Comments made by EU and its Member States

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

Note by the Secretariat

C. Guidelines for participants in investment mediation

1. General remarks

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 guidelines. The EU and its Member States politely make the following comments to the draft, which are to be read in light of the comments to the related draft clauses document.

2. Draft Guidelines

1. Purpose

As a preliminary comment, the EU and its Member States wish to underline the usefulness of these guidelines. This document provides for a comprehensive overview of the mediation process and flags the areas where flexibilities can be applied. In view of the EU and its Member States, those flexibilities constitute policy options and decisions that are for States to reflect upon and decide in the context of their policy-making and subsequently when negotiating international investment agreements. These guidelines are likely to be an essential element for States when engaging in such exercises.

4. Role of Institutions

As it has already been indicated in the comments to the related draft clauses document, notably under paragraph 13, the EU and its Member States support that a permanent Multilateral Investment Court could also be invested with the necessary flexibilities to facilitate mediation.

Similar to what is envisaged in relation to adjudication, the ability of the Multilateral Investment Court to act as a forum for the administering of mediation would emanate notably from the relevant investment treaty. In other words, that would be the case where the States Party to the treaty had agreed to submit any mediation arising thereunder to the authority of the Multilateral Investment Court. Additional ways to submit mediation processes to the Court, including on an ad hoc basis, could also be explored.

5. The mediator – Role, qualification, appointment process

1. Mediator’s appointment process

6. The mediator is typically appointed jointly by the parties (proposed ICSID Mediation Rules 13(1), article 4(5) IBA Rules, article 3(2) UNCITRAL Mediation Rules). Mediations are usually conducted either by one mediator or two co-mediators who are each appointed jointly by the parties (proposed ICSID Mediation Rule 13(1), article 6(1) IBA Rules). Parties may agree on a named candidate or on a procedure for mediator appointment, which may include appointment by a third person or institution (proposed ICSID Mediation Rule 13(3), article 4(6) IBA Rules, article 3 (3) UNCITRAL Rules). If the parties have not appointed the mediator(s) within a certain timeframe, they may invoke default provisions (proposed ICSID Mediation Rule 13(4), article 4(7) IBA Rules).

The EU and its Member States agree that the process for the appointment of a mediator is...
often regulated by the set of mediation rules. In this respect, the EU and its Member States note that the EU’s most recent agreements with Canada, Mexico, Singapore and Viet Nam also include rules on the appointment of a mediator.

It would be undesirable to give the impression that only those sets of rules expressly referred to in paragraph 13 of this document may be applicable in relation to the appointment of the mediator. As indicated in the comment under paragraph 40 of the draft clauses document, rules in existing or future investment treaties may also be applicable to the appointment of a mediator. As explained, a Multilateral Investment Court could be equipped with the necessary flexibilities to ensure that it can facilitate mediation according to the applicable set of substantive rules, whether they emanate from a bilateral or multilateral forum.

9. General Process Principles: “without prejudice” principle, confidentiality, and information disclosure obligations

23. Without prejudice principle. For facilitated negotiations to succeed, the parties must feel able to engage without concern that information exchanged during the mediation will be used by the other party in other proceedings, either as evidence or otherwise. To facilitate this, the parties typically agree that the “without prejudice” principle applies to information exchanged during the mediation, i.e., that a party may not rely on any document, statement, admission, or offer of settlement made by one party, or anything said by the mediator, in any other proceedings, unless the parties jointly agree to waive this privilege (proposed ICSID Mediation, Rule 11; see also article 7 of the UNCITRAL Mediation Rules). This principle is also reflected in a number of recent investment agreements.

The EU and its Member States recall their comments under paragraph 50 of the related draft clauses document.

24. Confidentiality, limits to confidentiality and affirmative information disclosure obligations. In commercial mediations, confidentiality vis-à-vis non-mediation participants, i.e., those outside the process, typically applies to the parties’ negotiations. In the investment context, confidentiality obligations, limitations on such confidentiality obligations and affirmative disclosure requirements can be established by various legal instruments. These may be provided in:

(a) The domestic legal framework applicable to the mediation and/or applicable to its participants, including domestic rules applicable to lawyers or mediators; disclosure requirements can be found, for example, in domestic legislation applicable to public-private partnerships, 10 public financial management regulations, budget transparency legislation or freedom of information legislation;

(b) International agreements applicable to the investment mediation; and

(c) Agreements by the disputing parties, including the investment mediation rules agreed upon by the parties.

The EU and its Member States recall their comments under paragraph 52 of the related draft clauses document.