



INVESTOR-STATE MEDIATION TASK FORCE

Response to ICSID on its Invitation to File Suggestions for Rule Amendments

25 September 2017

This Note advocates the further use of mediation as a component of any reformed multilateral investor-state dispute settlement (“ISDS”) system. It responds to the [Invitation to File Suggestions for Rule Amendments](#) launched by the International Centre for the Settlement of Investment Disputes (“ICSID”) Secretariat on 25 January 2017. In particular, this Note recommends, *first*, that the place of mediation should be made explicit as a means to settle disputes between investors and host states in the reformed ICSID Regulations and Rules (the “Rules”); *second*, that the Secretariat disseminate mediation information and develop ICSID mediation support services; *third*, that, in due course, the Secretariat consider implementing a standalone set of Mediation Rules, which IMI would be happy to help prepare; and, *fourth*, that the Secretariat offer client and Mediator education and training.

This Note is submitted by the [Task Force on Investor-State Mediation established by the International Mediation Institute in 2013 \(the “Task Force”\)](#). 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 is the only organization in the world to transcend local jurisdictions to develop global, professional standards for experienced mediators, advocates and others involved in collaborative dispute resolution and negotiation processes. IMI also convenes stakeholders, promotes understanding and disseminates skills in a non-service provider capacity.

I. The Case for Mediation

Mediation presents a credible and compelling option for both investors and states to settle disputes arising from investment activities. Mediation takes account of broader economic and non-economic goals, more appropriately and completely construing the positive impact that investment projects can have for both the investor and the host state. Built on the basis of contract law, mediation creates a means for creatively bringing greater attention to needs, interests or concerns which might not, or could not, have been fully countenanced at the time of forming of the contract, or those considerations which might have arisen or developed since the time of contract formation. That flexibility of perspective is further supported by the procedural context and means by which mediation seeks to remedy disputes: mediation creates an informal context for negotiation and problem resolution and, importantly, reserves decision-making to investors and states rather than obliging the parties to cede authority to either an arbitral tribunal or a court.

Mediation gives states and investors an opportunity to arrive at practical solutions in a process that is less constrained by either the contract or the law. In so doing, in some circumstances, mediation permits and even facilitates the continuance of the investment relationship, with its larger intended economic and social benefits. The Task Force encourages the inclusion of specific language offering mediation as part of the ICSID ISDS system. The Task Force also observes that there will be subsequent need to, first, develop and incorporate guidelines or rules for the mediation process itself and, second, ensure that the process is carried out by specialised investment mediators. To the extent possible, it is recommended that mediation processes be referenced not only at the international level

as part of ISDS, but also at the domestic level as part of Conflict Management Mechanisms (“CMMs”), and, more concretely, as part of Systemic Investment Retention Mechanisms (“SIRMs”). As discussed later in this Note, the Task Force has launched initiatives to explore these matters.

Given that investment, unlike trade, requires relationships and not just transactions, it is important to have a mediation process which not only problem-solves, but which also facilitates understanding among the parties. At its best, mediation makes the preservation of long term, strategic relationships and the projects which flow from those relationships, more likely. In any event, mediation provides investors and states with an opportunity to take control of their dispute, narrow if not entirely resolve disputes and realise significant economic and non-economic benefits. Mediation, with its great procedural flexibility, is uniquely suited to facilitate effective dialogue, especially through the use of co-mediation, which can be used as means of adding additional skills and for bringing cultural sensitivity to bear.

II. The Case for Mediation at ICSID

Mediation is in keeping with the spirit of the [Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#) (“ICSID Convention”). The ICSID Convention was developed with “the need for international cooperation for economic development, and the role of private international investment therein” explicitly borne in mind. Moreover, “particular importance [was attached] to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire”. As discussed above, mediation presents a credible and compelling option for both investors and states to settle disputes arising from investment activities. In addition to being more expedient and less costly, mediation facilitates the preservation of the trade and investment relationship between the parties, an aspiration central to international development. Moreover, mediation proceedings might be conducted before, during, or after arbitral proceedings.

Mediation is a malleable process that might be used in conjunction with ICSID’s present ISDS offerings. While the exact method of inclusion deserves further discussion, it bears noting that there are several means by which mediation might be added to any dispute resolution component. Most simply, mediation could be added by specific reference during the so-called “cooling off” periods (*i.e.*, waiting periods, or requirements for the negotiation and resolution of disputes) that are common to investor-state treaties. Going further, the adoption of a mediation obligation, concurrent with court or arbitral processes and subject to a unilateral “opt out” by either the state or investor, might be considered. In all such cases, ICSID can add value to the proceedings by encouraging and facilitating the use of mediation. The Rules and/or administrative practices of ICSID should reference that facilitative role.

Furthermore, it is in the interest of the Parties to promote mediation alongside arbitral proceedings. Highlighting mediation as a viable dispute resolution option would, in keeping with ICSID’s mission, go far to both facilitating and expediting the ISDS process, therein reducing the costs—both of time and treasure—imposed on states and investors. As noted, mediation complements arbitration.

In the Task Force’s experience, ambivalence regarding settlement and mediation is a disservice to clients, and especially to states. First, failing to make explicit what options are available for the “agree[ing] on a settlement” is contrary to the best interests of the client—both investors and states—as mediation is more amicable, less costly and may be conducted in conjunction with ISDS arbitration. Moreover, and particularly with regard to states, the Task Force has found that there is often a general unawareness of mediation as a viable ISDS option. Even where there is awareness, knowledge regarding the most basic elements of mediation, such as where funds for the process and for settlement might come from, are left unanswered. Such questions have largely been resolved or developed in the case of arbitration, and ICSID actively facilitates such procedures. Thus, a specific reference to mediation in the Rules would go quite far towards broadening the conflict management vision of clients. In highlighting and specifying mediation as an option alongside arbitral proceedings,

the Rules can provide both legitimacy and the long-acknowledged, best-practice deference to mediation that is recognized in modern state judicial systems and commercial contracts.

III. Suggestions for the ICSID Rules Review

By way of amending the Rules and, conjointly, the Secretariat's subsequent practice, the Task Force recommends four things: *first*, that the existing settlement component already present in the [Arbitration Rules](#) be developed, with specific reference to mediation being made in the amended version; *second*, that the Secretariat publish mediation guidance and develop a suite of mediation support services; third, that the Secretariat consider joining the major international arbitration and ADR-provider organisations in promoting the use of mediation through the promulgation of a standalone set of Mediation Rules; and *fourth* that the Secretariat continue its active role in providing mediation education and training to investors, states, party representatives, mediators and other stakeholders and interested parties.

A. Make Explicit the Place of Mediation in the Arbitration Rules

Mediation and negotiated ISDS already occurs alongside the arbitration of disputes brought for settlement under the ICSID Convention, and the Rules already speak implicitly to such settlement. Indeed, although not specifically referred to by name, mediation is allowed for under the existing Rules. As such, amending the Rules to further develop the place for mediation is in keeping with the spirit of the Rules, and is a matter of improving an element of the Rules that is presently underdeveloped and underutilised.

Specifically, the Task Force urges the Secretariat to expand the settlement component of Rule 43 of its Arbitration Rules, explicitly positing mediation as a viable ISDS settlement option.

The settlement process mentioned in the Arbitration Rules, though appropriately simple, lacks specificity. Presently, the process is initiated and conducted entirely by the parties, without any particular involvement of either the Secretariat or the Tribunal: per [Rule 43 of the Arbitration Rules](#), where the Tribunal has yet to be constituted, the parties need only notify the Secretary-General that they desire to discontinue arbitral proceedings; where the Tribunal has been constituted, the full and signed settlement must be filed with the Secretary-General. Nothing more is stipulated. Thus, while Rule 43 specifically permits the parties to discontinue arbitration proceedings by themselves "agree[ing] on a settlement or otherwise [...] discontinu[ing] proceedings", it makes no indication as to how that settlement might be reached. This is a missed opportunity. Rule 43 should make specific reference to the use of mediation.

B. Develop a "Suite" of Mediation Resources, and Encourage Settlement and Mediation as Part of Secretariat Activities

The Secretariat is uniquely suited to remind the parties of the benefits of settlement and to encourage such settlement through mediation. Such assistance can be provided in several ways. Providing the parties with information on how mediation works, how to select a mediator and how mediation might proceed in connection with an on-going arbitration would all be helpful. By way of example, ICSID might look to the Mediation Guide adopted by the Energy Charter Conference.

The Secretariat can go further, offering its assistance in identifying sources for the selection of mediators and providing the parties with names and CVs of suitable, experienced mediators, scheduling mediation conferences, acting as a repository for mediator fees and disbursing fees to mediators as appropriate and facilitating the process of turning mediated settlements into Consent Awards. This "suite" of mediation services, detailed in writing and made widely available, will give confidence to parties considering mediation and make it more likely that parties accessing ICSID mediation will have a positive experience with the mediation process.

Throughout the dispute resolution process, the Secretariat should encourage settlement communications between and amongst the parties. In particular, the Secretariat should consider a recurring, standard mediation reference as part of a short, administrative conference, both at an early

stage, as well as at some selected mid-point in the arbitral process to remind the parties that mediation and settlement are always available options.

C. Consider Promulgating a Standalone Set of Mediation Rules

In time, the Task Force urges the Secretariat to consider developing a separate set of Mediation Rules comparable to its existing Arbitration Rules and Conciliation Rules.

The development of ICSID Mediation Rules would go some way towards both legitimising the use of mediation for Investor/State disputes and providing parties with helpful structure and procedural guidance. Major arbitral institutions and professional bodies, including the [International Chamber of Commerce](#) (ICC), the [International Centre for Dispute Resolution](#) (ICDR), and the [International Bar Association](#) (IBA), offer mediation rules and/or administrative support for mediation, in addition to arbitration. The IBA Rules for Investor-State Mediation, in particular, were specifically designed to address the needs of parties to investor-state disputes and might prove easily adaptable to ICSID procedures.

Mediation Rules need not be complex—indeed, they ought not to be complex. In terms of procedural components, they need only stipulate the basics needed to structure a mediation, including (1) what is necessary to form the Agreement to mediate; (2) what constitutes the beginning and end of mediation; (3) what is the procedure for Mediator selection; (4) what powers, and limitations thereon, the Mediator has; (5) stipulate that the Mediator(s) be impartial and independent; (6) assurances of confidentiality of proceedings; and (7) the possibility and impact of negotiated settlement on ancillary proceedings and possible enforcement options. With regard to enforcement, ICSID is well and uniquely positioned to provide innovative leadership. Drafters will want to reference ongoing discussions at UNCITRAL regarding the enforcement of agreements reached in mediation. The Task Force would be happy to offer its assistance in the drafting of such a set of rules and in developing an administrative framework for facilitating mediation.

D. Offer Party and Mediator Guidance, Education and Training

Beyond affirmatively amending the Arbitration Rules to include explicit reference to mediation, publishing mediation guidance for parties, detailing areas of ICSID administrative support for mediation and promulgating a standalone set of Mediation Rules, the Task Force encourages the Secretariat to continue developing education and training materials and programmes focused on the nature of mediation and how it might be used, either in lieu of or alongside arbitral proceedings.

In addition to periodic reminders and instruction on the use of mediation, the Secretariat should provide client and mediator education and training programmes. The Secretariat, in cooperation with IMI and others, is already engaged in providing mediator skills training programmes tailored for Investor-State disputes. A pilot training programme took place on June 12–14, 2017 at ICSID's facilities in Washington, D.C. This training covered the context and framework of investor-state dispute settlement, considerations specific to investor-state mediation, intercultural competency, process design, conduct of an effective investor-state mediation and ethical challenges, among other topics. ICSID has also recently sponsored a high-level mediation education forum for state and investor representatives. Continuing ICSID guidance, education and training for investors, states and prospective mediators will facilitate more frequent and effective use of mediation in investor-state disputes.

IV. Additional IMI IS Task Force Support

The Task Force has actively promoted its findings. First, in 2014, it prepared a response to the European Commission. In that note, [*Response to the European Commission Public Consultation on Modalities for Investment Protection and Investor-State Dispute Settlement \(ISDS\) in Transatlantic Trade and Investment Partnership \(TTIP\) \(7 June 2014\)*](#) (“ISDS Note”), the Task Force observed that there are several benefits to mediation and to why mediation might be particularly beneficial in the ISDS context. The Task Force reiterates the points and reasoning that it therein proffered in support of the use of mediation, as well as the accompanying supporting documentation (*e.g.*, mediation reference list; IBA Rules for Investor-State Mediation). The Task Force’s initial ISDS Note is of value to this Consultation and, as such, is attached hereto (**Annex 2**).

Bearing in mind its own earlier recommendations to the European Commission, the Task Force has prepared a holistic set of [*Investor-State Mediation Competency Criteria*](#) (“Criteria”), also attached hereto (**Annex 3**). Recognising that investment disputes are particular in their nature, and that mediation is as much of an art as a science, the Criteria seek to lay out a series of areas in which the ideal investor-state mediator would be competent. The Criteria have been discussed in the Global Pound Conference (GPC) Blog in a piece entitled [*Investor-State Mediation: Not Whether, Or Even When, But How*](#). The GPC was established to facilitate the development of commercial dispute resolution tools, at domestic, regional and international levels. In that piece, the Task Force takes greater account of mediation’s unique ability to facilitate and further the greater investment relationship. Task Force members assisted the Energy Charter Secretariat in formulating its Mediation Guide (July 2016), which specifically advocates for the use of mediation in Energy Charter Treaty disputes.

After developing the Criteria, the Task Force turned its attention to the development of educational and consultative opportunities to test the Criteria. The Task Force is uniquely qualified to pursue this work given its geographic, cultural and gender diverse membership of investor-state experts drawn from academia, government and the private sector. A list of Task Force current members is included at the end of this Note (**Annex 1**). Specifically desirous of seeing the Criteria normalized in investor-state conflict management and dispute resolution architecture, the Task Force has entered into informal partnerships to pilot and explore the expansion of the Criteria. In addition to the aforementioned cooperative pilot 2017 IS Mediator training programme that is being developed with the Energy Charter Secretariat, CEDR and ICSID, the Task Force is also exploring academic partnerships, with the goal of providing the investor-state community with data, case studies, new and useful insights.

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It bears specifically reemphasising that the Task Force is not advocating that mediation supplant the place of either arbitration or courts, as appropriate. Rather, the Task Force urges that mediation is a particularly useful and efficient tool for the continuation of the investment relationship (where possible), or for the partial or final resolution of disputes. Further, unlike other dispute resolution mechanisms, mediation can be used at different stages of a dispute—for instance, mediation might be used at the point that the dispute first arises, or at any subsequent stage, up to and including final adjudication. Moreover, even after a decision has been made, mediation can be used with the aim of facilitating its enforcement. Together, mediation and adjudication can operate in a mutually supportive sense.

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In summary, the Task Force urges the ICSID Secretariat to do the following to do the following:

1. Make an explicit reference to mediation in the ICSID Arbitration Rules.
2. Disseminate mediation information and develop ICSID mediation support services
3. Consider promulgating standalone ICSID Mediation Rules, which the Task Force would be happy to help draft alongside the Secretariat; and

4. Offer client and Mediator education and training

We remain at the Secretariat's disposal to further elaborate on any of the matters discussed herein.

Mark E. Appel, Task Force Chair

Conrad C. Daly, Task Force Secretary

ANNEXES:

- ANNEX 1: IMI Investor-State Mediator Task Force Current Members (25 Sep. 2017).
- ANNEX 2: IMI Investor-State Mediation Task Force, *Competency Criteria for Investor-State Mediators* (19 Sep. 2016)¹;
 - Appendix A: Relevant Provisions in Recent Investment Mediation Rule;
 - Appendix B: Members of the IMI Task Force on Investor-State Mediation (19 Sep. 2016).
- ANNEX 3: IMI Investor-State Mediation Task Force, *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)* (7 Jun. 2014)²;
 - Annex A: IMI Investor-State Mediator Task Force Members (7 Jun. 2014);
 - Annex B: Reference List;
 - Annex C: IBA Rules for Investor-State Mediation (4 Oct. 2012);
 - Appendix A: Model Statement of Independence and Availability;
 - Appendix B: Qualifications for Mediator;
 - Appendix C: Choice of Mediator Through Designating Authority;
 - Annex D: Reference text proposed in Table 7 of the EU Consultation.

¹ <https://imimediation.org/investor-state-mediation-criteria>.

² [https://imimediation.org/private/downloads/ES1rB_ivAcw95PcGpXEXtg/IMI%20ISM%20Taskforce%20response%20to%20EU%20Commission%20\(final%2016.7.14\).pdf](https://imimediation.org/private/downloads/ES1rB_ivAcw95PcGpXEXtg/IMI%20ISM%20Taskforce%20response%20to%20EU%20Commission%20(final%2016.7.14).pdf).

ANNEX 1:

**IMI INVESTOR-STATE MEDIATOR TASK FORCE
CURRENT MEMBERS**

25 September 2017

- **Mark APPEL** - Task Force Chair; Arbitrator & Mediator, ArbDB Chambers (London, UK)
- **Conrad C. DALY** - Task Force Secretary; Consultant, The World Bank; Of Counsel, GRC Counsel LLP (Washington, DC, USA)
- **Mohamed ABDEL RAOUF**, Partner, Abdel Raouf Law Firm (Cairo, Egypt)
- **Alejandro CARBALLO LEYDA**, General Counsel, Energy Charter Secretariat (Brussels, Belgium)
- **James CLAXTON**, Professor, Kobe University (Kobe, Japan)
- **Michael COVER**, Arbitrator & Mediator, ArbDB Chambers (London, UK)
- **Mustaqeem DE GAMA**, Counsellor, South African Mission to the WTO (Geneva, Switzerland)
- **Roberto ECHANDI**, Lead Private Sector Specialist, IFC, World Bank Group (Washington, DC, USA)
- **Mariam GOTSIRIDZE**, Head of Arbitration Department, Ministry of Justice (Tbilisi, Georgia)
- **Elise GROULX DIGGS**, Lawyer, Doughty Street Chambers (Washington, DC, USA)
- **Olfa HAMDİ**, Advanced Work Packaging Institute (San Francisco, CA, USA)
- **Mariana HERNANDEZ CRESPO GONSTEAD**, Professor, University of St. Thomas (Minneapolis, MN, USA)
- **Wolf VON KUMBERG**, Managing Director, Global Resolution Services, Ltd. (London, UK)
- **Bart LEGUM**, Partner, Head of Investment Treaty Arbitration Practice, Dentons (Paris, France)
- **László MOLNÁR**, Partner, Technopolis Innovation Center (Budaörs, Hungary)
- **Vilawan MANGKLATANAKUL**, Director, Ministry of Foreign Affairs (Bangkok, Thailand)
- **Karen MILLS**, Founder & Arbitrator, Karim Syah Law Firm (Jakarta, Indonesia)
- **Frauke NITSCHKE**, Sr. Counsel/Team Leader, ICSID, World Bank Group (Washington, DC, USA)
- **Eloise OBADIA**, Partner, Derains & Gharavi (Washington, DC, USA)
- **Naa Lamle ORLEANS-LINDSAY**, Principal Legal Officer, Ghana Investment Promotion Centre (GIPC) (Accra, Ghana)
- **Jeremy SHARPE**, Partner, Shearman & Sterling, LLP (London, UK)
- **Marie TALASOVA**, Head of International Legal Services Department, Ministry of Finance (Prague, Czech Republic)
- **Hannah TÜMPEL**, Director of Communications and Engagement, United World Colleges (London, UK)
- **Sarah VASANI**, Head of Investment Arbitration, Addleshaw Goddard (London, UK)
- **Nancy WELSH**, Professor Law and Director of Dispute Resolution Program, Texas A&M University School of Law (Fort Worth, TX, USA)

ANNEX 2:

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)

7 June 2014

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.³ 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

³ 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).

of arbitration;

- 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.⁴ 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 dispute.

This latest generation of treaties goes beyond allowing mediation in the “cooling-off”

⁴ 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).

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-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.

* * *

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;

	<p>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 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 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> <p>1. The disputing parties may at any time agree to have recourse to mediation.</p> <p>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).</p> <p>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).</p> <p>4. Disputing parties shall endeavour to reach a resolution to the dispute within 60 days from the appointment of the mediator.</p> <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>

ANNEX 3:

IMI COMPETENCY CRITERIA FOR INVESTOR-STATE MEDIATORS

19 September 2016

The aim of the IMI Competency Criteria for Investor-State Mediators (“Criteria”) is to assist parties, institutions, designating authorities and other appointing bodies in selecting competent and suitable mediators, or co-mediators, for disagreements involving private sector entities and States, by listing criteria that can help inform and guide their choices. Ideally, these Criteria should be applied cumulatively.

Mediation presents a credible and compelling option for both investors and States seeking to settle disagreements and disputes arising from investment activities. Mediation can be used in conjunction with, or in parallel to, investment arbitration, notably as a means to reach early settlement during the “cooling off” period provided for in treaties. When properly used with competent and suitable mediators, mediation can generate significantly more expedient, less expensive and more satisfactory outcomes in line with the overall objective of the long-term investment relationship between foreign investors and a State.

While a pool of Investor-State arbitrators has developed over the recent years, and while, in parallel, mediation of international disputes has gained momentum, there is as yet no readily available pool of accredited or identifiable Investor-State mediators from which parties can choose their mediator or co-mediators. Further, as good arbitrators do not necessarily make good mediators, and not all competent mediators may be suitable for mediating investment disputes, it is important for the parties and appointing bodies to carefully carry out due diligence before appointing their mediator. The skillset used by mediators differs considerably from those of conciliators, adjudicators, and arbitrators, and, while there is often overlap, many of those skills do not crossover. Co-mediation may also be a useful way of combining qualities found in different candidates and assisting in dealing with cultural nuances and the complexities of Investor-State disagreements.

At the outset, two issues should be emphasized:

- (1) Investment disputes are particular, as they involve private parties on the one hand, and States on the other, and, therefore, may involve issues of public interest, public international law or sovereignty.
- (2) Mediation is as much an art as a science, and Investor-State mediators should be not only competent but also suitable for each dispute.

* * *

Ideally, selected Investor-State mediators should have satisfactory levels of knowledge and experience in each of the following areas:

1. Understanding of Investor-State issues

An Investor-State mediator should be informed on, and advised of, common issues that may arise in the course of investment disagreements. The mediator may be helpful in resolving not only substantive issues but also procedural ones (e.g., who has authority to represent the State, public interest defences, transparency concerns, sovereign immunity claims). The mediator should, therefore, have a solid understanding of, or familiarity with, procedural and substantive issues that may arise in Investor-State dispute settlement proceedings.

The mediator should be familiar with international investment processes, international commerce, financing mechanisms, public international legal issues and international arbitration procedures (e.g., ICSID, UNCITRAL and ICC). The mediator need not be an expert in all of these fields but should have sufficient background knowledge to understand complex issues arising from disputes involving the domestic and international responsibilities of States, and the inherent risk for companies investing abroad, independent of the dispute’s subject matter. Mediation allows participants to meet, interact and

share their interests and concerns with their counterparty(-ies) and the mediator(s) in a safe and confidential manner. This social aspect of the process allows the participants to explore solutions that might not be available in arbitration or other adjudicative forms of dispute resolution.

2. Experience in mediation and other dispute resolution processes

An Investor-State mediator should be familiar with a wide range of dispute resolution processes, as well as with how to safely combine them. The mediator should understand how to address the potential for adverse impact on parallel arbitration or court proceedings. The mediator should know how to assist the parties in the following:

- (1) Diagnosing the dispute and the risks of it escalating;
- (2) Identifying likely timing issues and deadlines;
- (3) Understanding the need to address proper party representation and ratification issues, taking into account the particular requirements for binding settlements;
- (4) Explaining the mediation process in detail and its possible outcomes, making sure that the right participants are present and that necessary internal processes are in place to allow effective communication between those present and those authorized to make decisions;
- (5) Convening and conducting the mediation process, and guiding the parties through it, being sure to address the needs of States regarding transparency and public and media access as appropriate, and balancing those needs with confidentiality, and establishing and maintaining trust among participants;
- (6) Foreseeing and addressing possible procedural issues and obstacles;
- (7) Understanding the possible impact of various procedural options on the parties' social behaviour (*e.g.*, triggering "pro-social" as opposed to "anti-social" behavioural patterns);
- (8) Recognizing the formalities needed to allow the parties and the State to enter into enforceable settlement agreements, including the budgetary and financial approval requirements to make payments.

3. Experience with different forms of negotiation, mediation and conciliation

An Investor-State mediator should be experienced in different forms of negotiation, mediation and conciliation, and should have experience in conducting international mediations involving a State or a state entity and a private party as either a sole or co-mediator.¹ The mediator should be a trained, certified or accredited professional mediator, with strong intercultural and interpersonal skills, and should be comfortable managing different types of mediation processes (*e.g.*, evaluative, facilitative, transformative), and working with other mediators or dispute resolution or other experts as part of a team (*e.g.*, as co-mediators), as may be appropriate. The mediator should understand that mediation is not only a legal but also a political and social process, and should know how to bring in appropriate experts when needed.

The mediator should know how to assist participants in using mediation to meet the various legal, political, social and/or cultural considerations that might arise in the course of resolving the disagreement, and should be familiar with relevant rules, guidelines and codes of ethics applying to Investor-State mediation.² Experience in international negotiations, particularly in settlement negotiations involving investment disputes or international disputes involving a State, could present an alternative to experience as a mediator.

4. Understanding of arbitration and adjudication

¹ At the time of preparing this set of competency criteria, the pool of experienced mediators with Investor-State dispute settlement experience is small and still being developed. These Criteria aim at encouraging the development of new expertise in Investor-State dispute settlement. It is advisable to treat them flexibly, and to revisit them once a sizable pool has emerged and experience has been gathered.

² See, *e.g.*, IBA Rules for Investor-State Mediation (2012).

An Investor-State mediator should be familiar with different forms of arbitration and adjudication. Although it is useful to have experience working as an arbitrator, tribunal secretary, party representative, advocate, legal counsel, advisor or neutral in international commercial arbitration or adjudication proceedings, or with Investor-State arbitrations, such experience is not essential. More importantly, the mediator should be familiar with differences between institutional and ad-hoc proceedings, civil law and common law approaches to dispute resolution, and ethical issues and guidelines affecting arbitration and mediation.³ The mediator should also understand enforceability issues and UNCITRAL texts on the recognition and enforcement of arbitral awards, as well as provisions regarding the possible use of consent awards or arbitral awards on agreed terms.

The mediator should have previous knowledge or experience with disputes involving a State as a party (*e.g.*, Investor-State arbitrations, international commercial arbitrations or adjudications). The mediator also should have an ability to synthesize complex information and provide a structural framework for identifying any applicable norms and dispositive issues (*e.g.*, issues of fact and law), while at the same time enabling the parties to focus on their future interests, the social dynamics between key participants, and any external procedural requirements (*e.g.*, transparency, public access, media) that may influence the handling of their discussions.

5. Intercultural competency

An Investor-State mediator should have strong and demonstrated competencies in dealing with cross-cultural situations. The mediator should understand culturally-shaped preferences and expectations, especially in international cross-border disputes and in different organizational cultures (*e.g.*, governmental, business) in relation to decision-making approaches and attitudes towards time and information exchange. The mediator should be able to appreciate nuances involved in different types of diplomacy, approaches to “cooling-off” periods, and how to convene, prepare for, coordinate, and conduct different types of meetings in different settings.⁴

6. Other competencies

An Investor-State mediator should also be familiar with various tools and technologies that can assist the participants in communicating more effectively, reducing costs and saving time, such as online webinar or video-conferencing systems, data-analysis tools (*e.g.*, decision trees, mind maps) and process management skills. Such tools will hopefully give participants a greater sense of predictability, helping them to better manage budgets and deadlines. Familiarity with issues arising from third party funding is also desirable. Although familiarity with the particular industry relevant to the disagreement (including technical, economic and legal trends, as well as common business practices and public policies) may be helpful, such should not be considered a necessary criterion for appointment. Co-mediation and/or expert participation might also be employed as means of bringing additional know-how to the mediation.

³ See, *e.g.*, IBA Guidelines on Conflicts of Interest in International Arbitration (2014) and IBA Rules on the Taking of Evidence in International Arbitration (2010).

⁴ The provisions contained in the Criteria for Approving Programs to Qualify Mediators for IMI Inter-Cultural Certification may also be relevant, in particular the Cultural Focus Areas set out in Appendix 1 to those Criteria, available at <https://imimmediation.org/intercultural-certification-criteria> (retrieved 15 Sep. 2016).

Appendix A:

Relevant Provisions in Recent Investment Mediation Rules

The following qualifications have been identified in recent publications, which should be taken into consideration when seeking prospective Investor-State mediators:

1. The IBA Investor-State Mediation Rules (2012) – Appendix B

“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.”*

2. The European Union’s Trade and Investment Partnership Agreements

The draft EU–U.S. Transatlantic Trade and Investment Partnership Agreement proposed by the European Commission sets the following criteria for the selection of a mediator:

“The [...] Committee shall, upon the entry into force of this Agreement, establish a list of six individuals, of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.”¹

¹ Draft EU–U.S. Transatlantic Trade and Investment Partnership Agreement, Section 3, Art. 3.4, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (retrieved 15 Sep. 2016).

Appendix B:
Members of the IMI Taskforce on Investor-State Mediation

Chair:

- **Mark Appel**, ArbDB Chambers (London, UK)

Former Co-Chairs:

- **Anna Joubin-Bret**, Partner, Cabinet Joubin-Bret (Paris, FR)
- **Barton Legum**, Partner & Head of the Investment Treaty Arbitration Practice, Dentons (Paris, FR)

Secretary:

- **Conrad C. Daly**, Consultant, The World Bank; Of Counsel, GRC Counsel LLP (Washington, DC, USA)

Members:

- **Suzana Blades**, Counsel, International Arbitration, ConocoPhillips (Houston, TX, USA)
- **Colin Brown**, Legal Officer, Directorate General for Trade, European Commission (Brussels, BE)
- **Jack J. Coe, Jr.**, Professor of Law, Pepperdine University (Malibu, FL, USA)
- **Silvia Constain**, Fellow, Weatherhead School of International Relations, Harvard University (Cambridge, MA, USA)
- **Roberto Echandi**, Lead Private Sector Specialist, Trade & Competitiveness Global Practice, IFC World Bank Group (Washington, DC, USA)
- **Susan D. Franck**, Professor of Law, American University, Washington School of Law (Washington, DC, USA)
- **Jason Fry**, Partner & global co-Head of the International Arbitration Group, Clifford Chance (Paris, FR)
- **Olfa Hamdi**, Founder, Advanced Work Packaging Institute (San Francisco, CA, USA)
- **Fatma Khalifa**, Counsellor, Foreign Disputes Department, Egyptian State Lawsuit Authority (Cairo, EG)
- **Meg Kinnear**, Secretary General, ICSID World Bank Group (Washington, DC, USA)
- **Jeremy Lack**, Attorney-at-Law & ADR Neutral (Geneva, CH)
- **Annette Magnusson**, Secretary General, Arbitration Institute of the Stockholm Chamber of Commerce (Stockholm, SE)
- **Vilawan Mangklatankul**, Director, Treaty Section, Ministry of Foreign Affairs of Thailand (Bangkok, TH)
- **Michael McIlwrath**, Global Chief Litigation Counsel, Oil & Gas division, General Electric (Florence, IT)
- **Karen Mills**, Founder & Arbitrator, Karim Syah Law Firm (Jakarta, ID)
- **Frauke Nitschke**, Senior Counsel, ICSID World Bank Group (Washington, DC, USA)
- **Eloïse Obadia**, Partner, Derains & Gharavi International (Washington, DC, USA)
- **Michael Ostrove**, Partner & Global Chair of the International Arbitration Group, DLA Piper (Paris, FR)
- **Mohamed Abdel Raouf**, Director, Cairo Regional Arbitration Center for International Commercial Arbitration (Cairo, EG)
- **Eduardo Silva Romero**, Partner & co-Chair of International Arbitration global practice, Dechert (Paris, FR)
- **Jeremy Sharpe**, former Chief of Investment Arbitration, Office of the Legal Adviser, U.S. Department of State (Washington, DC, USA); Partner, Sherman and Sterling (London, UK)
- **Margrete Stevens**, Consultant, International Arbitration Practice Group, King & Spalding (Washington, DC, USA)
- **Hannah Tümpel**, former Senior Counsel and Manager ICC International Centre for ADR (Paris, FR); Director of Communications and Engagement, UWC International (London, UK)
- **André von Walter**, Legal Officer, Directorate General for Trade, European Commission (Brussels, BE)
- **Nancy Welsh**, Professor of Law, The Pennsylvania State University, Dickinson School of Law (Carlisle, PA, USA)