The logo for UNCITRAL Working Group III is a large orange circle with a thin blue border. Inside the circle, the text "UNCITRAL" is written in large white letters, "Working Group III" in smaller white letters, and "Virtual Pre-Intersessional Meeting" in even smaller white letters. Below this, "The Use of Mediation in ISDS" is written in blue and white. The logo is set against a light blue background that has a curved shape at the bottom left.

UNCITRAL

Working Group III

Virtual Pre-Intersessional Meeting

The Use of
Mediation
in ISDS

Settling Investment Disputes through Mediation

- Korea's Experience and Challenges Ahead

Prof. Jaemin Lee

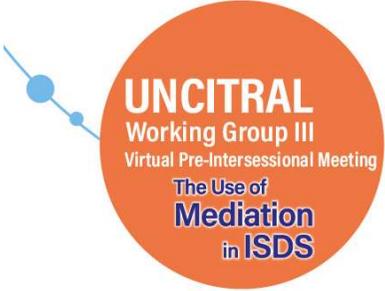
School of Law

Seoul National University

A decorative blue curved line with three small blue dots, located in the bottom right corner of the slide.

Contents

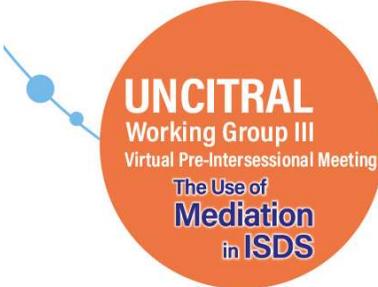
- **Increasing Demand for Mediation**
- **Investment Disputes & Mediation**
- **Contribution and Benefit**
- **Challenges to Consider**
- **Overcoming Challenges**



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Working Group III
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The Use of
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Increasing Demand for Mediation

- **Increasing Use of Mediation to Settle Int'l Disputes**
 - **Fast**
 - **Flexible**
 - **Low-cost**
 - **Party-autonomous**
- **Global Trend**
 - **Useful for commercial disputes and State-to-State disputes**
 - **Valuing long-term relationship and amicable resolution**
- **New Momentum**
 - **2019 *United Nations Convention on International Settlement Agreements Resulting from Mediation* ('Singapore Convention')**
 - **53 signatories and counting**
- **Korea's Experience and Treaty Practice**



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Investment Disputes & Mediation

- **IAs value amicable resolution of disputes**
 - Consultation, Conciliation, Mediation
 - Have not been effectively or robustly used
- **WG III discussion**
 - Dispute prevention & Mediation
 - Renewed attention to ADR generally
 - Exploring alternative ways of resolving disputes
 - Not to replace arbitration but to offer more options
 - May help address states' concerns identified
- **Renewed attention to mediation**
 - Recent IAs begin to include meaningful provisions
 - Discussion of Mediation Rules at ICSID

Mediation- Contribution & Benefit

- **Arguably equally useful investment disputes**
 - **Maintaining long-term relationship**
 - **Seeking common ground between investor/host state**
 - **Reducing cost and duration**
 - **Dealing with political sensitivity**
 - **Addressing arbitration-specific concerns identified**
- **In particular:**
 - **1.5 track between consultation and arbitration**
 - **Involving a third party (mediator) and still maintaining flexibility**
 - **Lessening confrontation and preserving relationship**
- **Korea's Experience and IIA Practice**

Challenges to Consider

- **Risk stemming from new experiments**
 - Insufficient precedents
- **Flexibility vs. Procedural Due Process**
 - B/w mediation's core feature & the need to regulate
- **Coordination with ISDS Arbitration**
 - Timing, consequence, materials and arguments
- **Possible impact on Cost and Duration**
 - Inserting another procedural layer leading to ISDS?
- **Possible impact on public oversight**
 - Reconcile with increasing trend of transparency?
- **Responsibility issue**
 - Possibly mediation-averse stance of gov't officials?

Overcoming Challenges

- **Elaboration**
 - Detailed provisions in IIA for mediation
 - Clearer guidance for proceedings
- **Systematization**
 - Structuring mediation in the overall context of ISDS
 - An alternative or a way station
- **Legitimacy safeguard**
 - Roster of mediators, and related code of ethics
 - Ensuring a minimum level of transparency
- **Practical availability**
 - Voluntary selection of mediation seems inevitable
 - But IIAs should foster & encourage in a stronger voice



Thank you
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