

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

Singapore International Mediation Centre's comments – Draft Guidelines for participants in investment mediation

- 1) Generally, we agree with the need for guidelines. For example, the guidelines are useful to provide parties with an overview of the mediation process, especially where they have little to no experience with mediation in the ISDS context. States may also leverage these guidelines in considering the implementation of legal frameworks and/or agencies which can facilitate the use of mediation, which is critical to the increased uptake of mediation.
- 2) Our general comments are as follows:
 - a. Given the importance of mediator selection (e.g., with experience in investor-state disputes, co-mediators with relevant expertise and cultural background), ensuring buy-in to procedural rules, and institutional support in terms of setting timelines, ensuring confidentiality and other important matters of mediator process and procedure, more emphasis should be placed on encouraging parties to engage institutions to administer and manage the mediation. At present, the guidelines may suggest that ad hoc mediation is the default, which may not be as effective in getting parties to the table to mediate meaningfully.
 - b. We encourage parties to mediate as early as possible and in any event, to be afforded the flexibility to do so at any point in the life cycle of the dispute.
 - c. We also encourage them to enter into agreements to mediate (e.g., through the incorporation of the relevant clause(s) before any dispute arises). In this regard, we agree that mandatory mediation is ideal for fostering the uptake of mediation by providing a clear policy basis for referring the dispute to mediation. This will go some way to overcoming obstacles such as public perception or political risks in settling a dispute. Notwithstanding our preference for mandatory mediation, we are open to other options that can also achieve these objectives.
 - d. SIMC is happy to assist with capacity-building efforts, and has been doing so (e.g., at the Singapore Convention Week 2021, SIMC organised a mediation workshop for industry and government representatives). We take the view that building awareness and capacity is important in encouraging and facilitating the resolution of disputes through mediation, which is a role that an institution or advisory centre can play.
 - e. Regarding the appointment of mediators, we agree with the position in paras 12-14 of the guidelines. Alternatively, co-mediators with complementary expertise (e.g., law and technical) and cultural/linguistic backgrounds could be employed. In our experience, this has proved effective especially when there are contrasting cultures and legal systems to contend with.
 - f. On para 16 of the guidelines, we agree that it is desirable to have at least one member within a team that has a clear line of communication to the relevant entity with settlement authority. In our experience, the advent of online mediation is effective in facilitating such communication.
 - g. On paras 36 to 40, we agree and propose that it is a good practice for States to identify an agency / the agencies responsible for investment conflict management, so as to facilitate the early resolution of disputes through mediation.
- 3) Our specific comments are as follows:
 - a. With reference to para 2 of the guidelines, we propose that mediation be distinguished from negotiation as the benefits of mediation over negotiation are not always clear to parties. In this regard, we note that complex disputes do not lend well to negotiation, and there are benefits in enlisting third parties, neutrals and/or experts to help resolve disputes. Mediation would also help to resolve such disputes by providing a structure for

the discussion (through process design), creating the right atmosphere, facilitating parties' negotiations and instilling a forward-looking approach.

- b. With reference to para 3, parties should be aware that even if there is no legal instrument providing for mediation, they can still enter into a subsequent agreement to mediate at any point. This can be facilitated by an institution which provides a standard form agreement to mediate, acts as a go-between for the parties, and assists in building awareness and capacity.
- c. Notwithstanding that the 'best' time to mediate will ultimately depend on the circumstances, we suggest that mediation be attempted as early as possible so that relationships can be preserved and before parties' positions are entrenched (see para 4). However, if the assessment suggests that mediation should only be attempted after a certain stage of proceedings (e.g., where parties require more time to fully understand the dispute and rights), parties should have the option of mediating at that juncture.
- d. With regard to para 5, as mentioned above, we should emphasise the importance that institutional mediation can play. Besides what we have set out elsewhere, this includes institutional linkages that allow parties that have mediated successfully to record their agreements as court orders or awards. Institutions may even allow parties to agree on using different sets of rules.
- e. On paras 6-24, and generally, we take the view that these issues may be better addressed by institutions, which takes the load off parties and parties having to agree – and face potential disagreements – on the various procedures.
 - For example, institutions are well-placed to assist parties with appointment of a mediator/co-mediators, as they would have access to a diverse list of mediators with the relevant expertise, cultural background and linguistic skills to resolve the dispute (paras 12-14).
 - Para 22 recommends that the use of in-person and remote meetings and the parties' preferences be discussed between "the parties and the mediator at the outset of the mediation". Institutions, with their experience in administering mediations, are well-placed to advise on and plan this together with the parties and mediator(s).
 - As another example, institutional rules and agreements to mediate administered by institutions addressed without prejudice and confidentiality issues (paras 23-24), to ensure these issues do not affect matters later on. We have provided examples of such clauses in SIMC's Rules and Agreement to Mediate in our earlier comments on the draft clauses.
- f. On the suggestion for experts to be appointed (para 18), one of the concerns with parties appointing their own experts is that they may devolve into "advocating" for their client's position rather than provide an objective assessment of the issues. It is suggested that joint appointment of experts may be more productive to the resolution of a dispute, and the institution may also assist with such appointment.
- g. With regard to the Checklist in Annex 2, our position is that mediation is suitable for most if not all disputes.
 - Under matters for consideration before commencing mediation, besides speed of resolving the dispute (sub-para (c)), other reasons to consider mediation include costs savings, as well as the benefit of understanding each other's case better. The latter will be useful even if mediation doesn't result in immediate settlement, and is followed by arbitration.
 - For sub-para (e), it should also be added that if parties can benefit from flexible and creative solutions beyond the mere payment of monetary damages and compensation, mediation should also be considered.

- h. In Annex 2, we should also add that parties should consider an institution to help them with the process and procedures. Institutions will be able to administer mediations in accordance with their own rules or other rules such as UNCITRAL's or ICSID's.

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

Singapore International Mediation Centre's comments – Draft clauses on mediation

B. Possible models for a clause on mediation in investment treaties		
1. Nature of the offer to mediate, timeframe and level of conduciveness (Draft provision 1)		
Paras	Draft Clauses	SIMC's Remarks
16-17	<p>a. No clause on mediation</p> <ul style="list-style-type: none">- The Working Group may wish to consider leaving the decision as to whether to use mediation fully in the hands of parties, an approach close to the current situation where mediation is rarely referred to in treaties and therefore rarely used.	<p>We do not propose this position as it does not allow investors and States to adequately access the benefits of mediation for their disputes, and may not meet the objective of fostering the use of mediation in ISDS. We note that in substance, there is little change from the current situation.</p>
18-21	<p>b. Availability of mediation (Option 1)</p> <ul style="list-style-type: none">- The Working Group may wish to consider: <i>"Each party to the dispute may, [before and during the cooling off period,] [at any time,] request the commencement of a mediation procedure."</i>- WG may wish to consider if it is preferable to also provide that once parties agree to mediation, they should enter into an agreement to mediate that will set up the agreed procedure. If so, the corresponding provision could read as follows: <i>"If the disputing parties agree to a mediation, they shall sign an agreement to mediate, which shall determine the applicable procedure."</i>	<p>In our experience, parties may find it difficult to keep agreeing on various things during a dispute. This option leaves too much to the parties to have to agree on after a dispute has arisen. Further, as a consequence, parties may take too long to come to agreement, and they may miss the window for meaningful mediation. Ultimately, this position may not encourage more parties to use mediation.</p> <p>With regard to the second question, it would be preferable for parties to use a neutral institution with a set of procedural rules for the parties to subscribe to. This reduces the chances of further disagreement that may delay the timelines and ultimately scupper the mediation.</p>

22-24	<p>c. Undertaking to commence mediation (Option 2)</p> <ul style="list-style-type: none"> - The Working Group may wish to consider: <p><i>“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.</i></p> <p><i>2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings [arbitration – standing mechanism].”</i></p> 	<p>Ideal preference is for Option 3 to be adopted (see below).</p>
25-28	<p>d. Mandatory Mediation (Option 3)</p> <ul style="list-style-type: none"> - The Working Group may wish to consider: <p><i>“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].</i></p> <p><i>2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings (arbitration).”</i></p> 	<p>Of the 3 options in the current draft, we find Option 3 to be the most ideal solution for the reasons stated below:</p> <p>We take the view that Option 3 promotes mediation and preserves its voluntary nature sufficiently. Even though parties are required to start mediation, they always retain the autonomy to withdraw from the mediation proceedings at any stage. It is also entirely voluntary if they decide to settle or not.</p> <p>In any event, “mandatory” mediation is outweighed by the benefits. For example, having mandatory mediation reduces potential concerns from one side that proposing or accepting mediation is a sign of weakness, and address potential political issues (which has been cited as a significant obstacle to settlement¹).</p>

¹ NUS - Centre for International Law Working Paper 18/01, Report: Survey on Obstacles to Settlement of Investor-State Disputes (Seraphina Chew, Lucy Reed, J Christopher Thomas QC)

		<p>The mere fact of engaging in mediation has signal benefits – for example, a mediation can be convened within a few weeks and concluded within a few months (c.f. para 26). Even if parties do not settle their dispute through mediation, it helps parties to streamline their cases, further reducing costs and time. Therefore, mediation, where planned well, is beneficial but is unlikely to add significantly to the time and costs of ISDS dispute resolution.</p> <p>As alluded to above, having an institution to drive the mediation forward will enable us to unlock the most out of this option. The neutral institution can make sure that timelines are adhered to, that the appropriate mediator(s) is/are selected, and regulate the rules and procedures, to ensure that any concerns are minimised.</p> <p>The value of an institution and of institutional rules for mediation is borne out by SIMC’s case management experience of complex commercial disputes, including a recent investor-state dispute, which was mediated successfully.</p> <p>Notwithstanding our preference for mandatory mediation, we are open to other options insofar as they can also provide a clear policy basis for parties to refer their dispute to mediation at an early stage.</p> <p><u>Drafting suggestions:</u></p> <p>We suggest that the relevant clauses include a provision that parties shall mediate in good faith, so that the discussions are constructive. We might also wish to consider that the failure to mediate in good faith might be a factor that is taken into account (e.g., costs), in the final adjudication.</p>
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29-36	<p>e. Considerations on timeframe (Draft provision 2)</p> <ul style="list-style-type: none"> - 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: <ul style="list-style-type: none"> <i>“[before and during the cooling off period] [within – days from -- -]”</i> <i>“[at any time]”</i> - 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): <ul style="list-style-type: none"> <i>“1. If the disputing Parties agree, mediation may continue while the dispute proceeds for resolution before an ISDS tribunal.</i> <i>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.</i> <i>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.”</i> 	<p>Mediation should take place as early as possible, while relationships remain intact and the dispute is manageable.</p> <p>In this regard, on the options stated in para 30, viz: during the cooling off period or to set a specific timeframe disconnected from the cooling off periods, we suggest that the key objective is to require parties to mediate as early as possible, upon the onset of a dispute. We therefore suggest that parties should mediate in lieu of – or in spite of – any cooling off period. The trigger for mediation can be the issuance of a notice to mediate by one of the parties (see our comments on draft provision 4 below). Upon this trigger, parties should complete the mediation within 3 months, unless they agree to extend the period. As mentioned above, the parties should also mediate in good faith, and the failure to do so may be taken into account in any subsequent adjudicative proceedings. The timeframe will assuage concerns that mediation is used as a delay tactic. It is only if mediation fails as the first port of call that the parties may proceed further, such as to file a notice for arbitration.</p> <p>To retain flexibility in the mediation process and cater for the specific context of each dispute, we agree with including the option for parties to mediate at any time (para 32). Such situations do arise as parties may need time to fully understand the dispute, facts and rights.</p> <p>With respect to para 34, we agree that this would be useful because mediation is in fact complementary with arbitration. It is increasingly common for parties to use mixed modes of dispute resolution, such as med-arb. Therefore, having provisions to address the use of mediation in parallel to arbitration or litigation will be useful.</p> <p>In this regard, it is also useful to have an institution administer the mediation because the institution will have rules providing for how parties may migrate seamlessly from one mechanism to another. For</p>
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		<p>example, the SIAC-SIMC AMA Protocol, which allows for the SIAC arbitration to be stayed and the case referred for mediation at SIMC during an eight-week window.</p> <p>On draft provision 2, we agree that it is important to make clear the steps set out in draft paragraphs 1 and 2. Draft paragraph 3 would typically be provided for in institutional rules, and we have mentioned above the reasons why it would be useful to have an institution that parties agree upon, and which will then help parties to manage the procedures. An institution can also interface between the parties and the mediator – and provide a choice of mediators.</p>
2. Other procedural matters		
38-40	<p>a. Application of rules on mediation (Draft provision 3)</p> <p>- The Working Group may wish to consider:</p> <p><i>“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.</i></p> <p><i>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.”</i></p>	<p>Regarding draft paragraph 1 of draft provision 3, we suggest that there be provision for parties to agree on other institutional rules, as a matter of future-proofing.</p> <p>We agree that a possible alternative to providing for the application of mediation rules would be to refer to a mediation centre that provides a comprehensive mediation framework (para 39). This is consistent with our views that this approach better allows parties to focus on resolving the substantive dispute. The institution assists both parties and mediators in terms of the administrative and logistics matters, enabling them to devote their energies towards the preparation and discussions.</p> <p>On draft paragraph 2, it would be useful to prioritise the appointment of 2 co-mediators as there is typically a cultural overlay to ISDS disputes i.e., foreign investors. In our experience of a cross-border joint venture dispute involving Japanese and Indian parties, where SIMC collaborated with the Japan International Mediation Centre to each appoint a co-mediator, the co-mediators were able to combine their expertise of the parties’ respective jurisdictions and cultures, which ultimately led to the successful mediation of the dispute. As</p>

		mentioned above, an institution or institutions would be able to assist the parties with appointment of co-mediators best suited to resolve the dispute.
41-47	<p>b. Written notice (Draft provision 4)</p> <p>- The Working Group may wish to consider:</p> <p><i>“1. To commence mediation, a party shall communicate to the other party a request for mediation (“request”), which shall contain:</i></p> <p><i>Option 1:</i></p> <p><i>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;</i></p> <p><i>b. A [brief/detailed] description of the factual and legal basis of the dispute;</i></p> <p><i>c. An indication of the agencies and entities of the Contracting Party that have been involved in the matters giving rise to the dispute;</i></p> <p><i>d. An explanation of any prior steps taken to resolve the matters in issue.</i></p> <p><i>Option 2:</i></p> <p><i>A brief summary of the factual and legal basis of the complaint and information on the subject matter of the claim made or received.</i></p> <p>1. The other party shall acknowledge receipt of any request for mediation within [14] days of its receipt.</p> <p><i>Option 1:</i></p>	<p>In the interests of reducing the obstacles to mediation, we propose an option that makes it as easy as possible to commence the process. This also reduces friction between parties who are already in dispute, and minimise the issues they can potentially disagree on. In this regard, we would suggest opting for Option 2 of draft paragraph 1 (i.e., a brief summary of the dispute as well as the factual and legal basis). We would reiterate that this is why having an institution administer a set of predetermined rules are important.</p> <p>As regards draft paragraph 2, we agree that parties should acknowledge receipt of the request for mediation within a specified timeframe. As alluded to above, if any party refuses to participate in the mediation or to do so in good faith, this should be a factor which the adjudicator may take into account, such as in deciding the issue of costs. In this regard, Option 2 of draft paragraph 2 ties in with “mandatory” mediation, which we have proposed (see above). As alluded to in para 47, institutional mediation will promote the regulation of the entire matter, leaving parties free to focus on the substantive areas of their dispute.</p>

	<p><i>The addressee of the request shall give due consideration to it and accept or reject it in writing within [15][30] days of receipt</i></p> <p><i>Option 2:</i> <i>The disputing parties shall commence mediation within [20] days of the date of the request, or such other period as they may agree."</i></p>	
48-50	<p>c. Without prejudice (Draft provision 5)</p> <ul style="list-style-type: none"> - The Working Group may wish to consider: <p><i>"Recourse to mediation is without prejudice to the legal position or rights of the disputing parties."</i></p>	<p>We have no objection to this draft provision, save to note that this is something that is typically set out in many institutional rules and agreements (as mentioned in para 50).</p> <p>For example, SIMC Mediation Rules – Rule 9.2 states "No communications made in the mediation, including any information disclosed and views expressed in relation to any proposal for settlement, shall be used in any judicial, arbitration or similar proceedings, unless required by applicable law". SIMC's Agreement to Mediate similarly provides "The mediation will be conducted in confidence and all communication will be on a without prejudice basis".</p>
51-52	<p>d. Confidentiality and transparency (Draft provision 6)</p> <ul style="list-style-type: none"> - The Working Group may wish to consider that confidentiality of the mediation process is addressed under mediation rules, and it would be redundant to provide for detailed provisions on confidentiality. - The Working Group may wish to consider: <p><i>"Mutually agreed solutions shall be made publicly available."</i></p>	<p>Similarly, such confidentiality provisions would be set out in institutional rules and agreements, and we agree that it may not be necessary to set them out again (see para 51). For example, SIMC Mediation Rules – Rule 9.1 states "Subject to any agreement between parties, the Singapore Mediation Act 2017, and any other applicable law: a. The mediation shall be private and confidential; and b. Any settlement agreement between parties shall not be disclosed save where it is necessary for the purposes of its implementation or enforcement".</p> <p>On draft provision 6 (set out under para 52), while we share the sentiment that transparency in the outcome of the mediation may increase confidence, we would recommend flexibility in this regard: i.e., to leave it to the parties to agree whether this is appropriate,</p>

		based on the context of their individual case. This is given the different sensitivities that may arise in the ISDS context.
3. Settlement Agreement (Draft provision 7)		
53-54	<p>The Working Group may wish to consider:</p> <p><i>“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.</i></p> <p><i>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].”</i></p>	<p>We are in agreement with the draft provisions and their intent i.e., that parties should be bound by mutually agreed solutions, and to draw the attention of parties to the Singapore Convention on Mediation in relation to enforcement of agreements.</p> <p>However, we take the view that the words in square brackets in draft paragraph 2 are not necessitated because the parties may be enforcing in a third country (other than that of a Contracting State to the investment treaty). There may also be other avenues for the parties to enforce such agreements, e.g., where they are recorded as consent arbitral awards.</p>
C. Linkage to other reform options		
55	<p>The Working Group may wish to consider:</p> <ul style="list-style-type: none"> a) 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; b) How the dispute prevention measures could be used to create a favourable environment for mediation; and 	<p>With respect to third-party funding, we will provide our comments in the WGIII workstream focusing on ISDS third-party funding, so that they can be considered in that context.</p> <p>Dispute prevention should be shaped to encourage parties to seek help early in the course of their projects. In this regard, they can be used in tandem with mediation where required. For example, Singapore’s Infrastructure Dispute-Management Protocol provides for the appointment and involvement of a Dispute Board (DB) to assist in the effective management of differences or disputes that may arise in the context of mega construction or infrastructure projects (above</p>

	<p>c) How the advisory centre, by providing certain mediation services, could have an impact on the use of mediation.</p>	<p>\$500m in value). Mediation has been grated into the protocol and is one of the ways in which the DB can facilitate the resolution of disputes between the parties. Establishing such protocols in the ISDS context can therefore integrate mediation into the dispute prevention process.</p> <p>Finally, given the lack of awareness/training generally, an advisory centre would be useful to promote awareness of what is, and how to use mediation, and the avenues for doing so. It can also play a role in facilitating the training of States and investors in resolving disputes through mediation, identifying potential disputants, as well as in steering parties to mediation if there are no clauses mandating them to do so. Mediation training would equip parties with the right skills and mindset to develop a negotiation strategy, prepare for the mediation well (e.g., by identifying who are the relevant participants and prioritise the important interests/aspects), and work with the mediator to communicate well with the counterparty.</p> <p>Even in cases where mediation clauses are incorporated, we take the view that it is important to allocate resources to inform parties on the process and procedure of resolving their dispute through mediation, which is a role that an advisory centre can play.</p>
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