory nature of the Centre and give rise to potential conflicts of interest.