

INTERNATIONAL MEDIATION INSTITUTE INVESTOR-STATE MEDIATION TASKFORCE

Response to the European Commission Public Consultation on Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in Transatlantic Trade and Investment Partnership (TTIP)

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This note responds to the Public Consultation launched by the EU Commission – Directorate-General for Trade on Modalities for Investment Protection and Investor-State Dispute Resolution in the context of the negotiation of the Transatlantic Trade and Investment Partnership. In particular, it responds to Question 7 of the Consultation as it relates more specifically to the “usefulness of mediation as a means to settle disputes” between investors and host States.

This note is submitted by the Taskforce on Investor-State Mediation established by the International Mediation Institute in 2013 (the “Taskforce”). The International Mediation Institute (“IMI”) is a non-profit foundation registered in The Hague, Netherlands. Its principal function is to develop global, professional standards for experienced mediators, advocates and others involved in collaborative dispute resolution and negotiation processes.

IMI established the Taskforce to further this objective in the specific context of investor-State mediation and with the following specific objectives in mind: (1) offering practical guidelines to make use of ISM during the cooling off period; (2) determining minimum standards of knowledge, skills and relevant experience for involved neutrals; (3) assisting parties in finding competent and suitable neutrals; (4) ensuring the identification of a Designating Authority in cases of party disagreement; (5) providing procedural tools (e.g., model documents, decision trees, and case assessment tools); (6) maintaining the distinction between Mediation Rules and Conciliation Rules; (7) enabling creative hybrids; and (8) using arbitral consent awards to implement mediated settlements.

The Taskforce membership provides a broad perspective on these issues, as it includes developed and developing State officials, members of the secretariat of international dispute resolution institutions, in-house counsel of users of investor-State dispute resolution and counsel and arbitrators active in this domain. A number of members of the Taskforce participated in the drafting and implementation of the International Bar Association Rules for Investor-State Mediation. The individuals who are members of the Taskforce are listed in Annex A to this note. Each member participates in the Taskforce in the member's personal capacity. Members employed by the United States Government or the European Commission have abstained from this note and the discussions leading to its preparation.

Introduction. Investor-State disputes may appropriately be resolved, and are resolved, by agreement between the parties. Statistics indicate that between 30 and 40 percent of these disputes are resolved by such agreement.¹ Experience with mediation in other contexts has shown that it materially increases the chances of the parties' reaching an agreed resolution of their dispute. Mediation is preferable to arbitration in multiple respects:

- Mediation may resolve the dispute early on and avoid the substantial costs and delays of arbitration;

¹ See R. Echandi & P. Kher, *Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. 41-65 (2014).

- A mediated resolution is more likely to be implemented because it is a product of both parties' agreement;
- Mediation allows the parties to control the outcome, rather than placing its resolution in the hands of non-parties who can never understand the dynamics of the dispute as well as the parties do.

Mediation presents a credible and compelling option for both investors and States to settle disputes arising from investment activities. Mediation places emphasis on broader economic goals and the positive impact investment projects can have for both the investor and the host State. Mediation will encourage parties to move potential disputes away from a strictly legal interpretation of investment treaty provisions in an adversarial setting and facilitate solutions that are less costly and more effective than the award of monetary compensation. When properly used, with competent neutrals, it can generate significantly faster, less expensive and more satisfactory outcomes.

Numerous in-depth analyses and discussions demonstrate that mediation is a viable option for resolution of investment disputes.² We do not intend to develop them further at this stage since abundant research and discussions are widely available in support of investment mediation.

Specific Responses on Mediation. An initial step to encourage the use of mediation would be to include specific language in the treaty text offering mediation not only during the cooling-off period but also at any subsequent time with the consent of the parties.

In addition to recourse to the domestic courts of the host State or to international arbitration, investment treaties have traditionally allowed for a time period for the parties to seek amicable settlement of the dispute before an arbitration may be commenced. This period, known as an amicable settlement or “cooling off” period, is usually limited to 3 or 6 months. However, few BITs establish the means or modalities by which the parties may reach such amicable settlement.

Recent years have seen increasing emphasis on a broad range of dispute settlement options for foreign investors faced with a problem with the host State of their investment. Real momentum has been regained recently with the emergence of regional investment treaties such as the ASEAN CCIA, COMESA CIA, and the revised Arab League Investment Treaty. Several model BITs from developing and developed countries, such as Morocco, Egypt and Thailand also include mediation among the options available to settle investment disputes.

² See also J.E. Kalicki & A. Joubin-Bret, *Introduction TDM Special issue on "Reform of Investor-State Dispute Settlement: In search of a Roadmap"*, 1 TDM (2014); F. Khalifa, *Mediation use in ISDS*, 1 TDM (2014); J. Lack, M. Leathes, & W.J. von Kumberg, *Enabling Early Settlement in Investor-State Arbitration—The Time to Introduce Mediation Has Come*, 1 TDM (2014); N.A. Welsh & A. Schneider, *Integrating Mediation Into Investor-State Arbitration*, 1 TDM (2014); E. Sussman, *The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*, 1 TDM (2014); N. Angelet, *Alleviating the Disruptive Nature of Investment Arbitration: Some Remarks on Restitution and Post-Arbitration ADR*, 1 TDM (2014); R. Echandi, *Investor-State Conflict Management: A Preliminary Sketch*, 1 TDM (2014); A. Joubin-Bret & B. Legum, *A Set of Rules Dedicated to Investor-State Mediation: The IBA Investor-State Mediation Rules*, 29 ICSID REV. 17-24 (2014); S. Constain, *Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape*, 29 ICSID REV. 25-40 (2014); R. Echandi & P. Kher, *Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. 41-65 (2014); S.D. Franck, *Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide*, 29 ICSID REV. 66-89 (2014); S.D. Franck & A. Joubin-Bret, *Investor-State Mediation: A Simulation*, 29 ICSID REV. 90-111 (2014); Frauke Nitschke, *The IBA's Investor-State Mediation Rules and the ICSID Dispute Settlement Framework*, 29 ICSID REV. 112-132 (2014); W. von Kumberg, J. Lack & M. Leathes, *Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come*, 29 ICSID REV. 133-141 (2014).

This latest generation of treaties goes beyond allowing mediation in the “cooling-off” period. In these treaties, contracting States expressly propose a stand-alone option to mediate, as a full-fledged alternative mechanism to which disputing parties may resort. In and by itself, this approach constitutes an encouragement to mediation. The concern is that without providing for mediation in the treaty or agreement itself, the parties may perceive that if they suggest mediation it may appear that they do not have confidence in their own position or case.

The Taskforce encourages this approach to be adopted in the TTIP. The inclusion of specific language offering mediation is an important factor favoring mediation (1). At the same time, in order to provide a meaningful alternative mechanism, the treaty text must incorporate guidelines or rules for the mediation process itself (2) and must ensure the process is carried out by specialized investment mediators (3).

(1) Regarding the proposed wording, we suggest that the following features or provisions be included in any text:

- **Include a stand-alone Annex on Investment Mediation:** An earlier version of the draft text of CETA contained such an annex. The Taskforce suggests that this would be most helpful as it gives the parties wanting to embark on mediation not only the option but a complete roadmap that guides them step by step through the various phases and outcome of a mediation.

- **Gives the State the option to propose mediation:** The collaborative nature of mediation suggests that either party should be able to propose or resort to a mediation, and not only the investor. From a policy point of view, this would give States the possibility of initiating mediation at an early stage. A strict timeframe within which to mediate should not be prescribed so that it remains an option at any time until final resolution of the dispute. Further, it should be clear that mediation can be held alone or in parallel with other proceedings. This would avoid mediation being used as a dilatory technique by a party to an arbitration or a domestic court proceeding, while also building in flexibility to commence mediation at any opportune time during the dispute.

- **Makes specific reference to concurrent proceedings:** Mediation can be conducted in parallel to any of the main alternatives in dispute resolution: domestic courts, international arbitration, State-State procedures and be conducted in parallel with these or by itself. The IBA Inter-State Mediation Rules (“IBA ISM Rules”) provide for this possibility and also for the required level of confidentiality to ensure that there is no negative interference with an arbitration or a court proceeding. This provision is useful to support a mediation process.

- **Option for co-mediation:** Co-mediation is where instead of a single mediator, there are two mediators that work in tandem to assist the parties in resolving their dispute. Co-mediation can facilitate a mediation that bridges the cultural, language and other divisions between the parties. In addition to avoiding differences in culture, legal background, language, experience with mediation, this feature can take into account that one of the parties to the mediation is a State where the decision-making may require more time and special procedures. Co-mediation can permit at least one of the mediators to be fully conversant with this circumstance, with the language, with the legal and administrative issues at stake. In addition, co-mediation would help assure both parties to the mediation that they are understood and their concerns and expectations are heard. The IBA ISM Rules as well as the recently revised ICC Mediation Rules launched on 1st January 2014 specifically provide for the possibility of resort to mediation by more than one mediator. Similarly, the ICDR, WIPO or other bodies provide specifically for this option, including the possibility of hybrid processes.

- **Propose a mediation management conference:** The text of the treaty or relevant rules should require that a mediation management conference be held before the parties take

their final decision to go along with mediation or stop it. This mediation management conference will allow the parties to address essential issues such as the actual power to negotiate and mediate, the schedule, venue, language, scope of the mediator's role and a number of other ground rules that will allow the mediation to proceed and avoid deadlock.

A mediation management conference also provides a forum for addressing a critical issue in mediation involving investors and States: identifying who has the authority to make decisions on participation in a mediation process itself and on the outcome at various stages. For the mediation to succeed, there must be participants with sufficient authority on both sides.

(2) Reference to the IBA Investor-State Mediation Rules or inclusion of a set of treaty-specific rules in an Annex. To foster recourse to mediation the parties will need guidance as to the steps and the essential elements of the mediation process. This may be done by referring to the IBA ISM Rules that have been specifically developed for investment disputes. Other rules could also be referred to in order to give the parties a broader range of options. In addition, the TTIP should give the parties the option of selecting whether to have institutional support for the mediation, and include a short summary of the main features of the IBA ISM Rules.

(3) Establishing or referring to a roster of mediators: The role and expertise required from an arbitrator and from a mediator are not identical and an expert arbitrator may not necessarily be an expert mediator (and vice-versa). This would also apply to former judges as proposed in the draft negotiating text. To further enhance effectiveness, an offer of mediation in investment treaties should be accompanied by awareness and capacity-building for States and investors on the qualities of an appropriate mediator for investor-State disputes. Such capacity-building should include the development of a pool of specialized and expert investor-State mediators for selection by parties and institutional support to administer mediations.

The Taskforce does not support the establishment of a formal roster of such mediators for purposes of TTIP. However, it does favor collaboration between the Contracting Parties and dispute-resolution institutions, non-governmental organizations and the private sector with a view toward disseminating the information on competency criteria for specialized mediators and promoting open resources to help make informed decisions while choosing mediators. The collaboration in this general sense initiated by NAFTA Article 2022 can serve as a potential guide.

(4) Creating a TTIP Mediation information website to facilitate the initiation and the conduct of mediation proceedings. The website could contribute to address the need for awareness and capacity-building among public officials, the business community, lawyers and practitioners about how to use mediation, how to conduct a mediation, how to prepare for a mediation. This could give rise to **technical cooperation between the two contracting parties**, the US and the EU, to exchange best practices, develop new approaches and build on existing expertise. It is one of the tasks that we have assigned to our group the IMI Taskforce on Investor-State Mediation.

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We remain available to the negotiating parties to further elaborate on any of the matters discussed above.

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Annex C: IBA Rules for Investor-State Mediation (4 Oct. 2012)

Article 1. Scope of Application

1. These rules are designed for the mediation of investment-related differences or disputes involving States and State entities, whether or not they arise out of contract between the parties. These rules apply when:
 - a) the mediating parties have agreed that these rules shall apply, whether before or after a difference or dispute arises, or
 - b) the mediating parties have authorized the mediator or another person or institution to design a mediation process and that mediator, person or institution adopts these rules in whole or in part.
2. The parties may agree to exclude or vary any of these rules at any time. These rules apply unless otherwise agreed or derogated from by the parties.
3. When any of these rules is in conflict with a provision of law from which the parties or a party cannot derogate, that provision prevails.
4. References in these rules to the mediator shall include co-mediators, unless the context otherwise indicates.

Article 2. Commencement of Mediation

1. The mediation shall be deemed to have commenced:
 - a) on the date on which the request described in Article 2(2) is received by a party, if the parties agreed to mediation under these rules before the differences or disputes arose; or
 - b) on the date on which the parties agreed to mediate under these rules, if the parties did not agree to mediation before the differences or disputes arose.
2. A party wishing to initiate mediation under these rules shall send a written request to mediate to the other party or parties and to the mediation institution that the parties have agreed will administer the mediation, if any.
3. The request shall contain: (a) a summary of the differences or disputes sufficient to identify the matter giving rise to the request; (b) an identification of any treaty, contract or other legal instrument to which the differences or disputes relate; (c) the names and contact details of the requesting party and its representative(s); and (d) either a reference to the agreement to mediate or an invitation to the other party or parties to mediate under these rules.
4. Mediation under these rules may take place at any time, regardless of whether court, arbitration or other dispute resolution proceedings have been initiated.

Article 3. Independence and Impartiality of Mediator

1. The mediator shall be impartial and independent.
2. Prior to accepting an appointment as a mediator, any person under consideration shall provide a signed and dated Statement of Independence and Availability, in the form annexed as Appendix A, to the parties or any Designating Authority (as defined in Article 4).
3. In the Statement of Independence and Availability, the person under consideration shall: (a) disclose any facts or circumstances that might call into question the mediator's independence or impartiality in the eyes of the parties; (b) state the mediator's availability and willingness to conduct the mediation expeditiously and efficiently within the time limit agreed by the parties or, in the absence of such an agreement, within a reasonable time limit following the mediator's appointment; and (c) state the mediator's proposed fee basis.
4. If, during the course of the mediation, a mediator becomes aware of any facts or circumstances that might call into question the mediator's independence or impartiality in the eyes of the parties, the mediator shall disclose those facts or circumstances to the parties in writing without delay.

Article 4. Designation of Mediator

1. There shall be a sole mediator, unless the parties designate two co-mediators pursuant to Article 6.
2. The parties may designate as a mediator any person whom they consider to be suited to assist them in resolving their differences or disputes.

3. In considering potential mediators, the parties may wish to take into account, but are not bound by, the qualifications set out in Appendix B (“Qualifications for Mediator”).
4. At any point during the consideration of potential mediators, the parties may jointly or separately contact any potential mediator. In the event that a party makes a separate contact, the discussion shall be limited to the potential mediator’s availability, independence, impartiality and qualifications.
5. The parties shall jointly designate the mediator within 21 days from the date of commencement of the mediation.
6. If the parties have not jointly designated a mediator within 21 days, the parties shall within 14 days agree on an institution or person that shall assist them in choosing a mediator (“Designating Authority”) in accordance with the procedure set out in Appendix C (“Choice of Mediator Through Designating Authority”).
7. If the parties do not agree on a Designating Authority within 14 days, then the Secretary-General of the Permanent Court of Arbitration at The Hague shall select a Designating Authority upon the request of either party.

Article 5. Resignation and Replacement of Mediator

1. The parties may by written consent agree to replace the mediator at any time.
2. If, during the course of the mediation, a party objects for any reason to a mediator continuing to act, then that party shall notify the mediator, the other party and any Designating Authority. The notification should preferably state the reasons for the objection.
 - a) Any other party to the mediation may comment in writing on the objection within 7 days of receipt of the objection.
 - b) Following consideration of the objection and any comment on the objection, the mediator shall in the mediator’s sole discretion: (i) resign as mediator; (ii) hold a telephone conference or in-person meeting with the parties to discuss the objection; or (iii) if the other party or parties agree, consult directly with the objecting party at a meeting or otherwise to discuss the objection.
 - c) If a party maintains its objection after the mediator has taken action in accordance with Article 5(2)(b)(ii) or (iii), the mediator shall resign and a new mediator shall be designated pursuant to these rules.
3. If a mediator resigns, is incapacitated or otherwise becomes unable to perform the mediator’s functions, a new mediator shall be designated pursuant to these rules.

Article 6. Designation, Resignation and Replacement of Co-Mediators

1. If the parties agree to co-mediation, the parties jointly or the Designating Authority shall designate two mediators. The procedures and rules set out in Articles 4 and 5 above shall apply to the designation of, objections to, and replacement of, each of the co-mediators.
2. In the event that one co-mediator resigns, is incapacitated or otherwise becomes unable to perform the functions of a mediator, the parties shall, following consultation with the remaining mediator and any Designating Authority, decide whether to continue with a single mediator or to designate a new co-mediator in accordance with Article 4.
3. The parties may decide to relieve one co-mediator of that co-mediator’s functions and to continue the mediation with the remaining mediator. The parties shall first consult with and obtain the agreement of the mediator with whom they wish to continue the mediation.

Article 7. Role of Mediator

1. The mediator shall be guided by principles of fairness, objectivity, independence and impartiality.
2. The mediator shall not have the authority to impose on the parties any partial or complete settlement of the differences or disputes.
3. Following consultation with the parties, the mediator may take decisions with regard to the procedural conduct of the mediation, including the language(s) of the mediation and the place, the format, times and dates of the mediation sessions.
4. In conducting the mediation and in taking procedural decisions, the mediator shall take into account the wishes of the parties, the circumstances of the case and the overall goal of a cost efficient and timely settlement of the differences or disputes.

5. Unless the parties agree otherwise, by accepting the designation as mediator the mediator agrees not to act in any other role, including that of counsel, arbitrator, expert or witness, in respect of:
(a) differences or disputes that are the subject of the mediation; or (b) during the pendency of the mediation, any differences or disputes in which a party is directly involved as a disputant.

Article 8. Conduct of the Mediation

1. The mediation shall be conducted in accordance with the parties' wishes and with the assistance of the mediator.
2. The mediator shall assist the parties to reach an agreement on a settlement of their dispute on a voluntary basis in which the parties make free, informed and self-determined choices as to the process and the outcome. The parties shall cooperate with the mediator and each other in good faith to advance the mediation as expeditiously and efficiently as possible.
3. The mediator may communicate with the parties orally or in writing, together or individually, at any point during the mediation. The mediator may conduct meetings with one party only.
4. No information provided orally by a party to the mediator during a separate meeting may be disclosed to any other party by the mediator, unless the party explicitly so authorizes the mediator. Any written material that one party provides to the mediator with the intention that it not be shared with the other party or parties shall be clearly labeled as "Confidential – For Mediator's Use Only" or words to similar effect.
5. In a co-mediation, each co-mediator shall share with the other co-mediator all written or oral communications received from a party or parties. The co-mediators shall coordinate their efforts and jointly conduct the mediation.
6. The mediator may at any time during the mediation suggest or request that a party provide such additional information or material as the mediator sees fit.
7. If requested by the parties, the mediator may make recommendations concerning an appropriate resolution of the differences or disputes.
8. With the agreement of the parties and subject to Article 10, the mediator may consult one or more experts. Any such expert shall be governed, *mutatis mutandis*, by Article 3.

Article 9. Mediation Management Conference

1. As soon as practicable following the mediator's designation, the mediator shall convene a mediation management conference with the parties, whether in person, by telephone or by any other means of telecommunication, to discuss:
 - a) the conduct of the mediation, in particular any outstanding procedural issues such as the languages and location of the mediation sessions;
 - b) a provisional timetable for the conduct of the mediation;
 - c) confidentiality and privacy arrangements, including any legal disclosure obligation that may affect such arrangements;
 - d) the applicability of any relevant prescription or limitation periods and whether the parties wish to address such periods by agreement;
 - e) whether the parties wish to agree in writing not to commence or not to continue any arbitral or judicial proceedings relating to the differences or disputes that are the subject of the mediation while the mediation is pending;
 - f) whether special arrangements for the approval of a settlement agreement need to be made; and
 - g) the financial arrangements, such as the calculation and payment of the mediator's fees and expenses.
2. During the mediation management conference, each party shall inform the other party and the mediator of the name and contact details of its representative(s) and any other person participating on its behalf in the mediation.
3. At the mediation management conference, to the extent possible, or as soon as possible thereafter, each party shall:
 - a) either identify a representative who is authorized to settle the differences or disputes on its behalf or describe the process necessary for a settlement to be authorized; and

- b) communicate to the mediator and the other party, for discussion, the names of any non-party whose participation in the mediation it deems to be necessary or useful to facilitate the settlement of the differences or disputes.
- 4. By agreeing to mediate under these rules, a party undertakes to participate in the mediation management conference. A party may withdraw from the mediation at any time after the mediation management conference. Prior to withdrawing from the mediation, a party must notify the other party or parties and the mediator of its intention to withdraw, preferably stating its reasons. Prior to a party's withdrawal from the mediation, the mediator shall hold a meeting with all parties in person, by telephone or by any other means of telecommunication.

Article 10. Privacy and Confidentiality

- 1. The mediation shall be private. Unless the parties and the mediator otherwise agree, no person other than the mediator, the parties, their representatives or other people identified pursuant to Article 9.2 shall be permitted to attend, hear or view any part of the mediation or any communications relating to the mediation.
- 2. Subject to any agreement between the parties and the mediator and to the specific exceptions set out below, all documents prepared and communications made in connection with the mediation shall be confidential and shall not be used for any other purpose, including, in particular, in legal proceedings.
- 3. The confidentiality obligation described in Article 10(2) shall not extend to:
 - a) the fact that the parties have agreed to mediate or a settlement resulted from the mediation, unless the parties otherwise agree in writing;
 - b) the terms of a settlement or partial settlement, unless and to extent that the parties otherwise agree in writing;
 - c) the disclosure of documents or information:
 - i) prepared by the disclosing party in connection with the mediation, if they contain no information provided by any other party or the mediator and do not refer to the mediation;
 - ii) as evidence that a settlement agreement was reached when any other party disputes it;
 - iii) for the purpose of enforcing or homologating a settlement agreement, subject to any requirement provided in the agreement;
 - iv) to comply with a pre-existing legal disclosure obligation that was made known to the other parties in the agreement to mediate or at the Mediation Management Conference, provided that the disclosure shall be as limited as permissible;
 - v) to comply with a court order or similar instrument requiring disclosure, provided that the disclosure shall be as limited as permissible and shall be made only after written notice to the other party or parties and the mediator, and an opportunity to contest the disclosure under such order or instrument;
 - vi) required to prevent a serious crime or eminent threat to public safety, provided that the disclosure shall be as limited as is reasonable in all circumstances; and
 - vii) that, at the time of disclosure, has demonstrably entered into the public domain through no direct or indirect breach of the confidentiality obligations set forth above.
 - viii) Except with respect to Article 10(3)(c)(i) and (vii), any disclosure made shall be in a manner that protects the confidentiality of information to the greatest extent feasible and permissible.
- 5. Every person participating in the mediation shall be deemed to have agreed to be bound by the provisions of this Article 10. At the request of the mediator such person shall confirm that agreement in writing.
- 6. Except for the sole purpose of a post-mediation dispute regarding the mediator's fees or expenses, no party or other participant in the mediation shall:
 - a) attempt to compel the mediator to disclose anything in relation to or about the mediation, including any notes or other documents made by the mediator, or any information or documents obtained during the mediation, including information relevant to whether a settlement agreement was made; or

- b) call, attempt to call or compel, or cause the mediator to be compelled to appear as a witness in any legal proceedings relating to the mediation or information acquired by the mediator in relation to the mediation.
7. The provisions of this Article 10 shall survive the termination of the mediation and continue in full force and effect unless provided otherwise by a signed agreement among all parties and the mediator.

Article 11. Settlement and Termination of Mediation

1. The mediator shall declare the mediation terminated in writing:
 - a) upon the signing of a settlement agreement by the parties;
 - b) upon the withdrawal of any party pursuant to Article 9.4; or
 - c) if, following consultation with the parties, the mediator determines that the parties will not resolve the differences or disputes through the mediation.
2. The declaration of termination shall be made and sent to all parties without delay. The mediation shall be deemed terminated as of the date of transmission of the declaration to the parties.

Article 12. Costs and Fees

1. The mediator's fees and expenses, and the administrative expenses of the Designating Authority, if any (together the "Costs"), shall be borne by the parties in equal shares. A party shall be free to pay any other party's share of the Costs, if it wishes to do so. A party's other expenditures shall remain the responsibility of that party. The parties are required to pay the Costs irrespective of whether a settlement agreement is concluded.
2. If a mediator resigns prior to the termination of the proceeding, the parties shall pay the fees and expenses that the mediator incurred prior to termination, unless the mediator and the parties have agreed otherwise.
3. The fees of the mediator shall be calculated on the basis of the hours spent by the mediator on the mediation, unless a flat fee or other basis is agreed among the parties and the mediator. The mediator's hourly rate or fees shall be agreed upon at the outset of the proceedings. If no party objects to the mediator's proposed hourly rate or other fee basis within 14 days of receipt of the Statement of Independence and Availability, then that proposal shall be deemed accepted. The mediator shall be reimbursed for reasonable expenses incurred in the course of the
4. proceedings, such as travel, accommodation or other expenses.
5. After the mediator's designation, the mediator may invite the parties to pay an initial deposit for the mediator's fees and expenses. The amount of the initial deposit shall be decided by the mediator based on the mediator's estimate of the time likely to be spent on the matter at least through the mediation management conference. During the course of the mediation, the mediator may request such additional deposits as the mediator deems necessary to cover anticipated fees and expenses. The mediator may decide not to proceed with the mediation until payment of the initial deposit, or, if applicable, any subsequent deposit.
6. After the termination of the mediation, the mediator shall send a final invoice for the mediator's fees and expenses to the parties. If the amount of any deposits is not sufficient to cover the final invoice, the shortfall shall be paid by the parties immediately in equal shares. If the amount of any remaining deposits is greater than the final invoice, then any excess will be returned to the parties in the proportions originally paid.
7. If the parties have recourse to a Designating Authority, the Designating Authority shall set the amount of its administrative expenses. The Designating Authority need not proceed with the matter until the administrative expenses have been paid. If necessary, the Designating Authority may request from the parties such additional amounts as become necessary should the circumstances envisaged under Article 5 and Appendix C to these rules arise.

APPENDIX A
Model Statement of Independence and Availability

In Mediation Proceeding between [xxx]

Family Name(s):	Given Name(s):

Please tick all relevant boxes

ACCEPTANCE

I agree to serve as mediator or, if applicable, co-mediator and conduct mediation pursuant to the IBA Rules for Investor-State Mediation, subject to any modifications agreed to by the parties. I confirm that I am familiar with the rules.

NON-ACCEPTANCE

I decline to serve as mediator in this mediation proceeding. *(If you tick here, simply date and sign the form without completing any other sections.)*

AVAILABILITY

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this mediation expeditiously and efficiently within the time limit agreed to by the parties or within an appropriate time frame following my appointment. I understand that it is important to complete this mediation as promptly as reasonably practicable. My current professional engagements are as below for the information of the parties.

Principal professional activity:	
<i>(e.g. lawyer, mediator, academic)</i>	

Are you already aware of any other professional engagements or activities likely to require a substantial time commitment from you in the next 12-18 months? *(if yes, please provide details below and/or, if necessary, on a separate sheet).*

INDEPENDENCE *(Tick one box and provide detailed information, if necessary.)*

In deciding which box to tick, you should take into account whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favor of disclosure. Any disclosure should be complete and specific, identifying among other things relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

Nothing to disclose: I am independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties.

Acceptance with disclosure: I am independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties, I draw attention to the matters on the attached sheet.

Date:

Signature:

The information requested in this form is disclosed solely to the parties and their counsel in the mediation proceeding referenced above under the IBA Investor-State Mediation Rules for the purposes of that proceeding and shall remain confidential.

APPENDIX B

Qualifications for Mediator

In considering prospective mediators, the following qualifications may be taken into consideration:

- Experience as mediator;
- Mediation training, including any accreditation as a mediator by an internationally recognized organization;
- Experience in any form of dispute resolution proceedings involving States or State agencies or instrumentalities, in particular including investor-State disputes, peace negotiations, border disputes and trade disputes;
- Experience in any form of dispute resolution proceedings involving commercial entities, including particularly disputes relating to the substantive field of the investment at issue;
- Regional or international stature;
- Experience in dealing with governments;
- Experience as mediator in cross-cultural disputes;
- Experience in dealing with parties of the nationalities at issue;
- Ability to communicate with the parties in the languages in which they and/or the key participants in the mediation are most comfortable communicating; and
- The advisability of appointing a mediator of a nationality other than the nationalities of the parties.

APPENDIX C
Choice of Mediator Through Designating Authority

1. Unless the parties jointly request the Designating Authority directly to designate a mediator, the Designating Authority shall as soon as practicable, and if possible within 14 days of acceptance by the Designating Authority of its appointment, provide the parties with a list of at least three potential mediators, together with the potential mediators' Curriculum Vitae and Statements of Independence and Availability.
2. In considering potential mediators, the Designating Authority shall take into account, but not be bound by, the recommended qualifications set out in Appendix B. Within 14 days of receipt of the list, the parties shall either agree on the name of a mediator or shall each return the list to the Designating Authority with an indication of any potential mediators that they deem unacceptable and an order of preference for any potential mediators they deem acceptable. If a party does not return the list within the allotted time frame, all potential mediators on the list shall be deemed acceptable. From among the mediators whom the parties have deemed acceptable, and taking into account the order of preference expressed by the parties, the Designating Authority shall designate a mediator.
3. If none of the potential mediators on the list provided by the Designating Authority is deemed acceptable by the parties, then the Designating Authority shall, using its discretion, designate a mediator and shall provide the parties with the mediator's Curriculum Vitae and Statement of Independence and Availability. If any party objects to the mediator so designated within 7 days of receipt mediator's Curriculum Vitae and Statement of Independence and Availability, then the Designating Authority shall consult with the parties. If, after consultation, the objecting party maintains its objection, then the Designating Authority shall designate another mediator pursuant to paragraph 4, above.

Annex D: Reference Text Proposed in Table 7 of the EU Consultation

<i>Example of provisions commonly found in bilateral investment treaties (BITs)</i>	<i>Text developed in EU-Canada agreement (CETA)</i>
	<p>Article x-21: Procedural and Other Requirements for the Submission of a Claim to Arbitration</p> <p>1. An investor may submit a claim to arbitration under Article x-22 (Submission of a Claim to Arbitration) only if the investor:</p> <ul style="list-style-type: none"> a) delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter; b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination; c) fulfils the requirements of the notice requesting a determination of the respondent; d) fulfils the requirements related to the request for consultations; e) does not identify measures in its claim to arbitration that were not identified in its request for consultations; f) provides a declaration, where it has initiated a claim or proceeding, seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, that: <ul style="list-style-type: none"> i. a final award, judgment or decision has been made; or ii. it has withdrawn any such claim or proceeding; The declaration shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; and g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration. <p>2. Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, both the investor and the locally established enterprise shall provide a declaration pursuant to subparagraph 1(f) and a waiver pursuant to subparagraph 1(g).</p> <p>3. The requirements of paragraphs 1(f), (g) and 2 do not apply in respect of a locally established enterprise where the respondent or the investor's host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling the requirements in subparagraph 1(f), (g) or 2.</p> <p>4. Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.</p> <p>5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:</p> <ul style="list-style-type: none"> i. where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds; ii. where the Tribunal dismisses the claim pursuant to Article x-29 (Claim manifestly without legal merit) or Article x-30 (Claims Unfounded as a Matter of Law); or <p>where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.</p>
	<p>Article x-23: Proceedings under different international agreements</p>

	<p>Where claims are brought both pursuant to this Section and another international agreement and:</p> <ul style="list-style-type: none"> a) there is a potential for overlapping compensation; or b) the other international claim could have a significant impact on the resolution of the claim brought pursuant to this Section, <p>a Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, stay its proceedings or otherwise ensure that proceedings pursuant to another international agreement are taken into account in its decision, order or award.</p>
	<p>Article x-19: Mediation</p> <ol style="list-style-type: none"> 1. The disputing parties may at any time agree to have recourse to mediation. 2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this chapter and shall be governed by the rules agreed to by the disputing parties including, if available, the rules established by the Services and Investment Committee pursuant to Article x-42(5)(d). 3. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from the roster established pursuant to Article x-25 (Constitution of the Tribunal) or requesting the Secretary General of ICSID to appoint a mediator from the list of chairpersons established pursuant to Article x-25 (Constitution of the Tribunal). 4. Disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator. <p>If the disputing parties agree to have recourse to mediation, Articles x-18(5) and x-18(7) (Consultations) shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.</p>