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Possible reform of investor-State dispute settlement (ISDS):

Mediation and other forms of alternative dispute settlement

Note by the Secretariat

Contents

C. Guidelines for participants in investment mediation

1. General remarks

1. At the thirty-ninth session of the Working Group, it was suggested that guidelines should be developed to encourage disputing parties to explore mediation and other methods of alternative dispute resolution (ADR) proactively (A/CN.9/1044, para. 30). In the context of these discussions, it was stressed that mechanisms promoting alternatives to arbitration should be designed so as to ensure consistency with good governance norms, including as reflected in Sustainable Development Goal (SDG) 16 (A/CN.9/1044, para. 31).

2. The Working Group highlighted that ADR methods were still largely underutilised in the ISDS context due to structural, legislative and policy impediments (A/CN.9/1044, para. 35). It noted that efforts should be deployed to strengthen capacity-building and awareness-raising, and it requested the Secretariat to prepare guidelines which should cover matters such as (i) an overview of the process; (ii) the organizational aspects that may need to be considered at the national level to minimize structural or policy impediments and to ensure that mediation could be effectively used; (iii) the representation of public interest in the mediation; and (iv) the development of a pool of qualified mediators in the field of ISDS (A/CN.9/1044, para. 39).

3. Accordingly, the draft below contains guidelines for consideration by the Working Group. They have been prepared with the substantive support of the ICSID Secretariat, drawing also from the discussions that took place during the development of the ICSID Mediation Rules. The Working Group may wish to note that the Notes on Mediation, which were adopted by the Commission at its session in 2021, provide guidelines on international commercial[1] mediation. Therefore, the Working Group may wish to consider whether the text below could be presented as a stand-alone text for investment mediation. In addition, the Working Group may wish to consider whether the guidelines should provide explanations on the model treaty clause (see section II of this Note). Furthermore, the Working Group may wish to recall the possible link between the guidelines and the reform option of establishing an advisory centre on international investment law.[2]

[**EU and its Member States:** 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

4. The Working Group may wish to consider the text of the draft guidelines as follows.

1. Purpose

1. The purpose of these guidelines is to provide participants and interested stakeholders in investment mediation with a tool that addresses the main phases of mediation. Given the flexibility that characterizes mediation, these guidelines are not intended to promote any particular best practice, but rather to outline issues that participants may wish to consider when undertaking a mediation to solve an international investment dispute.

[**EU and its Member States:** 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

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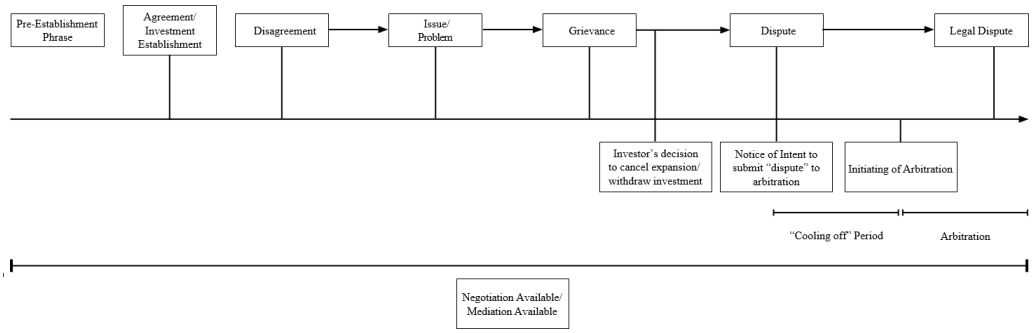
their policy-making and subsequently when negotiating international investment agreements. These guidelines are likely to be an essential element for States when engaging in such exercises.]

[1] According to the definition in Footnote 1 of the Model Law on International Commercial Mediation and Settlement Agreements resulting from Mediation, "the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: (…) investment (…)".

[2] The Working Group may wish to note that a number of training courses and capacity building initiatives in the field of investment mediation take place. They are listed in Annex 1 to the guidelines.

2. Availability of mediation in the investment context

2. Mediation is a flexible process whereby a third person (the "mediator") assists the parties in reaching an amicable settlement of the issues in dispute. It is in essence a facilitated dialogue between the disputing parties and is an efficient tool to resolve investment disputes. As a form of assisted negotiation, mediation is available as a dispute resolution tool whenever negotiations between parties are considered suitable. Therefore, mediation is not only limited to the time after a dispute has formally crystallized but could also be employed as a tool throughout the investment life cycle and alongside arbitration as indicated in the chart below.



3. Assessing the suitability of mediation

3. Such criteria are intended to assist parties in considering whether mediation is suitable to resolve a particular investment dispute or parts thereof. Parties may wish to ensure that there is an option to pursue mediation as a dispute resolution mechanism in the legal instrument under which the dispute arises and, if so, whether there is an agreed framework, such as reference to mediation rules or a mediation centre and whether there is a suitable agency or inter-agency arrangement in charge of a mediation.

4. Not all factors may need to be present at the same time or for all disputing parties. Disputing parties may wish to revisit their assessment of the suitability of mediation at different stages as such assessments may change over time when surrounding circumstances evolve. A checklist of elements to take into consideration when undertaking mediation is contained in Annex 2 to these guidelines.

4. Role of Institutions

5. Mediation as a form of a facilitated dialogue can be conducted *ad hoc* between the parties. However, the support of a neutral, international institution devoted to investment dispute settlement could play an important role by supporting the process.[3] Such support could for instance consist of providing (i) general information and education about investment mediation and guidance on the procedural steps; (ii) assistance to convey offers to mediate to the other party; (iii) assistance with the appointment of the mediator; (iv) support in all administrative and logistical aspects of the mediation procedure, including meeting organization, and advanced technological support for remote meetings; (v) handling of the financial aspects of a mediation (e.g. requesting, holding and managing advance payments made by the parties to cover the costs of the mediation, processing of mediator fees and expenses, etc); (vi) a cost-effective and transparent fee structure; and (vii) a certification that a mediation took place which may assist parties seeking to comply with the requirements of the Singapore Convention or other requirements possibly established in investment treaties.

[**EU and its Member States:** 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

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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.]

6. The mediator – Role, qualification, appointment process

[3] Different institutions may provide the services of mediation. Regarding recent reform efforts, it may be noted that the ICSID Mediation Rules seek to provide broad access to States and investors as the parties do not need to have a nexus to an ICSID Contracting State and there are no nationality requirements.

(1) The mediator's role

6. The mediator facilitates the parties' negotiations. The mediator's role is therefore to assist the parties to arrive at a mutually agreeable solution. Accordingly, the mediator does not resolve nor decide the dispute for the parties but supports the parties in resolving the issues themselves through negotiation. While exercising this role, the mediator may meet with the parties jointly or separately. Negotiations by way of separate meetings is a common feature in mediation and allows the mediator to explore with each party freely its interests and concerns and to develop possible options for settlement.

7. There are certain functions that a mediator does not take on, such as making decisions or reaching any conclusions related to the substantive resolution of the dispute. The mediator does not make judgments over past conduct or give legal, financial, or other expert advice. The mediator, however, assists the parties in assessing the strengths and weaknesses of their views themselves through reality testing and risk assessment techniques.

(2) Mediator's qualifications

8. Given the role of the mediator, it appears essential to select an experienced mediation professional with procedural/mediation process competence who is trained in a variety of communication and negotiation styles and tools to assist the parties with developing mutually acceptable solutions, taking into account the parties' needs, interests, concerns, constraints and motivations.

9. *Competency Criteria.* A number of documents, including Appendix B to the 2012 IBA Rules, [4] the Energy Charter Secretariat's 2016 Investment Mediation Guide,[5] and the IMI's 2016 Competency Criteria[6] set out standards and competency criteria for investor-State mediators. These include, *inter alia*:

(a) Practical experience serving as mediator;

(b) Mediation training, including any accreditation as a mediator by an internationally recognized organization;

(c) Experience in international dispute resolution involving States or State entities in investment or other matters, including different forms of negotiation, mediation and conciliation;

(d) Experience working in or with governments or public entities;

(e) Understanding of the context and framework of investor-State disputes, including economic, legal, social and cultural considerations;

(f) Demonstrated competence in dealing with cross-cultural relationships; and

(g) Ability to conduct the mediation in a timely manner.

10. *Impartiality and independence.* In the context of investment mediation, it might be of particular importance to States that the mediator be impartial and/or independent (see proposed ICSID Mediation Rule 12(1); article 7 IBA Rules) or at a minimum to require relevant disclosures to enable the parties to make an informed mediator appointment (see proposed ICSID Mediation Rule 14(3)(b); see also article 3(6) UNCITRAL Mediation Rules).

11. *Nationality limitations.* In the context of mediation as a form of facilitated dialogue, no nationality limitation principle exists for mediators, hence parties may appoint mediators who are of the same nationality as any of the disputing parties. Parties may agree to exclude certain nationalities, or they may consider that

[4] International Bar Association, 'Rules for Investor-State Mediation' (2012), available at: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.

[5] Energy Charter Secretariat, 'Guide on Investment Mediation' (2016), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf.

[6] International Mediation Institute, 'Competency Criteria for Investor-State Mediators' (2016), available at: https://imimediation.org/download/104/ism/1472/investor-state-mediation- competency-criteria.pdf.

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familiarity with the language, customs and culture of the disputing parties could be beneficial during their mediation.

12. *Expertise in the field of law.* Recalling the mediator's role as a negotiation facilitator, practical mediation process experience and competence are key to exercising the function of a mediator (see article 3(4) of the UNCITRAL Mediation Rules). [7] Additional investment law expertise could be beneficial in probing the strengths and weaknesses of a party's stated position. However, this would not be essential as the mediator does not decide the dispute; should the parties desire a legal opinion, they may appoint a legal expert to do so. In addition, a party's lawyers will be available to provide their clients with a legal evaluation of any given proposed solution (see below the roles of the mediation participants).

(3) Mediator's appointment process

13. 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).

[EU and its Member States: 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.]

(4) Co-mediation

14. In certain instances, disputing parties may consider the appointment of two co-mediators. In co-mediation, each mediator is appointed *jointly* by the parties. Co-mediation requires the mediators to possess team-working skills to jointly facilitate the parties' negotiations. The appointment of two mediators may be considered beneficial in complex disputes or if a large number of disputing parties are involved. The parties may consider a two-mediator team helpful when geographical, gender, racial and cultural diversity in a team are of particular importance to the parties.

7. Role of other participants in mediation

15. Besides the mediator and the parties, mediations may be attended by lawyers, experts and, in some cases, by non-disputing parties whose input may be beneficial for the resolution of the disputed issues.

16. *Role of Parties.* Mediation as a facilitated negotiation requires the active participation of the disputing parties; without it, the mediation cannot proceed. The parties will work with the mediator to explore the issues in dispute and generate ideas and potential options for settlement. Such discussions may be conducted in joint or in separate sessions between the mediator and one party only. The size and composition of each party's team is typically discussed between the parties and the mediator at the outset of the mediation. While it is desirable to have a team member vested with settlement authority present throughout the mediation, it may not always be possible given structural or organizational aspects (for instance, the need for approval/sign-off from a ministry or ministries or cabinet on the side of the State party, or a board of directors or corporate oversight body on the investor's side). 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. The parties will be asked early on in the mediation to share with the mediator information regarding the settlement authority and any applicable approval process.

17. *Role of Lawyers.* In mediation, the role of a legal representative differs from the role in an adjudicative process such as arbitration. Rather than focusing on legal arguments and evidence regarding past compliance with, or breach of, legal obligations with the goal of persuading a tribunal who will be issuing a binding ruling,

[7] The Working Group decided to delete the reference to "expertise in the subject matter" in article 3(4)(a) of the draft UNCITRAL Mediation Rules as a mediator did not necessarily need to be an expert on the subject matter (see A/CN.9/1049, para 68).

the role of lawyers in mediation shifts to the approach of a collaborative, transactional lawyer, assisting the party (the client) with exploring its interests and goals and advocating for these interests and goals with a focus on future-oriented solutions to disputed issues within the applicable legal framework. The tasks of a lawyer may include educating the party about the mediation and available investment mediation rules, assisting with a realistic assessment of strengths and weaknesses of the case, assisting in drafting written statements, and identifying and compiling relevant documents to be used in the mediation. Lawyers are also involved in the discussion of procedural matters, the preparation of opening statements, and drafting of the detailed terms of an eventual settlement agreement.

18. *Role of Experts.* During a mediation, the parties may consider it desirable to appoint experts, such as financial experts or subject-matter experts, to advise the party on non-legal aspects relevant for generating offers or finalizing detailed terms of settlement. In addition, the parties may agree to jointly appoint independent experts to provide expert advice on legal, financial or other matters. The type of participation and scope of an experts' input will be determined by the parties and the mediator.

19. *Role of Non-disputing Parties.* In certain circumstances, the input of non-disputing parties might be relevant and/or helpful to the resolution of the dispute. The flexibility of the mediation process allows the parties to consider whether any non - disputing party participation is desired and to determine the scope and procedural framework for such participation. Thus, the scope of such participation is determined by party agreement and may range from being consulted during the process on specific points to providing written statements for consideration by the parties to more active forms of participation as agreed between the parties and the mediator. The impact of investments on specific groups might be considered when deciding whom to invite to a mediation.

8. Conduct of Investment Mediation

20. Mediation as a facilitated form of negotiation is a structured process.

(1) General Process Overview

21. For illustration purposes, one may consider the following five stages of a mediation[8]:

(i) A "preparation" phase, during which the parties provide the mediator with initial written statements with a short description of the disputed issues and the parties' views on these issues. The mediator will also be discussing aspects of mediation procedure;

(ii) An "opening" phase, during which each party (or party representative) provides an opening statement;

(iii) An "exploration" phase, during which the mediator engages with the parties to identify the foundation of and outline for any mutually acceptable resolution, typically on the basis of the parties' underlying interests, motivations, needs and constraints;

(iv) A "bargaining" phase, during which the mediator assists the parties in developing options for settlement and facilitates the exchange of initial offers. In the later stage of the negotiations, the mediator assists the parties in dealing with counter-offers and overcoming potential impasse; and

(v) A "concluding" phase, during which the parties record the detailed terms of their settlement agreement and ensure the agreement complies with all requirements of the applicable law.

(2) In-person and online mediation sessions

22. Mediations include meetings between the parties and the mediator either jointly or separately. Such meetings may be held in-person or via remote technologies such

[8] This text uses the CEDR's 5-stage model for illustration. CEDR, 'Seminar on Investment Mediation for Government Officials: The Conduct of Mediation', available at: https://slideplayer.com/slide/13240515/.

as videoconferencing. While many mediations have historically been conducted by way of in-person meetings, the use of video-conferencing technology for mediation sessions has significantly increased in recent years. Remote meetings are cost- and time- effective and offer the advantage that no travel is required from any participant. Therefore, such meetings could be a useful tool for scheduling purposes either for some selected sessions or the entire mediation procedure. The use of in-person meetings and remote meetings and the parties' preferences should be discussed between the parties and the mediator at the outset of the mediation.

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.[9]

[**EU and its Member States:** 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.

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

10. Public Interest Representation in Mediation

25. *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 licence at the beginning of the investment lifecycle, 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.

26. *Information disclosure.* This includes the domestic legislation on information disclosure which safeguards the public interest and may include the publication of

[9] For example, the Thailand Model BIT (2012), which stipulates in Article 10(4) that a mediation shall be confidential; and CETA (2017), which foresees in Annex 29(C), Article 6, that the mediation proceeding shall be confidential, except for the fact that the mediation is taking place, and subject to the position that, "mutually agreed solutions shall be made publicly available" subject to the redaction of information a Party designates as confidential.

[10] The World Bank's PPP Disclosure Framework is illustrative of the objectives and scope of such

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disclosure regimes. See, for example, World Bank Group, CoST and PPIAF, 'A Framework for Disclosure in Public-Private Partnerships – Technical Guidance for Systematic, Pro-active, Pre- and Post-Procurement Disclosure of Information in Public-Private Partnership Programs' (August 2015), available at: http://pubdocs.worldbank.org/en/773541448296707678/Disclosure-in- PPPs-Framework.pdf.

any agreed engagement and/or ongoing disclosure of performance, as well as any renegotiated terms[11]. It is not unusual for disputing parties in investment matters to agree to a specific media or public disclosure protocol to provide updates to the public and/or relevant constituents during the mediation.

27. *Non-disputing party participation.* The flexibility of mediation and the possibility to include non-disputing parties, such as local communities affected either by the investment, the dispute or any negotiated solution, in the amicable dispute settlement process also allows the public interest to be represented in the mediation.

28. *No regulatory chill.* Whether the final and binding rulings issued by investment arbitration tribunals impact regulatory processes at the national level, leading to a form of "regulatory chill", is controversial. To the extent the phenomenon of regulatory chill does arise as a consequence of binding rulings by tribunals, this phenomenon does not occur in investment mediation. In an investment mediation, no resolution of a dispute is imposed on a State. To the contrary, the State is an active negotiator who is in full control whether to agree to any settlement and under which conditions. Hence, the voluntary conclusion of a mediated settlement agreement, the terms of which were agreed to by the State in its negotiating capacity, does not appear to impact government regulatory activity or lead to a form of "chill".

11. Policy, structural and organizational aspects to encourage the use of mediation

29. Certain types of structural, organizational and policy measures could be considered at the domestic and international level to minimize impediments to the use of mediation and to ensure that a State party can participate effectively in mediation and use it as a tool to resolve disagreements, problems, grievances or disputes related to investment matters. These measures may include policy considerations, as well as structural/organizational aspects:

(1) Policy Considerations – Anchoring Mediation in the State's Domestic and International Legal Framework.

30. *Domestic Legal Framework.* A clear domestic policy anchoring the State's approval of mediation as an investment dispute settlement tool could provide a clear basis for the State's participation in mediation and address concerns by public officials to engage in facilitated negotiations. Such legislation may not only address the availability of mediation involving a State or State entity, but also clarify lines of authority, representation of the State in formal or informal dispute resolution processes and other matters (see para. 36 below). Detailed comparative research providing examples of such a domestic legal framework encouraging the use of mediation has been conducted by the Energy Charter Secretariat and is reflected in the Model Instrument on Management of Investment Disputes.[12]

31. *International legal framework.* States may also wish to anchor mediation in their international investment agreements, making it available at any time during the investment lifecycle, during the life of a dispute, prior to and alongside any other dispute settlement processes (such as arbitration), and/or providing for mediation during specific stages such as during the amicable settlement period (see para. 21 above).

32. *Mandatory mediation.* Some States have inquired about the usefulness of mandatory or compulsory investor-State mediation, similar to mandatory processes established on the domestic level in some jurisdictions. When mediation is "mandated", it means that the entry into the mediation process is compulsory. However, the parties are typically free to leave the process at any stage, unless a specific provision requires them to remain in the mediation for a specified time or until a certain milestone is reached (see IBA Rules Article 9(4) requiring a party to

[11] See ibid.

[12] Energy Charter Secretariat, 'Model Instrument on Management of Investment Disputes' (2018), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_ -_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes.

participate in the mediation management conference). Mandating mediation is generally viewed as controversial. Some consider mandatory mediation to be an infringement on party autonomy by limiting access to other processes, counter-productive given the need for active participation by the parties in the negotiation, or not appropriate for all disputes. Others take the view that mandatory mediation could be helpful to engage the parties in the mediation, provide a clear policy basis and offer a time- and cost-effective dispute resolution mechanism. Research suggests that voluntary mediation on the domestic level has had little uptake in some States, while the settlement rate following compulsory mediation was substantial. [13]

33. *Awareness raising and training.* Awareness raising of the benefits of the mediation process as a form of facilitated negotiation and capacity building may also be helpful to further encourage the use of mediation as a means for investment dispute settlement. Trainings for State officials, as well as for meditators, are offered on a regular basis[14] which delineate the structural and organizational considerations that enable the effective use of mediation as an investment conflict management tool.

34. Investment disputes concern a wide range of economic activities[15] and could involve entities and agencies at the municipal, state or federal level across all branches of government in relation to a range of legal instruments, including investment contracts, investment laws and bilateral and multilateral treaties. Given the multitude of circumstances, economic sectors, entities and legal instruments involved, clear organizational structures and lines of communications may be helpful to assist a State in using and effectively participating in mediation. Research by the World Bank [16] and the Energy Charter Secretariat[17] suggests that information gathering and sharing, the establishment of a specific unit or units responsible for investment conflict management and capacity building within the government would be beneficial to assist States in resolving investment disputes.

35. *Information Gathering and Dispute Settlement Process Assessment.* Information gathering and analysis of the relevant facts, stakeholders, issues, relevant economic circumstances and State interests is helpful to gain a comprehensive understanding of the disputed issues and allow the State party to assess and make an informed choice of the most suitable dispute resolution mechanism for a given dispute, including mediation. Based on the World Bank's research, States benefit from effective internal information sharing, by way of an early warning mechanism or otherwise, to ensure that relevant individuals or agencies become aware of problems with investors as soon as they arise.[18]

36. *Establishing a conflict management lead agency/agencies.* Based on the World Bank's and Energy Charter's research, States may wish to consider establishing one or several bodies to assist with the management of investment conflicts. Such an entity or entities could assist with information gathering, assessing which dispute resolution mechanism may be the most appropriate in the circumstances and represent the State throughout the dispute settlement process (including formal or informal processes, such as negotiations, mediation and arbitration).

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[13] Anna Howard, 'EU Cross-Border Commercial Mediation: Listening to Disputants - Changing the Frame; Framing the Changes', p. 28 (2021). See also, N.A. Walsh and A. Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) 18 Harv. Negot. L. Rev. 71, 122.

[14] See Annex 2 for further information regarding training courses and capacity building.

[15] The ICSID Caseload – Statistics (2020-2), p. 12, available at: https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf.

[16] World Bank Group and European Commission, 'Retention and Expansion of Foreign Direct Investment – Political Risk and Policy Responses (The World Bank Group 2019). <https://openknowledge.worldbank.org/bitstream/handle/10986/33082/Political-Risk-and-Policy-Responses.pdf?sequence=1&isAllowed=y> p. 46 and p. 73.

[17] Energy Charter Secretariat n (11).

[18] P. Kherand D. Chun, Policy Options to Mitigate Political Risk and Attract FDI, FCI In Focus. Washington, D.C., 2020, World Bank Group, available at: https://hubs.worldbank.org/docs/ImageBank/Pages/DocProfile.aspx?nodeid=32322281 , p. 17.

37. The research indicates that the structural choice for such a responsible entity is likely to differ from State to State, taking into account the State's organizational structures, administrative and other legal requirements, and may range from autonomous entities to a unit within an already existing department or ministry, to an inter-ministerial commission, or consist of an entirely different organizational structure. Some States have adopted a single unit or single agency approach. Other States have implemented a phased approach where issues arising with investors are first handled by an investment after-care unit and subsequently by the Investor Grievance Mechanism (IGM), [19] a program developed by the World Bank, which assists in investment grievance management up to approximately the time of the Notice of Dispute. A helpful resource in this context is the Energy Charter Secretariat's Model Instrument which outlines various options for how such an agency or agencies could be set up, indicating possible functions, structures and composition.[20]

38. In relation to whether a multi-body or single entity approach is preferred, the World Bank's and Energy Charter's research suggests that the entity or entities may benefit from being vested with the following functions:

(a) Serve as point of contact for investors and/or for State entities when disagreements or issues arise;

(b) Collect data to identify origins of governmental conduct generating political risks, to identify issues, sectors and/or agencies that may help with targeted capacity building and to maintain a centralized data repository;

(c) Develop a comprehensive understanding of the disputed issues;

(d) Connect and coordinate with agencies and ministries related to the dispute to gather facts and benefit from technical knowledge within the government about the disputed issues;

(e) Handle contacts and communications with the investor concerned;

(f) Identify suitable conflict management mechanisms (negotiation, mediation, escalation to high-level government body, etc);

(g) Identify the interest of the State in relation to the affected investment and conflict;

(h) Prepare summaries, legal opinions and economic assessments relevant to the dispute for use by the Government;

(i) Lead negotiations, represent the State and prepare the State's strategy during mediation or other formal dispute settlement proceedings (such as expert determination, early neutral evaluation, arbitration);

(j) Have the ability to unify public statements in relation to the dispute and to ensure public disclosure obligations are complied with;

(k) Possess the ability to engage in settlement discussions (either being vested with authority to settle or a clear line of communication with a relevant body or bodies with settlement authority);

(l) Have the ability to request information, advice and cooperation from all government entities involved with the dispute or a possible solution;

(m) Possess the ability to approve funds and hire professional support, including experts and external counsel; and

(n) Design and lead capacity building efforts for all entities implementing the State's obligations vis-à-vis investment matters to minimize recurrence of government conduct that may give rise to an investment dispute that implicates the State.

39. Based on the World Bank's research, key factors relevant for the success of a lead agency include: (i) the existence of effective support from the highest levels of government; (ii) the ability to facilitate systematic data collection, tracking and

[19] Ibid.

[20] Energy Charter Secretariat (n 11).

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analysis; (iii) a clear and supportive legislative framework; and (iv) an emphasis on capacity building within both the lead agency and other branches of government in order to raise awareness concerning the proper implementation of the State's obligations under investment agreements or other applicable instruments.

40. Such an institutional framework, providing for effective conflict management, would further promote the United Nation's Sustainable Development Goal (SDG) 16, i.e., it "[p]romote[s] peaceful and inclusive societies for sustainable development, provide[s] access to justice for all and build[s] effective, accountable and inclusive institutions at all levels."

(2) Possible Involvement of the Home State

41. 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:

(a) Include provisions in investment treaties, contracts and laws encouraging mediation in the policy framework of the Home State of the investor on the domestic or international level;

(b) Establish organizational structures in the form of a point of contact for investors encountering difficulties with their investments abroad; and

(c) Encourage and promote investment mediation by disseminating knowledge about mediation to relevant target groups.

Annex 1 – List of training courses and capacity building initiative

- The UNCITRAL Academy events, hosted in Singapore once a year (see: https://uncitral.un.org/en/gateway/meetings/events);
- The training organized by ICSID, the ECT Secretariat and CEDR aimed at providing Government officials with an overview of the mediation process and basic tools to effectively participate in a mediation (see: https://www.energycharter.org/media/events/article/investor-state-mediation-online-workshop-for-state-officials/); and
- The Mediation skills training for Government officials organized by the IFC, supported by ICSID and CEDR (see: https://icsid.worldbank.org/news-and-events/news-releases/investor-state-mediator-training);

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Annex 2 – Check list

Matters for consideration before commencing mediation

Questions that parties may wish to consider when determining whether mediation is a suitable process for the dispute or parts thereof include the following:

a) Is there a desire to maintain the relationship, for instance in view of retaining the investment or of possible future investments?;

b) Is there a willingness to enter into negotiations/dialogue?;

c) Do the parties desire a rapid resolution or more rapid resolution than could be achieved through other processes?;

d) Do the parties prefer to keep control over the outcome?;

e) Do the parties seek tailored solutions other than the relief available on the basis of the applicable legal basis (not only contractual provisions)?;

f) Are there multiple conflicts or issues in dispute between the parties, some of which could mediated?; and

g) Are there multiple parties involved in the dispute (with differing interests)?

Matters for consideration during the mediation

See UNCITRAL Notes on Organizing Arbitral Proceedings[21], covering the:

a) Commencement of the mediation;

b) Selection and appointment of a mediator;

c) Preparatory steps, including the (i) Terms of reference, fees and other costs; (ii) Administrative assistance; (iii) Parties' attendance and representation; (iv) Addressing confidentiality; (v) Determining the location and the timing of the mediation; and (vi) Agreeing on the language of the mediation;

d) Conduct of the mediation, including the (i) Role of the mediator; (ii) Initial consultations; (iii) Submissions and supporting documents; and (iv) Mediation sessions and active negotiations; and

e) Termination of the mediation.

Matters for consideration when concluding the settlement agreement

a) Settlement proposals by the parties;

b) Drawing up the settlement agreement; and

c) Enforceability:

[21] UNCITRAL Notes on Organizing Arbitral Proceedings (2016), available at: https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings .

- Generally, the parties comply voluntarily with the obligations set forth in the settlement agreement.
- Nevertheless, the parties should consider any requirement as to the form (including language requirements), content, filing, registration or delivery of the settlement agreement set forth by the applicable mediation law, the relevant law at the place(s) of enforcement and the applicable mediation rules.
- States that are party to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation") and States that have enacted legislation based on the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "Model Law on Mediation") presumably follow the enforcement procedure defined therein. While drafting the settlement agreement, the parties may take note of the relevant provisions and requirements under the Singapore Convention on Mediation and the Model Law on Mediation (a list of reservations made by State parties under article 8 of the Singapore Convention can be found on the UNCITRAL website).