

Comments by the Republic of Panama Regarding ADR Initial Drafts

The Republic of Panama (“**Panama**”) is grateful for the opportunity to comment on the initial drafts that the UNCITRAL Secretariat recently circulated, both of which were related to ADR; namely: (1) the draft Guidelines for Participants in investor-State Mediation (“**Draft Guidelines**”), and (2) the Draft Note on Mediation and Other Forms of Alternative Dispute Resolution (“**Draft Note**”).

At the outset, Panama wishes to thank — and commend — the drafters for their hard work on these Drafts. At this early stage in the process, Panama has only three comments:

First, Panama accepts that, in a mediation, a State is essentially acting as a “negotiator” — and that the State’s representatives would need to be vested with the authority to negotiate and reach settlements. However, in practice, it can be tricky to navigate the question of “authority,” because (1) the rules and regulations themselves may not be clear, and (2) there also can be *competing* rules (e.g., if there are two or more agencies with overlapping authority). Accordingly, Panama would propose to revise Paragraph 25 of the Draft Guidelines as follows:

“*Rule of Law.* Given that mediation is a facilitated negotiation between the parties, the State assumes a negotiator role, and its participation in the mediation constitutes administrative governmental action, similar to Government conduct during negotiations of a concession or license at the beginning of the investment cycle, i.e., at the time of the investment entry. Therefore, the State’s actions in the mediation have to comply with the rule of law, ~~including all applicable laws and regulations, domestic or international.~~”

In Panama’s view, this revision would preserve the key part of the above-quoted guideline, but would do so without also creating a potentially unworkable standard for State representatives.

Second, in Paragraph 41 of the Draft Guidelines,¹ it may be useful to add a footnote recalling that there may be certain practical limits to what a “home State” may do if it wishes to promote investor-State mediation. For example, by “promot[ing] mediation” in the context of a specific dispute, it is possible that the home State could run afoul of Article 27 of the ICSID Convention, which prohibits a home State from formally espousing a claim that an investor and State have already agreed to submit to ICSID arbitration.² Although it does not seem necessary to canvass all of the limits, it still could be useful to acknowledge that certain limits exist.

¹ In relevant part, Paragraph 41 states as follows: “States have inquired if the Home State of the investor could promote mediation and other forms of amicable dispute settlement. Possible avenues of doing so could be to: [list of examples].” Draft Guidelines, ¶ 41.

² See ICSID Convention Article 27 (“(1) *No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention*, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic protection, for the purposes of paragraph (1), shall not include *in*formal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.”) (emphasis added).

Third, and finally, because the Draft Note and Draft Guidelines employ certain terms that are also used in investor-State arbitration, it seems important to flag that the statements in the Drafts apply **only** to ADR, and should not be extrapolated and applied in other contexts. Thus, for example, the statement below — *i.e.*, that “[a] dispute has not crystallized” before litigation commences — should not be construed as a statement of law on the issue of jurisdiction *ratione temporis*:

Draft Note, Paragraph 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 crystallized*** and it may be easier to find creative solutions to solve the dispute, not limited to financial compensation. . . .”³

³ Draft Note, ¶ 30 (emphasis added).