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Possible reform of investor-State dispute settlement (ISDS)

Draft guidelines on investment mediation

Note by the Secretariat

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Introduction

1. At the thirty-ninth session in October 2020, it was suggested that guidelines should be developed to encourage disputing parties and arbitral tribunals to explore mediation 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 16 (Peace, Justice and Strong Institutions) (A/CN.9/1044, para. 31).

2. At the forty-third session in September 2022, the Working Group considered document A/CN.9/WG.III/WP.218, which contained draft guidelines on investment mediation (the "Guidelines"). At that session, there was wide support for the preparation of the Guidelines, which could be a useful educational and awareness-raising tool to promote the use of mediation (A/CN.9/1124, para. 173).

3. The Annex to this Note contains a revised version of the Guidelines based on the deliberations at the forty-third session (A/CN.9/1124, paras. 173–200). As requested by the Working Group, the Guidelines focus mainly on the necessities and constraints faced by States in the use of mediation (A/CN.9/1124, para. 199). The Guidelines have also been prepared as a stand-alone text independent of the draft provisions on mediation found in document A/CN.9/WG.III/WP.226 (A/CN.9/1124, para. 173).

4. Upon review of the Annex, the Working Group may wish to consider how to present the Guidelines, including its title. The Working Group may wish to consider presenting the Guidelines possibly as the "UNCITRAL Notes on Investment Mediation" making a link with the UNCITRAL Notes on Mediation (2021) – an explanatory text on the organization of mediation proceedings generally and providing an annotated list of matters that may arise in mediation.

Annex

Draft Guidelines on Investment Mediation

A. Purpose

1. The purpose of the Guidelines on Investment Mediation (the "Guidelines") is to explain how mediation can be utilized to resolve investment disputes. The Guidelines do not intend to promote any 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 the resolution of a dispute may vary. The Guidelines aim to assist States in understanding the different aspects of investment mediation, the nuances of the process and the possible benefits. The Guidelines are not binding on the parties and are purely explanatory in nature.

B. Availability of mediation to resolve investment disputes

2. Mediation is a flexible, non-formal 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 investment disputes with the mediator structuring and facilitating a dialogue between investors and Government officials. 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 the 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 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 investment dispute

3. In considering whether mediation is suitable to settle any issue or conflict arising out of an investment, the following aspects should 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 to 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 (A/CN.9/1124, para. 174);

(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 seeking tailored and creative solutions; and

(k) Budgetary and financial implications to comply with any settlement agreement.

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 need to be taken into account. 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

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,[1] investment contracts or domestic legislation. Consent can be expressed as part of a multi-tier dispute resolution clause, which provides 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 an outline of the subject matter of the dispute, a copy of the documents out of which the dispute arises, the possible basis for mediation, rules to be applied and a time period for acceptance of the invitation.

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, they are generally free to leave the process at any time. Some mediation rules 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 (A/CN.9/1124, para. 177).[2]

E. Timing and duration of mediation

8. While the suitability of mediation may change with the evolving circumstances, it is available at any point in time – at the stage of a mere grievance, prior to the crystallization of the dispute, prior to the initiation of any other dispute resolution proceedings as well as during and after such proceedings (for example, with regard to the implementation of an arbitral award). It can thus be employed as a tool throughout the life cycle of an investment whenever issues or conflicts arise. Investment treaties and contracts may specify a period of time, during which parties are encouraged to reach an amicable settlement (referred to as the "cooling-off" period). In certain instances, the lapse of the cooling-off period may be a precondition for initiating arbitration.

9. If mediation takes place at the grievance stage, the dispute might not have yet crystallized. Mediation may resolve some of the underlying issues, which might help to de-escalate the dispute or narrow it down. In general, it is easier to find creative solutions mutually agreeable to the parties, if mediation takes place prior to parties taking adversarial positions.

[*Note to the Working Group: The previous version of the draft Guidelines contained a time chart on when mediation would be available. However, such a chart would be too complicated to draft so as to reflect the various situations and the different considerations of the parties. Accordingly, the chart has been deleted (A/CN.9/1124, para. 176)*].

[1] For an analysis of the treaty practice, see document A/CN.9/WG.III/WP.217, paras. 6–10.

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

10. When parties agree to mediate, they may wish to fix 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 (for example, six months).

F. Mediation rules

11. When parties express their consent or agree to mediate, they can also agree on 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)[3] and the Rules for Investor-State Mediation by the International Bar Association of 2012 (IBA Rules) are examples of rules tailored to investment disputes. Parties may also refer to the generic UNCITRAL Mediation Rules adopted in 2021[4] or any other mediation rules consistent with international standards (A/CN.9/1124, para. 179). Reference could be made to such rules in the parties' consent to mediate (see paras. 5–6 above). The set of rules would provide the framework for mediation, which can avoid 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 the provisions of the law applicable to the mediation which the parties cannot derogate from, the provisions of the applicable law would prevail (A/CN.9/1124, para. 179).[5]

G. Role of institutions

12. As a form of facilitated negotiation, mediation can be conducted with or without the administrative support of institutions, which are established for the purposes of resolving investment disputes or supporting States in handling such disputes.

13. Support offered by institutions includes, for instance: (i) guidance on procedural aspects; (ii) assistance in communicating with the other party, including an offer to mediate; (iii) identification of a pool of mediators and assistance in their selection and appointment (A/CN.9/1124, para. 180); (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) services regarding the financial aspects of mediation (for example, requesting, holding and managing advance payments by the parties to cover the costs of the mediation, processing of mediator fees and expenses); and (vi) issuance of a certification that mediation took place.[6] Such institutions may also raise awareness about the availability of mediation, provide general information and conduct capacity-building activities for interested parties and potential mediators (A/CN.9/1124, para. 180).

H. Role, qualification and appointment of a mediator

1. The 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

[3] Available under https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf.

[4] Text available under https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf.

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

[6] 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 to initiate arbitration).

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 generally refrain from taking decisions or suggesting any solution to resolve the dispute. A mediator should also not make judgments over parties' past conduct that led to the dispute and should not offer legal advice to the parties. A mediator may, however, assist the parties in assessing the strengths and weaknesses of their arguments through reality testing and risk assessment techniques.

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 the mediation process. 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* – A mediator, should possess, among others, the following experiences and competencies (A/CN.9/1124, paras. 181 and 183):[7]

(a) Practical experience as a mediator and the ability to conduct mediation in an effective manner;

(b) Mediation training, including any accreditation;

(c) Practical experience working in or with Governments or State entities;

(d) Practical experience in different forms of dispute resolution involving Governments or State entities;

(e) Expertise in the field of investment law or in the relevant sector (see para. 20 below);

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

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

18. *Impartiality and independence* – A mediator shall be impartial and independent since the mediation process as well as the outcome may be under public security.[8] A mediator should therefore disclose relevant information to enable the parties to become aware of any conflicts of interest.[9]

19. *Nationality* – The nationality of the mediator may also be a factor to be taken into account. For example, it may be advisable to select a mediator other than the nationalities of the parties to avoid any perception of bias. However, when a party feels the need for the mediator to be familiar with its language, customs and culture, a mediator of the same nationality can be appointed, including as a co-mediator (see para. 22 below).

20. 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 in investment mediation considering that the main task of a mediator lies with facilitating the negotiations between the parties. Should a legal opinion be required in mediation, a legal expert could be appointed to assist

[7] 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).

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

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

the mediator and the parties' legal representatives can provide their clients with a legal evaluation of the dispute or any given proposed solution (see para. 26 below).

3. Appointment of a mediator

21. A mediator is typically appointed by the parties.[10] Parties may agree on the mediator or on the appointment procedure, which may involve an institution or another person.[11] Under certain sets of 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.[12]

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 mediators may be appointed jointly by the parties, or each party may appoint one mediator each. Co-mediation requires the 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,[13] which could facilitate the parties' negotiations and prevent or eliminate the perception of bias (A/CN.9/1124, para. 182).

I. Role of the parties and other participants in mediation

24. 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 to 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.

25. *Composition of the parties' team* – Each party needs to determine the size and the composition of the team that will take part in the mediation process. It would be advisable for the parties to discuss those aspects with the mediator at the outset of the process. It would also be important to include a member vested with the authority to settle the dispute and to have him or her 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 with a clear line of communication with the person or entity with settlement authority. Information about the settlement authority and any applicable approval or sign-off process should be shared with the mediator and the other parties at an early stage of the mediation process.

26. *Role of the legal representatives* – The role of legal representatives in mediation differs from that in adversarial processes. For example, in arbitration, legal representatives usually focus on making legal and factual arguments with the

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

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

[12] 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).

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

goal of persuading the arbitral tribunal in issuing an award in favour of their clients. On the contrary, in a mediation, legal representatives take a collaborative approach assisting their respective clients in identifying their interests and goals and exploring future-oriented solutions (A/CN.9/1124, para. 185). In this sense, legal representatives guide the parties through the proceeding. 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 an eventual settlement agreement.

27. Experts and non-disputing parties may also take part in the mediation process. Their participation can be beneficial to the parties and assist them in achieving an amicable solution.

28. *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 will usually be determined by the parties in consultation with the mediator.

29. *Role of non-disputing parties* – The flexibility of mediation allows for the participation of non-disputing parties in the process, which is one way to take into account the public interest in investment disputes and might assist in achieving an amicable solution (A/CN.9/1124, para. 191). Examples of non-disputing parties may include States Parties to the underlying investment treaty not party to the dispute, local communities affected by the investment, the dispute, or any negotiated solution, the civil society at large, and other interested stakeholders. The scope and the procedural framework for participation by non-disputing parties would need to be determined by the parties. Non-disputing parties may be consulted during the process on specific points or may be asked to provide written statements for consideration by the parties.

J. Conduct of investment mediation

Different phases

30. Mediation may consist of different phases depending on the issues at hand.[14]

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 will discuss the procedural aspects with the parties. In this phase, the procedure to be followed, 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 fails, 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

31. Meetings held during mediation may be held in person or remotely using online means. While mediations have traditionally been conducted in person, technology has allowed for a significant increase in the number of online mediations in recent years. While in-person meetings allow for direct interaction between the parties and the mediator, remote online meetings do not require travel and may address scheduling conflicts, leading to a more time- and cost-effective process. Online meetings could be useful for conducting parts of or the entirety of the mediation process, while in-person mediation could be beneficial to the mediator and the parties to build rapport, which might facilitate the negotiations.

32. It is, however, important to note that online mediation may pose challenges regarding data protection and cybersecurity, which might affect the integrity of the process. Measures may need to be put in place to ensure a high level of security for those engaging on online platforms. Parties should be aware of the applicable privacy policies and consider whether the data processing and retention policies of the platforms align with their interests. Additional safeguards may be implemented to ensure the integrity of the online 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. Further consideration may be stipulated in confidentiality arrangements, for example, on the use of password-protected conferences and/or prohibition of audio and video recordings of the negotiations (see para. 36 below).

33. 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 (A/CN.9/1124, para. 188).

[14] 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.

K. Treatment of information exchanged: "without prejudice" principle, confidentiality, and disclosure obligations

"Without prejudice" principle – use of information in other proceedings

34. 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 that the "without prejudice" principle would apply to information exchanged during the mediation and to all persons involved in the mediation process.[15] The application of this principle 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 as a consequence of having been used in mediation.[16]

Confidentiality and transparency

35. Keeping the mediation proceedings as well as shared documents confidential is necessary to enable an open and frank discussion. The confidentiality obligation of the parties usually begins with the commencement of mediation. Parties must be assured that they can share confidential information and discuss the issues without fearing any negative consequences. Therefore, confidentiality is an important attraction and strength of mediation, in other words, all information arising from and relating to the mediation are to be kept confidential by all those involved in the mediation (A/CN.9/1124, para. 189).

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 by referring to the 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; (iii) whether and to what extent agreed settlements shall be confidential;[17] and (iv) the extent of confidentiality to participating non-disputing parties and experts.

37. There have also been increased calls for transparency with regard to investment disputes and their resolution in light of public interests and the possible expenditure of public funds. Generally, in order to encourage public acceptance and to enhance the legitimacy of investment mediation involving a State, a balance should be struck between confidentiality and transparency.

Limits on confidentiality and affirmative information disclosure requirements

38. Provisions or rules applicable to investment mediation may impose limitations on confidentiality and include affirmative disclosure requirements as a way to address the public interest and the principles of transparency and due process (for example, disclosure may be required in domestic legislation, in international agreements or in the mediation rules). In such instances, the contractual undertaking of confidentiality is overridden by the affirmative disclosure requirement. Further examples may be found in the domestic legal framework applicable to the

[15] 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).

[16] See for instance Article 11 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

[17] See IBA Rules, Article 10(3)(b) which states that the confidentiality does not extend to the terms of a settlement or partial settlement.

underlying transaction or dispute (such as domestic legislation governing public-private partnerships, [18] public financial management regulations, budget transparency legislation, or freedom of information legislation) and/or that applicable to mediation participants, including mediators or legal representatives.

39. There are 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 renegotiated terms. It is also possible for the parties to agree to a specific media or public disclosure protocol to provide updates to the public and/or relevant constituents during the mediation. In that context, parties may wish to consider the extent of disclosure in the event of unsuccessful mediation leading to adversarial proceedings.

L. Settlement agreement

40. Given the voluntary nature of mediation, parties will generally comply with the terms of the negotiated settlement agreement. Nevertheless, parties should consider requirements as to the form, content, filing, registration, and delivery of the settlement agreement in order to enforce the settlement agreement in case of non-compliance. 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 such requirements (such as the signing of the settlement agreement by the parties, and the provision on evidence that the settlement agreement resulted from mediation). Parties should therefore make efforts to meet the requirements when drafting their settlement agreement.

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 insofar as the parties have reached a settlement agreement.

42. In mediation, parties are in control of the process and are expected to be actively engaged in the negotiations. This means that a settlement agreement including the terms therein are not imposed on the parties until it is agreed by them. In that sense, the mediation process and its outcome would not limit or have any negative impact on the regulatory authority of a State taking part in the process.

M. Fostering the use of mediation

43. Sections B to L explain how mediation can be used to resolve investment disputes. In addition, States may wish to consider ways to remove impediments to the use of mediation, so as to further facilitate its use and so that investors and States alike can effectively participate in mediation. These measures include providing an enabling domestic and international legal framework as well as capacity-building measures.

44. *Domestic legal framework* – A clear legal basis in domestic law referring to the State's approval of mediation as a tool to settle disputes, including investment disputes, would alert the investors of the possibility to use mediation. Such a legislation would also allow States and State entities to participate in mediation and thereby also address possible concerns of Government officials, for example, those

[18] 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.

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.[19]

45. When providing a legal framework for enabling mediation, States may wish to consider the adoption of the Model Law on Mediation (A/CN.9/1124, para. 193), 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.[20]

International legal framework

46. *Singapore Convention and the Model Law on Mediation* – As noted (see para. 41 above), the need to enforce a settlement agreement does not arise so often as parties tend 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 Model Law on Mediation would recognize the binding and enforceable nature of a settlement agreement (see article 15 of the Model Law on Mediation) and the agreement could be enforced by their courts (see Article 18 of the Model Law on Mediation).[21] When it comes to cross-border enforcement of settlement agreements, the Singapore Convention makes it possible for parties to enforce settlement agreements in the courts of a State party to the Convention.[22] Becoming a party to the Singapore Convention will show the State's recognition of mediation as a suitable dispute resolution mechanism and the willingness to comply with any outcome reached.[23]

47. *Mediation clauses in investment treaties and investment contracts* – States might include provisions in their investment treaties or investment contracts to make mediation available prior to, during or after an adversarial proceeding, in other words at any time during the life cycle of an investment. A provision that highlights the availability of mediation would urge 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.

48. *Awareness raising and training* – Raising awareness about mediation as a tool to resolve 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.

[*Note to the Working Group: A list of future training and capacity building activities conducted at the international level could be included as an Annex to the*

[19] 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.

[20] Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status.

[21] 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.

[22] 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. The parties should take note of any declaration made under Article 8(1)(a) of the Singapore Convention, where a Party may declare that it shall not apply the Singapore Convention to settlement agreements to which it is a party.

[23] For States concerned about the Singapore Convention being applied to settlement agreements to which it is a party or to which any governmental agencies or any other persons acting on behalf of a governmental agency is a party, it is possible to make a reservation under Article 8(1)(a) of the Convention. For further information, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.

Guidelines, but if so, would require regular updates by the organizers of such events (A/CN.9/1124, para. 197)].

49. *Institutional framework for effective conflict management* – States might wish to consider a holistic approach to manage conflicts with investors effectively with mediation being one of the important tools. Such an approach would for instance include systematic information gathering and dispute settlement process assessment, so that the State can easily become aware of, [24] understand and assess comprehensively the issues in dispute, and make an informed choice of the most suitable dispute resolution mechanism, including mediation. It could also include the establishment of clear communication lines that assist a State as a whole to effectively engage in mediation, clarify the settlement authority and the entity or agency that would be responsible for complying with the outcome. This is particularly important as investments typically involve a wide range of entities and agencies at the federal, state or municipal level across all branches of Government and may relate to a range of different legal instruments, including investment contracts, investment laws and bilateral and multilateral investment treaties.

50. States may wish to consider the organizational structure and institutional framework for effective conflict management as well as dispute prevention, all of which should enable mediation. Effective conflict management could help in further promoting the United Nation's Sustainable Development Goal 16 by promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable, and inclusive institutions at all levels.

[24] P. Kher and D. Chun, Policy Options to Mitigate Political Risk and Attract FDI, Finance, Competitiveness and Innovation in Focus, 2020, World Bank Group, available at: https://openknowledge.worldbank.org/handle/10986/34380, p. 17.