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Approaches to Providing for Mediation in Investment Treaties and Model Clauses

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In 2021, ICSID conducted an extensive survey of dispute resolution clauses in bilateral investment treaties (BITs), free trade agreements (FTAs) and other treaties (including model treaties). The data set comprised more than 900 treaties, from which nearly 350 clauses were identified for closer analysis. The overarching goal of the survey was to see to what extent, and how, existing dispute resolution clauses already provide for mediation and/or other forms of amicable dispute resolution, and to provide the investor-state dispute settlement ('ISDS') community with a useful resource for addressing the question of the role that mediation can and should play in the resolution of investor-state disputes.

The Evolution of Approaches to Investor-State Dispute Settlement in Investment Treaties

The survey highlighted that the ways in which dispute settlement clauses in investment treaties (including model treaties) have provided for amicable dispute resolution generally, and mediation specifically, have evolved considerably. Many early generation investment treaties (predating the 1990s) provided only for the submission of an investment dispute for resolution by arbitration or conciliation at the investor's election. These early treaties made no mention of alternative dispute resolution mechanisms prior to this step (see e.g., Article 6 of the Jordan-UK BIT (1976)). Over the past 25-30 years, however, there has been a gradual trend to provide expressly for amicable dispute resolution within disputes clauses. The last decade, in particular, has seen an increase in clauses providing for mediation as a means of amicable dispute resolution, as explained further below.

Categories of Investor-State Dispute Settlement Clauses Providing for Amicable Dispute Resolution

Broadly speaking, investor-state dispute settlement clauses that include amicable dispute resolution methods can be placed into five categories:

1. *Clauses which have an amicable settlement period and, usually, a bare direction to seek "amicable settlement" prior to the institution of arbitration*. Such clauses typically make the

initiation of an arbitration contingent only upon the dispute having not been resolved during the amicable settlement period (and do not affirmatively require the parties to do anything within this period). The process the parties might use to achieve amicable settlement is not addressed. An example of a clause in this category is Article 10 of the Peru-UK BIT (1993), which provides that disputes "shall, as far as possible, be settled amicably between the two parties concerned. If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID] for settlement by conciliation or arbitration…"

2. *Clauses that expressly permit mediation or other specified amicable dispute resolution mechanism prior to arbitration*. These clauses expressly provide for amicable settlement, by (i) providing for optional "non-binding third party procedures" (or similar), which would include mediation, or (ii) providing specifically for optional mediation. However, they go no further than this. For example, Article 23 of the Australia-Hong-Kong IA (2019) requires the parties to the dispute to "initially seek to resolve the investment dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation," and makes submission of a claim to arbitration contingent upon six months having elapsed following the initiation of this consultation process.
3. *Clauses affirmatively encouraging the use of mediation or other amicable dispute resolution mechanisms in the amicable settlement / "cooling off" period*. These clauses go beyond merely *permitting* mediation or another amicable dispute resolution mechanism, to affirmatively *encouraging* A clause may stipulate that specific conditions or milestones must be achieved with respect to the designated amicable dispute resolution mechanism, in the period after the filing of the notice of dispute/request for consultations, thereby gently encouraging the affirmative use of the mechanism. For example, Article 31 of the ASEAN Comprehensive IA (2009) imposes a timeframe for the commencement of amicable settlement discussions (defined to included non-binding, third party procedures), stipulating that "Consultations shall commence within 30 days of receipt by the disputing Member State of the request for consultations, unless the disputing parties otherwise agree." The Colombia Model BIT (2017) takes a slightly different track, mandating that the amicable dispute resolution procedure (in this instance "consultation and negotiations") take place over a minimum timeframe and not simply that a particular timeframe must elapse before an arbitration can be commenced. Other clauses, such as Article 17.1 of the Netherlands Model IA (2019), impose an obligation on the disputing parties to give favorable consideration to a request for mediation.
4. *Clauses mandating mediation or other amicable dispute resolution mechanisms prior to arbitration*. A small handful of clauses have gone further still, by (i) imposing an obligation on *both* disputing parties to undertake mediation unless another method of amicable dispute resolution is agreed (e.g., Article 26(2) of the COMESA Investment Agreement (2007)), by (ii) requiring a designated amicable dispute resolution procedure to actually have taken place before an arbitration can be initiated (e.g., Article 3.35 of the EU-Viet Nam IPA (2019)), or by (iii) making participation in the designated amicable dispute resolution procedure mandatory for the investor, at the State's election (e.g., Article 14.23 of the Australia-Indonesia CEPA (2019)) (or including advance consent of the State to mediate at the investor's election, e.g., Articles 19 and 20 of the Mainland-Hong Kong CEPA Investment Agreement (2017)).
5. *Clauses permitting mediation at any point in time (i.e., stand-alone mediation)*. These clauses provide, in addition to typical provisions permitting arbitration of a dispute, that the parties can agree to mediation of a dispute at any point in the dispute resolution process (i.e., prior to or during the amicable settlement period or parallel to an ongoing arbitration). Such clauses make mediation optional, and subject to an additional agreement to mediate between the investor and

the State. Article 23 of the Burkina-Faso-Canada BIT (2015) provides an example of such a clause, stipulating that "[t]he disputing parties may at any time, be it after notice of intent to submit a claim to arbitration has been given or after a claim has been submitted to arbitration, agree to mediation."

Regulation of Procedure for Mediation

The survey also revealed great variety in the ways in which the *procedure* of a mediation is regulated (if at all). Most treaties that expressly provide for amicable dispute resolution, including through mediation, do not regulate the procedure to be adopted. This may reflect the understanding that the appropriate procedure in any given case is dispute-specific, and can readily be agreed upon by the parties to the dispute (including through the incorporation of institution-specific investment mediation rules). However, to the extent disputes clauses do regulate the procedure, they typically provide only minimal procedural guidance relating to the commencement of the process (e.g., written notice requirements, the designation of responsible agencies), and how the process interacts with other proceedings relating to the same dispute (e.g., clauses addressing without prejudice privilege and confidentiality, or the staying of a related arbitration during the pendency of a mediation).

Issues to be Considered by Drafters of Dispute Settlement Clauses

On the whole, the survey demonstrated that drafters of disputes clauses seeking to include mediation might consider, *inter alia*:

1. when to make mediation available (early, during the amicable dispute period, or at any stage);
2. whether to make mediation entirely optional or to endeavor to encourage or even mandate mediation;
3. the appropriate duration of an amicable dispute period, should mediation be envisioned as taking place in this period;
4. the timing of, and requirements for, a written notice of dispute/ request for mediation;
5. whether to stipulate the agency to which notices relating to disputes should be sent, to ensure timely notification of disputes within a state; and
6. the extent to which other procedural aspects of mediation should be explicitly addressed in a Treaty (another option is to stipulate a set of institutional mediation rules that are to apply).

As treaty drafting continues to become more sophisticated, and as recognition that mediation can be an effective means for the resolution of investor-State disputes increases, we expect to see even more varied and innovative approaches to including mediation in disputes clauses in the coming years.

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