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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.

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 guidelines³; 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 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.

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 www.doj.gov.hk/en/publications/pdf/2020_pre_intersessional_meeting_proceedings_e.pdf

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

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 reference⁴. 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 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, problem-solving techniques, and data collection and analysis.

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.

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 disputes 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 within 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 institutionalized dialogue between the host and home governments (e.g. joint

committee 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 arrangements⁵. A recent example was the mediation clauses and rules under the Investment Agreement of the Closer Economic Partnership Arrangement

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.

(CEPA) between the Mainland and the Hong Kong SAR⁶, 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 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

⁶ The texts of the CEPA Investment Agreement 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.

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 advice 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.
