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MEDIATE FIRST 調解為先

HONG KONG MEDIATION LECTURE

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Resolving International Disputes Through Mediation: Where We Stand, Challenges and Opportunities Ahead

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Introduction

Mediation, as an important method of dispute resolution, has a long history and practical basis in both Eastern and Western civilizations. In modern times, with the increase in international interactions and the rise of international investment and trade, mediation has been widely used to resolve disputes in areas such as territorial disputes, armed conflicts, diplomatic relations, economic rights, trade and investment, and commercial matters. It has also been adopted by many bilateral, multilateral, and regional treaties.

In recent years, as the dispute settlement mechanisms, such as the WTO dispute settlement system and international investment arbitration, have faced significant problems and challenges, reforming existing mechanisms has become a consensus among various parties. At the same time, international mediation has been increasingly favored, and the demand for mediation in the international community has continued to grow. A series of new rules in the field of mediation have been formulated and introduced, expanding the practice of international mediation. I need to clarify that although *in public international law, "mediation" and "conciliation" are mentioned as different methods of dispute resolution in the UN Charter and there are procedural differences between "mediation" and "conciliation", both fall under the mechanism of third-party intervention and do not have the authority to impose a solution on the parties. In this lecture, mediation will cover both "mediation" and "conciliation".*

Practice and Advantages of Resolving Inter-State Disputes through Mediation

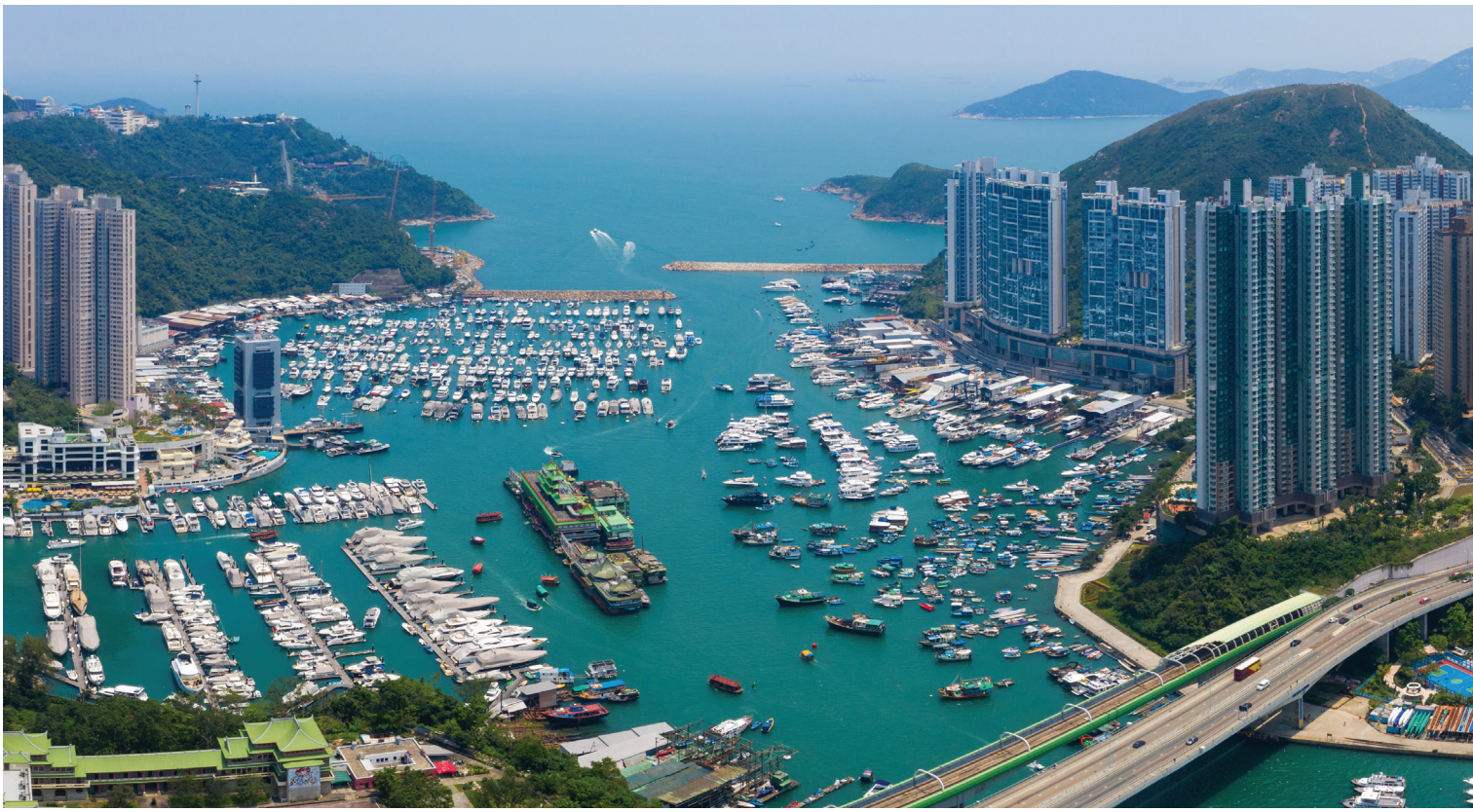
Mediation as well as conciliation, as an important means of resolving inter-state disputes, is stipulated in numerous bilateral and multilateral treaties. The 1899 and 1907 Hague Conventions on the Pacific Settlement of International Disputes recognized mediation as one of the four methods for the peaceful settlement of international disputes. From 1925 to World War II, there was a wave of support for mediation or conciliation worldwide, resulting in the conclusion of nearly 200 treaties related to mediation or conciliation. Article 33 of the United Nations Charter also explicitly states that mediation and conciliation are important means of peaceful settlement of international disputes.

Mediation/conciliation has also been incorporated into regional treaties, such as the 1948 American Treaty of Pacific Settlement, the Pact of Bogota, the 1957 European Convention for the Peaceful Settlement of Disputes, as an independent dispute resolution mechanism parallel to judicial and arbitration processes.

Many global multilateral treaties have detailed provisions on conciliation procedures[1] . For example, the 1969 Vienna Convention on the Law of Treaties provides that a party to a dispute concerning the application or the interpretation of any of the invalidity, termination and suspension of the operation of treaties may set in motion the conciliation procedure specified in the Annex to the Convention. According to incomplete statistics, among the 145 multilateral treaties with third-party dispute resolution clauses, which are deposited with the United Nations Secretary, 26 treaties provide for mediation or conciliation procedures, mainly in the fields of environment, treaty law, navigation, transportation and communication.[2]

There have been many successful practices of mediation internationally. For example, in 1825, mediation by the United Kingdom resolved the conflict between Portugal and Brazil, leading to the signing of the Treaty of Rio de Janeiro, which recognized Brazil as an independent nation, formally ending the Brazilian war of independence.

1. Such as the 1928 Geneva General Act for the Pacific Settlement of International Disputes as revised in 1949, the 1962 Protocol Instituting a Conciliation and Good Offices Commission to be Responsible for Seeking the Settlement of Any Disputes which May Arise between States Parties to the Convention against Discrimination in Education, the 1969 Vienna Convention on the Law of Treaties, the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1982 United Nations Convention on the Law of the Sea, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.
2. See Multilateral Treaties Deposited with the Secretary-General, https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en



In 1938, a Treaty of Peace, Friendship and Boundaries between Bolivia and Paraguay was signed at Buenos Aires. This treaty made Argentina, Brazil, Chile, Peru, Uruguay, and the United States mediators of the Bolivia-Paraguay boundary. Representatives of the Presidents of the mediator countries announced their decision on the delimitation of the Bolivia-Paraguay boundary, which determines the present alignment of the boundary between Bolivia and Paraguay.

In 1960, Indus Waters Treaty was signed after nine years of negotiations between India and Pakistan mediated by the World Bank. The treaty fixed and delimited the rights and obligations of both countries concerning the use of the waters of the Indus River system.

In 1970s, the Camp David accords and the Peace Treaty between Egypt and Israel were concluded with the mediation of the United States, which ended the state of war and notably made Egypt the first Arab country to officially recognize Israel.

In 1977, Kenya, Uganda, and Tanzania entrusted a former Swiss diplomat as a sole mediator to handle the distribution of assets of the former East African Community, and finally reached a comprehensive agreement in 1984.

The United Nations has also played a significant role in mediating inter-state and intra-state conflicts. The UN Secretary-General and his representatives carry out mediation efforts at the request of parties to disputes, on the Secretary General's initiative, or in response to a request from the Security Council or the General Assembly.

A number of conciliation commissions were established to deal with certain cases pursuant to treaties or on an ad hoc basis. Among these are, for example, the 1929 Chaco Commission, set up under the Inter-American General Convention of Conciliation; the 1956 Italo-Swiss Commission pursuant to the 1924 bilateral treaty between them; and the 1981 Iceland-Norway Jan Mayen Continental Shelf Conciliation Commission established on an ad hoc basis.

The most recent example is the compulsory conciliation procedure initiated by Timor-Leste in 2016 under the United Nations Convention on the Law of the Sea regarding the maritime delimitation issue with Australia. A Conciliation Commission was established, and the two parties reached the Comprehensive Package Agreement in 2017. In 2018, they signed the Timor-Leste Maritime Boundaries Treaty, ending a decade-long maritime boundary dispute between the two countries and demonstrating the effectiveness of resolving disputes through mediation.

Practice has proven that mediation is an effective means of preventing, managing, and resolving inter-state conflicts. When states cannot resolve their disputes through negotiations, third-party intervention is a viable approach to breaking the deadlock and generating acceptable solutions. Especially when disputes primarily involve legal issues and the parties expect to compromise, mediation is the most effective method of dispute resolution. The advantages of mediation lie in its voluntary nature, allowing the parties to retain control over the dispute resolution process. Unlike judicial and arbitration processes, mediation does not have unexpected or potentially exacerbating outcomes that may go against a state's expectations. If a dispute involves sensitive issues, the mediation process can be kept completely confidential to meet specific requirements of states for handling the dispute.

Practice and Latest Developments of Resolving International Investment Dispute through Mediation

Investor-State Dispute Settlement (ISDS) mechanisms, as an important institutional arrangement for global economic governance, have been widely applied internationally in recent decades. The ISDS mechanism includes negotiation, mediation, arbitration, and litigation, with arbitration being the most commonly used method. In the practice of investment treaties, according to the databases of the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Institute, out of 3,815 international investment agreements globally, 1,141 treaties (approximately 30%) provide for mediation/conciliation procedures. In terms of case volume, according to UNCTAD statistics, there were about 100 ISDS cases globally from 1987 to 2000. However, in the 21st century, the number of ISDS cases has rapidly increased, reaching 1,257 cases as of October 2023. According to the International Centre for Settlement of Investment Disputes (ICSID) statistics, out of the cases registered under the ICSID Convention and Additional Facility Rules, 962 cases were registered, of which 948 were arbitration cases and only 14 (approximately 1.46%) were conciliation cases.

From the perspective of cases registered under the ICSID, the majority of investment disputes between investors and states are resolved through arbitration, with only a few cases being resolved through conciliation, mainly concentrated in areas such as natural resources and infrastructure. The claimants of conciliation are mostly investors, with only one known case initiated by a state[3]. In contrast to state-to-state mediation, there is relatively limited information available regarding investor-state dispute mediation. Due to the confidentiality of mediation procedures, some cases are not made public. In addition to the aforementioned cases at ICSID, there is also one known case managed by the Permanent Court of Arbitration (PCA) involving conciliation related to disputes under the United Nations Framework Convention on Climate Change's Clean Development Mechanism. However, due to confidentiality reasons, information about this case cannot be obtained from publicly available sources.

As investment arbitration has been widely used, its negative impacts and inherent flaws have gradually become apparent. These include foreign investors using arbitration mechanisms to challenge host country policies, which can affect the public interests of host countries, inconsistent arbitration award standards, lengthy and costly arbitration procedures, and issues regarding the impartiality and independence of arbitrators. ISDS reform has become a consensus among various parties, with many countries, especially those in Asia and Africa, expressing their intention to reject international arbitration and promote the use of more friendly dispute resolution methods such as mediation. Since July 2017, the United Nations Commission on International Trade Law (UNCITRAL) entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. In 2023, the UNCITRAL Model Provisions on Mediation for International Investment Disputes and the UNCITRAL Guidelines on Mediation for International Investment Disputes were finalized and adopted.

Various international institutions have successively formulated and promulgated mediation rules, such as the International Energy Charter Conference's Guide on Investment Mediation in 2016, and the ICSID's Mediation Rules in 2022, actively promoting investment mediation. In addition, in recent years, an increasing number of bilateral or multilateral investment and trade treaties have included mediation/conciliation as part of their dispute resolution mechanisms, such as the Regional Comprehensive Economic Partnership Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the ASEAN Comprehensive Investment Agreement, the European Union-Canada Comprehensive Economic and Trade Agreement, and the Indonesia-Australia Comprehensive Economic

3. Republic of Equatorial Guinea v. CMS Energy Corporation and others (ICSID Case No. CONC(AF)/12/2).

Partnership Agreement. More than 20 bilateral investment or free trade agreements signed by China with other countries include mediation/conciliation as one of the dispute resolution methods, and the Mainland China-Hong Kong/Macao CEPA investment agreements also explicitly provide for conciliation procedures.

Compared to investment arbitration, mediation provides both states and investors with a high degree of flexibility and autonomy in choosing dispute resolution methods. It allows mediators to adopt creative and forward-looking approaches to facilitate the resolution of investment disputes, which is conducive to achieving win-win outcomes and maintaining long-term cooperation between investors and host governments, thereby playing a role in resolving disputes and avoiding the escalation of conflicts. At the same time, it can also avoid lengthy arbitration procedures and high costs.

Practice and Latest Developments of Resolving International Commercial Disputes through Mediation

In the field of commercial dispute resolution, mediation has significant advantages compared to litigation. Mediation not only relies on contracts, laws, or treaties to determine legal rights, obligations, and liabilities, but also takes into account the existing relationships, cultural backgrounds, business customs, and time costs of the parties, aiming to achieve a win-win outcome and promote their common long-term interests. In addition, mediation offers a range of advantages such as lower costs, expedited procedures, party control, and strong confidentiality.

As early as 1980, the United Nations Commission on International Trade Law (UNCITRAL) recognized the value of mediation in resolving commercial disputes and formulated and adopted UNCITRAL Conciliation Rules, which were later revised into UNCITRAL Mediation Rules in 2021 based on the development of mediation practice. In the 21st century, with mediation becoming an effective means of resolving international commercial disputes, rules and legislation related to international mediation has been developed. UNCITRAL formulated the UNCITRAL Model Law on International Commercial Conciliation in 2002 and revised it in 2018. The United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Mediation Convention") was adopted in 2018, opened for signature in 2019, and entered into force in September 2020. The International Chamber of Commerce (ICC) issued the Amicable Dispute Resolution Rules in 2001 and replaced it with the Mediation Rules in 2014. Many countries have also enacted legislation on commercial mediation, with 33 countries adopting relevant domestic legislation based on the UNCITRAL Model Law on International Commercial Mediation[4]. The European Union issued Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters in order to promote furthering use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework.

With the legislation and professionalization of commercial mediation, as well as the increasing demand for mediation in the international community, more and more institutions have started to provide mediation services. Since mid-1990s, international commercial arbitration institutions such as the ICC International Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), the Asian International Arbitration Centre (AIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Beijing International Arbitration Center (BIAC), and the Shenzhen Court of International Arbitration (SCIA) have begun to offer cross-border mediation services.

Some countries have also established specialized mediation institutions to resolve international disputes, such as the China Council for the Promotion of International Trade (CCPIT) Mediation Center, the Singapore International Mediation Centre, the Kyoto International Mediation Center, and the Bali International Arbitration and Mediation Center.

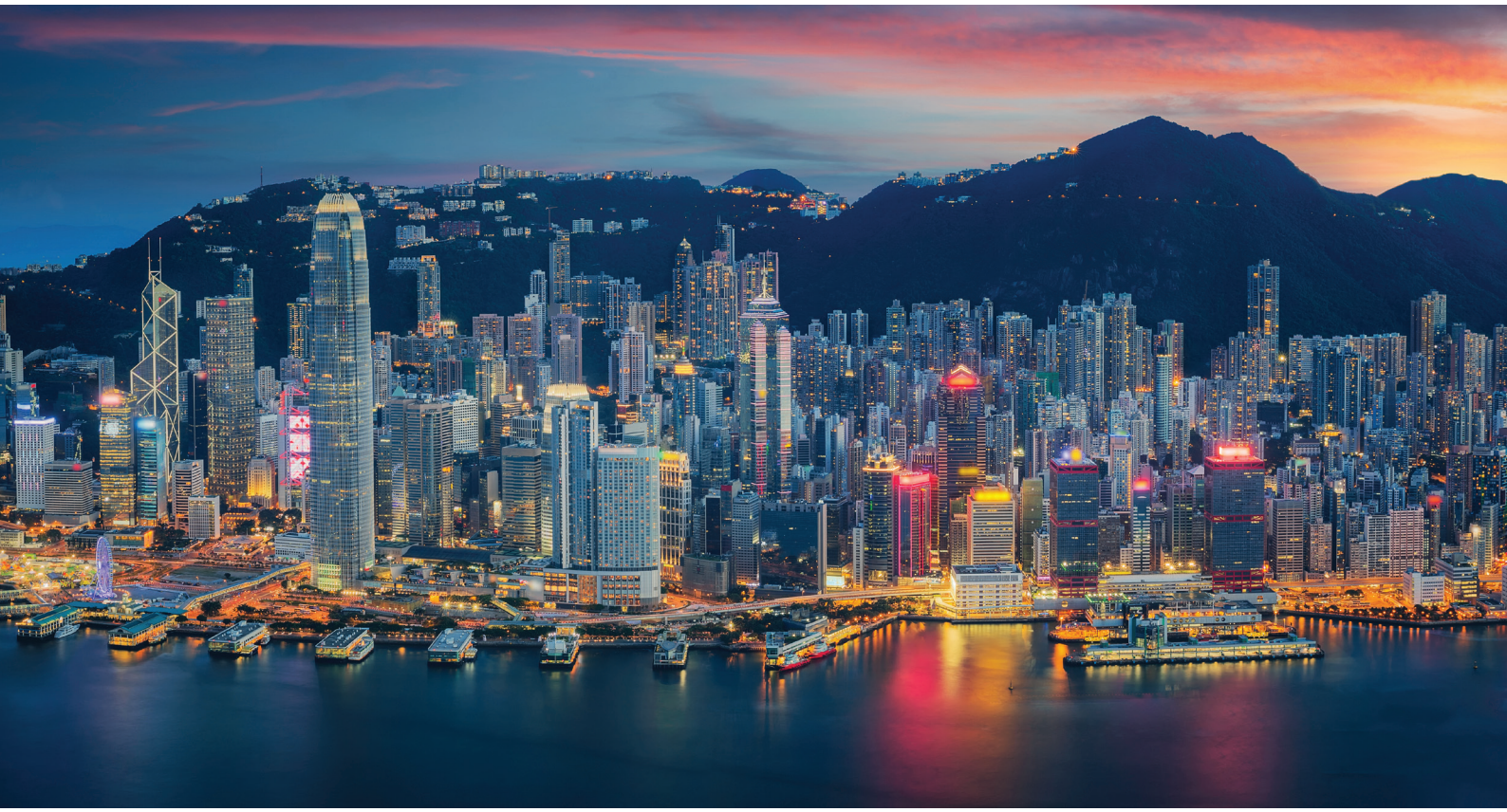
Specialized institutions focusing on specific types of mediation are also emerging. For example, in the field of intellectual property disputes, the World Intellectual Property Organization (WIPO) established the WIPO Arbitration and Mediation Center in 1994 and issued the WIPO Mediation Rules in 2021. It has been widely used to handle disputes in areas such as technology and entertainment involving intellectual property. As of now, the center has handled approximately 1,350 cases of mediation, arbitration, and expert determination, with a mediation success rate of up to 70%. It has also facilitated over 850 good offices cases and administered over 60,000 cases under the Uniform Domain Name Dispute Resolution Policy (UDRP) and related policies.

Establishing the International Organization for Mediation (IOMed)

The Joint Statement

Despite the global trend and the rising demand for mediation, currently there is no inter-governmental body that is dedicated to mediation. The existing international dispute settlement organizations mainly take mediation as a supplemental measure to litigation or arbitration procedures.

4. Status: UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (amending the Model Law on International Commercial Conciliation, 2002), https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status



In response to the development momentum of and demand for mediation, China, joined by many liked-minded States[5], concluded the Joint Statement on the Future Establishment of the International Organization for Mediation in 2022 agreeing to jointly establish the International Organization for Mediation, the IOMed, with the aim of providing dedicated mediation service as well as friendly, flexible, cost effective and convenient solutions to various international disputes. The Joint Statement laid down common understandings on the key elements of the IOMed, which provides a solid starting point for the preparatory work on the establishment of the IOMed.

The role of IOMed

The International Organization for Mediation is unique in the sense that it will be the first intergovernmental organization dedicating to resolve international disputes through mediation. It will act as a useful complement to the existing international judicial and arbitral organizations, by providing a new option for peaceful settlement of international disputes enshrined in the UN Charter. It will also be a global public good for rule of law that can strengthen the global governance system and enhance the participation and representation of the developing countries in the dispute resolution area.

According to the Joint Statement, the IOMed will undertake: a. to provide mediation services for the resolution of international disputes; b. to promote the use of mediation in dispute resolution, to develop the culture of mediation, and to explore and promote best practices of mediation; c. to organize international, regional, national and local forums and conferences on mediation, building a platform for communication, capacity building and information sharing; d. to cooperate and communicate with other international organizations and dispute resolution agencies.

The progress

Creating an international organization from the ground up is not an easy task and it requires synergy from parties and stakeholders who are committed to working together towards the common goal. Following the conclusion of the Joint Statement, the Preparatory Office of the IOMed was set up in Hong Kong SAR, China in February this year. Pursuant to the local legislation, the Preparatory Office enjoys juridical personality and legal capacity required to exercise its functions.

The Preparatory Office, pursuant to the Joint Statement, has been entrusted with a broad mandate to facilitate the completion of the elaboration of the Convention on the Establishment of the International Organization for Mediation (the IOMed Convention) including but not limited to: a. to coordinate and organize formal elaboration on the IOMed Convention and other related matters; b. to prepare and present the draft IOMed Convention and related instruments for elaboration; c. to promote the concept of the IOMed.

The process is an open and inclusive one. Apart from current participants, other interested States may join the future negotiation sessions of the Convention by signing, endorsing or supporting the Joint Statement. States who join the negotiation of the Convention at an early stage would have the benefit of playing an active role in the formulation of the Convention and the relevant rules and mechanisms governing the operation of the organization, as well as enjoying the status as Founding Members.

5. Indonesia, Pakistan, Laos, Cambodia, Serbia, Belarus, Sudan, Algeria, Djibouti.

To set things in motion, the Preparatory Office successfully organized the first session of the Elaboration of the IOMed Convention within three months after its establishment. The first session was attended by the Governments that have signed, endorsed or supported the Joint Statement which already represent more than two billion people across the globe. The second session has already been successfully convened last month. We are confident that with the strong support and cooperation of the participating countries, the goal set out in the Joint Statement to complete the elaboration of the Convention in around 2 years would be successfully achieved.

Some legal issues relating to the IOMed Convention

Scope of cases

The scope of cases could be one of the most important issues in the negotiation of the Convention, which will prescribe the types of cases that could be submitted to the organization. There are three types of disputes to be considered: disputes between States, disputes between a State and a national of another State and international commercial disputes between private parties.

At the same time, party autonomy will be highlighted throughout setting in motion or the conduct of mediation process. Only disputes submitted by the disputing parties on a voluntary basis can be mediated under the organization. In addition, States will be allowed to make declarations or reservations on the class or classes of disputes which it would or would not consider submitting to the IOMed.

To distinguish mediation by the IOMed from adjudication by a court and arbitration, the use of word "jurisdiction" will be avoided in drafting the Convention.

In view of promoting the use of mediation and considering the voluntary nature of mediation, the organization may also provide mediation services for the resolution of disputes submitted by Non-Member States and international organizations.

Enforcement of settlement agreements

The legal effect as well as the enforcement of settlement agreements is also one of the most difficult issues of the convention. In practice, when disputing parties arriving at an amicable settlement, it means the mediation almost succeed. In most of the cases, settlement agreements would be performed by the parties voluntarily and would not go to the next stage of enforcement by competent authorities.

However, whether a settlement agreement is enforceable or whether to prescribe a legal framework for enforcement in the convention needs to be further explored.

It is well established that the proposals or recommendations made by mediator or the commission are not binding upon the disputing parties, which is also stipulated in many treaties.

As to settlement agreements regarding interstate disputes, the results of mediation may lead to a treaty, an agreement, a protocol, a declaration, a communique, an exchange of letters or a gentleman's agreement reached by the parties, the legal effect or character of which will depend on the instrument per se. At the same time, these instruments rely on the voluntary performance of states rather than enforcement.

Concerning other disputes, especially commercial disputes, it is generally understood that the settlement agreement reached by the parties to a dispute is considered as a contract, which is legally binding upon the parties.

From the practices mentioned above, it may be observed that a common understanding on the effect of settlement agreement may be drawn that a

settlement agreement duly concluded between parties to the dispute is binding upon them. But the enforcement is another story and need further elaboration. (keep it or leave it, now or future).

Mediation procedure

The IOMed will have its own sets of rules for mediation proceedings with respect to different types of disputes, which will be drafted with reference to the well-established mediation rules and practices in the international community. These sets of rules would provide the framework for mediation proceedings, which can avoid procedural lacunae and at the same time, provide flexibility to the disputing parties to tailor the procedure to their needs.

The principles of mediation proceedings under the IOMed have been set forth as: mediation proceedings will be instituted by mutual consent by the parties to the dispute expressed before or after dispute arises, and conducted in accordance with the principles of voluntariness, impartiality, good faith, efficiency and cost-effectiveness.

The parties will retain full control of their participation in a mediation conducted under the IOMed. The parties are usually free to: agree on the mediator; agree on the conduct of the mediation procedure; determine the scope of issues to be submitted to mediation and develop their own solutions; solve their dispute holistically or agree on a partial solution, and/or terminate the mediation at any time.

Panel of Mediators

As a standing multilateral institution, the IOMed will play a role in identifying a pool of qualified mediators by maintaining its own panels of mediators designated by the Contracting State provided for the disputing parties to appoint mediators of their case.

Considering the significant differences between mediation of interstate disputes and other disputes, it is recommended that the organization maintain two Panels of Mediators, one Panel for mediating disputes between States, the other Panel for mediating other disputes involving private entities. The designation, qualifications and term of office of mediators will be decided in the future negotiation.

In this regard, the issue of capacity building must be highlighted although it is not a legal issue per se, but the negotiation parties have a keen interest in capacity building for the member states in particular developing member states.

Concluding Remarks

In short, while many dispute resolution organizations have attached increasing importance to mediation, they generally take mediation as a measure supplementary or prior to the litigation or arbitration procedure, which fails to meet the growing demand for mediation services.

To build a more harmonized and sustainable world, we need greater use of mediation.

The future IOMed will be the intergovernmental organization dedicated to mediation that gives full play to the advantages of mediation, namely voluntariness, efficiency and cost-effectiveness, making it a complement to the existing international dispute settlement mechanisms, as well as a comparable institutional alternative to international arbitration and adjudication.

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