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Possible reform of investor-State dispute settlement (ISDS)

Draft guidelines on investment mediation

Note by the Secretariat

Contents

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I. Introduction

1. At the thirty-ninth session of the Working Group in October 2020, 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 that context, it was stressed that mechanisms promoting alternatives to arbitration should be designed 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 mediation was still largely underutilized in ISDS due to structural, legislative, and policy impediments (A/CN.9/1044, para. 35). Noting that efforts should be deployed to strengthen capacity-building and awareness-raising, the Working Group requested the Secretariat to prepare guidelines on investment mediation 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 lists or rosters of qualified mediators in the field of ISDS (A/CN.9/1044, para. 39).

3. Accordingly, this Note contains draft guidelines on investment mediation for consideration by the Working Group. The draft guidelines have been prepared with the substantive support of the ICSID Secretariat, drawing from the discussions that took place during the development of the UNCITRAL Mediation Rules and the ICSID Mediation Rules, and inputs from State delegates, experts, mediators, and other stakeholders, particularly during the fifth intersessional meeting on the use of mediation in ISDS (see A/CN.9/WG.III/WP.210) and other informal meetings.[1]

4. As to the possible scope and format of the draft guidelines, the Working Group may wish to consider the following:

- whether the commentary to the draft provisions on mediation (A/CN.9/WG.III/WP.217) should be included as part of the draft guidelines;
- whether the guidelines should expand further on the investor's perspective, as they have been prepared with a primary focus on the necessities of and constraints faced by States; and
- whether a list of capacity-building and awareness-raising activities should form part of the draft guidelines, which would require constant updates (possible undertaking for the advisory centre if and when established).[2]

5. The draft guidelines would need to be updated and adjusted according to the discussions on the draft provisions on mediation. They would need to be considered closely in conjunction with the ongoing work to develop reforms options relating to dispute prevention. They may also need to be adjusted in light of the work on an advisory centre, which may be tasked with providing mediation services, possibly limited to advisory or representation services, and a standing mechanism for resolving investment disputes. Other reform options being considered by the Working Group might need to be further reflected in the guidelines (for example, regulation of third-party funding and its impact on negotiating and concluding a settlement agreement).

[1] For instance, the 'Forum for Further Preparatory Work on Investment Mediation', https://uncitral.un.org/en/content/uncitral-working-group-iii-isds-reform-forum-further-preparatory-work-investment-mediation-5. For further information, see also: https://uncitral.un.org/en/strengtheningmechanisms.

[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, such as the UNCITRAL Academy events, hosted in Singapore once a year (see: https://uncitral.un.org/en/events/singapore).

II. Draft guidelines on investment mediation

A. Purpose

6. The purpose of the guidelines on investment mediation (the "Guidelines") is to explain how mediation could be utilized to resolve investment disputes. Given the flexible nature of mediation, these Guidelines do not intend to promote any best practice, but rather outline issues that should be considered when undertaking investment mediation. The Guidelines are not binding upon the parties and are purely explanatory in nature.

[Note to the Working Group: The Working Group may wish to consider whether the Guidelines should specifically refer to foreign investment or investors.]

B. Availability of mediation in the investment context

7. Mediation is a flexible process whereby a third person (the "mediator") assists the parties' negotiations with the goal of reaching an amicable settlement of the issues in dispute. Accordingly, it is an efficient tool for resolving investment disputes with the mediator structuring and facilitating the dialogue between the disputing parties. The involvement of the mediator provides the necessary safeguard for government officials and investors entering into the negotiation particularly where the outcome is scrutinized or otherwise challenged, for example, on the basis of corruption. As a form of assisted negotiation, mediation is available as a dispute resolution tool whenever facilitated negotiations between parties are considered suitable. Mediation can take place not only after a dispute has formally crystallized but also prior to the dispute. It can thus be employed as a tool throughout the life cycle of the investment and the dispute whenever relevant issues arise – prior to a claim being raised, alongside arbitration or litigation, and even after the proceeding (for example, with regard to the implementation of the award rendered through arbitration).

C. Assessing the suitability of mediation

8. In considering whether mediation is suitable to resolve any issue arising out of an investment, the following aspects should be taken into account:

(a) Desirability of maintaining the relationship, for instance in view of retaining the investment or of possible future investments;

(b) Willingness of the parties to enter into negotiation or dialogue;

(c) Desirability of an effective resolution;

(d) Desirability of a formal dispute resolution mechanism involving a third-party;

(e) Desirability of keeping control over the outcome;

(f) Desirability of seeking tailored and creative solutions rather than legal remedy;

(g) Budgetary and financial implications;

(h) Complexity of the issues and urgency to address them;

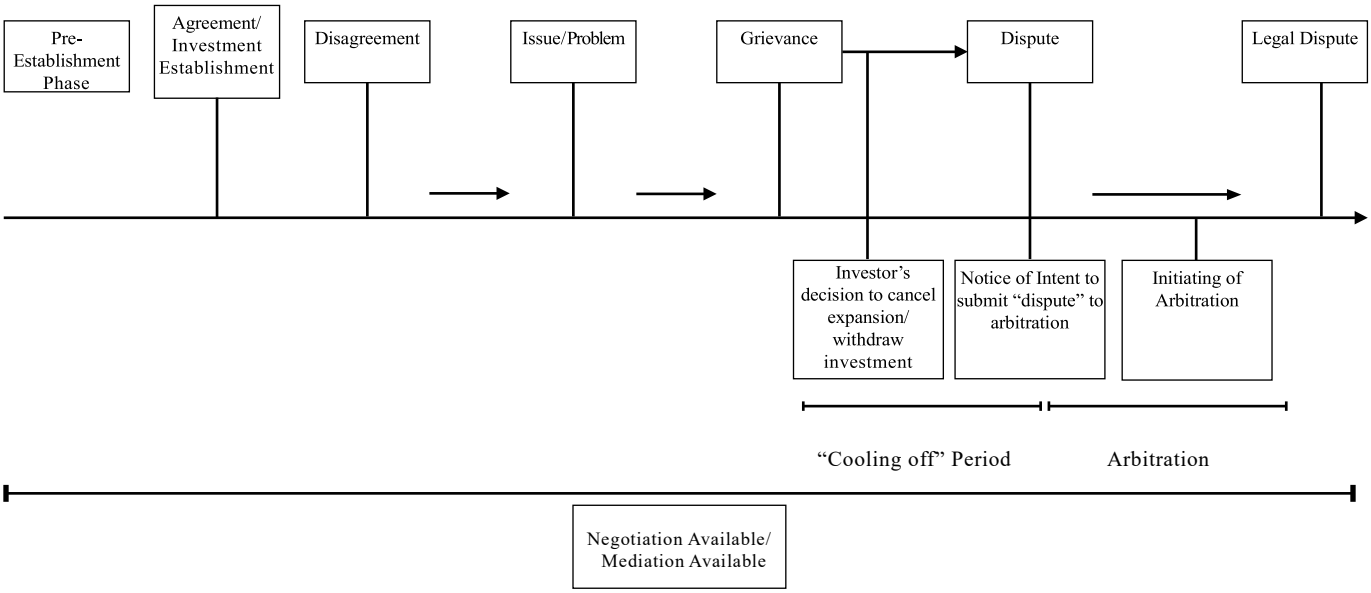
(i) Number of parties involved, including those with potentially different interests; and

(j) Need to understand the other parties' position, allowing the parties to streamline the issues at stake.

9. The above checklist aims to assist the parties in determining the suitability of mediation for a given dispute and not all factors would need to be taken into account.

The suitability of mediation might differ depending on the perspectives of each party. While some parties may find mediation suitable early on, for example, at the time of project operations, others may find mediation suitable after a certain stage of the arbitration or litigation (for example, after the written statements or a hearing).

10. The suitability of mediation may also change over time as the surrounding circumstances evolve. The chart below illustrates that mediation is available at any point in time, should the parties wish to pursue negotiations facilitated by a mediator.



D. Consent to mediate

11. Mediation is a consensual process that requires the parties' agreement to the process. Parties are free to agree to mediate at any point in time. States may express their consent to mediation in investment treaties by offering mediation as an option for resolving claims arising thereof. Similarly, parties may express their consent in their investment contracts, which can also take the form of a multi-tier dispute resolution clause. In some cases, parties may be required to take part in mediation. However, they are generally free to leave the process at any stage (see para. 41 below).

E. Timeframes

12. If mediation takes place at an early stage of the dispute, the dispute might not have crystalized, and it might be easier to find creative solutions mutually agreeable to the parties. Mediation is often conceived as a dispute settlement method prior to utilizing other more adversarial methods. There may be a specified time period to allow the parties to reach an amicable settlement (often referred to as the "cooling-off") and in certain instances, the lapse of that time period is a pre-condition to the commencement of arbitration. That time period should not be too short and be sufficient to conduct mediation (for example, six months). And it should be possible for parties to engage in mediation even after the commencement of other adversarial proceedings.

F. Reference to mediation rules

13. When parties agree to mediate, they could refer to a set of mediation rules, such as to the more generic UNCITRAL Mediation Rules, or the 2022 ICSID Mediation Rules or the IBA Rules, both of which are more tailored to investment mediation.

These mediation rules provide a comprehensive procedural framework for mediation avoiding procedural lacunae or unintended omissions, while providing flexibility to the parties to tailor the proceedings according to their needs. Reference could be made to such rules in investment treaties, investment contracts or domestic legislation, all of which could also contain provisions on mediation.

G. Role of institutions

14. As a form of a facilitated negotiation, mediation can be conducted *ad hoc,* that is without the administrative support of an institution or with such support from an institution.

15. Administrative support that could be provided by institutions include for instance: (i) general information and training regarding investment mediation and guidance on the procedural steps; (ii) assistance in communicating offers to mediate to the other party; (iii) assistance with the selection and appointment of mediators; (iv) assistance in all administrative and logistical aspects of the mediation procedure, including organization of meetings and technical support for online meetings; (v) services regarding the financial aspects of a mediation (for example, requesting, holding and managing advance payments made by the parties to cover the costs of the mediation, processing of mediator fees, and expenses); (vi) issuance of a certification that mediation took place, which may assist parties seeking to comply with the requirements of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") or other requirements in investment treaties (for example, as proof that mediation took place prior to raising a claim under arbitration).

H. The mediator – role, qualification, and appointment

1. The role of a mediator

16. The mediator facilitates the parties' negotiations and assists the parties in arriving 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 caucus with the parties jointly or meet with them separately. Facilitating 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.

17. There are certain functions that a mediator usually 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 may, however, assist the parties in assessing the strengths and weaknesses of their views through reality testing and risk assessment techniques.

2. Qualifications and requirements of a mediator

18. Given the role of the mediator, it is essential to select an experienced professional with recognized competence in carrying out the mediation process and accompanying the parties - one who is trained in a variety of communication and negotiation styles as well as tools to assist the parties with developing mutually acceptable solutions and one who takes into account the parties' needs, interests, concerns, constraints, and motivations.

19. *Impartiality and independence* - In the context of investment mediation which may potentially be under public scrutiny, it might be of particular importance to States that the mediator is impartial and independent (see: 2022 ICSID Mediation Rules, Rule 12(1); IBA Rules for Investor-State Mediation (IBA Rules), Article 3) or at a

minimum, is required to make relevant disclosures to enable the parties to be aware of any conflicts of interest (see UNCITRAL Mediation Rules, Article 3(6); 2022 ICSID Mediation Rules, Rule 14(3)(b)).

20. *Competency* – Mediators should possess certain competencies in order to undertake investment mediation.[3] These include, *inter alia*:

(a) Practical experience as a 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) Experience in dealing with cross-cultural relationships; and

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

21. *Nationality* – The nationality is usually not taken into account when appointing a mediator. Hence, parties may appoint a mediator who is of the same nationality with one of the disputing parties, who would be familiar with the language, customs and culture of that disputing party. Parties may also agree to exclude certain nationals.

22. *Expertise in the field of investment law* – Expertise in investment law could be beneficial in probing the strengths and weaknesses of the parties' positions. However, such legal expertise would not be essential as the mediator does not make any decisions about the dispute, and therefore does not necessarily need to be an expert on the subject matter. Should the parties or the mediator require a legal opinion, they may appoint a legal expert to assist the mediator. In addition, the legal representatives of the parties can provide their clients with a legal evaluation of any given proposed solution (see para. 23 below).

3. Appointment of the mediator

23. The mediator is typically appointed by the parties (UNCITRAL Mediation Rules, Article 3(2), 2022 ICSID Mediation Rules, Rule 13(1), IBA Rules, Article 4(5)). Parties may agree on a mediator or on a procedure for the mediator's appointment, which may involve a third person or an institution (UNCITRAL Rules, Article 3(3), 2022 ICSID Mediation Rules, Rule 13(3), IBA Rules, Article 4(6),). If the parties have not appointed or cannot agree on the mediator(s) within a certain time frame, they may request that a third person or an institution makes the appointment in accordance with the default provision (see for example, the Secretary General of ICSID in accordance with ICSID Mediation Rules, Rule 13(4) or the Secretary-General of the Permanent Court of Arbitration in accordance with IBA Rules, Article 4(7)).

Co-mediation

24. Parties may wish to consider the appointment of two mediators (referred to as co-mediation), each of whom are either appointed *jointly* by the parties, or one

[3] For example, competency in this regard is referenced in Appendix B to the IBA Rules, available at: www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C, the Energy Charter Secretariat's 2016 Investment Mediation Guide (Energy Charter Secretariat, 'Guide on Investment Mediation' (2016), available at: www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf), and the IMI's 2016 Competency Criteria (International Mediation Institute, 'Competency Criteria for Investor-State Mediators' (2016), available at: https://imimediation.org/wp-content/uploads/2022/03/IMI-Investor-State-Mediation-Competency-Criteria.pdf)

proposed by each party. Co-mediation requires the mediators to possess team-working skills to jointly facilitate the parties' negotiations. As the mediators may have different backgrounds or areas of expertise, a co-mediation may be considered beneficial in complex disputes, in a case involving a multitude of parties or when cultural diversity needs to be bridged.

[*Note to the Working Group*: *The Working Group may wish to consider whether the benefits of co-mediation would need to be further elaborated including the factors to take into account when parties decide to use co-mediation.]*

I. Role of the parties and other participants in mediation

25. Besides the mediator and the parties, legal representatives of the parties, experts and, in some cases, non-disputing parties take part in the mediation. This is to assist the parties in achieving amicable resolution but also when their input may be beneficial for the resolution of the dispute.

26. *Role of the parties* – Mediation requires the active participation of the parties; without it, the mediation cannot proceed. The parties need to work with the mediator to explore the issues in dispute and generate ideas and potential options for settlement. Such discussions may be conducted jointly with all the parties or in separate sessions between the mediator and one of the parties.

27. *Composition of the party's team* – 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 include a member vested with settlement authority and to have him or her present throughout the mediation, it may not always be possible (for instance, the need for approval/sign-off from a ministry or ministries or cabinet on the side of the State, or the same from a board of directors or corporate oversight body on the side of the investor). It is desirable to have at least one team member, who has a clear line of communication with the person or entity with settlement authority. The parties will be asked early in the mediation to share with the mediator information regarding the settlement authority and any applicable approval process.

28. *Role of the legal representatives* – In mediation, the role of legal representatives differs from that in an adjudicative process, such as arbitration. In an adversarial process, legal representatives would usually focus 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. On the contrary, in a mediation, they should take a collaborative approach assisting the party with exploring its interests and goals and advocating for these interests and goals in the context of a future-oriented solution. The tasks of legal representatives 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. Legal representatives 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.

29. In most cases, the cost of legal representation in mediation is lower than that of an adversarial proceeding, particularly as the dispute is resolved in a shorter period of time. States may therefore consider providing financial incentives to ensure that legal representatives are willing to engage in mediation.

30. *Role of experts* – During a mediation, a party's team may include subject-matter experts, for example, to advise the party on financial or other matters relevant for generating offers or contributing to detailed terms of the settlement. The parties may also consider jointly appointing an independent expert, whose input may be beneficial during the negotiation of a mutually agreed solution. In that case, the type of participation and scope of the expert's input will need to be determined by the parties in consultation with the mediator.

31. *Role of non-disputing parties* – The input of non-disputing parties, including non-disputing State Parties to the underlying investment treaty, might be relevant and/or helpful to reaching an amicable solution through mediation. 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. The scope of such participation to be determined by the parties could vary. Non-disputing parties may be consulted during the process on specific points, may be asked to provide written statements for consideration by the parties or could take a more active role in the process if agreed between the parties and the mediator. An investment and a related dispute may affect specific groups, concern the civil society, and/or other interested stakeholders. Such third parties may therefore be considered when deciding whom to invite to a mediation.

J. Conduct of investment mediation

Overview

32. For illustration purposes, mediation may be conducted in the following five phases:[4]

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

(ii) An "opening" phase, during which each party (or their 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 solutions;

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

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

[*Note to the Working Group: The Working Group may wish to consider whether further guidance on the applicable law is required.]*

In-person and online mediation sessions

33. Mediation meetings may be held in-person or online. While many mediations have been conducted by way of in-person meetings, the use of technology for online mediation has increased significantly in recent years. While in-person meetings allow for a direct interaction between the parties, online meetings are cost- and time-effective and do not require travel of the participants. Therefore, online meetings could be useful for scheduling parts of the mediation sessions or the entire mediation procedure. Whether to use in-person or online meetings should be discussed between the parties and the mediator at the outset of the mediation.

[4] See CEDR, 'Seminar on Investment Mediation for Government Officials: The Conduct of Mediation', available at: https://slideplayer.com/slide/13240515/.

K. General principles: without prejudice principle, confidentiality, and disclosure obligations

Without prejudice principle – use of information in other proceedings

34. For mediation to succeed, the parties must be able to freely engage in the negotiations without being concerned that information exchanged during the mediation will be used by the other party in another proceeding as evidence or otherwise. For this purpose, 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. This approach is found in the relevant mediation rules (UNCITRAL Mediation Rules, Article 7; 2022 ICSID Mediation Rules, Rule 11) as well as in a number of recent investment agreements.[5]

Confidentiality, limits to confidentiality and affirmative information disclosure obligations

35. Confidentiality is key to enable parties to frankly discuss the issues without fearing any negative consequences subsequently. Therefore, generally in a mediation, all information relating to the mediation shall be kept confidential by all those involved in the mediation, except where disclosure is required by law (or for the implementation of the agreement). Limitations on such confidentiality obligations and affirmative disclosure requirements can be established through various legal instruments, among which 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,[6] public financial management regulations, budget transparency legislation, or freedom of information legislation).

36. Parties concerned about the confidentiality of the mediation, including the information shared during the proceeding as well as the settlement agreement may agree on such aspects including by making reference to investment mediation rules or provisions therein. Aspects that parties may wish to regulate include (i) whether the fact that mediation took place shall be confidential, (ii) whether information relating to or obtained during the mediation shall be confidential, and (iii) whether and to what extent agreed settlements are to be confidential (see in that context IBA Rules, Article 10(3) that limits the confidentiality obligation with regard to the fact that a mediation has commenced and that it has been concluded or discontinued).

L. Settlement agreement

37. Generally, parties comply voluntarily with the obligations set forth in the settlement agreement and thus enforcement is not necessary. 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 in the applicable mediation law, and the relevant law at the place(s) of enforcement and the applicable mediation rules. For example, the Singapore Convention and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "Model Law on Mediation") include certain requirements that need to be met. Parties should therefore take note of

[5] For example, Article 25(1) of the Argentina-Japan BIT (2018), and Article 9.18(3) of the CPTPP (2018); see also Article 8.20(2) CETA (2017).

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

such requirements when drafting the settlement agreements. States that are party to the Singapore Convention 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"), are listed on the United Nations Treaty Collection website, respectively UNCITRAL's website.[7]

M. Public interest in mediation

38. *Rule of Law* – State's participation in the mediation constitutes administrative governmental action, similar to governmental conduct during negotiations of a concession or license at the beginning of the investment lifecycle, i.e., at the time of the entry into investment. Therefore, the State's actions in the mediation must comply with the relevant legal framework.

39. *Disclosure of information* – There may be domestic legislation on disclosure of information, which safeguards the public interest and may include the publication of any agreed engagement and/or ongoing disclosure of performance, as well as any renegotiated terms.[8] Such disclosure requirements could ensure that the outcome of the mediation is not challenged, and that the persons engaging in the mediation process are protected against allegations of or acts of corruption. It is not unusual for disputing parties to agree to a specific media or public disclosure protocol to provide updates to the public and/or relevant constituents during the mediation (see para. 31 above).

40. *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 process also allows the public interest to be represented in a mediation (see para. 26 above).

41. *Impact on regulatory authority of the State* – Unlike arbitration, no binding decision is imposed on a State following investment mediation. To the contrary, the State is an active negotiator who is in full control of whether to agree to any settlement and under which conditions. Hence, the voluntary conclusion of a settlement agreement, the terms of which were agreed to by the State in its negotiating capacity, would not impact governmental regulatory activity or lead to a form of "chill".

N. Means to encourage the use of mediation

42. Certain accompanying measures could be considered at the domestic and international level to minimize impediments to the use of mediation and to ensure that a State can participate effectively in mediation and use it as a tool to resolve disagreements, problems, grievances, or disputes related to investment. Such measures include a mediation enabling domestic and international framework, as well as capacity building and organizational measures.

43. *Domestic legal framework* – A clear domestic basis anchoring the State's approval of mediation as an investment dispute settlement tool would allow for the State's participation in mediation and address concerns expressed by government officials in engaging in facilitated negotiations. Such basis may not only cover the possibility for a State or State entity to engage in mediation, but also clarify lines of

[7] States that are party to the Singapore Convention can be found here: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.
Additionally, 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") are listed here: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status.

[8] Ibid.

authority, representation of the State in formal or informal dispute resolution processes, and other matters (see paras. 43–49 below).[9]

44. *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.

45. While the rate of compliance with a mediated settlement is high, the availability of an enforcement framework may nevertheless be an element to take into account when considering suitable dispute resolution mechanisms. The centrepiece of the enforcement framework for mediation is the Singapore Convention. The Singapore Convention makes it generally possible for parties to directly enforce mediated settlement agreements.[10] Becoming a party to the Singapore Convention will show the State's willingness to engage in mediation. The universal uptake of the Singapore Convention would ensure enforceability in favour of investors and States.

46. *Commencement of mediation as a pre-condition for other dispute resolution means* – States might consider the usefulness of making mediation compulsory in their investment treaties, investment contracts or domestic legislation (see A/CN.9/WG.III/WP.217, paras. 23–30). When mediation is compulsory, it means that the parties are compelled to engage in the mediation process. However, the parties are typically free to leave the process at any stage, unless they are required to remain in the mediation for a specified time, or until a certain stage of the process (see IBA Rules Article 9(4) requiring a party to participate in the mediation management conference). This approach would give mediation a chance to exhibit its full benefits. Research suggests that voluntary mediation on the domestic level has had little uptake in some States, while the settlement rate following compulsory mediation increase substantially.[11]

47. *Awareness raising and training* – Awareness raising of the benefits of mediation and capacity building can further encourage the use of mediation as a means for investment dispute settlement. Trainings for State officials, as well as for mediators, and other relevant target groups should be offered on a regular basis, to foster the understanding of what mediation means and entails, so that mediation can be used as an effective investment conflict management tool.

48. *Clear communication lines* – Investment disputes concern a wide range of economic activities[12] 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 should be established within the Government which would assist a State in using and effectively participating in mediation. Information gathering and sharing, the establishment of a specific unit or units responsible for investment

[9] Comparative research providing examples of clear domestic legal frameworks have been conducted by the Energy Charter Secretariat and are reflected in the Model Instrument on Management of Investment Disputes. See Energy Charter Secretariat, 'Model Instrument on Management of Investment Disputes' (2018), available at: www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf.

[10] The disputing parties may take note of whether the relevant jurisdictions have made a declaration under Article 8(1)(a) of the Singapore Convention, where the scope of that declaration (Article 8(1)(a)) provides that a Party may declare that it shall not apply the Singapore Convention to settlement agreements to which it is a party).

[11] 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. See also, Anna Howard, 'EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes', p. 28 (2021).

[12] 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.

conflict management and capacity building within the Government would be beneficial for assisting States in resolving investment disputes.[13]

49. *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 in order 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. 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.[14]

50. *Establishing a conflict management agency/agencies* – States may wish to consider establishing one or several entities to oversee the management of investment conflicts.[15] Such an entity or entities could also lead the information gathering, assessing which dispute resolution mechanism may be the most appropriate in the circumstances and representing the State throughout the dispute settlement process (including formal or informal processes, such as negotiations, mediation, and arbitration).

51. The structural choice is likely to differ from State to State, depending on the State's organizational structures, administrative and other legal requirements.[16] The responsible entity may be structured as an autonomous entity, a unit within an existing department or ministry, an inter-ministerial commission, or an entirely different organization.

52. The entity should be vested with the following responsibilities to:

(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 a high-level governmental body, etc.) and eventually engage in them;

(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;

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[13] Supra note 10.

[14] P. Kher and D. Chun, Policy Options to Mitigate Political Risk and Attract FDI, FCI In Focus. Washington, D.C., 2020, World Bank Group, available at: https://openknowledge.worldbank.org/handle/10986/34380, p. 17.

[15] Supra note 18.

[16] For various options on how such an agency or agencies could be established indicating possible functions, structures, and composition see Energy Charter Secretariat (supra note 10). See also, World Bank Group and European Commission, 'Retention and Expansion of Foreign Direct Investment – Political Risk and Policy Responses' (The World Bank Group 2019), available at: https://openknowledge.worldbank.org/bitstream/handle/10986/33082/Political-Risk-and-PolicyResponses.pdf?sequence=1&isAllowed=y.

(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) Unify public statements in relation to the dispute and to ensure public disclosure obligations are complied with;

(k) 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) Request information, advice and cooperation from all governmental entities involved with the dispute or a possible solution;

(m) 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 governmental conduct that may give rise to an investment dispute that implicates the State.

53. Key factors relevant for the success of a lead agency include: (i) the existence of effective support from the highest levels of the Government; (ii) the ability to facilitate systematic data collection, tracking and 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 to raise awareness concerning the proper implementation of the State's obligations under investment agreements or other applicable instruments.

54. Such an institutional framework 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."