28 & 29 OCTOBER 2021

HONG KONG SAR, CHINA

PROCEEDINGS

UNCITRAL
WORKING GROUP III ON ISDS REFORM

Inter-Sessional Meeting

The Use of Mediation in ISDS

AAIL ASIAN ACADEMY OF INTERNATIONAL LAW


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Proceedings

of

2021 UNCITRAL Working Group III Inter-Sessional Meeting

The Use of Mediation in ISDS

ORGANISERS

United Nations Commission on International Trade Law

Department of Justice, The Government of the Hong Kong Special Administrative Region of the People's Republic of China

Asian Academy of International Law

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United Nations Commission on International Trade Law
https://uncitral.un.org/

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. A legal body specialising in commercial law reform worldwide for over 50 years, UNCITRAL is dedicated to the modernisation and harmonisation of rules on international business. Amongst its various working groups, UNCITRAL Working Group III currently focuses on investor-State dispute settlement (ISDS) reform and is tasked with identifying concerns and considering recommendations to enhance the ISDS mechanisms.

Department of Justice
The Government of the Hong Kong
Special Administrative Region

Department of Justice
The Government of the Hong Kong Special Administrative Region of the People's Republic of China
https://www.doj.gov.hk

The Department of Justice's vision is to advance the rule of law and access to justice, through effective, efficient and equitable administration of justice and strategic legal policy, for inclusive and sustainable development. As its mission, the Department of Justice has pledged to: strengthen the community's understanding and practice of the rule of law; act as a guardian of public interest; adhere to its independent role of conducting criminal prosecutions free from any interference; provide independent and professional legal advice to the Government; prepare clear, intelligible and accessible legislation; and enhance and promote Hong Kong SAR's status as an international legal hub for legal, deal-making and dispute resolution services. Since 2017, the representatives of the Department of Justice have, pursuant to the 'One Country, Two Systems' policy and the Basic Law, participated in the work of UNCITRAL Working Group III as members of the Chinese delegation.

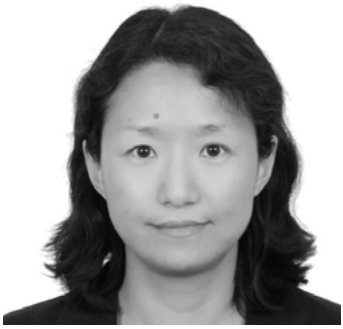
Asian Academy of International Law
https://aail.org

The Asian Academy of International Law (the Academy) is an independent and registered charitable body set up in Hong Kong to further the studies, research and development of international law in Asia. By organising conferences, seminars, workshops and specialised courses, the Academy aims to enhance and reinforce Asia's role and participation in the formulation of international law and international relations. In addition to promoting capacity building among Asian countries, the Academy also endeavours to facilitate collaboration among practitioners and academics. Since 2018, the Academy has been attending sessions of UNCITRAL Working Group III as an observer.

[28 October 2021]

Opening Remarks

開幕致辭



李詠箑
司長
中華人民共和國商務部條法司

李詠箑爲現任中國商務部條法司司長，負責世界貿易組織（世貿）爭端解決、投資協定談判、投資者與國家間爭議解決，以及與投資、貿易和國際經濟合作有關的立法工作。李詠箑代表中國參與了與主要貿易伙伴的雙邊投資協定談判，在世貿爭端解決方面擁有豐富經驗，並處理過多宗投資爭端。李詠箑畢業於北京外國語大學、對外經濟貿易大學和美利堅大學。

很高興參加由貿法會第三工作組、香港律政司以及亞洲國際法律研究院聯合舉辦的這次間會研討會！今天的間會研討會是2020年間會預備研討會的延續，兩次會議的主題均是投資爭端的調解。

儘管受到疫情的影響，會議只能線上舉行，但我們很高興地看到，第三工作組關於投資爭端解決機制的討論沒有停滯。我的同事告訴我，2020年間會預備研討會以來，關於投資爭端調解，秘書處已經提供了詳細的背景文件和具體條款。我們高興地看到關於調解的討論，已經從概念逐漸進展到具體的制度設計。

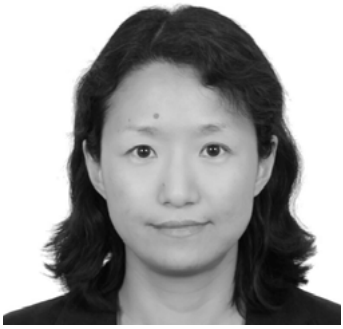
儘管有了這些積極的進展，但我們認爲，關於投資爭端調解仍有一些重要的問題需要研究。我們同意秘書處提出的、需要進一步研究的三個核心問題，特別是第一個問題 — 如何促進調解的使用。我們認爲這個問題至關重要。其中最關鍵的是，如何能夠推動東道國政府願意使用投資爭端的調解制度，因爲這一點對未來精心設計的投資爭端調解制度能否眞正地運作至關重要。

回答並且解決這個問題並不容易。根據我們的經驗，東道國政府和投資者在決策方式上有顯著不同。對投資者而言，只要願意就可以同意調解。但東道國政府往往面臨著本國法律的束縛，還需要協調大量不同利害關係方的意見，往往東道國政府的妥協餘地和靈活空間是非常有限的。所以，調解制度的設計如何能夠幫助東道國政府緩解和減少這方面的困難和壓力就顯得尤爲必要。在此方面，我特別希望通過本次會議能夠聽到各位專家的具體建議。

另外我還希望提及一點，儘管第三工作組的討論已經在調解和行爲守則方面取得了積極進展，但是關於投資爭端解決機制仍有很多關鍵的問題有待討論。一方面，投資仲裁程序的過度商事化、投資仲裁的裁決缺乏合理穩定

的法律預期，這一直是引起廣泛爭議的問題。另一方面，投資仲裁的費用和成本不斷攀升，對爭端雙方都造成了沉重的負擔。調解只能部分緩解上述問題，但是這些關鍵問題的解決還需要繼續推進第三工作組的改革進程。希望大家能夠共同努力，投入第三工作組的討論。預祝本次研討會圓滿成功！

Opening Remarks



Li Yongjie

Director-General

Department of Treaty and Law, Ministry of Commerce,
People's Republic of China

Ms Li Yongjie is currently the Director-General of the Department of Treaty and Law of the Ministry of Commerce of China. In this capacity, she is responsible for World Trade Organization (WTO) dispute settlement, investment agreement negotiations, Investor-State dispute settlement, and legislations relating to investment, trade, and international economic cooperation. By representing China, Ms Li has been engaged in bilateral investment agreement negotiations with major trading partners. She also has extensive experience in WTO dispute settlement and has handled a number of investment disputes. Ms Li studied at Beijing Foreign Studies University, University of International Business and Economics, and American University.

It is my pleasure to participate in this Inter-Sessional Meeting jointly organised by the UNCITRAL Working Group III, Department of Justice of the Hong Kong SAR and Asian Academy of International Law. Today's Meeting is a continuation of the preparative meeting held in 2020 that focused on discussing the use of mediation in investment disputes.

Due to the pandemic, this Meeting has to be held online, but we are pleased to see that the group discussion on dispute settlement mechanism has not stalled. My colleagues told me that, since the preparative meeting of 2020, the UNCITRAL Secretariat has provided detailed background papers and specific provisions on investment dispute mediation. And we are pleased to see that the discussion on mediation has gradually progressed from concept to concrete institutional design.

Despite the positive progress, we believe there are still certain important issues to be addressed regarding investment dispute mediation. We agree with the three core issues raised by the UNCITRAL Secretariat, especially the first one – promoting the use of mediation in investment disputes, which we believe is very crucial. And the most critical part is to encourage host governments to use mediation as it is vital to the future application of investment dispute mechanism.

It is not easy to address this issue. In our experience, there is a significant difference in the way governments and investors make decisions. For investors, they could go for mediation as long as they want to; but host governments are often faced with the constraints of domestic laws and the need to coordinate the views of a large number of different stakeholders, leaving them not much leeway. Therefore, it is crucial to design a mediation system that could actually help host governments to deal with the aforementioned issue. In this regard, I am hoping to get some specific suggestions

from the experts at this Meeting.

Another point that I would like to mention is that, although the discussion in Working Group III has made positive progress in mediation and code of conduct, there are still many key issues pending discussion. On the one hand, there are two widely debated issues, i.e. the excessive commercialisation of investment arbitration procedures and the lack of stability of legitimate expectations in investment arbitration award. On the other hand, the costs and fees of arbitration are rising, placing a heavy burden on both sides of the dispute. Mediation can only solve part of the problems, and the ultimate solution would require the continuous effort put forth by the Working Group III. Let us have a fruitful discussion and I wish this Meeting a great success!

Opening Remarks

Anna Joubin-Bret

The Secretary

United Nations Commission on International Trade Law

Ms Anna Joubin-Bret is the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) and the Director of the International Trade Law Division in the Office of Legal Affairs of the United Nations, which functions as the substantive secretariat for UNCITRAL. She is the 9th Secretary of the Commission since it was established by the General Assembly in 1966. Prior to her appointment on 24 November 2017, Ms Joubin-Bret practiced law in Paris, specialising in International Investment Law and Investment Dispute Resolution. She focused on serving as counsel, arbitrator, mediator and conciliator in international investment disputes. She served as arbitrator in several ICSID (International Centre for Settlement of Investment Disputes), UNCITRAL and ICC (International Chamber of Commerce) disputes. Prior to 2011 and for 15 years, Ms Joubin-Bret was the Senior Legal Adviser for the United Nations Conference on Trade and Development (UNCTAD). She edited and authored seminal research and publications on international investment law, notably the Sequels to UNCTAD IIA Series, and co-edited with Jean Kalicki a book titled *Reshaping the Investor-State Dispute Settlement System* in 2015. Ms Joubin-Bret holds a postgraduate degree (DEA) in Private International Law from

the University of Paris I Panthéon-Sorbonne, a Master's degree in International Economic Law from the University of Paris I and in Political Science from Institut d'Etudes Politiques. She was Legal Counsel in the legal department of the Schneider Group, General Counsel of the KIS Group and Director-Export of Pomagalski S.A. She was appointed judge at the Commercial Court in Grenoble (France) and was elected Regional Counsellor of the Rhône-Alpes Region in 1998.

Madame Li, dear Teresa, distinguished delegates, ladies and gentlemen.

It is a great pleasure to deliver the opening remarks for the fifth Inter-Sessional Meeting of Working Group III on the Use of Mediation in Investor-State Dispute Settlement (ISDS). I would like to first express my thanks to the Central Government of the People's Republic of China, Department of Justice of the Hong Kong SAR and Asian Academy of International Law for hosting us, and to all those who have worked diligently behind the scenes, especially David Ng and Dora Sze, in co-organising this inter-sessional meeting dedicated to advance the work on mediation in the ISDS context.

When we decided to hold a pre-intersessional meeting in November 2020, it was with the hope that we would be able to meet in person in 2021. I know that a lot of effort has been put to make this happen and I myself was scheduled to travel to Hong Kong. Unfortunately, due to the current travel restrictions, I have decided to rain check with the hope that we shall meet and engage in discussions soon in-person. Nonetheless, we trust the hybrid format would provide ample opportunity to engage in fruitful discussions.

In November 2020, during the pre-intersessional meeting, it was emphasised that mediation could offer host jurisdictions and foreign investors unique benefits, including a high degree of autonomy, flexibility, and consensual settlement arrangements for the resolution of international investment disputes. In addition, it was highlighted that mediation also allowed parties to preserve their long-term business relationships and save significant costs and time.

The purpose of this Meeting is to bring together delegations of UNCITRAL's Working Group III, practitioners, and academics

to discuss ways in which the use of mediation can be strengthened in the context of investor-State disputes as part of the ISDS reform package.

To this end, the two-day programme comprises a series of panel discussion, workshop and roundtable discussions to engage in discussions to

(a) Obtain feedback on the two draft notes prepared by the UNCITRAL Secretariat, one on treaty provisions and another on guidelines for participants engaged in investor-State mediation; and

(b) Explore how the existing UNCITRAL mediation framework could be utilised and may enhance investor-State mediation.

In July 2021, UNCITRAL adopted three new texts in the area of mediation supplementing the Singapore Convention and 2018 Model Law, and one of them is the **UNCITRAL Mediation Rules**, which provide comprehensive procedural rules for the conduct of mediation as well as model provisions. The Singapore Convention on Mediation is continuing to draw attention, with Turkey depositing its instrument of ratification in the past two weeks. We would like to take this opportunity to congratulate them for this achievement.

Given the ultimate aim of this Inter-Sessional Meeting, we strongly encourage delegations of Working Group III to make interventions and share their views on and experiences with mediation in the roundtable discussions. This is particularly important as the deliberations of this Inter-Sessional Meeting will form the basis of and facilitate the update of the two draft notes by the Secretariat before it is discussed formally by the Working Group at a session. We also hope that this Meeting would serve as a capacity-building

function for delegations for their work in Working Group III.

In closing, I wish you an enriching and informative experience over the next two days. Thank you very much and all the best.

PRESENTATION BY THE UNCITRAL SECRETARIAT OF THE INITIAL DRAFTS ON MEDIATION AND OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION (ADR) AS POSSIBLE REFORM OPTION

Corinne Montineri

Senior Legal Officer
United Nations Commission on International Trade Law

Ms Corinne Montineri is the Senior Legal Officer at the International Trade Law Division of the United Nations Office of Legal Affairs, which functions as the substantive secretariat for the United Nations Commission on International Trade Law. She is currently the Secretary of Working Group III on Investor-State Dispute Settlement Reform and also services the sessions of Working Group II on Dispute Settlement. Before joining the United Nations in 2003, she was Legal Counsel in the legal department of French companies. Ms Montineri holds a post-graduate degree (DEA) in Private International Law and International Trade Law from the University of Paris I Panthéon-Sorbonne, a Master's Degree in International Law from the University of Paris I and a degree in Economy and Finance from Institut d'Etudes Politiques, Paris.

Judith Knieper

Legal Officer

United Nations Commission on International Trade Law

Ms Judith Knieper is a legal officer at the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) in Vienna. Until her appointment to the Secretariat, she had been working in South East Europe from 1998 to 2013 for numerous donors/organisations, e.g. OSCE (Organization for Security and Co-operation in Europe), CoE (Council of Europe), World Bank and GIZ (Deutsche Gesellschaft für Internationale Zusammenarbeit), the German international cooperation. She obtained both Legal State Exams in Frankfurt, Germany, as well as her Ph.D. and is also qualified and certified as a mediator.

Jae Sung Lee

Legal Officer

United Nations Commission on International Trade Law

Mr Jae Sung Lee is a legal officer at the International Trade Law Division of the United Nations Office of Legal Affairs, which functions as the substantive secretariat for the United Nations Commission on International Trade Law. He functions as the secretary of Working Group II on Dispute Settlement and further services the Working Group III on Investor-State Dispute Settlement Reform. Before joining the United Nations in 2007, Jae Sung served in the Korean Ministry of Foreign Affairs. A Korean national, Jae Sung is a graduate of Seoul National University School of Law, and holds LL.M. degrees from Seoul National University Graduate School of International Studies and New York University School of Law as well as a Ph.D. in Law from Seoul National University.

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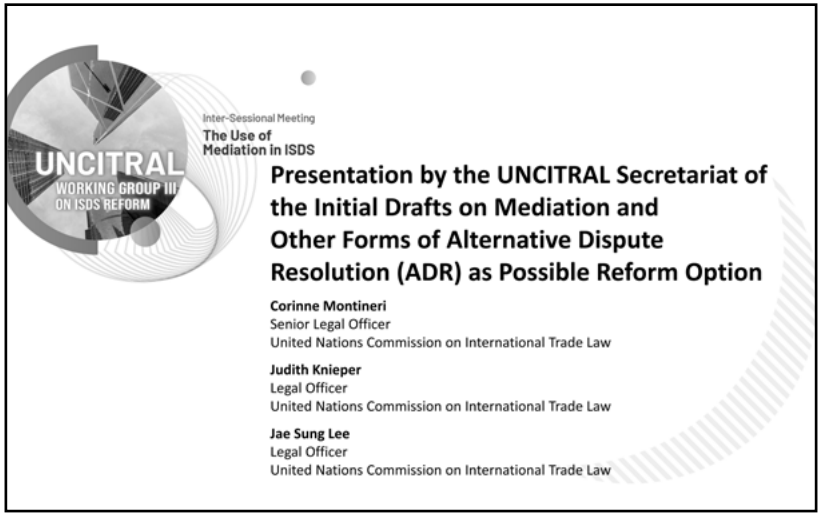

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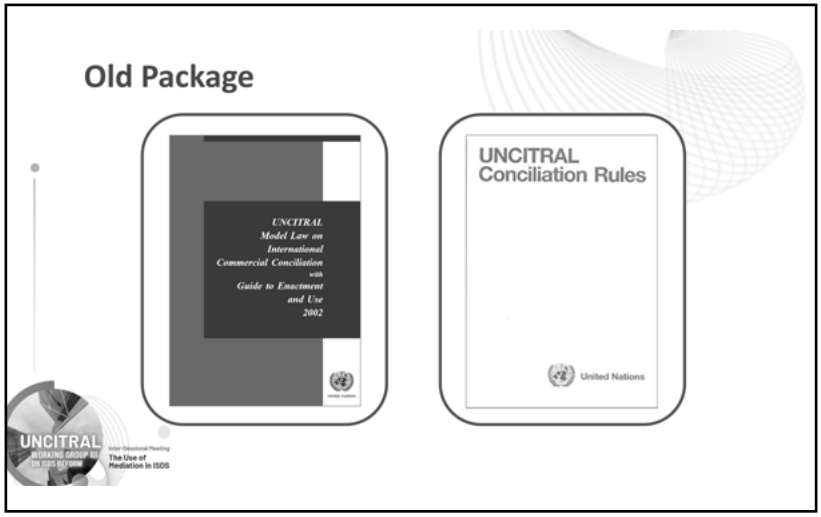

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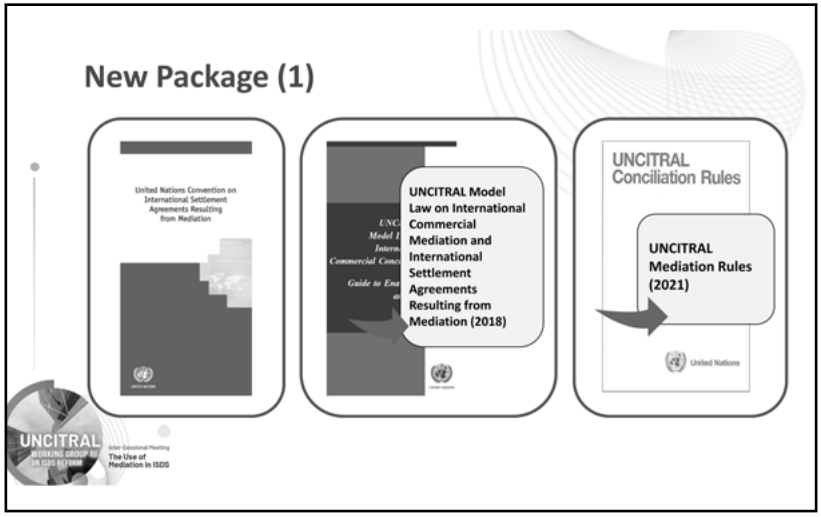

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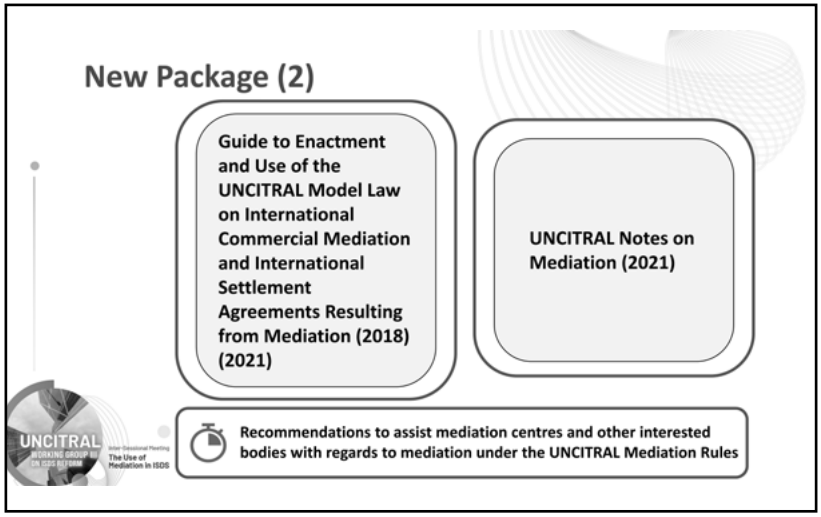

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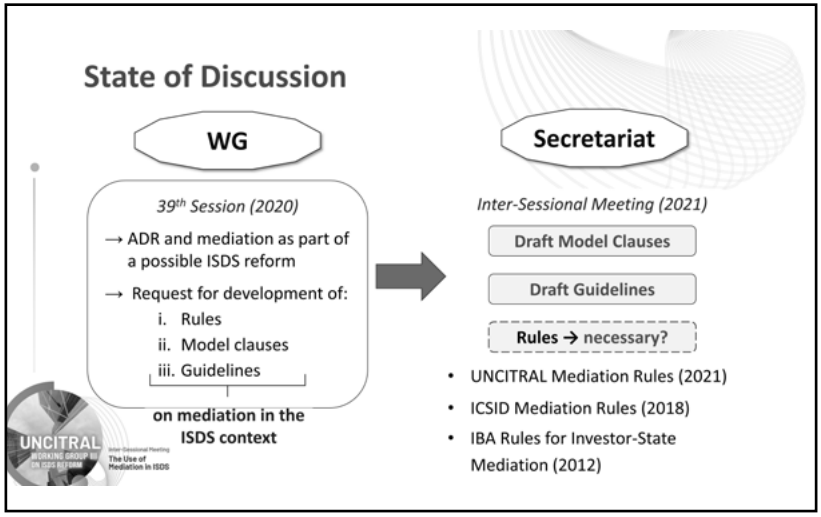

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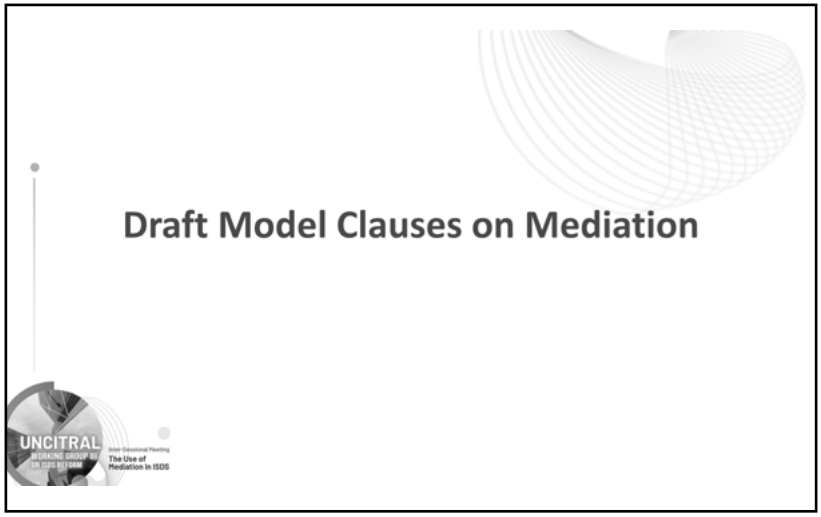

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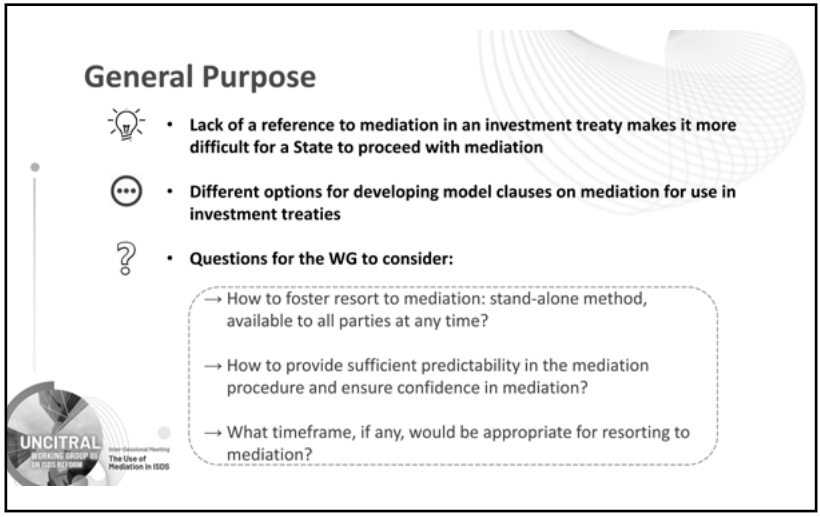

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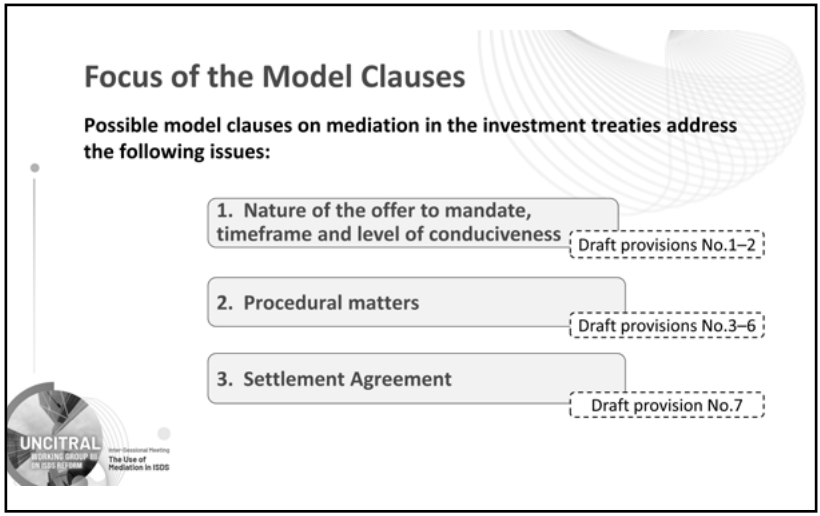

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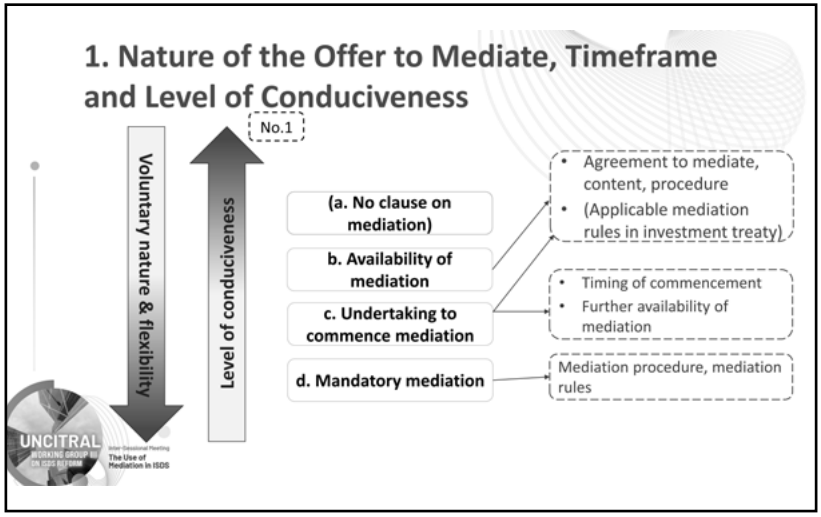

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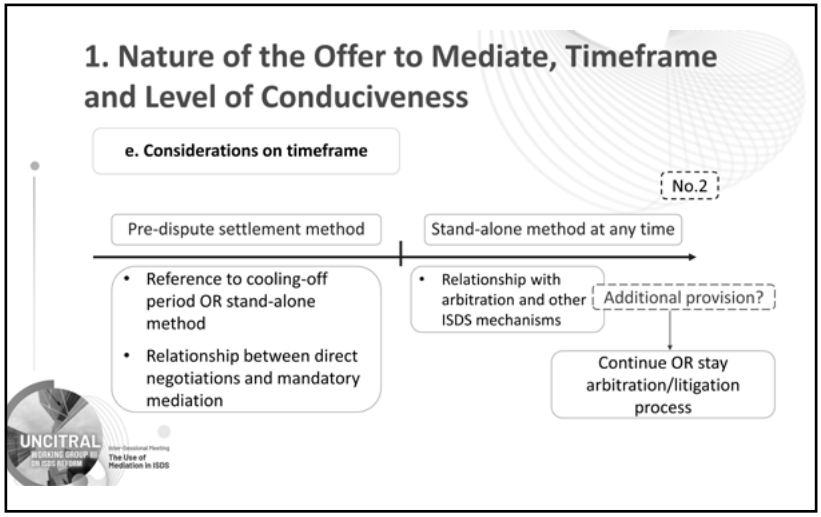

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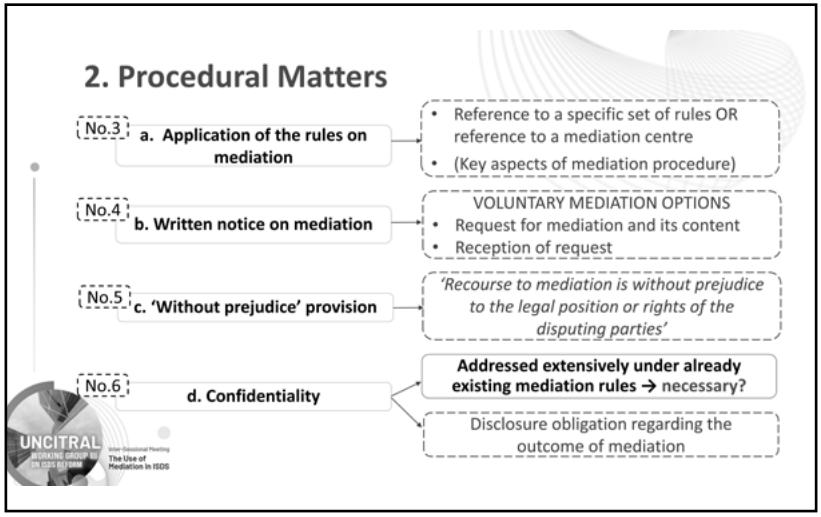

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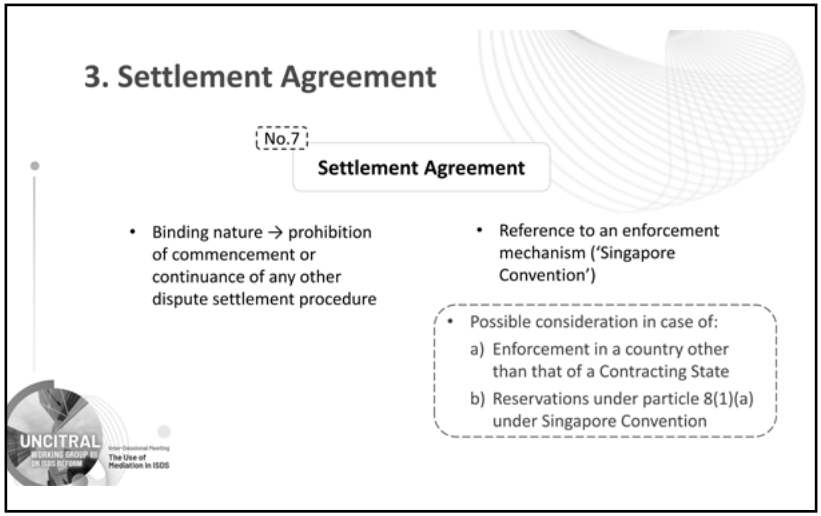

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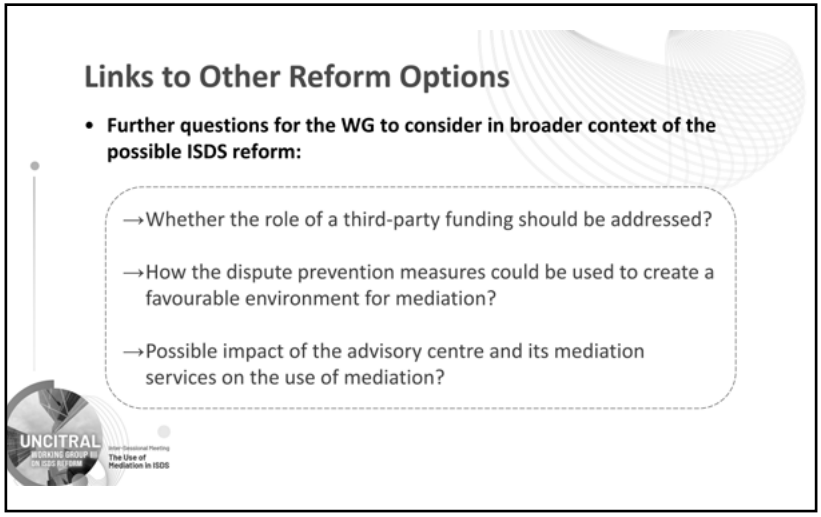

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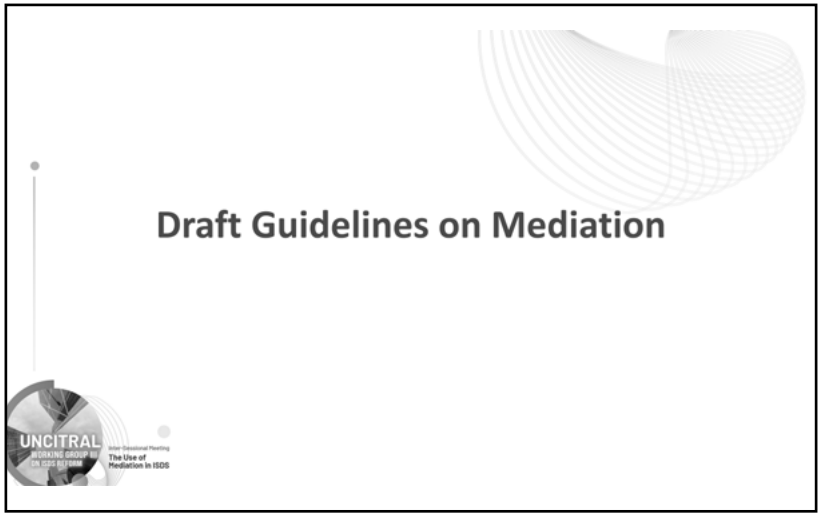

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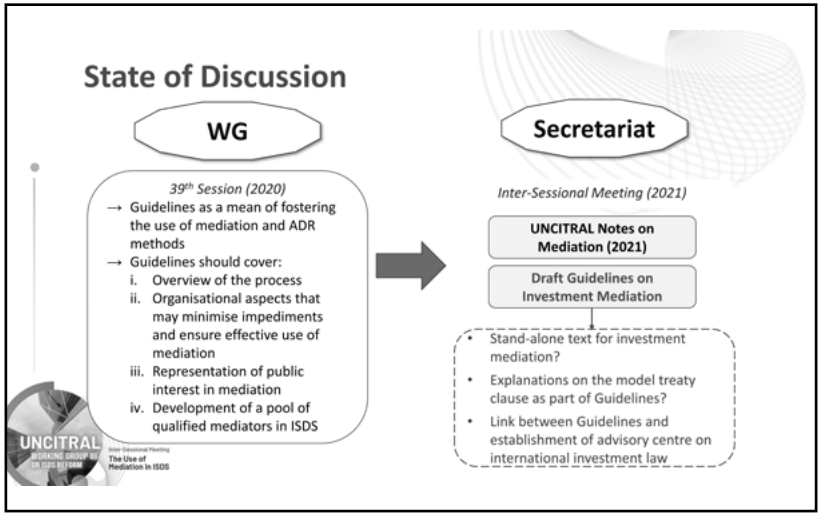

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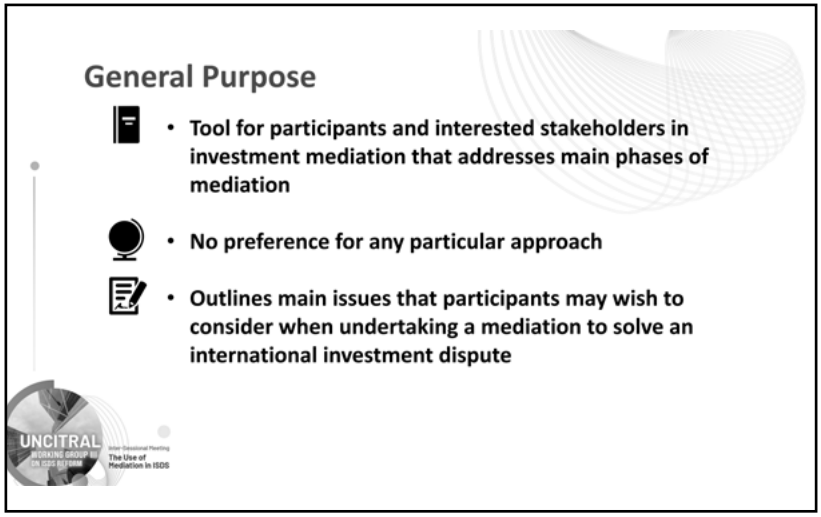

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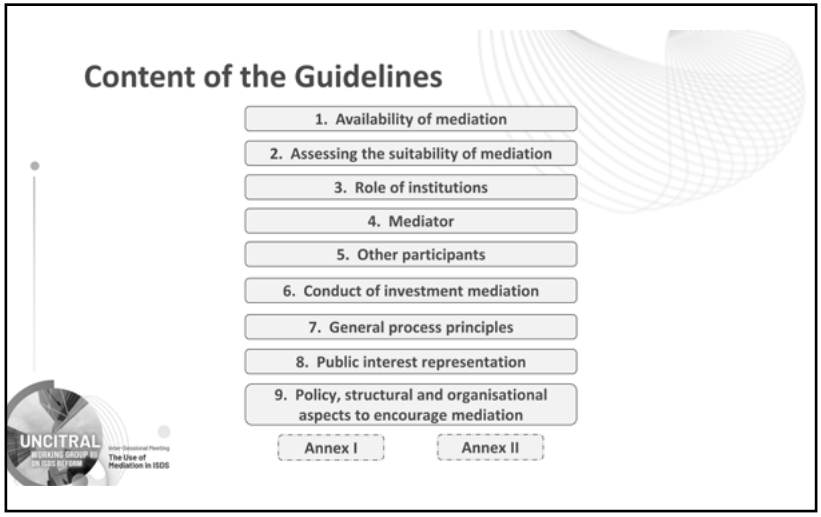

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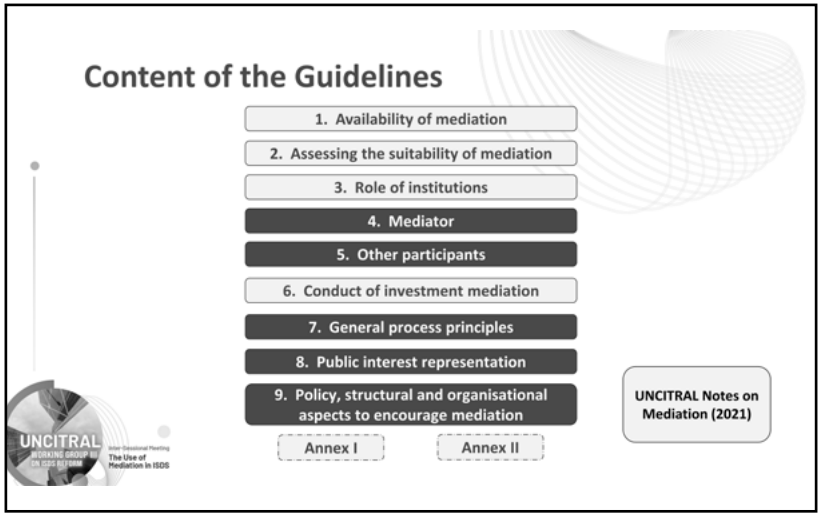

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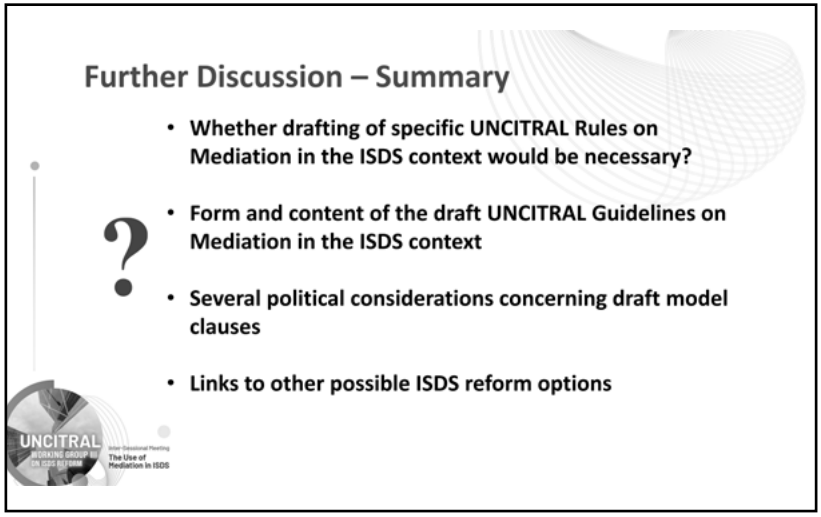
Further Discussion – Summary
?
• Whether drafting of specific UNCITRAL Rules on Mediation in the ISDS context would be necessary?
• Form and content of the draft UNCITRAL Guidelines on Mediation in the ISDS context
• Several political considerations concerning draft model clauses
• Links to other possible ISDS reform options
UNCITRAL
The Use of Mediation in ISDS

[An initial draft]

Possible reform of investor-State dispute settlement (ISDS)
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C. Linkage to other reform options

I. Introduction

1. At its thirty-ninth session, the Working Group noted the general interest in pursuing further work on alternative dispute resolution (ADR) methods, including mediation, with a view to ensuring that these methods could be more effectively used (A/CN.9/1044, para.35). It was observed that these methods were still largely underutilised in the settlement of international investment disputes. The structural, legislative and policy impediments to their use, in particular for governments, were also noted (A/CN.9/1044, para.35). The Working Group therefore requested the Secretariat to work with interested organisations, including with the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID), to develop or adapt (i) rules for mediation in the investor-State dispute settlement (ISDS) context; (ii) model clauses providing for mediation that could be used in investment treaties or a potential multilateral instrument on ISDS reform; and (iii) guidelines for effective use of mediation (A/CN.9/1044, paras.36–40).

2. Regarding the development of mediation rules, the Working Group may wish to note that the UNCITRAL Mediation Rules, adopted by the Commission at its fifty-fourth session in 2021, are of a generic nature and are available for the settlement of international investment disputes.[1] It may also be noted that there are specific rules designed for the settlement of investor-State disputes, such as the ICSID Mediation Rules[2] and the IBA Rules on Investment for

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1 According to a definition in Footnote 1 of the Model Law on International Commercial Mediation and Settlement Agreements resulting from Mediation (2018), "the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: (...) investment (...)" (see https://uncitral.un.org/sites/uncitral.un.org/files/media- documents/uncitral/en/annex_ii.pdf).

2 See https://icsid.worldbank.org/fr/node/18906

Investor-State Mediation.[3] In that light, the Working Group may wish to consider whether the development of specific rules would be necessary or rather duplicative of the existing standards, and whether reform efforts should focus on the development of model clauses (see section B below) and guidelines (see section C in the addendum to this Note), which aim at fostering the use of mediation in international investment dispute settlement.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic.[4] This also includes research and analysis undertaken by the Secretariat of ICSID on the topic. This Note does not seek to express a view on the reform options which is a matter for the Working Group to consider.

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II. Mediation in international investment disputes

A. Background information on mediation in ISDS

5. The Working Group may wish to note that mediation has been mentioned as an element of reform in many submissions by

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3 See https://www.ibanet.org/MediaHandler?id=C74CE2C9 -7E9E-4BCA-8988-2A4DF573192C

4 Such published information include: the 2016 Energy Charter Secretariat, Investment Guide Energy Charter Conference: Guide on Investment Mediation (adopted 19 July 2016), available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC2 01612.pdf, and the Model Instrument on Management of Investment Disputes, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes; ICSID, Background Paper on Investment Mediation, July 2021, available at https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_In vestment_Mediation.pdf, and Overview of Investment Treaty Clauses on Mediation, July 2021, available at https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_T reaties.pdf; K. Fan, "Mediation of Investor-State Disputes: A Treaty Survey", *Journal of Dispute Resolution* (2020), No.2, Article 8, pp.327–342, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3549661; C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, "Mediation in Future Investor-State Dispute Settlement", Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic- forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf (AF Study); R. Weeramantry, B. Chang and J. Sherard-Chow, "Investor-State Arbitration Meets Mediation: Putting Mediation and Conciliation Back into ISDS —The Asian Experience", Kluwer Arbitration Blog (2 October 2020, available at http://arbitrationblog.kluwerarbitration.com/2020/10/02/investor-state-arbitration-meets- mediation-putting-mediation-and-conciliation-back-into-isds-the-asian-experience/

States in preparation for the third phase of its mandate ("Submissions"). Nearly all Submissions referring to mediation highlight that it is less time and cost-intensive than arbitration, and that its increased use would therefore address concerns regarding the cost and duration of ISDS.[5] In addition, mediation is considered as offering a high degree of flexibility and autonomy to the disputing parties and allowing the preservation of long-term relationships through appropriate measures, thus serving the purpose of averting disputes and avoiding intensification of conflicts (A/CN.9/1044, para.27).[6]

6. The Working Group may wish to consider the brief overview below regarding the reference to mediation under existing investment treaties, noting also the difficulties faced by States in using mediation where it is not already provided for under investment treaties.

1. Mediation under existing investment treaties

- *Reference to mediation*

7. It may be noted that a vast majority of ISDS clauses in investment treaties foresee a so-called cooling off period before arbitration can be triggered,[7] ranging from 3 months to 2 years, but only a few provide for mediation either before or during this period.

8. Clauses range from those:

- Providing for a specified time period that must

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5 Submission from the Government of Thailand (A/CN.9/WG.III/WP.147, para.7); Submission from the Governments of Chile, Israel and Japan (A/CN.9/WG.III/WP.163, p.7, annex I); Submission from the Government of Turkey (A/CN.9/WG.III/174, p.3, bullet point 7); Submission from the Government of South Africa (A/CN.9/WG.III/WP.176, paras.40 and 41); Submission from the Governments of Chile, Israel, Japan, Mexico, and Peru (A/CN.9/WG.III/WP.182, p.2, annex).

6 Submission from the Government of China (A/CN.9/WG.III/WP.177, p.5).

7 A study suggests that more than 70% of the treaties contain cooling off clauses, see C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, "Mediation in Future Investor-State Dispute Settlement", Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020).

elapse before submission of a claim to arbitration, without any reference to mediation and other forms of ADR,[8] or with a general direction that the parties to the dispute should attempt to resolve the dispute "amicably" during such specified time period, while remaining silent as to the method and process the parties might use to achieve a settlement, and not requiring the parties to follow any determined procedure;[9]

- Referring to direct negotiation or consultation;

- Providing for mediation as one of the means for reaching amicable settlement[10] together with consultation and negotiation,[11] or as a separate means,[12] with some clauses including the advance consent of the State to mediation at the investor's

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8 See, for example, the Bolivia-US BIT (1998), Article IX(2) ("a ... party to an investment dispute may submit the dispute for resolution" to binding arbitration provided, *inter alia*, "that three months have elapsed from the date on which the dispute arose.")

9 See, for example, Peru-UK BIT (1993), Article 10 ("Any legal dispute arising between one Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former shall, as far as possible, be settled amicably between the two parties concerned. If any such dispute cannot be settled within three months between the parties to the dispute through amicable settlement, pursuit of local remedies or otherwise, each Contracting Party hereby consents to submit it to [ICSID] for settlement by conciliation or arbitration..." Other examples are found in the Hungary-UK BIT (1987), Article 8, the Indonesia-Netherlands BIT (1994), Article 9, and the Georgia-Israel BIT (1995), Article 8.

10 See Iraq-Saudi Arabia BIT (2019), Article 12 (1), which refers to direct amicable means, mediation or conciliation; Egypt-Mauritius BIT (2014), Article 10(1); Mali- Morocco BIT (2014) Articles 9(1) and (2); Colombia-Singapore BIT (2013), Article 13(2); Austria-Nigeria BIT (2013), Article 20; see also Bahrain-Russian Federation BIT (2014), Article 8, which mentions mediation to be held under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes.

11 See Kazakhstan-United Arab Emirates (2018), Article 10 (1); Austria-Kyrgyzstan BIT (2016), Article 20; Turkey-Ghana BIT (2016), Article 14; Netherlands Model BIT (2019), Article 17; see also CPTPP, Article 9.18 ("Consultation and Negotiation 1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.")

12 See C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), which indicates that 44% of the cooling off periods do not mention any means, 42% mention negotiation, 10% mention consultations, 3% mention conciliation and 1% mention mediation.

election, making it optional for the investor;[13]

- Providing that a disputing party shall give favourable consideration to a request for mediation by the other disputing party;[14]

- Imposing a *de facto* obligation on both disputing parties to undertake mediation as a precondition to arbitration;[15]

- Making participation in the designated amicable dispute resolution procedure mandatory for the

13 For example, the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Investment Agreement (2017), Articles 19 and 20; see also the Mainland China-Macau CEPA Investment Agreement (2017), Articles 19 and 20.

14 See, for example, the Netherlands Model BIT (2019), Article 17.1 which provides that disputes should be settled amicably through negotiations, conciliation or mediation in the first instance: "[a] disputing party shall give favourable consideration to a request for negotiations, conciliation or mediation by the other disputing party". The EU-Singapore IPA (2018) and the EU-Viet Nam IPA (2019) both include provisions requiring the recipient to "give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt." CETA (2017) contains a similar provision (Annex 29(C), Article 2(2)).

15 The Costa Rica-United Arab Emirates BIT (2017) foresees two stages before the investor is entitled to proceed to arbitration: the first stage being consultations and negotiation (for which 3 months are reserved), see Article 14 (1), followed "by a third party procedure such as conciliation or mediation before an authorized centre of the Party complained against in the dispute". Article 14 (4) foresees that: "4. For greater certainty, compliance with the requirements pursuant to paragraphs 1, 2 and 3 regarding consultation and negotiation and third-party procedures is mandatory and a condition precedent to the submission of the dispute to arbitration". See also the Rwanda-United Arab Emirates BIT (2017), Article 12: "Mediation and Conciliation, 1. In lieu of, or in addition to, the mandatory negotiation requirement, the parties to the Investor-State Dispute may agree to mediation or conciliation, without prejudice to their rights, claims and defences under this Agreement. 2. The parties to the Investor-State Dispute shall agree upon the rules applicable to (i) the mediation or conciliation of the dispute and (ii) the method of appointment of the mediator or conciliator." See further the EU-Viet Nam IPA (2019), which provides for a three-tier dispute resolution: first, negotiations or mediation, which is then followed by "consultations," and if the dispute is not resolved, the disputing parties may resort to arbitration; Article 3.31 provides that "[t]he disputing parties may at any time ... agree to have recourse to mediation". Having stipulated this multi-tier method for dispute resolution, the EU-Viet Nam IPA (2019) also conditions, in Article 3.35, the submission of a claim to arbitration not only on (i) a minimum period of 6 months having passed since the request for consultations and 3 months having passed since the notice of intent to submit an arbitration claim, but also on (ii) the condition that "the legal and factual basis of the dispute was subject to prior consultations."

investor, at the State's election.[16]

9. While most investment treaties reserve mediation to the pre-arbitration stage during the amicable settlement or cooling off period, some treaties highlight that the disputing parties can refer their dispute, by mutual agreement, to *ad hoc* or institutional mediation or conciliation before or during the arbitral proceedings,[17] thereby allowing mediation at any time.[18] Such clauses provide for a stand-alone mechanism for mediation where mediation is optional, and subject to an agreement to mediate between the investor and the State.[19]

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16 The Australia-Indonesia CEPA (2019) provides for consultations in the initial phase and then stipulates, in Article 14.23, that "[i]f the dispute cannot be resolved within 180 days from the date of receipt by the disputing Party of the written request for consultations, the disputing Party [i.e., the State party to the dispute] may initiate a conciliation process, which shall be mandatory for the disputing investor, with a view towards reaching an amicable settlement." Article 14.26(2)(b) further conditions the commencement of an arbitration on 120 days having elapsed since the State initiated the conciliation process, where the State has elected to do so. The provisions of the Indonesia-Korea CEPA (2020) are similar. The Mauritius-UAE BIT (2015) also provides for "consultations and negotiations" in the initial phase, and thereafter makes mediation or conciliation mandatory for investors, at the State's election. Article 10(3) provides that "When required by the Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice, it shall be submitted to the competent authority of that Contracting Party or arbitration centres thereof, for conciliation and mediation." Article 10(4) provides that the investor can initiate an arbitration "if the dispute cannot be settled amicably within six months from the date of the start of the conciliation and mediation process." The Armenia-UAE BIT (2016) contains similar provisions.

17 See also Colombia-Turkey BIT (2014), Article 12(4), which reads as follows: "Nothing in this Article shall be construed as to prevent the parties of a dispute from referring their dispute, by mutual agreement, to ad hoc or institutional mediation or conciliation before or during the arbitral proceeding." See also Colombia-United Arab Emirates BIT (2017), Art.15(2); and Japan-Morocco BIT (2020), which states in Article 16(3) that "Nothing in this paragraph precludes the use of non-binding, third party procedures, such as good offices, conciliation or mediation."

18 Australia-China FTA (2015), Article 15(6): "Good Offices, Mediation and Conciliation 1. The Parties may at any time agree to good offices, conciliation, or mediation. They may begin at any time and be terminated at any time. 2. If the Parties agree, good offices, conciliation or mediation may continue while the dispute proceeds for resolution before an arbitral tribunal convened under Article 15.7"; Eurasian Economic Union-Viet Nam FTA (2015), Article 145: "Good Offices, Conciliation or Mediation The disputing Parties may at any time agree to good offices, conciliation, or mediation. Procedures for good offices, conciliation or mediation may begin at any time and be terminated at any time upon the request by either disputing Party. If the disputing Parties so agree, good offices, conciliation or mediation may continue while the proceedings of the Arbitral Panel provided for in this Chapter are in progress. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the disputing Parties during those proceedings, shall be confidential and without prejudice to the rights of either disputing Party in any further proceeding."

19 The EU-Singapore and EU-Viet Nam IPAs are examples of treaties with stand-alone mediation mechanisms, providing that "[t]he disputing parties may at any time, including prior to the delivery of a notice of intent, agree to have recourse to mediation." Other examples include the Burkina-Faso-Canada BIT (2015) ("The disputing parties may at any time, be it after notice of intent to submit a claim to arbitration has been given or after a claim has been submitted to arbitration, agree to mediation", Article 23); CETA (2016), Article 8.20; the Netherland Model BIT (2019); Article 17(1); and the Thailand Model BIT (2012), Article 10.

- *Procedural guidance*

10. The substantial majority of ISDS clauses in investment treaties that expressly provide for mediation or other ADR methods do not seek to regulate the applicable procedure in detail. They usually address one or two procedural aspects with minimal guidance.[20] It is noteworthy that a small number of recent treaties include a detailed provision on the mediation procedure.[21]

11. Where a procedure for mediation is provided for, procedural matters addressed have included the commencement of the process, and how the process interacts with other proceedings relating to the same dispute.[22]

2. Identified need to foster the use of mediation in ISDS

12. Data from institutions suggest that mediation and other ADR methods are not often used.[23] As part of the obstacles to their use, the Working Group mentioned the difficulties regarding coordination among the relevant government agencies when negotiating an amicable settlement to a dispute, the legal certainty

20 Such treaties in this last category include: the COMESA IA (2007), Article 26(4); the Belgium-Luxembourg Model BIT (2019), Article 19(C), which designates the Secretary-General of ICSID as appointing authority to appoint a mediator where the parties reque st (see also CETA (2017)).

21 These treaties include: CEPA (2017) (Annex 8); CETA (2017) (Annex 29(C)); the EU-Singapore IPA (2018) (Annex 6); and the EU-Viet Nam IPA (2019) (Annex 9).

22 Some ISDS clauses in recent investment treaties have clarified the timeframe within which mediation can be used and its possible interaction with other dispute settlement methods: for example, the EU-Viet Nam IPA (2019), which provides in Article 3.31(5) for a stand-alone ability to agree to mediation at any time, making explicit that this option can be exercised even if an arbitration proceeding has already been commenced, and mandates that, if there is already an arbitral tribunal constituted at the time of the mediation, it "*shall stay its proceedings until the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party*".

23 ICSID statistics indicate that about 35 per cent of ICSID cases were settled or otherwise discontinued, which might indicate the use of ADR by the parties to some extent (see the ICSID Caseload – Statistics, Issue 2021-1 Statistics, p.11). To date, ICSID has registered 13 conciliation cases, including 2 additional facility conciliation cases, and no case under the ICSID Fact-Finding Additional Facility Rules. The Permanent Court of Arbitration has so far not administered mediation proceedings based on a treaty, nor the Energy Charter Secretariat and neither has the SCC administered any investor-State mediation. The ICC has so far administered only one treaty-based mediation, which ended unsuccessfully due to partial participation of a party (see document A/CN.9/WG.III/WP.190, para.43).

required for officials to be involved in such settlement and the need to ensure that the necessary approval process was set up, including that those negotiating the settlements had the necessary authority to agree to a settlement. It was said that policies as well as the legal framework for encouraging mediation would need to be developed or strengthened (A/CN.9/1044, para.29; see also document A/CN.9/WG.III/WP.190, paras.29–48).[24]

13. As indicated above (see paras.9 and 10), very few treaties regulate the mediation procedure. If the investment treaty does not refer to mediation or does not include a provision requiring the State to undertake mediation, an ad hoc agreement to mediate will be required, which may make it more difficult for government officials to engage in a voluntary mediation.

B. Possible models for a clause on mediation in investment treaties

14. As noted above (see para.13), where mediation is not provided for in the underlying investment treaty, it may be more difficult for a State to proceed with a mediation on an ad hoc basis (A/CN.9/1044, para.29). Therefore, treaty Parties should consider providing for mediation in their investment treaties, so as to establish a favourable framework for its use. There are different possible options for developing model clauses for use in investment treaties which, as indicated below, would be more or less conducive to the use of mediation by the disputing parties.

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24 A study on obstacles to settlements in ISDS concluded that it might be challenging for the State to settle. The reasons identified are manifold and include fear of public criticism, particularly if the case is a sensitive or politicized one, with extensive media coverage, fear of allegations of corruption, or future prosecution for corruption, fear of setting a precedent, difficulties regarding access to public funds to organize the defence, as well as difficulties regarding intergovernmental coordination in short timeframes. This reluctancy may be particularly prevalent in cases involving multiple stakeholders in agencies and ministries across various levels of government who may all need to approve or at least provide input to the settlement (Report: Survey on Obstacles to Settlement of Investor-State Disputes, National University of Singapore, NUS Centre for International Law Working Paper 18/01, by Chew, S., Reed, L., Thomas, J.C. QC, to be found under https://cil.nus.edu.sg/publications; see also Echandi, "Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention", pp.15–19).

15. In that light, the Working Group may wish to consider the following questions when developing a model clause on mediation for investment treaties:

(i) How to foster resort to mediation, and whether making it a stand-alone method, available at any time to all parties, would be more conducive to the use of mediation;

(ii) How to provide sufficient predictability in the mediation procedure to allow States and investors to have confidence in mediation; and

(iii) What timeframe, if any, would be appropriate for resorting to mediation in light of the other available methods for solving investor-State disputes and the need to retain the flexibility inherent to mediation.

1. Nature of the offer to mediate, timeframe and level of conduciveness (Draft provision 1)

a. No clause on mediation

16. The Working Group may wish to consider that, given the voluntary nature of mediation and the flexibility inherent in the process, a first possible approach could be to leave the decision as to whether to use mediation fully in the hands of the disputing parties, as they are best placed to assess whether mediation would be appropriate.

17. This approach would come close to the current situation where mediation is rarely referred to in the investor-State dispute settlement clauses in investment treaties, and therefore also rarely used as it is not part of the ISDS framework.

b. Availability of mediation (Option 1)

18. The Working Group may wish to consider option 1 below which refers to mediation as an available means for solving investor-State disputes. Under such an option, the voluntary nature of mediation would be fully preserved.

> *Option 1 – Reference to mediation as an available means for solving disputes*
>
> > *Each party to the dispute may, [before and during the cooling off period,][at any time,] request the commencement of a mediation procedure.*

19. Under this option, mediation would be expressly mentioned in the investment treaty as a possible means for resolving disputes. It would be upon invitation by a party and acceptance by the other that mediation would commence. It is suggested that the request and acceptance thereof should be made in writing (see also below, paras.40–46).

20. The Working Group may wish to consider whether it would be preferable to also provide that once the parties agree to undertake mediation, they should enter into an agreement to mediate that would set up the agreed procedure. If so, the corresponding provision could read as follows: "*If the disputing parties agree to a mediation, they shall sign an agreement to mediate, which shall determine the applicable procedure.*" The Working Group may wish to consider the level of details that should be provided regarding the content of the agreement to mediate.

21. As an alternative to providing details in the agreement to mediate, the treaty could determine which procedural mediation rules would apply. Mediation rules usually contain all relevant information, including the commencement of the procedure, the appointment of mediators, the confidentiality and transparency requirements, the flow of communications, and the termination of the procedure (see below, paras.35–37).

c. Undertaking to commence mediation (Option 2)

22. The Working Group may wish to consider option 2 below, which would be more conducive to the use of mediation as it requires the disputing parties to commence mediation. It would also preserve the flexibility of the procedure, but the first step of engaging in the procedure would be mandated.

> *Option 2 – Reference to an undertaking to commence mediation*
>
> > *1. The parties to the dispute shall commence a mediation procedure [within – days from –] and attend the first meeting convened by the mediator. If any party does not wish to pursue mediation after having attended the first meeting or at any time thereafter, it shall communicate a written notice to the mediator and to the other party terminating the mediation procedure.*
> >
> > *2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings [arbitration – standing mechanism].*

23. Option 2 would go a step further as compared to option 1, as it provides for an undertaking of the disputing parties to attend at least the first meeting set up by the mediator under paragraph 1. The objective would be to facilitate the formation of a mutually agreed solution, and to make sure that parties would at least attempt mediation. The Working Group may wish to consider the timing for the commencement of the mediation. Paragraph 2 underlines that mediation remains available at any time.

24. The remarks under paragraphs 19 and 20 above are also relevant for this option.

d. Mandatory mediation (Option 3)

25. The Working Group may wish to consider option 3 below which provides for mandatory mediation. This option would depart from the voluntary nature of mediation as there is no room for the disputing parties to decide whether to either undertake mediation (as under option 1) or continue with mediation after a first meeting (as under option 2).

Option 3 – Mandatory mediation

> *1. The parties shall submit their dispute to mediation [within – days from –]. If the parties cannot reach an agreement within [6][9] months after the [commencement of the mediation procedure] [appointment of the mediator], the dispute shall, upon request of any party, be submitted to [arbitration] [other ISDS method].*
>
> *2. Mediation shall remain available to the parties at any time, including after the commencement of other ISDS proceedings (arbitration).*

26. Option 3 provides for mandatory mediation, which implies that a longer period is provided for mediation so as to ensure that the parties would follow a comprehensive procedure with the assistance of the mediator. The length of such period should also be reasonable, so as to encourage an expeditious procedure. Paragraph 2 clarifies that if the mandatory mediation did not end in a settlement, the parties would remain free to engage in a mediation procedure, on a voluntary basis, at any time thereafter.

27. Such mandatory language directing the parties to mediation is more rarely found in investment treaties. It is however a guarantee that the disputing parties would engage in mediation and it would

provide a clear policy basis to do so. Mandatory mediation is also seen as the most conducive option for the use of mediation and for ensuring that parties would become more familiar with it. It would require active participation by the parties in the negotiation and should also be appropriate for the dispute at hand.

28. Where a treaty would provide for mandatory mediation, it would be advisable that it also regulates the mediation procedure to be followed by the parties, including by referring to a set of mediation rules (see below, paras.37–39).

e. Considerations on timeframe (Draft provision 2)

29. The Working Group may wish to consider the various options regarding the timeframe for mediation as provided for under the various options of draft provision 1 above.

[before and during the cooling off period] [within – days from –]

30. Mediation is often conceived of as a pre-dispute settlement method available to parties to find a mutually agreed solution, failing which litigation would commence. If mediation takes place at an early stage, then the dispute has not crystalized and it may be easier to find creative solutions to solve the dispute, not limited to financial compensation. A possible option would be to refer to the cooling-off period as a point of reference in time for the mediation to take place as investment treaties usually specify such a period to encourage the use of ADR methods before parties can initiate formal arbitration procedures. Another option could be to provide for a specific timeframe for mediation as a standalone method disconnected from cooling off periods.

31. Regarding mandatory mediation (option 3 of draft provision 1), which is to be used by parties before the dispute escalates

to arbitration, the findings of a study might be noted. Such study has found that a mandatory mediation requirement would be welcomed.[25] A matter that has raised some comments, however, relates to the relationship between direct negotiation and mediation, in particular whether mediation should be mandated after direct negotiation. A staged or multi-tiered approach, which would provide for direct negotiations first followed by mandatory mediation, has been described as inefficient. A possible conclusion from the study would be that mandatory mediation could be provided for in lieu of, or in addition to, direct negotiation in the cooling off period.[26]

[at any time]

32. Mediation could also be considered as a standalone method available for use by the parties at any time during the dispute settlement stage, including before a formal investment dispute has even crystallized.

33 Permitting the mediation of disputed issues between the parties when they first arise may help prevent fully formed investment disputes from arising in the first place. Expressly permitting mediation during the course of an arbitration may also allow the parties to resolve some elements or potentially the entirety of the dispute, which would consequently reduce the scope of the matters remaining for a binding decision and hence save costs and time and ensure the greatest flexibility to the disputing parties.

- *Relationship with arbitration and other ISDS mechanisms (Draft provision 2)*

34. The Working Group may wish to consider whether additional

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25 2019/2020 QMUL investors' survey, available at http://www.arbitration.qmul.ac.uk/research/, p.25.

26 C. Kessedjian, A. van Aaken, R. Lie, L. Mistelis, "Mediation in Future Investor-State Dispute Settlement", Academic Forum on ISDS Concept Paper 2020/16 (5 March 2020), (AF paper) available at https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic- forum/papers/2020/isds-af-mediation-paper-16-march-2020.pdf

provisions would be needed to address the use of mediation in parallel to arbitration or litigation in cases in which mediation can be used at any time. Some ISDS clauses in recent investment treaties have addressed this topic[27] as well as the impact on applicable time limits that the initiation and conduct of a mediation may have.[28]

35. The Working Group may wish to consider draft provision 2 below which would complement draft provision 1 (as it is relevant for options 1 and 2 and paragraph 2 of option 3).

> *1. If the disputing Parties agree, mediation may continue while the dispute proceeds for resolution before an ISDS tribunal.*
>
> *2. If the disputing parties agree to mediate after the investment dispute has been submitted to [arbitration] / [standing mechanism], upon request of all disputing parties, the tribunal shall stay its proceedings until the mediation is terminated.*
>
> *3. All timelines pursuant to [arbitration] / [standing mechanism] are suspended from the date on which the disputing parties agreed to have recourse to mediation and shall resume on the date on which either disputing party decides to terminate the mediation. Any party may terminate the mediation at any time by written notice to the mediator and to the other party.*

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27 For example, the EU-Viet Nam IPA (2019), which provides in Article 3.31(5) that parties may have recourse to mediation at any time even if an arbitration proceeding has already been commenced, and mandates that, if there is already an arbitral tribunal constituted at the time of the mediation, it "shall stay its proceedings until the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party".

28 For example, the EU-Viet Nam IPA (2019) imposes a limitation period for the initiation of "consultations" (a step that itself follows the initial period of "negotiations or mediation" in this treaty's three-tier disputes clause). The treaty provides expressly that this timeframe is tolled for the period of any voluntary mediation that takes place prior to "consultations" (Article 3.31(4)).

36. Draft provision 2 above foresees that arbitration or litigation processes could either continue or be stayed while mediation commences. They aim at providing a framework for ensuring that mediation could proceed at any time.

2. Other procedural matters

37. The Working Group may wish to consider that, in order to provide for an adequate level of trust in mediation, an ISDS clause would need to adequately spell out matters relevant to the procedure, including by:

(i) Encouraging the application of a set of investment mediation rules, such as the ICSID Mediation Rules, the UNCITRAL Mediation Rules or the IBA Rules for Investor-State Mediation;

(ii) Providing for a clear mechanism to commence mediation, including a request to commence mediation and an acknowledgement of receipt of the request for mediation and, if needed, an agreement to mediate that, *inter alia*, would identify who within the State has had involvement in relation to the dispute; and

(iii) Providing the necessary framework for protecting confidentiality and for a candid exchange of views between the parties, which includes ensuring that documents and views exchanged between the parties will not be used in any further proceedings.

a. Application of rules on mediation (Draft provision 3)

38. The Working Group may wish to consider draft provision 3 below regarding the procedure of mediation.

> *1. Mediation of an investment dispute shall be conducted in accordance with either: (i) the ICSID Mediation Rules; (ii) the UNCITRAL Mediation Rules; or (iii) the IBA Rules for Investment State Mediation, and the provisions of this section.*
>
> *2. The mediation is to be conducted by [one mediator] / [two co-mediators] unless otherwise agreed by the disputing parties. A mediator shall be appointed by agreement of the disputing parties. The disputing parties may also request that a selected appointing authority proposes the mediator to be selected.*

39. Draft provision 3 provides for mediation to be governed by a specified set of mediation rules. The application of mediation rules would aim at ensuring the use of a comprehensive procedural mediation framework and avoiding procedural lacunae or unintended omissions. The Working Group may wish to note that a possible alternative to providing for the application of mediation rules could be to refer to a mediation centre that would provide for a comprehensive mediation framework. A similar approach is found in certain treaties.[29]

40. Regarding paragraph 2, while there would be no need to include such a provision because mediation rules usually address all these matters, States may wish to consider whether there are certain key aspects that they nevertheless would wish to address. The Working Group may wish to consider whether and to what extent other elements of the mediation procedure should be covered in the model clause.

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29 See Armenia-United Arab Emirates BIT (2016), Article 10 (3): "When required by the Contracting Party, if the dispute cannot be settled amicably within three months from the date of receipt of the written notice, it shall be submitted to the competent authority of that Contracting Party or arbitration centres thereof, for conciliation and mediation."; see also Mauritius-United Arab Emirates BIT (2015), Art.10(3).

b. Written notice (Draft provision 4)

41. The Working Group may wish to consider draft provision 4 below regarding the service of notice for mediation which would apply in relation to options 1 and 2 of draft provision 1 as well as option 3 where mediation is undertaken under paragraph 2 (at any time):

> *1. To commence mediation, a party shall communicate to the other party a request for mediation ("request"), which shall contain:*
>
> *Option 1:*
>
> *a. The name and address of that party and its legal representative(s) and, where a request is submitted on behalf of a legal person, the name, address, and place of incorporation of the legal person;*
>
> *b. A [brief/detailed] description of the factual and legal basis of the dispute;*
>
> *c. An indication of the agencies and entities of the Contracting Party that have been involved in the matters giving rise to the dispute;*
>
> *d. An explanation of any prior steps taken to resolve the matters in issue.*
>
> *Option 2:*
>
> *A brief summary of the factual and legal basis of the complaint and information on the subject matter of the claim made or received.*
>
> *2. The other party shall acknowledge receipt*

of any request for mediation within [14] days of its receipt.

Option 1:

The addressee of the request shall give due consideration to it and accept or reject it in writing within [15][30] days of receipt

Option 2:

The disputing parties shall commence mediation within [20] days of the date of the request, or such other period as they may agree.

42. The Working Group may wish to note that draft provision 4 addresses the request to mediation, a matter also often covered by mediation rules. Draft provision 4 provides that the request could be sent by either disputing party.

43. The request for mediation under a treaty is usually (although not always) a separate written notification, distinct from a subsequent written notice of intent to submit a claim to arbitration. The request is meant to enable the parties to understand and assess the dispute and to gather information from the entities involved in the dispute, so as to allow for meaningful participation in the mediation. It may be noted that a very small number of ISDS clauses contain requirements regarding when and how a request for mediation should be responded to by its recipient.[30]

44. There are different approaches in investment treaties as to

30 For example, Article 17.1 of the Netherlands Model BIT (2019) states that disputes should be settled amicably through negotiations, conciliation or mediation in the first instance, stipulating that "[a] disputing party shall give favourable consideration to a request for negotiations, conciliation or mediation by the other disputing party". The EU-Singapore IPA (2018) and the EU-Viet Nam IPA (2019) both include provisions requiring the recipient to "give sympathetic consideration to the request and reply by accepting or rejecting it in writing within ten days of its receipt." CETA (2017) contains a similar provision (Annex 29(C), Article 2(2)).

whether an initial notice must merely inform the other Party of the existence of a dispute[31] or must contain a request regarding the commencement of mediation.[32]

45. Option 1 of draft paragraph 1 provides for specific information to be included in the request. It may be noted that there is also a range of approaches with regard to the information required to be included in any written notice of dispute/written request for the initiation of mediation. As an illustration, clauses may (i) require that the written notice be "*accompanied by a sufficiently detailed memorandum*" or that the notice includes "*detailed information of the facts and legal basis*" of the dispute;[33] (ii) incorporate a qualitative standard describing the amount of details that such written notice should contain;[34] or (iii) stipulate the required content of a written notice of dispute/request for the initiation of mediation, which could include a factual description of the dispute, information relating to the investor, an identification of the provisions allegedly breached, the outcome/relief sought, and/or the supporting documents.[35]

46. By contrast, option 2 does not list specific items to be included in the request to mediation. It provides flexibility to the

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31 For example, the Central America-Korea FTA (2018) (which provides for initial settlement by consultation and negotiation, including through optional mediation) calls for notification of the dispute only, requiring a "dispute ... [to] be notified by submitting a notice of the dispute (notice of dispute) in writing...".

32 Article 152 of the China-New Zealand FTA (2008) calls for the submission of a written request for the institution of the designated amicable dispute procedure: "a request for consultations and negotiations shall be made in writing..."). The CPTPP (2018), (Article 9.18(2), Article 23(2)); and Australia-Peru BIT (2020) (Article 8.19(2)) take this same approach.

33 For example, Belgium-Luxembourg-Montenegro BIT (2010) (Article 12(1)); China-Colombia BIT (2008) (Article 9(2)).

34 For example, Article 14(6) of the Norway Model BIT (2015), which requires a notification in the form of a request for consultation to "include information sufficient to present clearly the issues in dispute so as to allow the Parties and the public to become acquainted with them."

35 For example, Article 20(4) of the Argentina-UAE BIT (2018) requires that "The investor seeking consultations will submit a written request for consultation, specifying: (a) the name and address of the investor and, where the claim is made on behalf of an enterprise, the name, address and place of incorporation of the enterprise; (b) the provision of this Agreement alleged to have been breached and any other applicable provisions; (c) the factual and legal basis for the claim; (d) the relief sought and the approximate amount of damages claimed; and (e) the evidence proving its condition of investor of the other Party and the existence of an investment." See also CEPA (2017) (Annex 8, Article 2).

parties regarding the relevant information needed to commence mediation. This approach is also found under certain investment treaties.[36] It can be noted that, in a number of treaties, a second written notice requesting arbitration may be required if no amicable settlement can be reached; that notice can require additional details to be provided at that later stage.

47. Paragraph 2 requires the recipient of a request to mediate to acknowledge receipt of the request within a specified time period. Imposing such an obligation may help ensure early establishment of a line of communication, thereby enhancing the potential for an amicable settlement. Option 1 would be relevant for situations where mediation is not mandated under the treaty provision, whereas option 2 would only work where mediation is mandated. Where institutional mediation would be chosen, this matter would already be regulated under the institutional mediation rules.

c. Without prejudice provision (Draft provision 5)

48. The Working Group may wish to consider the following draft provision:

> *Recourse to mediation is without prejudice to the legal position or rights of the disputing parties.*

49. In mediation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the mediation does not result in a settlement and a party initiates arbitral or other proceedings, it should be ensured

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36 For example, the Australia-Hong Kong BIT (2019) requires the parties to "*initially seek to resolve the investment dispute through consultations, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.*" It requires that the initiating party "*deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.*" More detail is required to be provided in a subsequent "*written notice of its intention to submit a claim to arbitration*", and is only necessary if the dispute has not been resolved in the initial "consultations" phase.

that those views, suggestions, admissions or indications of willingness to settle will not be used to the detriment of the party who made them.

50. In this respect, it is noteworthy that ISDS clauses in investment treaties that explicitly provide for mediation sometimes include an express "without prejudice" clause, underlining that the participation in the procedure shall not be considered as a concession as to jurisdiction should the dispute proceed to arbitration or that information shared during the mediation should not prejudice the legal position of either party in any other proceedings.[37] This matter is also addressed in existing mediation rules.[38]

d. Confidentiality and transparency (Draft provision 6)

51. The Working Group may wish to consider that confidentiality of the mediation process is carefully addressed under mediation rules regarding both the fact that a mediation in being undertaken and the mediation process.[39] In this light, it would be redundant to provide for detailed provisions on confidentiality.[40] It should be noted that national legislation may provide for disclosure obligations, for example on re-negotiated concession agreements. However, the Working Group may wish to consider whether to

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37 Examples of such clauses can be found, *inter alia*, in the Argentina-Japan BIT (2018), Article 25(1) and the CPTPP (2018), Article 9.18(3). Other treaties, such as CETA (2017), do not limit this caveat to the question of jurisdiction, instead stipulating "*[r]ecourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter.*" (Article 8.20(2)). See also CEPA (2017), Annex 8, Article 3.3.

38 For example, see, proposed ICSID Mediation Rule 11, Article 10(2); IBA Rules on Investment for Investor-State Mediation, Article 7(1); UNCITRAL Mediation Rules, Article 7(1).

39 For example, see, proposed ICSID Mediation, Rule 10; IBA Rules on Investment for Investor-State Mediation, Article 10(1); UNCITRAL Mediation Rules, Article 6.

40 It may be noted that ISDS clauses also occasionally address the question of confidentiality and disclosure in mediation proceedings. These include the Thailand Model BIT (2012), which stipulates in Article 10(4) that a mediation shall be confidential; and CETA (2017), which foresees in Annex 29(C), Article 6, that the mediation proceeding shall be confidential, except for the fact that the mediation is taking place, and subject to the position that, "*mutually agreed solutions shall be made publicly available*" subject to the redaction of information a Party designates as confidential.

provide for information disclosure regarding the outcome of the mediation, as proposed in the following draft provision:

> *Mutually agreed solutions shall be made publicly available.*

52. The Working Group may wish to consider whether transparency regarding the outcome of a mediation would enhance confidence in this method and also alleviate concerns that mediation could be criticized as an opaque means of solving disputes.

3. Settlement agreement (Draft provision 7)

53. The Working Group may wish to consider the following draft provision regarding the settlement agreement:

> *1. The disputing parties shall not commence nor continue any other dispute settlement procedure relating to the dispute subject to mediation while the mediation is pending if the disputing parties have reached a mutually agreed solution.*
>
> *2. Any settlement agreement resulting from a mediation shall comply with the requirements for reliance on a settlement agreement provided for under the United Nations Convention on International Settlement Agreements Resulting from Mediation, adopted on 20 December 2018 ("Singapore Convention on Mediation"), [provided that one or both of the Contracting Parties are signatories to the Singapore Convention on Mediation].*

54. Paragraph 1 clarifies that parties should be bound by any mutually agreed solution, and therefore, that they shall not commence any other dispute settlement procedure thereafter. Paragraph 2 serves to draw the attention of the disputing parties to

the existing international framework on enforcement of settlement agreements resulting from mediation. The Working Group may wish to consider whether the bracketed text should be retained, given that a settlement agreement may need to be enforced in a country other than that of a Contracting State to the investment treaty. States may also be signatory to the Singapore Convention and have formulated the reservation provided for under particle 8(1)(b) which provides that a party "shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration".

C. Linkage to other reform options

55. The Working Group may wish to consider:

- Whether the role of third-party funding would need to be addressed considering that, where third-party funding is provided, the third-party funding arrangement may become an obstacle for the funded party to negotiate and accept a settlement;[41]
- How the dispute prevention measures could be used to create a favourable environment for mediation;[42] and
- How the advisory centre, by providing certain mediation services, could have an impact on the use of mediation.[43]

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41 More information on the reform element regarding third party funding is available at https://uncitral.un.org/en/thirdpartyfunding

42 More information on the reform element regarding dispute prevention and mitigation is available at https://uncitral.un.org/en/strengtheningmechanisms

43 More information on the reform element of an advisory centre is available at https://uncitral.un.org/en/multilateraladvisorycentre

[An initial draft]

Possible reform of investor-State dispute settlement (ISDS)
Mediation and other forms of alternative dispute resolution (ADR)

Note by the Secretariat

C. Guidelines for participants in investor-State mediation

1. General remarks

2. Draft guidelines

C. Guidelines for participants in investment mediation

1. General remarks

1. At the thirty-ninth session of the Working Group, it was suggested that guidelines should be developed to encourage disputing parties to explore mediation and other methods of alternative dispute resolution (ADR) proactively (A/CN.9/1044, para.30). In the context of these discussions, it was stressed that mechanisms promoting alternatives to arbitration should be designed so as to ensure consistency with good governance norms, including as reflected in Sustainable Development Goal (SDG) 16 (A/CN.9/1044, para.31).

2. The Working Group highlighted that ADR methods were still largely underutilised in the ISDS context due to structural, legislative and policy impediments (A/CN.9/1044, para.35). It noted that efforts should be deployed to strengthen capacity-building and awareness-raising, and it requested the Secretariat to prepare guidelines which should cover matters such as (i) an overview of the process; (ii) the organizational aspects that may need to be considered at the national level to minimize structural or policy impediments and to ensure that mediation could be effectively used; (iii) the representation of public interest in the mediation; and (iv) the development of a pool of qualified mediators in the field of ISDS (A/CN.9/1044, para.39).

3. Accordingly, the draft below contains guidelines for consideration by the Working Group. They have been prepared with the substantive support of the ICSID Secretariat, drawing also from the discussions that took place during the development of the ICSID Mediation Rules. The Working Group may wish to note that the Notes on Mediation, which were adopted by the Commission at its session in 2021, provide guidelines on inter-

national commercial[1] mediation. Therefore, the Working Group may wish to consider whether the text below could be presented as a stand-alone text for investment mediation. In addition, the Working Group may wish to consider whether the guidelines should provide explanations on the model treaty clause (see section II of this Note). Furthermore, the Working Group may wish to recall the possible link between the guidelines and the reform option of establishing an advisory centre on international investment law.[2]

2. Draft guidelines

4. The Working Group may wish to consider the text of the draft guidelines as follows.

1. Purpose

1. The purpose of these guidelines is to provide participants and interested stakeholders in investment mediation with a tool that addresses the main phases of mediation. Given the flexibility that characterizes mediation, these guidelines are not intended to promote any particular best practice, but rather to outline issues that participants may wish to consider when undertaking a mediation to solve an international investment dispute.

2. Availability of mediation in the investment context

2. Mediation is a flexible process whereby a third person (the "mediator") assists the parties in reaching an amicable settlement of the issues in dispute. It is in essence a facilitated dialogue between the disputing parties and is an efficient tool to resolve investment

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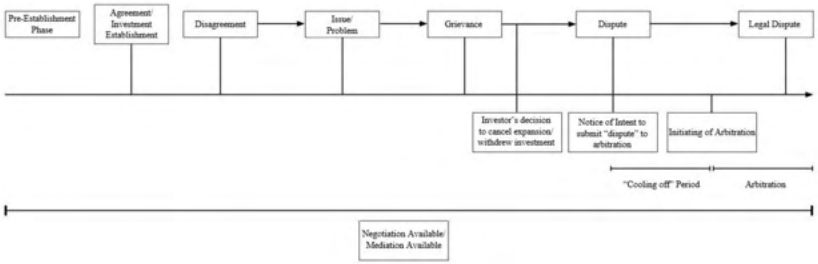
1 According to the definition in Footnote 1 of the Model Law on International Commercial Mediation and Settlement Agreements resulting from Mediation, "the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: (...) investment (...)".

2 The Working Group may wish to note that a number of training courses and capacity building initiatives in the field of investment mediation take place. They are listed in Annex 1 to the guidelines.

disputes. As a form of assisted negotiation, mediation is available as a dispute resolution tool whenever negotiations between parties are considered suitable. Therefore, mediation is not only limited to the time after a dispute has formally crystallized but could also be employed as a tool throughout the investment life cycle and alongside arbitration as indicated in the chart below.



3. Assessing the suitability of mediation

3. Such criteria are intended to assist parties in considering whether mediation is suitable to resolve a particular investment dispute or parts thereof. Parties may wish to ensure that there is an option to pursue mediation as a dispute resolution mechanism in the legal instrument under which the dispute arises and, if so, whether there is an agreed framework, such as reference to mediation rules or a mediation centre and whether there is a suitable agency or inter-agency arrangement in charge of a mediation.

4. Not all factors may need to be present at the same time or for all disputing parties. Disputing parties may wish to revisit their assessment of the suitability of mediation at different stages as such assessments may change over time when surrounding circumstances evolve. A checklist of elements to take into consideration when undertaking mediation is contained in Annex 2 to these guidelines.

4. Role of institutions

5. Mediation as a form of a facilitated dialogue can be conducted ad hoc between the parties. However, the support of a neutral, international institution devoted to investment dispute settlement could play an important role by supporting the process.[3] Such support could for instance consist of providing (i) general information and education about investment mediation and guidance on the procedural steps; (ii) assistance to convey offers to mediate to the other party; (iii) assistance with the appointment of the mediator; (iv) support in all administrative and logistical aspects of the mediation procedure, including meeting organization, and advanced technological support for remote meetings; (v) handling of the financial aspects of a mediation (e.g. requesting, holding and managing advance payments made by the parties to cover the costs of the mediation, processing of mediator fees and expenses, etc.); (vi) a cost-effective and transparent fee structure; and (vii) a certification that a mediation took place which may assist parties seeking to comply with the requirements of the Singapore Convention or other requirements possibly established in investment treaties.

5. The mediator – Role, qualification, appointment process

(1) The mediator's role

6. The mediator facilitates the parties' negotiations. The mediator's role is therefore to assist the parties to arrive at a mutually agreeable solution. Accordingly, the mediator does not resolve nor decide the dispute for the parties but supports the parties in resolving the issues themselves through negotiation. While

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3 Different institutions may provide the services of mediation. Regarding recent reform efforts, it may be noted that the ICSID Mediation Rules seek to provide broad access to States and investors as the parties do not need to have a nexus to an ICSID Contracting State and there are no nationality requirements.

exercising this role, the mediator may meet with the parties jointly or separately. Negotiations by way of separate meetings is a common feature in mediation and allows the mediator to explore with each party freely its interests and concerns and to develop possible options for settlement.

7. There are certain functions that a mediator does not take on, such as making decisions or reaching any conclusions related to the substantive resolution of the dispute. The mediator does not make judgments over past conduct or give legal, financial, or other expert advice. The mediator, however, assists the parties in assessing the strengths and weaknesses of their views themselves through reality testing and risk assessment techniques.

(2) Mediator's qualifications

8. Given the role of the mediator, it appears essential to select an experienced mediation professional with procedural/mediation process competence who is trained in a variety of communication and negotiation styles and tools to assist the parties with developing mutually acceptable solutions, taking into account the parties' needs, interests, concerns, constraints and motivations.

9. *Competency criteria.* A number of documents, including Appendix B to the 2012 IBA Rules,[4] the Energy Charter Secretariat's 2016 Investment Mediation Guide,[5] and the IMI's 2016 Competency Criteria[6] set out standards and competency criteria for investor-State mediators. These include, *inter alia*:

(a) Practical experience serving as mediator;

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4 International Bar Association, 'Rules for Investor-State Mediation' (2012), available at: https://www.ibanet.org/MediaHandler?id=C74CE2C9 -7E9E-4BCA-8988-2A4DF573192C

5 Energy Charter Secretariat, 'Guide on Investment Mediation' (2016), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC 201612.pdf

6 International Mediation Institute, 'Competency Criteria for Investor-State Mediators' (2016), available at: https://imimediation.org/download/104/ism/1472/investor-state-mediation- competency-criteria.pdf

(b) Mediation training, including any accreditation as a mediator by an internationally recognized organization;

(c) Experience in international dispute resolution involving States or State entities in investment or other matters, including different forms of negotiation, mediation and conciliation;

(d) Experience working in or with governments or public entities;

(e) Understanding of the context and framework of investor-State disputes, including economic, legal, social and cultural considerations;

(f) Demonstrated competence in dealing with cross-cultural relationships; and

(g) Ability to conduct the mediation in a timely manner.

10. *Impartiality and independence.* In the context of investment mediation, it might be of particular importance to States that the mediator be impartial and/or independent (see proposed ICSID Mediation Rule 12(1); article 7 IBA Rules) or at a minimum to require relevant disclosures to enable the parties to make an informed mediator appointment (see proposed ICSID Mediation Rule 14(3)(b); see also article 3(6) UNCITRAL Mediation Rules).

11. *Nationality limitations.* In the context of mediation as a form of facilitated dialogue, no nationality limitation principle exists for mediators, hence parties may appoint mediators who are of the same nationality as any of the disputing parties. Parties may agree to exclude certain nationalities, or they may consider that familiarity with the language, customs and culture of the disputing

parties could be beneficial during their mediation.

12. *Expertise in the field of law.* Recalling the mediator's role as a negotiation facilitator, practical mediation process experience and competence are key to exercising the function of a mediator (see article 3(4) of the UNCITRAL Mediation Rules).[7] Additional investment law expertise could be beneficial in probing the strengths and weaknesses of a party's stated position. However, this would not be essential as the mediator does not decide the dispute; should the parties desire a legal opinion, they may appoint a legal expert to do so. In addition, a party's lawyers will be available to provide their clients with a legal evaluation of any given proposed solution (see below the roles of the mediation participants).

(3) Mediator's appointment process

13. The mediator is typically appointed jointly by the parties (proposed ICSID Mediation Rules 13(1), article 4(5) IBA Rules, article 3(2) UNCITRAL Mediation Rules). Mediations are usually conducted either by one mediator or two co-mediators who are each appointed jointly by the parties (proposed ICSID Mediation Rule 13(1), article 6(1) IBA Rules). Parties may agree on a named candidate or on a procedure for mediator appointment, which may include appointment by a third person or institution (proposed ICSID Mediation Rule 13(3), article 4(6) IBA Rules, article 3 UNCITRAL Rules). If the parties have not appointed the mediator(s) within a certain timeframe, they may invoke default provisions (proposed ICSID Mediation Rule 13(4), article 4(7) IBA Rules).

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7 The Working Group decided to delete the reference to "expertise in the subject matter" in article 3(4)(a) of the draft UNCITRAL Mediation Rules as a mediator did not necessarily need to be an expert on the subject matter (see A/CN.9/1049, para.68).

(4) Co-mediation

14. In certain instances, disputing parties may consider the appointment of two co-mediators. In co-mediation, each mediator is appointed *jointly* by the parties. Co-mediation requires the mediators to possess team-working skills to jointly facilitate the parties' negotiations. The appointment of two mediators may be considered beneficial in complex disputes or if a large number of disputing parties are involved. The parties may consider a two-mediator team helpful when geographical, gender, racial and cultural diversity in a team are of particular importance to the parties.

6. Role of other participants in mediation

15. Besides the mediator and the parties, mediations may be attended by lawyers, experts and, in some cases, by non-disputing parties whose input may be beneficial for the resolution of the disputed issues.

16. *Role of parties.* Mediation as a facilitated negotiation requires the active participation of the disputing parties; without it, the mediation cannot proceed. The parties will work with the mediator to explore the issues in dispute and generate ideas and potential options for settlement. Such discussions may be conducted in joint or in separate sessions between the mediator and one party only. The size and composition of each party's team is typically discussed between the parties and the mediator at the outset of the mediation. While it is desirable to have a team member vested with settlement authority present throughout the mediation, it may not always be possible given structural or organizational aspects (for instance, the need for approval/sign-off from a ministry or ministries or cabinet on the side of the State party, or a board of directors or corporate oversight body on the investor's side). It is desirable to have at least one member within a team that has a clear line of communication

to the relevant entity with settlement authority. The parties will be asked early on in the mediation to share with the mediator information regarding the settlement authority and any applicable approval process.

17. *Role of lawyers.* In mediation, the role of a legal representative differs from the role in an adjudicative process such as arbitration. Rather than focusing on legal arguments and evidence regarding past compliance with, or breach of, legal obligations with the goal of persuading a tribunal who will be issuing a binding ruling, the role of lawyers in mediation shifts to the approach of a collaborative, transactional lawyer, assisting the party (the client) with exploring its interests and goals and advocating for these interests and goals with a focus on future-oriented solutions to disputed issues within the applicable legal framework. The tasks of a lawyer may include educating the party about the mediation and available investment mediation rules, assisting with a realistic assessment of strengths and weaknesses of the case, assisting in drafting written statements, and identifying and compiling relevant documents to be used in the mediation. Lawyers are also involved in the discussion of procedural matters, the preparation of opening statements, and drafting of the detailed terms of an eventual settlement agreement.

18. *Role of experts.* During a mediation, the parties may consider it desirable to appoint experts, such as financial experts or subject-matter experts, to advise the party on non-legal aspects relevant for generating offers or finalizing detailed terms of settlement. In addition, the parties may agree to jointly appoint independent experts to provide expert advice on legal, financial or other matters. The type of participation and scope of an experts' input will be determined by the parties and the mediator.

19. *Role of non-disputing parties.* In certain circumstances, the input of non-disputing parties might be relevant and/or helpful

to the resolution of the dispute. The flexibility of the mediation process allows the parties to consider whether any non-disputing party participation is desired and to determine the scope and procedural framework for such participation. Thus, the scope of such participation is determined by party agreement and may range from being consulted during the process on specific points to providing written statements for consideration by the parties to more active forms of participation as agreed between the parties and the mediator. The impact of investments on specific groups might be considered when deciding whom to invite to a mediation.

7. Conduct of investment mediation

20. Mediation as a facilitated form of negotiation is a structured process.

(1) General process overview

21. For illustration purposes, one may consider the following five stages of a mediation:[8]

(i) A "preparation" phase, during which the parties provide the mediator with initial written statements with a short description of the disputed issues and the parties' views on these issues. The mediator will also be discussing aspects of mediation procedure;

(ii) An "opening" phase, during which each party (or party representative) provides an opening statement;

(iii) An "exploration" phase, during which the mediator engages with the parties to identify the foundation of and outline for any mutually

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8 This text uses the CEDR's 5-stage model for illustration. CEDR, 'Seminar on Investment Mediation for Government Officials: The Conduct of Mediation', available at: https://slideplayer.com/slide/13240515/

acceptable resolution, typically on the basis of the parties' underlying interests, motivations, needs and constraints;

(iv) A "bargaining" phase, during which the mediator assists the parties in developing options for settlement and facilitates the exchange of initial offers. In the later stage of the negotiations, the mediator assists the parties in dealing with counter-offers and overcoming potential impasse; and

(v) A "concluding" phase, during which the parties record the detailed terms of their settlement agreement and ensure the agreement complies with all requirements of the applicable law.

(2) In-person and online mediation sessions

22. Mediations include meetings between the parties and the mediator either jointly or separately. Such meetings may be held in-person or via remote technologies such as videoconferencing. While many mediations have historically been conducted by way of in-person meetings, the use of video-conferencing technology for mediation sessions has significantly increased in recent years. Remote meetings are cost- and time- effective and offer the advantage that no travel is required from any participant. Therefore, such meetings could be a useful tool for scheduling purposes either for some selected sessions or the entire mediation procedure. The use of in-person meetings and remote meetings and the parties' preferences should be discussed between the parties and the mediator at the outset of the mediation.

8. General process principles: "Without prejudice" principle, confidentiality, and information disclosure obligations

23. *Without prejudice principle*. For facilitated negotiations to succeed, the parties must feel able to engage without concern that information exchanged during the mediation will be used by the other party in other proceedings, either as evidence or otherwise. To facilitate this, the parties typically agree that the "without prejudice" principle applies to information exchanged during the mediation, i.e., that a party may not rely on any document, statement, admission, or offer of settlement made by one party, or anything said by the mediator, in any other proceedings, unless the parties jointly agree to waive this privilege (proposed ICSID Mediation, Rule 11; see also article 7 of the UNCITRAL Mediation Rules). This principle is also reflected in a number of recent investment agreements.[9]

24. *Confidentiality, limits to confidentiality and affirmative information disclosure obligations*. In commercial mediations, confidentiality vis-à-vis non-mediation participants, i.e., those outside the process, typically applies to the parties' negotiations. In the investment context, confidentiality obligations, limitations on such confidentiality obligations and affirmative disclosure requirements can be established by various legal instruments. These may be provided in:

(a) The domestic legal framework applicable to the mediation and/or applicable to its participants, including domestic rules applicable to lawyers or mediators; disclosure requirements can be found, for example, in domestic legislation applicable

9 For example, the Thailand Model BIT (2012), which stipulates in Article 10(4) that a mediation shall be confidential; and CETA (2017), which foresees in Annex 29(C), Article 6, that the mediation proceeding shall be confidential, except for the fact that the mediation is taking place, and subject to the position that, "mutually agreed solutions shall be made publicly available" subject to the redaction of information a Party designates as confidential.

to public-private partnerships,[10] public financial management regulations, budget transparency legislation or freedom of information legislation;

(b) International agreements applicable to the investment mediation; and

(c) Agreements by the disputing parties, including the investment mediation rules agreed upon by the parties.

9. Public interest representation in mediation

25. *Rule of law*. Given that mediation is a facilitated negotiation between the parties, the State assumes a negotiator role, and its participation in the mediation constitutes administrative governmental action, similar to Government conduct during negotiations of a concession or licence at the beginning of the investment lifecycle, i.e., at the time of the investment entry. Therefore, the State's actions in the mediation have to comply with the rule of law, including all applicable laws and regulations, domestic or international.

26. *Information disclosure*. This includes the domestic legislation on information disclosure which safeguards the public interest and may include the publication of any agreed engagement and/or ongoing disclosure of performance, as well as any renegotiated terms.[11] It is not unusual for disputing parties in investment matters to agree to a specific media or public disclosure protocol to provide updates to the public and/or relevant constituents during the

10 The World Bank's PPP Disclosure Framework is illustrative of the objectives and scope of such disclosure regimes. See, for example, World Bank Group, CoST and PPIAF, 'A Framework for Disclosure in Public-Private Partnerships – Technical Guidance for Systematic, Pro-active, Pre- and Post-Procurement Disclosure of Information in Public-Private Partnership Programs' (August 2015), available at: http://pubdocs.worldbank.org/en/773541448296707678/Disclosure-in- PPPs-Framework.pdf

11 See *ibid.*

mediation.

27. *Non-disputing party participation.* The flexibility of mediation and the possibility to include non-disputing parties, such as local communities affected either by the investment, the dispute or any negotiated solution, in the amicable dispute settlement process also allows the public interest to be represented in the mediation.

28. *No regulatory chill.* Whether the final and binding rulings issued by investment arbitration tribunals impact regulatory processes at the national level, leading to a form of "regulatory chill", is controversial. To the extent the phenomenon of regulatory chill does arise as a consequence of binding rulings by tribunals, this phenomenon does not occur in investment mediation. In an investment mediation, no resolution of a dispute is imposed on a State. To the contrary, the State is an active negotiator who is in full control whether to agree to any settlement and under which conditions. Hence, the voluntary conclusion of a mediated settlement agreement, the terms of which were agreed to by the State in its negotiating capacity, does not appear to impact government regulatory activity or lead to a form of "chill".

10. Policy, structural and organizational aspects to encourage the use of mediation

29. Certain types of structural, organizational and policy measures could be considered at the domestic and international level to minimize impediments to the use of mediation and to ensure that a State party can participate effectively in mediation and use it as a tool to resolve disagreements, problems, grievances or disputes related to investment matters. These measures may include policy considerations, as well as structural/organizational aspects:

(1) Policy considerations – Anchoring mediation in the State's domestic and international legal framework.

30. *Domestic legal framework*. A clear domestic policy anchoring the State's approval of mediation as an investment dispute settlement tool could provide a clear basis for the State's participation in mediation and address concerns by public officials to engage in facilitated negotiations. Such legislation may not only address the availability of mediation involving a State or State entity, but also clarify lines of authority, representation of the State in formal or informal dispute resolution processes and other matters (see para.36 below). Detailed comparative research providing examples of such a domestic legal framework encouraging the use of mediation has been conducted by the Energy Charter Secretariat and is reflected in the Model Instrument on Management of Investment Disputes.[12]

31. *International legal framework*. States may also wish to anchor mediation in their international investment agreements, making it available at any time during the investment lifecycle, during the life of a dispute, prior to and alongside any other dispute settlement processes (such as arbitration), and/or providing for mediation during specific stages such as during the amicable settlement period (see para.21 above).

32. *Mandatory mediation*. Some States have inquired about the usefulness of mandatory or compulsory investor-State mediation, similar to mandatory processes established on the domestic level in some jurisdictions. When mediation is "mandated", it means that the entry into the mediation process is compulsory. However, the parties are typically free to leave the process at any stage, unless a specific provision requires them to remain in the mediation for a specified time or until a certain milestone is reached (see IBA Rules Article 9(4) requiring a party to participate in the mediation management conference). Mandating mediation is generally

12 Energy Charter Secretariat, 'Model Instrument on Management of Investment Disputes' (2018), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes

viewed as controversial. Some consider mandatory mediation to be an infringement on party autonomy by limiting access to other processes, counter-productive given the need for active participation by the parties in the negotiation, or not appropriate for all disputes. Others take the view that mandatory mediation could be helpful to engage the parties in the mediation, provide a clear policy basis and offer a time- and cost-effective dispute resolution mechanism. Research suggests that voluntary mediation on the domestic level has had little uptake in some States, while the settlement rate following compulsory mediation was substantial.[13]

33. *Awareness raising and training.* Awareness raising of the benefits of the mediation process as a form of facilitated negotiation and capacity building may also be helpful to further encourage the use of mediation as a means for investment dispute settlement. Trainings for State officials, as well as for meditators, are offered on a regular basis[14] which delineate the structural and organizational considerations that enable the effective use of mediation as an investment conflict management tool.

34. Investment disputes concern a wide range of economic activities[15] and could involve entities and agencies at the municipal, state or federal level across all branches of government in relation to a range of legal instruments, including investment contracts, investment laws and bilateral and multilateral treaties. Given the multitude of circumstances, economic sectors, entities and legal instruments involved, clear organizational structures and lines of communications may be helpful to assist a State in using and

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13 Anna Howard, *EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes*, 2021, p.28. See also, N.A. Walsh and A. Kupfer Schneider, 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration', 2013, 18 Harv. Negot. L. Rev. 71, 122.

14 See Annex 2 for further information regarding training courses and capacity building.

15 The ICSID Caseload – Statistics (2020-2), p.12, available at: https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20S tatistics%20%282020-2%20Edition%29%20ENG.pdf

effectively participating in mediation. Research by the World Bank[16] and the Energy Charter Secretariat[17] suggests that information gathering and sharing, the establishment of a specific unit or units responsible for investment conflict management and capacity building within the government would be beneficial to assist States in resolving investment disputes.

35. *Information gathering and dispute settlement process assessment*. Information gathering and analysis of the relevant facts, stakeholders, issues, relevant economic circumstances and State interests is helpful to gain a comprehensive understanding of the disputed issues and allow the State party to assess and make an informed choice of the most suitable dispute resolution mechanism for a given dispute, including mediation. Based on the World Bank's research, States benefit from effective internal information sharing, by way of an early warning mechanism or otherwise, to ensure that relevant individuals or agencies become aware of problems with investors as soon as they arise.[18]

36. *Establishing a conflict management lead agency/agencies.* Based on the World Bank's and Energy Charter's research, States may wish to consider establishing one or several bodies to assist with the management of investment conflicts. Such an entity or entities could assist with information gathering, assessing which dispute resolution mechanism may be the most appropriate in the circumstances and represent the State throughout the dispute settlement process (including formal or informal processes, such as

16 World Bank Group and European Commission, 'Retention and Expansion of Foreign Direct Investment – Political Risk and Policy Responses (The World Bank Group 2019). <https://openknowledge.worldbank.org/bitstream/handle/10986/33082/Political-Risk-and-Policy- Responses.pdf?sequence=1&isAllowed=y> p.46 and p.73.

17 Energy Charter Secretariat (n.11).

18 P. Kherand and D. Chun, *Policy Options to Mitigate Political Risk and Attract FDI*, FCI In Focus. Washington, D.C., 2020, World Bank Group, available at: https://hubs.worldbank.org/docs/ImageBank/Pages/DocProfile.aspx?nodeid=32322281 p.17.

negotiations, mediation and arbitration).

37. The research indicates that the structural choice for such a responsible entity is likely to differ from State to State, taking into account the State's organizational structures, administrative and other legal requirements, and may range from autonomous entities to a unit within an already existing department or ministry, to an inter-ministerial commission, or consist of an entirely different organizational structure. Some States have adopted a single unit or single agency approach. Other States have implemented a phased approach where issues arising with investors are first handled by an investment after-care unit and subsequently by the Investor Grievance Mechanism (IGM),[19] a program developed by the World Bank, which assists in investment grievance management up to approximately the time of the Notice of Dispute. A helpful resource in this context is the Energy Charter Secretariat's Model Instrument which outlines various options for how such an agency or agencies could be set up, indicating possible functions, structures and composition.[20]

38. In relation to whether a multi-body or single entity approach is preferred, the World Bank's and Energy Charter's research suggests that the entity or entities may benefit from being vested with the following functions:

(a) Serve as point of contact for investors and/or for State entities when disagreements or issues arise;

(b) Collect data to identify origins of governmental conduct generating political risks, to identify issues, sectors and/or agencies that may help with targeted capacity building and to maintain a centralized

19 *Ibid.*

20 Energy Charter Secretariat (n.11).

data repository;

(c) Develop a comprehensive understanding of the disputed issues;

(d) Connect and coordinate with agencies and ministries related to the dispute to gather facts and benefit from technical knowledge within the government about the disputed issues;

(e) Handle contacts and communications with the investor concerned;

(f) Identify suitable conflict management mechanisms (negotiation, mediation, escalation to high-level government body, etc.);

(g) Identify the interest of the State in relation to the affected investment and conflict;

(h) Prepare summaries, legal opinions and economic assessments relevant to the dispute for use by the Government;

(i) Lead negotiations, represent the State and prepare the State's strategy during mediation or other formal dispute settlement proceedings (such as expert determination, early neutral evaluation, arbitration);

(j) Have the ability to unify public statements in relation to the dispute and to ensure public disclosure obligations are complied with;

(k) Possess the ability to engage in settlement discussions (either being vested with authority to settle or a clear line of communication with a relevant body or bodies with settlement authority);

(l) Have the ability to request information, advice and cooperation from all government entities involved with the dispute or a possible solution;

(m) Possess the ability to approve funds and hire professional support, including experts and external counsel; and

(n) Design and lead capacity building efforts for all entities implementing the State's obligations vis-à-vis investment matters to minimize recurrence of government conduct that may give rise to an investment dispute that implicates the State.

39. Based on the World Bank's research, key factors relevant for the success of a lead agency include: (i) the existence of effective support from the highest levels of government; (ii) the ability to facilitate systematic data collection, tracking and analysis; (iii) a clear and supportive legislative framework; and (iv) an emphasis on capacity building within both the lead agency and other branches of government in order to raise awareness concerning the proper implementation of the State's obligations under investment agreements or other applicable instruments.

40. Such an institutional framework, providing for effective conflict management, would further promote the United Nation's Sustainable Development Goal (SDG) 16, i.e., it "[p]romote[s] peaceful and inclusive societies for sustainable development, provide[s] access to justice for all and build[s] effective, accountable and inclusive institutions at all levels."

(2) Possible involvement of the home State

41. States have inquired if the Home State of the investor could promote mediation and other forms of amicable dispute settlement.

Possible avenues of doing so could be to:

(a) Include provisions in investment treaties, contracts and laws encouraging mediation in the policy framework of the Home State of the investor on the domestic or international level;

(b) Establish organizational structures in the form of a point of contact for investors encountering difficulties with their investments abroad; and

(c) Encourage and promote investment mediation by disseminating knowledge about mediation to relevant target groups.

Annex 1 – List of training courses and capacity building initiative

- The UNCITRAL Academy events, hosted in Singapore once a year (see: https://uncitral.un.org/en/gateway/meetings/events);

- The training organized by ICSID, the ECT Secretariat and CEDR aimed at providing Government officials with an overview of the mediation process and basic tools to effectively participate in a mediation (see: https://www.energycharter.org/media/events/article/investor-state-mediation-online-workshop-for-state-officials/); and

- The Mediation skills training for Government officials organized by the IFC, supported by ICSID and CEDR (see: https://icsid.worldbank.org/news-and-events/news-releases/investor-state-mediator-training);

Annex 2 – Check list

Matters for consideration before commencing mediation

Questions that parties may wish to consider when determining whether mediation is a suitable process for the dispute or parts thereof include the following:

a) Is there a desire to maintain the relationship, for instance in view of retaining the investment or of possible future investments?;

b) Is there a willingness to enter into negotiations/ dialogue?;

c) Do the parties desire a rapid resolution or more rapid resolution than could be achieved through other processes?;

d) Do the parties prefer to keep control over the outcome?;

e) Do the parties seek tailored solutions other than the relief available on the basis of the applicable legal basis (not only contractual provisions)?;

f) Are there multiple conflicts or issues in dispute between the parties, some of which could mediated?; and

g) Are there multiple parties involved in the dispute (with differing interests)?

Matters for consideration during the mediation

See UNCITRAL Notes on Organizing Arbitral Proceedings,[21] covering the:

a) Commencement of the mediation;

b) Selection and appointment of a mediator;

c) Preparatory steps, including the (i) Terms of reference, fees and other costs; (ii) Administrative assistance; (iii) Parties' attendance and representation; (iv) Addressing confidentiality; (v) Determining the location and the timing of the mediation; and (vi) Agreeing on the language of the mediation;

d) Conduct of the mediation, including the (i) Role of the mediator; (ii) Initial consultations; (iii) Submissions and supporting documents; and (iv) Mediation sessions and active negotiations; and

e) Termination of the mediation.

Matters for consideration when concluding the settlement agreement

a) Settlement proposals by the parties;

b) Drawing up the settlement agreement; and

c) Enforceability:

- Generally, the parties comply voluntarily with the obligations set forth in the settlement agreement.
- Nevertheless, the parties should consider

21 UNCITRAL Notes on Organizing Arbitral Proceedings (2016), available at: https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings

any requirement as to the form (including language requirements), content, filing, registration or delivery of the settlement agreement set forth by the applicable mediation law, the relevant law at the place(s) of enforcement and the applicable mediation rules.

- States that are party to the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation") and States that have enacted legislation based on the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "Model Law on Mediation") presumably follow the enforcement procedure defined therein. While drafting the settlement agreement, the parties may take note of the relevant provisions and requirements under the Singapore Convention on Mediation and the Model Law on Mediation (a list of reservations made by State parties under article 8 of the Singapore Convention can be found on the UNCITRAL website).

SHARING OF VIEWS AND EXPERIENCES OF INTERNATIONAL ORGANISATIONS

Moderator

Anthony Neoh QC SC JP

Chairman

Asian Academy of International Law

Dr Anthony Neoh is a senior member of the Hong Kong Bar specialising in international litigation, arbitration and financial regulatory matters. In 1979, he commenced practice at the Hong Kong Bar after serving for 13 years in the Hong Kong Civil Service. From 1991 to 1994, he was a member of the Hong Kong Stock Exchange Council and its Listing Committee, and chaired its Disciplinary Committee and Debt Securities Group, and was Co-Chairman of the Legal Committee of the Hong Kong and China Listing Working Group. He was the chief architect of the legal structure for the listing of Chinese enterprises in Hong Kong. He is former Chairman of the Hong Kong Securities and Futures Commission from 1995 to 1998; during this time, he was the first Asian to be elected Chairman of the Technical Committee of the International Organization of Securities Commissions. From 1999 to 2004, he was Chief Advisor of the China Securities Regulatory Commission, at the personal invitation of former Premier Zhu Rongji. Dr Neoh was appointed as Chairman of the Hong Kong Independent Police Complaints Council from June 2018 to May 2021. He was the Convenor of the Hong Kong Monetary Authority (HKMA) Expert Group on the Finance Academy and now serves as Member of the HKMA Preparatory Committee for the

Finance Academy. He is also the Co-Chairman of 2018 B20 Financing Growth and Infrastructure Task Force, and Co-Chairman of The China Securitization Forum.

Speaker

Frauke Nitschke

Senior Counsel and Team Leader

International Centre for Settlement of Investment Disputes

Frauke Nitschke is a senior counsel at the International Centre for Settlement of Investment Disputes (ICSID). Frauke serves as the team lead for ICSID staff handling proceedings in English. Frauke also serves as secretary of tribunals, conciliation commissions and *ad hoc* committees in investor-State proceedings conducted pursuant to the ICSID Convention and the ICSID Additional Facility Rules involving a variety of economic sectors and legal instruments. Frauke further leads ICSID's investor-State mediation activities, including the drafting of the proposed Mediation Rules and amendments to ICSID's conciliation frameworks. Frauke has conducted investment mediation skills trainings for mediators and government officials. Prior to joining ICSID, Frauke served in the World Bank's Legal Vice Presidency and the Inspection Panel. Frauke is an accredited mediator and admitted to the D.C. and New York State Bar. She holds a law degree from the Freie Universität Berlin, an LL.M. from Georgetown University Law Center, and a Master's degree in Psychology from the FernUniversität in Hagen.

ICSID's Latest Work on Investment Mediation

It is a pleasure to participate in this Inter-Sessional Meeting on the use of mediation in investor-State dispute settlement, together with colleagues from other international organisations. My presentation will focus on ICSID's work on mediation, and in particular on the following three categories:

- the ICSID Mediation Rules;
- our awareness raising and capacity building programmes; and
- ICSID's inter-organisational cooperation with other institutions around the world.

The ICSID Mediation Rules

In 2018 we proposed to our member States a set of mediation rules to complement the existing ICSID framework on conciliation, arbitration and fact-finding. We noticed an increasing number of treaties over the last decade referring specifically to mediation as a dispute settlement option alongside other dispute resolution tools. Our statistical data on settlement and discontinuance shows that about 1/3 of arbitrations terminate before the tribunal renders an award to resolve the dispute. The mediation rules further responded to requests from our member governments who wished to have a trusted international forum that offers mediation services. World Bank research also suggests that about 6% of investment disputes are resolved by investment arbitration. It is against this background that ICSID decided to offer mediation as an additional cost-effective dispute settlement tool to investors and States.

I wanted to say a few words about the mediation process under the ICSID rules. It starts out with a request for mediation. The request may contain an existing written consent to mediate such as

in a contract or treaty. However, mediations may also be commenced without such pre-existing written agreement. In those situations, the request itself may contain an offer to mediate that addressed to the other party, and the ICSID Secretariat then transmits such offer to the other party by inviting that party to state whether it accepts or rejects that offer. On acceptance of the other party's consent, the next step will entail the registration of the request. This is followed by the appointment of one or two mediators by agreement of the parties. From here, the process moves to brief initial statements filed by the parties, setting out their views on the disputed issues and matters of procedure. The rules then envision a first session between the mediator and the parties to develop the protocol, the ground rules, and the procedural framework for the mediation. Termination may, of course, occur with a notice from the parties stating that a settlement agreement has been reached. Here, we aligned the ICSID provisions with the formal requirements in the Singapore Convention. The procedure may also be terminated at the request of either party.

I also wanted to highlight the fact that, the scope of ICSID mediation is different from what you may be familiar with under the ICSID Convention and Additional Facility. It is broader in the sense that there is no ICSID membership requirement and there is no nationality requirement for the investor. The goal is to provide broad access for States and investors who wish to engage in mediation concerning investment disputes.

ICSID membership will vote on the mediation rules in early 2022. However, it is already possible for parties to agree to apply the mediation rules in their current form and request our administrative assistance, and this has already happened in practice.

Mediation Awareness and Capacity Building

Let us take a brief look at ICSID's capacity building efforts. The Investment Mediation Insights[1] series comprised six episodes, running from October 2021 to January 2022. The overarching goal is to share practical insights since investment mediation is no longer simply a good idea in theory but is happening in practice. From the information that we have, there have been at least 30 investment mediations between foreign investors and States.

ICSID also recently prepared a background paper on investment mediation[2] as well as an analysis of treaty clauses on mediation.[3] The former serves as a step-by-step introduction to mediation as a process to resolve investment disputes, while the latter features an extensive survey of existing dispute resolution clauses in bilateral investment treaties, free trade agreements, and dispute settlement provisions in model treaties.

I also wanted to mention the training we conducted in April and May 2021, together with the Energy Charter Secretariat, for government officials; the investor-State mediation training that we held in 2017, and since 2018 together with the Department of Justice of the Hong Kong SAR (DoJ) and Asian Academy of International Law (AAIL); and recently we have also trained our in-house counsel at ICSID so that they are prepared to administer mediations. The latest training will be held in January[4] and March[5] 2022.

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1 Available at https://icsid.worldbank.org/services/mediation-conciliation/mediation/investment-mediation-insights-webinar-series

2 Available at https://icsid.worldbank.org/resources/publications/background-paper-investment-mediation

3 Available at https://icsid.worldbank.org/resources/publications/overview-investment-treaty-clauses-mediation

4 Available at https://icsid.worldbank.org/sites/default/files/Events/Investor-State_Mediation_course_flyer_final.pdf

5 Available at https://icsid.worldbank.org/sites/default/files/Events/2021-2022_IL_IM_Training_eFlyer.pdf

Inter-Organisational Cooperation

Finally, let me touch upon what we are doing to support other organisations and intergovernmental institutions. We are pleased to be supporting the UNCITRAL Secretariat and Working Group III in the area of mediation and amicable dispute settlement or treaty analysis. We also supported Priyanka Kher, Private Sector Specialist in the Investment Climate Unit of the World Bank Group, and her team by preparing mediation skills training to government officials. And I already mentioned the cooperation with DoJ and AAIL, with whom we organised a mediator training programme focusing on teaching experienced mediators how to apply their skills in the investor-State context. Lastly, in 2021 ICSID concluded three cooperation agreements with a specific emphasis on mediation with the Singapore International Mediation Centre,[6] the Energy Charter Secretariat,[7] and the Centre for Effective Dispute Resolution.[8]

I hope this presentation gives you a helpful overview on our most recent work on mediation, and I look forward to hearing from my fellow panellists on their experiences and views of their respective institutions.

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6 Available at https://icsid.worldbank.org/news-and-events/news-releases/simc-icsid-conclude-cooperation-agreement

7 Available at https://icsid.worldbank.org/news-and-events/news-releases/energy-charter-secretariat-and-icsid-conclude-cooperation-agreement

8 Available at https://icsid.worldbank.org/news-and-events/news-releases/centre-effective-dispute-resolution-and-icsid-sign-cooperation

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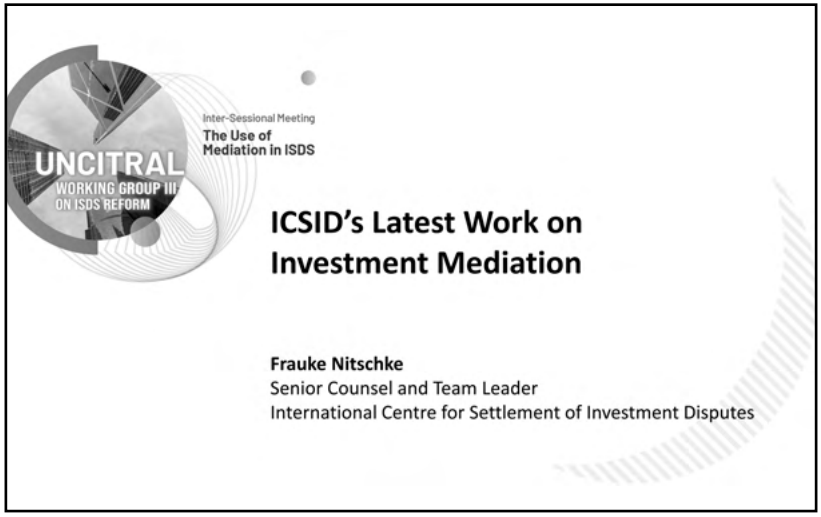

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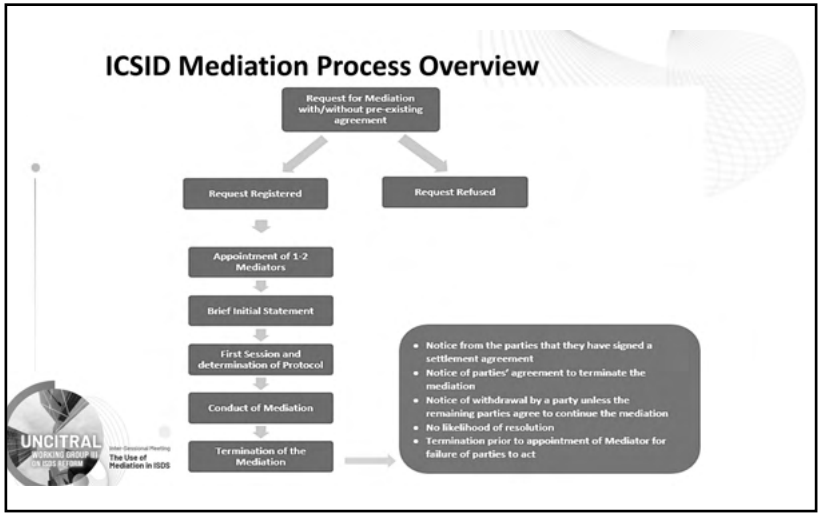

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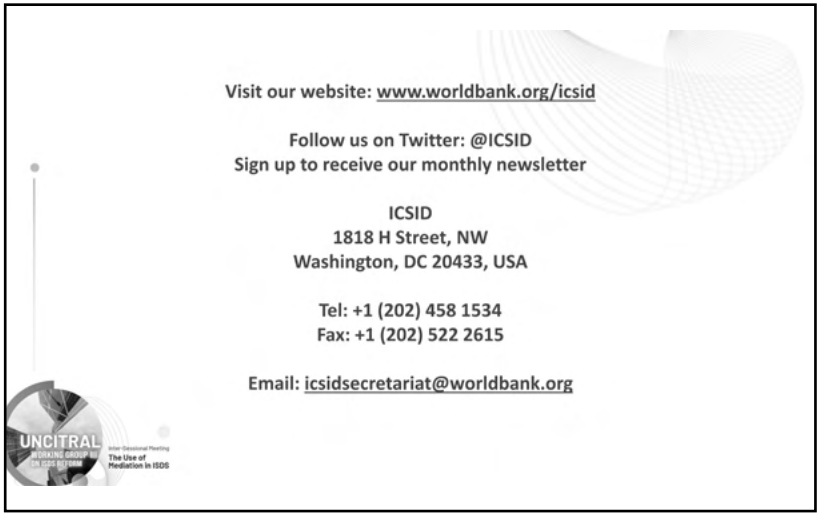
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Email: icsidsecretariat@worldbank.org
UNCITRAL
The Use of Mediation in ISDS

Speaker

Joerg Weber

Head of Investment Policies Branch

United Nations Conference on Trade and Development

Dr Joerg Weber is Head of the Investment Policies Branch in the Division on Investment and Enterprise of United Nations Conference on Trade and Development (UNCTAD), responsible for implementing the work of the organisation on national and international investment policies and its *Investment Policy Reviews*. He is also a team member of the prestigious annual *World Investment Report*. Dr Weber joined the United Nations in New York in 1990, after working for Columbia University and the Academy of Sciences at the University of Göttingen. Since 1993, he has been working for UNCTAD in Geneva, focusing on matters related to a possible multilateral framework for investment and international investment agreements. Dr Weber received his Ph.D. degree from the Free University of Berlin.

Practices in the Use of Mediation in Resolving International Investment Disputes

[Mediation and conciliation are often used interchangeably in international law. They are not the same in the context of the current reform process. Conciliation has always been part of the ICSID convention and many IIAs refer to it for that reason. Indeed, it is rarely used – 12 ICSID conciliations vs hundreds of arbitrations. New draft rules specifically for mediation have recently been developed by ICSID. Conciliation is unenforceable (unlike arbitration, which is enforceable) dispute settlement where a third party can make recommendations for solving the dispute and issue a report. Mediation is best described as guided negotiation.]

UNCTAD has been advocating the reform and modernisation of the international investment regime for over a decade. UNCTAD's *Investment Policy Framework for Sustainable Development* first launched in 2012 and then updated in 2015; and it contains:

- ten guiding principles for investment policymaking;
- guidelines for national investment policies;
- guidance for the design and use of international investment agreements (IIAs); and
- an action menu for the promotion of investment in sectors related to the sustainable development goals.

UNCTAD's Reform Package for the International Investment Regime[1] combines the researches and policy analyses of the *World Investment Report* from 2015 to 2018 into one single document,

1 Available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

providing detailed guidance on the three phases of reform.

IIA reform is well underway with most new IIAs reflecting UNCTAD's five action areas identified in its *Investment Policy Framework for Sustainable Development*, and *Roadmap for Reforming International Investment Regime*:

- safeguarding the right to regulate, while providing protection;
- reforming investment dispute settlement mechanism;
- promoting and facilitating investment;
- ensuring responsible investment; and
- enhancing systemic consistency.

The impact of our technical assistance work on IIA reform is clear, with over 130 countries benefiting from guiding principles developed in cooperation with UNCTAD. Examples include:

- the G20 Guiding Principles for Global Investment Policymaking;
- the Joint African, Caribbean and Pacific Group of States (ACP) – UNCTAD Guiding Principles for Investment Policymaking;
- the Joint D-8 Organisation for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking; and
- the Organisation of Islamic Cooperation Guiding Principles for Investment Policymaking.

In addition, UNCTAD has been assisting countries to effectively reform their old treaties.

- Over 1,000 government officials trained on key IIA issues since 2012; and
- 75 countries and REIOs benefiting from UNCTAD's IIA and model BIT reviews.

To support and accelerate ongoing IIA reform efforts, UNCTAD recently launched the IIA Reform Accelerator to assist States in modernising the existing stock of old-generation investment treaties. It operationalises the idea of gradual innovation by focusing on the reform of the substantive provisions of IIAs in selected key areas.

I am providing this background on what UNCTAD does because it is important to bear in mind that the current system requires holistic reform. This is not to say that procedural reform is not extremely important, but it is also vital not to lose focus of the bigger picture.

As you know, mediation is a policy option that is proposed as a means of alternative dispute settlement already in the *Investment Policy Framework for Sustainable Development*. We will see there has really been an increase in the number of recent treaties that refer to 'mediation'.

We also know that 55% of investors see mediation as positive according to a study conducted by the Queen Mary University of London in 2020.

The recent proliferation of rules on mediation shows that there is a broad agreement on the benefits of mediation. Think for example of the Singapore Convention, the IBA Rules for Investor-State Mediation and the recent ICSID work on their mediation

rules. It may be fair to say that there is a general demand for mediation.

Let's look at a breakdown of the outcome of all concluded cases since 1987. While 20% of the cases are already settled, 12% are discontinued. These cases would not be impacted much by an option to mediate as there is already a settlement or the investor abandons recourse to international dispute settlement for other reasons.

Cases where there is serious doubt as to jurisdiction under the IIA may also not be very suitable for mediation. Then, there are the cases where States would simply be absolutely unwilling to settle, e.g. tobacco plain packaging cases against Australia and Uruguay.

Overall, there are thus not all that many cases where mediation would really make a difference. This raises the question of the actual demand of mediation.

Also, high-income countries settle comparatively fewer cases. So, if we encourage more settlements, we have to ask ourselves who are we encouraging to settle cases and for whose benefit. Will mediation really help to remedy the problems of developing countries?

The broader point again here is that, we need reform going well beyond small procedural improvements. At best, a handful of cases a year would additionally be settled. The major grievances, the backlash against the investment regime, would not be solved by such small procedural changes with so limited impact.

Something else should be underlined, especially when it comes to best practices, and the domestic framework is very important.

Arbitration can be implemented supranationally through treaties and exist relatively autonomously of domestic legal frameworks.

Mediation requires a suitable domestic framework, institutions with designated competences, and an appropriate internal

organisation of the State in addition to the international legal framework.

In 2010, UNCTAD published a guide entitled *Investor–State Disputes: Prevention and Alternatives to Arbitration.*[2] Everything we say on domestic good practices in this guide remains up to date.

So first and foremost, mediation is a question of domestic capacity building. A commitment to mediation would thus mean that, States – developed and developing – are willing to dedicate resources to this capacity building process.

There are a number of policy options for IIAs as well that could help to encourage mediation. I would not call these best practices as every country may have different needs, but maybe these can be referred to as good practices.

First, it is important to find an appropriate 'cooling off' period. When the investor notifies a claim, the State needs some time to get their ducks in a row, assess the claim and decide on its willingness to settle. Almost all treaties provide for this period. Six months is a very common period, but it may be rather short to enable mediation.

Second, States have to decide whether they want mediation to be mandatory before recourse to arbitration is possible. This may encourage more settlements but could also result in longer and more expensive proceedings. Alternatively, parties could have a choice to compel mediation instead of making mediation always compulsory.

Third, it is important not to lose sight of holistic reform. Currently, investors are able to circumvent pre-arbitration procedures by relying on investor-friendly tribunals or MFN clauses. In other words, the best reform options in an IIA are worthless if arbitral interpretations and other important clauses remain unchanged.

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2 Available at https://unctad.org/system/files/official-document/diaeia200911_en.pdf

Next, we would recommend including an explicit reference to mediation to show the validity of the procedure and put it on one level with other means of alternative dispute resolution.

On slide 8, you can see the number of treaties that include an explicit reference to mediation. Only 1% of the treaties from before 2001 referenced mediation. And there are many of those treaties as you can see from the size of the bar.

Many recent treaties include mediation. 31% of the treaties concluded since 2016 have an explicit reference. But as you can see from the size of the bar, there are very few recent treaties. In reality, the vast majority of IIAs does not explicitly reference mediation.

Also, contrast this with the IIAs that are actually invoked in investor-State dispute settlement. 99% of cases relied on treaties from before 2010.

In the end, this always goes back to the same point. If you want something to change, you have to holistically reform the existing stock of over 2,500 old-generation IIAs that are currently in force. That would really be *the best* practice.

There are a number of other IIA policy options that can help to strengthen mediation. For example, a focal point could be designated directly in the IIA. The IIA could be explicit on the time frame during which the mediation should take place.

Procedural rules could be designated in the IIA. This would help investors and States with little experience to better understand what to expect from a mediation. This could be a reference to existing rules, the ICSID mediation rules for example. Or States could design their own bespoke procedure or develop a hybrid solution.

Importantly, the IIA should preserve a sufficient degree of flexibility. Every mediation is different. If the IIA designs too rigid

a framework, mediation could be hindered rather than supported.

Also, States can enhance the likelihood of successful investment mediations by creating favourable conditions. This is done primarily in domestic frameworks, and a little bit with complementary IIA provisions.

But I would also like to add a word of caution. The criticisms that were launched against investment arbitration may also hold in the case of mediation. This could be confidentiality issues. This could be limited participation for other stakeholders. This could be third-party funding. Commercial mediation between two private parties should not serve as the blueprint for investor-State mediation.

Finally, holistic reform, in particular of the stock of old-generation IIAs, should remain the priority. Better mediation will lead to settlements in, at best, a small number of additional cases, given that so many cases are already being settled. Therefore, the best practice recommendation for this process would be not to lose sight of the bigger picture and the things that may have a bigger impact in the long run.

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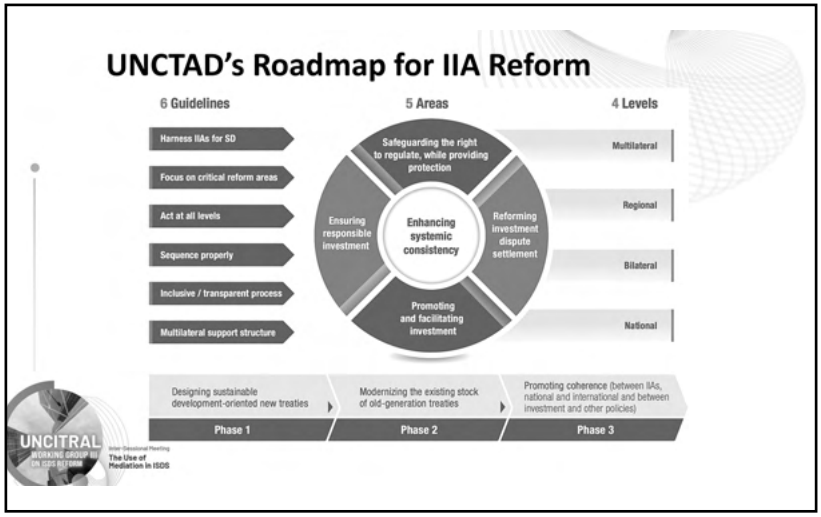

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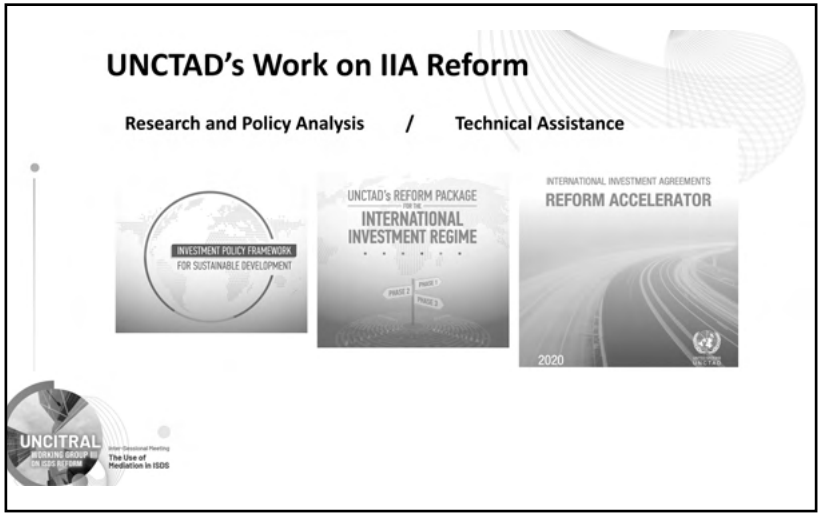

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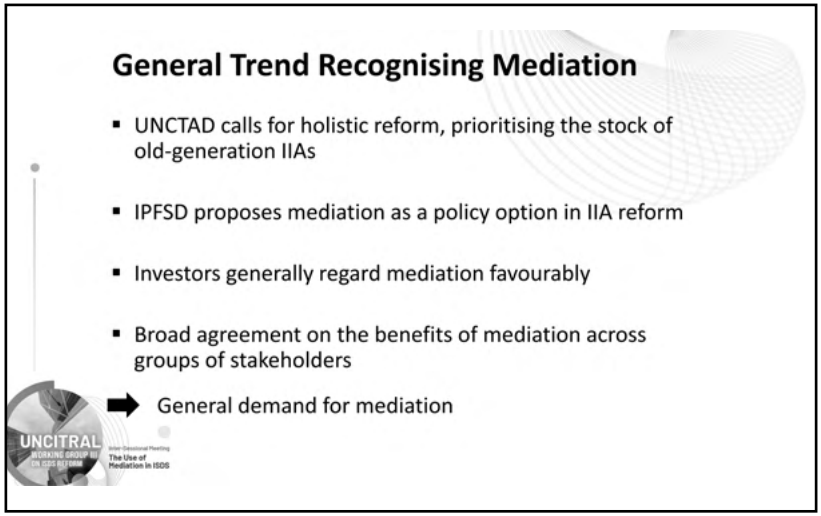

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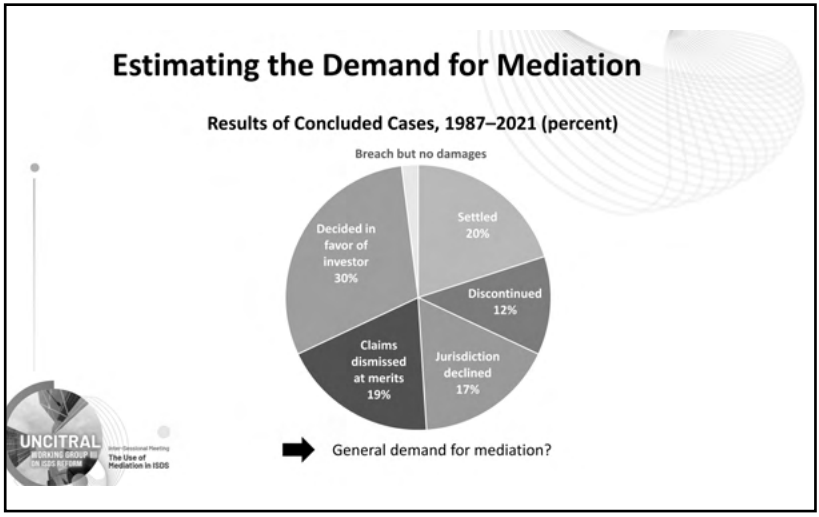

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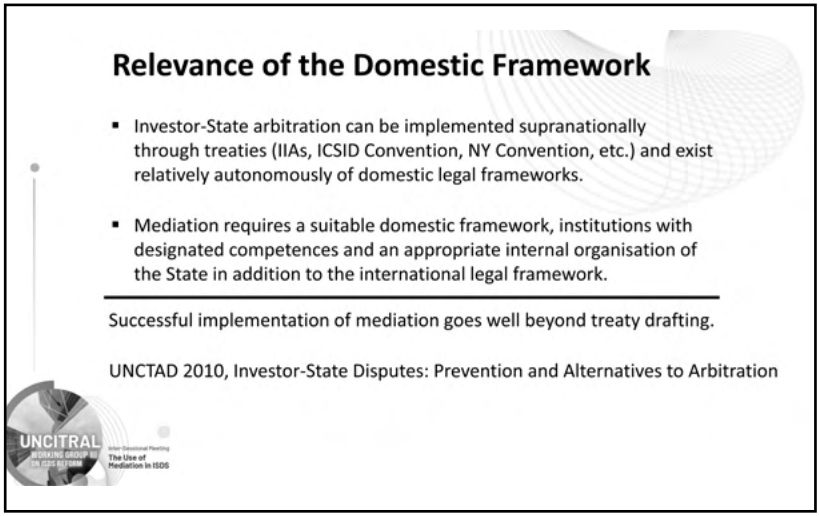

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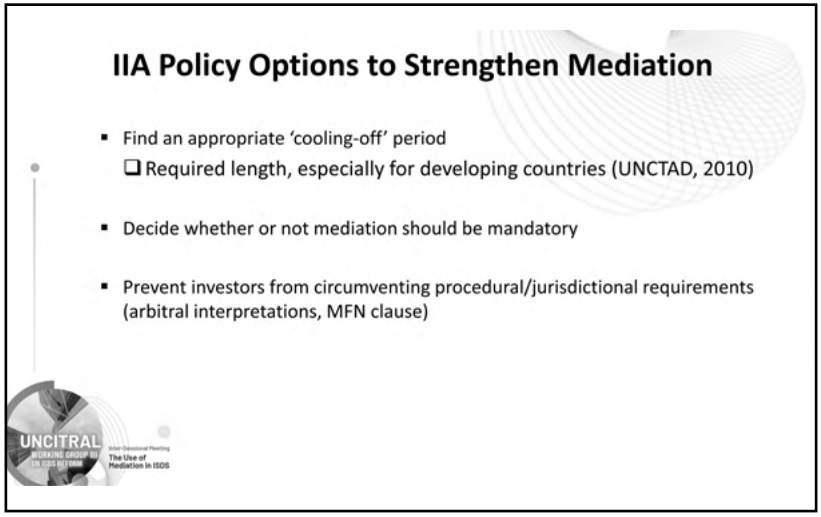

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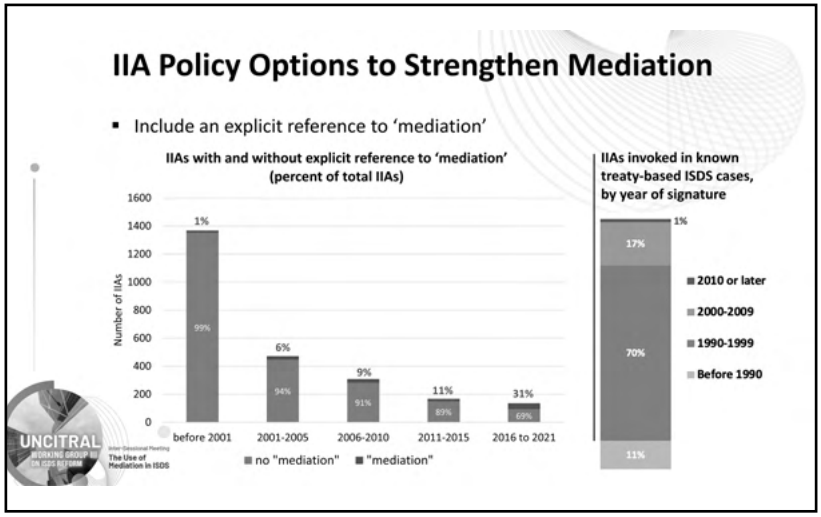

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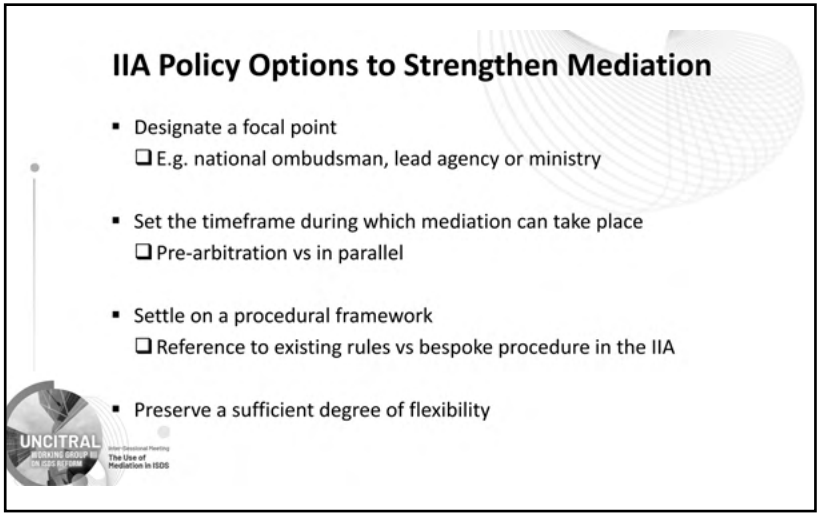

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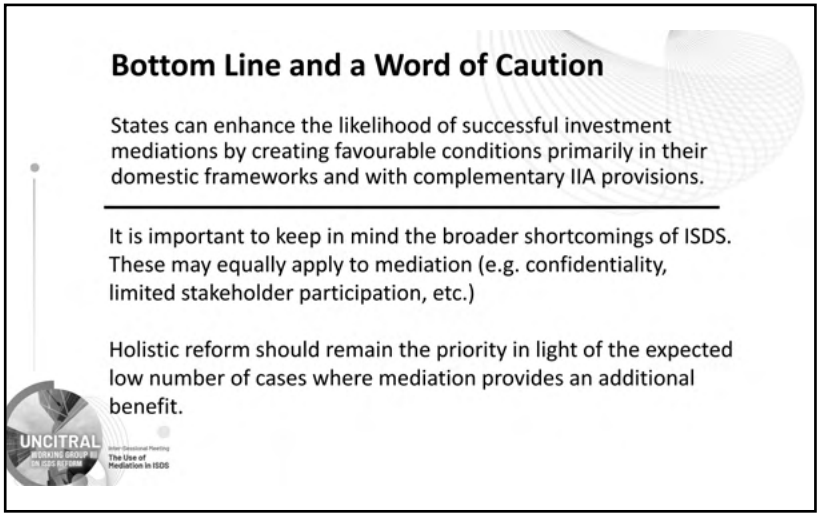

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Contacts
diaeinfo@untad.org
Division on Investment and Enterprise
UNCTAD
unctad.org/diae
investmentpolicy.unctad.org
Twitter@unctadwif
Investment Policy Hub
International Investment Agreements Navigator
Explore the world's most comprehensive free database of investment treaties and model agreements.
Investment Dispute Settlement Navigator
Find details on all publicly known treaty-based investor-State dispute settlement cases.
UNCITRAL
The Use of Mediation in ISDS

Speaker

Alejandro Carballo-Leyda

General Counsel and Head of Conflict Resolution Centre
International Energy Charter

Alejandro Carballo-Leyda (LL.B. with Economics, Certificate on international conflicts, LL.M., European Ph.D. in international law, Harvard Program on Negotiation, accredited mediator of the Centre for Effective Dispute Resolution) is the General Counsel of the International Energy Charter and Head of its Conflict Resolution Centre, which provides good offices and mediation support to investors and governments. From December 2020 to mid-September 2021, he was also Acting Deputy Secretary-General of the International Energy Charter. He coordinated the Guide on Investment Mediation (2016), the amendment to the energy transit conciliation rules (with a commentary), the Model Instrument on Management of Investment Disputes (2018) and the first training for investment mediators. Currently, he supports several countries in developing their internal instrument on managing investment disputes and is working on a joint research paper with the World Bank on investment dispute prevention in the energy sector. Alejandro also teaches foreign investment law at Paris 1 Panthéon-Sorbonne. Previously,

he advised States and private clients on a wide range of public and private international law issues. He also edited the book *Asian Conflict of Laws* (Wolters Kluwer, 2015) and participated in the working groups of *UNIDROIT Principles of International Commercial Contracts* (2010 ed.) and the Hague Principles on Choice of Law for International Contracts.

How to Design Guidelines for Governments' Use of Mediation in Resolving ISDS Disputes

For a State entity to effectively manage investment disputes and participate in amicable dispute resolution, one might argue that other than providing for amicable dispute settlement in international instruments, a clear domestic framework would be beneficial to increase confidence and trust from all stakeholders involved. But, how would such a domestic framework look like? What basic features should it contain?

In 2018, the Secretariat developed a *Model Instrument for Management of Investment Disputes*[1] based on discussions with international institutions and government officials dealing with investment dispute resolution, as well as some existing frameworks in countries from Europe, Asia and Latin America (mainly from countries who had experienced several investment disputes). An initial workshop to discuss a preliminary draft with government officials from several countries, the World Bank, UNCITRAL, AALCO (Asian-African Legal Consultative Organization) and UNCTAD (United Nations Conference on Trade and Development) was held by the Secretariat in Brussels in July 2018. Additional discussions were conducted by the Secretariat during the UNCITRAL Trade Law Forum in September 2018 in South Korea, at a seminar on investment dispute resolution organised by AALCO in October 2018 in Tanzania, and at a seminar in December 2018 in Washington, D.C. which included the participation of the World Bank and ICSID.

The aim of the Model Instrument is to provide guidance to States seeking to implement or update their own domestic legal

1 The Model is available in different languages at https://www.energychartertreaty.org/model-instrument/ For a comment on the Model, see Alejandro Carballo Leyda, 'Model Instrument for Management of Investment Disputes', in Handbook of International Investment Law and Policy (Julien Chaisse et al. eds., 2019).

and institutional frameworks concerning the management of investment disputes, including making effective use of negotiation, mediation and conciliation. It endeavours to cover as many practical issues and challenges as possible, based on the experiences and needs highlighted by government officials and provides States with several policy options with which they can best fit their needs, taking into account their specific organisational, cultural and legal particularities. The Model Instrument also covers the prevention of disputes and provides for an early alert mechanism.

It is for the State implementing the Model Instrument to decide the level of detail needed and whether some issues should be better developed by ancillary documents. Besides, the title ('Model Instrument') provides States (following UNCITRAL practice) with the flexibility to implement it by way of a Protocol, Decree, Decision, Law, Order or any other instrument they consider more fit according to their legal system. Nevertheless, an enforceable instrument is vital for the effective compliance of the domestic framework.

The most significant features that a domestic framework should contain and that are relevant to facilitating the effective use of investment mediation are:

(i) *Establishing a responsible body to coordinate.* International investment disputes are usually complex and rarely involve a single public entity, so proper preparation and internal coordination are crucial to managing these disputes effectively. The responsible body (whose contact details should be publicly available) may have a different name, nature, composition, and work frame depending on the administrative structure and particular circumstances of the State it operates within. In some States, it will be an existing ministry (or a unit

or department within a ministry); while in others, it could take the form of a newly created agency or inter-institutional or inter-ministerial commission. While some of its functions may vary from one State to another, the responsible body should be a central focal point with enough competencies, resources, legitimacy, and authority (both legal and political) to effectively handle all communications with the concerned foreign investor, and to ensure there is not only the necessary coordination with other public institutions but also adequate restraint of other State agencies, making sure that those agencies do not abuse their power in dealings with the investor during the resolution of the conflict or dispute.

Furthermore, such a responsible body could:

- lead negotiations, representing the State and preparing its strategy during mediation or other dispute settlement proceeding ensuring that the State's position is correctly delivered;

- prepare documents for submission in close consultation with other stakeholders as well as third parties (hired legal counsel, witnesses, experts), if appropriate. While the responsible body is expected to take the lead in amicable procedures, it can also hire external legal counsel or advisers with more experience in investment mediation to facilitate creative solutions. The Model Instrument provides suggestions regarding retention of those external experts and lawyers, who have to be coordinated by the responsible body;

- conduct a comprehensive, early assessment of the dispute and the interests of the State to ascertain the most effective course of action for the particular dispute, including mediation. To facilitate such assessment by the responsible body, the Model Instrument includes an open set of criteria; and
- be vested with the authority to negotiate settlements or have a clear line of communication to the relevant body with settlement authority.

(ii) *Providing a clear and express legal basis for negotiation and mediation* with foreign investors. This should include the authority to settle (or the process under which such will be determined) as well as identify the relevant mechanisms for addressing the related financial issues.

(iii) *Dealing with the tension between confidentiality and transparency* requirements. Investment disputes and their resolution are a matter of public interest and attract public, political and media interest, so the responsible body should coordinate public statements relating to the dispute, ensure compliance with public disclosure obligations and implement an early strategic communications plan. Besides, the threat of cyberattacks in international dispute resolution is a real risk, especially when States are involved. Therefore, specific measures should be adopted to protect sensitive data from unauthorised access and to react promptly in case of a security breach.

(iv) *Establishing an organised, centralised and consistent*

> *online database* of previous problems, conflicts and disputes with foreign investors, together with the reaction to them and the identified solutions that worked, the origins of governmental conduct generating political risks, and the economic impact of the problem solved. This can also serve as an early warning mechanism and provide relevant information where capacity building is most needed to prevent disputes.

On 23 December 2018, the Energy Charter Conference recommended the Model Instrument to its Members, considering that it will assist States in enhancing their management of investment disputes. The Energy Charter Secretariat already provides technical assistance and capacity-building for governments willing to implement their legal framework for managing investment disputes.

Of course issuing a domestic framework is not enough; it is necessary to effectively implement it and raise awareness at all levels. Apart from regular reporting (which facilitates an evaluation of the Instrument's efficiency), the responsible body should conduct training for all entities implementing the State's obligations in investment matters to minimise recurrence of government conduct that may give rise to an investment conflict or dispute, based on the data gathered from previous conflicts and disputes.

The Energy Charter Secretariat, in cooperation with CEDR (Centre for Effective Dispute Resolution), IMI (International Mediation Institute) and ICSID (International Centre for Settlement of Investment Disputes), has organised several training, workshops and seminars for government officials and the industry on the specific topic of investment mediation.

Speaker

Priyanka Kher

Private Sector Specialist

Investment Climate Unit, World Bank Group

Priyanka is a Private Sector Specialist in the Investment Climate Unit of the World Bank Group's Finance, Competitiveness and Innovation Global Practice. She leads analytical and operational projects on policy, legal and regulatory reforms to enable countries to attract, retain and benefit from investment. Prior to joining the World Bank Group, she practiced law at law firms in India and Singapore, advising companies on domestic and cross-border corporate and commercial transactions. She has published several papers on investment climate reform, mega-regional trade and investment agreements, regional integration and investor-State disputes. She has also served as a consultant to the United Nations Conference on Trade and Development and Commonwealth Secretariat. She holds a postgraduate law degree from Harvard Law School (Cambridge, United States) and a law degree from the National Law Institute University (Bhopal, India). She is a dual qualified attorney admitted to practice in New York and India.

Building Government Capacity to Prevent Investor-State Disputes

I would briefly talk about how government capacity can be built – including mediation problem-solving techniques – to prevent escalation of investor issues into legal disputes. The foundation of all our work on dispute prevention at the World Bank is really based on three important research findings.

First, since 2009, we have been conducting investor surveys and have consistently found that political risks – issues such as expropriation, breach of contract, adverse regulatory changes, transfer restrictions and certain types of operational risks – can cause investors to withdraw their existing investment or cancel expansion plans. Countries spend sizeable efforts in attracting new investors and ideally would want them to stay in the country and expand, especially when reinvested earnings by existing investors are a significant part of global Foreign Direct Investment (FDI) flows.

Second, investors are protected by these very issues in their international investment agreements and domestic investment legislation; and, they can sue the State. The costs, both financial and reputational of these disputes, are well known. So, you want to prevent these disputes.

Third, we have looked into the cases of the International Centre for Settlement of Investment Disputes (ICSID). ICSID comes out with its caseload statistics and we found that a sizeable number, about one third of the investor-State disputes were settled between parties. And when we researched further, we found that a lot of the settlements, about 40% were actually taking place very early – even prior to the establishment of the arbitral tribunal. So, we thought that perhaps if there is a mechanism or a platform that allows the State and the investors to come together to explore an interest-based solution, there is a good chance that escalation of at

least some of the investor-State issues into full-blown legal disputes can be prevented.

Our next question was then, what sort of government capacity or domestic framework is needed? To link it with other speakers, what kind of minimum institutional infrastructure is needed to allow States to enable this.

Based on our experience of working with governments on investment retention programmes, also called investor grievance management mechanisms in some countries, perhaps I can outline five elements or features that we think are critical to build government capacity in this regard.

First – establishment of a lead agency with the right mandate and authority. The mandate and authority here would be seeking cooperation, information and really engaging with other government stakeholders in problem-solving. Typically, mandate and authority basing on a legal binding instrument is more solid and sets the lead agency up to engage in effective problem-solving.

Second – establishing a clear set of operating procedures for the lead agency to follow, ensuring that the process of engagement for problem-solving is well defined and systematised. Typically, the operating procedures would include a couple of steps – recording all information on the investor issue, including who caused it, when it was caused, and what the impact of that issue was. Very importantly, analysing that issue specially from two perspectives. (1) What is the impact of the investor issue on the operations of an investor, if it is causing the investor to rethink the continuity of their investment and expansion plans in the country? (2) Could it in any way lead to liability for the State? The operating procedures also outline the steps to engage in problem-solving, including the timelines. They specify the avenue for escalation of issues that are not resolved by the

lead agency and should also establish the process of implementation of the solution.

Third – engaging in effective problem-solving with government stakeholders and the investor to find an interest-based solution. Something important to note here is the use of data in problem-solving. In our experience, when the lead agency goes to other stakeholders within the government with analysis, showing the impact of an investor issue on the investor's expansion and retention plans as well as on possible liability for the State, other stakeholders would simply sit up, take note and want to engage more constructively.

Fourth – capacity building. I think we have reached a consensus on that one.

Fifth – tracking and monitoring. The lead agency needs to implement a tracking tool to track the nature of the issue, where it is in its resolution process, etc. Through such tracking, governments are able to follow up on the resolution process more effectively as well as identify recurring issues for more systemic overall investment climate reforms.

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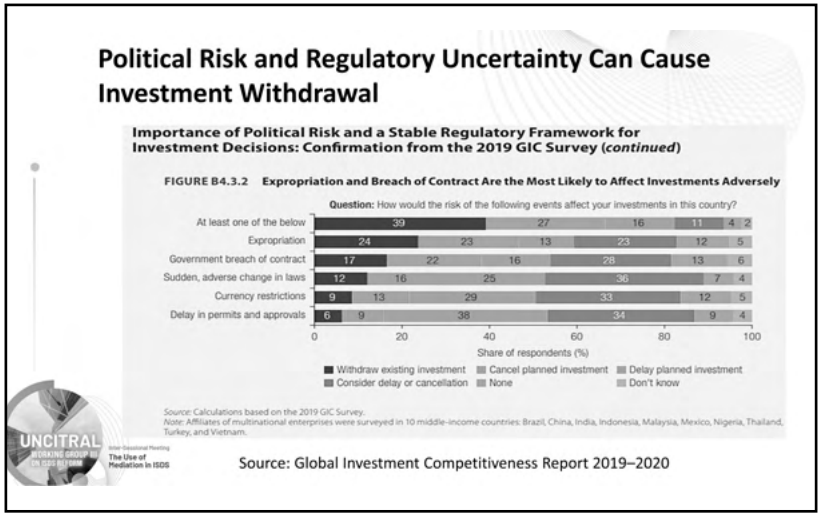

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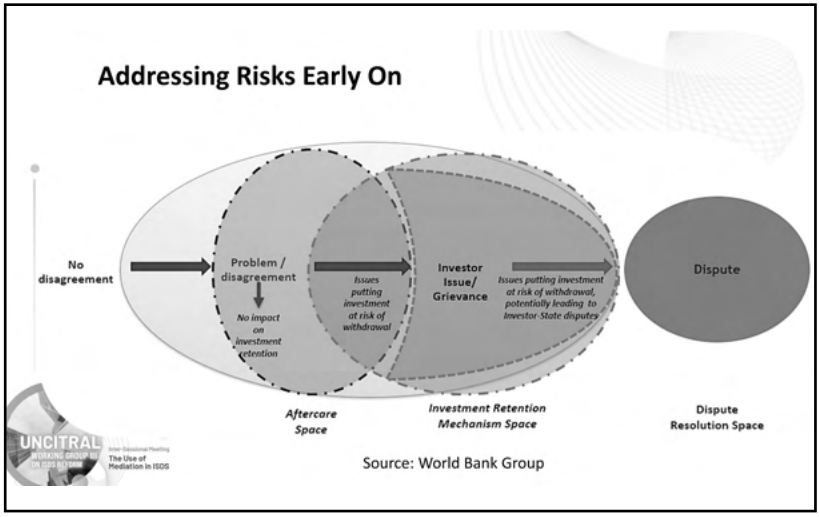

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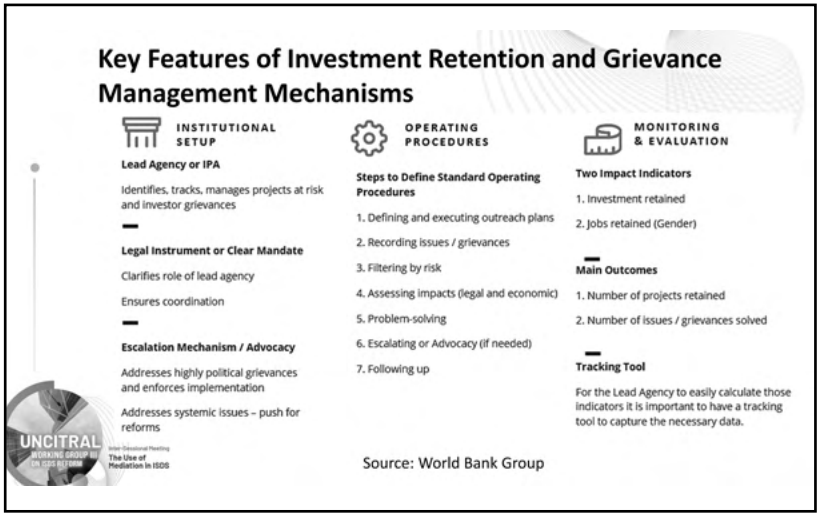

Wrap Up

Teresa Cheng GBM GBS SC JP

Secretary for Justice

Hong Kong Special Administrative Region of the People's Republic of China

Ms Teresa Cheng, SC, was appointed Secretary for Justice on January 6, 2018. She was a Senior Counsel in private practice before joining the Government. She is also a chartered engineer and chartered arbitrator. She was frequently engaged as arbitrator or counsel in complex international commercial or investment disputes. Ms Cheng was one of the founders and Chairman of the Asian Academy of International Law. She is a Past Vice President of the International Council of Commercial Arbitration, Past Vice President of the ICC International Court of Arbitration and Past Chairperson of Hong Kong International Arbitration Centre. In 2008, she became the first Asian woman elected through a global election as President of the Chartered Institute of Arbitrators. She served as Deputy Judge/Recorder in the Court of First Instance of the High Court of Hong Kong from 2011 to 2017. She is a member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators, and was a member of the World Bank's Sanctions Board. Ms Cheng is a Fellow of King's College in London, and was the Course Director of the International Arbitration and Dispute Settlement Course at the Law School of Tsinghua University in Beijing.

1. Good morning, good afternoon and good evening, ladies and gentlemen. This is described as a wrap up, but I'd like to think it as half-time, because tomorrow morning we're going to have another session as well. It is very heartening to see the Inter-Sessional Meeting finally taking place in the Hong Kong Special Administrative Region (SAR), which has previously been delayed as a result of the pandemic. This particular meeting on mediation is of great significance to the Hong Kong SAR not only because it is the very first time for an Inter-Sessional Meeting of an UNCITRAL Working Group to formally take place in our city, but also it is a prelude to the third annual Hong Kong Legal Week of next week.

2. With the advancement in technology, I am pleased to share with you that this meeting brings together a total of over 640 registered participants from 94 jurisdictions around the world.

3. We are very grateful to the UNCITRAL Secretariat for the useful presentation on the two draft notes on mediation model clauses and guidelines, the sharing by the distinguished speakers from various international organisations, and the roundtable session.

4. These fruitful discussions echo three main directions derived from the Virtual Pre-Intersessional Meeting of the Working Group III held in Hong Kong in 2020. **And to recap, these three main directions are: 'getting the frameworks right'; 'overcoming psychological barriers through education'; and 'unlocking mediation's synergy with other ISDS reform options'.**

'Getting the frameworks right'

5. First, 'getting the frameworks right', both at the inter-

national and domestic levels, is crucial for empowering, incentivising, regulating and facilitating the use of mediation in investment disputes. During the panel session, we have heard the experience of ICSID in devising the new mediation rules and the International Energy Charter on its model instrument on management of investment disputes, which touches upon establishing domestic institutional framework for the use of mediation. The presentation by the representative from UNCTAD also echoes the importance of domestic framework in the successful implementation of mediation.

6. At the international level, the absence of express reference to mediation in treaty provisions and rules on the mediation procedure has been identified as matters that have to be addressed for the greater use of mediation in ISDS.

7. The roundtable session moderated by the Chair of Working Group III has provided the opportunity for us to look at various broader questions on the use of mediation in ISDS.

8. One particular issue of interest is on the draft model mediation clauses prepared by the UNCITRAL Secretariat, which can be incorporated into international investment agreements, thereby getting a framework at the international level.

9. Mediation provisions in international investment agreements generally follow a two-tier structure, with the first tier being mediation clauses providing for the overall architecture of the mediation process, from the availability of mediation, the procedural steps and requirements for initiating the process, whether mediation is mandatory, timing, confidentiality and transparency requirements, and to the eventual mediated settlement agreements. The

second tier provides for the detailed investment mediation rules setting out operational details such as appointment of mediators and code of conducts.

10. An example has been mentioned just now, and if I may share a little bit more on Investment Agreement under the Closer Economic Partnership Arrangement between Hong Kong and the Mainland, which we call the CEPA Investment Agreement. The CEPA Investment Agreement has generally followed a two-tier structure by expressly making mediation an option for resolving investment disputes in its clauses and setting out the details in its mediation rules. As expected, there can be variations across different models, with each providing for different features.

11. In terms of its features, the CEPA Investment Mediation Rules provides for, as the Chair of Working Group III mentioned just now, a unique three-mediator commission model with mediation administered by designated institutions, and the use of mediation management conference. The Rules have also struck a balance between confidentiality and transparency. On the one hand, it expressly provides for the survival of the confidentiality requirements following the termination of mediation; and on the other hand, it allows disclosure of the fact that the disputing parties have agreed to mediate or have reached a settlement from the mediation.

'Overcoming psychological barriers through education'

12. Whilst a set of well-drafted mediation clauses and mediation rules lays the foundation for the greater use of mediation in investment disputes, officials of host States and investors need to be convinced of the usefulness of mediation and

put their trust in professionally trained mediators to assist them in resolving disputes, which have both monetary and policy significance. So the key question would be how we can achieve this.

13. There is a consensus in today's sessions on the importance of capacity building on investment mediation. Since 2018, I am happy to say Hong Kong has been at the forefront in Asia with DoJ partnering with ICSID, the International Energy Charter, and AAIL in offering investment law and investor-State mediation training courses for government officials as well as legal and mediation practitioners around the world.

14. Over 200 participants from more than 33 jurisdictions have attended the training and I understand that the Investor-State Mediation Module of the 3rd edition will soon be held in Hong Kong in March 2022.

15. From the perception of government officials, psychological barriers over the use of mediation are inevitable. Focused and specialised capacity building may well be the much needed catalysts. I hope this will be a topic that will be further explored in tomorrow's Practical Workshop on the Use of Mediation in ISDS.

'Unlocking mediation's synergy with other ISDS reform options'

16. A holistic mindset also needs to be adopted in considering the reform of ISDS, and naturally mediation cannot be considered in isolation from other reform options in the eco-system of ISDS. That's where we get into the direction of 'unlocking mediation's synergy with other ISDS reform options'.

17. Much room for creativity can be observed in this area. A treaty can expressly provide for both arbitration and mediation for investment disputes by a tiered dispute resolution clause providing for 'mediation first and arbitration next'. Furthermore, as illustrated by the World Bank representative in the panel session, prevention of escalation of the dispute can be an area for the Working Group to look into.

18. In tomorrow's Workshop, we hope we will be able to have another opportunity to look further into the relationship between procedures preventing escalation of differences into disputes and mediation clauses if disputes do materialise.

19. In Working Group III, the reform option of third-party funding in arbitration has also been extensively discussed. As recognised by the UNCITRAL's draft note on model clauses and the roundtable discussion, the use of third-party funding in mediation may also be a relevant area to consider.

20. Various international organisations such as ICSID and a number of jurisdictions have experience in relation to the use of third-party funding in ADRs. In Hong Kong, as mentioned also just now, legislative amendments have been made in 2017 to clarify that third-party funding for arbitration and mediation is not prohibited by any common law doctrines of maintenance and champerty. We will be happy to share our experience with the Working Group on this issue when opportunities arise.

[29 October 2021 - Morning]

PRACTICAL WORKSHOP: THE USE OF MEDIATION IN ISDS – OVERCOMING BARRIERS AND CAPACITY BUILDING

Moderator

James Ding

Commissioner of Inclusive Dispute Avoidance and Resolution Office

Department of Justice, Government of the Hong Kong Special Administrative Region of the People's Republic of China

Dr James Ding is the Commissioner of Inclusive Dispute Avoidance and Resolution Office, Department of Justice of the Government of the Hong Kong Special Administrative Region of the People's Republic of China. He has been awarded the Chief Executive's Commendation for Government/Public Service in 2021. He coordinates and promotes various policy initiatives for dispute avoidance and resolution as well as on advancing the rule of law. He has published on different subjects of international law and international cooperation, and has given presentations at different international and regional conferences, including a workshop during 2020 Hong Kong Arbitration Week, events at the Hong Kong Legal Week 2020, 'Mediate First' Pledge Event 2021 as well as various APEC (Asia-Pacific Economic Cooperation) workshops on online dispute resolution. He is also currently the Chair of the APEC Economic Committee. He obtained LL.B. (Hons) and a Postgraduate Certificate in Laws (Distinction) from The University of Hong Kong, LL.M. from Kyushu University, Japan (under the Monbusho scholarship)

and Ph.D. from the University of Queensland, Australia. He became a barrister in Hong Kong in 1997 and joined the Department of Justice in 1999. He also taught on a part-time basis at the Faculty of Law of The University of Hong Kong and The Open University of Hong Kong during the academic years of 1998 and 1999.

Speaker

Martin Rogers
Partner and Chair (Asia)
Davis Polk

Mr Rogers is the Chair for Asia of Davis Polk and a partner in its Litigation Department, based in Hong Kong. He is regarded as one of Asia's leading litigation, financial services regulatory and corporate governance lawyers, with over 30 years' experience. His practice includes corporate governance, Listing Rules and Takeovers Code work, complex litigation and arbitration, particularly disputes arising out of investments and mergers and acquisitions transactions, regulatory, white-collar crime and FinTech. He has extensive experience advising both global and regional corporates, institutional investors and financial institutions. He also advises government and public bodies. He regularly advises corporates and financial institutions at main board level. Mr Rogers has a strong relationship with Hong Kong's regulators and substantial experience with regulators in China, India, Japan, Korea, and Singapore. Mr Rogers is consistently recognised as a leading lawyer by the foremost legal directories, including Chambers Asia-Pacific, IFLR1000 and The Legal 500 Asia Pacific. Mr Rogers is in the 'Hall of Fame' in Dispute Resolution: Litigation category of The Legal 500's. He is also named Asia's top 15 litigators by ALB's first-ever ranking for his out-of-the-box strategising

to deliver the ideal outcome for his clients. For 20 years, he has been the General Editor of Sweet & Maxwell's *Hong Kong Civil Procedure*, more commonly known as the *White Book*.

Psychological Barriers of Investors and Governments to the Use of Mediation in ISDS

It is exceptionally important that investor-State disputes are dealt with, and are seen to be resolved, in the most effective manner possible. Most important, in my view, is investor confidence. From the perspective of the State, not just the outcome, but the effectiveness of the process, can boost or damage investor certainty and confidence generally. Mediation is not suitable for all disputes. We should not pretend that mediation is a panacea, and I believe part of the task in front of us is identifying realistically the factors that make a case more suitable for mediation or a case unsuitable and then gearing capacity and support to fit the suitable cases. However, in my experience, mediation can be very effective. It is clearly a tool that is capable of benefitting a significant proportion of cases. (As is well known, and I believe others will address, a significant minority of investor-State disputes do settle; and in my view, as dispute resolution lawyer with, so far 33 years of experience, the compelling inference is that at least a significant minority of cases may benefit from mediation.) So, we need to make mediation work as effectively as possible.

Mediation is generally a voluntary process. Removing psychological barriers to agreement to mediate is therefore key. I have been invited to talk briefly on the topic of 'Psychological Barriers of Investors and Governments to the Use of Mediation in ISDS'. I have no qualification in psychology. However, the focus on psychology and barriers makes considerable sense. In my thirty plus years of experience (almost all in Asia), I have been involved in a significant number of investor-State disputes, both in the region and in other continents (Europe and South America in particular), either acting for the State or the investor. Some were governed by the ICSID Convention, some were governed by UNCITRAL and some

were *ad hoc*. Some were full-blown BIT cases. Some were governed by local statutory regimes providing for a form of investor-State adjudication process, typically based on an IRR pricing mechanism, intended to reward and incentivise the investor. I can say that, while about 50% of these disputes went to a fully contested hearing without any prospect of settlement, probably 50% of them would certainly have benefited from mediation, but only 10% did actually enter mediation. And, I can say that the key factors that got in the way of a mediation taking place can be viewed as psychological.

Categorisation of psychological barriers

I suggest that the psychological barriers can usefully be divided into three categories: (i) external; (ii) internal; and (iii) process in efficiency. You may recognise that I have borrowed this categorisation from aspects of psychology concerned with communication. (Dispute resolution is, of course, a form of dialogue, albeit generally quite intensive and often hostile.)

External factors

The external factors are well-recognised, and relate to the institutional framework, or lack of it, for mediation.

The initial key questions (asked equally often by investors and States) always focus on lack of clarity in the process and lack of a track-record of successful mediations. One might call this, in psychological terms, uncertainty and lack of experience leading to distrust and scepticism. Subject to the process inefficiency aspect that I will come onto, I have generally found that both investor and State recognise and generally welcome the fact that the mediation is normally not binding. States generally seem to find this more conducive to agreeing to a mediation than investors. For investors, generally, timing and certainty of outcome are given greater weight. However, the lack of clear rules and indicative timeframe, and most

important of all, the lack of empirical evidence of useful outcomes are frequently seen by both sides as real problems.

Equally, if not even more important, is the question of who will be the mediator and how they are chosen. Acute questions arise as to nationality, any political affiliations, as well as the question of whether one is looking for someone with legal expertise or conversely a non-lawyer, and there is a preference for someone who is truly impartial and independent of the parties, or someone known to both parties. In fact, the most useful mediations I have seen have been ones where the mediator or mediators do have a pre-existing relationship with one or both parties, and are generally well-known public figures, but are trusted to act impartially. I have seen both investors and States baulk at rules which provide for a third party (for example, the Secretary-General of ICSID under Rule 13.4) to have power to appoint a mediator on request by only one party in the event of inability to agree upon a mediator. Also, in practice, I have seen the most success in mediations involving two co-mediators.

There can also be considerable concern about disclosure of information and confidentiality. I have seen cases where there has been real concern, typically on the part of the State, that a mediation proposal, typically by an investor, is a tactic designed to flush out additional information about a State's case and evidence, rather than a genuine attempt to resolve all or part of a dispute. In this respect, it is important that the rules do not attempt to provide for too much detailed process, but provide for a basic process (typically an exchange of written statements) with power for the mediators to develop and guide stage in the mediation, including further exchanges of material. Perhaps the most notably successful example of a mediation in an investor-State dispute arose out of frustration on the part of an investor that the State was stalling, with an impending deadline for extension of the management of a project shrinking

from four years to two years, with informal negotiations slow and lacking in structure or real content. From the investor's perspective, the State was primarily stonewalling, with time perceived by the State to be on its side. From the State's side, the project and the dispute were very complex involving numerous different aspects of government policy, and the need to coordinate different departments with different policy considerations. And all in the context of looming political elections. Ultimately, the parties were persuaded to appoint a mediator who encouraged the parties to at least exchange position papers setting out their respective descriptions of the range of issues in dispute. This exercise in itself, after it had been progressed to a second level of detail, providing extremely useful information to narrow down and re-focus the key issues, ultimately significantly facilitating a successful resolution. In my view, it is very helpful for institutional mediation rules in this context to emphasise that mediation is not only available for an overall resolution but may be conducted to clarify and narrow down the issues in dispute.

I have seen confidentiality be a major concern for both States and investors. Typically, a concern predominantly of States, is that detailed information about its case will be shared by the investor; for example, with its home government and sometimes, where the issues are industry-wide, with competitors with similar claims. Equally, I have seen cases in which there has been fairly egregious leakage and mischaracterisation of an investor case put forward during a mediation, with details appearing in the public media. The challenge is controlling leakage, which may not be endorsed by the State, but result from individual actions of officials, sometimes quite junior officials. I pose the question, without any real answer, of how such leakage might be controlled and addressed, if it occurs.

The nature and background of the institute administering the mediation can also be a major stumbling block. Both States and

investors can be very concerned about the perceived nationality and international political complexion of the administrating institute.

Internal factors

The most common internal psychological barrier is fairly obvious. It arises from the role of the State generally as guardian of the public interest and the duties to act in the public interest, and avoid corruption, to which public officials are necessarily and properly subject. Time and again, in many countries in Asia, public officials at all levels, but particularly higher levels (where they are publicly elected) have been very concerned that even exploring the possibility of a settlement, through mediation, will be seen politically and potentially legally, as an abandonment of duties, of political compromise and at worse raising the smell of corruption. The fact that mediation is non-binding and generally not prescriptive is a core positive factor in breaking through this barrier. However, there are types of disputes, where this psychological barrier is very difficult to break and the fact that governmental funds will need to be expended on the mediation, without any guarantee of a positive outcome, is also a barrier. In my experience, the classic case where mediation, and any form of comprise is very difficult, are public-private infrastructure projects where investors bring expropriation claims based on allegations of a failure to honour revenue-adjustment mechanisms, or a refusal to renew or extend operating periods, or the imposition of new or additional taxes of financially burdensome requirements excluded in the original project agreement. If these projects concern, for example, water systems, or extractive industry projects which provide significant tax revenue and employment to a State or a province, the government official responsible for handling the dispute may feel highly politically constrained whatever the legal position is. A vivid example in which I was involved as a lawyer concerned the privatised water system of Cochabamba, Bolivia,

which resulted in violent protests following a big hike in water rates and multiple deaths, the government announcing it could not guarantee the safety of the executives of the water company and cancelling the contract. The company's complaints filed with ICSID were ultimately settled. If I may be allowed a moment of black humour, it is the only time that as a lawyer, I refused an instruction from my clients to go on a site visit to the company's headquarters in Cochabamba, at the time of the ongoing protests.

Here there is also a coupling of an external and internal psychological barrier, typically for the State. The issue is transparency, or more accurately lack of transparency. An extreme example in which I was involved had an arrangement whereby, at the request of the State, both the arbitration and the mediation were conducted in front of closed-circuit TV cameras connected to viewing rooms which could be accessed by members of the public. Clearly, though, if nothing else, the existence of published formal rules to govern mediations provides transparency at least as to process.

Schizophrenia is also an issue, more commonly for a State. In a major dispute, for example involving a public-private project, there can be a very large number of different governmental stakeholders. What if they don't all agree to a mediation? In some cases, I have seen State parties take months and months simply to agree internally, in principle, whether or not to agree to mediate.

For the investor, generally, the internal psychological barriers are less strong. Even now, in a world in which corporate governance is redefining the stakeholders of a business organising more broadly than merely shareholders' interests. In reality, the board of the investor wishes to identify the most effective, and generally quick, way to resolve the dispute and put certainty on the monetary outcome for shareholders.

Having said that, a common issue is tension between senior management of the investor, typically offshore, and sometimes half way around the globe, and local management. Local management can be more aligned with the State, than with their own headquarters, with reluctance to move into any formal process, even a mediation, let alone an arbitration. This alignment can be based on cultural and political affinity, as well as an on-the-ground reluctance to 'rock the boat' too much. It may also be because local management perceive, often incorrectly, weaknesses in the case of the company which go beyond the assessment of global management.

Process inefficiency

The third category of barrier, which I identified as process inefficiency, is often a psychological barrier for the investor. 'How much time will a mediation potentially waste, given the uncertainty of any positive outcome and the non-binding nature of the process?' 'There is no additional confidentiality: an arbitration is also confidential? Why don't we go straight into an arbitration? We can always settle it while it is ongoing?' These are the common questions. Here I would suggest that the burden very much falls on the lawyers on both sides, to devote sufficient effort to develop concrete cost-benefit and time-benefit analyses of opting for mediation, either because mediation will achieve a total resolution, or narrow down the scope of the issues in dispute and the evidence required to be compiled. Lawyers continue to be notoriously weak and producing cost and time models for different processes, including mediation. This is disappointing and further efforts should be made to address this. It would be wonderful to see collaboration across the industry and even between lawyers in government and private practice.

Training and education are also important. Of course, formal mediation rules providing indicative time periods and long-stop dates are helpful.

Conclusion

I am sorry that I cannot provide more details of the cases, including the attempts to mediate, in which I have been involved. They remain confidential. I am also sorry that I have not provided answers. However, I hope my presentation would somewhat set the scene for the discussion to follow.

Speaker

Ronald Sum

Head of Dispute Resolution (Asia)
Addleshaw Goddard LLP

Mr Sum concentrates his practice in all areas of dispute resolution, specialising in China related matters, cross-border disputes, complex commercial disputes, international trade, insurance and reinsurance, product liability and product recall, with specific focuses on arbitration, litigation, mediation and investigations. Mr Sum is qualified as a solicitor in Hong Kong, England and Wales, and Australia and sits on the panel of arbitrators of various institutions, acting as both counsel and arbitrator in many proceedings. Mr Sum has recently been appointed as the only sports arbitrator in Hong Kong under the panel of arbitrators for Tribunal Arbitral du Sport/Court of Arbitration for Sport. Apart from being an experienced international arbitrator, he is also an accredited mediator of the Hong Kong Mediation Accreditation Association Limited (HKMAAL), China International Economic and Trade Arbitration Commission (CIETAC) and The Law Society of Hong Kong. Mr Sum is the immediate past chairman of the International Chamber of Commerce: Arbitration and ADR Sub-Committee and a director of the eBRAM International Online Dispute Resolution Centre and Vis East Moot Foundation. In addition to serving on the Hong Kong

Mediation Council, the Hong Kong Government Advisory Committee on the Promotion of Arbitration and the Hong Kong Steering Committee on Mediation, Mr Sum has been appointed as an investor-State mediator under the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA).

Overcoming Barriers and Capacity Building: Experience and Practice of Mediation in Resolving International Investment Disputes

I am very fortune to be the second one in presenting because I share quite a lot of common thoughts as our previous speaker. I started off my career nearly 30 years ago on small maritime cases and then moved on to a number of high-profile disputes by way of arbitration, a lot of which could have been settled.

My topic today is on the experience and practice of mediation in resolving international disputes and this is a practical workshop. I am not going to go into lots of theory. One of the main concerns for investors has always been the cost and time involved in investor-State disputes. The 'modern' investors are sophisticated, with a team of in-house accountants and counsel that can produce all the financial due diligence reports justifying the investments and provide diligent legal analysis and strategy.

In time of disputes, when their legal counsel raises the issue of investor-State mediation, the investors may have limited knowledge but they may not understand the mechanism behind such mediation. It is not uncommon for investors to have scepticism in pursuing a State, in particular when the investors may still prefer to operate in that State.

It is also not unusual in investor-State disputes that there are a number of interested parties involved, the shareholders, the board of directors, the accountants, the in-house counsel, the parties who provide the money, and the private equity funders. They are concerned about how they can recoup their investments. There is distrust and scepticism in the process. In more times than not, the interested parties will prefer to 'have their day in arbitration'.

There should be more education and publicity on what

is investor-State mediation and how this should be conducted efficiently and effectively.

It is not uncommon that in investor-State disputes, many of which can be settled before the arbitration process. On the one hand, the investors will need to answer to various interested parties, who may not have heard of investor-State mediation and are more prone to 'have their day in arbitration'. On the other hand, investors will need to proceed with caution to avoid incurring further losses and embarrassment should they lose. Investors should be mindful that a successful mediation will achieve a 'win-win situation'.

The other common concern for the investors is 'time'. Investors will need to explain to the interested parties on how much time will be spent on the investor-State arbitration. Even for the Closer Economic Partnership Arrangement (CEPA) Mediation mechanism, which is relatively simpler and straight forward, investors usually take time to understand the mechanism. In addition to 'time' investment, other factors the investors will consider are 'costs' and the 'bureaucratic' process.

A well-thought-out plan and detailed understanding of the investor-State mediation are required and all these are relevant to the investors' decisions. Another major decision for the investor is the number of mediators involved – sole mediator, co-mediator tribunal or three-mediator tribunal.

Once the investors comprehend the process, the methods of mediation to be utilised for the investor-State mediation can become relevant, in particular for the legal practitioners. The investors, however, are usually not overly concerned about which method to be used in mediation, be it facilitative, evaluative, or even a conciliation. The investors are more concerned as to the number of mediators involved and who should be appointed as mediator.

In particular, if there is more than one mediator involved, the investors will start to have an adversarial thinking in such mediation process, which defeats the purpose of mediation.

For Mainland investors pursuing the CEPA Mediation in Hong Kong, this will be conducted by a three-mediator tribunal as indicated by our Honourable Secretary for Justice, Ms Teresa Cheng, GBM, GBS, SC, JP. For Hong Kong investors pursuing a CEPA Mediation in Mainland, this shall be conducted by way of a co-mediator tribunal. Whether the CPEA mediation is conducted by 1, 2 or 3 mediators, there are advantages and disadvantages. There have been instances as such that, with the appointment of a senior and reputable mediator, this mediator then expressed a concern over the co-mediator, indicating the co-mediator was neither sufficiently experienced nor reputable enough. There is already a built-in bias before the CEPA Mediation even commences.

Hence, choosing an appropriate mediator is important so that the mediation process does not become adversarial.

Turning to the CEPA Mediation mechanism, many have found the CEPA Mediation mechanism to be user friendly and comprehensible. The CEPA Mediation mechanism aims to assist practitioners with deepening their understanding. If the legal practitioners can understand the CEPA Mediation mechanism concisely, they can certainly explain the mechanism to the investors clearly.

Under Article 19 of the CEPA Investment Agreement (Mediation Mechanism for Investment Disputes), there are six methods in settling an investor-State dispute.

These six ways are summarised as follows:

Art 19(1)(i)–(vi)

(i) resolution through amicable consultation between

the disputing parties;

(ii) resolution through the complaint handling organisations for foreign investors in the Mainland in accordance with the relevant requirements of the Mainland;

(iii) resolution through the function of notification and coordination of investment disputes under Article 17 (Committee on Investment) of this CEPA Investment Agreement;

(iv) resolution through administrative review in accordance with the laws of the Mainland;

(v) resolution through mediation whereby a Hong Kong investor may submit an investment dispute arising from this CEPA Investment Agreement between that investor and the Mainland to a mediation institution of the Mainland side; and

(vi) recourse to the judicial proceedings under the laws of the Mainland.

Art 19(1)(v) deals with CEPA Mediation. To many investors, CEPA Mediation is the most attractive of the six avenues.

The CPEA Mediation principles are not overly different to other commercial mediation principles. However, there are designated mediation institutions that deal with this type of CEPA Mediation.

- China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC)
- China International Economic and Trade Arbitration Commission (CIETAC)

- Hong Kong International Arbitration Centre (HKIAC)
- Mainland – Hong Kong Joint Mediation Centre (MHJMC)

The investors are receptive to the CEPA Mediation mechanism given that the parties can participate and withdraw from the CEPA Mediation at any stage. The CEPA Mediation is purely conducted on a voluntary basis.

Once settlement is reached, a Mediation Settlement Agreement (MSA) is usually prepared. There is no limit to the types of settlement options. It is not unusual that the MSA comprises a mixture of monetary compensation and other commercial settlement terms. There are usually no concerns about the enforcement of the MSA (given the parties settled the disputes amicably) but such enforcement must be in accordance with the local jurisdiction laws and regulations where the investment is made.

Once mediation settlement is reached and a MSA signed, under the laws of Hong Kong, the MSAs are enforceable as a contractual agreement. This is a relatively simple process and can be pursued expeditiously. Similarly, for enforcement of the MSA in the Mainland, the most usual avenue is by way of enforcement for breach of the MSA. There are certain procedures which need to be satisfied:

(i) the MSA must be validly signed;

(ii) the MSA entered voluntarily; and

(iii) the Mainland civil procedures are applicable.

There have been no concerns raised to date over the enforcement of the MSA.

The other avenue in enforcing the MSA in the Mainland is

under the 'Provisions Dealing with Actions Relating to Settlement Agreements' (2002). However, the more popular avenue is still by way of enforcement of the MSA for breach of contract.

As for a summary of the CPEA Mediation Procedures, whichever set of rules apply depends on whether it is the Hong Kong investors investing in the Mainland or the Mainland investors investing in Hong Kong.

Certain procedures are the same for both inbound and outbound investments. The major differences are:

(i) time of commencement of mediation; and

(ii) the number of mediators involved. Sole mediator or co-mediator tribunal if CEPA Mediation is conducted in the Mainland. A three-mediator tribunal if mediation is conducted in Hong Kong.

As for similarities;

(i) there is a 'cooling-off' period of at least 1 month;

(ii) mediation is voluntary; and

(iii) mediation bundles are to be prepared by the parties for mediation purposes. There is no designated format for the preparation of the mediation bundles.

The CPEA Mediation mechanism has proven to be successful for both Hong Kong and Mainland investors. There are a couple of reasons for such success:

- the culture in Hong Kong and Mainland and Asia in general is that the adversarial approach should be regarded as the last resort;
- the 'easier' avenue to resolve investor-State disputes

is by way of CEPA Mediation. However, should CEPA Mediation is unsuccessful, there are other avenues for the investors to pursue;

- while the CEPA Mediation Rules provide for a set of compulsory procedures, other more administrative matters are not. The parties can withdraw from the mediation at any stage and the process is voluntary; and
- sole mediator, co-mediator tribunal and three-mediator tribunal received general acceptance.

To conclude:

- The CEPA Mediation mechanism is transparent.
- It is bilateral and the mechanism has received endorsement by both the Hong Kong and Mainland governments.
- Hong Kong is a major gateway for 'in-bound' and 'out-bound' investment into and from the Mainland, investors welcome such mediation approach to settle the disputes.
- Mediation creates a 'win-win' situation.
- Hong Kong has a great pool of professional mediators. Hong Kong has proper training for mediators and the same is governed by the Hong Kong Mediation Accreditation Association Limited (HKMAAL).
- Given the success of the CEPA Mediation mechanism, this can be used as a 'blueprint' for

the appropriate UNCITRAL future initiatives on investor-State mediation.

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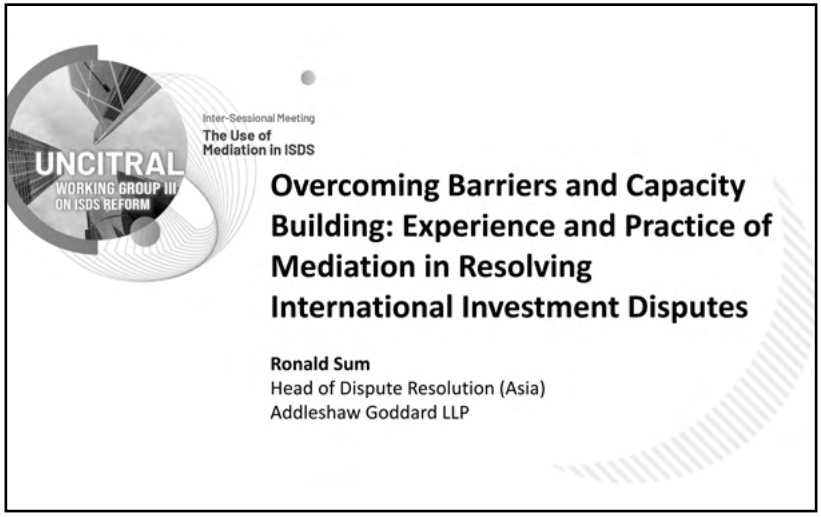

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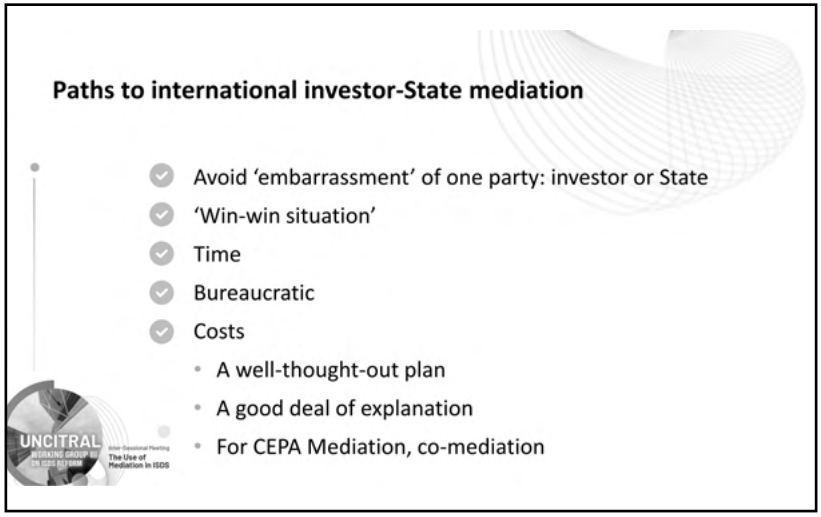

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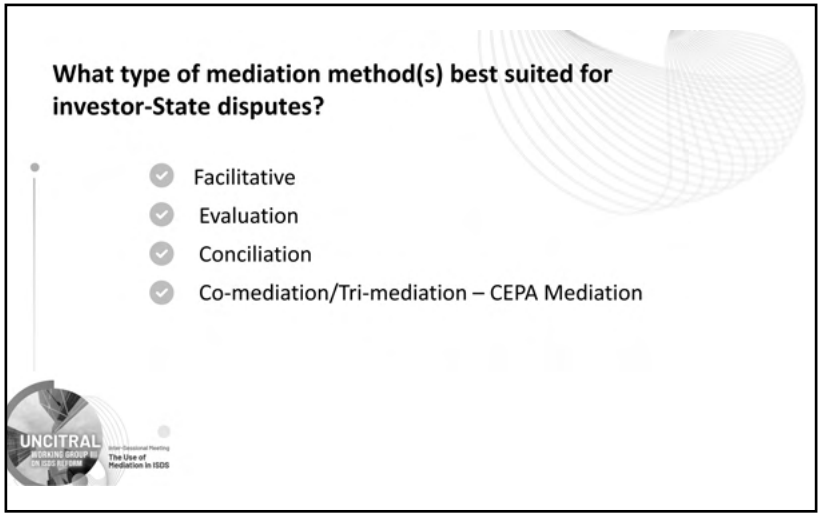

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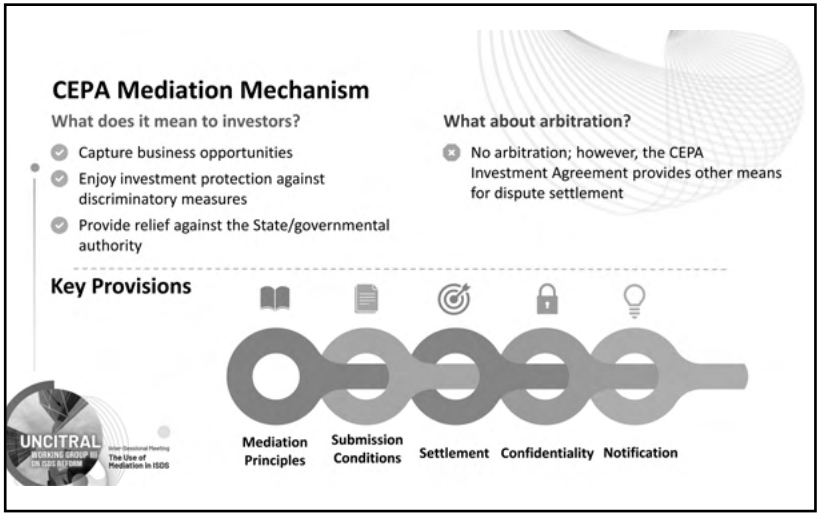

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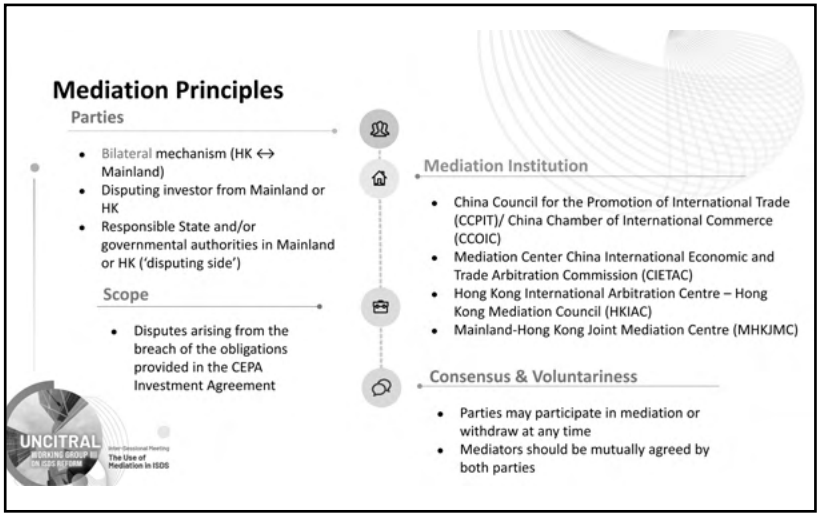

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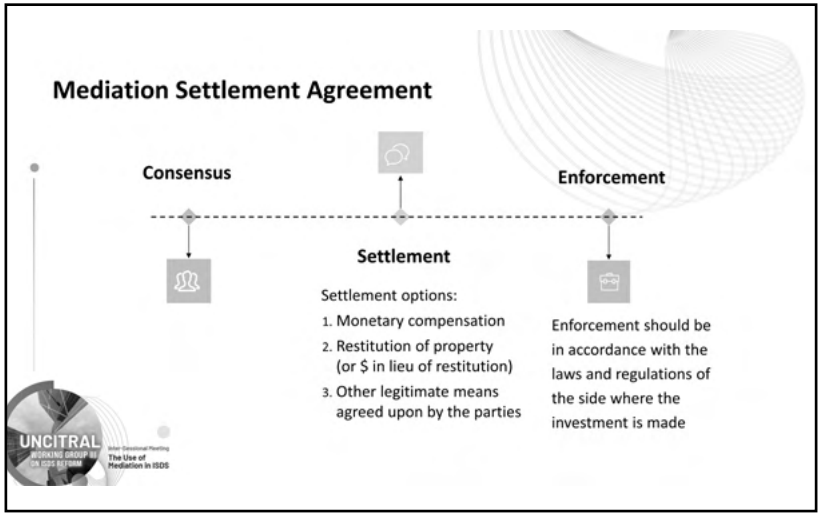

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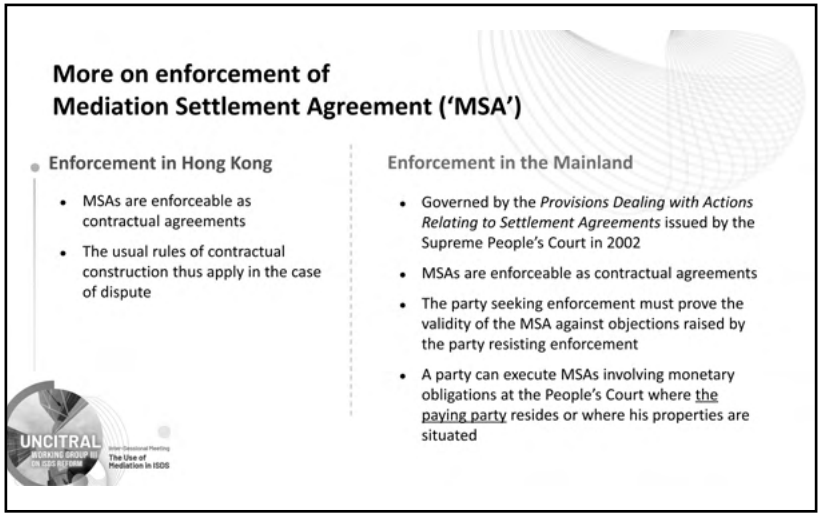

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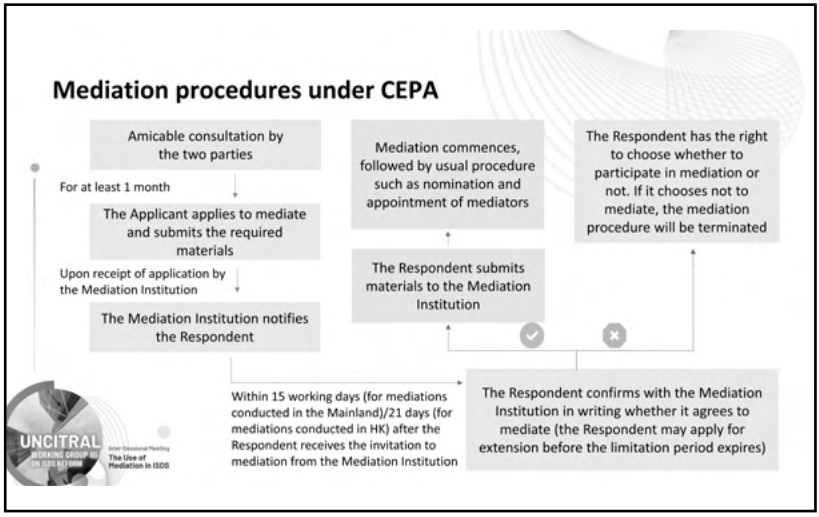

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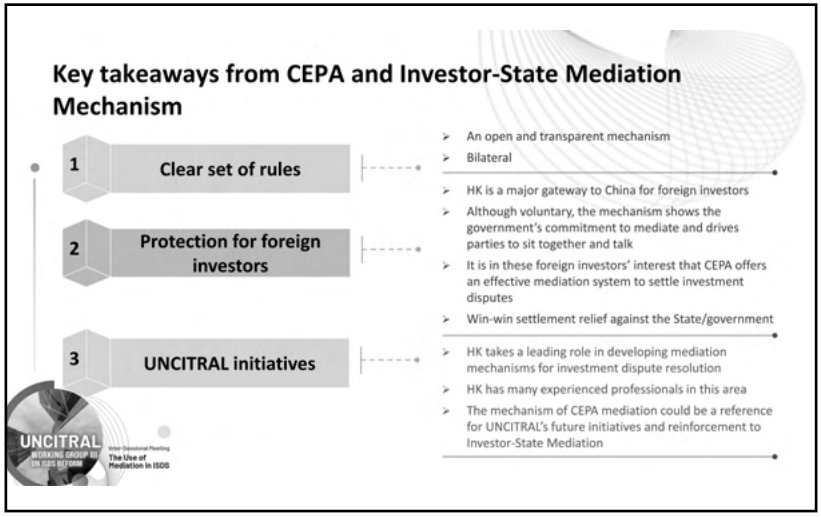
Key takeaways from CEPA and Investor-State Mediation Mechanism
1
Clear set of rules
2
Protection for foreign investors
3
UNCITRAL initiatives
An open and transparent mechanism
Bilateral
HK is a major gateway to China for foreign investors
Although voluntary, the mechanism shows the government's commitment to mediate and drives parties to sit together and talk
It is in these foreign investors' interest that CEPA offers an effective mediation system to settle investment disputes
Win-win settlement relief against the State/government
HK takes a leading role in developing mediation mechanisms for investment dispute resolution
HK has many experienced professionals in this area
The mechanism of CEPA mediation could be a reference for UNCITRAL's future initiatives and reinforcement to Investor-State Mediation
UNCITRAL
WORKING GROUP III ON ISDS REFORM
The Use of Mediation in ISDS

Speaker

Wolf von Kumberg

International Mediator and Arbitrator

Wolf von Kumberg spent nearly over 25 years in Zurich, Switzerland and then London, England, as European Legal Director and Assistant General Counsel to Northrop Grumman Corporation, a global aerospace/security company. In that position he was responsible for its international legal affairs. Prior to that, he served for five years as the Vice President – Legal Affairs for Litton Canada, after having spent several years in legal practice with a major Toronto law firm. He retired from Northrop Grumman in 2015 to develop his global practice as an arbitrator and mediator. He is now a member of specialist International ADR Chambers in London, Arbitra International – based at the International Dispute Resolution Centre. Wolf is also the Managing Director of Global Resolution Services, a provider of dispute resolution services. He is a qualified lawyer in both Canada and England, a certified CEDR (Centre for Effective Dispute Resolution) mediator, an American Arbitration Association Master Mediator and a Fellow of the Chartered Institute of Arbitrators. He has experience of disputes across Aviation and Aerospace, Defence, Compliance, IP, Cyber Security and High Tech Industries – this throughout, Asia, US, Europe and Middle-East which includes

commercial, government and State entities. Wolf is also active in international commercial and ISDS arbitration and mediation. He has been a thought leader working with ICSID (International Centre for Settlement of Investment Disputes), ECT (The Energy Charter Treaty), IMI (International Mediation Institute) and CEDR to help develop the use of mediation in investor/State disputes and has taught courses and written articles on the subject. He was the first Chair of the IMI, which has advocated international standards for mediators and in particular IS mediators. Wolf is also the former Chair of the CIArb Board of Management. He serves as a Director of the American Arbitration Association and of CEDR in the UK.

How to Make Investor-State Mediation Mainstream

I think the first two speakers, Martin and Ronald, have really set the stage here, because they were talking about their experience with investor-State mediation and how it's starting to be utilised and it was interesting that Martin said that 50% of the cases that he has experienced over the last 30 years could certainly have benefitted from mediation, and that's an interesting insight, because over the last five or six years, together with the Energy Charter Treaty Secretariat, ICSID, and CEDR, the UK Mediation Institute, we have been working on developing investor-State mediation. I can tell you when I broached the subject, particularly with arbitration lawyers five or six years ago, very few of them thought that there was really any hope for the use of mediation in the investor-State dispute arena.

We have come a long way, and a lot of that has to do with the efforts that have been made by many different stakeholders in looking at mediation as a possible adjunct to arbitration in ISDS.

Maybe I could just start with really setting the stage for mediation. As we know, in the commercial world in domestic dispute resolution, mediation has now been utilised quite broadly in many different jurisdictions for the resolution of disputes. People have become accustomed to mediation becoming part of the normal process. And if we look at litigation, it is part of the normal litigation process now in many jurisdictions.

People have become comfortable with it, and as Ronald said, process and understanding the process is a key ingredient to something actually being utilised. With respect to investor-State disputes, this simply has not been part of the normal practice. Practitioners in the investor-State world will have known a lot about arbitration, will have understood arbitration and how it would be

utilised, but mediation was something that they might only have recognised in a domestic setting, and not in investor-State.

Making investor-State mediation part of the process and making it a legitimate dispute resolution mechanism is a key factor for its broader use. And one of the important things is to look at how we can continue to build that capacity in the future for this really to become more mainstream.

The international legitimacy of mediation really got a big boost through the Singapore Convention. Through the process of UNCITRAL Working Group II, the exploration of the enforcement of mediated settlements was something that was discussed for several years, and there became then an understanding by States that mediation does play an important role in dispute resolution. While we can say, it is really confined to crossborder commercial disputes, it actually has a much more important meaning – that is the States themselves, because it is a treaty, have recognised that there is a process called 'mediation', and it is a process that is credible. So, these States have signed up to it. Many of them are now ratifying the treaty itself.

Just the very fact that States have dealt with mediation through the Singapore Convention lends great legitimacy to the mediation process. And in that process, of course, as we talk about investor-State disputes, the State side of it is becoming more familiar with the use of mediation. By adopting it in the Singapore Convention makes mediation something that is becoming more mainstream.

We also know a lot of the more recent bilateral investment treaties (BITs) have also incorporated a mediation provision. If you look at many of the more recent ones, in addition to arbitration, there will also be an election with respect to mediation. The investor can actually request mediation if they choose to do so.

In most of these BITs, mediation is still a voluntary choice. It is something the parties agree to do, which is traditionally of course the mainstay of mediation. It is a party autonomy and parties agreeing to mediate, not being forced to do so. Although there are several BITs that actually require mediation as a preliminary step to arbitration.

You will see that some States have gone so far as actually to make mediation mandatory. That is still, as I say, only two or three BITs that actually have that provision in it. But it does show us that mediation, certainly from the perspective of States, is something that is being contemplated as part of the ISDS process.

What we have seen as well is that, increasingly there is a role for mediation rules in investor-State. And I think Martin said earlier that we don't want to be too prescriptive with respect to the way that mediation is applied in investor-State disputes. But there is value in having a general framework, a process framework, and as Ronald said, the parties, whether States or investors, but particularly States I think, want to have a process that they can rely on and point to, and by having mediation rules that provide that kind of framework. About ten years ago, the International Bar Association (IBA) was already a thought leader in this by coming up with a set of investor-State mediation rules.

I think very important to our current discussion is the fact that ICSID, that is of course responsible for a majority of the investor-State arbitration, has now also seen fit to promulgate investor-State mediation rules. I think the intent is for those rules to come into force in 2022 – of course I don't speak for ICSID, but I think that's the intent. ICSID's embracing of mediation and the mediation process will be a big boost for the utilisation of mediation. It is because it gives investor-State disputes and the use of mediation in them much more legitimacy. States can point to

ICSID having these rules; and investors can actually persuade States to perhaps use them because ICSID has those rules.

There's a question raised about conciliation and mediation as well as the fact that they are increasingly seen as synonymous with each other. ICSID of course also has conciliation rules and those rules stay in place even with the mediation rules coming into force and it's actually an important difference. If you look at the ICSID conciliation rules, they're much more akin to an arbitration process, in the sense that you have actually a tribunal of experts that render a non-binding opinion with respect to the dispute. That was the sense behind the conciliation rules – they would be persuasive but non-binding. So, it's a different process. Mediation is a process which is usually conducted by one mediator or comediators, as Ronald was discussing as well, with the challenges that comediation of course also brings. Then, there is the CEPA structure, which is more akin to a tribunal-type of arrangement.

In investor-State mediation rules, there is certainly flexibility in the approach being taken by various institutions. Of course, we are here talking about UNCITRAL Working Group III, and the exploration by UNCITRAL as to the use of mediation within ISDS, and the degree that the UNCITRAL model mediation rules can be utilised within investor-State disputes as well. We have got potentially three mediation rules that we can point to and that will help with the enhancement of the use of mediation in ISDS.

I'd like to very quickly just look at another area of capacity building that is occurring in helping to underpin the use of mediation.

The ECT, the Energy Charter Treaty Secretariat, really has played a leading role in capacity building over the last five to six years by including mediation or the possibility of use of mediation

within its treaty. And they started back in 2016 with an investor-State mediation guide to help their member States to build knowledge about what mediation even is. What is this process that we are talking about and how can it be utilised in investor-State disputes? It is well worth looking at that guide because it is a good primer, providing background information for people who know little about mediation to understand how it can be utilised.

The ECT then went on in 2018 to establish a model instrument which really is a framework for States to adopt to allow them to mediate. One of the obstacles for States to mediate is that they don't have an internal process and that makes it very difficult for State officials to utilise it. If there is an internal process that States have, with mediation as one of the potential mechanisms to use, State officials will feel much more comfortable in using it. It is very important and the model instrument will play an important role as States start to adopt it into their own framework.

In some cases, States aren't even allowed to mediate and so there is a need for them to change their law to permit that to occur. And so that's another area that needs to be addressed obviously for those particular States.

Training of State officials and the use and application of mediation is also important to build capacity. Again, ECT and ICSID are actually doing a great job in trying to get information out to member States and to at least build knowledge with respect to the use of mediation, and how it might apply. And there's been a great uptake of those particular courses that were run by ECT just over the last year or so. And a lot of State officials have actually come and taken part in those courses.

I think there's a greater recognition, particularly now with respect to the pandemic and the effect that's had on States, that

foreign direct investment is an important strategy for many States to help to sustain and build their economies. Part of that strategy in many States is looking at ways to convince investors that there are mechanisms in place to deal with questions, with issues, with conflicts and then with disputes, as they arise.

We have seen many States put ombuds programmes in place that allow the investor to go to an ombudsperson to deal with issues that have arisen with the State in the hope of resolving the issues at a very early stage so that they don't even become disputes. And mediation and the mediation process can also be built into that kind of early resolution process, so that mediation is used very early on and it's not left until the cooling-off period that Ronald was speaking about. It is because by that time, positions are quite entrenched. So, having mediation as part of the State's process with investors early on could also be something that's useful.

Finally, I want to close with some practical matters. I think Martin has already touched on some of this and that is identifying who the mediators are that practice investor-State mediation. Commercial mediation is very different from investor-State mediation. While there are basic skills that all mediators, no matter what field they practice in, are utilising, we know that ISDS is a very particular type of forum and a particular type of dispute. There has to be some understanding for the context of ISDS for somebody to actually be a successful mediator in that field. The training of mediators involving people who already have the basic skills, but to give them an understanding of ISDS, is an important element of capacity building. ICSID, CEDR and ECT jointly, have been doing this type of training now for several years thereby training up a cadre of mediators to address these types of disputes. Creating a panel or panels where investors and States can go to select people who have the credentials and capability to deal with these mediations

is very important.

Another point that Martin made, and it's an extremely important point, is that we have to understand how successful mediation in ISDS actually is. Of course, mediation is a private and confidential process and so often we don't even know whether a mediation has taken place. We know perhaps that settlements have taken place and ICSID has statistics on the number of cases that don't proceed to hearing and a certain percentage of those have settled, but how they settled and whether mediation played a role in that, often isn't known. But ICSID is trying to work on gathering statistics on how many have actually gone to mediation and resolved or partially resolved because I think that's an important point. Mediation can also be used to partially resolve disputes and thereby only part of the dispute goes to arbitration. This is also important in the ISDS context as many of the claims are complex both with respect to issues and calculating damages. Resolving part of the dispute through mediation and having others go to arbitration therefore has cost and time saving benefits for parties. Parallel processes with mediation and arbitration proceeding at the same time, might therefore be contemplated by the parties.

Process design and an understanding of it, I think Ronald has mentioned this, is extremely important in these types of disputes. It's very different from commercial disputes. You've got to spend a lot of time upfront in developing the process that will be utilised together with the parties and perhaps other stakeholders that are involved in that kind of dispute.

With that, hopefully I've given you a little bit of insight in what's happening in helping to build capacity for investor-State mediation, and this is all going to continue to develop.

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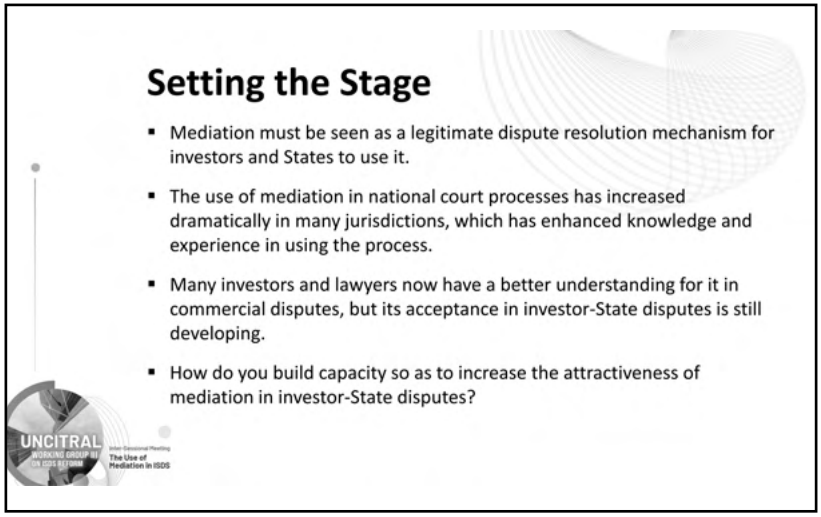

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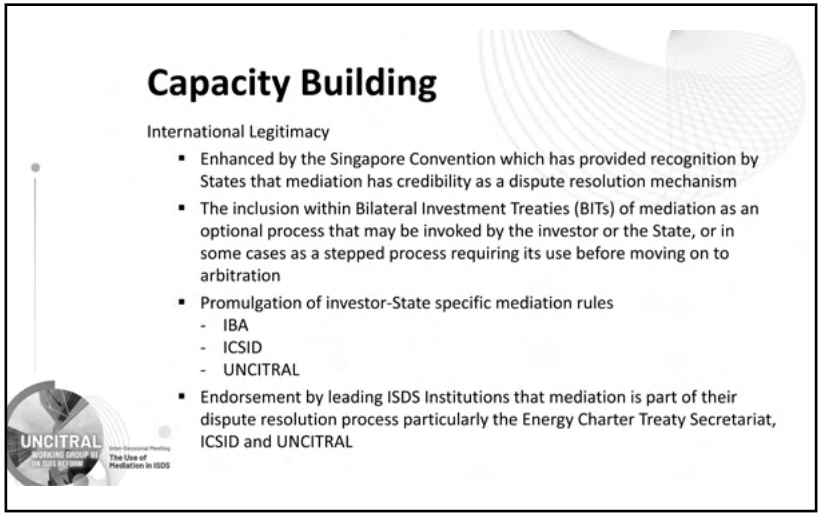

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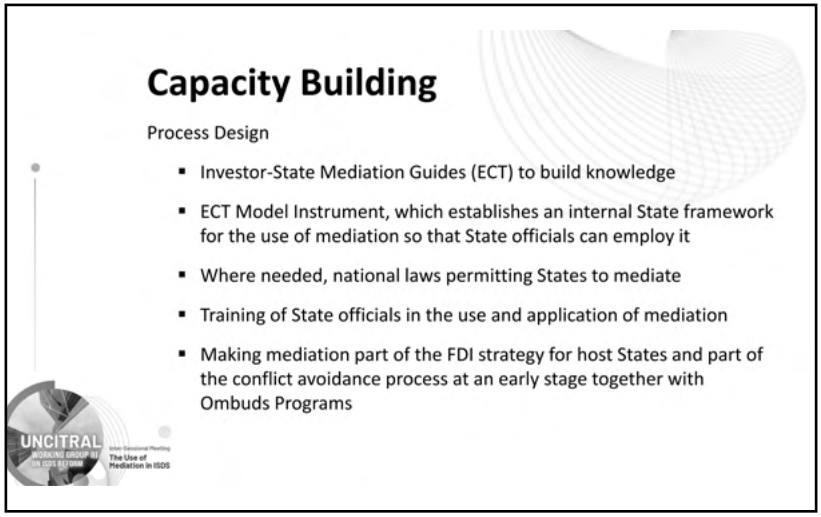

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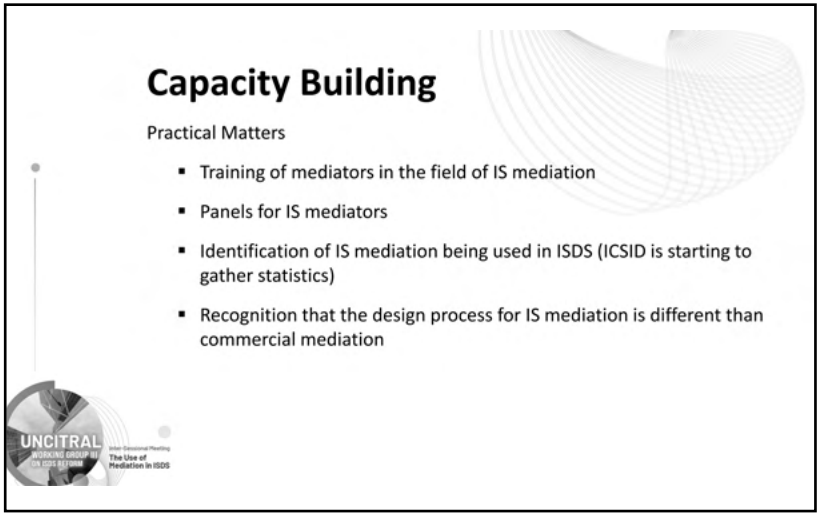
Capacity Building
Practical Matters
Training of mediators in the field of IS mediation
Panels for IS mediators
Identification of IS mediation being used in ISDS (ICSID is starting to gather statistics)
Recognition that the design process for IS mediation is different than commercial mediation
UNCITRAL
The Use of Mediation in ISDS

Speaker

May Tai

Managing Partner (Asia)
Herbert Smith Freehills

May is the Managing Partner of Herbert Smith Freehills Asia where the firm has nine offices including three across China and a Joint Operation with Shanghai Kewei Law Firm. In her practice, she specialises in cross-border China-related and Asian disputes, as well as contentious regulatory matters. She regularly advises governments, government-owned entities, and commercial clients (including financial institutions and energy companies) in Asia, Europe, and the United States, including acting as counsel and advocate in arbitrations under various rules and court proceedings. She has acted as an arbitrator in SIAC (Singapore International Arbitration Centre) and HKIAC (Hong Kong International Arbitration Centre) proceedings, and has also sat as an Emergency Arbitrator under the ICC (International Chamber of Commerce) Rules. She is a CEDR (Centre for Effective Dispute Resolution) accredited mediator and an arbitrator in the HKIAC List of Arbitrators, and is also qualified as a solicitor in England and Wales as well as in Hong Kong.

Role of Practitioners in Promoting the Greater Use of Mediation in ISDS

There is an ancient Buddhist saying, 'Holding on to anger is like drinking poison and expecting the other person to die'. I feel slightly the same way about arbitration. Using legal proceedings to rehash and closely examine, in minute legal and factual detail, every wrong and insult that has been done to a party is not a good way to resolve disputes.

I am very pleased that the UNCITRAL Working Group III, the Department of Justice of the Hong Kong SAR, and the Asian Academy of International Law have brought us together to talk about mediation as a form of dispute settlement that will settle and calm the dispute so that the parties can refocus on the things they do best.

I will tackle the question of what dispute lawyers like me can do to promote greater use of mediation.

I thought I should start by sharing my personal experience of raising mediation in the context of ISDS, and my experience spans almost 20 years in about half a dozen ISDS cases, so they are not necessarily reflective of the most recent developments and experience in this area.

In all cases, my disputes led to the sending of cooling-off letters. My experience has been that the chance of successful settlement and resolution following a cooling-off letter is not bad. More sophisticated and experienced government departments and entities can be quite pragmatic about disputes.

Regardless of the rights and wrongs, they are willing to consider doing a deal to avoid one or more expensive and cumbersome disputes. They, therefore, often do engage with the investor and the

issues to try and get rid of it early, if possible. I note this aligns with ICSID's experience that the vast number of investment disputes do not end in arbitration proceedings.

For me, a second and much smaller group of cases settled after arbitration is initiated and usually after a significant part of the arbitration process has passed (e.g. merits hearing).

A final small group of cases do not settle and go all the way to an award and enforcement proceedings.

Therefore, the encouraging news for me is that the vast majority of ISDS cases do not make it into arbitration or do not make it through the arbitration process entirely. Instead, they are resolved by amicable settlement. What is perhaps less encouraging is that even though mediation has been suggested to my clients and the counter party on every ISDS matter thus far, there have been no takers.

My experience is that one party, usually the investor, is prepared to entertain the suggestion of mediation. When this is suggested to the counterparty, there is no meeting of minds. Interest in and comfort with using mediation cannot be taken for granted. It still requires a lot of discussions, education, and persuasion regarding the benefits of mediation. The recent focus given by the institutions on using mediation has helped with this.

Thus far, I have only persuaded the investor to propose mediation in each of my matters. I have not managed to convince the State to accept the mediation proposal yet.

This is interesting, particularly as I've had reasonably good results from the negotiated settlement. In one case, we've succeeded in getting both sides to agree to an expert determination concerning quantum. So, it's indeed not a reluctance of the parties to engage in

alternative dispute resolution (ADR).

I should, however, clarify that my experience has all been about ISDS arising from bilateral investment treaties (BITs) and investment contracts that provide for arbitration as the dispute resolution (DR) mechanism with no escalation clause requiring mediation or providing for mediation as an option. In the earlier sessions, I was delighted to hear that there are or have been at least thirty ICSID investment mediations. I'm glad that others have succeeded while I have failed. I've spoken to colleagues who have participated in investor-State (IS) mediation to develop these points on what lawyers can do to motivate parties to use mediation. These are some of the tips that they shared.

First, who makes the proposals is very important. In the past, one party, usually the investor, would put together all of the mediation's framework and guidelines. These include the seat of mediation, the governing law of the agreement to mediate, and the draft agreement to mediate. There were no guidelines or best practices until recently, so everything was prepared on an *ad hoc* basis usually by the investor.

The downside to this is not that one side has to take the initiative and do the hard work, but rather the psychological downside which is the lack of trust that permeates this proposal because it comes from the investor.

This has always been problematic for me, and that's why I think arbitration and even expert determination has had more success than mediation.

The framework for the DR mechanism needs to be set down by an impartial and objective authority. Therefore, it is a significant development that institutions such as UNCITRAL, ICSID, UNCTAD, now offer impartial, objective assistance in

mediation. The experience of my more successful colleague, who did persuade a government to undertake mediation for ISDS, is that the institution is key to a successful IS mediation.

In her case, ICSID offered an official framework that could provide comfort and a level of protection to the public officials participating in the mediation process on behalf of the State. The transparency and legitimacy of the process makes corruption claims against public officials more difficult to sustain. Interestingly, ICSID offers its services as an administrator of IS mediation even in the absence of ICSID being chosen or offered in the arbitration clause.

I would probably go so far as to suggest that in addition to making the framework for mediation available to parties, it would be even more helpful if the initial suggestion to mediate could come from some neutral third party because as soon as one party makes the suggestion, we have lost some psychological ground. The proposal, even though well intended, is no longer neutral but will be received with suspicion.

My second suggestion for what lawyers can do to promote successful mediation is that it is essential to get an early independent evaluation of the dispute. It's a valuable prerequisite for both mediation and arbitration.

This independent evaluation is an essential prerequisite to thinking about mediation. Because unless the parties themselves understand the range and likelihood of legal outcomes from the dispute, we won't even get to the starting line for a mediation.

So, if counsel cannot provide that level of independent reflection on the dispute because he or she needs to be seen to be fully aligned with their clients, then someone else should be brought in to do that legal and factual 'soul searching'. This could be senior arbitrators or another law firm.

The exercise needs to be undertaken from different perspectives – not just looking for a binary win/lose analysis but rather one that also assesses the political and commercial implications for the parties.

In this regard, other parties might be helpful, for example, trusted third parties with interest in resolving the dispute rather than taking sides. (e.g. development bank involved in the funding for the investment project). Whilst they understandably do not want to get involved in the dispute per se, there may be things they can do or say to encourage settlement. In one of my cases, a development bank was prepared to consider a loan to help the State pay off any liability. Other relevant third parties include experts to advise on the impact on the investment climate, implications for the sector's growth if the formal dispute were to continue indefinitely, etc.

Hopefully, the parties can be persuaded to participate in mediation because there is an authoritative and independent framework for mediation and an early independent assessment has been undertaken. But that is just the first step. After that, there is still more work to be done by the lawyers.

I would just pick out three important areas where the lawyer's input is critical to success:

(1) Choose the right mediator(s)

It depends on complexity but if an IS dispute deals with complex international law concepts and industry-related issues, it will be useful to have two mediators. One who understands ISDS and PIL, and one who understands the industry. It takes time to pick the right mediators, but the competence of and trust in the mediators is key to encouraging parties to have complete confidence in the process.

(2) Lawyers need to dig deep to find a balance between protecting their clients' rights in the arbitration and reaching for a negotiated solution through mediation. **Leave the rottweiler litigator behind for this one.**

This means biting your tongue when you need to. Remember that it is a confidential process, so it is not always necessary or helpful to go after each statement we disagree with as counsel. The priority on the day of the mediation is different. It is about bringing people together, rebuilding something that has broken down. This requires being on the lookout for common ground and common interest where an agreement can be found rather than the gaps and flows in each other's logic or argument. It requires a lot of concentration. Regular breaks are recommended!

(3) Bring the clients along

In litigation or arbitration, your lawyers are the hired guns and the client needs only to pull the trigger and then gets to sit back and watch how things unfold. In mediation, clients need to get more involved and do the hard work. Clients are required to interject and are to make tough decisions on the spot. Leaving aside the prerequisites about levels of authority, the lawyers need to make sure their clients are ready for these challenges. A lot of preparation needs to be done before getting to mediation to rehearse and socialise difficult organisational decision points.

I've just covered the critical pull factors to pull parties into mediation. If more is needed, there are also push factors: cost and time, etc. Arbitration is very time-consuming and costly. Moreover, arbitration is backward-looking, recreating and reliving the historical wrongs that led to the dispute. This is not helpful or necessary for moving forward. Using my Buddhist quote again, you are paying a

lot for the poison and dying slowly.

Next, I will move on to the appropriate times to suggest mediation. Your first chance would be pre-arbitration. As a few previous speakers have mentioned, the chance of successful pre-arbitration settlement is quite high. ICSID mentioned the vast majority of disputes do not go to arbitration. It is never too early to start preparing for and suggesting mediation.

The first procedural hearing is also a good time – parties have not yet seen detailed written submissions and evidence, (in other words, hundreds of pages of complaints and criticism of the other sides' conduct). You haven't drunk too much poison yet at this stage.

Another good time to suggest mediation might be during a change of government. People who are not so personally invested or entrenched in their past behaviours and decisions might have a different perspective on its rights or wrongs and possible compromises, obviously.

Before the merits hearing, remind clients that they would have to make significant efforts to get ready for a hearing. It is a time when both sides have the most understanding about their own case and the other side's case. The cost of the hearing can be avoided if there is a successful mediation. If this is not possible, I would not give up but also suggest mediation again after the hearing. It would be very educational for parties to see their case through the eyes of the arbitrators. After this, there might be better understanding of the strengths and weaknesses.

I think it would be helpful to suggest mediation early and often. It is very common in commercial mediation to have several mediations before the dispute is settled.

Finally, is there anything that the arbitral tribunal can do?

Are there any carrots or sticks for the parties when proposing mediation in the context of the arbitration, which is often taking place in parallel?

I would suggest the following points.

The first suggestion is to consider correspondence. Lawyers are very reluctant to discuss sensible matters that could be discussed on a without-prejudice basis in open correspondence. I'm afraid I have to disagree that there should be a without-prejudice presumption. The side proposing mediation should see this as a sign of strength. It is something that should give you confidence that it would put you in a good place with the tribunal.

The second point is sanctions and cost consequences for failing to agree to mediation. Whilst there is no rule about this in the context of IS arbitration, there are a number of jurisdictions where there would be sanctions and cost consequences for failing to mediate before formal proceedings, such as in England and Indonesia. Many arbitrators come from or are familiar with these jurisdictions. It is worth a try to get costs on an indemnity basis. It may not be binding, but there is no reason why the tribunal cannot be persuaded by the logic that the costly arbitration could have been avoided if the parties had participated sensibly in a mediation.

Conclusion

In conclusion, lawyers need to work hard at this. We need to get comfortable with taking on a different role and pushing in different ways. Once a dispute has arisen, we need to work hard with our clients to find the right neutral framework and conduct on early evaluation. To get to the point of success, we need to make constant effort and reflection.

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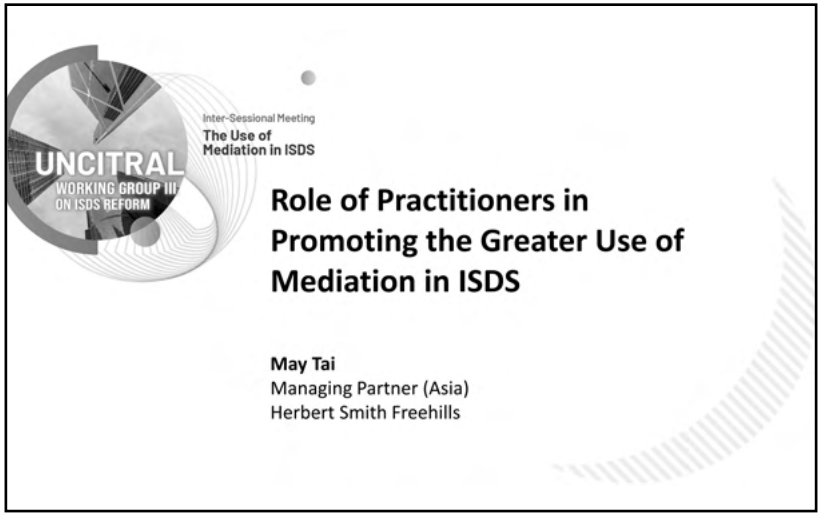

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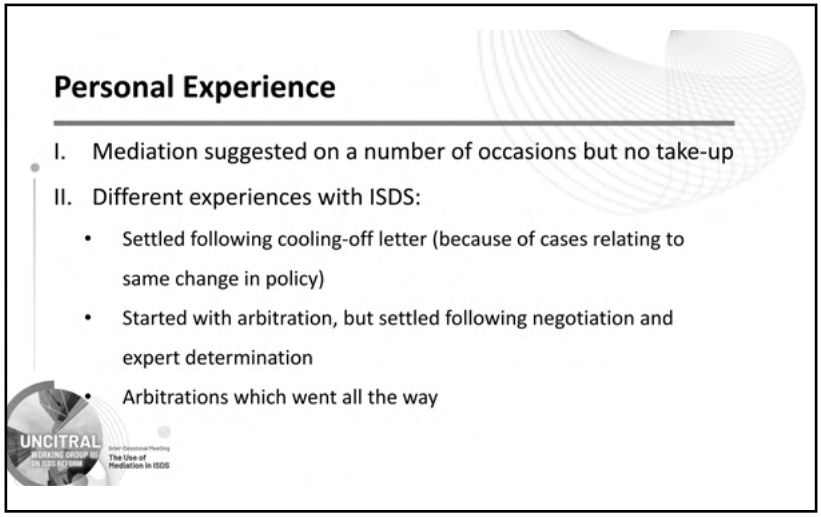

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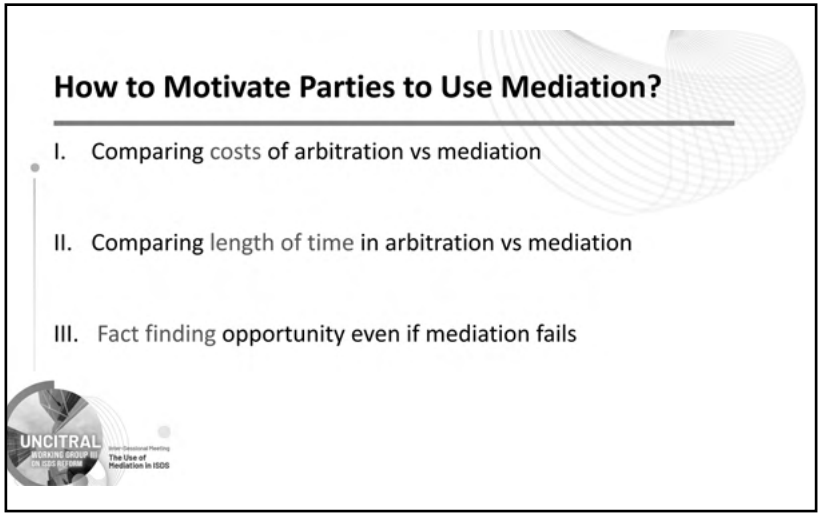

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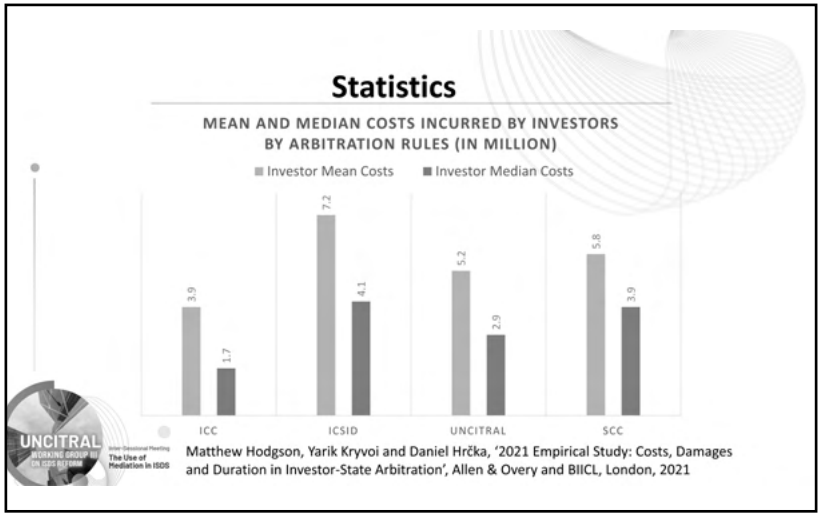

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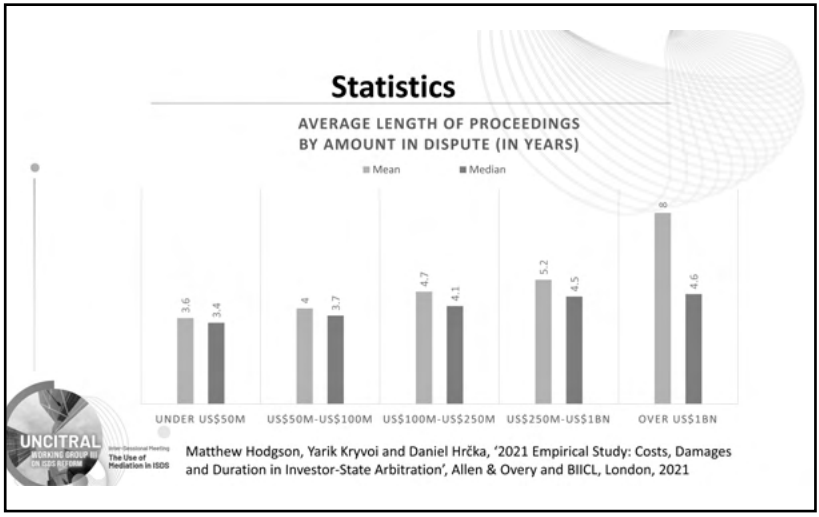

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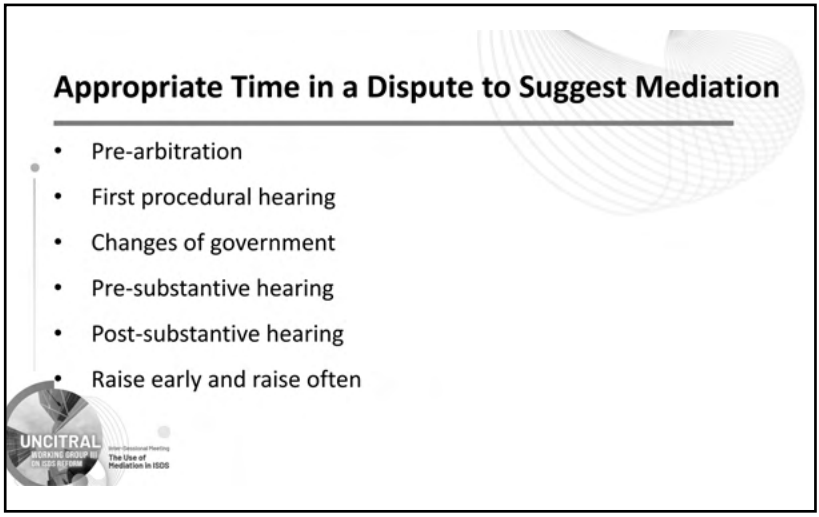

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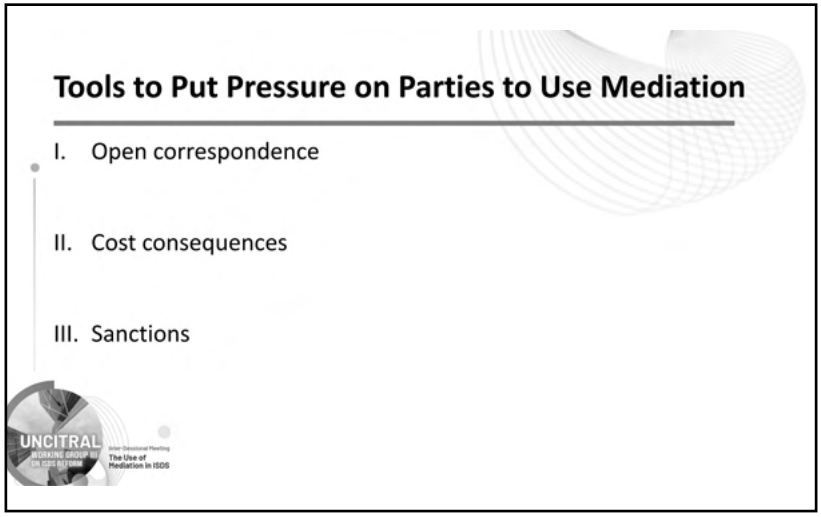

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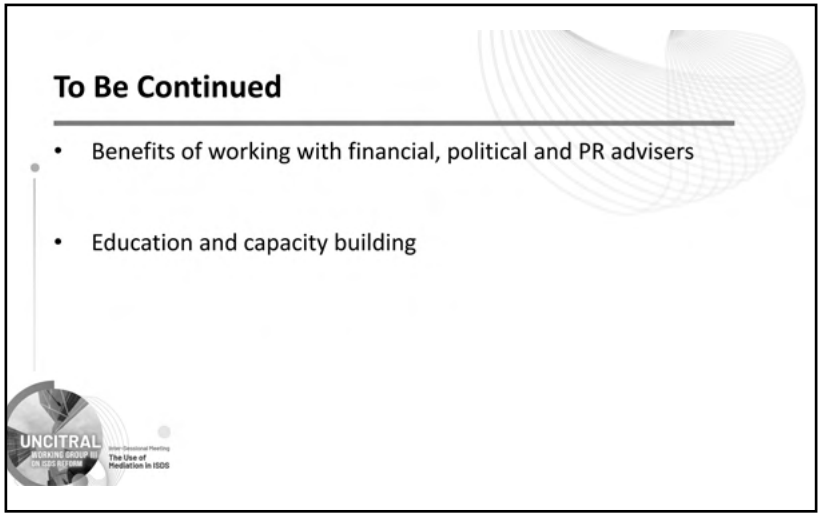

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UNCITRAL
WORKING GROUP III
ON ISDS REFORM
Inter-Sessional Meeting
The Use of
Mediation in ISDS
May Tai
Managing Partner (Asia)
Herbert Smith Freehills
Contact
E-mail: may.tai@hsf.com
Phone: +852 2101 4031

Speaker

Hi-Taek Shin

Professor of Law (Emeritus)

School of Law, Seoul National University, Korea

With solid expertise in international business transactions and resolution of commercial and investment disputes arising from cross-border transactions, Professor Shin currently serves as Chairman of the Korean Commercial Arbitration Board's international division (KCAB INTERNATIONAL). Prior to that, he was a partner at Kim & Chang. Professor Shin is an arbitrator at Twenty Essex Chambers and is on the panel of arbitrators for major international institutions such as the Hong Kong International Arbitration Centre (HKIAC), the International Centre for Dispute Resolution (ICDR), and the International Centre for Settlement of Investment Disputes (ICSID); and he regularly sits in international commercial arbitrations and investment treaty arbitrations. Moreover, Professor Shin has chaired special commissions organised by the Ministry of Justice of Korea for the enactment of the Arbitration Promotion Act. He also participated in the task force commissioned by the Ministry of Justice for the amendment of the Arbitration Act of Korea.

Explore the Synergy of Dispute Prevention Tools and Mediation

I will focus on three questions relevant to the topic assigned to me. First, whether mediation is well suited for investor-State disputes. What are the obstacles to the use of mediation by State parties? And how to generate synergy of dispute prevention tools and mediation.

Quite a number of those aspects have already been touched upon by other speakers. I use the word 'dispute prevention tools' in a very broad sense, referring to the structural design and policy considerations as well as legal instruments which can be considered useful for the prevention and mitigation of investor-State disputes.

Although interest in mediation in ISDS cases are growing in recent years, the statistics on mediation in ISDS cases by institutions are still very low. Hence, we often hear a question whether mediation is well suited for investor-State disputes. However, as Frauke Nitschke of ICSID has mentioned in her contribution to Kluwer Mediation Blog (6 October 2021), ICSID caseload statistics show that 34% of all ICSID arbitration cases were settled or discontinued. This is an encouraging indication that the State parties have been interested in and have actually pursued the negotiated settlement of investment disputes even after the commencement of the arbitration.

Given the State practice of settlement of investment dispute, as evidenced by these statistics, in my opinion, if concerted efforts could be made on the national as well as treaty, international and multilateral level to link the dispute prevention and mitigation tools to mediation from the time a dispute arises, there is a good potential for mediation to be employed more in the future as a meaningful option for resolving ISDS cases than in the past.

Factors identified as main obstacles to the use of mediation by

State parties are as follows. Other speakers have already mentioned several of them. Thus, I will just focus only on key obstacles. Some of those obstacles are structural or organisational issues, while others are overall governance issues of a particular host country, or even political or social environment impacting the mindset of the officials involved in the management of investor-State disputes.

Important factors, in my opinion, include the following:

(i) no lead agency serving as a channel of communication with foreign investors or having a mandate to hear their grievances;

(ii) lack of a mechanism within the government to detect dispute or share information on emerging disputes at an early stage before escalation;

(iii) no lead agency is empowered to coordinate among relevant agencies in the management of disputes with investors, resulting in the difficulty of intergovernmental coordination;

(iv) no clear legal basis empowering or encouraging the lead agency or officials to engage in negotiated settlement through mediation;

(v) fear of public criticism or fear of allegation of corruption, and even possibly of prosecution of the officials involved, particularly after change of the administration;

(vi) extensive media coverage of investment disputes and ensuing political sensitivity; and

(vii) lack of capacity in two important aspects –

(a) lack of capacity to objectively analyse the

strength and weakness of the State's case; and

(b) lack of capacity and the resulting lack of confidence in, and fear of, conducting negotiated settlement with investors by using mediation.

Let's turn to the dispute prevention and mitigation tools. Dispute prevention and mitigation aim to prevent or solve disputes through methods alternative to litigation or arbitration, including negotiated settlement. This is one of the key ISDS reform agendas under discussion at UNCITRAL Working Group III. Dispute prevention tools could be designed or used to remove or reduce the obstacles identified earlier to the use of mediation by State parties. As such, I think that effective implementation of dispute prevention and mitigation tools with the use of mediation would lead to more efficient and cost-effective but less adversarial settlement of investment disputes, which could possibly restore mutually beneficial economic engagement.

Let me briefly mention some of those dispute prevention and mitigation tools which will have synergy with mediation. First, at the national level. The very important first step would be the establishment or strengthening of agencies within the government serving as a channel of communication between the investors and gathering of information on investors' complaints, hearing grievances and channelling them to an appropriate governmental agency at a very early stage. This is an early detection function. And in this process, a governmental or quasi-governmental agency such as an investment ombudsman could play an important role. In my experience, a very passionate Korean investment ombudsman, a retired professor of Economics, was very sympathetic with the foreign investor after having heard its grievances, and he played a kind of *de facto* mediator between the government agency

responsible for the complained measures and the investor concerned and successfully resolved the dispute well before it was elevated to arbitration. Such a lead agency as well as an impartial investment ombudsman would enhance possibility of dispute resolution by a negotiated settlement through a formal or informal mediation before it is escalated or politicised.

Another important organisational tool could be the establishment or designation of a lead agency with the clear legal authority to manage investor-State disputes using various tools of dispute resolution including mediation. This lead agency could have mandates including (i) raising awareness on the State's investment obligation under the treaty; (ii) performing functions such as coordination among governmental agencies in the development of dispute prevention policies; (iii) managing disputes including representation of the States in negotiation, mediation and arbitration; and (iv) conducting an objective analysis of the strengths and weaknesses of the State's case, independent of the agency having taken complained measures.

The legal authority and accumulated experience and knowledge of this lead agency would enhance the quality of decisionmaking of the State to pursue a negotiated settlement, possibly through formal or informal mediation, in earnest with confidence, not as a formality as an interim step leading ultimately to an arbitration as stipulated in the treaty.

Turning to the treaty level, another important tool could be a clear provision in the treaty requiring or allowing the parties, especially State officials, to refer to mediation, whether it's optional or compulsory. At the moment, there are very few treaties requiring mandatory mediation, and the desirability of having a mandatory mediation provision is under debate. In my opinion, the mandatory mediation provision would serve as an anchor giving certain

comfort to the State officials in choosing mediation as a means of dispute settlement.

Many existing investment treaties provide a multi-layer dispute resolution process before an investor files a binding arbitration. However, not many of them treat mediation as seriously as arbitration, thus such provisions tend to be viewed as one of the formality steps ultimately leading to an arbitration. For instance, Article 11.15 of Korea-US Free Trade Agreement states that, '[i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.' More recent treaties tend to expressly refer to mediation. For instance, Article 9.18 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides that, 'in the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures, such as good offices, conciliation or mediation.' Certainly, these types of treaty provisions would allow State officials to pursue mediation with lesser degree of concern over public criticism or political risk. They can justify their decision to mediate, pointing out that mediation is the mandated procedure in the treaty.

Another tool which some of the treaties have already embraced is a provision requiring involvement of home States in an institutionalised structure rather than *ad hoc* involvement in the form of joint committee or commissions which are intended to function as a forum for regular exchange of information to prevent dispute and exchange of views to ensure coherent treaty interpretation.

The next point is the enhancement of awareness of the utility of the mediation as well as mediation rules and other useful instru-

ments relating to mediation such as UNCITRAL Mediation Rules, ICSID Mediation Rules and Singapore Convention on Mediation, to name a few. This point has already been touched upon by other speakers. If the information or good experience of referring to mediation under those instruments are widely shared, it would boost the legitimacy of mediation and thereby enhance interest on the part of State officials in resolving disputes through mediation.

My final point is the importance of providing training and capacity building assistance to States in need. This would include development of comprehensive databases for sharing knowledge and experience specifically on dispute prevention and mediation and establishment of an international advisory centre to support States in need of assistance, which is already on the agenda of UNCITRAL Working Group III. Capacity building would also lead to confidence building for the utilisation of mediation as a meaningful alternative method of investor-State dispute resolution.

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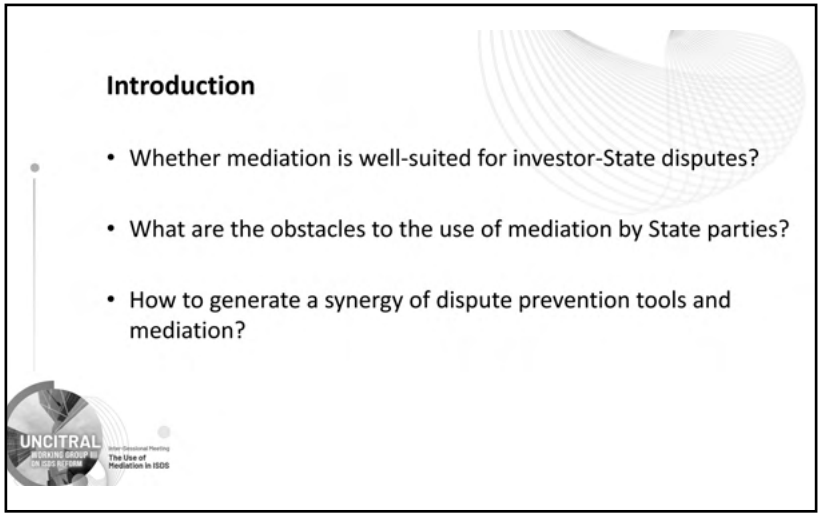

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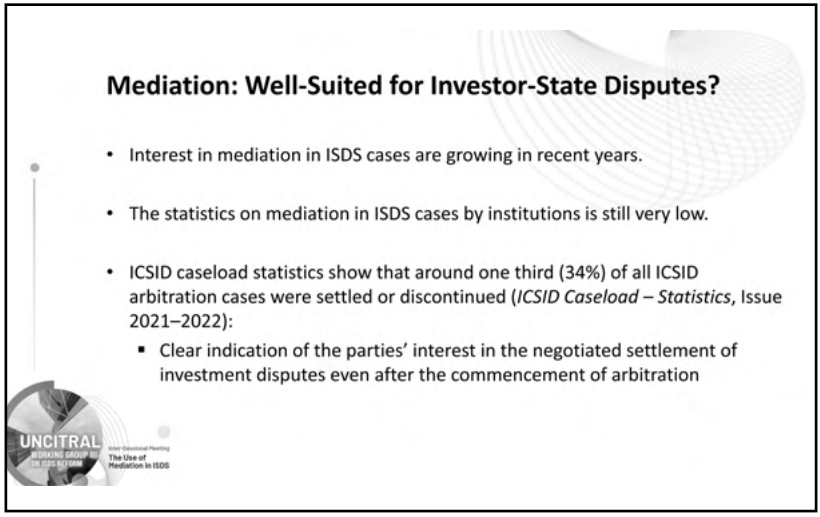

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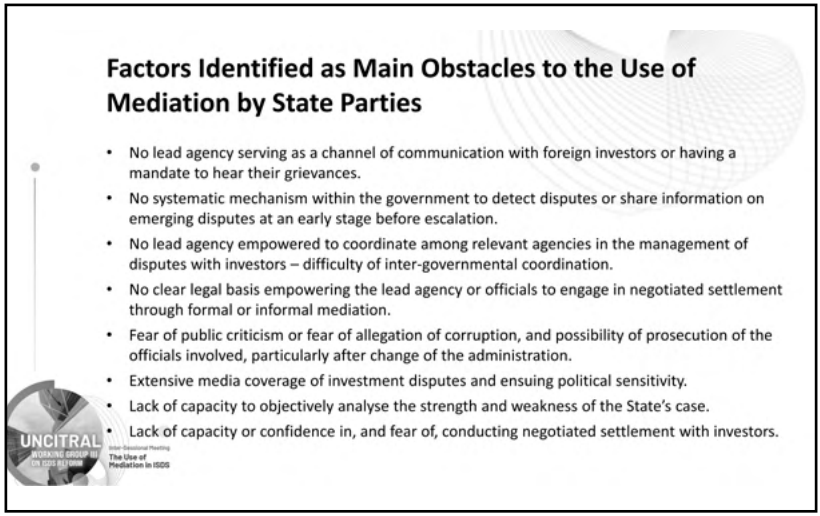

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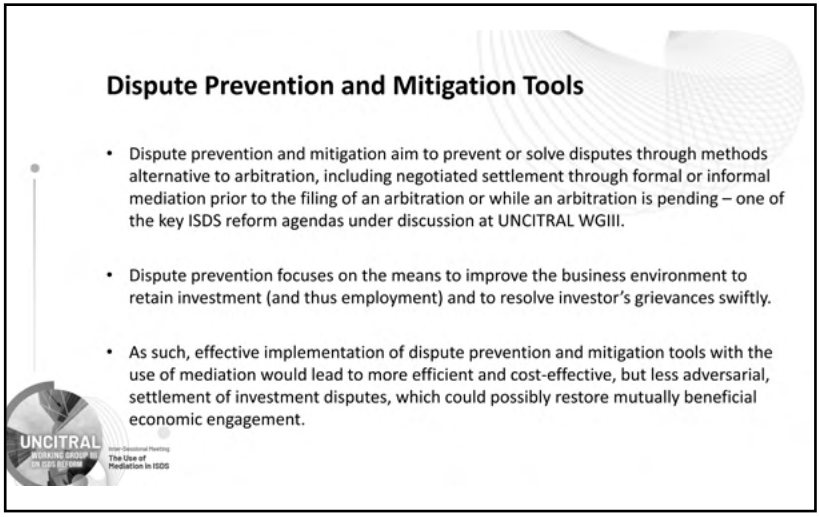

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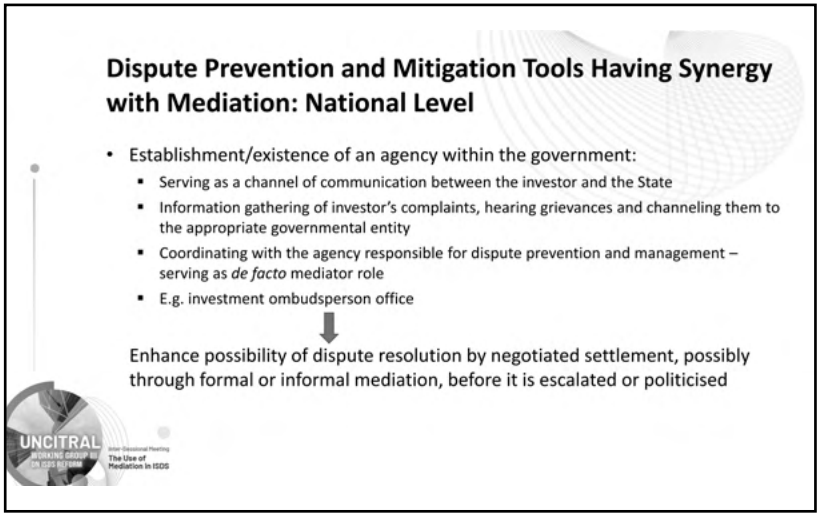

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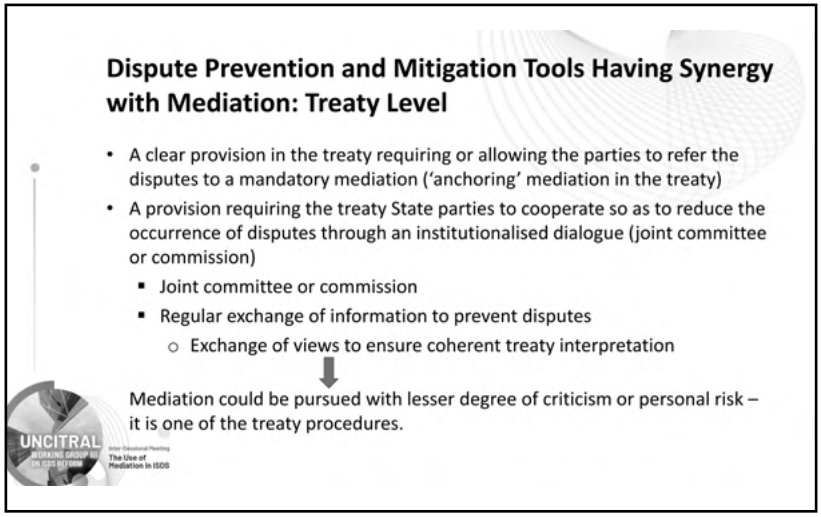

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Enhance Awareness of the Utility of Mediation Instruments and Capacity Building: International and Multilateral Efforts
Disseminate information and knowledge and share experience on the utility of practical and flexible mediation rules and other useful instruments relating to mediation
UNCITRAL Mediation Rules (2021)
ICSID Mediation Rules (WP5)
Singapore Convention on Mediation
UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)
Training and capacity-building assistance to States in need
Developing comprehensive databases for sharing knowledge and experience on dispute prevention (e.g. UNCTAD Investment Policy Hub website)
Advisory Centre to support States in need of assistance
Training and technical assistance on investment and ISDS issues and dispute prevention
UNCITRAL
The Use of Mediation in ISDS
Capacity and confidence building for utilisation of mediation

Speaker

Thomas So JP

Chairman

eBRAM International Online Dispute Resolution Centre

Dr Thomas So is a partner of Mayer Brown. He advises on shareholders- and equity-related disputes, property-related litigation, libel litigation and media-related litigation work, and litigation and arbitration in the PRC. He represents banks and financial institutions, property developers and corporations as well as Mainland China enterprises on securities- and equity-related disputes. Dr So was one of the founder members of eBRAM International Online Dispute Resolution Centre (eBRAM) and was appointed Chairman of eBRAM in 2020. Dr So is the immediate past president of The Law Society of Hong Kong, who has been committed to promoting and improving the standard of legal and dispute resolution services in Hong Kong. He is also a member of multiple arbitration committees in Asia. In January 2018, Dr So was appointed as a member of the National People's Congress. He was also commissioned as a mediator of Guangdong Court for Cross-border Commercial Dispute Resolution in the Guangdong-Hong Kong-Macao Greater Bay Area by the High People's Court of Guangdong Province for three years. Dr So received his J.S.D. from Tsinghua University School of Law, and has been frequently invited to be the lecturer by various universities in the Mainland. Dr So

also acted as Deputy Judge at the District Court and Temporary Deputy Registrar at the High Court from 2002 to 2004.

Explore the Application of Online Dispute Resolution to Mediation of International Investment Disputes

We have been talking about mediation in investor-State dispute resolution mechanism and I'm going to look at mediation as a trend that we're going to embrace more often in investor-State disputes. Moreover, I will deliberate on the use of technology in mediation in resolving investor-State disputes, the possibility of using more technology and how we're going to go about it.

In the first part, I will share a bit of statistics and data. In fact, many of us have talked about it, and I will take you through very quickly some statistics to show that there is definitely evidence to show that mediation is a trend. There is a trend for us to embrace more mediation in investor-State disputes. In the second part, I will share some challenges which I think we see in the way how conventional mediation is being held; then, we will look at how to use technology to help meet those challenges so that the use of mediation can be more cost and time efficient.

I'm speaking here as a representative of eBRAM, which is an online dispute resolution centre, but I myself am also a dispute lawyer for many years. From that angle, I will try to share some of the challenges that practitioners see in the conventional style of dispute resolution.

The survey done by Queen Mary University of London in 2019/2020 shows that the more popular way of resolving investor-State dispute is still contract-based arbitration and treaty-based arbitration, which has 81% and 72% of positive views.

If you look at mediation, it is in the middle rank which has a 54% of positive views. Why is it that mediation is not that popular? There are many reasons and some say that, it's because there is a lack

of established contractual mechanism for mediation, and I believe that is the reason why we are here today, to talk about how we can promote better use of mediation.

But the survey also reviews some feedback from the investors in their dissatisfaction with investor-State arbitration because of the cost involved, because of the time, because of unpredictability of outcome, and problems of compliance, etc.

The survey goes on to talk about the investors' views on mediation as a mandatory requirement, and the result shows investors generally welcome mediation as a mandatory requirement – 64% of the respondents are in favour of mediation as a mandatory requirement. But then the general sentiment is that: 'Mediation is better suited than formal dispute resolution mechanisms to achieve the parties' commercial or business objectives as it has less of a negative impact on the parties' relationship'.

In mediation there is no right or wrong. There is no requirement of having a decision out there to decide 'you are right; you are wrong'. The main thing is to look for a way out from the common and long-term interest of the parties rather than to find out who is right or wrong. This is a special feature of mediation.

Having seen the statistics, we have also seen some important milestones, where many speakers have talked about, signalling the trend that international organisations and treaties are starting to bring in mediation into the dispute resolution mechanism. Recently ICSID has launched two new publications designed to promote the use of mediation in investment disputes. And then in Hong Kong in 2018, we had the CEPA arrangement, under which we have included mediation as a way to resolve investment disputes, and we also have the Energy Charter Conference endorsing the 'Guide on Investment Mediation'. There are other international treaties which

have brought in mediation as a tool to resolve investment disputes such as the Central America-Dominican Republic free trade agreement (FTA), the EU-Canada FTA, the EU-Vietnam FTA, and the EU-Singapore FTA. All of them embraced mediation as a way to resolve investment disputes. So, the signs are there, we are seeing a trend that governments and parties are putting more and more effort in embracing and promoting mediation as a way to resolve investment disputes.

What's next, what are the challenges? As I'm speaking here as a representative of an online dispute resolution centre, I'd be telling you that there are challenges with using conventional mediation, and how the use of technology could help. And I hope that after my presentation, I will be able to convince you to consider using high technology to make mediation more cost and time efficient.

Let's first look at some common challenges. Since investor-State disputes are normally cross-border disputes, you are likely to encounter language barriers, geographical barriers, and even the sensitive 'face' issues. When you have a conventional mediation, you'd need to meet to mediate. *Are you coming to my place? Or am I going to your place? Why do I have to go to your place? Why can't you come to my place?* Such discussion could take a month or two, simply trying to decide where to do the mediation.

COVID is actually an awakening call, because COVID prevent people from travelling. As a result, people start thinking about how the problem could be resolved. For example, in the court we have a judicial backlog. We have delayed dispute resolution proceedings as a result of COVID. Then when we look at the private sectors where we do arbitration and mediation, they continue the process with the help of high technology.

Advanced technologies, therefore, will shake up the entire

dispute ecosystem. I identify here four products:

i. Videoconferencing technology enables virtual meetings to take place between parties. And in the mediation perspective, there is no requirement for you to travel all the way and avoid the '*Are you coming over, or am I going over, and where are we going meet*' kind of scenario.

ii. Then we have artificial intelligence where we could make use of in doing a chatbot technique. AI translation – cross-border disputes invariably involve different languages. E-transcription and e-bundle. People who do international arbitration are well aware of this. We have this already in place, so this is nothing new.

iii. And we have a blockchain technique where you could actually track documents, and this is more relevant, I think, to the question of smart contract.

iv. And then we have a cloud technique where we have a secured storage of information and data as well as multifactor authentication and data encryption to ensure the data are well protected.

So, LawTech eases the hardship of disputing parties and mediators. It breaks the limitation imposed by physical borders and serves as a cure for cross-border investment dispute settlement under the influence of the pandemic. Consequently, I would say that e-format mediation is not only a tool, but also the direction for future development in cross-border mediation setting.

Finally, let's turn to eBRAM. We are an independent and not-for-profit organisation established in 2018 by a group of legal

and technology professionals including Asian Academy of International Law, Law Society of Hong Kong and Hong Kong Bar Association. eBRAM was set up in response to the government call, the policy address of 2018, and have full support from the government of the Hong Kong SAR, especially the Department of Justice.

We run a platform that adopts a multitier online dispute resolution process starting from negotiation, mediation, and arbitration, and we support Mediate First. The COVID-19 ODR scheme was set up in June 2020. It is a multitiered dispute resolution targeting COVID-related dispute which disputing amount does not excess HKD 500,000. eBRAM only charges HKD 200 for each party and we aim to resolve the dispute within six weeks. This is a domestic scheme.

The eBRAM APEC ODR platform is a scheme that we will roll out in December 2021. It also shares the feature of three-stage proceedings: negotiation, mediation, and arbitration. It targets dispute of around half a million dollars, charging an all-inclusive fee of ca. HKD 41,000 and aiming to have the dispute resolved in seven weeks.

You will see that the two schemes that I've introduced are actually tailor-made products targeting a specific type of dispute that we could provide online. In addition to these two platforms, we also work on other projects in having stand-alone ODR platform for stand-alone arbitration, stand-alone mediation, *ad hoc* cases as well as legal cloud portal. We will also be able to provide e-transcription and e-bundling services. A deal-making platform will be coming out very soon.

This deal-making platform is to use an online platform not just to resolve dispute but to enable people to reach a deal based

on an online platform without the need of physically meeting each other. Now, I know that in investor-State disputes where you talk about mediation, you have an additional requirement probably on data security. Since one party is a State, States are very concerned about how you manage their data and all the rest of it. So, one of the most important requirements for a successful ODR platform, particularly targeting cross-border disputes, is to ensure that the system is reliable and credible as well as the data and cyber security requirements do match international standard. We are pleased to say that eBRAM has actually met the international standard for cyber security and data platform.

This is our roadmap for the next two years. Regarding capacity building, we have been providing training to over 150 to 200 mediators and arbitrators already, and we will continue to provide capacity building training to interested professionals from around the world.

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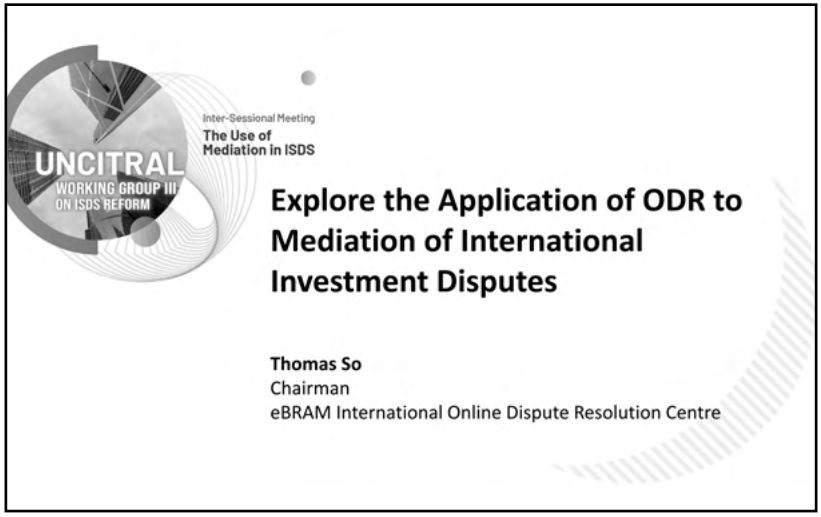

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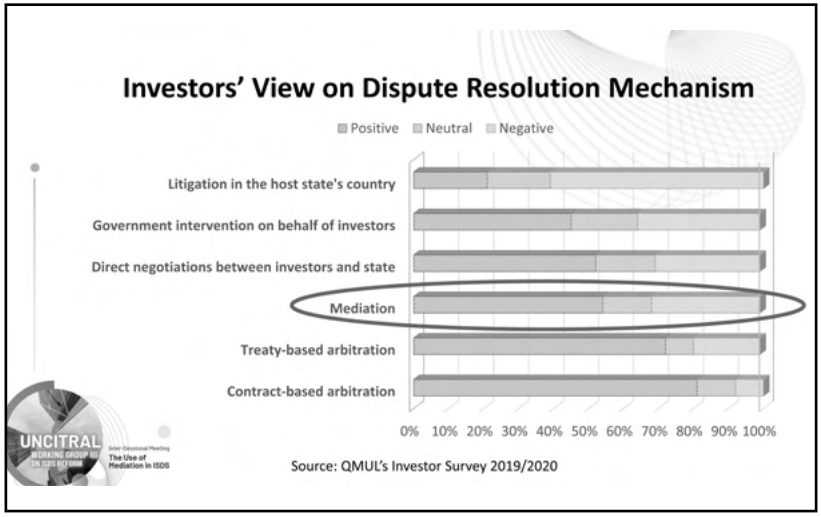

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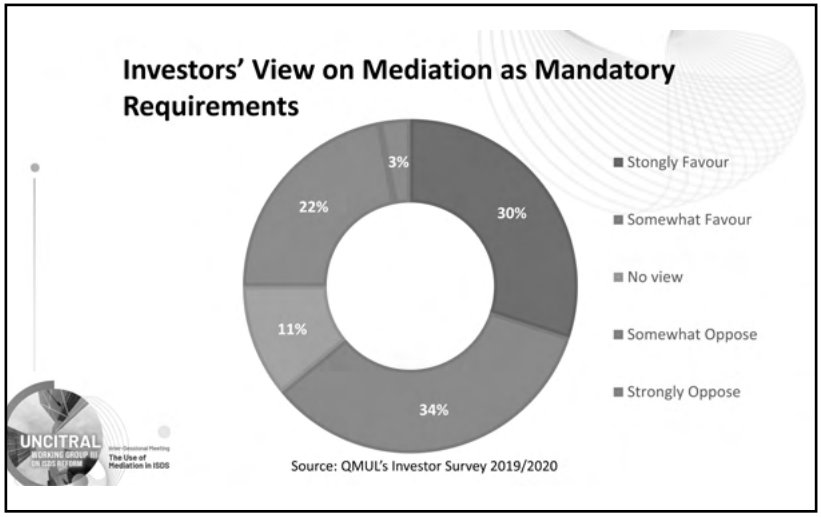

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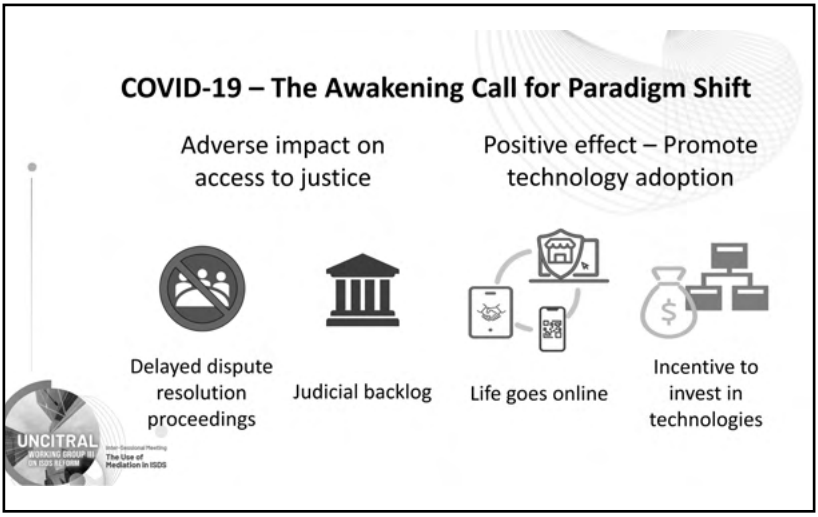

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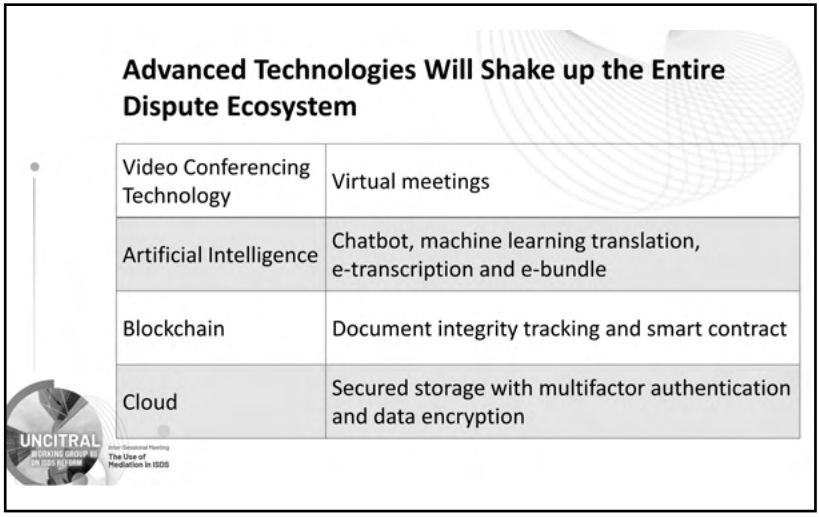

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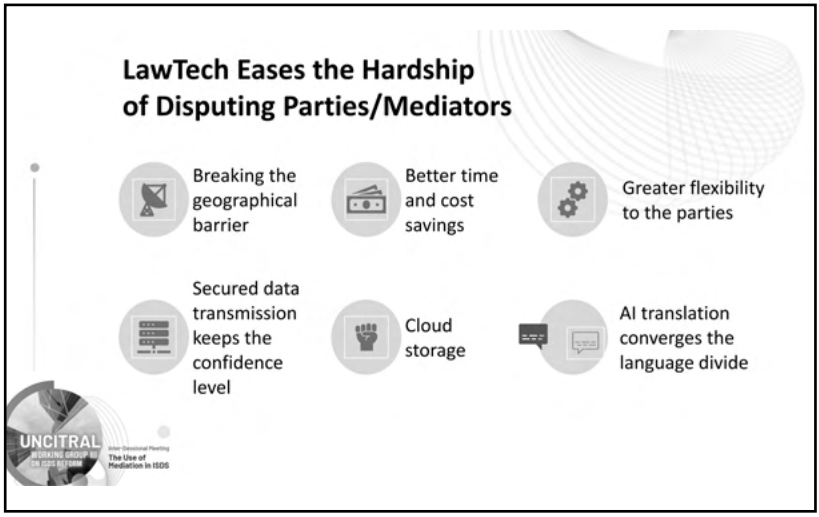

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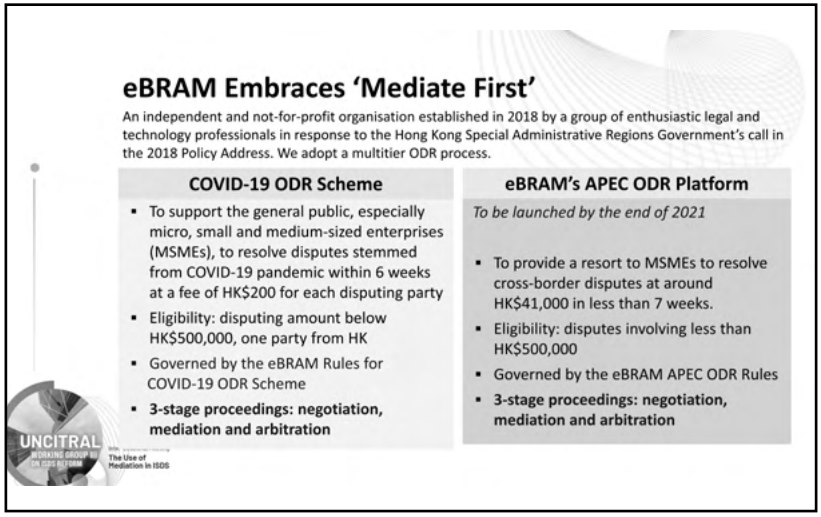

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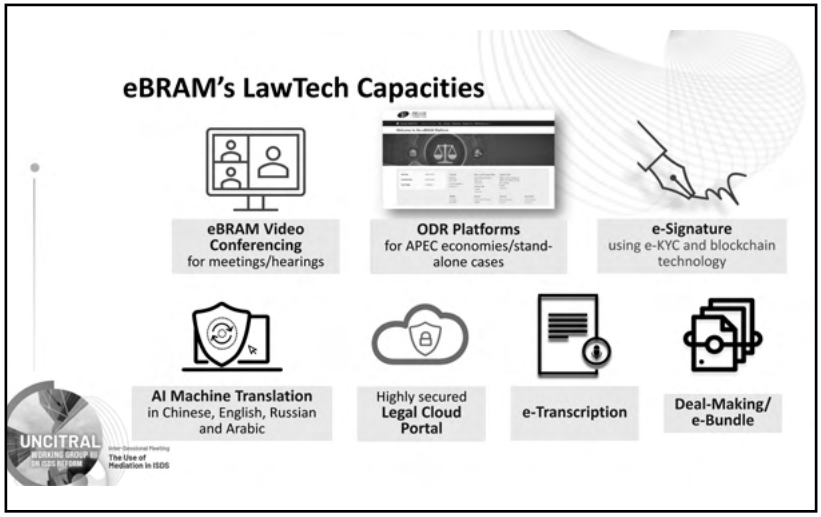

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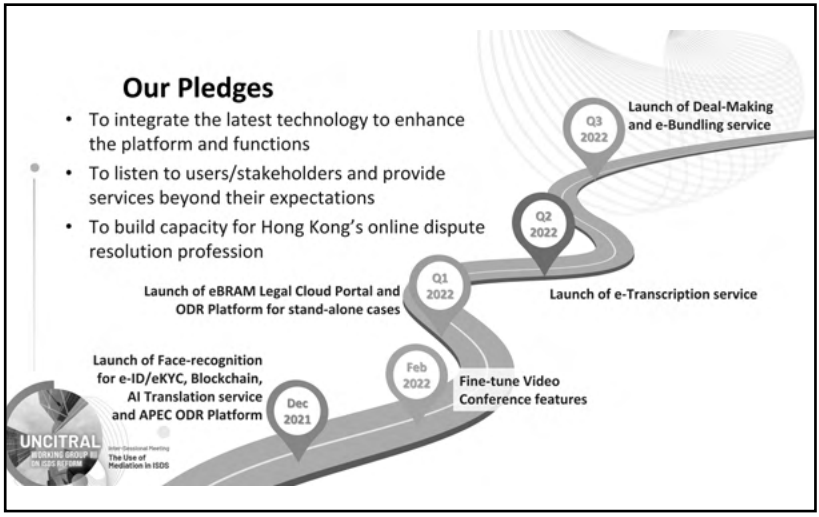

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[29 October 2021 - Evening]

Opening Remarks

Opening Remarks

Teresa Cheng GBM GBS SC JP

Secretary for Justice

Hong Kong Special Administrative Region of the People's Republic of China

Ms Teresa Cheng, SC, was appointed Secretary for Justice on January 6, 2018. She was a Senior Counsel in private practice before joining the Government. She is also a chartered engineer and chartered arbitrator. She was frequently engaged as arbitrator or counsel in complex international commercial or investment disputes. Ms Cheng was one of the founders and Chairman of the Asian Academy of International Law. She is a Past Vice President of the International Council of Commercial Arbitration, Past Vice President of the ICC International Court of Arbitration and Past Chairperson of Hong Kong International Arbitration Centre. In 2008, she became the first Asian woman elected through a global election as President of the Chartered Institute of Arbitrators. She served as Deputy Judge/Recorder in the Court of First Instance of the High Court of Hong Kong from 2011 to 2017. She is a member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators, and was a member of the World Bank's Sanctions Board. Ms Cheng is a Fellow of King's College in London, and was the Course Director of the International Arbitration and Dispute Settlement Course at the Law School of Tsinghua University in Beijing.

1. Good morning, good afternoon and good evening, welcome back to Day 2 of the Inter-Sessional Meeting. With the support of the Central People's Government, it is a great pleasure for the Department of Justice to co-organise with UNCITRAL and the Asian Academy of International Law this roundtable discussion session for the delegations of Working Group III.

2. Today's roundtable discussion will follow the UNCITRAL deliberation process which emphasises inclusiveness, constructiveness and transparency. The purpose of this discussion session is for us to build upon the foundation established in our Pre-Intersessional Meeting in 2020 and the ideas we have gathered in yesterday's sessions and this morning's practical workshop in order to gain a sense of the elements that are to be included in the reform option of mediation. In essence, it is a scoping exercise for the Working Group on mediation-related work.

3. As is the tradition of UNCITRAL Working Group III, no decision of the Working Group will be made in this roundtable session.

Agenda of the roundtable discussion session

4. Today, it is our pleasure to have Jae, the representative from the UNCITRAL Secretariat, Natalie, the Rapporteur of the Working Group to moderate the roundtable discussion, and Shane, the Chair of the Working Group to wrap up the discussion. Thank you to all of you.

5. In today's agenda, we have quite a number of topics to cover, namely, the two draft notes prepared by the UNCITRAL Secretariat on model treaty provisions and guidelines on the use of mediation in ISDS disputes, the relevance of

and coherence with UNCITRAL texts on international mediation and the linkages of mediation with other ISDS reform options.

6. Before I hand the floor to the moderators, I would like to first suggest that there are some overarching principles to bear in mind when considering the questions at hand.

Mediation as a rule of law-based ISDS reform option

7. First, mediation as an ISDS reform option emphasises peaceful and mutually beneficial settlement of disputes and its use in ISDS disputes will support Goal 16 of the United Nations Sustainable Development Goals in the promotion of just, peaceful and inclusive societies.

8. Second, apart from ensuring mediation as a rule of law-based ISDS reform option, it is equally important for the reform option to preserve the characteristics of mediation as an efficient, voluntary and flexible dispute resolution procedure aiming at preserving the long-term relationship between foreign investors and the host States and also fundamentally avoiding intensification of conflicts.

9. Having highlighted these overall considerations, I now turn to the specific agenda items.

Agenda items: UNCITRAL's draft notes on mediation – model clauses and guidelines

10. In yesterday's roundtable session, we have preliminarily looked at the issue of mediation model clauses. Various models such as the mediation clauses and rules under the CEPA Investment Agreement have been discussed. Today, we will look closer at the topic and go through clause-by-clause the draft model in the note prepared by the UNCITRAL

Secretariat. Hopefully, the comments received in this roundtable session will facilitate the Secretariat to further refine the notes on model clauses for deliberation by the Working Group next year.

11. An item closely related to model mediation clauses is the guidelines on mediation. This is the subject of the second note by the UNCITRAL Secretariat, which will be further discussed in today's roundtable. The UNCITRAL draft guidelines itself is a product of international cooperation as it is prepared with ICSID's support. The draft guidelines can also be seen as a companion to the model mediation clauses as it can familiarise the potential users with the basic concepts of the process of investment mediation.

12. The guidelines also serve as a tool for awareness raising and knowledge dissemination for policymakers as it touches upon measures for encouraging the use of investment mediation at policy, structural and organisational dimensions, such as getting the frameworks right at international and domestic levels and overcoming barriers to mediation through capacity building and education. Ideas from the delegations will no doubt further enrich the draft guidelines.

Agenda item: UNCITRAL mediation rules

13. The need for a clear set of mediation rules was reiterated by a number of speakers in the earlier sessions. Indeed, various international organisations, mediation institutions and governments have developed mediation rules, some specifically for investment disputes.

14. UNCITRAL is certainly to be congratulated for having its new UNCITRAL Mediation Rules adopted in the Commission Session earlier this year. As noted by the

Secretariat, the UNCITRAL Mediation Rules are for generic use for international commercial disputes, but can also be used in mediating international investment disputes. This roundtable may be an opportune moment for the Working Group to consider the relevance of the UNCITRAL text in the context of ISDS disputes.

15. The CEPA Investment Mediation Rules for resolving investment disputes between Mainland investors and Hong Kong may also be one of the reference models the Working Group may wish to consider.

Agenda item: linkages with other ISDS reform options

16. Exploring the potential synergy of mediation with other reform options in the ecosystem of ISDS, for example, arbitration, dispute avoidance, third-party funding and an advisory centre on international investment law have been suggested.

17. The suggestion by eBRAM earlier this morning to look into how online dispute resolution can complement the use of mediation as part of the reform option makes a lot of sense in the light of the pandemic and the new normal that we all will have to adapt to.

18. Hong Kong has been active in exploring the potential of LawTech and the Department of Justice Project Office for Collaboration with UNCITRAL has launched a project on the Inclusive Global Innovation Platform on ODR (iGLIP on ODR).

19. Given the inherent nature of mediation as a flexible dispute resolution procedure that allows the disputing parties and the mediators to creatively design the process, there are no limits as to the types of ISDS reform options that can

synergise with mediation. Your creativity will be much appreciated.

Working method for developing mediation-related ISDS reform option

20. Having collected these views, an important practical issue is how to ride on the momentum and synthesise all these ideas into a comprehensive and deliverable package of reform option on mediation.

21. In the Virtual Pre-Intersessional Meeting of Working Group III in 2020, I have ventured to suggest the use of drafting groups as a tool for the Working Group to draw on the practices, experience and knowledge of the delegations to expedite the work of mediation such as developing model texts and guidelines.

22. I am indeed very pleased to see that this work approach has found its way into the Revised Work Plan of the Working Group as annexed to the report of its 40th session. If it is considered useful, the Hong Kong Special Administrative Region is, as always, willing and more than happy to offer its assistance in facilitating such mediation-related work for the Working Group.

SUMMARY OF THE INTER-SESSIONAL MEETING ON INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) REFORM SUBMITTED BY THE PEOPLE'S REPUBLIC OF CHINA

United Nations Commission on International Trade Law

Working Group III (Investor-State Dispute Settlement Reform)

Forty-first session

Vienna, 15-19 November 2021

Summary of the inter-sessional meeting on investor-State dispute settlement (ISDS) reform submitted by the People's Republic of China

This Note reproduces a submission from the Government of the People's Republic of China containing a summary of the inter-sessional meeting on ISDS reform held on 28 and 29 October 2021 in the Hong Kong Special Administrative Region ("Hong Kong SAR") of the People's Republic of China. The English version of the summary was submitted on 10 November 2021 and the text received by the Secretariat is reproduced as an annex to this Note.

Annex

Introduction

1. The inter-sessional meeting, with the theme of the use of mediation in investor-State dispute settlement ("ISDS"), was co-organized by the United Nations Commission on International Trade Law ("UNCITRAL"), the Department of Justice ("DoJ") of the Hong Kong Special Administrative Region ("Hong Kong SAR") and the Asian Academy of International Law ("AAIL"), with the support of the Central People's Government of the People's Republic of China.[1] The inter-sessional meeting has, through a hybrid mode of virtual and in-person participation, brought together 640 registered participants from 94 jurisdictions around the world.

2. The two-day inter-sessional meeting in the Hong Kong SAR on 28 and 29 October 2021 was preceded by a virtual pre-intersessional meeting held on 9 November 2020 in which delegations of the Working Group and other stakeholders in the reform of ISDS discussed how to overcome challenges to the use of mediation in ISDS, multi-tiered dispute resolution process (mediation protocol), hybrid models for resolving international investment disputes and the way forward for mediation as a reform option for ISDS.[2]

3. The inter-sessional meeting followed on from the discussion of the pre-intersessional meeting and took the form of panel discussion, a practical workshop and roundtable discussion sessions.

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1 The programme and other information of the pre-intersessional are available at https://2021-uncitral-wg-iii-intersessional.net/.

2 The proceedings for the virtual pre-intersessional meeting are available at https://www.doj.gov.hk/en/publications/pdf/2020_pre_intersessional_meeting_proceedings_e.pdf.

Opening remarks

4. The inter-sessional meeting was opened by Ms. Li Yongjie (Director General of the Department of Treaty and Law, Ministry of Commerce of the People's Republic of China), who drew attention to the positive progress of Working Group III in promoting the use of mediation in ISDS and the need for a holistic and coherent approach for the reform. Ms. Li expressed that the inter-sessional meeting could draw on the collective efforts of UNCITRAL, delegations of Working Group III and experts who may collaborate together on mediation-related work.

5. Ms. Anna Joubin-Bret (Secretary of UNCITRAL) expressed her appreciation to the Central People's Government of the People's Republic of China for hosting the inter-sessional meeting and the co-organizers for their efforts. Ms. Joubin-Bret highlighted the benefits of mediation and explained that the purposes of the inter-sessional meeting were two-fold, which were: (i) to obtain feedback on the two draft notes on mediation prepared by the Secretariat on model mediation clauses and guidelines;[3] and (ii) to explore how the existing UNCITRAL mediation framework could be utilized to enhance investor-State mediation.

6. Ms. Teresa Cheng (Secretary for Justice, Hong Kong SAR, People's Republic of China) delivered the wrap-up remarks for Day 1 and also the opening remarks for Day 2. She expressed that it was heartening for the inter-sessional meeting to take place for the first time in the Hong Kong SAR, and remarked that the development of mediation continued to follow three main directions: (i) getting the frameworks

3 The two draft notes are available at https://uncitral.un.org/en/strengtheningmechanisms.

right; (ii) overcoming psychological barriers through education; and (iii) unlocking mediation's synergy with other ISDS reform options. Ms. Cheng also expressed the willingness of the Hong Kong SAR of the People's Republic of China in offering assistance to facilitate mediation-related work for the Working Group.

Summary of the panel discussion – "Sharing of Views and Experiences of International Organisations"

7. This panel was moderated by Dr. Anthony Neoh (Chairman, Asian Academy of International Law).

8. Ms. Frauke Nitschke (Senior Counsel and Team Leader, International Centre for Settlement of Investment Disputes) presented an overview of ICSID's mediation process and the ICSID Mediation Rules (expected to be adopted in early 2022). She also mentioned the possibility for parties to agree to apply the ICSID Mediation Rules in their current form or other rules such as the newly adopted UNCITRAL Mediation Rules, and to request ICSID's administrative assistance. In addition, ICSID continued to act as a platform for awareness raising and capacity building since 2017 by providing a series of ICSID webinar series, trainings and courses, and is planning further activities, such as an investor-State mediation training in early 2022 together with DoJ of the Hong Kong SAR, AAIL, the Centre for Effective Dispute Resolution (CEDR) and the Energy Charter Secretariat.

9. Dr. Joerg Weber (Head, Investment Policy Branch Division on Investment and Enterprise, United Nations Commission on International Trade Law) shared a number of initiatives of UNCTAD in his presentation on the best practices on

the use of mediation in resolving international investment disputes. As an example, UNCTAD launched its investment policy framework for sustainable development which covers issues related to the reform of the international investment agreements regime and alternative dispute resolution, particularly mediation. Dr. Weber mentioned the UNCTAD's guides entitled "Investor–State Disputes: Prevention and Alternatives to Arbitration" setting out some best practices on mediation for reference.[4] He discussed a number of policy options for strengthening mediation such as defining appropriate cooling-off periods, making mediation mandatory or making express reference to mediation.

10. Dr. Alejandro Carballo-Leyda (General Counsel and Head of Conflict Resolution Centre, International Energy Charter) shared his views on how to design guidelines and legislative clauses for governments' use in preparing an enabling framework for mediation in resolving ISDS disputes, in particular with reference to the experience of the Model Instrument on Management of Investment Disputes developed by the International Energy Charter. He emphasized that a clear and express legal basis for mediation would include the authority to settle and a clear process and mechanism to address potential financial issues. He also made some suggestions on ways to improve case management such as conducting early independent assessment of a dispute before deciding on any form of dispute resolution and setting up an organised and centralised database for conflict resolution and prevention.

11. Ms. Priyanka Kher (Private Sector Specialist, Investment

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[4] The UNCTAD's guides are available at https://unctad.org/system/files/official-document/diaeia200911_en.pdf and https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf.

Climate Unit, World Bank Group) spoke on World Bank's experience in respect of building government capacity to prevent investor-State disputes. Ms. Kher identified five features critical in building government capacity, namely (i) early intervention of mediation by a lead agency; (ii) establishing a clear set of operating procedures for the lead agency to follow; (iii) engaging in effective problem-solving techniques; (iv) building capacity on mediation techniques for engaging in interest-based solutions with various stakeholders; and (v) the need of lead agency in tracking and monitoring. More specifically on the area of capacity building, it was explained that the World Bank provided for dispute prevention programmes aiming at increasing the understanding of investment obligations by government officials, problemsolving techniques, and data collection and analysis.

Summary of the practical workshop on investor-State mediation

12. A practical workshop on overcoming barriers and capacity building mediation in ISDS was held on 29 October 2021 in conjunction with the inter-sessional meeting. The practical workshop was moderated by Dr. James Ding (Commissioner, Inclusive Dispute Avoidance and Resolution Office, DoJ, Hong Kong SAR, People's Republic of China).

13. The practical workshop started with the presentation of Mr. Martin Rogers (Partner & Chair (Asia), Davis Polk) on the psychological barriers of investors and governments on the use of mediation in ISDS. He categorized the psychological barriers into three categories: (i) external barriers (e.g. lack of clarity in the mediation framework); (ii) internal barriers (e.g. psychological concerns of

government officials in concluding settlement arrangement with investors); and (iii) process inefficiency that could result from unsuccessful mediation. To overcome such psychological barriers, Mr. Rogers nevertheless called upon the legal industry to make further efforts in producing empirical data to demonstrate the benefits of mediation in terms of time and cost.

14. Mr. Ronald Sum (Head of Dispute Resolution (Asia), Addleshaw Goddard LLP) then spoke on the experience and practice of mediation in resolving international investment disputes. Mr. Sum referred to various models such as facilitative mediation, evaluative mediation, conciliation and co-mediation. In particular, Mr. Sum shared his practical experience with respect to the investment mediation regime under the CEPA Investment Agreement, which adopted a three-mediator co-mediation model and followed the principle of voluntariness.

15. Mr. Wolf von Kumberg (International Mediator and Arbitrator) discussed ways to unlocking the potential of mediation through capacity building. Mr. von Kumberg suggested that efforts could be invested in promoting the international legitimacy of mediation by the inclusion of mediation as an optional process within international investment agreements and public endorsement of mediation as an effective dispute resolution tool by international organisations. He further underlined that specialized training for mediators of ISDS disputes was useful and creating a panel or panels from which investors and government officials could refer to in identifying mediators with adequate credibility and capability was crucial. Mr. von Kumberg also echoed the importance of statistics on how ISDS dis-

putes were settled and whether mediation was involved in such settlements.

16. Ms. May Tai (Managing Partner (Asia), Herbert Smith Freehills) provided her views on the role of practitioners in promoting the greater use of mediation in ISDS. From her experience, the chance of successful settlement in the early stage of a dispute was good and the fact that the vast majority of cases did not go all the way to arbitration showed the parties' willingness and commitment to finding a resolution outside of the formal dispute resolution mechanisms. Ms. Tai also suggested that lawyers could promote the use of mediation by obtaining an early independent evaluation of the disputes in order to assess the range of possible legal outcomes and opportunity costs of engaging in protracted arbitration. Apart from legal assessment, Ms. Tai also recommended the engagement of experts on other aspects of a dispute such as the impact on the investment climate, the implications of the sector's growth and the political impact of any decision making or settlement.

17. Professor Hi-Taek Shin (Professor of Law (Emeritus), School of Law, Seoul National University) shared his insights on the synergy of dispute prevention tools and mediation. Professor Shin considered that the establishment of a lead agency with-in the government dedicated to dispute prevention enhanced possibility of dispute resolution by negotiated settlement, before the dispute escalated or got politicized. Such a lead agency could accumulate experience and knowledge, thereby enhancing the quality of decision-making of the officials over time. For treaty provisions, Professor Shin suggested the inclusion of the requirements of mandatory mediation or insti-

tutionalized dialogue between the host and home governments (e.g. joint com-mittee or commission) to address the concerns over criticism or personal risk for pursuing mediation as part of treaty procedures.

18. Dr. Thomas So (Chairman, eBRAM International Online Dispute Resolution Centre) presented on the possible application of online dispute resolution to mediation of international investment disputes. Dr. So pointed out the use of Online Dispute Resolution (ODR) and advanced technologies, namely video conferencing technology, secured data transmission, artificial intelligence for translation, blockchain usage and cloud storage had the potential to facilitate the use of mediation in ISDS disputes. In this connection, Dr. So also made reference to the latest initiatives of eBRAM including the COVID-19 ODR Scheme and the APEC ODR Platform.

19. During the panel discussion of the practical workshop, the issue of whether mediations would become a normal part of the ISDS process in the future attracted much interest. Optimism was expressed that mediation could be an attractive addition to arbitration. It was also said that the active participation of practitioners, institutions and government representatives in this inter-sessional meeting indicated a very positive trend in the legal community in exploring the use of mediation in ISDS. The emergence of several guidelines and frameworks for investment mediation in recent years was proof of the tremendous advancement for mediation.

20. With regard to overcoming the major obstacles or difficulties in combining the use of dispute prevention tools and mediations, it was stressed again that there was the

need to address the mindset of the government officials through capacity building and training at the international level. It was suggested that a detailed but simple model mediation process chart would be useful for providing a comprehensive overview on how to link dispute prevention tools with mediation. Even for ODR, it was said that a change of users' mindset would be necessary, while issues related to user-friendly platform and data security should also be addressed.

21. Based on the discussion at the practical workshop, Dr. James Ding summarized that the keys to unlocking the potential of mediation would be to: (i) engage the disputing parties through clear and express mediation frameworks; (ii) empower the parties and mediators through capacity building on mediation; and (iii) explore innovative options such as dispute prevention and mitigation tools and ODR for enriching the practice of mediation. Dr. Ding also mentioned the Inclusive Global Legal Innovation Platform ("iGLIP") for ODR, in relation to which UNCITRAL in its annual session in 2021 confirmed its continued collaboration with DoJ of the Hong Kong SAR.

Summary of the roundtable discussion sessions

22. The roundtable discussion sessions were moderated by the chair, the rapporteur of Working Group III and the Secretariat.

Model clauses on mediation

23. It was generally agreed that concise procedures and clear provisions could be useful in persuading investors and government officials in attempting mediation. On the design of mediation clauses and rules, it was suggested that

there was a need to strike a balance between prescriptiveness and flexibility in devising mediation model clauses.

24. Internationally, the UNCITRAL Mediation Rules, the ICSID Mediation Rules and IBA Mediation Rules were mentioned as examples. Some jurisdictions also incorporated mediation clauses and detailed rules in their international investment agreements and arrangements.[5] A recent example was the mediation clauses and rules under the Investment Agreement of the Closer Economic Partnership Arrangement (CEPA) between the Mainland and the Hong Kong SAR,[6] which adopted a unique three-mediator commission model that had taken inspiration from the party appointment mechanism of investment arbitration.

25. With regard to capacity building, the consensus of the discussion was that training was vital for addressing psychological barriers for the use of mediation in ISDS disputes and the need for diversifying the pool of mediators with expertise in handling ISDS disputes was stressed. It was said that model mediation clauses themselves could be a capacity building tool which would allow States to understand the key elements of mediation and to become more familiar with the mediation process.

Clause-by-clause discussion of the model mediation clauses

26. Having gone through the general comments, the roundtable then proceeded to the clause-by-clause discussion of the draft

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5 Some examples mentioned are European Union's recent investment agreements, the Investment Chapter under the Indonesia – Australia Comprehensive Economic Partnership Agreement and the Hong Kong SAR – United Arab Emirates Investment Promotion and Protection Agreement.

6 The texts of the CEPA Investment Agreement and its mediation rules are available at https://www.tid.gov.hk/english/cepa/legaltext/files/cepa14_main.pdf and https://www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf.

model clauses in the draft note prepared by the Secretariat. Currently, international investment agreements generally contain no express reference to mediations. In the draft model mediation clauses prepared by the Secretariat, three options for draft provision 1 were provided, ranging from: (i) option 1 – expressly stating the availability of mediation for dispute resolution; (ii) option 2 – providing for an undertaking to commence and attempt mediation; and (iii) option 3 – imposing a strict form of mandatory mediation for a fixed period of time.

27. On the model mediation clauses, the general view was that such clauses should be designed in a way that would preserve the voluntariness of mediation. For option 1, it was generally considered that it would not add too much value to the existing regime. Preliminarily, views were expressed in favour of option 2 and option 3, making mediation mandatory and thereby unlocking the potential of mediation at a time when government officials and investors were still trying to get familiarized with the process of mediation. The difference between option 2 and option 3 was on the level of commitment to mediation required from the parties. Some delegations expressed that they incorporated provisions similar to option 2 and option 3 in their international investment agreements.

28. The topic of mandatory mediation attracted much interest in the roundtable. It was pointed out that what objectives mandatory mediation aimed to achieve would be the key question to be addressed. It was further observed that ISDS disputes would generally involve public policy decisions and the elements of good faith should be ensured in all negotiation processes. On this, it was further elaborated

that mandatory mediation requirement, especially for option 3, should at least include the possibility for one of the parties or the parties to terminate the mediation procedure, for instance through written notice, when it would be evident that no agreement could be reached.

29. On draft provision 2 of the model clauses, reflection was drawn on the issue of time-frame. It was suggested that one option would be for mandatory mediation to take place in the cooling-off period, either in lieu of, or in addition to direct negotiation, which would not cause much delay in the initiation of arbitration should mediation fail. There were also suggestions that the option of mediation should be available at any stage of the dispute, even after arbitration had commenced. On the other hand, some concerns were expressed regarding whether this may raise the issue of delay, e.g. if the disputing parties would resort to mediation at the very later stage of the process. Nevertheless, it was clarified that making mediation available at any time could enhance the potential and interest for the parties to resolving dispute through mediation even after they commenced arbitration.

30. Interest was expressed for more specific clauses in relation to draft provision 2 to be developed for clarifying the interactions between mediation and ongoing arbitration process, e.g. whether arbitration would be stayed and for how long. Some other issues that were suggested to be worth further consideration included the consequence for failure of using mediation, and whether non-compliance with the mandatory mediation requirements would have implications on the admissibility or jurisdiction of an ISDS dispute.

31. Draft provision 3 of the model clauses, addressing the applicable mediation rules, prompted the question of

whether there would be a need to develop a separate set of mediation rules for ISDS disputes. It was considered that this issue would need to be further examined, taken into consideration that rules were already available.

32. Some raised the issues of what treatment should be given to information shared and gathered during mediation when there was ongoing litigation or arbitration. Such concerns were apparently matters addressed under the without prejudice provision under draft provision 5 of the model clauses.

33. Draft provision 6 addressed the tension between confidentiality and transparency of the mediation process for ISDS disputes. The general view was that a balance should be struck between confidentiality and disclosure obligations. It was also suggested while every State has a different level of expectation and regulation on public policy concerns, the level of transparency in draft provision 6, which would require making mutually agreed solution publicly available, appeared to be sufficient.

34. For the development of model clauses, there were some other suggestions such as referencing the Dispute Adjudication Board (DAB) or DAAB under the 2017 FIDIC (International Federation of Consulting Engineers) terms for large and complex construction disputes as well as exploring the potential of a tiered dispute resolution procedure of "mediation first, arbitration next".

35. Apart from the model clauses, the role of UNCITRAL and other international organizations in providing capacity building, exchanging best practices and experiences and offering technical assistance to States on framework-setting were again emphasized.

Guidelines on mediation

36. The roundtable discussion also touched upon the guidelines on mediation in the draft note prepared by the Secretariat.

37. The guidelines were considered to depict an accurate overview of the mediation process and to give disputing parties an idea of how mediation worked so they could make an informed decision to choose to engage mediation officially. As such, the guidelines would be useful for government officials in order to address possible concerns over allegations of corruption and public criticisms, because as compared with investors, it would generally demand a higher level of certainty that the decision made would be in conformity with the rule of law and government protocols. It was suggested that the most important part for an efficient mediation was to have a thoughtful and proactive mediator who could design a proper process and constantly guide the parties towards a resolution.

38. On whether the guidelines should provide explanations on the model treaty clauses, there was general support for such idea because the guidelines were created for raising awareness of the possibility of using mediation as one of the alternatives for dispute resolution. It was further suggested that the guidelines could also elaborate on the role of institutions in promoting mediation, e.g. in terms of general education or administrative and logistical support etc.

39. The linkages of mediation with other ISDS reform options were discussed and some examples mentioned included third party funding, advisory centre on international investment law, multilateral instruments, standing mechanisms and code of conduct. It was generally agreed

guidelines could further elaborate on these linkages.

40. On the institutional framework, Peru's experience on ISDS dispute prevention and management, which was based on a model of an inter-ministerial commission, was mentioned as example for facilitating the use of mediation. Another example mentioned was the India – Brazil Investment Cooperation and Facilitation Treaty, which did not contain any ISDS clause, but provided for two layers of dispute resolution composing of a joint commission and an investment ombudsman for disputing parties to resolve disputes through mediation.

41. While the roundtable discussion recognized the importance of setting up an advisory centre, some queried whether it should play an extensive role in mediation and it was suggested that the link between the advisory centre and mediation process should be framed carefully, e.g. by limiting the role of the advisory centre to providing advice to States on how to best engage in a mediation and provide adequate counselling advise during the mediation, but not acting as a mediation centre.

42. Regarding a code of conduct for mediators, some comments were expressed to the effect that a clear line should be drawn between mediators and arbitrators or judges, as their roles were substantially different. It was also observed that if States preferred to apply a separate set of code of conducts to mediators, they would be free to incorporate the same in their treaties.

43. Moreover, it was suggested that the question of enforcement of mediated settlement agreements could be further elaborated in the guidelines, which could be

an important consideration for the disputing parties. The United Nations Convention on International Settlement Agreements Resulting from Mediation was mentioned as a relevant aspect. The possibility for mediated settlement agreements to be recorded as a consent arbitral award and thereby enforced under the New York Convention and the ICSID Convention was also noted. Furthermore, it was said that a balance should be struck between the enforcement mechanisms and the need for ensuring voluntary compliance with the settlement agreements, and this was considered to be an issue that may need to be addressed in the model clauses.

Concluding remarks

44. In closing, the chair of the Working Group expressed gratitude towards the People's Republic of China for hosting the inter-sessional meeting and to Secretary Cheng's offer for the Hong Kong SAR to provide further assistance in mediation-related work.

AAIL ASIAN ACADEMY OF INTERNATIONAL LAW

Following the first-ever Virtual Pre-Intersessional Meeting held in November 2020, this Inter-Sessional Meeting (Meeting) has gathered together delegations of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), world-renowned practitioners and academics to discuss ways to strengthen the use of mediation in ISDS disputes.

With the support of the Central People's Government of the People's Republic of China, this Meeting was jointly organised by the UNCITRAL, the Department of Justice of the Hong Kong Special Administrative Region, and the Asian Academy of International Law.

This publication is a collection of presentations given at the Meeting, covering a wide range of topics on the use of mediation in ISDS.

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