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Draft UNCITRAL guidelines on investment mediation

Note by the Secretariat

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Introduction

At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS).[1] At its fifty-fourth session in 2021, the Commission commended the Working Group for its consideration of other means of alternative dispute resolution, such as mediation as a reform element.[2] At its fifty-fifth session in 2022, the Commission expressed its satisfaction with the progress made by the Working Group[3] and encouraged the Working Group to submit for its consideration texts on alternative dispute resolution mechanisms.[4]

At its thirty-ninth, forty-third and forty-fifth sessions, the Working Group undertook work on the preparation of guidelines for effective use of mediation.[5] In accordance with the request by the Working Group,[6] this note contains draft UNCITRAL guidelines on investment mediation reflecting the deliberations and decisions of the Working Group at its forty-fifth session.

I. Draft UNCITRAL Guidelines on Investment Mediation

A. Purpose[7]

1. The purpose of the UNCITRAL Guidelines on Investment Mediation (the "Guidelines") is to explain how mediation can be utilized to resolve international investment disputes. The Guidelines do not intend to promote best practice, but rather list and describe briefly issues that should be considered when undertaking investment mediation. Owing to the flexible nature of mediation, the procedural styles, practices, and methods that lead parties to a settlement of a dispute may vary. The Guidelines assist parties in understanding the different aspects of investment mediation, the nuances of the process and the possible benefits. The parties and the mediator may use or refer to the Guidelines at their discretion and to the extent they see fit, and need not adopt or provide reasons for not adopting any particular element of the Guidelines. The Guidelines do not impose any legal requirements binding upon the parties or the mediator and are not suitable to be used as mediation rules.

B. Availability of mediation to resolve international investment disputes[8]

2. Mediation is a flexible process, whereby a third person (the "mediator") assists the parties to negotiate an amicable settlement of the issues in dispute. It is an effective tool to resolve international investment disputes with the mediator structuring and facilitating a dialogue between the parties. Mediation allows the parties to exercise control over the process, to reach a self-tailored outcome and to preserve their relationship. Additionally, the involvement of a mediator provides necessary safeguards for due process, which is important as the outcome of the negotiations may be scrutinized or challenged by the public. As a form of assisted or

[1] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. 264.
[2] Ibid., *Seventy-sixth session, Supplement No. 17* (A/76/17), para. 197.
[3] Ibid., *Seventy-seventh session, Supplement No. 17* (A/77/17), para. 186.
[4] Ibid., para. 194(c).
[5] The deliberations and decisions of the Working Group at its thirty-ninth, forty-third and forty-fifth sessions are set out in documents A/CN.9/1044, paras. 36–40, A/CN.9/1124, paras. 173–200, and A/CN.9/1131, paras. 36–45, respectively.
[6] A/CN.9/1131, para. 44.
[7] For deliberations of the Working Group on this section, see document A/CN.9/1131, para. 38.
[8] Ibid.

facilitated negotiation, mediation can be useful when negotiations between the parties are considered most suitable for resolving a dispute.

C. Suitability of mediation to resolve an international investment dispute[9]

3. In considering whether mediation is suitable to settle any issue or dispute arising out of an international investment, the following are some of the aspects, if relevant, to be taken into account:

(a) Desirability of maintaining the parties' relationship also in light of retaining the current investments as well as the possibility of attracting future investments;

(b) Willingness of the parties to enter into a dialogue or negotiations and understand the other party's positions;

(c) Number of the parties involved, including those with potentially different interests;

(d) Desirability of resolving a dispute in a time- and cost-effective manner;

(e) Nature of the dispute and the underlying grievance;

(f) Complexity of the issues in dispute and urgency to address them;

(g) Usefulness for the parties to streamline the issues at stake;

(h) Desirability of involving a third party;

(i) Desirability of the parties having control over the resolution process and the outcome;

(j) Desirability of the parties developing tailored and creative solutions;

(k) Any implication of complying with any settlement agreement, including any political, economic, social and financial implication.

4. While the above checklist can assist the parties in determining the suitability of mediation for resolving an issue or a dispute, not all aspects may be relevant. The suitability of mediation might differ depending on the perspective of each party. While some parties may find mediation suitable early on, for example, prior to an issue being escalated into a dispute, others may find it suitable after the initiation of arbitration or litigation or at a later stage of such proceedings (for example, after the written statements or a hearing).

D. Consent to mediate[10]

5. Mediation is a consensual process that is based on the parties' agreement to that process. States may express their consent to mediation in investment treaties, investment contracts, domestic legislation or in any other form. Consent to mediation can also be expressed as part of a multi-tier dispute resolution clause, which provides, for example, that when a dispute arises, parties are bound to perform certain steps, for instance, to attempt mediation before commencing arbitration.

6. Consent to mediation does not need to be expressed prior to the dispute. A party wishing to mediate can invite the other party to mediation, which may include a description of the basis of the dispute sufficient to identify the matters giving rise to

[9] For deliberations of the Working Group on this section, see documents A/CN.9/1124, para. 174; and A/CN.9/1131, para. 38.

[10] For deliberations of the Working Group on this section, see documents see A/CN.9/1124, para. 177; and A/CN.9/1131, para. 38.

the dispute, and a description of any prior steps taken to resolve the dispute, including any information on pending claims.

7. There may be instances where parties are required to take part in mediation prior to initiating arbitration or litigation. However, as a consensual process, parties are generally free to leave the process at any time. Some mediation rules[11] and treaties provide that once mediation is initiated, it should continue for a certain period of time or until a certain stage of the process.

E. Timing and duration of mediation[12]

8. While the suitability of mediation may change with the evolving circumstances, it is available at any point in time. It can thus be employed as a tool throughout the life cycle of an investment whenever issues or disputes arise. Investment treaties and contracts may specify a period of time, during which parties are encouraged to reach an amicable settlement including possibly through mediation. In certain instances, the lapse of that period may be a precondition for initiating arbitration.

9. Mediation may resolve some of the underlying issues, which might help de-escalating the dispute or narrowing it down. In general, it is easier to find solutions mutually agreeable to the parties if mediation takes place prior to the parties taking adversarial positions.

10. When parties agree to mediate, they may wish to set a time period during which they will engage in mediation. The duration should not be too short and be sufficient to conduct mediation in an efficient and streamlined manner.

F. Mediation rules[13]

11. When parties express their consent or agree to mediate, they should also agree on and refer to a set of rules to govern the mediation process. The Mediation Rules of the International Centre for Settlement of Investment Disputes of 2022 (ICSID Mediation Rules)[14] and the Rules for Investor-State Mediation by the International Bar Association of 2012 (IBA Rules) are examples of rules tailored to international investment disputes. Parties may also refer to the generic UNCITRAL Mediation Rules adopted in 2021[15] or any other set of mediation rules. Mediation rules provide a procedural framework for mediation, assist the parties in avoiding procedural lacunae and at the same time provide flexibility to the parties to tailor the procedure to their needs. However, where such rules or the agreement of the parties are in conflict with provisions of law applicable to the mediation which the parties cannot derogate from, the provisions of the applicable law would prevail.[16]

G. Role of institutions[17]

12. As a form of facilitated negotiation, mediation can be conducted with or without the administrative support of institutions. Administrative support offered by institutions includes, for instance: (i) guidance on procedural aspects; (ii) assistance

[11] For example, Article 9(4) of the IBA Rules requires parties to participate in the mediation management conference.

[12] For deliberations of the Working Group on this section, see documents A/CN.9/1124, para. 178; and A/CN.9/1131, para. 38.

[13] For deliberations of the Working Group on this section, see documents A/CN.9/1124, para. 179; and A/CN.9/1131, para. 39.

[14] Available at https://icsid.worldbank.org/rules-regulations/mediation.

[15] Text available at https://uncitral.un.org/en/texts/mediation.

[16] See UNCITRAL Mediation Rules, Article 1(5); ICSID Mediation Rules, Rule 3(3); IBA Rules, Article 1(3).

[17] For deliberations of the Working Group on this section, see documents A/CN.9/1124, para. 180; and A/CN.9/1131, para. 39.

in communicating with the other party, including conveying an offer to mediate; (iii) identification of a pool of mediators and assistance in their selection and appointment; (iv) assistance in the logistical aspects of mediation, including the organization of in-person and remote meetings as well as providing for data protection and cybersecurity measures; (v) financial services (for example, requesting, holding and managing advance payments by the parties to cover the costs of the mediation and processing of mediator fees and expenses); and (vi) issuance of a certification that mediation took place.[18]

13. Such institutions may also raise awareness about the availability of mediation, provide general information – including on best practices – and conduct capacity-building activities for interested parties and potential mediators.

H. Role, qualification and appointment of a mediator[19]

1. Role of a mediator

14. A mediator facilitates the parties' negotiations and assists the parties in arriving at a mutually agreeable solution. Accordingly, a mediator does not decide how the dispute shall be resolved but rather supports the parties in resolving the issues themselves through negotiation. A mediator creates a neutral environment for the parties to discuss, overcome deadlocks and arrive at a solution.

15. A mediator should not take decisions, make judgments over the parties' past conduct that led to the dispute nor offer legal advice to the parties. A mediator may, however, assist the parties in assessing the strengths and weaknesses of their arguments.

2. Qualifications and other requirements of a mediator

16. Given the above-mentioned role, a mediator should be an experienced professional with recognized competence in carrying out mediation. A mediator should be experienced in various means of communication and different negotiation styles and be capable of utilizing tools to assist the parties as they develop mutually acceptable solutions. A mediator should be able to take into account the needs, interests, concerns, constraints, and motivations of all the parties.

17. *Competency* – When choosing a mediator, parties should consider whether the mediator possesses, among others, the following experiences and competencies (see also para. 22 below):[20]

(a) Experience as a mediator;

(b) Ability to conduct mediation in an effective manner;

(c) Mediation training, including any accreditation;

(d) Experience working in or with Governments or State entities;

(e) Experience in different forms of dispute resolution involving Governments or State entities;

(f) Expertise in the field of investment law or in the relevant sector (see para. 18 below);

[18] Such a certificate may assist parties in enforcing a settlement agreement under the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") or meeting other requirements in investment treaties (for example, as proof that mediation took place when initiating arbitration).

[19] For deliberations of the Working Group on this section, see documents A/CN.9/1124, paras. 181–184; and A/CN.9/1131, para. 39.

[20] For a list of competencies, see, for example, Appendix B to the IBA Rules, Energy Charter Secretariat, Guide on Investment Mediation (2016), and International Mediation Institute, Competency Criteria for Investor-State Mediators (2016).

(g) Understanding of the context and framework of investment disputes, including economic, legal, social and cultural aspects;

(h) Knowledge of one or more languages to communicate effectively with the parties and understand the issues at hand.

18. While expertise and knowledge of investment law could be beneficial in probing the strengths and weaknesses of the parties' positions, such legal expertise might not be the key competency considering that the main task of a mediator lies with facilitating the negotiations between the parties. Should legal expertise be required in mediation, a legal expert could be appointed to assist the mediator and the parties' legal representatives could provide their clients with the legal evaluation of the dispute or any given proposed solution (see para. 27 below).

19. *Independence and Impartiality* – A mediator should be independent and impartial.[21] A mediator should therefore disclose relevant information to enable the parties to become aware of any conflicts of interest.[22]

20. *Nationality* – The nationality of the mediator may also be a factor to be taken into account when selecting a mediator. For example, parties may consider whether the appointment of a mediator of a nationality other than those of the parties would avoid any perception of bias. However, the parties may also consider whether there might be benefits in selecting a mediator with the same nationality, for example, such a mediator would be familiar with their language, customs and culture and the acceptability of the resulting settlement agreement might be enhanced.

3. Appointment of a mediator

21. A mediator is typically appointed by the parties.[23] Parties may agree on the mediator or the appointment procedure, which may involve an institution or another person.[24] Under certain mediation rules, if the parties have not appointed or cannot agree on a mediator within a certain time frame, they may request an institution or another person to make the appointment (see para. 12 above).[25] Such institution should take into account geographical diversity and gender when appointing a mediator.

Number of mediators and co-mediation

22. Parties are free to agree on the number of mediators and may wish to consider appointing two mediators (referred to as "co-mediation"). Both co-mediators may be appointed jointly by the parties. Co-mediation requires mediators to possess team-working skills to jointly facilitate the parties' negotiations. As mediators may have different backgrounds or areas of expertise, co-mediation may be beneficial in complex disputes and in cases where a multitude of parties is involved or cultural diversity needs to be bridged.

23. When considering prospective mediators, particularly co-mediators, parties should strive to take into account geographical diversity and gender,[26] which could facilitate the parties' negotiations and increase the confidence in mediation.

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[21] See ICSID Mediation Rules, Rule 12(1); IBA Rules, Article 3.

[22] See UNCITRAL Mediation Rules, Article 3(6); ICSID Mediation Rules, Rule 14(3)(b); IBA Rules, Article 3(3) and (4).

[23] UNCITRAL Mediation Rules, Article 3(2), ICSID Mediation Rules, Rule 13(1), IBA Rules, Article 4(5).

[24] UNCITRAL Mediation Rules, Article 3(3), ICSID Mediation Rules, Rule 13(3), IBA Rules, Article 4(6).

[25] For example, the Secretary General of ICSID in accordance with ICSID Mediation Rules, Rule 13(4) and the Secretary-General of the Permanent Court of Arbitration in accordance with IBA Rules, Article 4(7).

[26] See UNCITRAL Mediation Rules, Article 3(5).

4. Resignation and replacement of a mediator

24. There may be instances where a mediator wishes to, or needs to, resign from the mediation, at which point the mediator should inform the parties as soon as possible. In addition, if requested jointly by the parties or if the mediator is not in a position to perform the duties required, the mediator should resign from the process. Upon the resignation of a mediator, the parties would usually replace the mediator using the same procedure used to make the original appointment.

I. Role of the parties and other participants in mediation[27]

25. Mediation requires the active participation of the parties, without which the proceedings cannot advance. The parties need to work together and with the mediator to explore the issues in dispute and generate potential solutions. The discussions may be conducted jointly with all parties or in separate meetings between the mediator and one of the parties. Facilitating negotiations by way of separate meetings is a common feature of mediation and allows the mediator to explore freely with the respective parties their interests and concerns and to develop possible options for settlement.

26. *Composition of the parties' teams* – In determining the size and composition of their team, parties should consider including a member vested with the authority to settle the dispute and to have that member present throughout the process. However, this might not be possible if, for instance, the approval or sign-off by a ministry, ministries or a cabinet is required on the side of the State, or the same by a board of directors or corporate oversight body on the side of the investor. In any case, it is desirable to include a member having a clear line of communication with the person or entity with settlement authority. Information about the extent of the settlement authority of the participants in the mediation should be shared with the mediator and the other parties at an early stage of the mediation.

27. *Role of the legal representatives* – The role of legal representatives in mediation, if any, differs from that in adversarial processes. For example, in arbitration, legal representatives usually focus on making legal and factual arguments with the goal of persuading the arbitral tribunal in issuing an award in favour of their clients. In mediation, legal representatives would take a collaborative approach in exploring and identifying future-oriented solutions that further the interest and goals of their clients. In this sense, legal representatives guide the parties through the mediation process. Legal representatives may also provide legal advice (for example, informing the parties about the possibility of mediation and available mediation rules), assist with a realistic assessment of the strengths and weaknesses of the case, assist the parties in drafting written statements, and identify and compile relevant documents to be used in mediation. Legal representatives may also be involved in the discussions on procedural matters, the preparation of opening statements, and drafting the terms of a potential settlement agreement.

Experts and other parties

28. The parties may wish to consider whether the participation of experts and other parties in the mediation might be beneficial and assist the parties in achieving an amicable solution.

29. *Role of experts* – A party's team may include subject-matter experts, who would advise the party, for example, on financial matters relevant for generating offers or the terms of a settlement agreement. The parties may also consider jointly appointing an expert, whose input may be beneficial in negotiating a mutually agreeable solution. The type of participation and the scope of the expert's input would be determined by the parties in consultation with the mediator.

[27] For deliberations of the Working Group on this section, see documents A/CN.9/1124, paras. 185–186, and 191; A/CN.9/1131, para. 40.

30. *Role of other parties* – The flexibility of mediation allows for the participation of other parties in the process. The parties should consider whether the participation of third parties (including through written statements) could be one way to take into account the public interest in international investment disputes and might assist in achieving an amicable solution. Examples of such parties include: (i) States Parties to the underlying investment treaty not party to the dispute, (ii) local communities affected by the investment, the dispute, or any negotiated solution, (iii) the civil society at large, and (iv) other interested stakeholders. The scope and the procedural framework for their participation would need to be determined by the parties in consultation with the mediator.

J. Conduct of international investment mediation[28]

Different phases

31. Mediation may consist of different phases depending on the issues at hand.[29] The following is an illustrative example of the different phases.

Phases				
	Facilitated dialogue			
Preparation/Initial consultation	*Opening*	*Exploration*	*Developing options*	*Conclusion settlement/Termination*
Parties provide the mediator with initial written statements with a short description of the issues and their views on those issues. The mediator discusses the procedural aspects with the parties. In this phase, the procedure to be followed, the mediator's approach and style are discussed.	Each party (or their representative) provides an opening statement.	The mediator engages with the parties to identify the foundation of or outline a mutually acceptable solution.	The mediator assists the parties in developing options for settlement.	The parties record the terms of their settlement agreement and ensure that the agreement complies with the requirements of the applicable law. If the mediation does not result in a settlement, it should be terminated, which should be recorded in clear terms as it may form the basis for any subsequent procedures or impact limitation periods.

In-person and online mediation

32. Meetings held during mediation may be held in person or remotely using online means. While mediation has traditionally been conducted in person, technology has allowed for a significant increase in the number of online mediations in recent years. In-person meetings allow for direct interaction between the parties and the mediator and could be beneficial to the mediator and the parties to build rapport, which facilitates the negotiations. Remote online meetings do not require travel and may address scheduling conflicts, leading to a more time- and cost-effective process. As long as the parties are able to easily access the meetings, online meetings could be useful for conducting parts of or the entirety of the mediation process.

33. Online mediation may, however, pose challenges regarding data protection and cybersecurity, which might affect the integrity of the process. Accordingly, applicable privacy policies and whether the data processing and retention policies of online platforms provide sufficient robust protection should be considered. Measures should be put in place to ensure a level of security for those engaging on online platforms.

[28] For deliberations of the Working Group on this section, see documents A/CN.9/1124, para. 187–188; and A/CN.9/1131, para. 40.

[29] See ICSID Background Paper on Investment Mediation (July 2021), p. 12, available at https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation.pdf.

Additional safeguards may be implemented to ensure the integrity of the process such as: (i) measures to ensure privacy of the proceedings (for example, data minimalization, encryption, and digital attestation), and (ii) a contractual stipulation that prohibits the other parties from publicizing or utilizing confidential information in subsequent adversarial hearings. Such considerations may be stipulated in confidentiality arrangements addressing, for example, the use of password-protected conferences and/or prohibition of audio and video recordings of the negotiations.

34. In any case, the advantages and disadvantages of conducting mediation in person and online should be discussed between the parties and the mediator at the outset of the mediation.

K. Treatment of information exchanged: Use of information in other proceedings, confidentiality, and disclosure obligations[30]

Use of information in other proceedings

35. For mediation to be successful, the parties must be able to freely engage in the negotiations without being concerned that the information exchanged, or statements made during that process will be used by the other party in another proceeding, for example, as evidence. For this purpose, parties typically agree to not use information exchanged during the mediation in other proceedings, which applies to all those involved in the mediation process.[31] This encourages discussions by preventing statements made or information exchanged in a genuine attempt to settle a dispute from being relied upon by the other party in any other proceeding. However, if the information or document is available independent of the mediation, such information does not become inadmissible merely as a consequence of having been exchanged in mediation.[32]

Confidentiality and transparency

36. Parties should consider whether the confidentiality of the mediation proceedings as well as information and documents shared therein is necessary to enable an open and frank discussion. If so, the confidentiality obligation should begin with the commencement of mediation and apply to all those involved in the mediation. Parties should be assured that they can share confidential information and engage in substantive discussions without fearing any negative consequences. Therefore, confidentiality may be an important advantage of mediation.

37. On the other hand, parties should also consider whether transparency may be relevant in light of the public interest and the possible expenditure of public funds with regard to international investment disputes. In order to ensure public acceptance and to enhance the legitimacy of investment mediation, a balance should be struck between confidentiality and transparency.

38. Parties wishing to specifically address confidentiality and transparency in investment mediation should agree on those aspects. When choosing mediation rules, the parties should consider whether the provisions therein are appropriate for international investment disputes and balance confidentiality and transparency. Aspects that parties may wish to consider include: (i) whether the fact that mediation took place should be confidential; (ii) whether information relating to or obtained during the mediation should be confidential; (iii) whether and to what extent agreed settlements should be confidential; (iv) the extent to which experts and other parties

[30] For deliberations of the Working Group on this section, see documents A/CN.9/1124, paras. 189–190; and A/CN.9/1131, paras. 41–42.

[31] This approach is found in mediation rules (see UNCITRAL Mediation Rules, Article 7; ICSID Mediation Rules, Rule 11) as well as in a number of recent investment agreements, for example, Article 25(1) of the Argentina-Japan BIT (2018), and Article 9.18(3) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018); see also Article 8.20(2) Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) (2016).

[32] UNCITRAL Mediation Rules, Article 7(4).

should have access to confidential information; (v) media or public disclosure protocols to provide updates to the public and/or relevant constituents during the mediation; and (vi) the extent of disclosure in the event of unsuccessful mediation.

39. There may be instances where the level of confidentiality that can be agreed to by the parties is limited. For example, disclosure may be required in domestic legislation or international agreements, or by domestic courts (referred to as affirmative disclosure requirements). Further examples may be found in the domestic legislation applicable to the underlying transaction or dispute (such as domestic legislation governing public-private partnerships,[33] public financial management regulations, budget transparency legislation, or freedom of information legislation) and/or to mediation participants. There are also instances in which domestic legislation on disclosure of information aimed at safeguarding the public interest require the publication of any agreed engagement and/or ongoing disclosure of performance, as well as any negotiated terms.

L. Settlement agreement[34]

40. In mediation, parties are in control of the process and are expected to be actively engaged in the process in good faith. This means that a settlement agreement including the terms therein is not imposed on the parties until it is agreed by them. Given the voluntary nature, parties are expected to comply with the terms of any negotiated settlement agreement. Nevertheless, to ensure validity of the settlement agreement, parties should be mindful of form and content requirements. Additionally, in the event enforcement is sought, requirements related to filing, registration and delivery may become relevant. For example, the requirements in the Singapore Convention and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "UNCITRAL Model Law on Mediation") should be considered (such as the signing of the settlement agreement by the parties, and providing evidence that the settlement agreement resulted from mediation).

41. Furthermore, parties should not commence nor continue any other international investment dispute resolution proceeding relating to all or parts of the dispute subject to mediation, to the extent the dispute had been resolved.

M. Fostering the use of mediation[35]

42. Sections B to L explain how mediation can be used to resolve international investment disputes. States wishing to facilitate the use of mediation as a means to resolve investment disputes may consider removing impediments to its use, so that investors and States alike can effectively participate in mediation. These include providing an enabling domestic and international legal framework as well as, to the extent possible, building the capacity of those expected to participate in mediation (see para. 47 below). States may also consider mediation as a component of dispute prevention and mitigation framework.

43. *Domestic legal framework* – A legal basis in domestic law referring to the State's approval of mediation as a tool to settle disputes, including international investment disputes, would signal the possibility to use mediation to investors. Such a legal basis

[33] The World Bank's PPP Disclosure Framework is illustrative of the objectives and scope of such disclosure regimes. See for example, World Bank Group, Construction Sector Transparency Initiative (CoST) and Public-Private Infrastructure Advisory Facility (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.

[34] For deliberations of the Working Group on this section, see document A/CN.9/1131, para. 43.

[35] For deliberations of the Working Group on this section, see documents A/CN.9/1124, paras. 193–198; and A/CN.9/1131, para. 43.

may also create an enabling environment for States and State entities to participate in mediation and address possible concerns of Government officials, for example, those arising from the fear of personal liability or of being accused of corruption. Such a legislation may also clarify lines of authority, representation of the State in formal or informal dispute resolution processes, and other matters.

44. When providing a domestic legal framework for enabling mediation, States may wish to consider the adoption of the UNCITRAL Model Law on Mediation, which provides for uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use.[36]

International legal framework

45. *Singapore Convention* – As noted (see para. 40 above), the need to enforce a settlement agreement may not arise often as parties are expected to abide by the terms therein. However, the availability of an enforcement mechanism is an element to be taken into account when choosing the most suitable dispute resolution mechanism. A State adopting the UNCITRAL Model Law on Mediation would recognize the binding and enforceable nature of a settlement agreement (see Article 15) and would ensure that the agreement is enforced by its courts (see Article 18). When it comes to cross-border enforcement of settlement agreements, the Singapore Convention is one tool for parties to enforce settlement agreements in the courts of a State party to the Convention.[37] The parties should take note of any declaration made by States parties in accordance with Article 8(1)(a) of the Singapore Convention, stating that it shall not apply the Singapore Convention to settlement agreements to which it is a party.[38]

46. *Mediation clauses in investment treaties and investment contracts* – States might include provisions in their investment treaties[39] or investment contracts to make mediation available. This may be prior to, during, or after an adversarial proceeding (including in an enforcement proceeding), in other words, at any time during the life cycle of an investment. Provisions that highlight the availability of mediation would encourage parties to consider engaging in mediation. States might alternatively consider mandating the commencement of mediation to promote early constructive dialogue and to require that mediation be conducted for a certain period of time or until a certain stage.

47. *Awareness raising and training* – Raising awareness about mediation as a tool to resolve international investment disputes and its potential benefits can further foster the use of mediation. In this regard, training and capacity-building of Government officials, as well as mediators, and other relevant target groups could be offered on a regular basis.

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[36] States that have enacted legislation based on UNCITRAL Model Law on Mediation are listed here: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status.

[37] 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.

[38] Ibid.

[39] Reference would be made to the draft mediation provisions in A/CN.9/1150 after they are finalized and adopted by the Commission at the fifty-sixth session.