

Dispute prevention and alternative dispute settlement

Submission of the Western Balkans region¹

Note: This submission does not prejudice the position that may be taken by the governments of each Western Balkans country independently, nor does it represent the commitment of any country to pursue one of the discussed reform options in the future.²

1. The Western Balkan countries commend the UNCITRAL Working Group III (Working Group III) for its work on the reform of the current investor-State dispute settlement (ISDS) regime.
2. The Western Balkans countries recognise the importance of reform process and appreciate the fact that the Working Group III provides the opportunity to a great number of countries as well as academia, business and non-governmental organisations and association to participate and contribute it. This way, the reform process is not only as inclusive as possible, but it takes into consideration wide range of interests and positions.
3. A comprehensive reform of the ISDS regime at the multilateral level would enable for a certain level of world-wide consistency in standards and procedures applied at the international level. Also, it can promote and set common standards for use of alternative dispute resolution in investor-State disputes. This, on the other hand require long time and agreement of many participants reducing the level of achievement and producing delayed application to this sensitive yet rather urgent reform.
4. The Western Balkan countries, being small economies net-recipients of foreign direct investments, believe that ISDS reform should lead to responsible international investment that will promote achievement of the Sustainable Development Goals.

I. Introduction

5. The ISDS is an exclusive mechanism available only to foreign investors to bring cases against States in which they invested and with no requirement of exhaustion of local remedies. In addition, the ISDS arbitration poses multiple challenges for developing and least-developed States. One of the most frequent critics is that high ISDS costs are paid with public

¹ This submission includes the expert comments and analysis of the representatives of Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia, within the framework of the UNCITRAL Working Group III (ISDS Reform). None of the statements in this text should be considered as binding positions of the Western Balkans governments, nor should they prejudice any different approach which may be taken by each respective government.

² This is in line with the approach of the UNCITRAL Working Group III in the discussions of various reform options, which represent „a preliminary consideration of the relevant issues with the goal of clarifying, defining and elaborating such options, without prejudice to any delegations’ final position.“ Most statements are a synthesis of the common conclusions derived from group discussions, and suggestions coming from individual states are indicated as such in the text.

funds which is difficult to justify for developing States, whose financial resources were scarce. Also, it is noted that responding to an ISDS claim can pose a disproportionately heavy burden on the officials of smaller states and their institutions. Smaller states generally require more time to respond to claims, as they are required to coordinate among a number of authorities and to engage legal counsel and experts to defend their case. In that context, sufficient time to respond to claims should be given to states.

6. In addition to reform of the ISDS itself, the best practices show the states, and in particular small and underdeveloped states, should be encouraged to introduce and use more frequently *Alternative Dispute Resolution* (ADRs) mechanisms. Among other, these would enable them to significantly reduce costs and time for resolution as well as to avoid or mitigated greater political impact and consequences.

II. Regional context

7. Having regard to discussions on potential ISDS reform options, in the context of the Working Group III sessions, the country representatives from the Western Balkans have weighed the importance of various areas of ISDS reform for this region.

8. Due to the fact that the Western Balkans countries have been challenged frequently before international arbitration and experienced tremendous financial losses based on unfavourable arbitral awards in the past decade, it is the common finding that in these cases the amicable settlement provisions contained in the respective applicable treaties were not utilized in an effective manner. The ineffective use of amicable settlement options can also be attributed to the fact that there is a complex framework of institutional competencies which are involved in such cases and prevent a proactive and adequate response.

9. While all Western Balkans countries agree that each segment of the ISDS reform has its own specific importance, it is however the prevailing opinion that the most significant topics that needs to be improved in their own systems are dispute prevention and amicable settlement mechanisms available.

10. The Western Balkans countries hold the position that an effective dispute prevention and amicable settlement mechanism is one of the strongest levers in the establishment of a healthy investment climate and the attraction and retention of valuable investments in the region. A generally shared view is that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration. There was also a view that alternative methods were an integral part of ISDS and that they should be mandatory under some investment treaties assisting in identifying concerns and providing possible procedural solutions to concerns about arbitration in ISDS.

11. With this background, and with the aim of creating a healthy legal framework for investment protection, the Western Balkans countries submit for the Working Group III consideration potential models of reform in favour of dispute prevention and amicable settlement. This reform option could be implemented as a stand-alone reform or in conjunction with any other reform options.

III. Previous conclusions and proposals of the Working Group III on strengthening of dispute settlement mechanisms other than arbitration (ombudsman, mediation)

12. In 1980, UNCITRAL adopted its Conciliation Rules, which are also available for use in the context of ISDS (currently being updated in the framework on international mediation). The Working Group III has noted the efforts of UNCITRAL to strengthen the mediation framework, following the adoption of different instruments, including the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). Three of the Western Balkans countries have already signed this Convention³.

13. It should be noted that other institutional rules on mediation, which could apply to ISDS, have also been developed.

- ICSID adopted its Conciliation Rules in 1967, as well as its Fact-Finding Additional Facility Rules in 1978. In 2018, ICSID initiated work on a new, stand-alone set of mediation rules for investment disputes.
- The Energy Charter Conference adopted a Guide on Investment Mediation in 2016, providing guidance on the conduct of investment mediation under the Energy Charter Treaty.
- The Mediation Rules of the International Chamber of Commerce (ICC) and Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) were both adopted in 2014 and may apply to investor-State disputes.
- Ad hoc Rules for Investor-State Mediation have been adopted by the International Bar Association (IBA) and were released in 2012.

14. The Working Group III heard preliminary proposals for strengthening alternative dispute settlement mechanisms, such as mediation and the institution of the ombudsman.⁴ Similar proposals are also addressed in other submissions:

- Alternative dispute settlement mechanisms are described in the Submission from the Government of Indonesia as a means to reduce duration and cost of proceedings and to prevent a dispute from escalating into a legal dispute.⁵
- It is further referred to in the Submission from the Government of Morocco as means to identify mutually acceptable solutions to the dispute.⁶
- In the Submission from the European Union and its member states, it is suggested that particular value-added could be brought through the provision of institutional

³ Montenegro, North Macedonia and Serbia.

⁴ Submissions from the Government of Brazil (A/CN.9/WG.III/WP.171, paras. 1-15) and the Government of the Republic of Korea (A/CN.9/WG.III/WP.179, p. 5)

⁵ Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, paras. 19 and 20)

⁶ Submission from the Government of Morocco (A/CN.9/WG.III/WP.161, para. 14)

support, for example through maintaining a list of conciliators or mediators and above all providing support in efforts to bring about amicable settlements.⁷

- The submission from the Government of Thailand indicates that mediation usually helps clarify the positions of the disputing parties, thereby reducing the gap between them. This submission also proposes the development of alternative dispute resolution rules specific to investment treaties and ISDS, which could also provide the procedural framework for combining adjudicative and non-adjudicative processes.⁸
- The Government of South Africa has submitted that mediation allows the parties to focus on the issues which are at stake.⁹
- Mandatory mediation, after the exhaustion of the consultation process, is referred to in the Submission from the Government of Indonesia as a way to prevent a dispute from escalating into a legal dispute which can be costly and damaging to the disputing parties' relationship.¹⁰

15. Other submissions which refer to the topic of dispute prevention and amicable settlement (including mediation) are:

- A/CN.9/WG.III/WP.163 Submission from the Governments of Chile, Israel and Japan
- A/CN.9/WG.III/WP.164 Submission from the Government of Costa Rica
- A/CN.9/WG.III/WP.174 Submission from the Government of Turkey
- A/CN.9/WG.III/WP.177 Submission from the Government of China
- A/CN.9/WG.III/WP.178 Submissions from the Government of Costa Rica

16. During the Working Group III sessions, it was considered that its work should not be limited to arbitration and that it should include other types of existing ISDS mechanisms. A generally shared view is that alternative dispute resolution methods, including mediation, ombudsman, consultation, conciliation and any other amicable settlement mechanisms, could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration. There was also a view that alternative methods were an integral part of ISDS and that they should be mandatory under some investment treaties assisting in identifying concerns and providing possible procedural solutions to concerns about arbitration in ISDS.

17. The explained proposal of the Working Group is the following:

“The Working Group may wish to consider whether an advisory centre might be established as a facility to also offer ADR services and support early settlement of disputes, in particular during the cooling-off period or before a final award is rendered. The functions of an advisory centre may range from handling ADR to only keeping a roster of experts available to act as mediators or early neutral evaluators. An advisory centre could also help ensuring that alternative dispute settlement

⁷ Submission from the European Union and its Member States (A/CN.9/WG.III/WP.159/Add.1)

⁸ Submission from the Government of Thailand (A/CN.9/WG.III/WP.162, para. 11)

⁹ Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras. 40 and 41)

¹⁰ Submission from the Government of Indonesia (A/CN.9/WG.III/WP.156, paras. 19 and 20)

methods would be properly conducted, which is essential for government officials in charge of negotiations under public scrutiny. This would assist them in settling disputes without fearing public criticism and allegations of corruption. An aspect to be considered, however, is how the centre would handle potential conflicts of interest that might arise from its activities, in particular where it would be involved in both ADR and defence services.”¹¹

18. The Working Group III emphasized the importance of mediation, especially at an early stage of the dispute, noting that the goal of “these alternative approaches is to provide for a faster and less costly settlement, the more so when the problem is tackled at an early stage and with the specific goal of avoiding escalation”.¹²

IV. ICSID proposed investor-State Mediation Rules

19. Being the global leader in investment dispute resolution (154 contracting states) and the only multilateral institution dedicated to resolving disputes among states and foreign investors, ICSID itself has recognized the trend to consider mediation as a tool to resolve investment dispute. In that sense, reference to mediation has been made in various treaties, such as: COMESA – Common Market for Eastern and Southern Africa, CAFTA – Central America & DR Free Trade Agreement, CETA – EU-Canada Free Trade Agreement, EU-Vietnam Free Trade Agreement, EU-Singapore Free Trade Agreement. Also, in 2016 the Guide on Investment Mediation was adopted by the Energy Charter Conference (57 ICSID member states).

20. Thus, in 2018, while amending its Procedural Rules, the ICSID began work on a new set of rules for investor-state mediation, being the first institution to formulate mediation rules designed specifically for investment disputes. They complement ICSID’s existing rules for arbitration, conciliation and fact-finding, and may be used either independently of, or in conjunction with, arbitration or conciliation proceedings. The latest draft of the rules was published in August 2019 in Working Paper #3: Proposals for Amendment of the ICSID Rules.¹³

21. The proposed Mediation Rules intend to:

- Complement bilateral and multilateral treaties providing for mediation;
- Complement ICSID’s other dispute resolution mechanisms and provide more options to the parties;
- Provides a flexible process;
- Contribute to a more time and cost-effective resolution of the dispute;
- Allow for tailor-made solution;
- Integrate formal requirements of the Singapore Convention.

¹¹ https://uncitral.un.org/sites/uncitral.un.org/files/wp190_dispute_prevention.pdf p. 12, para. 47.

¹² *Ibid.* p. 3, para. 6.

¹³ The updates on this process can be followed on the official website of ICSID: <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>.

22. The participation is entirely voluntary – either party may withdraw at any time, but the consent of all parties is required before the mediation can commence. First, the Secretary-General reviews the request and registers it, in case it appears on the basis of the information provided that it is within the scope of Article 2 of the ICSID Mediation Rules. If the other party does not accept the offer within 60 days, the mediation will not proceed.

23. The main functions of ICSID are case administration and technical assistance. This is very helpful and important having in mind that it is much easier for parties to mediate if the international, neutral forum exists. Also, the biggest difference comparing to the ICSID arbitration mechanism is that the ICSID is authorized to administer any mediation proceeding that relates to an investment and involves a state or a regional economic integration organization, irrespective of the ICSID membership status of the state party or nationality of the investor. Mediation can commence on the basis of 1) pre-existing agreement to mediate (e.g. clause in a contract or treaty requiring or offering mediation; 2) offer by one party to mediate by accepted by other party. Mediation can be terminated on: notice from parties that they have signed settlement agreement, notice of withdrawal by a party, notice from parties that they have agreed to terminate the mediation, determination by mediator that there is no likelihood of resolution. It should be noted that if the parties reach an amicable settlement through mediation during an arbitration under the ICSID Convention, the settlement can be embodied in an award pursuant to the ICSID Arbitration Rules.

24. The default method for appointment of the mediator(s) is also provided. Namely, in case the parties fail to appoint one mediator (or two co-mediators) by agreement within 45 days of registration, either party can request that the mediator be appointed according to the default method which means that the ICSID's Secretary-General will appoint a sole mediator in consultation with the parties.

25. The ICSID Mediation Rules regulate the mediator's conduct as well as duties and main tasks of mediators and parties.

26. The ICSID Secretariat administer the investment mediation proceedings, provide technical assistance in dispute prevention and management and investor-state mediator training for experienced mediators and government officials. For now, ICSID does not have the mandate to make a list of mediators, but mediators are required to have certain qualifications.

27. The feedback regarding the introduction of mediation from the member states is positive, so mediation is considered to be the new way on how to handle investor state disputes. However, the proposed ICSID Mediation Rules require the endorsement of at least 50% of ICSID's membership to come into effect.

V. Other relevant institutionally led initiatives and treaties

28. It is useful to note that across the globe, various other institutions and treaties are giving more consideration to mediation. Namely, the *International Bar Association* has enacted in *2012 Rules for Investor–State Mediation*¹⁴, the *Energy Charter Conference 2016*

¹⁴ International Bar Association Rules for Investor–State Mediation (2012), available at: https://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx

has endorsed in 2016 the *Guide on Investment Mediation*¹⁵, while the *International Mediation Institute's* (“IMI’s”) *Investor–State Mediation Taskforce*, set up in 2013, has actively participated in relevant public policy discussions, regionally.¹⁶

29. In addition, international trade and investment treaties are increasingly incorporating mediation into their dispute resolution clauses. The *EU–Canada Comprehensive Economic and Trade Agreement* (2016) includes provisions that encourage the use of mediation at any time and without prejudice to parties’ rights or legal positions.¹⁷ The *ASEAN Comprehensive Investment Agreement* from (2009) contains provisions for investment disputes to be resolved through consultations, negotiations or arbitration.¹⁸ The *Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement* includes a mediation mechanism for the settlement of investment disputes, which can be initiated by the investor. Finally, the *Indonesia–Australia Comprehensive Economic Partnership Agreement* (2019) contains a dispute settlement mechanism and includes requirements for consultation and mediation.¹⁹

VI. The state of play in the Western Balkans countries

30. Regardless of which mechanism of amicable settlement or alternative dispute resolution the parties might choose in specific instances, it is of key importance that the right institution or government representative is identified and engaged from the moment the investor notifies the existence of potential claim.

31. The timely response and a good faith effort to efficiently resolve the dispute outside of arbitration or judicial proceedings significantly improves the chances of successful amicable settlement. Therefore, it is important to establish a clear institutional framework and arrange for an open communication channel each step of the way.

32. The Western Balkans countries have some common experiences and challenges in this area, but also some particularities characteristic to each respective country. Some of these issues are presented and elaborated below.

The Republic of Albania

As of February 2020, the Republic of Albania (Albania) has been a Respondent in ten international investment disputes. The monetary and human resources implications that are interlinked with being involved in such a relatively high number on investor-state arbitrations, makes the participation and monitoring of the current global discussions on ISDS reform a

¹⁵ The Decision on the Adoption of the Guide on Investment Mediation is available at: <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>

¹⁶ Details are available on the official website of the Investor– State Mediation Taskforce: <https://imimediation.org/about/who-are-imi/ism-tf/>

¹⁷ Article 8.20, EU–Canada Comprehensive Economic and Trade Agreement (2016), available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf

¹⁸ Article 31, ASEAN Comprehensive Investment Agreement from (2009), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3095/download>

¹⁹ Article 20.6, Indonesia–Australia Comprehensive Economic Partnership Agreement (2019), available at: <https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/iacepa-chapter-20-consultations-and-dispute-settlement>

priority for Albania. Therefore, Albania considers that the on-going participation of its representatives in different global forums such as the Working Group III and other high-level discussion platforms serves as a further commitment that Albania intends to actively participate and carefully evaluate all alternatives and proposals before ultimately taking a position.

At a national level, Albania has also undertaken several legal initiatives with the aim of improving the general legal framework related to the prevention and treatment of investment disputes. On September 2017, the Council of Ministers approved its Decision no. 511 13.09.2017 ‘for the scope of activity of the State Minister for the Protection of Undertakings’, art.3 of which, among others, stipulates that ‘ the Minister, in the carrying out of its activities shall a) investigate and address all administrative complaints that private undertakings, including strategic and foreign investors, may have towards local/central public institutions, including publicly owned enterprises” Moreover, in December 2018 the Albanian Parliament approved law no. 85/2018 ‘For some amendments on the law on ‘State Advocacy’’. The new legal amendments and the subsequent secondary legislation deriving from it had provided for a clearer and more detailed framework for the Office of the State Advocate General when dealing with investment arbitrations while also raising capacities and expertise within the institution in this regard.

Albania welcomes the sharing of expertise and good practice cases from the region in this particularly important issue, with a special emphasis on any established procedures for the settlement of disputes before resorting to a timely and costly investment arbitration proceeding.

Bosnia and Herzegovina

Bosnia and Herzegovina has been a respondent party in four investor-state dispute settlement arbitration processes so far. Representatives of Bosnia and Herzegovina actively participate in the multilateral processes and discussions on the ISDS reform, which are taking place within the UNCTAD and Working Group III as well as in the activities on the regional level and process of implementation of the Multiannual Action Plan for the Regional Economic Area (MAP REA) and Regional Investment Reform Agenda (RIRA). With the aim of efficient use of the period for amicable settlement of disputes provided in international investment agreements, the Council of Ministers of Bosnia and Herzegovina established the Negotiating body for the peaceful settlement of international investment disputes in 2017. Bosnia and Herzegovina was also very interested to participate in the regional processes for finding additional ways to make more use of alternative dispute resolution, such as mediation.

The North Macedonia

The Republic of North Macedonia (North Macedonia) was a respondent in seven investor-state dispute settlement arbitration cases, three of which are pending. North Macedonia is interested in joining the initiatives on the ISDS reform on the worldwide level. The country's representative participates at the Working Group III meeting sessions (ISDS reform).

In 2005 the Government founded Invest North Macedonia, as an official Government investment and export promotion agency responsible for attracting foreign investments and supporting the export promotion of the Republic of North Macedonia. One of the programs

of Invest North Macedonia is their Aftercare program which provide assistance by mediating on behalf of foreign investor with local authorities and the Government.

In 2019 a New Draft-Law for Mediation was proposed. The draft-Law is fully based on the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. This draft-Law is still not enacted by the Parliament of North Macedonia and the Law on Mediation from 2013 is in force (Law on Mediation 2013). In 2019, North Macedonia also signed the United Nations Convention on International Settlement Agreements Resulting from Mediation.

Montenegro

Montenegro has been a respondent party in eight investor-state dispute settlement arbitration processes so far out of which three were filed with the International Centre for Settlement of Investment Disputes (ICSID), four under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and one was brought before the foreign District Court. Some of the investments disputes in Montenegro were brought under BITs and some were based on the commercial contracts between investors and the State. Six of those disputes were decided in favor of the State and the procedures for the other two are still pending.

In all case, Montenegro as the respondent in these disputes, acted in the same manner. Government of Montenegro formed inter-ministerial working groups composed of representatives of all relevant ministers and institutions with a task to follow the arbitral proceedings, provide logistics to the legal counsel and inform the Government about the proceedings and gives consent to engage an external legal law firm. It should be noted that the structure of the working groups goes in line with the subject matter of dispute (in terms that the members of the working group come from the competent governmental bodies). In the end, the GoM hired a specialized law firm to represent the state before arbitration tribunal, and at the suggestion of the line ministry and the working groups, was the main actor and decision-maker.

It is important to note that Montenegro is aware that the mechanism for resolving investment disputes should be reformed but at the same time an investment environment that will prevent the occurrence of investment disputes should be created.

In that regard, representatives of the GoM actively participate in the multilateral processes and discussions on the ISDS reform, which are taking place within the UNCTAD and UNCITRAL Working Group III as well as in the activities on the regional level and process of implementation of the Multiannual Action Plan for the Regional Economic Area (MAP REA) and Regional Investment Reform Agenda (RIRA).

The Republic of Serbia

The Republic of Serbia (Serbia) itself was a respondent in a few investor-state disputes, thus having an evident interest to actively join in the discussion on the ISDS reform on the global level. The first step is the participation of the national representative of Serbia at the Working Group III meeting sessions (ISDS reform). Also, Serbia is currently conducting a reform of the State Attorney's Office and raising the capacities of this institution. In that regard, the

ISDS reform is also important, since both the Ministry of Justice and the State Attorney's Office are taking measures to enhance the capacity of relevant institutions and improve the relevant legal framework.

In 2017, the Government of Republic of Serbia rendered the *Decision on the formation of a Commission to Consider Disputes that May be the Subject of International Arbitration* ("Official Gazette of Republic of Serbia" No. 83 of 15 September 2017). Thus, the ISDS is an important issue for which reform Serbia is very interested.

This issue is very important (and delicate) for Serbia, since the Working Group for Drafting Amendments to the Law on Mediation in Dispute Resolution was considering the introduction of the first mandatory meeting with a mediator in Serbian legal system. Those intentions were interrupted due to the publicly issued platform of the Bar Associations in Serbia that expressed direct opposition to the proposal, i.e. the first mandatory meeting with a mediator, with a threat of potential protests. Their stance is that the main principle of mediation is voluntariness (not obligingness/mandatory effect in any form, especially not as a precondition for initiating court or arbitral proceedings). Also, they claim that the introduction of the first mandatory meeting with the mediator as a precondition for filing a lawsuit represents a restriction of the citizens' right of access to courts, extends the total length of the proceedings and increases the costs of the proceedings.

VII. Concluding remarks

33. As the global understanding of and interest in non-adjudicative dispute resolution processes grows, there is a nearly universal recognition that parties to disputes should be encouraged to consider Alternative Dispute Resolution processes (ADR), such as mediation before commencing adjudicative dispute resolution proceedings. For example, in the United States mediation became one of the most popular ways of dispute resolution. The commercial benefit for parties is the crucial factor which motivates the parties to resort to mediation.

34. The main benefits of using mediation are the following:

- It enhances a natural dynamic – i.e. it represents an informal process where the parties are the ones who control the whole process having in mind their own preferences, needs and interests, providing flexibility.
- It satisfies the need for justice, saves money and time.
- Difficulties which are encountered in other dispute resolution mechanisms are reduced. This was confirmed by the entry into force of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention)²⁰ showing the global support for mediation. The Singapore Convention was designed to become an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving trade disputes. It ensures that a settlement reached by parties becomes binding and enforceable in accordance with a simplified and streamlined procedure.

²⁰ United Nations Convention on International Settlement Agreements Resulting from Mediation, available at: <https://www.singaporeconvention.org/>.

35. There are also some specific arguments in favour of investor-state mediation. The first one is definitely the opportunity for parties to significantly reduce costs. The success rate is promising since 70-75% cases settle in a day and almost 90% settle within a week. At the same time the costs involved are relatively minor and often include just a mediator's fee. On the other hand, studies show that the average length of investment arbitration proceeding is four years, costing at least US\$ 6 million and US\$ 4.8 million on representation fees. Also, the arbitral award is often unpredictable, while a settlement is tangible and certain. Mediation enables the parties to solve their dispute in an amicable way and to preserve their relationship, so it is very useful when there is an ongoing or potential relationship between parties, which is often the case with investors and host state. Moreover, mediation process is fully confidential which is very important for the parties, since they can have business or sovereign reputational concerns in filing or sustaining an arbitration claim. On the other hand, there is a recent trend toward transparency over confidentiality in investor-state arbitration.

36. It should be noted that the non-adjudicative processes like mediation or conciliation can work effectively in combination with litigation or arbitration. Thus, states should be encouraged to include into their agreements with investors multi-tiered dispute resolution clauses (multi-step dispute resolution clauses) that provide a phased system to resolve dispute, which starts with a number of alternative dispute resolution steps (negotiation between senior managers, mediation, dispute boards etc.) and eventually ends with arbitration if the alternative steps are unsuccessful.

37. Mediation can be conducted in any phase of the arbitration, that is a) just prior to filing an arbitration claim, b) during the arbitration proceedings or c) even after the award is rendered. It is considered that the best time to use mediation is during the cooling-off period, also known as "waiting period" when parties have a second chance to amicably resolve their dispute. That is why investment treaties usually impose cooling-off periods – a period that should elapse before initiating an arbitration proceeding, during which an amicable resolution of the dispute should be attempted. Unfortunately, this possibility is rarely used.

38. Mediation is a very effective form of dispute resolution. There is clear and growing global demand for mediation which has a huge potential for substantial time and cost savings and preserving or minimizing damage to business relationships. Thus, the instances of investor-state mediation are likely to increase. Also, there are only few reasons why states are reluctant to use mediation in investor-state disputes. Namely, state actors usually do not want to take the responsibility for a settlement, but they rather defer responsibility for decision-making to a third party – arbitral tribunal. They have a perception that the negotiation of a settlement agreement means the public acceptance of liability for certain state actions. In that sense, state officials do not often possess the relevant knowledge and experience in international law, so they shift the responsibility to external counsel who will argue the case before the tribunal. At the end, it can be more difficult to obtain an official budgetary approval for a settlement, while the award can be enforced without special approval.