IPBA DECISION TREES

ON INVESTOR-STATE MEDIATION

IPBA

INTER-PACIFIC
BAR ASSOCIATION

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IPBA DECISION TREES ON INVESTOR-STATE MEDIATION

FOREWORD

Foreword

We are pleased to offer these Decision Trees and Notes for use, adoption, reflection and perhaps improvement by the community engaged in considering or using mediation in the settlement of Investor-State disputes.

The Working Group and Its Mission

The Decision Trees and Notes are the product of a Working Group of the IPBA Investment Arbitration Sub-Committee (IASC) of the IPBA Dispute Resolution and Arbitration Committee (DRAC).

The IASC was convened in 2020 under the leadership of Lars Markert and Kshama Loya.

In 2023, Kshama was succeeded as Co-Chair by Mariel Dimsey.

The Working Group on Investor-State Mediation was convened in April 2021 and set itself the task of seeking to add to the already considerable body of knowledge on the use of mediation in the context of Investor-State disputes.

The Working Group Members

The Working Group comprised a small but diverse team qualified in a number of jurisdictions and often working in a different jurisdiction:

Nicholas Peacock (England & Wales) - Chair
Simona Peter (England & Wales) - Secretary
Kyongwha Chung (South Korea/New York)
Elodie Dulac (France/Singapore)
Santiago Gatica (Uruguay/New York)
Nathan Landis (Australia)
Hiroyuki Tezuka (Japan)
Lars Markert (Germany/Japan) - IASC Co-Chair
Kshama Loya (India) - IASC Co-Chair

From Theory to Practice: Creating a Decision Tree Toolkit

Having surveyed the existing materials, the Working Group was struck by the extensive and erudite writings that already existed on the theory and practice of Investor-State Mediation.

This led the Working Group to consider whether something more practical might be attempted – a toolkit to assist those facing an Investor-State dispute to decide whether and, if so, how to make use of mediation.

From this idea sprang the suggestion of a Decision Tree.

Developing the Decision Trees

The Working Group's first task was to create a Decision Tree for use by a State party.

Attempting to put itself in the position of a government lawyer or other stakeholder, the Working Group sought to provide a simple path to consider the questions of whether the dispute was suitable and ready for mediation.

In considering these questions, the Working Group recognised (as stated in the Notes) that any dispute may benefit from mediation at any time, but nonetheless sought to help those contemplating mediation to consider whether a dispute which could be mediated immediately, might also benefit from a further step or steps that could enhance the prospects of a successful resolution.

Key Considerations in the Decision Trees

The Working Group identified some core issues which inform this analysis for the State, and then – later – for the Investor.

In doing so, the Working Group did not seek to factor in every question and subtlety that might arise in a particular dispute, as to do so would have risked complicating the Decision Trees to the extent that they would cease to perform their essential function.

Inevitably there will be bespoke issues that arise in every dispute, but it is hoped the broader route sketched out in the Decisions Trees will bring these into focus within a wider context.

Feedback and Finalization

The Decision Trees and Notes were presented for wider consideration during a webinar on Investor-State Mediation in June 2022 convened by the IASC and featuring the helpful perspectives of Frauke Nitschke of ICSID and Natalie Morris-Sharma of the Singapore Attorney General's Chambers, and then again during a panel discussion as part of the IPBA Annual Conference in Dubai in March 2023.

Having taken account of the comments on and following those sessions, and with the kind support of the IPBA Dispute Resolution and Arbitration Committee co-chaired by Sae Youn Kim and Koh Swee Yen, the Decision Trees were finalised in the latter half of 2023.

Nicholas Peacock
Chair, Working Group on Investor-State Mediation
London

Lars Markert / Kshama Loya / Mariel Dimsey
IPBA IASC Co-Chairs (present and former)
Tokyo, Mumbai, Hong Kong

April 2024

DECISION TREES INTRODUCTORY NOTES

PURPOSE & STRUCTURE

Purpose of the Decision Trees

The Decision Trees have been produced with the aim of providing a helpful tool for parties to a live or prospective investment dispute to consider whether they should attempt to mediate the dispute and the factors that may influence such a decision.

Unique Circumstances of Disputes

Every investor-state dispute will have its own particular circumstances and nuances that may ultimately make it suitable and ripe for mediation.

Factors for Consideration

While it is always necessary to consider the specifics of the dispute at hand, the Decision Trees highlight important substantive and procedural factors that may be taken into account, especially by parties without prior experience participating in a mediation.

Intended Use of the Decision Trees

The Decision Trees are intended as a practical prompt for stakeholders on both sides of a dispute to consider whether and when mediation may be helpful, and certain factors that may influence that decision.

These factors are not exhaustive and there may be other considerations that are relevant and necessary for the parties to consider, but which do not necessarily lend themselves to a “Yes/No” answer.

Understanding the Decision Points

The Notes to the Decision Trees are intended to help users understand the decision points being presented and, where necessary, to explain the technical language or acronyms used.

Neither the Notes nor the Decision Trees are intended to be a comprehensive guide to mediation or to investor-state disputes.

There are many other resources available which describe both processes in detail.

Simplifying the Decision-Making Process

The aim of the Decision Trees is to provide a simple method of considering the various factors in play to decide whether and, if so, when to invest in an attempt to settle a live or pending dispute through mediation.

Structure of the Decision Trees

The factors/decision points in the Decision Trees are arranged thematically.

First Theme: Treaty and Agreement Consideration

The **first** theme involves consideration of the applicable treaty, investment agreement, or other instrument under which the claim has been brought or threatened between the Investor and the State.

Does that instrument itself require the use of mediation?

If investor-state arbitration or some other form of ISDS is already in progress, do the relevant procedural rules have any requirement for mediation?

If any such requirement exists, has mediation under those provisions been attempted and the obligation exhausted?

Note that the absence of mediation provisions in the instrument does not preclude a mediation from taking place through a separate agreement, nor does the fact of mediation having been attempted under a treaty prevent a further, separate attempt at mediation.

Second Theme: Optimal Timing for Mediation

The **second** theme involves a consideration of whether it is a "good time" to mediate the dispute, or if further steps might first be taken in order to render the dispute "ripe" for mediation and/or to maximise the prospects of a successful outcome to the mediation (i.e. a settlement).

If the threatened claim has yet to be defined and served on the State, it may be difficult for the State to engage with it.

Similar reasoning applies if the ability of the Investor to bring the claim under the instrument in question is contested by the State.

Where the Investor is in the position of seeking urgent interim relief, for example, to protect the status quo in the face of anticipated or pending State action, it may be difficult for the Investor to agree to mediation unless the pending action is paused by agreement or suitable interim order.

Other Themes: Readiness and Clarity for Mediation

Other themes consider the readiness to mediate, such as the ability of both parties to understand each other's positions, the remedies being sought and whether they can be appropriately addressed by mediation, as well as confidentiality and transparency issues.

Without clarity on these factors, it may be difficult or impossible for the parties to engage meaningfully on settlement.

The remaining themes and factors differ slightly between the State and Investor Decision Trees

For the State

For the **State**, relevant factors may include seeking advice on the merits of the Investor's claim, establishing a budget for participation in the mediation, considering whether the remedy sought by the Investor is something within the power of the State's decision-makers to bring about, and also considering whether there are issues of publicity and public scrutiny of any settlement process or proposed compromise that would make it difficult or impossible for the State to agree to amend its formal position, if that was the only route to a negotiated settlement (especially for a State faced with a proposal to make a payment from public funds against a claim it has formally stated is without merit).

ISDS has historically been conducted in private, although there is an increasing trend to bring transparency to the process where claims are made against public funds.

In any event, States and Investors (especially listed companies) may feel they need to make public statements about the claim/ISDS process.

The Decision Trees accordingly include this as a factor, primarily in the State's consideration, although as stated above it may also be helpful for an Investor to consider.

For the Investor

For the **Investor**, relevant factors may include the consent of any third-party funder(s) to an attempt at mediation, a consideration of whether the options available on a negotiated settlement may be wider and more attractive than those remedies that might ultimately be ordered through ISDS, whether any such order might face difficulties of enforcement, or conversely whether there are concerns that a negotiated compromise would not be honoured by the State.

Mediation may be more fruitful if jurisdictional issues have been determined and no interim relief is being sought (or if interim measures can be agreed upon pending mediation).

STATE DECISION TREE

State Decision Tree

ISDS stands for 'Investor-State Dispute Settlement'. Typically, this will be international arbitration provided for under a bilateral or multilateral treaty covering investment, although some treaties provide for specially constituted investment courts rather than arbitral tribunals.

Parties to an ISDS dispute considering mediation may consider it useful to review the ICSID Mediation Rules.

1. A defective mediation provision is one that is not capable of being operated in the manner provided for in the relevant instrument.

2. Many treaties provide for a mandatory 'negotiation period' (also known as a 'cooling off period') after an Investor has given notice of a dispute and before arbitration or other formal dispute resolution may be commenced.

3. Parties to a dispute may agree to mediate at any time, but should be aware of upcoming deadlines (including any applicable limitation periods) or procedural steps that might make mediation more difficult to agree upon and/or organise.

   Also, they should be aware of any prospective change in management of the Investor, or government of the State, that might be expected to impact the willingness or ability of either side to continue a settlement dialogue or give effect to any compromise agreed.

4. Mediation may be attempted at any time. However, a party is unlikely to be able to engage to seek to resolve

a claim until the details of that claim, and the legal basis on which it is made, have been clearly set out.

5

Arbitral Tribunals' jurisdiction over investment claims constitutes a complex question which is often contested in ISDS.

The issue will turn on the provisions of the specific instruments, and potentially also international law, but typically will involve considering whether the Investor and its investment fall within the relevant treaty provisions and whether the subject matter of the claim is one that is covered by the treaty.

A State challenging the ability of the Investor to bring its claim may create an obstacle to the State being able to settle that claim before a decision has been made on jurisdiction.

Conversely, States may, in some instances, see strategic benefit in settling claims without prejudice to arguments on jurisdiction which are thereby preserved without decision and remain available as a defence to future claims.

6

Interim relief is a decision made pending the final outcome of the case.

Often this is an order to preserve a current situation (sometimes termed the 'status quo') pending the determination of whether either side is entitled to take action to change that situation.

If either side considers that it needs urgent interim relief to avoid significant or irreparable harm, then it may be unwilling to mediate the dispute until its application for such relief is decided, or until the other party commits not to take the threatened action for a sufficient period to allow the mediation to take place.

7

Mediation is a separate process to any arbitration or other proceedings to determine the dispute.

The costs of mediation will typically be modest compared to the costs of the main proceedings.

Nevertheless, a budget will be needed for preparation, attendance and legal representation at any mediation, as well as the costs of the mediator, and potentially venue hire, travel, accommodation, etc.

Some costs may be avoided or reduced if the mediation is conducted online.

8

Where the remedy is monetary damages, it may be assumed that the State would have the power to agree to a compromise payment, subject to considerations of authorisation or scrutiny that may be involved.

9

If the remedy is something that the State is not able to bring about, then the Investor cannot expect it to form part of a negotiated settlement. In that situation, the Investor would need to be willing to accept some other compensation or remedy as a substitute.

10

Mediation is typically a confidential process in which opposing parties feel comfortable making concessions to their formal positions on an 'off the record'/'without prejudice' basis in order to seek a settlement compromise that avoids the needs for further proceedings and a formal award/order on the claims.

However, the nature of investment claims can mean that the existence of the claim becomes public (e.g. through inclusion in the public register of proceedings initiated at the International Centre for Settlement of Investment Disputes (ICSID), if the Investor is obliged to make an announcement to its shareholders, or if the State considers that public interest requires some form of disclosure, or if disclosure is compelled, or comes about through a leak or inadvertence).

Where the existence of a claim and the formal positions adopted by the parties are public, it can make it more difficult for either side to compromise.

On the Investor side, company management may be criticised for abandoning or compromising valuable claims.

On the State side, government officials may be criticised for not fighting claims involving public funds/assets to a decision, and may also expose themselves to accusations that any settlement was brought about by corrupt inducements.

In certain jurisdictions there is also a risk of the government or public official acting as the officer signing the settlement agreement being faced with personal liability.

Interested action groups may also bring public action litigation against governments seeking to prevent settlements with which they disagree.

11

To date, nine States have ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention') committing to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to investment disputes.

Parties to pending or actual ISDS proceedings should consider whether the Mauritius Convention applies to them. See signatories and treaty text at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII 3&chapter=22&clang=_en.

Even if the Mauritius Convention applies, it should be noted that a mediation can nevertheless remain confidential.

If applicable, the ICSID rules on transparency also provide for greater transparency of the arbitration.

12

If the lack of confidentiality is likely to make it difficult to move from a public position and/or agree to a compromise, consider some other alternative dispute resolution (ADR) process such as non-binding early neutral evaluation (i.e. an evaluation of the merits of the claim by an experienced, independent lawyer or retired judge approached by the parties jointly to prepare such an evaluation).

The fact that a claim is, or may become, public should not of itself be a reason to reject the use of mediation.

However, where a claim involves an industry or issue that is highly politicised or sensitive, it may be difficult for a State to consider any public compromise.

INVESTOR DECISION TREE

Investor Decision Tree

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7

If Investors have entered into a third-party funding arrangement, they should consider what approval and participation may be necessary and/or prudent to seek from third-party funders before embarking on a mediation process because issues of the authority to settle claims and the mechanisms for doing so will typically be covered by the terms of any third-party funding arrangements.

8

If the Investor's preferred solution is not one that any arbitral tribunal could order as a result of an arbitration, then this may be a factor in seeking to agree to more 'creative' solutions with the State through mediation (which is not constrained to remedies available via arbitration).

9

Fourteen States have to date ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention') committing to enforce settlement agreements resulting from mediation that fall within the terms of the Singapore Convention (albeit some have made a reservation). This includes the criterion that the settlement resolves a 'commercial dispute'.

Parties to pending or actual ISDS proceedings should consider whether the Singapore Convention applies to them (see signatories at https://www.singaporeconvention.org/jurisdictions), including whether the dispute in question would be considered 'commercial' under the Singapore Convention and by the national courts of any country where it may need to be enforced.

Even if the dispute may not fall within the terms of the Singapore Convention, the fact that a State is a signatory may indicate a commitment to recognise and adhere to settlement agreements resulting from mediation.

10

Where the terms of settlement are included in an Award by the Tribunal, the result may be enforceable under the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') or under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention').

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