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



UNCITRAL

Working Group III

Virtual Pre-Intersessional Meeting

The Use of
Mediation
in ISDS

The logo for UNCITRAL Working Group III is a circular emblem. It features a large orange circle in the center. Overlaid on this circle is a blue circle with a thin blue line and several small blue dots. The text 'UNCITRAL' is written in white, bold, uppercase letters across the top of the orange circle. Below it, 'Working Group III' is written in a smaller white font. At the bottom of the orange circle, the text 'Virtual Pre-Inter-Sessional Meeting' is written in a very small white font. To the left of the orange circle, the text 'The Use of Mediation in ISDS' is written in blue, with 'Mediation' in a larger, bold font.

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The views of the European Union and its Member States on the functioning of mediation in the context of a Multilateral Investment Court

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A decorative graphic element consisting of two parallel, curved blue lines that sweep from the bottom right towards the top right. Small blue dots are placed at intervals along these lines.



Outline

1. Mediation in EU bilateral investment agreements
2. Mediation in the context of a permanent structure
3. Elements to consider as discussions move forward
4. Conclusion



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1. Mediation in EU bilateral investment agreements

- Investor-state mediation is specifically provided for in the recent EU agreements with Canada, Mexico, Singapore and Vietnam. Significant novelty in investment agreements.
- Idea is to make available a clear framework whilst incorporating flexibilities that allow the parties to resort to mediation at any time in the litigation proceedings.
- The EU advocates for the resolution of disputes through ADR and mediation as an efficient option in areas beyond investor-state. Examples of Mediation Directive, ADR Directive, ODR Directive.

2. Mediation in the context of a permanent structure

- Plethora of sets of mediation rules available contrasts with relatively poor track record of use of mediation in investor-state disputes.
- Structurally, there is little clarity on how to proceed and what to expect from mediation. States make policy choices based on their ability to plan ahead and anticipate scenarios and the lack thereof impinges on their incentives to resort to mediation.

2. Mediation in the context of a permanent structure (2)

- A permanent institution would provide the necessary support for mediation procedures to be carried out in a reliable manner and in a dedicated structure providing for the necessary support and procedural predictability, allowing for governments and investors to plan, anticipate the process and thereby encourage mediation.
- The EU is committed to the creation of a permanent court mechanism that provides also for the resolution of investor-state disputes through ADR and in particular mediation.

3. Elements to consider as discussions move forward

- International Ombudsperson (inspired by Korea's Foreign Investment Ombudsman):
 - Importance of legitimacy and impartiality.
 - Increased confidence derived from the support of a plurality of governments for the Ombudsperson.
 - Preservation of transnational nature of investor-state disputes.
 - Would need to explore how to factor a similar mechanism into an inter-governmental structure, ensuring investors' fair access and needs.

3. Elements to consider as discussions move forward (2)

- Integration of mediation in a permanent court structure with all necessary guarantees to ensure efficacy and fairness of procedures:
 - Pool of readily available mediators with expertise in investor-state mediation different from that of adjudicators.
 - Code of Conduct to secure high ethical standards and of independence and impartiality as well as lack of undue interference.
 - Incorporation of necessary flexibilities : conduct, timeframes, conclusion...
 - Institutional and logistical support.

3. Elements to consider as discussions move forward (3)

- Ideas on possible moments for the conduct of mediation which bring different advantages:
 - Prior to litigation (to avoid risk of erosion of the investment relation).
 - During litigation (maximises efficiency):
 - Same adjudicating individual.
 - Different mediating and adjudicating individuals.
- Possibility that mediated solution benefit from enforcement mechanism attached to the multilateral investment court.

4. Conclusion

- A permanent court structure would bring much needed predictability and structure to mediation.
- The structure needs to be sufficiently broad and embed the necessary flexibilities so as to accommodate existing rules and best practices and preserve equality of arms while bringing added predictability and support to all actors involved.

