

UNCITRAL Working Group III on ISDS Reform Forum for Further Preparatory Work on Investment Mediation

(5 May 2022, Hong Kong Special Administrative Region
of the People's Republic of China)

Report

Introduction

1. On 5 May 2022, the Forum for Further Preparatory Work on Investment Mediation (“Preparatory Forum”) of Working Group III of the United Nations Commission on International Trade Law (“UNCITRAL”) was co-organized by 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 Government of the People’s Republic of China¹.

2. Preceded by the pre-intersessional meeting² and the intersessional meeting³ respectively held in the Hong Kong SAR of the People’s Republic of China in 2020 and 2021, the Preparatory Forum has, through a hybrid mode of virtual and in-person participation, brought together around 500 registered participants from 68 jurisdictions around the world (including delegations of UNCITRAL Working Group III and other stakeholders in ISDS reform) to further discuss and exchange preliminary views on the draft model clauses and guidelines⁴ on investment mediation prepared by the UNCITRAL Secretariat.

Part 1 – Seminar on Investment Mediation

Opening remarks

3. Dr. Sun Jin (Deputy Director-General of the Department of Treaty and Law, Ministry of Foreign Affairs of the People's Republic of China), in his opening remarks, emphasized the many benefits of international mediation as a peaceful

¹ The full videos of the Preparatory Forum and the presentation materials are available at <https://aail.org/past-event-2022-05-uncitral-wgiii-forum/>.

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

³ The summary and proceedings of the inter-sessional meeting are available respectively at <https://undocs.org/en/A/CN.9/WG.III/WP.210> and https://www.doj.gov.hk/en/publications/pdf/UNCITRAL_eBook_e.pdf.

⁴ The discussion in the Forum is based on the initial drafts of the model clauses and guidelines on mediation, which are available at <https://uncitral.un.org/draftworkingpapers>.

and rule-of-law based means of dispute resolution conducive towards preserving parties' long-term relationship, optimising international business environment as well as promoting values of peace, harmony and multilateralism.

4. Ms. Anna Joubin-Bret (Secretary of UNCITRAL) expressed her appreciation to the co-organizers for arranging the Preparatory Forum to advance the work in promoting the use of investment mediation, in particular the draft model mediation clauses and guidelines, and to serve as a capacity building function for the delegations of UNCITRAL Working Group III.

Briefing on the discussion of the draft model clauses and guidelines on investment mediation

5. Ms. Judith Knieper (Legal Officer, UNCITRAL) presented an overview and updates of the development of the draft model mediation clauses and draft guidelines on investment mediation based on previous discussions and written comments from the delegations of UNCITRAL Working Group III.

Summary of the panel discussion – “Topical Issues on Model Clauses and Guidelines on Investment Mediation”

6. This panel was moderated by Mr. Simon Chapman QC (Regional Head of Dispute Resolution (Asia), Herbert Smith Freehills).

7. Professor Susan Franck (Professor of Law, Washington College of Law, American University) shared her views on the key considerations in the design of effective investment mediation clauses and rules. In this regard, Professor Franck proposed integrating mediation into the broader framework of dispute resolution in investment treaties through, for examples, linking express language about mediation to the life cycle of managing treaty conflicts; and setting out clear *ex ante* procedures to indicate what investors must fulfil prior to accessing the right to arbitration. She also remarked that the term “mandatory mediation” could be a misnomer and such mechanism should be viewed as part of the procedural prerequisites to arbitration in ISDS disputes. In respect of investment mediation rules, she suggested giving considerations to adopting a co-mediator model and providing general checklists for expectation management before and during the mediation process.

8. Ms. Sun Huawei (Partner, Zhong Lun Law Firm) sought to explore in her presentation what the optimal model would be for formulating the clauses and guidelines for mandatory mediation in ISDS disputes. She observed that the design

of such model clauses involves a balancing exercise to, on one hand, preserve the voluntariness of mediation, and on the other hand, promote an effective and efficient use of investment mediation. In terms of the timeframe for commencing mandatory mediation, she suggested conducting such mediation process either in lieu of a cooling-off period or within certain days after service of the notice of arbitration. To preserve the voluntary nature of mediation, Ms. Sun proposed that disputing parties could be given more autonomy by allowing them to achieve an exit of such mediation process when no consensus can be reached (e.g. the disputing parties fail to reach agreement on the constitution of co-mediators or panel of mediators within two months after the commencement of the mediation procedure).

9. Mr. Li Xiongfeng (Deputy Secretary General and Board Secretary, South China International Arbitration Center (Hong Kong); Secretary of the Council, Shenzhen Court of International Arbitration) in his presentation on the practitioner's perspective on balancing between confidentiality and transparency in investment mediation, observed that confidentiality is recognised as a general rule, subject to party autonomy and certain exceptions (e.g. disclosure required by laws). He further noted that there are different approaches towards balancing confidentiality and transparency under the existing mediation rules which are relevant to the context of ISDS. For example, the IBA Rules for Investor-State Mediation and the investment mediation rules under the Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) set out detailed and specific confidentiality protection to the mediation process, with transparency requirements extending to, amongst others, the fact that the disputing parties have agreed to mediate and a settlement has been reached from the mediation, and provide for the survival of confidentiality obligations upon the termination of mediation. On the other hand, the ICSID and UNCITRAL mediation rules set out general confidentiality requirements which cover the existence and result of the mediation.

10. Professor Qi Tong (Professor, School of Law, Wuhan University) shared his views on the role of institutions in facilitating investment mediation for ISDS disputes. Professor Qi, with reference to paragraph 5 of the draft guidelines on mediation, noted that institutions can play different roles such as facilitating investment mediation by building capacity and raising awareness, and case administration by offering logistical and administrative assistance to the mediation process. He mentioned that further thoughts could be given to, for example, how the institutional setting for investment mediation could be improved, and whether

new institutions should be established through international collaboration to provide access to mediation by offering inclusive and affordable investment mediation services with credibility and cultural diversity.

11. Dr. Anthony Neoh QC SC (Chairman, Asian Academy of International Law) shared his insights on unlocking the potential of mediation clauses and guidelines for capacity building. Dr. Neoh suggested the creation of an investment-friendly ecology to minimize disputes through the following measures, such as maintaining proper rule of law framework for rights protection at the domestic level; capacity building for the legal profession as well as the executive authorities, legislature and judiciary of the host jurisdictions; ensuring compliance with international conventions and agreements; and adopting aftercare standards and practice for investment. More specifically on the guidelines for capacity building, Dr. Neoh suggested to foster the development of best practices for due diligence in respect of cross border investment; strengthening dispute resolution skills in profession; holding seminars and training; and promotion of the Regional Comprehensive Economic Partnership (RCEP).

12. Ms. Pui-ki Emmanuelle Ta (Chief Executive Officer, eBRAM International Online Dispute Resolution Centre (eBRAM)) discussed how to overcome the challenges regarding the use of Online Dispute Resolution (ODR) in the investment mediation, such as data security, users' receptiveness to online applications and cost of IT infrastructure. To address such challenges, she suggested that ODR platform providers such as eBRAM can provide various IT solutions in one single platform, including a highly secured video conferencing system for online meetings, a cloud storage with data encryption, artificial intelligence machine translation, and an e-signing system requiring identity verification.

13. During the panel discussion on the draft model clauses, it was expressed that the imposition of mandatory mediation requirements (option 3) would create a strategic opportunity for investment mediation to take place at the right moment, compared to other options in draft provision 1 (nature of the offer to mediate, timeframe and level of conduciveness), which are less effective in shifting the current *status quo*. Drawing reference to the high settlement rate of ICSID cases, it was highlighted that flexibility and party autonomy should be fully considered when drafting the model clauses so as to facilitate the use of mediation in parallel to arbitration or other forms of international dispute resolution. Concerning the predictability of the mediation procedure, it was suggested that a standard protocol

could be incorporated into international investment agreements to build an ecology to ensure confidentiality and procedural integrity, and it was further underlined that it would not be necessary to add clarifications in the draft model clauses for aspects covered by mediation rules (e.g. confidentiality provision).

14. With regard to the draft guidelines, further thought could be given to the question of when is the possible timing to engage mediation during the whole dispute resolution mechanism. Regarding paragraph 22 of the guidelines for the use of online mediation, it was further suggested that the reliability and security of ODR platforms could be ensured by incorporating cybersecurity policies, and advanced digital technologies could be identified in the guidelines for parties' consideration. In addressing various approaches to the mediation process across different legal cultures, it was expressed that the right ecology for conflict management will be a function of individual cultures (e.g. creating lead government agencies for dispute prevention).

15. Ms. Teresa Cheng SC (then Secretary for Justice, Hong Kong SAR, People's Republic of China) delivered the wrap-up remarks for Part 1 (Seminar on Investment Mediation) of the Preparatory Forum. Ms. Cheng noted the reference in the panel discussion and the draft note prepared by the Secretariat, to the mediation clauses and the detailed investment mediation rules under the CEPA Investment Agreement⁵ as a possible model. She remarked that the idea of mandatory mediation echoes the model of "Mediate First, Arbitration Next" and pointed out that the notion of mandatory mediation needs not be seen as being equivalent to compelling the disputing parties to go through the whole process of mediation as there are different models of mandatory mediation. Apart from highlighting the importance of capacity building for investment mediation, Ms. Cheng considered that institutional mediation for ISDS disputes remains to be an emerging area with much potential and such institutions can facilitate dissemination of knowledge, experience and best-practices. Furthermore, she referred to the work of the DoJ Project Office for Collaboration with UNCITRAL on the Inclusive Global Legal Innovation Platform on Online Dispute Resolution, an initiative which was endorsed at the 54th annual session of the UNCITRAL Commission in 2021. Ms. Cheng concluded by remarking that the Hong Kong SAR looks forward to the opportunity to welcome the delegations of UNCITRAL

⁵ The texts of the Investment Agreement of the Closer Economic Partnership Arrangement (CEPA) between the Mainland and the Hong Kong SAR and its mediation rules are available at www.tid.gov.hk/english/cepa/legaltext/files/cepa14_main.pdf and www.tid.gov.hk/english/cepa/investment/files/HKMediationRule.pdf.

Working Group III to meet in the city to further develop the work of the Working Group on the reform option of investment mediation.

Part 2 – Roundtable Discussion

Summary of the roundtable discussion

16. Following the opening remarks by the Secretary of UNCITRAL, the first part of the roundtable discussion session, which focused on the draft model treaty clauses on investment mediation, was moderated by Dr. James Ding (Commissioner, Inclusive Dispute Avoidance and Resolution Office, DoJ, Hong Kong SAR, People’s Republic of China).

Discussion on the draft model treaty clauses on investment mediation

17. After delivering a summary of the key points discussed during Part I (Seminar on Investment Mediation) of the Preparatory Forum, Dr. Ding opened the floor to invite interventions from the delegations of UNCITRAL Working Group III on the draft model treaty clauses on investment mediation on a clause-by-clause basis.

18. In respect of draft provision 1 (nature of the offer to mediate, timeframe and level of conduciveness), views were expressed that some active encouragement should be made to investors and host jurisdictions to use mediation in ISDS disputes. The CEPA investment mediation model was mentioned as an example under which an integrated and comprehensive mediation mechanism was provided. The incorporation of the so-called “mandatory mediation” requirement received general support, with suggestions to rephrase such mediation requirement as a procedural prerequisite to arbitration (instead of using the word “mandatory”) as the purpose is not to mandate the disputing parties to go through the whole process of mediation even if the disputing parties find it futile to further engage in the mediation process. Framing mediation as a procedural pre-requisite to arbitration is to ensure that the disputing parties would at least attempt to engage in the mediation process and express drafting language may be added to clarify that the disputing parties are free to withdraw from the mediation process to preserve the voluntary nature of mediation.

19. Regarding draft provision 2 (considerations on timeframe), it was generally considered that mediation should be available at any time during the disputing resolution process to allow for flexibility, and clarity should be ensured

in respect of the timeframe of suspension of arbitral proceedings (if necessary) when the disputing parties engage in mediation.

20. For draft provision 3 (application of rules on mediation), it was suggested that disputing parties should be allowed to choose their own preferred set of mediation rules, in addition to default rules (if any) provided in the treaty clauses.

21. In relation to draft provision 4 (written notice), it was suggested that the information required to be provided in the notice for mediation should avoid being overly complex and burdensome, which might in turn deter the use of mediation.

22. The discussion on draft provision 6 (confidentiality and transparency) was concerned primarily with how to strike a right balance of confidentiality and transparency in the mediation of ISDS disputes. It was generally considered that investment mediation should be subject to a general principle of confidentiality in that the mediation process and the information obtained in such process should be made confidential between the disputing parties to facilitate dispute resolution, with a certain degree of transparency requirement.

23. In respect of such transparency requirement, certain issues have been raised for further consideration, including whether the scope of transparency would cover only the existence of a mediation or would also cover the outcome of such mediation. On this, the approach under the CEPA mediation model, which extends the transparency requirement to the fact that the disputing parties have agreed to mediate or a settlement has been reached from the mediation, was mentioned as an example. There was also a discussion on how the outcome of mediation may be disclosed if the transparency obligation extends to the mediated settlement agreements, e.g. with redactions of confidential information in the mediated settlement and publishing only a summary of the mediated settlement agreement.

24. Regarding draft provision 7 (settlement agreement), comments have been raised as to whether the current draft may give rise to risks of abuse by a disputing party to use mediation as a tactic to stay or delay the arbitral proceedings and whether the draft has adequately catered for a situation where the dispute is only partially settled under the mediated settlement agreement.

25. In respect of capacity building, there were suggestions that the promotion of the model treaty clauses on investment mediation can be conducted

by applying them in mediation-related mooted competitions at local, regional and global levels.

Discussion on the draft guidelines for participants in investment mediation

26. The second part of the roundtable discussion, which was mainly concerned with the draft guidelines for participants in investment mediation, was moderated by Ms. Natalie Morris-Sharma (Rapporteur, UNCITRAL Working Group III, and Government Legal Counsel, Attorney-General's Chambers, Singapore) and she invited interventions from the delegations of UNCITRAL Working Group III.

27. It was suggested that the purpose of the draft guidelines should be for informing policy making of governments and the negotiations of instruments related to international investments. During the discussion, the following issues have also been raised for future consideration by UNCITRAL Working Group III, including: whether the draft guidelines should include an explanation on the model treaty clauses on investment mediation; whether the draft guidelines should be presented as a standalone text or be complemented with other existing outcome documents such as the UNCITRAL Mediation Rules; and whether there is a need to prepare a new set of investment mediation rules on top of the model treaty clauses and guidelines on investment mediation.

28. Regarding the specific issue of mediator's appointment process as discussed in the draft guidelines, the three-mediator commission model under the CEPA investment mediation mechanism was mentioned as a possible reference model. In this relation, it was said from practical experience that a merit of the tri-mediation model is that the third mediator could moderate the two mediators appointed by the respective disputing parties and act as an *umpire* to balance the interests of the parties.

29. In terms of awareness raising and capacity building, it was suggested that the draft guidelines could also illustrate how different jurisdictions could share their information or statistics concerning the use of investment mediation. It was also observed that culture played an important role in settling ISDS disputes and capacity building could facilitate understanding of different cultures of investors or host jurisdictions.

Closing of the Forum and the Way Forward for the Work on Investment Mediation in UNCITRAL Working Group III

30. Mr. Shane Spelliscy (Chair, UNCITRAL Working Group III, and Director General and Senior General Counsel, Trade Law Bureau, Canada) expressed gratitude towards the co-organizers for hosting the Preparatory Forum. In his closing remarks, the Chair mentioned the plan to have the texts on investment mediation finalized for consideration by UNCITRAL in its annual Commission Session in 2023.